Case Number: 2411568/2019
2414676/2019
2408076/2020

EMPLOYMENT TRIBUNALS

Claimant | **Respondent**

Ms H McManus **v** South Ribble Borough Council (1)
Paul Foster (2)
Michael Titherington (3)

Heard at: Manchester Employment Tribunal **On**: 20 November 2020

Before: Employment Judge Johnson

Appearances
For the Claimant: Mr R Dennis (counsel)
For the Respondent: Ms A Del Priore (counsel)

JUDGMENT

1. The Tribunal's judgment concerning the preliminary issues identified by Employment Judge Benson in her case management order of 10 September 2020 is as follows:

   a) With the agreement of the parties, the question of whether the claimant's claim against the second respondent be dismissed under Rule 37(1)(a) on grounds that it has been presented out of time, will be postponed and determined at the final hearing;

   b) The claimant's email dated 30 April 2019 and sent at 10:50pm does amount to a qualifying protected disclosure for the purposes of section 43B ERA 1996; and,

   c) Further case management orders are discussed at the end of the judgment.

REASONS

Background

1. These proceedings arise from the claimant Ms McManus's employment as the Chief Executive of the first respondent local authority, South Ribble Borough Council ('South Ribble'). She worked in this role from 1 July 2017 until 26 May 2020, when she resigned.

2. Ms McManus presented a claim form against the South Ribble on 10 September 2019 following a period of early conciliation from 10 July 2019 to 10 August 2019. At this point she was suspended from her job and brought a complaint of detriments arising from the making of a protected disclosure, which is commonly known as whistleblowing.

3. A further claim form was presented against the second respondent Councillor Paul Foster ('Councillor Foster') on 18 November 2019 following a period of early conciliation from 15 November 2019 to 18 November 2019. She raised a complaint of whistleblowing against him.

4. A third and final claim form was presented against South Ribble, Councillor Foster and Councillor Michael Titherington ('Councillor Titherington'), as first, second and third respondents respectively following her resignation on 26 May 2020 and early conciliation on 15 June 2020. The complaints under this claim form were 'ordinary' unfair dismissal and unfair dismissal arising from the making of a protected disclosure contrary to section 103A Employment Rights Act 1996. Since this third claim was presented, Ms McManus has been given permission to amend her claim to include a complaint that Councillor Foster subjected her to a whistleblowing detriment by voting in favour of summary dismissal on 15 July 2020.

5. The case was considered by Employment Judge Benson on 2 March 2020 and she listed the case for an open preliminary hearing today to consider the following matters:

   (i) Whether the claimant's claim against the second respondent be dismissed under Rule 37(1)(a) on the grounds that it has been presented out of time?
   (ii) Whether the claimant's whistleblowing complaint be dismissed under Rule 37(1)(a) on the grounds that the email of 30 April 2019 does not amount to a qualifying protected disclosure for the purposes of section 43B of the Employment Rights Act 1996?
   (iii) Any further case management orders.

6. She also listed the case for a final hearing before an Employment Judge sitting with members on 11, 12, 13, 14 and 15 October 2021 at the Civil and Family Courts in Vernon Street. It is understood that this listing remains in place. Case management orders were made up to an including the preliminary hearing today.

The Evidence Used in the Hearing

7. Ms McManus gave evidence and had intended to call Mr Bounds. Councillor Foster, Mr Wheeler and Mr Hall were present to give evidence in support of the respondents' case.

8. Mr Dennis and Ms Del Priore confirmed that the Tribunal's preliminary issue 6(i) should be postponed and considered at the final hearing. Additionally, the claimant's proposal that claim number 2411568/2019 should be amended to add the second respondent as a party was consequential to the decision which would be made in respect with issue 6(i).

9. I agreed that this proposal was a sensible one, because it was likely by considering issue 6(i), I would find it necessary to make findings of fact which might be relevant to the issues to be considered at the final hearing. Under these circumstances, it made sense to ensure that any issues which would involve determining similar facts, be heard together at the final hearing.

10. Accordingly, it was no longer necessary for Mr Bounds and Mr Hall to give evidence and they were released.

11. This hearing took place considering the restrictions placed upon the Tribunal by the Covid 19 pandemic. This meant that there were restrictions upon the number of persons who could be present in the Tribunal room at any one time and witnesses only came in to give their evidence. The claimant and the second respondent as parties, however, were present throughout.

