



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114389/2019

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Held via Cloud Video Platform (CVP) on 1 and 2 February 2021

Employment Judge: A Strain (sitting alone)

10 **Mr Alex Forootan**

**Claimant
In Person**

15 **Alliance Trust Savings Limited**

**Respondents
Represented by:
Ms Laura Fitzpatrick –
Solicitor**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgement of the Tribunal is that the reason (or principal reason) the Claimant was dismissed was not that the Claimant had made a protected disclosure contrary to section 103A of the Act and his claim is accordingly dismissed.

Background

25 1. The Claimant presented his ET1 on 13 December 2019 which contained various claims. Following a Preliminary Hearing on 30 June 2020 the claims were narrowed to a complaint of automatic unfair dismissal in breach of section 103A of the Act.

30 2. The Respondent's position was that the Claimant they accepted that the Claimant had been dismissed but that he had been dismissed due to the relationship and mutual trust and confidence between the Parties having irretrievably broken down.

35 3. The issue for the Tribunal to determine was whether or not the reason (or principal reason) for the dismissal was that the Claimant had made a protected disclosure contrary to section 103A of the Act.

4. The remedy sought by the Claimant was compensation.
5. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal and the Claimant had lodged a separate Remedy Bundle.
6. The Claimant gave evidence on his own behalf. For the Respondent, Mr Richard Lord (RL), their former Chief Information Officer who dismissed the Claimant, gave evidence.
7. Subsequent to the conclusion of the Hearing the Claimant lodged additional documentation which included the ICO complaint.

Findings in Fact

8. Having heard the evidence of the Parties and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - (1) The Respondent is a large organisation engaged in the provision of financial services;
 - (2) The Claimant was employed by the Respondent as a Database Administrator in the Respondent's Dundee Office from 2 October 2017 until his employment was terminated on 3 July 2019;
 - (3) Terms and conditions of employment were issued to the Claimant on 22 September 2017 (Production 4);
 - (4) The Respondent was on sickness absence from 9 January 2019 until the termination of his employment;
 - (5) The Respondent deployed an application called MobileIron on a number of employee's personal phones (including that of the Claimant) to allow employees to securely access corporate emails;
 - (6) On 16 January 2019 the Claimant raised concerns with regard to the capabilities of the MobileIron application and the extent to which it accessed and stored personal data of his at a meeting with Lisa

Storrier (**LS**) and Jean Montgomery (**JM**) (HR Business partners). It was agreed at this meeting that the Respondent would clarify the capabilities of the MobileIron application and how it was used by them;

- 5 (7) The Respondent commissioned an internal audit into the capabilities of the MobileIron application in January 2019. By email of 31 January 2019 (Production 6) from LS to the Claimant the Respondent informed the Claimant of the findings of the internal audit. The findings were that MobileIron was only enabled
10 by the Respondent to track location and detail applications installed on a device. The email enclosed logs showing that there had been no request for such data in respect of the Claimant. MobileIron was capable of many other features (including the ability to relay SMS messages sent from a device) but these had
15 not been enabled by the Respondent. The email confirmed that independent verification of the internal audit's findings would be conducted;
- (8) During February and March 2019 the Claimant raised further queries with regard to the MobileIron application which were
20 responded to by email (Production 7);
- (9) By email of 14 March 2019 (Production 8) the Claimant raised a formal grievance under the Respondent's Grievance Policy (Production 5). This grievance included a reference to "installation of a wire-tapping agent on Personal Phone". It also enclosed a
25 detailed list of questions ;
- (10) The detailed list of questions was responded to by the Respondent (Production 15);
- (11) By email of 27 March 2019 (Production 9) LS sent the Claimant a copy of the external audit report (Production 10);

(12) The external report was prepared by Sapphire who were the suppliers of the MobileIron application to the Respondent;

(13) The external report found:

5 a. "there is no cross over of employee personal data and corporate data";

b. "members of staff with access to the MobileIron management interface do not have routine access to personal data"; and

10 c. "Privacy implications are minimal with the only area of (minor) concern being that the names of installed applications are captured."

(14) The external report concluded:

a. "No personally identifiable information was found within the log file"; and

15 b. "Generally, best practice settings are in place making an overall good level of security hygiene".

(15) The Claimant made a complaint to the Information Commissioner (ICO) on 8 April 2019;

20 (16) The Respondent fixed a Grievance Hearing for 18 April 2019. At the request of the Claimant by email of 17 April 2019 (Production 11) the Grievance was determined in writing;

(17) By email of 20 April 2019 (Production 11) the Claimant informed the Respondent that he was not satisfied with the investigation into MobileIron and was escalating this to his legal team;

25 (18) The Claimant sent 2 emails on 20 April 2019 to LS (Production 12) which contained the following statements:

a. "My legal team will educate you, and the ATS management and your legal team on my human rights soon"; and

b. "We are not horses we are human and different to a horse. We have rights and lawyers. Horses don't have lawyers."

