Case Number: 3203011/2019

RM

EMPLOYMENT TRIBUNALS

Claimant: Mr MB Uddin

Respondent: BGC Technology International Limited

JUDGMENT FOLLOWING RECONSIDERATION

The Judgment striking out the Claim is confirmed.

REASONS

1. In this set of Reasons, for ease of reference, I have used the following abbreviations:

> "the Reasons" refer to the Reasons for the striking out Judgment, promulgated on 4 November 2020;
> "DPA" means the Data Protection Act 1998
> "ICO" means the Information Commissioner's Office
> "Claimant's Skeleton Argument" refers to the Claimant's Skeleton Argument dated 16 October 2020 (which was before me at the hearing on 16 October 2020).
> Page references refer to page numbers in the bundle of documents prepared for the Preliminary Hearing on 16 October 2020."

Material and Submissions filed for this Reconsideration

2. There was a significant amount of correspondence and a number of documents filed with the Tribunal between the date of the Judgment and my reconsideration of it. The parties, particularly the Claimant, should recognise that so many threads make it difficult for any Court or Tribunal to pull them together. However, I did so. It is important that the parties understand that the fact that I do not refer to every document, and every submission, in this set of Reasons is not evidence that I have not read and considered each point; it is a product of the nature of the task that I was undertaking and the need to adopt a proportionate approach in order to further the overriding objective. As a result of the number of submissions made by the parties, this set of reasons is relatively long for a reconsideration decision.

3. The Claimant filed submissions on 22 December 2020 (entitled "Claimant's Response to the Respondent's letter to the ET dated 14/12/20). I will refer to this document as "the Claimant's Submissions".

4. On 23 December 2020, in order to ensure that the parties had an opportunity to direct their arguments to the grounds on which I had decided to reconsider the Judgment and after I had decided that there should be a reconsideration on paper (after neither party had requested an oral hearing after being given an opportunity to do so), I ordered that the parties should file any further submissions on or before 15 January 2021.

5. The Respondent filed submissions, plus authorities, on 15 January 2021. The Claimant's Further Skeleton Argument was received on the 16 January 2021, together with a paginated bundle of evidence (which was the same bundle that he filed on 22 December 2020, but now paginated), and an authority, Morrison Supermarkets Plc v Various Claimants [2020] UKSC 12. Both sets of submissions and their attachments were read and considered, along with the earlier submissions filed by the parties.

6. The Claimant subsequently sent a further email dated 22 January 2021, containing 1 page of further submissions, which I read.

7. Page references in these Reasons refer to pages in the main bundle used at the open Preliminary Hearing, save where stated.

The power to strike out

8. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

> ***"Striking out***
>
> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…"*

9. The proper approach to be taken in a strike out application in a discrimination or whistleblowing case is that:

> (1) *only in the clearest case should a discrimination claim be struck out;*
>
> *(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;*
>
> *(3) the Claimant's case must ordinarily be taken at its highest;*
>
> *(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and*
>
> *(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.*
>
> *See Mechkarov v Citibank NA [2016] ICR 1121 at paragraph 14.*

10. I directed myself that in a whistleblowing case, it would only be in an exceptional case that a Claim will be struck out as having no reasonable prospect of success when the central facts are in dispute. There may be cases which include disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success – such as where the facts sought to be established by the Claimant

are totally and inexplicably inconsistent with contemporaneous documentation. See Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 at paragraphs 27-29.

Consideration of the Claim as pleaded and in the relevant supporting documentation

11. With the above guidance in mind, I considered the Claimant's case as pleaded with the relevant supporting documentation by way of the particulars provided at the Preliminary Hearings closed (heard by Employment Judge Russell) and the evidence and Skeleton Argument provided before me at the Preliminary Hearing on 16 October 2020. In deciding the reconsideration application, I reminded myself that I must consider the case that was before me, and not a different case which was not before me on the face of the Claim and the Skeleton Argument provided; and that I should determine the reconsideration on the evidence before me when I reached the original decision, unless satisfied that it arises from material which was not and could not reasonably have been relied upon at that date and that it was relevant to the issues before me.

12. I had regard to the way in which the Claimant's case was advanced in the Claim form (at Section 8.2, p.7 hearing bundle) and the particulars provided at the Preliminary Hearing on 15 April 2020 when he was represented by Counsel (paragraph 6 of the Case Management Summary (p.46). These show that it was not part of the Claimant's case that he held a reasonable belief that the disclosure tended to show concealment of a criminal offence or legal obligation.

