



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101866/20 (P)

Held on 20 November 2020

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Employment Judge N M Hosie

Mrs V Shields

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**Claimant
Represented by
Mr S Martins -
The Employment
Law Service**

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Wilson James Ltd

**Respondent
Represented by
Mr P Chadwick -
KLC Employment
Law Consultants**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the complaints of detriments and unfair dismissal as a result of making a protected disclosure have “*no reasonable prospect of success*” and they are struck out in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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E.T. Z4 (WR)

REASONS

Introduction

- 5 1. The claim in this case comprises complaints that the claimant suffered
detriments as a result of making a protected disclosure; that she was
automatically unfairly dismissed as a result of making a protected disclosure;
that she was unfairly dismissed; and that she was wrongfully dismissed. The
respondent admits the dismissal, but claims that the reason was conduct and
10 that it was fair. Otherwise the claim is denied in its entirety.

Protected disclosure

2. The protected disclosure relied upon by the claimant is an e-mail which the
claimant sent to her line manager, David Chambers, on 23 August 2019 at
15 05:42. It was in the following terms:-

“Subject: footage

Dave

- 20 *I think you need to see the footage on dates:- August*

4th 07.03

7th at 20.42

8th at 00.09 and 21.07

- 25 *9th at 21.01,*

10th at 04.15

18th at 05.41

Re Control Room Door being wedged open.

- 30 *Vicki.”*

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The issues for determination

3. The claimant relies upon s.43B(1)(d) of the Employment Rights Act 1996 (“the 1996 Act”) which states: -

5 **“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, was made in the public interest and tends to show one or more of the following:

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d. that the health or safety of an individual has been, is being, or is likely to be endangered.”

15 4. The respondent’s representative maintained that the claimant’s e-mail of 23 August was not a disclosure qualifying for protection. He also submitted, with reference to s.47(B)(1), that the alleged detriments were not detriments in terms of the 1996 Act, as they all occurred prior to any alleged disclosure.

20 5. He submitted, therefore, that the complaints founded upon the alleged protected disclosure should be dismissed in terms of Rule 37(1)(a), in Schedule 1 of the Rules of Procedure, as they have, “no reasonable prospect of success”.

25 6. It was agreed that, in all the circumstances and having regard to the “overriding objective” in the Rules of Procedure, I would consider and determine these issues “on the papers”: on the basis of parties’ written submissions.

30 **Claimant’s submissions**

7. The claimant’s representative attached his submissions to an e-mail of 1 September 2020 at 21:40. He confirmed that the protected disclosure was the claimant’s e-mail of 23 August 2019 and that the statutory provision relied upon was s.43B(1)(d) of the 1996 Act.

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8. In support of his submissions he referred to the following cases:

Cavendish Munro Professional Risks Management Ltd v. Geduld 2010 ICR 325

Royal Cornwall Hospitals NHS Trust v. Watkinson EAT0378/10

5 **Goode v. Marks & Spencer Plc** EAT 0442/09

Kilraine v. London Borough of Wandsworth [2018] EWCA Civ1436;

Babula v. Waltham Forest College [2007] ICR 1026;

9. As far as the relevant facts were concerned he submitted:-

10 “That on Friday 23 August 2019, the claimant disclosed information to David Chambers – Line Manager, who is the first chain of command.

15 He was the only person the claimant informed by e-mail from her Wilson James email address to his Wilson James email address on the mentioned date.

20 That the door of the Control Room was left open contrary to the training they were given – by David Chambers – DC who made it expressly clear to all staff that he wanted to know matters relating to security, no matter how small they were.

25 Valery Barnett – an employee at the material time, had stated to the claimant that she and her team were verbally told by David Chambers, of matters related to the above.”

10. He submitted, with reference to **Cavendish, Royal Cornwall and Goode**, that the claimant conveyed information in the form of facts that engaged the whistleblowing provisions.

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11. He further submitted, “*but separately, in practice, information and allegations are often intertwined. The question is whether the disclosure has ‘sufficient factual content and specificity’ such as is capable of tending to show the relevant failures*”.

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12. He then went on to submit:-

“That the claimant disclosed information to DC that was clearly identifying a breach/failure relative to the health and safety of her colleagues and herself.

The Court of Appeal in **Kilraine**, agreed there was no disclosure of any 'information' which tended to show a breach of a legal obligation or any of the other relevant failures in an employee's letter simply complaining of 'inappropriate behaviour towards her' without anything more.