(19) On 22 April 2019 (Production 13) the Claimant sent an email to the Chairman of Alliance Trust PLC in the following terms:

5 *"Can you please allocate someone to look into this. If you can not fix this in the next 24 hours I will get police involved. My phone has been hacked by IT and this is a criminal offence".*

(20) The Respondent informed the Claimant of the outcome of his grievance by letter of 3 May 2019 (Production 14) which found that
10 "There is no evidence to suggest that your privacy at work has been breached or your personal data compromised".

(21) The Claimant sought to appeal the grievance outcome by email of 4 June 2019 (Production 16) and was asked to set out the grounds of his appeal in writing by email of 5 June 2019 from LS;

15 (22) The Claimant set out the grounds of his appeal in an email to LS of 5 June 2019 (Production 17). This email complained (amongst others) that the "internal and external audit was too narrow in scope and only focussed on current configuration and findings require clarification" and that the Claimant "was supplied with
20 partial logs for 1 of my mobile device, I owned 2 devices and I expected full logs for both devices."

(23) The Claimant sent LinkedIn messages to Matteo Basso (a work colleague) on 12 and 13 June 2019 (Production 18) in which he states
25 "I talked to HR and they confirm in writing that they can access your sms. And call logs."

(24) The Claimant sent LinkedIn messages to Emma Gorman (a work colleague) on 13 June and 12 July 2019 (Production 19). The message of 13 June asked if MobileIron has been installed on her personal phone and states "I think it gives my line manager and
30 colleagues in IT full access to employee personal phone.", "I

guess I'm going to report my manager to the police." . The message of 12 July stated "Looks like our chairman of ATS Lord Robert Smith was fined for bribery and corruption" and accuses him of being a "mobster".

5 (25) The Claimant sent a LinkedIn message to Richard Glass (a work colleague) on 13 June 2019 (Production 20) stating "Corey installed app on my personal phone it seems like wiretapping agent called mobile iron. I wonder if he has also installed on your personal mobile too? I think gives him full remote access to my phone."

10 (26) The Claimant sent an email of 14 June 2019 (Production 21) to the BBC alleging "I have discovered my employer and in particular IT is hacking employee's personal phone....They use a technology called mobile iron... this is wiretapping agent and....get full access to employee phone including microphone and camera, Whatsapp, socila media, etc."

15 (27) The Respondent's LS wrote by email of 14 June 2019 (Production 22) to the Claimant expressing the Respondent's disappointment "that you have felt it necessary to send inflammatory and unfounded comments to an external media channel, and in addition discuss this matter with colleagues in an inappropriate manner ... and ultimately misrepresenting ATS." And "we are now seeking legal advice to consider the motives and integrity around your behaviour..".

20 (28) By letter of 21 June 2019 (Production 23) the Claimant was informed that his grievance appeal would be determined by written submissions;

25 (29) The ICO issued findings in relation to the Claimant's complaint against the Respondent by email of 21 June 2019 (Production 24). Those findings included that the Respondent "is processing an excessive amount of personal data....the app must collect details

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of the other apps an individual may have installed on the device....this would be classified as sensitive personal data...ATS are using an app which is inappropriate for its purposes...ATS has not been able to rely upon a lawful basis for processing this information". The ICO stated that "ATS should review whether it is appropriate to use the app given the requirement to process excessive amounts of personal data...This review should also look into ensuring that any consent recorded is freely given to ensure that this lawful basis can be relied upon."

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10 (30) The Claimant sent an email on 24 June 2019 (Production 25) to JM in which he says "I have now received reply from ICO and I can not work for you again. ICO confirms what ATS has put me through is unlawful and illegal. I would like you to make me a settlement offer so we can bring my employment with ATS to an
15 end. Should ATS fail to make me a settlement offer I will take my case to external media and press criminal charges against our director Lord Robert Smith."

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(31) The Claimant sent an email on 28 June 2019 (Production 26) to the Dundee Courier and copied it to LS and JM. In that email he states that the ICO confirmed in writing that "ATS has unlawfully accessed my personal mobile phone.....I believe my employer is putting its employee's life and wellbeing at risk by acting very reckless and irresponsible. I am getting impression that my employer is financial services of ill repute.."