12. There was a hearing bundle which had been prepared for the hearing and which only related to the preliminary issues.

The Issues

13. The remaining issue for me to determine at the preliminary hearing was Whether the claimant's whistleblowing complaint be dismissed under Rule 37(1)(a) on the grounds that the email of 30 April 2019 does not amount to

a qualifying protected disclosure for the purposes of section 43B of the Employment Rights Act 1996?

Findings of fact

Background information concerning South Ribble and the political position in 2019

14. The findings of fact are made purely for the determination of the preliminary issue and have been restricted insofar as it is possible, to those facts which are relevant to it and not matters which will be determined at the final hearing.

15. It is not disputed that Ms McManus began employment with South Ribble when she was appointed as its Chief Executive on 1 July 2017. South Ribble is a borough council and is governed by councillors elected by registered voters from the local adult population. Councillors, (also known as elected members), stand for election in each of the wards within the borough and those elected tend to represent one of the major national political parties. The political party with the most members at any one time will have the majority of potential votes in any Council decision making process and in South Ribble, it was understood that this would usually either be members from the Conservative or Labour parties. Naturally, this political environment can be a challenging one for the Chief Executive. Ms McManus was the head of the paid service (local government officers and employees), within the Council and has to maintain a good relationship with the party 'in power' at the time, but also with all elected members. This must be done while considering her responsibility to ensure that the Council behaves in a way which is lawful and which looks after the wellbeing of the public that it serves, the 'stakeholders' with whom it works and, also its employees.

16. As well as the role of Chief Executive, there a two other 'statutory' posts whom the local authority must employ and which originated from the Local Government Act 1972 and Local Government & Housing Act 1989 respectively. They are the Chief Finance Officer (also known as the Borough Treasurer and/or 'section 151 officer') and also the Monitoring Officer, ('MO'). The MO has a particularly important role in ensuring good governance and that elected members behave in a way that is consistent and appropriate with their role.

17. It is correct to say that as a local authority with responsibilities for local planning decisions, South Ribble has a duty under section 70(2) of the

Town and Country Planning Act 1990, ('TCPA'), to determine planning applications which provides that:

'(2) In dealing with an application for planning permission or permission in principle the [local] authority shall have regard to –

> *(a) The provisions of the development plan, so far as material to the application,*
>
> *(aza) a post examination draft neighbourhood development plan, so far as material to the application,*
>
> *…*
>
> *(b) Any local finance considerations, so far as material to the application;*
>
> *(c) Any other material considerations'.*

18. This creates a legal obligation and duty upon South Ribble to take into account the above factors when dealing with any planning application. While some planning matters have been delegated to and can be dealt with by paid officers in South Ribble's planning team, many planning applications are determined by the Council's planning committee, which consists of elected members selected from the entirety of the Council membership. It is understood that selection of membership of the planning committee takes place following the most recent election which normally takes place in May. The committee comprises of a cross section of elected members representing the political make-up of the Council as a whole, but the majority party will usually have the most nominees.

19. The planning committee meets regularly and determines planning applications before it. Although they are advised by planning and legal officers as to their legal obligations, the decision rests with a majority vote of elected members.

20. Not surprisingly, planning and development is a matter which concerns many local residents, being a local authority function which can visibly affect all neighbourhoods and those living and working there. Local residents affected by these decisions will of course notify local councillors of their unhappiness or concern. The position that an elected member takes on a planning or development matter can affect how their local electorate votes. While an individual elected member may not have a great deal of influence over the Council's decision-making, it is understood that a member who is also the leader of a political party that could become the largest party following an election, may well have influence over his party's position on a matter of local concern. However, the planning committee remains the relevant body within a local authority who make decisions as to whether or not a planning proposal should be allowed or not.

21. When Ms McManus was appointed as Chief Executive in July 2017, there had just been a local election a few months earlier. South Ribble has 3 councillors representing each ward within the Council area and they serve for a 4 year term. This means that in each 4 year cycle, there would be one *'fallow'* year, where no elections took place. It is understood that 2018 was such a fallow year and that the next local election would not be until 2019.

22. In 2017, the majority party in the Council were the Conservatives. The Labour party were seeking to secure more councillors in the May 2019 election and understandably, this would be a hotly contested election between the two main parties.

23. There was some suggestion in the claimant's statement that she had concerns about the impact on local politics as a consequence of the rise of the *'Momentum'* wing of the Labour party who supported the then national Labour party leader Jeremy Corbyn. However, I find on balance that there was insufficient evidence to suggest that the claimant behaved in a partial or biased way in her dealings with elected members belonging different political parties during her employment with South Ribble. In relation to the preliminary issue that I have to determine, I find that Ms McManus behaved impartially in her dealings with elected members and was not seeking to undermine or favour any political group.