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Reasonable belief relates to the worker's belief in the accuracy of the information. This test, is in essence, a subjective one, although there is an objective element to it.

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The focus is on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances.

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In **Babula** the Court of Appeal held that a belief may be reasonably held and yet be wrong. Provided the whistle-blower's is objectively reasonable, the fact that it turns out to be wrong is not sufficient to render it unreasonable and thus deprive the whistle-blower of protection."

Respondent's submissions

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13. The respondent's representative attached his submissions to an e-mail of 22 September 2020 at 12:10. He submitted that the claimant's e-mail of 23 August, "does not, and cannot in the reasonable belief of the claimant, tend to show that a person has failed or is likely to fail to comply with any legal obligation to which he is subject, or that the health and safety of any individual has been, is being, or is likely to be endangered." He also submitted that, "it is not accepted that in the reasonable belief of the claimant the disclosure was made in the public interest."

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"Case Law"

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14. The respondent's representative referred to **Kilraine**, which the claimant's representative had relied upon in his submissions. He made reference to the following passage from the Judgment of the Court of Appeal:-

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"The question in each case in relation to s.43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in subparagraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc.]' in order for a statement or disclosure to be a qualifying disclosure according to this language, it has

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to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-section 1.” and

5 “As explained in **Chesterton Global** this has both a subjective and an objective element”.

15. The respondent’s solicitor then went on to submit that:-

10 *“The e-mail relied upon by the claimant meets neither the subjective nor objective test. The e-mail merely states facts and provides absolutely no context as to how or why these facts tend to show that this might be a danger to health and safety. There is nothing that could suggest that as a minimum that this was a health and safety matter.*

15 *Additionally, had the matter have been reasonably believed to have been a danger to health and safety, the claimant would have said so in her e-mail, as well as logging the incidents in the CCTV Incident Log. She did neither.*

20 *The claimant’s submissions provide no further detail and merely state that the words in the e-mail constitute information that tends to show that there has been a danger to health and safety. This is not accepted.*

25 *In any reading of that e-mail it merely states that a door has been left open on a number of occasions.*

The respondent makes an application for the claims in relation to protected disclosures to be dismissed as having no prospect of success.

The alleged detriments

30 *Whilst not specifically requested by the Employment Judge in the preliminary hearing note, the respondent repeats its assertions and submissions regarding the claimant’s alleged detriments.*

35 *The claimant has provided as ordered further and better particulars of the alleged detriments that the claimant says she suffered as a result of making a protected disclosure.*

40 *Whilst the respondents submits that the claimant has not made a protected disclosure on the 23 August 2019, none of the events relied upon by the claimant either in the claim form or the further and better particulars are said to have occurred after the 23 August 2019. They all occur before that date.*

45 *It is therefore submitted that the claimant’s case in relation to “detriment” is fundamentally flawed. S.47B(1) of the Employment Rights Act 1996 states ‘A worker has the right not to be subject to any detriment by any act or by any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.’*

The claimant seeks to rely upon detriments which all occurred prior to the alleged disclosures. It is clearly impossible for the claimant to have suffered any detriment on the ground of something that has not yet occurred, and it is somewhat surprising that the claimant still seeks to argue that this is possible.

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Notwithstanding the above, all the alleged complaints regarding detriments are significantly out of time. ACAS early conciliation did not commence until 11 January 2020. The last date for an alleged detriment would have to have taken place by 12 October 2019. All the alleged detriments are significantly prior to that date.

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The respondent makes an application (should the previous applications be unsuccessful) for the claimant's claims of protected disclosure detriments to be dismissed on the grounds they have no prospect of success and/or that they are vexatious. Additionally, all claims of detriment are out of time and the Employment Tribunal has no jurisdiction to hear them."

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Claimant's response

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16. The claimant responded to the submissions by the respondent's representative by e-mail on 29 October 2020 at 20:11 as follows: -

"Para. 3.2 of R's submission is clearly subjective, the claimant wrote several e-mails drawing the Respondent to matters that she believed caused or was likely to cause a breach of health and safety to both her colleagues and herself because of the security door being left open.

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It is both unreasonable and presumptuous for the respondents to conclude that the test has not been met in the absence of clarifying what was on the claimant's mind at the material time the disclosures were made."