13. The Claimant subsequently provided particulars of the disclosure to the ICO by serving and filing the email to the ICO dated 10 July 2019 (p.56).

14. At the Preliminary Hearing open, before me, on 16 October 2020, the Claimant filed a Skeleton Argument. Under the heading "Merits of C's claim and R's conduct", at paragraph 6, this stated:

> *"R1 has a clear case to answer in relation to a criminal offence committed by R2 under section 55 of the Data Protection Act 1998, which it is trying to conceal as defined under ERA 1996 Section 43B(1)(f)."*
>
> *["R1" is understood to refer to the Respondent; "R2" is a reference to Ms. Patel]*

15. In his Skeleton Argument and his witness statement filed for the open Preliminary Hearing, and in his oral submissions on 16 October 2020, the Claimant did not allege or identify any statutory duty or civil law obligation within the DPA which his email disclosure of 10 July 2019, in his reasonable belief, tended to show was breached.

Claimant's submissions on reconsideration

16. Viewed as a whole, the Claimant's Submissions had limited focus on the issues that were before me at this reconsideration and displayed some degree of

misunderstanding about the issues raised by the definition of what amounts to a qualifying disclosure within section 43B(1) ERA.

17. The majority of the Claimant's submissions were devoted to arguments that the Respondent had in fact committed a criminal offence or breached a legal obligation under the DPA. I have sought to extract the main arguments below.

18. At paragraphs 3 to 7, under the heading "Particularisation of the Claim", the Claimant stated that *"This Claim has always been about the DPA 98". He developed his argument as follows: the disclosure of 10 July 2019 mentions the DPA in "generic terms, which includes Section 4(4), Section 55, the data protection principles (Schedule 1, Part 1) and the conditions relevant for purposes of the first principle: processing of any personal data (Schedule 2)."*

19. In any case, at paragraph 5, the Claimant relied as follows:

19.1. Mervyn v BW Controls Ltd [2020] EWCA Civ 393 was authority for the principle that Employment Tribunals must assists litigants in person to some extent and help them in identifying the correct list of issues.
19.2. It would be in the interests of justice to properly consider the sections of the DPA identified above.

20. Paragraphs 7-9 of the Claimant's Submissions addressed various provisions of the DPA, but without explanation as to how these provisions related to issues before me on the reconsideration of the Judgment.

21. Paragraphs 13 and 14 were directed to paragraphs 44.3 to 44.5 of the Reasons, but the focus of the arguments was that Ms. Patel had committed an offence under section 55 DPA. These arguments were not directed to whether he had a reasonable prospect of showing both: (i) on making the disclosure to the ICO on 10 July 2019, he had a reasonable belief that the disclosure tended to show the commission of an offence under section 55 DPA; and (ii) that he had a reasonable belief that such disclosure was made in the public interest.

22. Paragraphs 15-16 of the Claimant's Submissions and the cases referred to, addressed alleged breaches of the data protection principles and of the statutory duty within section 4(4) DPA. Paragraphs 17-22 alleged various actions by the Respondent and alleged breaches of the DPA.

23. Paragraphs 25-34 contained a series of questions.

24. Although paragraph 35 was framed as a question, it referred to paragraphs 44.3, 44.5, and 46.1 of the Reasons, and the bundle of evidence submitted by the Claimant (pp5-6, which he alleged "*clearly showed*" that he was discussing his anxiety states, even though, on their face these emails do not do so). He stated that there was no evidence that the Claimant, a single Muslim man, sent emails to Ms. Patel, a married Hindu woman, because he found her attractive or wanted to form a relationship.

25. In paragraph 36, the Claimant referred to Chesterton Global v Nurmohamed.

26. However, Paragraph 36 tended to show that, in respect of the statutory test within section 43B(1) ERA, the Claimant failed to appreciate that it was for him to prove that he had a reasonable belief that the disclosure relied upon (on 10 July 2019) tended to show commission of a criminal offence or breach of a legal obligation, and a reasonable belief that the disclosure was made in the public interest. His sub-paragraphs 36a-h are evidence of this.

