RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M B Uddin**

Respondent: **BGC Technology International Limited**

Heard at: **East London Hearing Centre**

On: **16 October 2020**

Before: **Employment Judge A Ross**

Representation

Claimant: In person
Respondent: Mr Rajgopaul (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The complaint under section 47B Employment Rights Act 1996 is struck out for having no reasonable prospect of success.**

2. **The Claim is dismissed.**

REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was Audio. A face to face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing. The start of the hearing was delayed, due to technical limitations within the Tribunal infrastructure.

2. An application by the Claimant for the hearing to proceed by telephone, rather than CVP, because of his alleged impairment of social anxiety, was allowed by Employment Judge Burgher shortly before the hearing. At the outset of the hearing, I asked the Claimant whether he required any further adjustment. He did not.

3. The documents that I was referred to are as follows:

   3.1. An agreed bundle of documents (437 pages; and page references in this set of Reasons refer to pages in that bundle);

   3.2. Witness statement bundle (76 pages) consisting of the Claimant's statement plus exhibits and schedules and the statement of Mr. Robert Snelling for the Respondent.

   3.3. Skeleton Arguments prepared by the parties.

4. Audio files were also provided by the Claimant.

5. Having read the statements and relevant pages in the bundle, read all the written submissions, and heard oral submissions, I reserved judgment on the application to strike out because of time constraints (due to the technical limitations causing a delay at the start of the hearing). I proceeded to deal with case management on the Second Claim and ordered that there should be a further Preliminary Hearing open in respect of that Claim. The case management order made is contained in a separate order.

Background

6. The Claimant has presented two Claims to the Employment Tribunal, 3203011/19 and 3202092/20, which I shall refer to in these Reasons as the "First Claim" and the "Second Claim" respectively. It was accepted by the Claimant that he had brought about six additional claims in the County Court, against the First Respondent ("BGC") and in one or two of which his former colleague, Ms. Patel, was also a defendant. I was not taken through the substance of those County Court claims by either party.

7. The First Claim consists of a single complaint of whistleblowing detriment under section 47B Employment Rights Act 1996 ("ERA"). The issues in the First Claim were set out with admirable clarity by Employment Judge Russell at the Preliminary Hearing on 15 April 2020

8. This Preliminary Hearing (open) was listed for the Employment Tribunal to consider the following issues in respect of the First Claim:

   2.1 Whether the Claimant was a worker between July – Dec 2016 within extended definition within s43K ERA.

   2.2. Whether the complaint should be struck out as having no reasonable prospect of success; and

   2.2. If not struck out, whether a deposit order should be made if the complaint was found to have little prospect of success.

9. The Respondents conceded that the Claimant was a worker within section 43K ERA for the reasons set out at pp 205-207.

Evidence and agreed facts

10. At the outset of the hearing, I explained to the parties that this hearing was not a mini-trial, and no findings of fact would be made now that the issue of worker status had been resolved. I questioned whether cross-examination was necessary. The parties agreed that they did not seek to cross-examine the witnesses.

11. As I discussed the issues in the First Claim with the parties, the Claimant said that he was relying on a second detriment referred to in paragraph 51 of his witness statement:

> *"The 1st Respondent has since subjected me to a further detriment by refusing to properly comply with my SAR submitted on 06 December 2019, which included a request for the 1st Respondent's email communications as part of RFA0832071."*

12. However, the Claimant admitted that this was not part of the Claim form. He did not seek to amend the Claim. Therefore, the alleged second detriment did not become part of the Claim.

13. Following my inquiries with the parties, the following facts were not in dispute:

13.1 The protected disclosure relied upon was within the report to the ICO sent on 10 July 2019 at p.56 (The Claimant admitted that he was bgcanonymous@gmail.com). This report states:

"(1) the allegation and data protection issue is that over two years ago from today Devika (Senior and Popular HR Lady still at BGC) verbally shared information (unauthorised disclosure) with her friend from compliance Paval Malde (previously referred to as PM and who is no longer at BGC) that I had sent Devika emails and wanted to speak to her (to get to know her, and not for work related reasons).