24. There may well have been some tension between Ms McManus and Councillor Foster, who was the leader of the Labour group in the Council, but this appeared to be more connected with her desire as a new Chief Executive to make some changes as how South Ribble provided local services. The tension between the leadership of political parties and the Chief Executive in a local authority is understandable, given the interaction between the day-to-day administration of a local authority and political decision making. Both sides will approach matters based upon their particular experiences and obligations that their roles placed upon them. This tension can no doubt be particularly challenging where elections often change the balance of power within the Council with the need for one party to win office, or another to avoid losing power.

25. At this hearing, I heard evidence from both Ms McManus and Councillor Foster and found that they were both reliable and credible witnesses. I do not criticise either for the way in which they gave their evidence. It is understandable that they had different views concerning the claims before the Tribunal. However, as I was dealing with the preliminary issue concerning the alleged protected disclosure, I did not have to hear

evidence concerning the substance of the claim and alleged detriments which the claimant has asserted.

26. The alleged protected disclosure arose in the shadow of the 2019 election. During the 3 weeks before an election takes place, the officers as the paid *'civil servants'* have to behave in a way which is more restrictive than is usually the case. This is to avoid any perception from those participating in the elections and more importantly among the voting public, that officers are behaving in a way that suggests political bias. It is known colloquially as *'purdah'* and requires officers to maintain a position of strict neutrality concerning matters of a sensitive political nature and to generally refrain from making any new announcements. In the case of South Ribble's political composition at the time of this election, Ms McManus was particularly concerned about displaying neutrality between the Conservative and Labour groups as this was where the balance of power lay.

Councillor Foster's email

27. Social media understandably plays a significant role in communications between the public and elected members of local authorities. On 28 April 2019, a local pressure group in the first respondent's area called *'Keep Bee Lane Rural'*, posted on its web site an email that they had received from Councillor Foster. It said the following:

    'Hi Graham

    Thanks for your email and sorry it's taken a couple of days to respond.

    Whether we were 3 years or 3 days off an election we would be challenging this development, as we have been doing behind the scenes for some considerable time. As a Group we are certainly not anti-development, but we are totally against inappropriate developments – which Bee Lane clearly is. Additional to the green belt arguments you made well below, there is also the huge concern surrounding density, air quality and infrastructure; we believe that these are all material considerations that are being overlooked currently.

    Talking politics for just a moment, there is absolutely no doubt that a Conservative Administration is returned next week then the current proposals will be passed exactly as presented. The Tory Leader has already made this clear, as has Cllr Cliff Hughes. If the local Conservative candidates say otherwise, they are being disingenuous. So what would a Labour Council do…well we are absolutely committed to halting the

development for a detailed review to take place, which will include the green belt arguments you state. Also, air quality, congestion and infrastructure will also become material considerations. WE WILL BE MAKING CHANGES TO THE LOCAL PLAN AND LOCAL PLANNING POLICIES (sorry about the caps, just trying to get the point across!!). If the developer attempts to push the application through prior to the review being concluded then we will be refusing it. But we will go further by inviting you and your colleagues to be part of the review, so the real-life considerations you mention will have a material impact.

In respect to your specific points about a greenbelt review, we absolutely committed to this, and have stated we will do this. You have our word. Development control in S. Ribble Has Lost Its Way, and Charnock, Farington and Lostock Hall for example, being battered by local developers at the moment, with the current Administrations full support. Look at the Cawsey and Bee Lane? What about the impact on the local communities? It appears to have been seriously overlooked.

I am passionate in challenging the damage these developments are creating for local people, and are committed to sorting it out stop I have gone on the record and stated as much, as we are wholly committed to Bee Lane. The only way to stop this is to change the Local Plan and Policies, which is basically what you also state. We do need to develop sites for housing, but we must find new sites, not what's being proposed currently.

But Graham put the chase, we need yours and your fellow campaigners support to realise these commitments. The only way to stop this is a Labour controlled Council, and I think most people do understand this. The local Conservative candidates will say whatever they need to-but it will hold no weight Fri 03 May 19 if Cllr Margaret Smith and co get their way. But I am afraid is an uncomfortable fact.

Your campaign is in politics at the moment because of the elections-I actually think this could be of benefit if we get thr [sic] right outcome. I really do hope the local residents support us. We have made absolute commitments in our manifesto that would make the community a better, healthier, happier place.