27. The Claimant's Further Skeleton Argument was directed, first, to apply to include evidence, some of which he alleged was deliberately withheld by the Respondent during the hearing on 16 October 2020. He alleged that the Respondent was seeking to change its case in its Skeleton Argument, compared to the documents and what was stated at the hearing on 16 October 2020. He directed me to pages 25, 26-30, 44, 45-46 of the bundle served with the Claimant's Further Skeleton Argument.

28. Having reviewed that evidence, I found that it was not directly relevant to my task in determining the issues on reconsideration. However, the bundle included (at p.29, and at p.243 Preliminary Hearing bundle) an indication that the Claimant had sought advice from the ICO about his wish for prosecution of the Respondent; the inference is that he was proposing to prosecute the Respondent and the ICO replied on 12 February 2020 to say that he would need to ask for consent to prosecute from the Director of Public Prosecutions. Despite the allegation by the Claimant that the Respondent was guilty of an offence under section 55 DPA, there is no evidence that, at any point in time, the ICO agreed with this allegation.

29. The Claimant addressed the question of whether the Respondent had breached section 4(4) DPA. He referred to the Morrison case at paragraphs 51-54 as authority for showing that the Respondent was vicariously liable for the actions of Ms. Patel: the Supreme Court determined that an employer could be vicariously liable for breaches of a statutory duty within the DPA.

30. In addition, in his Further Skeleton Argument, the Claimant argued that Morrison showed that a breach of section 4(4) DPA was also a criminal offence under section 55 DPA. Insofar as it is relevant, I concluded that the Morrison case is not authority for that proposition: see paragraphs 51 and 54, in which the Court explains that an employer may be vicariously liable for breach of statutory duties imposed by the DPA or breaches of civil duties arising under the common law or in equity, not for a criminal act within section 55 DPA.

31. Secondly, the Claimant addressed the issue of whether the disclosure was made in the public interest. He argued that:

31.1. The Court of Appeal in Ibrahim v HCA International did not rule out that defamation could amount to a failure to comply with a legal obligation.

31.2. The threshold for a strike out application was very high. His case was complex and linked to his mental impairment. He argued the case could only be properly investigated at a final hearing.

Respondent's submissions

32. The Respondent's submissions on this reconsideration were contained in the following documents:

32.1. Letter to the Employment Tribunal dated 14 December 2020;

32.2. "R's written submissions on C's Reconsideration Application" ("Respondent's Submissions"). These submissions correctly pointed out that the references to sections ii and iii the Claimant's Grounds in the letter of 23.12.20 from the ET were intended to refer to 2.b.ii – v of the Grounds.

33. The Respondent argued that the Claimant's approach to this litigation demonstrated that he was abusing the process of the Tribunal by the disproportionate volume of documentation served by the Claimant in support of his reconsideration application, which was designed to increase costs and force settlement. In an attempt to take proportionate steps, the Respondent stated that it did not attempt to respond to each allegation or point made by the Claimant, but to focus on the points identified in the Tribunal's letter of 23 December 2020.

34. The Respondent's Submissions warned me not to be misled by the "*scattergun*" approach of the Claimant in submissions; they invited me to ignore matters and evidence not before the Tribunal, and argued that there were a range of matters in the Claimant's Submissions which were inaccurate, hypothetical, irrelevant, or allegations about acts after the disclosure of 10 July 2019.

Reconsideration: Conclusions

35. Despite the wide-ranging submissions of the Claimant, some of which were not relevant to the issues before me, or raised new matters, or were incorrect in fact (such as the examples given in the Respondent's Submissions), I have directed my attention to the relevant issues, and reminded myself of the relevant law as set out in my original Reasons, the submissions and in this set of Reasons.

<u>Error of law? Paragraph 44 Reasons</u>

36. In his Grounds (part 2.b.ii Breach of the DPA 1998), the Claimant argued that I misdirected myself in law in paragraphs 44.3 to 44.5, and that there was in a breach of the DPA 1998 contrary to paragraphs 44.3 to 44.5 of my Conclusions. This was not an issue for determination at the Preliminary Hearing: see paragraphs 18-22, 43 and main paragraph 44 of the Reasons.

37. However, I decided to reconsider my conclusions under 44.3 to 44.5 in the interests of justice, but for different reasons to those set out in the Grounds.

