EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Steven Dance	AND	North Devon Healthcare NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 29 October 2020

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: In person
For the Respondent: Mr J England of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant did not make a protected public interest disclosure and his claims for detriment on the grounds of that disclosure are therefore dismissed.

RESERVED REASONS

1. In this case the claimant Mr Steven Dance has issued proceedings alleging that he has suffered a number of detriments said to be on the grounds of one protected public interest disclosure. This is the judgment following a preliminary hearing to determine five potential preliminary issues which were identified in a case management order dated 1 May 2020 as follows: (i) Whether the disclosure upon which the claimant relies, namely his disclosure to Lisa Lilly of the respondent in February 2018 to the effect that KS was self-harming and had said that he wished to kill himself, was a protected public interest disclosure; and (only in the event that it was) (ii) the claimant's disputed application to amend his claim to add additional alleged detriments; and (iii) whether the claimant's claim should be struck out on the grounds that it has no reasonable prospect of success, or (iv) whether the claimant should be ordered to pay a deposit as a condition of continuing with the claim because it has little reasonable prospect of success; and (v) to the extent that it is necessary, for any further case management directions.
2. The claimant gave evidence in person today for the purposes of this hearing, and has made submissions. The respondent did not call any witnesses, but did question the claimant and

also made submissions. There was an agreed bundle of documents running to 230 pages. I have considered the oral and documentary evidence and I have also listened to the factual and legal submissions made by and on behalf of the respective parties. I make the following findings of fact on the balance of probabilities.

3. The respondent is an NHS Trust which provides health care services is to the population of Devon principally at North Devon District Hospital in Barnstaple. The claimant Mr Steven Dance commenced employment with the respondent on 1 February 2012 and he remains employed as a Reception Team Leader.
4. The claimant has a friend and work colleague who has been referred to in these proceedings as KS. In February 2018 the claimant suspected that KS was self-harming because he saw deep scratches on his legs, and had commented that he was considering suicide. The claimant reported this to KS's line manager, namely Lisa Lilly, by way of a short verbal report. The claimant told her that he had seen KS self-harming and that he had told him that he wanted to kill himself.
5. Lisa Lilly subsequently told KS about the claimant's comments which appear to have caused difficulty in the relevant working relationships. The claimant complains of a course of conduct by which he says he has suffered detriment which commenced approximately 10 months later in December 2018. The respondent argues that there is clearly no causative link between the claimant's alleged disclosure and any subsequent work difficulties which may have arisen many months later, but that is not an issue which now falls to be determined today.
6. The claimant was very candid and honest in his evidence today. He conceded that at the time he made the disclosure his sole concern was over the welfare of his friend and colleague KS. The claimant explained that subsequently he remained concerned about KS, and felt that insufficient action had been taken, and that because KS worked as a phlebotomist he later became concerned that KS should not be treating members of the public whilst in his perceived mental state. However, the claimant's clear evidence was that at the time of his alleged disclosure he did not consider it to be a matter of public concern, and that the sole concern was the welfare of his friend and colleague KS.
7. The claimant's evidence in this respect is consistent with other documents which have arisen during the course of this litigation. In reply to the respondent's grounds of resistance in which the claimant was put on notice that the respondent disputed any public interest element to the alleged disclosure, the claimant retorted: "I reported to Lisa Lilly that I was concerned about Keith's state, at the time she was on the phone and said that she had already been made aware." In an application to amend his claim to include further detriments, the claimant refers to his disclosure in these terms: "I did the right thing and tried protecting someone and the result of that is damage to me and my life both inside and outside of work." And in the course of the investigation into a subsequent grievance raised by the claimant, an administration manager Mrs Newton gave evidence to this effect: "Steve [the claimant] came in and said he had concerns about Keith as he was always talking about suicide. Steve was coming from a personal side rather than a working relationship."
8. In any event the working relationship generally appears to have deteriorated somewhat. The claimant was moved to a different department temporarily, and complains of a number of detriments after December 2018. The claimant subsequently referred Lisa Lilly to her professional body the Nursing and Midwifery Council with the result that the claimant faced disciplinary proceedings and received a final written warning in connection with his conduct during the course of that referral to the NMC.
9. The claimant issued these proceedings on 2 August 2019 and there were two case management preliminary hearings and subsequent orders on 11 December 2019 and 1 May 2020, which have led to this preliminary hearing.
10. Having established the above facts, I now apply the law.
11. The relevant statutory provisions are in the Employment Rights Act 1996 ("the Act").
12. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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.

13. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
14. Under section 47B of the Act, 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.
15. I have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018;and Ibrahim v HCA International Ltd [2019] EWCA Civ 2007. The tribunal directs itself in the light of these cases as follows.
16. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.
17. [24] "As for the words "in the public interest", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).
18. [25] "More generally, in Chesterton, Underhill LJ offered the following guidance. First, as to the approach that has to be taken in general: "[27] First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see paragraph 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable. [28] Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is

perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course, we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative. [29] Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.[30] Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

19. It is also now clear that in whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.
20. The claimant relies for the purposes of this claim on one protected public interest disclosure. This disclosure is explained at the start of paragraph 8.2 of the claimant's grounds of application to this effect: "In February 2018 I had reported that I had seen a member of staff (KS) self-harming and that he told me he wanted to kill himself. I reported this to Keith's manager Lisa Lilly." The claimant has confirmed that this was a verbal disclosure to Lisa Lilly. The claimant confirmed during a case management preliminary hearing on 11 December 2019 that this verbal disclosure was the sole disclosure upon which he relies to suggest that he subsequently suffered detriments on the grounds of having made this disclosure.
21. The respondent disputes that this is a protected public interest disclosure for two reasons, and I deal with each of these in turn.
22. The first challenge is that the claimant did not provide "information" sufficient to satisfy Section 43B(1), relying on Kilraine v London Borough of Wandsworth for the proposition that a disclosure "has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in [s43B] subsection (1)". "Facts" and "specifics" are therefore key to providing "information" and a rigid dichotomy between "allegations" and "information" is not necessary.
23. In my judgment the claimant disclosed clear information to Lisa Lilly that the claimant was self-harming and considering suicide. In my judgment there was sufficient specificity for this to amount to a disclosure of information that the health or safety of an individual (KS) had been, was being or was likely to be endangered. I find that this was specific information

for the purposes of section 43B(1)(d) of the Act, and I reject the respondent's challenge to this aspect of the disclosure for this reason.

24. The second challenge raised by the respondent is that this disclosure was not made in the public interest. This is now a requirement of s43B(1). Applying Ibrahim v HCA International Limited, whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. This is consistent with Chesterton, in which it was confirmed that the tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
25. In this case it is clear from the claimant's own evidence (which is also consistent with his other comments and observations in documents which have arisen during the course of these proceedings), that at the time he made the disclosure relied upon he did not believe that the disclosure was in the public interest. In any event, in my judgment any such belief as to public interest at the time the disclosure relied upon was made (if indeed the claimant had alleged the same) would not have been reasonable given the personal nature of the claimant's concerns about his friend and colleague KS.
26. In my judgment therefore, the claimant's disclosure does not satisfy the statutory requirements of section 43(B)1, because at the time the disclosure was made, it was not made in the public interest. No disclosure was made under section 43 (B)(1) which qualified for potential protection. In the absence of a protected public interest disclosure the claimant's claim for detriment on the grounds of any such disclosure must therefore fail. Accordingly I dismiss the claimant's claims.

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Employment Judge N J Roper
Dated: 29 October 2020
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