EMPLOYMENT TRIBUNALS

Claimant:	Mr E Ekakitie
Respondent:	Bookacehemist Recruitment Ltd
Date	15, 16, 17 and 18 February 2022
Conducted by CVP	
Employment Judge	EP Morgan QC
Members	Mr K Smith Mr P Kent

Appearances

Claimant	In Person
Respondent	Ms Boorer (Counsel)

WRITTEN REASONS

1. Having delivered its judgment on 18 February 2022, dismissing the Claims, the Tribunal provides these reasons in response to an application from the Claimant.

Introduction

1. By his claim form issued on 29 August 2020, the Claimant alleges that he was subjected to various forms of detriment on account of having made protected disclosures. At an early stage of the proceedings, the Claimant recognised he was not an employee and, on that account, was not bringing any claim of unfair dismissal: [p28].

2. The claims are denied in their entirety. It is said on behalf of the Respondent that the relationship, and course of dealing between the parties, was terminated by reason of operational concerns and complaints generated by the Respondent's staff in relation to the Claimant's attitude and performance.

The Issues

3. The issues requiring determination by the Tribunal have previously been identified in the course of a preliminary hearing. Within a subsequent hearing the putative disclosures relied upon by the Claimant were listed together with the detriments to which he contends he was subjected. Whilst there was some outstanding detail required concerning the third putative disclosure, the Claimant's position was confirmed before EJ Smith at a preliminary hearing. Within that hearing, the Claimant identified the third putative disclosure as having been made on 22 April 2020.

4. It is apparent from the terms of the issues identified, that the factual dispute between the parties is rather narrow. This is unsurprising given that the parties' relationship occupied such a short space of time. Importantly, however, the events with which the Tribunal is concerned occurred at the start of the global COVID pandemic. In the view of the Tribunal, this is an important component which must necessarily inform the assessment of the concerns raised by the Claimant and the Respondent's reaction to them.

Evidence

5. Following an earlier hearing, the Claimant was identified as a 'worker' for the purposes of **section 43K of the Employment Rights Act 1996**. In reaching that conclusion Employment Judge Smith made a number of factual findings. The Tribunal has considered those findings together with the evidence it has received as part of this hearing. Where appropriate, it has drawn assistance from them.

6. For the purposes of this hearing, the Tribunal was provided with a bundle of documents and a number of witness statements. Both parties provided supplementary material during the hearing. Whilst produced during the conduct of the hearing, none of the material generated any objection and both the Claimant and Counsel for the Respondent were given full opportunity to consider and respond to the material in question.

7. The Tribunal also heard evidence from the following witnesses:

7.1 On behalf of the Claimant: The Claimant himself; and

7.2 On behalf of the Respondent: Mr Tabssum Nawaz (Director); Ms Samantha Sidebottom (Dispenser); Ms Emma Monk (Dispenser); Ms Laura Marson (Dispenser) and Mrs Caron Gent (Supervisor).

Findings of fact

8. The Tribunal has given careful consideration to all of the documentary material and testimony received from each of the witnesses. It has assessed both and formulated its principal findings upon the balance of probabilities. Having done so, the Tribunal has come to the following principal findings, namely:

8.1 The Claimant is a qualified pharmacist. He is a person of conspicuous intelligence and highly articulate. During the course of his evidence, the Claimant volunteered- and the Tribunal accept- the Claimant has some familiarity with legal procedures and processes. In the view of the Tribunal the Claimant was well placed to clearly communicate concerns to others and demonstrated no reticence in doing so;

8.2 In or about 2011, the Claimant formed a private limited company. Since that time, he has utilised that company for the purposes of providing his professional services to a wide range of clinical clients;

8.3 The Respondent is a private limited company. Mr Nawaz is the principal director and shareholder. He is, like the Claimant, a qualified pharmacist. However, during his evidence, he indicated to the Tribunal and the Tribunal accepts, that Mr Nawaz has for some years confined himself to the commercial operation of the practices operated by the Respondent company. The Respondent is in fact concerned in the operation of a number of pharmacies; four of which feature within these proceedings;

8.4 In February 2020, the Respondent advertised for a permanent locum manager at its Rotherham Road pharmacy. The Claimant applied for that post and was interviewed. An offer was made “in principle”; with a provisional start date being indicated of May 2020. A draft agreement was exchanged between the parties. However, it was not finalised. The document was intended to take effect as a Deed. It was never executed;

8.5 Pending finalisation of the contractual arrangement and terms, the Claimant was requested to provide *ad hoc* services as a locum. He did so via his own limited company; raising invoices in relation to each shift undertaken. Under this arrangement, there was no contractual obligation to offer (nor to accept) shifts. Nor was there any prior indication as to the level or location of work required;

8.6 The documentation provided to the Tribunal confirms that the Claimant in fact worked at four pharmacies. In the case of Rotherham Road, the Claimant worked on seven occasions between 4 March and 27 March 2020. In respect of Winter Hill, the Claimant undertook eight shifts between 10 March and 6 April 2020. There were two occasions upon which the Claimant worked at Wickersley (20 March and 30 March 2020). The Claimant also undertook eleven shifts at Dinnington pharmacy. He did so in the period 14 April to 7 May 2020;