38. In considering the application for reconsideration, I noted that in the Reasons, the question which should have been set out in the sub-paragraphs under paragraph 44 was as follows: whether the Claimant had no reasonable prospects of showing that he held a reasonable belief, at the date of the disclosure, that the disclosure tended to show the wrongdoing relied upon in his Claim.

39. In sub-paragraphs 44.3 to 44.5, however, if read out of context, I appeared to substitute a different question, namely whether there has been a breach of the DPA. This

would be surprising given the detailed outline of the law included in the Reasons. However, in those circumstances, I considered that it was in the interests of justice to reconsider the Judgment striking out the Claim by considering particularly sub-paragraphs 44.3 to 44.5.

40. The Claimant's case at the open Preliminary Hearing was that Ms. Patel had a case to answer in respect of an alleged criminal offence under section 55 DPA, which the Respondent was trying to conceal. As I have explained, it was not part of the Claimant's Claim, as particularised in the earlier Preliminary Hearings, that he held a reasonable belief that the disclosure of 10 July 2019 tended to show concealment of an offence.

41. The Claimant's Skeleton Argument did not specify any other provision of the DPA which was alleged to be breached: see paragraphs 6, 33 and 36 which all refer to section 55 DPA. For example, Paragraph 6 states:

> *"R1 has a clear case to answer in relation to a criminal offence committed by R2 under Section 55 of the Data Protection Act 1998, which it is trying to conceal as defined under ERA 1996 Section 43B(1)(f)."*

42. In the documents referred to after paragraph 6 of the Claimant's Skeleton Argument, insofar as they are relevant on this point, the ICO in an email dated 12 February 2020 (at p.243) appeared to respond to an enquiry by the Claimant as to how a prosecution against the Respondent could proceed (the reply is that the Claimant would need to make a request to the Director of Public Prosecutions for consent to bring the prosecution and that the ICO could not forward this request).

43. The content of the Claimant's Skeleton Argument and the documents referred to, insofar as they addressed the relevant issues, demonstrated that the Claimant was advancing the case that he held a reasonable belief that the disclosure of 10 July 2019 tended to show the commission of a criminal offence under section 55 DPA.

44. In its letter dated 14 December 2020, the Respondent repeated paragraph 14 of its Skeleton Argument from the open Preliminary Hearing, which included:

> *"It could not be reasonable to believe that Mrs. Patel telling her friend Ms. Malde that C wanted to meet with her for personal reasons might amount to a criminal offence. Indeed, even if the fact that C communicated with Mrs. Patel over email rather than speaking to her somehow turned his request to meet with her for personal reasons into "personal data" within the meaning of the DPA: i) Mrs. Patel could and would obviously have reasonably believed that she was permitted in law to discuss a male approaching her for a personal meeting to her friend (section 55(2)(b) DPA; and ii) Mrs. Patel could and would obviously have believed that the "data controller" (on C's case either Mrs. Patel herself or BGC) would permit her to discuss that fact with her friend – section 55(2)(c) DPA; (iii) Mrs. Patel's conversation with Ms. Malde could not amount to "personal data" within the meaning of the DPA (since it was just a discussion), so Ms. Malde could not be restricted under the DPA from passing on what she had been told orally by her friend."*

45. In passing, I should add that although the Claimant alleged in his Grounds that whether Ms. Patel and Ms. Malde were friends with each other was a central fact in dispute, in his disclosure, he stated that these two women are friends. Taking his case at

its highest, his disclosed stated that they were friends, irrespective of the Respondents' case about the relationship between Ms. Patel and Ms. Malde. Moreover, in my judgment, there is no reasonable prospect of the Claimant establishing as a fact that Ms. Malde and Ms Patel were not friends, given his own admission in the disclosure of 10 July 2019 that is central to his Claim.

Reasons: paragraph 44.3

46. The Respondent argued that the last sentence in 44.3 was not material to the decision; and that paragraphs 44.4 and 44.5 are central to the decision.

47. Having reconsidered the conclusion at paragraph 44.3, I am satisfied that there is no reasonable prospect of the Claimant showing that 44.3, taken as a whole with the initial main paragraph of 44, demonstrated an error of law by me in the application of section 43B(1) ERA such that it is in the interests of justice that the Judgment should be varied or revoked.

