Case Number: 2301353/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Cox	v	**The Commissioner of Police of the Metropolis**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 11 and 12 March 2021**

Before: Employment Judge O'Neill

Appearance:

For the Claimant: Mr C Khan

For the Respondent: Mr M Ley - Morgan

JUDGMENT

The claimant, by his email of 8 November 2018 to Sgt Rainbird, has made a qualifying protected disclosure under section 43B Employment Rights Act 1996.

REASONS

1. Purpose of Hearing

By order dated 14 October 2020 set this matter down as a Preliminary Hearing on the following issue

For the purposes of s.43B ERA 1996:

a. Did the Claimant's e-mail of 8 November 2018 (at 17.08) contain information?

b. Did that information tend to show a relevant failure? (The gateways relied upon are: (i) a criminal offence; (ii) breach of a legal obligation; (iii) endangering health and safety).

c. Was the disclosure made in the public interest?

2. Law

A qualifying disclosure is defined by S43B Employment Rights Act 1996. Both parties are represented by counsel I do not set out the texts of the section in respect of which the relevant issues have been identified in the above directions.

Counsel have referred to sections 2 and 2A of the Road Traffic Act 1988.

Counsel for the Claimant has referred to me the following authority on the issue of information

Kilraine v London Borough of Wandsworth [2016] IRLR 422

Counsel for the respondent has referred me to the following authorities in addition

Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR 325

Western Union Payment Services Ltd v Anastasiou [2014] 2 WLUK 687

Gibson v LB of Hounslow UKEAT/0129/18

Goode v Marks & Spencer plc UKEAT/0442/09

3. Documents

I had before me an agreed bundle of documents running to 78 pages, paginated and indexed; the pleadings, including the above order; witness statements of Mr M Cox, Mr R. Prior and Mr S Hill. The parties and their witnesses confirmed they also had access to these documents. Counsel for the parties submitted very helpful skeleton arguments which I read at the outset of the hearing together with the documents and witness statements. Counsel also made oral submissions.

4. Witnesses

Witness statements were produced by Mr Cox, Mr Pryor and Mr Hill. Mr Khan assured me that sign copies of the witness statements had been lodged with the Tribunal. The witness statements were adopted and taken as read and the witnesses cross-examined.

5. Findings of Fact

5.1 Having considered all of the evidence both oral and documentary the Tribunal makes the following findings of fact on the balance of probabilities which are

relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider the particular matter assisted me in determining the issues. Some of the findings are also set out in the conclusions below in an attempt to avoid unnecessary repetition. Conversely, some of the conclusions are set out in the findings of fact adjacent to those findings.

5.2 The claimant is a serving police officer and the motorcycle rider in the special escort group (SEG), a specialist unit whose purpose is to escort the royal family, senior government officials and foreign government visitors safely through London. The primary purpose was the safety and protection of the Principals (ie the dignitaries escorted) and it was important to ensure that they passed freely through the traffic not only to facilitate their timetables, but also for their personal protection.

5.3 The claimant was involved in escort duty on 7 November 2018, after which the supervisor Police Sergeant Rainbird followed up a debriefing with an email dated 8 November 2018 reminding SEG officers of their duties in respect of segregated cycle lanes which he emphasised should only be used as a last resort.

5.4 Although the claimant at first took exception to the email, because he believed it was making an example of him, after reading the email and on reflection, the claimant accepted that it was interesting and helpful.

5.5 It is clear from the evidence of Mr Simon Hill (who is Assistant Secretary of the Metropolitan Police Federation and lead for road policing) that for some time there has been concern on the part of the Federation and the force as to the legal position of police drivers under the Road Traffic legislation. According to Mr Hill police drivers are judged by the same general standard as the public and the exemptions from road traffic offences applicable to them are limited. This leaves police drivers exposed to potential criminal prosecution in the event of an accident. Mr Hill explained that SEG drivers were particularly vulnerable.