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Discussion and decision

Relevant statutory provisions

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17. S.43B of the Employment Rights Act 1996 ("the 1996 Act") is in the following terms:-

"43B Disclosures qualifying for protection

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(1) *In this Part a "qualifying disclosure" means any disclosure of any 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 –

.....

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

18. S.47B(1) is in the following terms:

10 **“47B Protected disclosures**

 (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.*”

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19. S.47B does not apply where the worker is an employee and the detriment complained of amounts to dismissal – s. 47B(2). Any such complaint instead falls under s.103A which renders dismissal automatically unfair if the sole or principal reason was that the employee made a protected disclosure.

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20. In ***Kilraine*** the Court of Appeal held that when considering whether a disclosure is protected, tribunals do not need to look to whether it is “information” or an “allegation”. This dichotomy is not one made by statute and very often information and allegation are intertwined. The question, in terms of s.43B(1), is whether a particular statement or disclosure is a “*disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub paragraphs (a) to (f)*”.

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21. Accordingly, for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-section (1).

35 22. In the recent case, ***Dray Simpson v. Cantor Fitzgerald Europe*** UKEAT/0016/18/DA, the Court of Appeal followed ***Kilraine*** in finding that

there was no dichotomy between disclosing information and making allegation. However, a disclosure needs not merely to be information, but also has to have sufficient factual content to show one of the matters in s.43B(1) and which in the claimant's reasonable belief tends to show it. Employees, therefore, if they do believe they are making a protected disclosure, should be specific in their complaint.

Present case

23. So far as the present case is concerned, in my view the claimant's e-mail of 23 August 2019 does not contain sufficient content or specificity to satisfy the statutory definition of a "qualifying disclosure" in s.43B(1). It is too vague. It does not have sufficient factual content such as is capable of tending to show that it falls within s.43B(1)(d). The claimant does not say in her e-mail that it was a health and safety matter; there is nothing in the e-mail to suggest that it was; she only says that the door was "*being wedged open*".

24. In my view the submissions by the respondent's representative in this regard are well-founded.

25. The claimant did not make a qualifying disclosure, therefore, and she does not qualify for protection.

26. The detriment complaints, in terms of s.47B, and the automatic unfair dismissal complaint, in terms of s.103A, all predicated on the claimant having made a protected disclosure, have "no reasonable prospect of success". They are struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The alleged detriments, further comment

27. Although I have decided to strike-out the detriment and automatic unfair dismissal complaints, for the sake of completeness I record my further views

in respect of the alleged detriments. In short, I find favour with the submissions by the respondent's representative that: "*The claimant seeks to rely on detriments which all occurred prior to the alleged disclosure. It is plainly impossible for the claimant to have suffered any detriment on the ground of something that has not yet occurred.*"

Time bar

28. Also, all the alleged detriments are out of time. This is an additional reason why the complaints in terms of s.47B have no reasonable prospect of success.

"Reasonable belief in the public interest"

29. Finally, I also wish to record my view in this regard. *Kilraine* was decided before s.43B was amended to add the requirement that, in order for any disclosure to qualify for protection, the person making it must have a "*reasonable belief*" that the disclosure "*is made in the public interest*".

30. There is still no statutory definition of "*public interest*" anywhere in the 1996 Act and nor has any statutory or non-statutory guidance been published.

31. I am mindful that, for a disclosure to qualify under s.43B(1) a worker need only have a *reasonable belief* which means that it is necessary to establish whether the worker believed that disclosure served that interest and whether that belief was held reasonably. However, there is no indication in the claimant's e-mail of 23 August 2019, or indeed in the submissions on her behalf, that the claimant believed the disclosure to be in the public interest. From the information before me it appears that this is no more than a private employment issue that did not engage the public interest.

32. In any event, as I recorded above, I have decided to strike-out the detriment and automatic unfair dismissal complaints and I shall issue a Judgment to that effect.

5 **Remaining complaints**

33. This means that the remaining complaints are unfair dismissal and wrongful dismissal. I am minded to fix dates for a Final Hearing to consider and determine these complaints. However, before doing so **I direct the parties' representatives to make representations to the Tribunal, as to further procedure, within the next 14 days.**

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15 **Employment Judge Nick Hosie**

Date of Judgement 7 December 2020

Date sent to parties 7 December 2020

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