48. The main paragraph 44 refers to the correct statutory test, which is referred to at length in the principles of law set out, and provides the conclusion that there was no reasonable prospect of the Claimant showing that he held a reasonable belief that the disclosure of 10 July 2019 tended to show the wrongdoing alleged. Paragraph 44.3 was part of a series of sub-paragraphs which were intended to explain that conclusion.

49. The final sentence of 44.3 is poorly worded, which is probably due to working in haste combined with the fact that both Skeleton Arguments included argument as to whether there was or could be an offence under section 55 DPA as a matter of fact.

50. Reconsidering this conclusion, I have concluded that this sub-paragraph does not require me in the interests of justice to vary or revoke my Judgment. The thrust of sub-paragraph 44.3 explains that the Claimant had emailed Ms. Patel in her personal capacity, not as a HR Manager, because he wanted to meet her for an "*informal/casual chat*". It does not suggest that there was a reasonable prospect of the Claimant showing that he had a reasonable belief that the disclosure on 10 July 2019 tended to show that Ms. Patel committed a criminal offence under section 55 DPA by telling Ms. Malde the information set out in the email correspondence from the Claimant.

Reasons: paragraphs 44.4-44.6

51. I have taken into account the Claimant's submissions at section 2.b.iv of the Grounds. The Claimant argued that in Paragraph 44.5 of the Reasons I misdirected myself by focussing on the oral conversation between Ms. Patel and Ms. Malde and holding that that conversation could not amount to personal data, whereas his case was that the email correspondence from the Claimant to Ms. Patel was the processed "*email activity information*" which was the personal data belonging to the Appellant.

52. In respect of paragraph 44.5, I did not accept the Respondent's argument that this should be corrected under the "slip rule". I decided that in fairness to the Claimant, this conclusion should be reconsidered as part of the reconsideration of the overall conclusion within paragraph 44.

53. On reconsideration, however, I concluded that paragraph 44.5 had to be read in the whole context of paragraph 44, and in respect of the application of section 43B(1)(a) ERA to the particulars of the Claim provided by the Claimant and on the arguments presented by him, which were based on an offence being committed under section 55 DPA. I reached this conclusion for the following reasons:

53.1. Paragraph 44.5 was one of a number of sub-paragraphs designed to explain the conclusion reached in the main paragraph 44.

53.2. It is important to understand that I was using the disclosure of 10 July 2019 relied upon as a key reference point when constructing the sub-paragraphs. In that disclosure, the Claimant stated that Ms. Patel "*verbally shared information (<u>unauthorised disclosure</u>) with her friend from compliance*", Ms. Malde. Thus, my reading and understanding of the disclosure, when read with the Claimant's Skeleton Argument at the Preliminary Hearing, was that this oral conversation amounted to the offence which the Claimant believed his disclosure (at p56) tended to show. The Claimant by his submissions on reconsideration agreed that the alleged oral discussion between Ms. Patel to Ms. Malde was not "personal data" as defined within s.1 DPA, and does not suggest that he held a reasonable belief that it was.

53.3. Further, in the alleged protected disclosure, the Claimant states that "*Paval Malde maliciously spread this information to the rest of my team, …*" Having reviewed the Skeleton Argument of the Respondent from the Preliminary Hearing, paragraph 44.5 of the Reasons was also intended to adopt the submissions at paragraph 14(iii) of that Skeleton Argument: see the extract above.

54. On this reconsideration, I have considered the Claimant's Submissions and section 2.b.ii of the Grounds in detail.

55. The Claimant made a number of legal submissions in respect of the DPA. The Grounds argued two points in particular.

56. First, the Claimant argued that Ms Patel breached the statutory duty within section 4(4) because of breach of the principles in Schedule 2 DPA 1998, because she did not have consent from the data subject (the Claimant) to make the disclosure to Ms. Malde, and could not have had a valid purpose to do so. Second, it is argued that Ms Patel did not have the consent of the data controller; and if Ms. Patel did not have the consent of the data controller (alleged to be the Respondent) then there was a breach or offence under section 55 DPA. The Claimant argued that he has reasonable prospects of persuading a Tribunal that there was a breach of the DPA by the disclosure alleged from Ms. Patel to Ms. Malde. This was indicative of the Claimant's mistaken approach in his application for reconsideration. His submissions focussed to a significant degree on information which arose after the disclosure on 10 July 2019, rather than his thought process at the time of the disclosure, although I accept some subsequent information may have evidential value.