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(32) The Claimant sent a further email on 28 June 2019 (Production 27) to the Dundee Courier and copied to LS and JM with a screenshot of a colleague's WhatsApp status and asserting that this colleague manages "wiretapping agent and has access to employee phone.....without their consent";

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(33) The Claimant sent an email starting "Hi Jean" dated 30 June 2019 (Production 29) to the Dundee Courier and copied it to JM and

LS in which he refers to the impact things are having on his father's health and that if anything happens to his father he will "hold ats management accountable and it will be a case of manslaughter ". He concludes the email by stating "If anything happen to my father as a result of this I will chase you for the rest of your life." The Respondent reported this email to the Police as they considered it threatening and intimidating towards JM.

Investigation

(34) In June 2019 RL was appointed to consider and investigate the the concerns they had with the Claimant's conduct particularly in light of his LinkedIn communications to colleagues, emails to the BBC and Dundee Courier and emails to JM and LS. Not the complaint to the ICO.

(35) RL had joined the Respondent in March of 2019. He was responsible for the delivery and performance of the Respondent's IT Systems. The Claimant was not known to him personally, but he was aware of him. He considered the Claimant to be a valued employee. He was aware that the Claimant had been signed off ill since January 2019. The Respondent wanted him well and back to work. The Claimant was part of a small team and was missed.

(36) RL was aware of the Claimant's issues with regard to MobileIron and that there had been an internal and external report commissioned by the Respondent. He was also aware of the complaint the Claimant made to the ICO.

(37) The internal and external reports had not concluded that sensitive personal data had been accessed. Whilst the MobileIron app had a lot of features,most of these had not been enabled on the version used by the Respondent and this had been confirmed to the Claimant.

- 5 (38) The ICO Report had concluded that the Respondent's should review their use of the MobileIron App and also ensure that express consent was obtained from employees to its use. It had not concluded that personal data had been accessed. RL had to implement this and he confirmed processes had been reviewed following the ICO findings.
- 10 (39) RL was of the view that the Internal Grievances and Appeal had been dealt with appropriately by the Respondent. The Claimant's issues had been treated seriously and had been professionally investigated. The Respondent's had spent £2000 on the commissioning of the external report and had implemented the recommendations that flowed from that, the internal report and the ICO.
- 15 (40) These communications were, in RL's view, unprofessional, unfounded and almost constituted harassment. The email message of 30 June 2019 to JM (Production 29) was of particular concern. JM is a young female HR colleague who found the email threatening and had suffered anxiety as a consequence. Other members of the team had expressed concerns to RL about the Claimant's issues with the Respondent.
- 20 (41) Following consideration of these inappropriate messages RL had the Claimant's email access turned off. This was done out of appreciation of the duty of care to other employees, customers, systems operated by the Respondent and duties to the Board and the Financial Services Regulator.
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Termination of Employment

- 30 (42) RL took the decision to terminate the Claimant's employment. The matter had become a conduct issue in light of his interactions with the Respondent, the media and his work colleagues. The Respondent had exhausted all means to get the Claimant back to work. It was clear to RL that there was no way forward for the

Claimant to return to work. The Respondent had exhausted all avenues. The Claimant simply would not accept the outcome of the internal grievance, appeal and investigation into the use of the MobileIron app.

5 (43) RL considered the impact on the Respondent and its employees if the Claimant were to return to work. There would be anxiety and distress, work colleagues felt threatened. RL was of the view that there had been a complete breakdown in the relationship and of mutual trust and confidence between employer and employee.

10 (44) RL issued the termination letter of 3 July 2019 (Production 31) to the Claimant setting out the reasons why his employment had been terminated. The letter confirmed the termination of the Claimant's employment with immediate effect. RL considered that the relationship and mutual trust and confidence between
15 employer and employee had broken down irretrievably. This was the reason (or principal reason) for termination of the Claimant's employment. He based this conclusion on the inflammatory and unfounded comments made to external media, inappropriate
20 approaches to colleagues misrepresenting the Respondent (LinkedIn messages), a direct threat to JM in his email of 30 June 2019, the fact that the Respondent had done all it could to resolve his issues and that the Claimant remained dissatisfied.

(45) The fact that the Claimant had made a complaint to the ICO did not play any part in the Respondent's decision to dismiss the
25 Claimant;

(46) In RL's view the breakdown in the relationship and of mutual trust and confidence was accepted by the Claimant.

(47) The Respondent communicated the outcome of the grievance appeal in writing to the Claimant by letter of 3 July 2019
30 (Production 30). The Respondent confirmed that the Claimant's appeal was not upheld and confirmed that the Respondent had

reviewed is policies and procedures following the ICO findings. It also stated that there was no evidence of inappropriate storing or access of his personal data.