Many thanks as always, and thanks for the email.

Paul

Cllr Paul Foster
Leader of the Labour Group & Opposition…

Bamber Bridge West
South Ribble Borough Council'

<u>*The reaction from the head of the paid service Ms McManus*</u>

28. Ms McManus says she became aware of this email as it had come to the attention of the Chief Planning Officer Jonathan Noade. She said that she took the advice of the interim MO/legal director Mr Whelan. She says at the time of their discussion, Mr Whelan shared her concerns that an elected member and potential leader of the council was making announcements concerning potential planning matters that had not yet been determined by the planning committee and which would be subject to a consideration of all the relevant issues as described in section 70(2) TCPA. In his evidence, Mr Whelan said it was Ms McManus who brought the email to his attention and that he thought it was she who notified Mr Noade, (and not the other way around).

29. Mr Whelan recalled in his evidence that he was not troubled by the email because no planning application had been made by the developers at the time the email was sent which could be pre-determined by Councillor Foster and therefore no decision was imminent concerning the future of Bee Lane. He said that his view was that with purdah taking place, the Council's officers should be careful in what they did because of the politicians' '*sensitivities'* with an election about to take place. He confirmed that Ms McManus did not mention to him that she would make a protected disclosure to Councillor Foster or others and did not mention whistleblowing.

30. In particular, Ms McManus says that both the MO and her were concerned that Councillor Foster was asserting in his email to *'Keep Bee Lane Rural',* that a Labour administration would refuse the developer's application. She believed that following her discussions with Mr Whelan, the email sent by by Councillor Foster, could be considered a promise predetermine a planning application. Ms McManus was also concerned that South Ribble's duty under other legislation relating to planning, development and the Human Rights Act 1998 towards development companies, as she believed they could be affected by the assurance made by Councillor Foster in his email.

31. Mr Whelan sent an email to Councillor Foster on 30 April 2019 at 15:38. He referred to the email which have been posted on the Keep Bee Lane Rural Facebook page and explained by way of advance notice, that the Council will be posting a message on this Facebook page to clarify a number of legal issues. This would include an explanation of the procedure for reviewing the local plan and secondly it would make a

general statement that the Council does not predetermine planning applications.

32. Councillor Foster replied on 30 April 2019 at 16:43 to Mr Whelan and copied in several councillors including Councillor Titherington and Ms McManus. He asked that the Council be very careful before sending out a response of that nature and went so far as to say it was '*a very dangerous thing to even consider doing*'. He felt that a rebuttal was not appropriate because elected members understood that policy pledges during an election would be subject to the outcome of the election and the necessary planning procedural steps that applied.

33. Mr Whelan then tried to speak with Councillor Foster on the telephone, but he was unavailable. He sent his email on 30 April 2019 at 17:49 containing the statement which he was *'putting out'* on behalf of the Council. Mr Whelan confirmed in evidence that the contents of the emails which he sent to Councillor Foster were written by him and he was not told what to write by Ms McManus.

34. Having considered the difference of recollection between Ms McManus and Mr Whelan as to how Councillor Foster's email about the Bee Lane development came to the attention of the Council's senior officers, I prefer the claimant's version of events. I think it is reasonable to concluded that newsworthy matters on social media come to the attention of senior officers by numerous different avenues and often from those whose work area is likely to be involved with an issue of political interest. As Chief Executive, Ms McManus would have a wide range of issues to manage and would have relied upon her senior leadership colleagues and the heads of particular services, to raise relevant matters with her. It is more likely than not, that the email from the Bee Lane Facebook page would have been initially spotted from within the Council's planning team and referred upwards by Mr Noades and in turn to Ms McManus and Mr Whelan.

35. In terms of the discussion which took place between Mr Whelan and Ms McManus, I would have expected there to be an open and honest discussion about the legal and political issues that might arise from the email. Mr Whelan by virtue of his legal and MO background will have particulars experience and so would Ms McManus by reason of her planning experience.

36. However, what is relevant here is that Mr Whelan was willing to draft an email reply himself using language which he felt would respect the sensibilities of Councillor Foster. He explained in his email that he had tried to call Councillor Foster before sending it, but he had been

unavailable. Mr Whelan was no doubt aware of his likely reaction to the email. However, he did not dispute that Ms McManus had concerns about the legal implications of Councillor Foster's email which was published on the Keep Bee Lane Rural Facebook page. Even if deep down he felt uncomfortable with Ms McManus' view, he was able to carry out her instructions. He was no doubt concerned that Labour elected members would have been unhappy with the rebuttal, but had he had genuine concerns about what was said by Ms McManus, he would have refused to correspond with Councillor Foster in the way that he did, especially if he felt these actions would contradict what was required by purdah.

