



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K O'Connor

**Respondent:** Mr Liam John Brooke (1)  
Lendy Ltd (In Administration) (2)

## REASONS

(following the request from the Claimant after promulgation of Judgment)

1. The Claimant pursues claims that on 5, 7 and 8 November 2018 he made qualifying disclosures to the Respondents within the meaning of **s.43 Employment Rights Act 1996 ("the Act")** as a result of which he was automatically unfairly dismissed by the Second Respondent ("Lendy") (by notice by letter served on him on 9 November 2018) on 10 February 2019, and was subjected to detriments by the First Respondent ("Mr Brooke") in contravention of the Act.
2. The Respondents deny that the Claimant made protected disclosures and, if he is found to have done so, will submit that he was not subject to any detriments, and was not dismissed because he had made a protected disclosure / protected disclosures or by reason of any such disclosures / disclosures.
3. At a TCMPH on 29 August 2019 this case was listed for a Preliminary Hearing to determine if the alleged protected disclosures were made by the Claimant. The hearing fixed at that TCMPH was subsequently vacated and converted to a further TCMPH which was held on 8 June 2020. At that hearing the previously agreed list of issues for the Preliminary Hearing was reviewed and confirmed by the parties. It is as follows
  - 1 (a) *whether the Claimant made Qualifying Disclosures. The disclosures relied upon by the Claimant are:*
    - (i) *alleged disclosure on 5 November 2018 relating to the proposed transfer of assets;*
    - (ii) *alleged disclosure on 5 November 2018 relating to the alleged abuse of staff;*
    - (iii) *alleged disclosure on 7 November 2018 relating to the alleged misuse of the Retained Interest Account;*
    - (iv) *alleged disclosure on 7 November 2018 relating to the flawed*

*entitlement to interest; and*

*(v) alleged disclosure on 8 November relating to the alleged inciting or organising of violence*

- (b) did the communications in 1(a)i – v take place in the terms alleged or at all?*
- (c) if so, during the communications did the Claimant make a disclosure of information; if so, what was the information that was disclosed?*
- (d) if so did the Claimant reasonably believe that the information tended to show one or more relevant failures, namely a failure falling within s.43B(1) of the Act?*
- (e) did the Claimant reasonably believe that the alleged disclosures were made in the public interest for the purposes of s.43(B)(1) of the Act?*

4. The Claimant submits that he held a reasonable belief that the information which he disclosed to the Respondents tended to show that a criminal offence had been committed by the Respondents; and / or there had been a failure to meet a legal obligation by the Respondents; and / or that information relating to such matters had been, or was likely to be concealed by the Respondents contrary to sections **43B(1)(a), (b) and (f)** of the Act. The Respondents accept that if the alleged disclosures are found to have been made by the Claimant then those disclosures were made to Lendy, the Claimant's employer.
5. Since the commencement of these proceedings Lendy has entered into administration with a view to its future liquidation. Mr Greaves, who represented the Respondents, confirmed that the administrators had consented to these proceedings going forward. The Claimant withdrew his claim at **1(a)(v)** above at the start of the hearing.
6. The Tribunal was provided with an Agreed Bundle of Documents (**Exhibit R1**). The Claimant gave evidence in chief by witness statement (**Exhibit C1**). Mr Brooke gave evidence in chief by witness statement (**Exhibit R2**). The Claimant submitted a Skeleton Argument (**Exhibit C2**) to support his oral submissions and Mr Greaves submitted written closing submissions to support his oral submissions (**Exhibit R3**).
7. The Tribunal has made the following findings of fact after considering all the evidence, documents and submissions it received during the hearing. There are substantial disputes of fact between the Claimant and Mr Brooke. When considering these disputes of fact the Tribunal has preferred the evidence of the Claimant to that of Mr Brooke. This is because the Claimant's evidence to the Tribunal, and his response to questions put to him in cross-examination, provided a coherent narrative which confirmed that he has a clear recollection of the relevant events that occurred in his short period of employment with Lendy and had undertaken careful analysis of his issues of concern in respect of Lendy's business model and governance that arose during his employment. Furthermore his evidence was supported by the

documents referred to the Tribunal during the course of the hearing. This is in stark contrast to Mr Brooke's evidence to the Tribunal. He often had no, or uncertain, recollection of relevant events about which he was questioned and his answers were often evasive and were contradicted by concerns about Lendy's business which had been raised by the Financial Conduct Authority during the period under consideration by the Tribunal.