5 (48) The Claimant did not receive the letter of 3 July 2019 (Production 31) until email from JM of 8 July 2019 sent it to him (Production 33);

10 (49) The Claimant sent an email of 8 July 2019 (Production 32) to JM and LS stating "I no longer wish to be associated with ATS I have lost my trust and faith in ATS management after crisis which they have created."

(50) The Claimant received payment of 3 months pay in lieu of notice and accrued annual leave;

(51) Following termination of his employment the Respondent became bankrupt;

15 (52) The Respondent set up in business as self employed consultant in November 2020 and has earned in the region of £4000 (Gross) to date.

The Relevant Law

20 9. The Claimant asserts a complaint of automatic unfair dismissal in breach of section 103A of the Act. Section 103A renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for his dismissal is that he made a protected disclosure.

25 10. The onus of proof is upon the Claimant (***Kuzel v Roche Products Ltd 2008 ICR 799 CA*** and ***Smith v Hayle Town Council [1978] I.C.R. 996.***)

Qualifying protected disclosure

11. In terms of sections 43B – 43H of the Act to be a qualifying protected disclosure the Claimant needs to satisfy the Tribunal that:

- (a) There was a disclosure of information;
- (b) The subject matter of this disclosure related to a “relevant failure”;
- (c) It was reasonable for him to believe that the information tended to show one of these relevant failures;
- 5 (d) He had a reasonable belief that the disclosure was in the public interest; and
- (e) the disclosure was made in accordance with one of the specified methods of disclosure.

Disclosure of information (section 43B(1))

- 10 12. The Employment Appeal Tribunal in the case of **Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325** provide guidance to the Tribunal highlight a distinction between “information” and an “allegation”. The EAT held the ordinary meaning of “information” is conveying facts”. **Kilraine v London Borough of Wandsworth [2018]**
- 15 **EWCA Civ 1436, CA** highlights a distinction between “information” and an “allegation”. The Court of Appeal in **Kilraine** noted that there can be a distinction between “*information*” (the word used in ERA 1996 s.43B(1)) and an “*allegation*”. However, the concept of “*information*” as used in ERA 1996 s.43B(1) is capable of covering statements which might also
- 20 be characterised as allegations.

There must be a Qualifying Disclosure (section 43B(1)(a-f))

13. 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—
- 25 (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,
- 5 (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
14. This requires the Tribunal to consider whether or not the disclosure was
10 (in the reasonable belief of the Claimant) (i) in the public interest and (ii) showed one or more of the matters contained within section 43B(1)(a-f).

Reasonable Belief

15. It is the Claimant's belief at the time of disclosure that is relevant and it is not necessary for the Claimant to prove that the information disclosed
15 was actually true (***Darnton v University of Surrey 2003 IRLR 133***). The Tribunal must assess the Claimant's belief on an objective standard (***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4***).
16. The EAT in ***Phoenix House Ltd v Stockman and anor 2016 IRLR 848***,
20 give further guidance on the approach to be adopted : "*on the facts believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints.*"

25 *Public Interest*

17. The approach to be adopted by a Tribunal in considering whether a disclosure was in the public interest was as set out by the Court of Appeal in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979***. The Tribunal should determine whether the employee

subjectively believed at the time of the disclosure that disclosure was in the public interest. If it was then the Tribunal should ask whether that belief was objectively reasonable.

Disclosure must be made to person specified in section 43C to H.

- 5 18. In order to be a protected disclosure the Tribunal must consider to whom the disclosure was made and whether they fell within sections 43C-H.

The reason (or, if more than one reason, the principal reason) for his dismissal

19. Once the Claimant has established that he made a qualifying protected disclosure he must then establish that the fact of making the disclosure was the reason (or, if more than one reason, the principal reason) for his dismissal.

- 10 20. In determining what the reason or principal reason for the dismissal was the Tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal (*El-Megrissi v Azad University (IR) in Oxford EAT 0448/08*).

Submissions

21. Both Parties made submissions orally and also submitted written submissions after the conclusion of the hearing.

Discussion and Decision

- 20 22. The Tribunal heard evidence from the Claimant and Richard Lord (**RL**) of the Respondent.

The Claimant

23. The Tribunal did not find the Claimant's evidence to be credible or reliable. His evidence was contrary to the clear and unequivocal documentary evidence and inconsistent. Frequently the Claimant sought to avoid answering questions in cross examination from the Respondent's solicitor.