37. There then followed a number of emails between Mr Whelan, councillors and the claimant. Councillor Tomlinson who sent an email on 30 April 2019 at 7:51pm, expressed surprise at the proposed message and questioned the impartiality of local authority officers. Ms McManus responded at 8:02pm and explained that legal advice was that South Ribble should clarify its position concerning the predetermination of planning applications and that the decision was not a political statement. This was followed quickly by a reply from Councillor Foster at 8:12pm and he suggested that the first respondent's officers had misunderstood the "purdah regulations". Councillor Titherington added his thoughts in an email sent at 8:48pm and said: '*[t]his is not the first time we have expressed our concerns over suspected impartiality off [sic] officers but rarely has it been so blatant'.* He concluded by saying: *'Paul [Councillor Foster] has made our position clear and he has the group's complete backing'.*

38. The final reply by Councillor Foster to Ms McManus at 20:27pm. He included as recipients the other individuals copied into earlier emails in this 'thread' said as follows:

   "Not prepared to discuss any more Heather. We want the S RBC inappropriate Facebook statement removing immediately.

   We will deal with this post-election. Added to the list."

   It is not clear what was meant by the final sentence of this email, but Councillor Foster clearly remained unhappy with the claimant's concerns raised in relation to the Facebook post regarding Bee Lane and with what she had instructed Mr Whelan to do.

<u>Ms McManus's disclosure at 10:50am on 30 April 2019</u>

39. Later that evening at 10:50pm, Ms McManus felt that she needed to send a further email to Councillors Titherington, Foster and Tomlinson. She also copied in a number of council officers who were Mr Whelan, Interim MO/Legal Service Manager, Tim Povall, Deputy Chief Executive and Gregg Stott, Deputy Chief Executive. These were among the most senior officers of the Council. The email said the following:

    "Dear Members

    It is disappointing to read the view set out in this email trail. As I have consistently advised, officers are here to assist the council as a whole, and are always a-political in providing any advise [sic]

    As detailed, a statement was issued today by the councils MO [monitoring officer] which sought to provide legal clarity around the councils non political planning process' … i.e. the council cannot and does not make predetermined decisions on planning applications. This is a legal position on the councils statutory obligation and does not touch upon any political policy-making process.

    I'm sure the M.O. will provide further clarification of this matter for you in due course."

40. Taking into account the preliminary issue which I have to determine in this hearing, it is not necessary for me to make findings of fact concerning what happened following 30 April 2019. Ms McManus asserts that the email which she sent at 8:50pm on 30 April 2019 amounted to a protected disclosure under section 43B ERA. She said that she was warning the relevant members of the Council that they were considering breaking planning law by predetermining an application as elected members of South Ribble.

41. Ms Del Priore asserted in her final submissions that Ms McManus did not describe her email as a protected disclosure until a letter was sent to the Council by her solicitors on 29 June 2019. This seems consistent with Mr Whelan's evidence that Ms McManus did not mention whistleblowing or a protected disclosure to him during their discussions on 30 April 2019. But what this argument does not acknowledge, is her belief that Councillor Foster by sending the email which was published on the Keep Bee Lane Rural Facebook page could be contrary to planning process and might be considered to be predetermination.

42. Ms McManus says that she had to send the email to Councillor Foster and his Labour colleagues despite the restrictions placed upon the Council's officers by purdah, because of the concerns of predetermining a planning

application. She explained that had she raised this matter with the Conservative group, she could have been accused of acting in a political way given that this information would have amounted to *"political capital".* As such, it appeared to be a measured approach to alert Councillor Foster of what she believed his email appeared to propose and what the Council needed to do, to avoid any perceptions by the public to that effect.

43. Ms McManus confirmed that she had experience of overseeing elections previously and was also aware that elected members could make statements during elections. She was an experienced local government officer and had occupied a number of senior officer roles since 2008. She recognised that politics within South Ribble were *'difficult'* because although there was a Conservative majority when she started as Chief Executive, power was *'finely balanced'* between the Conservative and Labour groups, and this created a *'tense environment'.* She contrasted this scenario with her time as Deputy Chief Executive of Lancaster Borough Council between 2008 and 2012 and where there were five different large political groupings. I accepted that the role of Chief Executive is challenging in any local authority, but in a council dominated by two of the larger political parties where power could change on a regular basis with the almost annual election cycle, Ms McManus was placed in a very difficult situation. However, her role in the decision to send the initial email by Mr Whelan and her subsequent emails were not in any way partial and represented a genuine concern on her part, that South Ribble's obligations under planning legislation could be breached. While it may be the case that this was an incorrect conclusion to draw (and clearly the elected members involved were in disagreement with her), I am satisfied that her view was a sincere one and not motivated by any political partiality.