8. Lendy was incorporated in 2012. It was already operating as a peer-to-peer ("P2P") firm facilitating investment in loans when the FCA began regulating this sector from 1 April 2014. The Tribunal was informed that P2P firms provide platforms which offer investment opportunities in property development to private investors. A P2P loan is a form of investment rather than a savings product. It generally offers a premium on interest rates from those which might be obtained from traditional forms of saving. The rate of interest reflects the high risk nature of funding speculative property development.
9. Lendy became regulated by the FCA under an Interim Permission granted from 1 April 2014. It applied to become fully authorised on 30 March 2016 and it gained that authorisation on 11 July 2018. The Tribunal was referred to a letter dated 30 July 2019 from the FCA to Lord Myners, who had raised a number of questions about Lendy to HM Government after it had been placed in administration. This refers to dialogue between Lendy and the FCA prior to its authorisation in July 2018 and states, inter alia, as follows:

*"Due to this dialogue, the firm put in place an action plan to address concerns we had relating to its governance and systems and controls. It also volunteered to complete a remediation exercise after we identified issues with the quality of information being presented to investors on certain loans an independent third party had been engaged to consider the full loan book in light of our initial concerns. The remediation exercise was based on this assessment and was on track at the point of authorisation"...*

*"Following the firm's authorisation on 11 July 2018, the FCA remained in close and constant contact and dialogue with the firm, including on the status of their loan book".*

10. At the time of authorisation in July 2018 Lendy had 22,000 investors and was managing something in the region of £300m of client monies. Mr Brooke was the owner, sole shareholder and CEO of Lendy. He recruited the Claimant, who has considerable experience in the financial services industry, and held various FCA authorisations, to the position of Chief Financial Officer ("CFO") on 1 June 2018 under the terms of a contract of employment completed on the same day.
11. At the later stages of the Claimant's employment Lendy was under substantial scrutiny by the FCA which required it to disclose substantial information about its business to enable the FCA to review the financial integrity of its business. It was also facing substantial criticism in the press and on social media, and was in need of substantial further investment to support the business. During the same period Mr Brooke was actively and

urgently pursuing enquiries to sell his shares / interest in the business.

12. The Claimant has been continuously regulated by the FCA, and its predecessors, in various senior jobs undertaken by him, since 1995. At this time he was approved by the FCA to carry out compliance functions. In his position of CFO Lendy's Heads of Compliance and Finance reported to him. He was required to have full knowledge of relevant financial and compliance issues relevant to Lendy's business and required to notify the FCA of any failures by Lendy to meet relevant regulatory requirements in the conduct of its business.
13. The Claimant explained to the Tribunal that Lendy's borrowers were not required to make debt service payments during the term of their loans. However, peer-to-peer investors were entitled to receive monthly interest payments on the monies they had loaned. Lendy agreed with each borrower that it would withhold from the advance to the borrower an amount equal to the total interest it would accrue over the loan term. The borrower would confirm to Lendy what it required as a "Net Advance", and Lendy would then add the amount calculated in respect of the total interest to the Net Advance to be made to the borrower together with Lendy's arrangement fee. The sum of the Net Advance, together with the sums calculated to equal the interest liability and Lendy's fee added up to the Gross Advance made to the borrower.
14. When Lendy transferred the Net Advance to the borrower, it took its arrangement fee to its operations account and then placed the balance of the amount withheld (equal to the total interest it had calculated) in to the "Retained Interest Account". Each month, Lendy would remove from the Retained Interest Account an amount equal to the interest that it had accrued over that month which it would pay to its customers as interest on the loan, or their part of the loan which had been advanced to the borrower. The Claimant understood that Lendy's remuneration was limited to the arrangement fee received on each loan but it became clear to him that Lendy had also been charging borrowers a margin of interest on its own account in addition to the interest paid to customers. Lendy's working capital is provided from its retained earnings, shareholders' equity or by borrowing from other lending institutions on the strength of its own assets and earning capacity, that is, the arrangement fees it charged for facilitating and implementing loans to property developers.
15. The Claimant's evidence to the Tribunal was that during the course of his employment he had received information from others, and also observed conduct by Mr Brooke which he thought risked blurring the lines between Mr Brooke's private interests and finances and Lendy's responsibilities and liabilities to its customers and borrowers and potentially compromised its duties, responsibilities, liabilities and accountability under the Regulations to them.
16. Lendy was subject to critical press reports in late September 2018 and around that time a document prepared by Mr Brooke, which apparently directed his staff to withhold information from the FCA as to Lendy's position, had been sent in error to the FCA. Then, on 10 October 2018 when the