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24. By way of example, the Claimant repeatedly asserted that the ICO report had found that his personal mobile had been unlawfully accessed or hacked and gave full access to sms, social media and so on. This was stated in his email of 14 June 2019 (Production 21) to the BBC alleging
5 *"I have discovered my employer and in particular IT is hacking employee's personal phone....They use a technology called mobile iron... this is wiretapping agent and....get full access to employee phone including microphone and camera, Whatsapp, socila media, etc."* The ICO report clearly did not support these assertions made by the Claimant.
- 10 25. The Claimant was asked about the cleary inappropriate and threatening emails he had sent to colleagues in cross examination. One such email was to JM. The Claimant sent an email starting "Hi Jean" dated 30 June 2019 (Production 29) to the Dundee Courier and copied it to JM amd LS in which he refers to the impact things are having on his father's health
15 and that if anything happens to his father he will "hold ats management accountable and it will be a case of manslaughter ". He concludes the email by stating *"If anything happen to my father as a result of this I will chase you for the rest of your life."* The Respondent reported this email to the Police as they considered it threatening and intimidating towards
20 JM. He refused to accept that this was a "threat" worthy of reporting to the Police and stated that the Police did not consider this threatening. When asked about this, the correspondence through LinkedIn with his work colleagues and the Dundee Courier he was reluctant to answer and appeared to find the line of questioning amusing. Ultimately he
25 conceded some of the corresodence was unprofessional and inappropriate.
26. Furthermore, the Claimant repeatedly asserted that the Respondent was not "transparent" despite all of the correspondence replying to his complaints, internal and external reports and copies of logs. The
30 Respondent provided evidence to the Claimant (repeatedly) that his personal information had not been accessed. This included internal and external reports. The Claimant did not accept this evidence. The Tribunal

did not accept that his view was supported by the evidence. Indeed, the Tribunal consider that the evidence contradicted the Claimant's views.

27. The Claimant had not produced the ICO complaint which was alleged to constitute the protected disclosure. His complaint had been that the Respondent dismissed him as a direct result of him making a complaint to the ICO (paragraph 13 of his ET1 sets this out). This assertion was further supported at a Preliminary Hearing (**PH**) on 30 June 2020 where the Claimant produced a completed PH Agenda which stated that he had been dismissed due to a protected disclosure which was a complaint to the ICO. The Tribunal concludes at paragraph 19 of the PH Judgement that the Claimant has produced "*enough information to enable his claim that he was automatically unfairly dismissed for making a protected disclosure to his employers and the Information Commissioner to proceed to a hearing.*" The Tribunal went on (at paragraph 20) to dismiss any other claims made by the Claimant.
28. The Tribunal commented (at paragraph 14) of the PH Judgement that the Claimant had not yet lodged a copy of his complaint to the ICO but these were matters which could be sorted out.
29. The Tribunal also noted (at paragraph 13) of the PH Judgement that the Claimant maintained his grievance was a protected disclosure to the Respondent.
30. In his evidence the Claimant appeared to maintain that his protected disclosures were not just his complaint to the ICO (which he had failed to produce) and his grievance but also his emails to the media and his LinkedIn messages to his colleagues. This contradicted the position he had maintained since the lodging of his ET1 and at the PH on 30 June 2020. The Respondent had no notice of this change in his position nor was there any basis for this in the Claimant's written pleadings. The Tribunal considered that the case for determination concerned the complaint to the ICO, his grievances and LinkedIn messages to work colleagues constituting protected disclosures but not the emails to the

media. What this did show was further inconsistent and contradictory evidence from the Claimant as to what his case was. This highlighted the lack of credibility and reliability of the Claimant's evidence.

- 5 31. The Tribunal did accept the Claimant's own evidence (which was supported by his own emails) that the relationship with the Respondent had broken down. The Claimant sent an email on 24 June 2019 (Production 25) to JM in which he says "I have now received reply from ICO and I can not work for you again. ICO confirms what ATS has put me through is unlawful and illegal. I would like you to make me a settlement offer so we can bring my employment with ATS to an end. Should ATS fail to make me a settlement offer I will take my case to external media and press criminal charges against our director Lord Robert Smith."
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- 15 32. The Claimant sent an email on 28 June 2019 (Production 26) to the Dundee Courier and copied it to LS and JM. In that email he stated that the ICO confirmed in writing that "ATS has unlawfully accessed my personal mobile phone.....I believe my employer is putting its employee's life and wellbeing at risk by acting very reckless and irresponsible. I am getting impression that my employer is financial services of ill repute."
- 20 33. The Claimant sent an email of 8 July 2019 (Production 32) to JM and LS stating "I no longer wish to be associated with ATS I have lost my trust and faith in ATS management after crisis which they have created."