44. It is true that she had raised concerns in her statement concerning the perceived rise of the 'Momentum' movement in the Labour Party and their leadership approaching Councillor Foster about becoming a Labour candidate for the Barrow-in-Furness Parliamentary constituency. However, as I have already mentioned and having heard Ms McManus's evidence in this case, I am satisfied that this reference was simply to provide evidence of how politically tense things were in South Ribble and did not represent any political bias on her part.

The Law

<u>Protected disclosures under section 43 Employment Rights Act 1996 ('ERA')</u>

45. Under section 43A ERA 1996, a 'protected disclosure' means a qualifying disclosure (as defined by section 43B), which is made by a worker in

accordance with any of sections 43C to 43H. Section 43C involves disclosures to an employer or other responsible person.

46. Section 43B ERA 1996 provides that:

'(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following –

(a) That a criminal offence has been committed, is being committed or is likely to be committed,
(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
(c) That a miscarriage of justice has occurred, is occurring or is likely to occur.
(d) That the health and 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 endangered,
(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.'

47. For there to be a 'protected disclosure' under section 43 ERA, the claimant must have *disclosed information* (section 43B(1)).

48. The *disclosure* can be orally or in writing. It need not follow any special whistleblowing procedure, even if the employer has such a procedure. The factual disputes before the tribunal may be:

a) If it was an *oral* disclosure, what exactly was said, to whom and when?
b) If it was a *written* disclosure – where was it written and who received it/read it?

49. In terms of whether *information* was disclosed, the claimant needs to identify how exactly what she or he, said or wrote amounted to the relevant 'information'. Claimants may refer to the disclosure being a long email or letter. But what is relevant, is the actual 'information' contained within the correspondence or communication. Complaints, allegations and comments may or may not contain '*information*' under section 43B of the ERA.

50. It does not matter that a claimant was telling his or her manager something which the manager already knew. It is still a '*disclosure of information'*.

51. The *information* must, in the claimant's reasonable belief, tend to show one of the following, (as described in section 43B(1)):

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,
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.

52. The Tribunal will want to pinpoint what issue the claimant had in mind. For example, if the belief concerns a criminal offence, what criminal offence? If it concerns breach of a legal obligation, what legal obligation?

53. The Tribunal does not decide whether in fact the *'thing'* disclosed had/was/is about to take place, (a legal obligation for example). Instead, it must decide:

    a) Did the claimant believe the information tended to show the relevant *'thing',* for example; a breach of a legal obligation?
    b) If so, was that belief 'reasonable' for the claimant to hold?

54. The Tribunal must also consider whether the disclosure was, in the claimant's reasonable belief, made in the public interest. Again, the question is not whether the disclosure was in fact in the public interest. The tribunal must decide:

    a) Did the claimant believe disclosure was in the public interest?
    b) Was it reasonable to believe that?

55. It does not matter if disclosure was also made in the claimant's own interest.

56. The 'public' can simply be other people employed by the same employer.

57. What is in the 'public interest' is common sense looking at all the circumstances including:

    a) How serious was the matter?
    b) How many people might be affected?
    c) The identity of the wrong-doer.

58. As mentioned above, sections 43C to 43H ERA 1996 refer to who may constitute a responsible person for the purposes of disclosure. In this

case, the claimant relies upon section 43C ERA 1996 only. This provides that:

‘*(1) A qualifying disclosure 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.’

59. For the avoidance of doubt in this hearing, I am considering whether or not the claimant made a protected disclosure. The question of whether or not a detriment arose in connection with the protected disclosure is for the final hearing to determine.

60. In terms of case law, I was taken to a number of cases by counsel for the claimant and the respondents in their final submissions.

61. Mr Dennis referred to the case of ***Jesudason v Alder Hey Children’s NHS Foundation Trust [2020] ICR 1226*** in relation to what constitutes ‘information’ and ‘reasonable belief’ under section 43B. He also referred to the case of ***Kilraine v Wandsworth London Borough Council [2018] ICR 1850*** in relation to whether a disclosure has sufficient factual content so as to satisfy the test under section 43B. Finally, he referred to the case of ***Chesterton Global Limited v Nurmohamed [2018] ICR 731*** as to the consideration of the public interest requirement and whether the claimant’s subjective belief is objectively reasonable.