(4) it is submitted that this is definitely a breach of the data protection act – Devika herself reported the matter confidentially and I have been identified as the subject."

13.2 The detriment relied upon was within the email from Mr. Snelling to the Claimant, sent on 1 October 2019, at p.153-157. The detriment is stated in the Claim form to be as follows: "The Claimant submits that he suffered a detriment on 1 October 2019 when a member of the Respondent's in-house legal team asked the Claimant to agree to and sign and an undertaking not to disclose the Respondent's corrupt practices and threatened to seek an "injunctive relief" against the Claimant and also to issue proceedings against the Claimant."

13.3 The Claimant admitted the contents of the statement of Mr. Snelling as follows:

(a) The exchange of messages referred to in paragraph 7 of Mr. Snelling's statement was an accurate record as far as he could tell.

(b) The content of an email sent by the Claimant in October 2016 was as set out at paragraph 8 of the statement.

(c) The Claimant had sent the email correspondence in the exchanges identified in paragraph 9 of the witness statement (although he said that other messages had been omitted which would have given a more accurate view of the dialogue overall).

(d) Paragraph 15(a) – (h) of the statement was correct, in that the correspondence referred to was sent, but the Respondent had left out other emails, so Mr. Snelling's statement was not the full picture.

(e) The Claimant agreed that the key detriment he relied upon was as set out in paragraph 16 of the Respondent's Skeleton, which referred to the extract of the Claim form (p.7 Bundle) that I have set out above.

14. On the issue of his means, the Claimant provided the following information:

14.1 He earned in the region of £72,000 - £96,000 per annum;

14.2 He owned 50% of a house, his share being worth about £200,000;

14.3 He had savings in the region of £100,000 to £150,000;

14.4 He had no debts.

15. In addition, the Claimant had argued that all the documents from p100-126 were sent without prejudice. However, for reasons given at the time, I concluded that these were not covered by the principles applying to documents sent without prejudice.

The Relevant Law:

1) Employment Rights Act 1996: Protected disclosures

16. I considered the relevant statutory provisions of Part IVA Employment Rights 1996 ("ERA"), and considered the statutory wording.

17. Section 43B(1) ERA includes, where relevant:

"*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) …

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

18. The Claimant referred to the following cases within the Public Interest section of his Skeleton Argument to demonstrate the nature of the reasonable belief required to be proved by him. He did not refer to specific paragraphs, so I have extracted those parts which I considered pertinent to his case.

19. The "wrongdoing" provisions of s.43B(1) were subject to some examination in Babula v Waltham Forest College [2007] ICR 1026, which explains that a reasonable belief may also be mistaken. As the EAT explained in Soh v Imperial College UKEAT 0350/14, the following propositions are well-established:

19.1. The Tribunal should follow the words of the statute. No gloss upon them is required. The key question is whether the disclosure of information, in the reasonable belief of the worker making the disclosure, tends to show a state of affairs identified in section 43B: in this case, that a person had failed to comply with a legal obligation to which he was subject.

19.2. Breaking this down further, the first question for the Tribunal to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question. The second question for the Tribunal to consider is whether, objectively, that belief was reasonable (see Babula at paragraph 81). If these two tests are satisfied, it does not matter whether the worker was right in his belief. A mistaken belief can still be a reasonable belief.

19.3. Whether the worker himself believes that the state of affairs existed may be an important tool for the Tribunal in deciding whether he had a reasonable belief that the disclosure tended to show a relevant failure. Whether and to what extent this is the case will depend on the circumstances.

20. In Chesterton Global v Nurmohamed [2017] IRLR 837, the Court of Appeal held that (with my emphasis added):

20.1. In applying s.43B, the tribunal had to ask whether the worker believed, at the time of making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The tribunal had to recognise that there could be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief was simply that the disclosure was in the public interest; the particular reasons why the worker believed that to be so were not of the essence.

20.2. While the worker had to have a genuine belief that the disclosure was in the public interest, that did not have to be the predominant motive in making it. There was not much value in providing a general gloss on the phrase "in the public interest": Parliament had chosen not to define it and the intention must have been to leave it to tribunals to apply it as a matter of educated impression (see paras 26-31).