The Respondent

- 25 34. The Claimant's evidence can be contrasted with that of RL. The Tribunal accepted the evidence of RL. His evidence was clear and consistent with the documentary evidence that had been produced. His evidence was measured, considered, credible and reliable.
- 30 35. RL had investigated and reached the decision to dismiss on the basis that the relationship and mutual trust and confidence had broken down irretrievably. RL considered this was the reason (or principal reason) for

5 termination of the Claimant's employment. He based this conclusion on the inflammatory and unfounded comments made to external media, inappropriate approaches to colleagues misrepresenting the Respondent (LinkedIn messages), a direct threat to JM in his email of 30 June 2019, the fact that the Respondent had done all it could to resolve his issues and that the Claimant remained dissatisfied. All of this was substantiated by the documentary evidence that had been produced.

36. The Tribunal then went on to consider whether or not the Claimant had made qualifying protected disclosures to the ICO or his employer.

10 *Qualifying Protected Disclosure*

37. The Claimant produced the original complaint to the ICO the day after the Tribunal Hearing had concluded. As the Tribunal Hearing had concluded the Respondent had no opportunity to comment on, lead evidence or question the Claimant regarding the content of the complaint. The Claimant had been on notice since the PH on 30 June 15 2020 that he needed to specify the disclosure(s) he was relying upon. There would be potential prejudice to the Respondent if the complaint was to be allowed in evidence at this stage in the proceedings.

38. The Tribunal considered the content of the complaint to the ICO. The ICO 20 complaint was in the following terms:

25 *"Hi RE: Case Reference IC-05754-F3Q6 - confidential Company installed mobile device monitoring app on my personal android, company did not explain reason for this and I suspect this is very powerful app and that my line manager and team member whom control the dashboard are turning on full surveillance on and accessing , tracking my personal gps location, call logs, sms and maybe more. I have raised with HR but hr is also puzzled and they are trying to investigate this without involving managers involved. I am shocked that such powerful app was installed on personal phone and employer did not ask for explicit permission of me and now find myself in situation that is very stressful and difficult to prove 30 if my manager and his colleagues have abused their power and data*

breach taken place. I have discussed with independent mobile iron consultant and they advised me to complain to you, I know for sure this app can access list of other personal apps I have on phone, and gps, other than this it can do much more however all depends on how much monitoring they will enable Alex”

39. It also went on to mention that the Claimant complained that the Respondent had used his personal information without his consent and used his personal information in a way he didn't expect. In terms of remedy from the ICO the Claimant asserted:

“please help me understand 1. what are capabilities of this app, and how much can my manager spy on my personal device (worst case scenario) 2. please help me understand if he has spied on me and to what extend and what information he holds and whom he shared with and going forward how I can get them to apologise and protect the data which they already collected illegally. my doctor has placed me on medication for anxiety because of this .Please contact me and or my union representative Mr Jim email: dundee@gmb.org.uk before engaging with my employer ,my email: alex.frootan@hotmail.co.uk ,I believe my manager also monitors company email and as per my discussion with HR we should exclude him from the investigation, if we email company he will read the email.”

Disclosure of information (section 43B(1))

ICO Complaint

40. The Tribunal considered whether or not the ICO complaint was a disclosure of information as required under section 43B(1). The cases of ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** and ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, CA*** provide guidance to the Tribunal and highlights a distinction between “information” and an “allegation”. The EAT held the ordinary meaning of “information” is “conveying facts”. The Court of Appeal in ***Kilraine*** noted that there can be a distinction between

"information" (the word used in ERA 1996 s.43B(1)) and an "allegation". However, the concept of "information" as used in ERA 1996 s.43B(1) is capable of covering statements which might also be characterised as allegations. The Tribunal considered that the Claimant was asking questions of the ICO to help him understand the capabilities of the app, whether he has been spied on, what information has been stored and what his colleagues who have access are doing (*how can my manager spy on my personal device*). The only aspect of his complaint to the ICO that could be said to be conveying facts was the fact that the app had been installed. The Tribunal find that the complaint to the ICO was an assertion of suspicions, allegations of the apps use and a request for assistance in his understanding of the capabilities of the app. The Tribunal considered that (following the more liberal approach of the Court of Appeal in *Kilraine*) this did constitute a disclosure of "information" as required under section 43B(1).

Grievance

41. The Claimant's Grievance (Production 8) was submitted on 14 March 2019. It asserted (amongst others) that a "wire-tapping agent" had been installed on his personal mobile phone and that his personal email account had been compromised. It also included a list of 28 questions which the Claimant wished responded to.

42. The Tribunal considered that the assertions in the Claimant's Grievance were allegations and opinions. They were not disclosures of facts. That being said the Tribunal considered that the Grievance was capable of and did constitute a disclosure of "information" as required under section 43B(1).