57. I concluded that, having considered the interests of justice and having reconsidered paragraphs 44.5-44.6 of the Reasons and all the submissions, my original decision should not be varied or revoked. My reasons are as follows.

(1) No Reasonable prospect of Claimant showing that he had, at the time of making the disclosure on 10 July 2019, a reasonable belief that the disclosure tended to show the commission of a criminal offence

58. At Ground 2.b.ii, the Claimant's case was that where Ms. Patel did not have the consent of the data controller (alleged to be the Respondent) to make the disclosure to Ms. Malde, there was a criminal offence under section 55 DPA.

59. On reconsidering my Judgment, I concluded that the Claimant had no reasonable prospect of persuading a Tribunal that, at the time of the disclosure, the Claimant's belief that the disclosure tended to show commission of a criminal offence was reasonable for the following reasons:

59.1. The subject matter of the original email conversation (between the Claimant and Mrs Patel) referred to in the disclosure of 10 July 2019 was personal between two workers in the same place of work.
59.2. It was not reasonable for the Claimant to believe that Mrs. Patel did not have the permission of the data controller to tell a friend about such emails received from the Claimant (irrespective of who was the data controller) or to believe that she would have had the consent of the data controller (irrespective of its identity) if it had known of the disclosure and the circumstances of it.
59.3. After all, the email of 7 October 2016 from the Claimant, cited in paragraph 7 of the witness statement of Mr. Snelling, sets out that the Claimant wanted to meet Ms. Patel for an informal or casual chat, which was not work-related. The informal and personal nature of the interaction sought by the Claimant is apparent from the emails referred to in the statement of Mr. Snelling (which, at the open Preliminary Hearing, the Claimant accepted were sent, evidenced by paragraph 13.3 of the Reasons).
59.4. Moreover, in respect of paragraph 35 of Claimant's Submissions, this does not give a full picture of the correspondence sent to Ms. Patel. This includes the correspondence referred to in Mr. Snelling's witness statement. The disclosure from Ms. Patel to Ms. Malde (who, putting the Claimant's case at its highest, was her friend), must be seen in that context when assessing the reasonableness of the belief about what the disclosure to the ICO tended to show.

(2) Was it part of the Claimant's case that he held a reasonable belief that the disclosure tended to show breach of a legal obligation under the DPA (other than the commission of an offence under s.55)?

60. At the Preliminary Hearing on 15 April 2020, the Claimant was represented by Counsel. The particulars provided did not identify any particular legal obligation that the disclosure relied upon to the ICO tended to show was breached. Despite representation by Counsel at the two closed Preliminary Hearings, the Claimant did not identify any legal obligation which the disclosure tended to show was breached.

61. Although the Claimant referred in his Grounds (p.5) and in the Claimant's Submissions to various statutory obligations, none of those were raised in the Claim, nor suggested at the earlier Preliminary Hearings, nor mentioned in the Claimant's Skeleton Argument for the open Preliminary Hearing (see paragraphs 31-37 in particular of that Skeleton Argument), nor raised in oral submissions.

62. Moreover, the Claimant's witness statement filed for the open Preliminary Hearing did not provide evidence to explain the nature of the Claimant's belief when the disclosure was made nor why it was reasonable. However, at paragraph 26 of the statement, the Claimant alleges that the "*DPA Breach (and its attempted cover up by the 1st Respondent)*" was a criminal offence under section 55 DPA.

63. In respect of the Claimant's argument that the disclosure to the ICO tended to show that a data controller had breached the statutory obligations under section 4(4) and Sch 2, it was not raised at the open Preliminary Hearing that he believed that the disclosure of 10 July 2019 tended to show breach of those obligations.

64. Moreover, the Claimant's Submissions state that the disclosure to the ICO mentions the ""*Data Protection Act" in generic terms, which includes section 4(4), section 55, Schedule 1 and Schedule 2*". This argument in itself points to the Claimant not having a reasonable belief at the time that the disclosure was made that the disclosure tended to show the breach of any particular legal obligation. The Claimant's argument is that the lack of particulars of the legal obligation in the disclosure – its "*generic"* nature - was an advantage to his case, because it showed that he held a reasonable belief that the disclosure tended to show that several civil law and criminal law obligations in the DPA had been breached. I considered that this demonstrated a misinterpretation of the requirements of section 43B(1)(b) ERA; the "generic" nature of the disclosure demonstrated that the Claimant lacked the required reasonable belief. After all, the DPA imposed several different legal duties as well as criminal offences.