Claimant, Mr Coles, Head of Compliance, and Mr Crascall, Loans Recovery Officer, met with representatives of the FCA Mr Crascall admitted that the recovery report which he had presented to the FCA was inaccurate. The FCA also criticised Lendy for failing to disclose a court judgment that had been made against it in March 2018.

17. Lendy was already under close scrutiny by the FCA by this time. The Claimant was also being asked by Mr Brooke to support the efforts which he was making to sell his business. The Claimant further alleges that in late September Lendy's cash reserves had been depleted when Mr Brooke had instructed Lendy's Financial Controller to transfer £1.5-2million out of Lendy's reserves to be paid as dividends to his holding company. He explained that this had resulted in a liquidity crisis as a result of which Mr Brooke had then directed that Lendy's ongoing operating expenses could be met by utilising funds from the Retained Interest Account.
18. Furthermore, in October 2018 the Tribunal was told that the FCA were also receiving complaints from lenders and were aware that previous lending may have been contractually unsound due to Lendy's poor due diligence in respect of borrowers and its unsatisfactory documentation. If that was the case then Lendy might not be able to recover many of the loans which it had made.
19. The Claimant was already aware that Lendy had from time-to-time already taken money from the Retained Interest Account for its own purposes. He was already concerned that Lendy had no entitlement to use the Account in that way but it had taken him some time for him to investigate the matter properly. In late October 2018 the Claimant shared with Mr Patel, Lendy's Head of Legal, his analysis of Lendy's position and responsibilities in respect of the Retained Interest Account, as a result of which he had concluded that Lendy had been systematically, and significantly, mismanaging the Account by using it to pay Lendy's operating expenses.
20. The Claimant and Mr Patel met on 5 November 2018. At this meeting Mr Patel confirmed that he agreed with the Claimant's conclusions as to Lendy's operation of the Retained Interest Account. Mr Patel also explained to the Claimant that he had sought legal advice from the Company's solicitors about another instruction given by Mr Brooke. He told the Claimant that Mr Brooke had instructed him to transfer certain of Lendy's assets to companies owned by Mr Brooke without due consideration for them. The assets in question were described to the Tribunal as loan receivables and profit shares on properties securing those loans. The Claimant was informed that when Lendy had offered to lend to a borrower but then found that customers were not attracted to providing sufficient funds for the loan Mr Brooke had on some occasions taken funds taken from the Retained Interest Account in order to complete the loan and when the loans had been repaid although Mr Brooke had directed that the principal sum should be returned to the Retained Interest Account he had given instructions that Lendy could retain the interest, fees and profit share from that loan. The Claimant was told that the legal advice received by Mr Patel was that in the circumstances described these assets were likely to amount to trust property and that, furthermore, transferring such assets away from Lendy to companies owned

by Mr Brooke would constitute a further breach of trust in addition to providing no consideration to Lendy.