LinkedIn messages

43. Leaving aside the issue as to whether or not the LinkedIn messages constitute a disclosure to an employer, the Tribunal considered the content of the LinkedIn messages and whether they constituted the disclosure of information for the purposes of section 43B(1). The

Claimant sent LinkedIn messages to Matteo Basso (a work colleague) on 12 and 13 June 2019 (Production 18) in which he stated *"I talked to HR and they confirm in writing that they can access your sms. And call logs."*

5 44. The Claimant sent a LinkedIn message to Emma Gorman (a work colleague) on 13 June 2019 (Production 19) in which he asked if MobileIron had been installed on her personal phone and states *"I think it gives my line manager and colleagues in IT full access to employee personal phone."*, *"I guess I'm going to report my manager to the police."* He sent a further LinkedIn message on 12 July 2019 which stated *"Looks like our chairman of ATS Lord Robert Smith was fined for bribery and corruption"* and accuses him of being a "mobster". This message makes no reference to the MobileIron app or any breach of legal duty by the Respondent. It only makes reference to Lord Robert Smith and makes accusations concerning him.

15 45. The Claimant sent a LinkedIn message to Richard Glass (a work colleague) on 13 June 2019 (Production 20) stating *"Corey installed app on my personal phone it seems like wiretapping agent called mobile iron. I wonder if he has also installed on your personal mobile too? I think gives him full remote access to my phone."*

20 46. The Tribunal considered and found that these messages contained allegations, questions and assertions. The Tribunal considered that the June 2019 messages were capable of and did constitute a disclosure of "information" as required under section 43B(1). The 12 July 2019 message did not relate to the MobileIron app or any alleged breach of legal obligation by the Respondent. It only contained accusations about Lord Robert Smith. It did not constitute a disclosure of information under section 43B(1)

30 47. The Tribunal find that the Grievance, the LinkedIn messages (under exception of the message of 12 July 2019) and the ICO complaint did constitute "information" as required under section 43B(1).

48. Having reached this conclusion the Tribunal considered whether or not the “disclosures” satisfied any of the remaining tests.

Did the disclosure (if it were a disclosure of information under section 43B(1)) show that the Respondent had failed to comply with any legal obligation section 43B(1)(b) of the ERA.

ICO Complaint

49. In so far as the complaint to the ICO alleges data breaches and access to/use of his personal data without his consent then this would appear to show that the Respondent had failed to comply with legal obligations in connection with his personal data.

Grievance

50. The Grievance, read together with the questions posed by the Claimant, (taken at their highest) may be said to constitute a disclosure of a failure to comply with legal obligations in connection with personal data.

LinkedIn messages

51. The LinkedIn messages (apart from the message of 12 July 2019) contain rather more vague assertions of monitoring or access to personal data which (taken at their highest) may be said to constitute a disclosure of a failure to comply with legal obligations in connection with personal data (under exception of the message of 12 July 2019 which could not).

Reasonable Belief

52. The Tribunal considered whether or not the disclosure was (in the reasonable belief of the Claimant) (i) in the public interest and (ii) showed one or more of the matters contained within section 43B(1)(a-f). It is the Claimant’s belief at the time of disclosure that is relevant and it is not necessary for the Claimant to prove that the information disclosed was actually true (*Darnton v University of Surrey 2003 IRLR 133*). The Tribunal must assess the Claimant’s belief on an objective standard

(Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4).

Grievance

53. The Claimant submitted his Grievance on 14 March 2019. By that time,
5 he had received responses by email from the Respondent on his particular queries about the use of the app and also received copies of the internal audit report (31 January 2019 (Production 6)) . The Claimant had been informed of the enabled capabilities of the app, the data accessed and usage. The information provided to the Claimant was clear
10 and did not substantiate his assertions.

ICO Complaint and LinkedIn Messages

54. The Claimant issued his complaint to the ICO on 8 April 2019 and the
LinkedIn messages in June. By that time he had received responses by
15 email from the Respondent on his particular queries about the use of the app and also received copies of the internal (31 January 2019 (Production 6)) and external audit reports (27 March 2019 (Production 9)). The Claimant had been informed of the enabled capabilities of the app, the data accessed and usage. The information provided to the Claimant was clear and did not substantiate his assertions. The Claimant
20 considered that the findings of the audits (both) were not independent, transparent and did not provide him with all of the information he required. He particularly objected to the external report on the basis that it had been produced by the suppliers of the app.