5.6 SEG drivers are required in the course of their duties to undertake driving manoeuvres which would otherwise attract prosecution and penalty on the part of the general public and which could pose a risk to the safety of the officers and the general public if steps are not taken to mitigate the risk. In respect of some manoeuvres the SEG drivers are expressly exempted under the Road Traffic regulations but the Act is silent in respect of other manoeuvres which the SEG drivers carry out on a regular basis. This has been an unresolved matter of concern and considered by the Federation to be an area which requires government intervention.

5.7 I accept the claimant's evidence that he saw Mr Rainbird's email of 8 November 2018 as an opportunity to raise his concerns about these other manoeuvres although he did not expect Mr Rainbird to be in a position to give him an authoritative reply.

5.8 The claimant sent an email to Mr Rainbird on 8 November 2018 in the following terms:

> *' Thank you for the clarification regarding this matter Dan. Would you also be able to take a moment and also clarify our legal position and the jobs policy regarding the following:*

offside roundabouts for right turns (a regular manoeuvre carried out a countless locations)

being the wrong side of a central reservation (approach to Hogarth, for instance)

negotiating a traffic system the wrong way with oncoming traffic (T-square, for instance)

contravention of no entry signs (Savoy Hill, for example)

contravention of one-way signs (again regularly carried out)

These manoeuvres are usually, but not always, carried out for the sole purpose of maintaining the principal's timetable by leaving traffic behind and appear no more justifiable than your example below. I am sure a careful and competent driver would view these actions as being far more dangerous than using a short stretch of empty cycle lane.

Clarification of these did issues will hopefully assist officers in the future, should they ever have to justify their actions.

Thank you'

5.9 The email from the claimant to Mr Rainbird of 8 November 2018 set out above in its entirety is the disclosure relied on by the claimant in this claim.

The email was answered by inspector P Lutz who wrote in the following terms

' *I'll answer this one, although I believe everyone at the unit already knows where we stand. The points Martin raises are grey areas that have never been tested in the courts, so there are no legal precedents. If anyone requires further explanation is uncomfortable performing these tactics. Please come and speak.'*

5.10 On 10 November 2018 the claimant wrote to his Federation representative Mr Richard Prior. In that email the claimant complains about a meeting with Inspector Lutz concerning his email of 8 November 2021 to PS Rainbird and which led to the alleged detriments relied on in this claim.

In the fifth paragraph of the email to Mr Prior, the claimant writes 'I replied that the polite and professional email had been sent with the safety of my colleagues in mind and that advice regarding many of our techniques would be useful and necessary to be supplied to all'

In the final paragraph, the claimant writes 'I do not understand how seeking clarification via email, regarding our working techniques, can result of this action being taken. This email was sent with no other intention than to seek the expert view of my line manager for the benefit of myself and others. This action has made me feel that it is not acceptable to ask simple safety questions at the SEG and that any perceived 'rocking the boat' will result in wildly disproportionate action'.

Conclusions

6. The claimant's email of 8 November 2018 clearly sets out five manoeuvres which the SEG drivers regularly carry out during the course of their escort duties. They are described in reasonably clear detail with examples of the places where such tactics are commonly adopted. It matters not that this information might have already been known and was likely to have been already known by Sgt Rainbird.

They are matters for which a member of the general public would be prosecuted and are inherently dangerous without appropriate protocols and safeguards.

7. Although the claimant is somewhat oblique in the language that he uses and does not simply and plainly set out that he is raising this as a matter which puts him and his colleagues at risk of committing traffic offences and / or driving in a way which puts the claimant and his colleagues and the public at risk of accident and injury, I find that is how he intended his email to be understood and I conclude that is how it would be likely to be understood by the SEG officers. Indeed, on an ordinary reading I consider this is what is being said.

8. The words 'these manoeuvres are usually, but not always, carried out for the sole purpose of maintaining the principals time table …. appear no more justifiable than your example below' I find were intended to mean and would have been understood by the SEG officers (who all had our background in traffic law) as meaning that the officers risked falling outside of the Road Traffic Act exemption and risked committing offences.