21. After this discussion the Claimant and Mr Patel attended on Mr Brooke in his office. In the discussion that followed the Claimant set out the advice that Mr Patel had received from Lendy's solicitors. He made no reference to conclusions he had reached in respect of the practice of meeting Lendy's operational expenses from the Retained Interest Fund. Mr Brooke became red-faced and frustrated during the course of this discussion. It is unclear to the Tribunal what if anything was decided by it. At the end of the meeting the Claimant and Mr Brooke went out for dinner where they were joined by Mr Bellringer, a consultant for Lendy. It was during the course of this dinner that the Claimant set out various concerns, which remain unparticularised, as to what he considered was Mr Brooke's aggressive approach towards his staff which he alleged had created a hostile work environment. Mr Brooke did not agree with these observations and criticisms. The extent of the disagreement between them brought their dinner to an abrupt end.
22. On 6 November Mr Crascall provided the Claimant with a copy of a written Opinion from David Halpern QC. This indicated that there was a strong case that Lendy did not have any enforceable claim to interest, and that deficient documents that had been used by Lendy, exposed it to the risk of having to return interest it had collected for its own account in and that it had no right to interest which had yet to be collected. This was significant in circumstances where the FCA were concerned to know whether Lendy was adequately capitalised to run its business. This was because Lendy was relying on income, predominantly characterised as interest, to meet its operating costs. The Claimant concluded that Lendy should disclose the Opinion to the FCA because the FCA needed to be aware of such a risk to the reliability of income that was critical to the integrity of its business model.
23. The Claimant was also informed that the FCA was proposing that Lendy should not pay out any amount greater than £5,000 without obtaining consent from the FCA. The Claimant had already concluded that unless Mr Brooke returned the capital that had been withdrawn from the business it would be in severe financial difficulty unless it could find a lender to support the business and was certain that the limitation proposed by the FCA would mean that no lender would be prepared to advance money to the business.
24. The Claimant was unable to make arrangements for a meeting with Mr Brooke on 6 November but was able to arrange to meet with him over breakfast at a café in Southsea on the morning of 7 November 2018. The Claimant raised three matters with Mr Brooke. These were whether the FCA might permit Lendy to avoid, or amend, the proposed payment restriction so as not to jeopardise the chances of arranging a new emergency liquidity facility for Lendy; the findings he had made as to Lendy's use of the Retained Interest Account which he had summarised in the memorandum he had sent to Mr Patel, and not previously set out to Mr Brooke; and the legal risk now identified as to Lendy's alleged entitlement to interest and the impact that had on its overall financial position.

25. The Claimant proposed crafting a careful addendum that could be added to the response which was being prepared for dispatch to the FCA later that day. He explained to Mr Brooke that he believed the FCA would allow Lendy to continue managing its operations if the Senior Management Team could demonstrate that they were being wholly transparent and co-operative with the FCA and made the necessary disclosures that he had explained to Mr Brooke and if Lendy proposed that it would appoint a substantial accountancy firm, such as Price Waterhouse to conduct a full audit in respect of its business.
26. Mr Brooke did not accept that further disclosure was required or accept any of the proposals set out by the Claimant who was told that no side letter, addendum or other disclosure to the FCA was needed and that none would be made. The Claimant was instructed to focus on raising new investment capital for the Company and to help secure Mr Brooke's sale of the business.
27. The Claimant also raised concerns about his personal position. At this point in the discussion Mr Brooke informed him that he would take out appropriate insurance cover to protect his position. The Claimant's response to that suggestion was to inform Mr Brooke that such cover would not protect either the Claimant or Mr Brooke from facing criminal prosecutions.
28. Later that day Mr Brooke excluded the Claimant from a telephone call with the FCA in which the proposed payment restriction was to be discussed. The Claimant was not provided with a draft, or final, copies of the Reports which were sent to the FCA on 7 and 14 November. On 9 November Mr Brooke gave the Claimant written notice of his dismissal and placed him on garden leave for the duration of the notice period. The Claimant remained on garden leave until termination of his employment on 10 February 2019.
29. The issues and requirements of s.43B of the Act have been fully set out in the Case Summary following the second TCMPh which has been referred to above. A qualifying disclosure is defined as 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 six concerns. A disclosure of information does not have to be in writing but it must convey facts. An expression of dissatisfaction with a situation is not enough and simply making an allegation does not fall within the definition. Therefore, informal, or generalised statements, and non-specific remarks, or observations, are unlikely to be enough to amount to a qualifying disclosure within the relevant terms of the Act.
30. The Tribunal received extensive, and helpful written submissions from the Claimant and Mr Greaves supplemented by brief oral submissions. It is not disputed that the FCA had put Mr Brooke's and Lendy on notice that Lendy was not meeting its Threshold Conditions relating to adequacy of resources and at the beginning of November 2018 required accurate information about anticipated income streams because of its concerns about Lendy's solvency.