20.3. An approach to public interest which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions. Whether disclosure was in the public interest depended on the character of the interest served by it rather than simply on the number of people sharing that interest.

21. A key point made by Underhill LJ in Nurmohamed is that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest: see sub-paragraph c above. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

22. From Korashi v Abertawe Bro Morgannwg University [2012] IRLR 4, a case involving a doctor in a hospital setting, it is helpful to consider the relevant paragraphs of the judgment, 61-62 (with emphasis added):

> *"61. There seems to be no dispute in this case that the material for the purposes of s43B(1)(a)-(e) would as a matter of content satisfy the section. In our view it is a fairly low threshold. The words "tend to show" and the absence of a requirement as to naming the person against whom a matter is alleged put it in a more general context. What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word "reasonable".*
>
> *62. This filter appears in many areas of the law. It requires consideration of the personal circumstances facing the relevant person at the time. … So in our judgment what is reasonable in s43B involves of course an objective standard - that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure…."*

Protected disclosures

23. For a qualifying disclosure to be protected, it must be made in accordance with any of sections 43C – 43H: section 43A ERA. These subsections set out various categories of

person to whom a disclosure may validly be made, and the conditions attached to disclosures made to each of them.

24. By section 43C(1), a qualifying disclosure is made if a disclosure is made by the worker to his employer and, where the worker reasonably believes that the relevant failure relates solely or mainly to any other matter for which a person other than his employer has legal responsibility, to that other person.

2) The Right not to be subject to a detriment

25. Under section 47B 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."

26. Section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower": see Fecitt v. NHS Manchester [2012] IRLR 64.

27. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done".

3) The power to strike out

27. Rule 37(1)(a) contains a power to strike out where all or part of a claim or response has no reasonable prospect of success.

28. A complaint must form part of a Claim before it can be responded to or proceed to a merits hearing: see *Chandhok v Tirkey* [2015] ICR 527, at paragraphs 16-17.

29. In general, the grounds for striking out a pleading under r 37(1)(a) include anything that might be deemed to be an abuse of the process of the tribunals. The term 'abuse of process' is not to be narrowly construed, and, in particular, the circumstances constituting such an abuse are not limited to claims that are 'sham and not honest and not bona fide': *Ashmore v British Coal Corpn [1990] ICR 485, CA*). According to Stuart-Smith LJ in *Ashmore*:

> "A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material."

30. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In Anyanwu v South Bank Students' Union [2001] IRLR 305, HL, a race discrimination case, Lord Steyn put forward the proposition against striking out in terms almost amounting to public policy, when he stated (at para 24):

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in*

the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

31. A whistleblowing case should not generally be struck out when a central core of facts is in dispute: see Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.

32. This point was also recently re-emphasised by the Court of Appeal in Ahir v British Airways Plc [2017] EWCA Civ 1392, paragraph 16 and the passages referred to in submissions. In Ahir, it was held that discrimination claims could be struck out, even where there was a dispute of fact, where there was no reasonable prospect of the facts necessary to establish liability being established.

4) Deposit Orders

33. In Hemdan v Ishmail [2017] ICR 486, at paragraphs 10-17, the EAT set out the legal principles to be applied when considering a deposit order application:

33.1. The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails.

33.2. The purpose is not to make it difficult to access justice or to effect a strikeout through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a full hearing and thereby access justice.

33.3. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strikeout which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

33.4. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise. If there is a core

factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested.

33.5. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had, for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved and the case is likely to be allocated a fair share of limited tribunal resources are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

33.6. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice.

Submissions

34. Having read the Skeleton Arguments and the documents that I was referred to by the parties, I heard oral submissions. I took into account each and every submission made by the parties, even if it has not been necessary to refer to them below.