55. The Tribunal did not accept the Claimant's criticism of the reports and
25 responses provided by the Respondent. He had been given full and frank responses from the Respondent to his queries. He had no reasonable basis to disbelieve or challenge the veracity of the information provided to him. He simply did not accept what he was told by them.

56. At the point of making the Grievance, the complaint to the ICO and
30 sending the LinkedIn messages in June to his colleagues the Claimant

had no evidence upon which to base his assertions and complaints that the Respondent was in breach of any legal obligation. At it's highest, the Claimant had a suspicion as to what the app was capable of and could be used for.

- 5 57. The Tribunal considered that the Claimant did not hold a reasonable belief in respect of his disclosures in the circumstances and that the belief was not held on an objective basis.

Public Interest

- 10 58. The Tribunal followed the approach set out by the Court of Appeal in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979***. The Tribunal should determine whether the employee subjectively believed at the time of the disclosure that disclosure was in the public interest. If it was then the Tribunal should ask whether that belief was objectively reasonable.

- 15 59. The Tribunal considered the state of knowledge of the Claimant at the time of the Grievance, the complaint to the ICO and the LinkedIn messages. At that point in time he had received the outcome of both internal and external reports. He had received detailed responses from the Respondent to his many queries. He simply did not accept the
20 evidence and information he had been provided with. Against that factual backdrop the Tribunal considered that the Claimant did not subjectively believe that the disclosures he made were in the public interest. Even if the Tribunal were wrong in reaching that conclusion the Tribunal considered that the Claimant's belief was not, in any event, objectively
25 reasonable in the circumstances. The Claimant was clearly intent on pursuing his own agenda and suspicions.

Disclosure must be made to person specified in section 43C to H.

60. In this instance the Claimant asserts that his disclosures were made to his employer (section 43C(1)(a)) and the ICO (section 43F).

- 30 *Employer*

61. The Tribunal accepted and found that the Grievance of 14 March 2019 could constitute a disclosure to his employer.

62. The Tribunal considered whether or not the LinkedIn messages could constitute a disclosure to his employer.

5 63. The Claimant confirmed that the LinkedIn messages were sent to colleagues. It did not appear that these colleagues were in a position of seniority over the Claimant or that they had any specific responsibility for dealing with disclosures, grievances or complaints on the Respondent's behalf. In the circumstances the Tribunal considered that the LinkedIn
10 messages could not be disclosures to an employer for the purposes of section 43C(1)(a).

ICO

64. The Tribunal accepted that disclosure to the ICO could be disclosure to an entity covered by section 43F.

15 *Conclusion*

65. The Tribunal concluded that the Grievance, the ICO complaint and the LinkedIn messages did not constitute protected disclosures for the purposes of section 103A. The Claimant's claim is unsuccessful.

66. In light of the Tribunal's findings in relation to the ICO complaint it
20 becomes academic whether or not it's late production should be allowed.

67. Furthermore, the Tribunal considered that even if the disclosures had been protected (which they were not) they did not form the reason or principal reason for dismissal.

Reason for Dismissal

25 68. In determining what the reason or principal reason for the dismissal was the Tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal (***El-Megrisi v Azad University (IR) in Oxford EAT 0448/08***).

69. The onus of proof is upon the Claimant (*Kuzel v Roche Products Ltd 2008 ICR 799 CA* and *Smith v Hayle Town Council [1978] I.C.R. 996.*) to establish that the reason (or principal reason) for dismissal was his making a protected disclosure to the ICO.
- 5 70. The Tribunal had no hesitation in accepting the evidence of RL. Having considered the clear and unequivocal documentary evidence contained within the Claimant's correspondence to the media, his work colleagues and especially HR it was evident that the relationship and mutual trust and confidence had irretrievably broken down.
- 10 71. The Claimant accepted as much in his evidence. He had no trust and confidence in the Respondent. He confirmed this in his email to JM and LS referred to above (Production 32). His description of the Respondent as "financial services of ill repute" (Production 28) and statement that he "can not work for you again" in his email of 24 June 2019 to JM
15 (Production 25) all supported this conclusion.
72. The Claimant simply refused to accept the internal and external reports, grievance outcomes and the Respondent's assurances that his personal data had not been breached. This underlined the absence of trust and confidence.
- 20 73. The Tribunal accepted RL's evidence that the principal reason for termination of the Claimant's employment was the breakdown in the relationship and of mutual trust and confidence.
74. The Tribunal accordingly find and determine that the principal reason for the termination of the Claimant's employment was the breakdown in the
25 relationship and of mutual trust and confidence.
75. The claim is accordingly dismissed.

30 **Employment Judge:**
Date of Judgment:
Date sent to parties:

Alan Strain
26 February 2021
26 February 2021