31. The Claimant had submitted his paper to Mr Patel on 1 November in which he concluded that raiding the Retained Interest Account was a breach of trust. On the same day the FCA had written to Mr Coles, Head of Compliance, who reported to the Claimant, stating that it did not consider that Lendy was meeting its Threshold Conditions and required that, as an urgent priority, Lendy provided cash flow forecasts and details of financial and capital resources by no later than 7 November. It is also not disputed that although Mr Halpern QC's advice had been given to Lendy earlier in 2018 it was not disclosed to the Claimant until 6 November 2018 and that no action had been taken by Lendy in respect of it up to that date.
32. The Claimant submits that he had encountered demonstrably poor corporate governance and serious financial irregularities since he commenced his employment with the Respondent. The Tribunal briefly summarises the disclosures on which he relies as follows. His first disclosure related to an imminent breach of trust by a proposed transfer of assets without adequate consideration and he had explained his concerns in respect of that to Mr Brooke in his office on 5 November. His second disclosure relies on a number of criticisms which he made to Mr Brooke in respect of Mr Brooke's conduct towards his staff later on that day over dinner.
33. The third disclosure relates to what the Claimant considered was mismanagement of the Retained Interest Account and overcharging interest to borrowers which led him to conclude there was a need for a full audit of Lendy's loan book. The fourth disclosure related to the potential implications of the Opinion that had been received from Mr Halpern QC and that this Opinion should be disclosed to the FCA because of the potential implications it had for the financial projections which the FCA had required Lendy to provide.
34. Mr Greaves submits that the conversation between the Claimant, Mr Patel and Mr Brooke in Mr Brooke's office on 5 November did not take place, and that the alleged criticisms which the Claimant made of Mr Brooke's conduct towards his staff over dinner later that day could not have amounted to a qualifying disclosure. The Respondents do not dispute that there were serious underlying issues in respect of Lendy's business and its sustainability at the relevant time and that the FCA were pursuing urgent enquiries in respect of these.
35. Mr Greaves also submits that the Tribunal should attach weight to the fact that the memorandum which the Claimant had prepared and submitted to Mr Patel (which Mr Greaves accepts would have amounted to a qualifying disclosure) was not shared with Mr Brooke by the Claimant during any of the conversations which the Tribunal has to consider.
36. Mr Greaves concedes that if the Tribunal accept the Claimant's evidence as to what was discussed with Mr Brooke on 5 November and then at their meeting in the café in Southsea on 7 November then those matters raised by the Claimant in the office on 5 November and on 7 November, that is, the first, third and fourth alleged disclosures would have amounted to qualifying disclosures.



37. The Respondents do not accept the conversation as to Lendy's employers at the dinner on 5 November took place and submit that, even on the Claimant's own evidence the assertions and criticisms with which he says he confronted Mr Brooke could not amount to qualifying disclosures because the Claimant did not disclose facts but criticised Mr Brooke in general terms.
38. The Tribunal has already confirmed that in areas of dispute it has for reasons it summarised above, preferred the evidence of the Claimant to that of Mr Brooke. The Respondents accept that the Claimant had serious, and genuine, concerns as to the operation of the Retained Interest Account and that the memorandum which he prepared after substantial enquiry would have amounted to a qualifying disclosure if it had been presented to Mr Brooke. The Claimant held a position in which he had substantial compliance duties and obligations to ensure proper governance of Lendy and his consistent concerns since shortly after his arrival to work for Lendy were in those areas where the FCA had substantial concerns, and had already made criticisms of Lendy's management. Mr Brooke also accepted that some of the matters on which the Claimant relies were discussed with him at their meeting on 7 November at a meeting initiated by the Claimant to ensure that Mr Brooke was made aware of his concerns and the need to ensure that the FCA were fully and properly informed of all relevant issues. The Tribunal has accepted the Claimant's evidence as to what was discussed and on that basis the Respondents concede that the first, third and fourth disclosures relied on by the Claimant were made orally to Mr Brooke as the Claimant has alleged. The Tribunal also accepts that at the dinner on 5 November the Claimant made substantial criticisms of Mr Brooke's conduct towards his staff but accept Mr Greaves' submission that such criticisms were unparticularised and made in general terms and could not have amounted to a qualifying disclosure within the terms of the Act. Therefore, the Tribunal have found that the Claimant made qualifying disclosures to the Respondents as set out in **paragraph 1(a)(i), (iii) and (iv)** of the agreed list of issues confirmed by the parties at the TCMPH held on 8 June 2020.

Employment Judge Craft  
Date: 02 August 2021

Reasons sent to the parties: 09 November 2021

FOR THE TRIBUNAL OFFICE