9. The words ' I am sure a careful and competent driver would view these actions as being far more dangerous than using a short stretch of empty cycle lane' were intended to mean and would have been understood by the SEG officers as referring to the definition of dangerous driving within sections 2 and 2A , of the Road Traffic Act 1988 (RTA). I find that it was intended to mean and was understood by the SEG officers as meaning that these five manoeuvres were potentially dangerous and a safety risk to the officers and to the public and therefore tactics in respect of which safeguards and guidance were required.

An example of this wording from the RTA , which would have been well known to police drivers and which would clearly signal that the manoeuvres are being raised as a matter of such concern is as follows '(1)…*a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—(a) the way he drives falls far below what would be expected of a competent and careful driver, and (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous'.* That professional familiarity with such wording is part of the contextual background.

10. The matters which the claimant raises in his email to Sgt Rainbird of 8 November clearly cover matters of endangering health and safety, criminal offences and breach of legal obligations.

11. The claimant told me that he wrote to Sgt Rainbird in this way because, in terms, he wanted to protect himself and wished to be seen as an officer raising an issue in a polite and professional way rather than in a hostile way.

12. Counsel for the respondent has highlighted the claimant's final paragraph of his email to Mr Prior. Mr Prior was the claimant's Federation representative and the email to him, would have been completely confidential and there would have been no need for the claimant to temper his concerns or language. Counsel points out that in the claimant's own words *'the email was sent with no other intention than to seek the expert view of my line manager for the benefit it of myself and others' ,* and argues that therefore this was not a disclosure within the meaning of the Employment Rights Act, but merely a request for clarification within a normal operational dialogue. However, I note that the claimant goes on to say ' *this action (ie the action of Inspector Lutz) has made me feel that it is not acceptable to ask simple safety questions at the SEG and that any perceived rocking the boat will*

result in wildly disproportionate action.' I also note the claimant's earlier paragraph in which he stated that the email had been sent with '*safety of my colleagues in mind'*. I am not persuaded that the claimant was merely seeking clarification and therefore doing something falling short of making a disclosure of information which tended to show one of the matters listed in section 43B.

13. In reaching this conclusion, I note the observations as to the dichotomy between information and allegation made in *Kilraine* to the effect that such matters are often intertwined '*the decision is not decided by whether a given phrase or paragraph is one or rather the other, that is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation that has nothing to the point'*. By analogy, in the context of these emails to Sgt Rainbird and Mr Prior, I consider that a request for clarification and guidance may well be intertwined with a qualifying disclosure, and that a request for clarification is not incompatible with or excluding of a qualifying disclosure. In this case, I conclude that the request for clarification and guidance is intertwined with the disclosure.

14. As I understood it at the hearing and from the skeleton provided by Counsel for the respondent the respondent's case at this PH is limited to the question of information '*the email made no assertion of factual information. The email was simply a request by the claimant to the expert opinion of PS Rainbird. The opinions sought was clarification of the email sent by PES rain Bird earlier on 8 November 2018.'* I therefore understood that the respondent was making no argument based on reasonable belief. Given the evidence of the Claimant, Mr Hill and the email of Inspector Lutz referred to above, I find the claimant's belief that these matters were exposing officers to the risk of prosecution and officers and the public to the risk of harm to be a reasonable belief.

15. As I understood it at the hearing, Counsel for the respondent conceded that if a disclosure has been made containing information which tended to show the matters listed at 1 b) above then it followed that such a disclosure was in the public interest. In any event, I find that information relating to the possibility of offences being committed by officers of the respondent and information relating to the road traffic safety risks to officers or the public, is a disclosure made in the public interest and that the claimant has made such a disclosure in the public interest.

16. In the circumstances I find that the claimant has shown on the balance of probability that he has made a qualifying disclosure under section 43B Employment Rights Act 1996.

12 March 2021

Employment Judge O'Neill