62. Ms Del Priore too referred to ***Kilraine*** and ***Chesterton Global*** in relation to the meaning of a disclosure qualifying for protection.

63. I am grateful to both counsel for their detailed submissions and their reference to the case law.

Discussion and Analysis

64. The focus of this preliminary hearing is with the Ms McManus’s email dated 30 April 2019 sent at 10:50pm (or 22:50). There were other emails which were sent by her and Mr Whelan prior to this one during the same evening, but they are not relied upon as protected disclosures and simply provide some context as to her email sent at 10:50pm.

65. The email was a written form of communication and the information which Ms McManus says amounts to a disclosure consistent with section 43B(1) of the ERA 1996, is contained within the second paragraph of this short email. It refers to the earlier statement issued by Mr Whelan in his capacity of MO in order that legal clarity could be provided concerning the '*non political planning process'.* The information which Mr Dennis says amounted to a protected disclosure was the statement in Ms McManus's email that; *'the council cannot and does not make predetermined decisions of planning applications'.*

66. Read in isolation, this might not appear to be a disclosure of information that could amount to a qualifying disclosure. However, once the email thread is read, which begins with Mr Whelan's initial 'warning email' sent to Councillor Foster at 16:49pm on 30 April 2019, the reason for Ms McManus's email sent at 10:50pm becomes clear.

67. As soon as she became aware of the email sent by Councillor Foster and published on the Keep Bee Lane Rural Facebook page, she was genuinely concerned that his views regarding any planning application by developers would be refused, could amount to predetermination. This would be contrary to section 70(2) of the TCPA 1990.

68. She discussed it with Mr Whelan and tasked him in his capacity as interim MO, with the job of preparing a rebuttal statement. He understandably ensured that Councillor Foster was warned of what the Council would be doing and why.

69. It is perhaps not surprising that with what was happening in a hotly fought and finely balanced local election, Councillor Foster took it badly and indeed took the view that South Ribble's senior officers were mistaken in sending out this rebuttal. Considering Mr Whelan's evidence, it was clear that he wished to distance himself from the concerns being raised and the officer who was the source of this concern, namely Ms McManus.

70. Following a series of ill-tempered emails from Councillor Foster and his colleagues as the evening progressed, it was understandable that Ms McManus as the head of the South Ribble's paid service and therefore its most senior officer, wanted to make clear the issue was one of governance and related to South Ribble's obligations under planning procedure. Her reference to South Ribble not being able to predetermine planning applications clearly illustrated her belief that Councillor Foster's email which was used by Keep Bee Lane Rural, caused her concern in relating to this matter.

71. In my view, this email had a sufficient factual content as it identified a concern regarding section 43B(1)(b) in relation to South Ribble's broad legal obligation to approve planning decision through a non-political planning committee and that a contrary view had been suggested in the email of Councillor Foster. As the recipients to Ms McManus's emails had seen the earlier emails on the subject, there was an understanding of the context of the disclosure. It relates to a specific concern, that this concern could be inconsistent with legislation and planning procedure and this could amount to a failure or likely failure of the necessary obligations. It served to give a clear position as to the reason for the Council's rebuttal, but also Ms McManus wanted senior Labour members and senior officers to understand the legal obligation and potential failure to comply. This was consistent with the principles discussed in the ***Kilraine*** with regard to what constitutes information.

72. As a consequence, and taking into account the events which took place on 30 April 2019, I find that the email which Ms McManus sent at 10:50pm that day was a disclosure of information, which she believed showed that Councillor Foster may have given the impression that the Labour Group if successful in becoming the largest political party in the Council, would fail to comply with the planning requirement under section 72(2) TCPA. As such, this was a protected disclosure under section 43B(1)(b), which relates to statutory obligations.

73. I find that this disclosure was made in the public interest as it relates to a matter of good governance and a concern that South Ribble through decisions of elected members could breach legal obligations. This was a matter of public interest to elected members, officers and indeed members of the public who would expect South Ribble to follow correct legal requirements in relation to planning.

74. As I explained in my findings of fact, I am satisfied that this disclosure was made in good faith and was not tainted in anyway by other considerations. Ms McManus behaved impartially. She was not motivated by any political bias and had this been the case, she may well have disclosed this information to the other parties represented in the Council and in particular the Conservative Party's councillors and candidates in the 2019 local election. Her approach was measured, even if perhaps understandably, it upset Councillor Foster and his colleagues.