35. The Respondents' strike out application focussed on two points:

a. The Claimant's belief that the Respondent had committed a criminal offence (or committed wrong in one of the ways identified by the Claimant in his submissions) under the DPA 1998, if proved to be genuine, was not reasonable. It was not reasonable to believe that Mrs. Patel telling her friend that the Claimant wanted to meet her for personal reasons could amount to a criminal offence. Applying an objective standard, there was no protected disclosure.

b. There was no reasonable prospect of the Claimant establishing causation. In particular, there was no prospect of the Claimant showing that Mr. Snelling sent the email of 1.10.19 because of the alleged protected disclosure at p.56. At paragraph 17 of the Skeleton Argument, 11 reasons were listed why the necessary causation would not be proved. At paragraph 18, the Respondents explained that Mr. Snelling, acting for BGC, had been entitled to robustly respond to the extreme claims being made by the Claimant in the correspondence of September and October 2019 (as listed in the witness statement of Mr. Snelling).

36. Counsel for the Respondent took me through the key points in the written submissions. I will not repeat his oral arguments.

37. The Claimant's Skeleton Argument (27 pages), although well-structured, contained a diverse range of points, parts of which appeared to relate more to issues in the Second Claim. Those parts which I found of most relevance were at paragraphs 31-37 ("Public Interest" section) and 53-90. The Claimant argued that he had a reasonable belief that one of the matters in section 43B(1)(a), (b), (c) and (f) were engaged, specifically that it is a criminal offence to breach the Data Protection Act 1998, or to cover up a breach, under s.55 of that Act.

38. The Claimant's oral submissions included the following points:

(a) The Respondent's case related to his communications with Mrs Patel; a lot of that communication was disability-related, as he explained at paragraph 13a) of his Skeleton Argument. His case is that his impairment can cause problems in encounters with the opposite sex.

(b) The email response to the Claimant from the ICO at p.230 (August 2019) demonstrated that the ICO accepted that BGC had committed a breach of the DPA; and that the ICO email of 12 February 2020, at p.243, proved this because the ICO told him that he could issue a private prosecution.

(c) The letter from ICO to Mr. Snelling of 5.8.19 showed that BGC was automatically the data processor when the disclosure of his personal data occurred.

(d) In respect of the Claimant's correspondence from 30 August to 1 October 2019 referred to by Mr. Snelling at paragraph 15 of his witness statement, at no stage did it mention breach of the DPA. However, his email of 1.10.19 and the undertaking did refer to the DPA. This showed that there was the necessary causal link between the Claimant's disclosure of 10 July and the detriment in the email of 1 October 2019.

39. His submission also included complaints about some matters which occurred before the alleged protected disclosure, which in my judgment were not relevant for the determination of the issues before me.

Decision

40. The large number of documents produced for this hearing tended to obstruct, not advance, the overriding objective. In my judgment, relatively few documents were relevant.

41. The alleged protected disclosure of 10 July 2019 at p56 includes that Devika Patel shared information with a friend in Compliance, Paval Malde, who then maliciously spread the information to the rest of the team and: "*It is submitted that this is definitely a breach of the data protection act – Devika herself reported the matter confidentially and I have been identified as the subject*"

42. The Respondent contended that as a matter of fact, the alleged breach of the Data Protection Act ("DPA") was no such thing, and took me to the definition of data within s.1 DPA and s.55 DPA.

43. In contrast, I recognised that the disclosure relied upon did not actually allege the commission of an offence under s.55 DPA and that given the law set out above, it was sufficient that the Claimant held a reasonable belief that the email of 10 July 2019 tended to show the wrongdoing alleged, which was that there was a breach of a legal obligation under the DPA. The term "reasonable" indicates that more than one possible belief could be reasonable.

44. However, I concluded that the Claimant had no reasonable prospects of successfully showing that the belief that the disclosure relied upon tended to show the wrongdoing alleged was reasonable. My reasons are as follows:

44.1. I am conscious of the principle in Anyanwu applied in Ezsias to whistleblowing cases. In this case, however, there is no disputed core of central facts. However, several primary and central facts are not in dispute: see, for example, the content of the disclosure relied upon (at p.56) and the degree to which the evidence of Mr. Snelling is accepted. Some, however, such as the issue of causation, are in dispute.