65. I have considered the guidance in the Mervyn case. I carefully considered the claim as pleaded and set out in relevant supporting documentation, none of which identified an alleged breach of the statutory duty within section 4(4) DPA.

66. Also, I have considered the guidance at paragraphs 39 – 42 of Mervyn. In Mervyn, at paragraph 40, the Court referred to Muschett v HM Prison Service [2010] IRLR 451.

67. It is important to note that Mervyn was a very different case on its facts, where the claimant had never been represented. This should be contrasted with the present case, where the Claimant had had the advice of Counsel at two previous Preliminary Hearings and the assistance of Employment Judge Russell in formulating the issues in his Claim.

68. In my judgment, in these factual circumstances, at the strike out application in this case, it would not further the overriding objective for the Tribunal to adopt an inquisitorial approach or to propose particulars in a Claim. A central issue before me on the strike out application was whether the Claimant had reasonable prospects of successfully showing that, at the time that the disclosure was made, the Claimant held a reasonable belief that the disclosure tended to show commission of a crime. At the open Preliminary Hearing, it would not further the overriding objective for me to suggest that the Claimant had a reasonable belief that the disclosure tended to show breach of a different legal obligation when the Claimant had addressed the form of wrongdoing relied upon by identifying a criminal offence in his Skeleton Argument.

69. Accordingly, from the Claim as pleaded and further particularised, and from the supporting documents, I concluded that it was not in the interests of justice to vary or revoke my Judgment on the basis of a complaint which was not before me.

70. Furthermore, insofar as the Claimant now argues that he had a reasonable belief that the disclosure to the ICO of 10 July 2019 tended to show a breach by a data controller of the data protection principles under section 4(4) and Schedule 2 DPA, and even if the Claimant's case was put at its highest, I concluded that there was no reasonable prospect that the complaint under section 43B(1)(b) ERA could succeed at a full merits hearing for the following reason for the following reason.

71. The alleged detriment is the undertaking sought by the Respondent: see paragraph 34 Claimant's witness statement (dated 18 September 2020). The undertaking was sent under cover of the email letter dated 1 October 2019 (see pp153-157). The undertaking sought requires the Claimant not to publish to any third party that any employee of the Respondent group has been guilty of or should be investigated for any corruption or any criminal offence under statutes including the Data Protection Act 2018 in connection with their employment.

72. Accordingly, I have concluded that even if the Claimant reasonably believed that his disclosure to the ICO tended to show a breach of a legal obligation within the DPA 1998 which imposed liability under the civil law, there is no reasonable prospect of him proving that the undertaking relied upon amounted to a detriment.

(3) Additional arguments made in the Grounds and Claimant's Submissions

73. Insofar as the Claimant has raised new arguments or claims not before me at the open Preliminary Hearing, I accepted paragraph 8 of the Respondent's Submissions. There is no need to add to them and in the interests of proportionality, I will not do so.

Conclusion: Paragraph 46 Reasons: Whether the Claimant has any reasonable prospect of showing that he held a reasonable belief that the disclosure to the ICO on 10 July 2019 was made in the public interest

74. Section 43B(1) ERA includes the following two stage test: (1) did the worker genuinely believe at the time that the disclosure was in the public interest and (2) if so, was it reasonable for him to have done so: Chesterton Global v Nurmohamed.

Case-law: what amounts to a reasonable belief that disclosure is in the public interest?

75. I considered all the guidance provided in Chesterton Global v Nurmohamed [2017] IRLR 837. I recognised that there could be more than one reasonable view as to whether a particular disclosure was in the public interest. I was careful not to substitute my own view of whether the disclosure was in the public interest for that of the worker. Although a worker may seek to justify the disclosure after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it, 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.

76. I accepted that 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. The question was to be answered by the tribunal considering all the circumstances of the particular case; and I considered the relevant factors identified in Nurmohamed.

77. In Ibrahim v HCA International plc [2019] EWCA Civ 2007 at paragraph 25, the Court held that it is incumbent on the Tribunal to ask a litigant who does not address the issue in their witness statement, whether they held the subjective belief that they were acting in the public interest. If the answer is yes, then they could be asked for an explanation, which could be the subject of cross examination as to whether it was a belief only formed at a later stage.