75. Mr Whelan gave evidence at the hearing stating that he disagreed with Ms McManus about the legal issues which she said arose from Councillor Foster's email. This did not appear to be something that he strongly asserted to Ms McManus on 30 April 2019, but even if he did, he recognised his Chief Executive's concerns and carried out her instructions.

Ms McManus may have been wrong about her beliefs concerning the issue of predetermination and it was clear from the Labour councillor's replies, that they disagreed with her view.

76. What I need to consider however, was whether Ms McManus acted in good faith in making the disclosure that she did at 10:50pm. I find that this was the case and she genuinely believed that there was a risk that the Council or its elected members could breach their statutory obligation under section 72(2) TCPA and the rebuttal email, a draft of which was sent to Councillor Foster by Mr McManus, was the correct thing to do. She did have a lot of planning experience and perhaps she interpreted the impact of the email through the 'lens' of an experienced planning officer and did not apply the degree of 'discretion' which another senior officer might have exercised in relation to election candidates and the promises that they make during the campaign, especially taking into account how purdah operated. Whether or not this is the case, Ms McManus became worried about the email and how it interacted with section 72(2) of the TCPA and the disclosure which she made at 10:50pm in the context of the events which took place on 30 April 2019 involved a genuine belief and one made in good faith. There is nothing to suggest that the claimant was using this email as a means to support a claim in any subsequent litigation. The fact that she did not specifically argue to Mr Whelan at the time or within the contents of that email, that it was a protected disclosure or sent under South Ribble's whistleblowing policy, indicates a genuine attempt to warn members rather than use it for more cynical purposes.

77. In terms of who received this email, it was sent to Councillor's Foster and Titherington and Tomlinson, who were senior members of the Labour Group and the Opposition in the Council chamber at that time. she also copied in Mr Whelan who was an Interim MO Legal Services Manager and Mr Gregg Stott and Timothy Povall, who were the Deputy Chief Executives.

78. Under Section 43C(1)(b) ERA 1996, where the worker 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, a qualifying disclosure will be made in accordance with section 43C.

79. As the most senior paid employee at the Council, Ms McManus did make her disclosure to her employer by virtue of including her immediate deputies Messrs Povall and Stott and also the MO and Legal Services Manager Mr Whelan. These officers were both in a leadership role and would have had responsibility for issues relating to governance. In this

respect, Ms McManus made a qualifying disclosure in accordance with section 43C(1)(a) ERA 1996.

80. Additionally, she was also concerned that the failure identified by her disclosure involved Councillor Foster and potentially his senior elected members in the Labour group. As they were included in Ms McManus's email sent at 10:50pm, the qualifying disclosure was made in accordance with section 43C(1)(b)(i), which involves the conduct of a person other than a claimant's employer.

Conclusion

81. For these reasons, in relation to the preliminary issue that I was asked to determine today, I find that the claimant Ms Mcmanus made a disclosure qualifying for protection in accordance with section 43B(1)(b) when she sent her email at 10:50pm on 30 April 2019 to Councillor Foster and other elected members and Mr Whelan and other senior officers employed by the first respondent Council.

Further case management orders (made in accordance with the Employment Tribunals' Rules of Procedure)

82. These orders have been made to ensure that the case will be prepared for the final hearing later this year. If the parties require any further case management orders that have not been made in this judgment, they should write to the Tribunal and the other party as soon as possible explaining what orders are required and why. The parties are of course expected to cooperate in furthering the overriding objective under Rule 2 and if possible, any such requests should be made jointly.

83. The claimant must provide to the respondent by **26 February 2021,** an updated schedule of loss setting out what remedy is being sought and how much in compensation the Tribunal will be asked to award the claimant in relation to each of the claimant's complaints and how the amounts have been calculated.

84. On or before **26 March 2021** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

85. By **23 April 2021**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date.

86. The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **25 June 2021**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission.

87. ***On the working day immediately before the first day of the final hearing*** *(but not before that day), by* ***12 noon,*** the respondent must lodge the following with the Tribunal:

    i) six copies (plus one electronic copy) of the bundle(s);
    ii) six hard copies (plus one electronic copy of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44);
    iii) six copies of an agreed list of issues, an agreed chronology and an agreed cast list.

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Employment Judge Johnson

Date:1 February 2021
Sent to the parties on: 9 February 2021

For the Tribunal Office