44.2. The Claimant's email does, as a matter of undisputed fact, allege a breach of the Data Protection Act 1998. But this is not sufficient. The question is whether the Claimant's belief that there was such a breach was reasonable.

44.3. It is not in dispute that the Claimant had emailed Mrs Patel at work, to say that he wanted to meet her for a chat, but not about any HR matter. He wanted to talk to her for an "*informal/casual chat and not to discuss anything work-related*". The admitted email correspondence shows that he was emailing her in her personal capacity, not as a HR manager. The use of BGC email was a tool for this personal approach. I concluded that there was no reasonable prospect of the Claimant persuading the Tribunal that there was a breach of the DPA simply because the Claimant placed a personal communication to another staff member into email rather than speaking it to her.

44.4. Given that the subject matter of the original email conversation referred to in the disclosure (between the Claimant and Mrs Patel) was personal between two workers in the same place of work, there was no reasonable prospect of persuading a Tribunal that Mrs. Patel did not have the permission of the data controller to discuss such a conversation with a friend (irrespective of who was the data controller).

44.5. Additionally, there was no reasonable prospect of the Claimant proving that Mrs. Patel's subsequent conversation with Ms. Malde could amount to "personal data" within the meaning of the DPA, so Ms. Malde was not restricted under the DPA from passing on what she had been told orally by a friend.

45. Moreover, in my judgment, the Respondent's submissions went just as much to the questions of whether it was reasonable for the Claimant to believe that the disclosure was made in the public interest.

46. I concluded that the Claimant had no reasonable prospects of showing that he held a reasonable belief that the disclosure of 10 July 2019 was made in the public interest. Accepting (without deciding) that the Claimant held a genuine belief that the disclosure was made in the public interest, I decided that he had no reasonable prospects of showing that such a belief was reasonable in the circumstances for the following reasons:

46.1. The question whether a disclosure is in the public interest depends on the character of the interest served by it (rather than the numbers of people sharing that interest): see Nurmohamed at paragraph 35. On the face of the disclosures in the email of 10 July 2019, the Claimant alleges that one friend, Ms. Patel, told another friend, Ms Malde, that she had received emails from the Claimant who wanted to get to know her. Ms Malde then told others in the team. The type of situation disclosed in the email of 10 July 2019 demonstrates a common type of office chat involving colleagues talking about emails received and which team member would like to have some form of personal contact or relationship with another member of staff. The Claimant has no reasonable prospect of showing that the character of the interest served by the disclosure was the public interest.

46.2. The content of the disclosure email points so strongly to it being made for the private interest of the Claimant and not in the public interest that the Claimant has no real prospect of persuading a Tribunal that his belief that it was made in the public interest was reasonable. The disclosure was about matters occurring to him alone, in a private office environment.

46.3. The "*allegation and data protection issue*" complained about in the disclosure occurred over two years before the email was sent. After such a length of time, the prospects of the Claimant successfully proving that his belief that such a disclosure (about what was said by one friend to another about a non-work related matter and which was then spread to the rest of the team) was in the public interest and was a reasonable belief must have reduced substantially. In my judgment, it is inconsistent with the belief (that the disclosure was in the public interest) being reasonable that such complaints within the email disclosure were only made after such a long delay.

47. Furthermore, the Claimant had no reasonable prospects of success in showing that his alleged belief that the email tended to show the matter in section 43B(1)(c) was reasonably held. The email does not tend to show any miscarriage of justice at all, even if the Claimant now perceives this to be the case.

48. Having reached these conclusions, the Claim should be struck out. I do not need to address the second part of the Respondent's arguments on the strike out application.

49. If I am wrong in my analysis of the application to strike out, I would have concluded that the Claim has little reasonable prospects of success, having applied Hemdan and in view of the undisputed facts.

50. In those circumstances, I would have exercised my discretion and made a deposit order in the sum of £1,000. The Claimant has ample means to pay such a deposit. Given the weaknesses in his case, it would be appropriate for him to take stock of his prospects of success. By paying such a deposit, he would be encouraged to do so.

Employment Judge Ross

2 November 2020