78. In his Grounds (at 2.b.v) and in his email to the Tribunal on 22 January 2021, the Claimant stated that in Ibrahim, the EAT had found that section 43B(1)(b) ERA was wide enough to include an allegation that Mr. Ibrahim was being defamed. For the avoidance of doubt, the Claimant did not allege in his Claim, his Skeleton Argument, his witness statement, nor in his oral submissions that he had a reasonable belief when making the disclosure of 10 July 2019 that it tended to show that the Respondent was liable in defamation.

Reconsideration

79. The Claimant's case on reconsideration in respect of this issue is set out at section 2.b.v of the Grounds, and expanded upon in the Claimant's Submissions and Further Skeleton Argument. It is alleged that I misdirected myself in law by failing to apply the guidance in Nurmohamed.

80. I have taken into account the guidance in Nurmohamed and Ibrahim and taken into account the Claimant's arguments on this point.

81. However, it is important to recognise what Ibrahim decided; in that case it was considered unfair that the Claimant was not asked whether he held a subjective belief that the disclosure was made in the public interest ie. did he have an honest or genuine belief that the disclosure was made in the public interest? In this application, I accepted (at paragraph 46 of the original decision) that the necessary subjective belief was held by the Claimant.

82. Secondly, it is important that the Tribunal directs itself to the time at which the disclosure was made when assessing whether there is any reasonable prospect of the Claimant proving that he held a reasonable belief that the disclosure was in the public interest at the time that it was made. However, in this case, the Claimant's substantive focus throughout was on trying to prove that, as a matter of fact, there was a criminal offence committed and (albeit different from the offence identified at the open Preliminary Hearing) a breach of the duty under section 4(4) DPA, rather than the real question of whether he held a reasonable belief that the disclosure was in the public interest.

83. However, I have reconsidered my conclusion at paragraph 46 of the Reasons. For these purposes, to put his case at its highest, I accepted that his complaint was that the "Processed Email Activity Information" was being processed by Ms. Patel on behalf of the Respondent. I approached it on the basis of the transcript at Exhibit Fa of the Claimant's witness statement, which is from a recording of his call with the ICO, in which an officer explained the response from the Respondent, in which the Respondent is recorded to have stated that it was not the data controller in the first place, because the information

was being used for purely domestic purposes so it was not responsible for the disclosure from Ms. Patel to Ms. Malde: see p.20 witness statement bundle.

84. However, accepting that the disclosure took place between Ms. Patel and Ms. Malde, on the face of the disclosure to the ICO in the email of 10 July 2019, the Claimant alleges that, two to three years earlier, one friend told another friend that she had received emails from the Claimant who wanted to get to know her; and Ms. Malde told others in the team.

85. Given those facts, there is no reasonable prospect of the Claimant showing that he held a reasonable belief that this disclosure in July 2019 was in the public interest.

86. The character of this interest is such that it points strongly to the disclosure to the ICO being made solely for the private interest of the Claimant.

87. I considered (or rather, reconsidered) whether this decision amounted to substituting my view for that of the Claimant as to what was in the public interest. I concluded that I had not done so.

88. The Claimant compares his situation to that of Mr. Nurmohamed in Chesterton Global case, arguing that the disclosure to the ICO served the interest of the Respondent's other employees and its business and charity partners. However, even putting the Claimant's case at its highest, this is an exceptional case where the nature of the disclosure demonstrates that the Claimant has no reasonable prospects of success in showing that he held a reasonable belief, at the time of disclosure, that it was made in public interest. It is not a question of substitution: there is nothing in the disclosure or the substance of the complaint to the ICO which suggests anything other than that the disclosure was made in the Claimant's personal interest.

89. In addition, the Claimant does not have reasonable prospects of showing that, at the material time, he held the necessary reasonable belief that the disclosure was made in the public interest by relying on the matters which he raised which post-date the disclosure to establish this reasonable belief. For example, the correspondence at Appx A of the Grounds and p.244 (letter from ICO dated 23.4.20) post-date the disclosure; and the subject access request was served on 6 December 2019 (according to paragraph 4 of Claimant's Skeleton Argument).

Summary

90. For all the above reasons, the Judgment striking out this Claim is confirmed.

Employment Judge Ross

1 February 2021