8.7 In normal circumstances the team within each pharmacy comprised a pharmacist manager (or locum) and a number of dispensers. The Respondent also recruits apprentices;

8.8 By March 2020 the Respondent undertaking was seeking to respond to the emerging concern regarding the Covid 19 pandemic. It had made staff aware of existing guidance, provided protective personal equipment in the form of masks and related materials and initiated process for sanitisation. There were also instructions for minimising direct physical contact;

8.9 These arrangements were intended to support a regime in which all members of staff were required to heed prevailing guidance and to operate safely. Some members of staff were required to self-isolate as part of these measures;

8.10 This was the context in which the Claimant first began to undertake work on behalf of the Respondent pharmacies. This picture would however be incomplete without mention of two further components. First: certain pharmacies operated by third parties had, by this time, already closed in the face of the pandemic. Second: access to hospital pharmacies was no longer possible. Taken together, these factors meant that the Respondent's pharmacies-like many others-were operating under acute forms of operational pressure. For the Respondent’s staff, there was a recognition of the need to maintain what was an essential local service;

8.11 The absence of colleagues (including those participating in self isolation) and the shortage of pharmacists generally was taking its toll. The Respondent was prevailed upon to provide continuity of service. In the words of one witness: “we could not close”;

8.12 Mr Nawaz would liaise with pharmacy managers on the Monday of each week in order to determine the need for pharmacist cover and/or locums. The Tribunal recognises and accepts that this was an evolving picture; one in which Mr Nawaz was anxious to maintain pharmacists, wherever possible. It is clear to the Tribunal, however, that this was increasingly a climate in which employment tensions were beginning to emerge. In the view of the Tribunal, team working and equality of effort

were key to the efficient operation of these pharmacies. Each of the Respondent's permanent staff was seeking to collaborate in this way;

8.13 Insofar as individual members of staff had concerns, these were expressed in the first instance to their individual managers. The hallmark of such communications was informality and openness. However, the Tribunal received evidence (and accepts) that-save in respect of stock related issues- there was little, if any, contact between the various pharmacies operated by the Respondent;

8.14 On 12 March 2020, the Claimant attended to undertake a shift at Winter Hill pharmacy. On this occasion, he found the pharmacy staffed by Mrs Gent and an apprentice. Mrs Gent had been experiencing symptoms of a "sore throat". The Claimant considered that this required Mrs Gent to go home. For her part, Mrs Gent was resistant to doing so. The Tribunal is satisfied that this resistance was out of concern for continuity of service for patients and service users and was not the outworking of any form of antagonism towards the Claimant. Presented with this situation, the Claimant transmitted a text message to Mr Nawaz. It stated:

> *"The lady Karen has got a cold today with flulike symptoms. She said Dan is also off sick for similar symptoms. In light of the new requirements from GPHC I think she should go home so it doesn't spread to the rest of us."*

8.15 The Claimant relies upon this text message as the first protected disclosure. He contends that at the time of transmitting this text, he considered the Respondent staff to be in breach of their obligations under the relevant professional regime in connection with pandemic regulations. Importantly, Mr Nawaz did not demonstrate any resistance to this approach. The exchange between himself and the Claimant concluded with an assurance that the Claimant should do what he considered best.

8.16 The text messages indicate that Mrs Gent remained resistant to the Claimant's request. This prompted Mr Nawaz advise the Claimant:

> *"it is important you explain to her."*

18.17 In the view of the Tribunal, this exchange confirms that Mr Nawaz was content to leave this situation to the professional judgement of the Claimant. In fact, Mrs Gent did go home and, after participating in direct interview with NHS111, returned to work the following day. Her return to work and continued attendance at work thereafter did not generate any further complaint or criticism from the Claimant;

18.19 During the course of cross-examination, it was put to Mrs Gent that she did not in fact wear a face mask during the course of the Claimant's time at Winter Hill. Mrs Gent accepted that this was the case. The Tribunal was satisfied that as at March 2020, there was no obligation upon her to do so. The Tribunal is further satisfied that her failure to do so did not generate any further report, complaint or criticism from the Claimant;

18.20 The Tribunal finds that the Claimant worked at this same pharmacy on six further occasions after this exchange with Mrs Gent. He did so without further challenge, criticism or complaint regarding the practices being adopted there;

18.21 On 30 March 2020, the Claimant was undertaking a shift at the Wickersley pharmacy. During the course of his shift, he transmitted a text to Mr Nawaz in the following terms:

"I'm thinking I'd rather avoid Wickersley until the COVID issue is over as it's too tight for the number of people

A staff member has a long-standing cough and we just working side-by-side is it possible to do WinterHill tomorrow"

18.22 Mr Nawaz responded:

"That's fine, Winterhill tomorrow, green arbour wednesday, winterhill Thursday, friday I don't have anything just…"

18.23 The schedule of shift-work undertaken by the Claimant confirms that he did indeed work at Winter Hill on 31 March, 2 and 3 April 2020;

18.24 The Wickersley surgery includes a dispensary which has been described by the various witnesses as occupying a total space 3m x 2m. It is not therefore an environment in which social distancing of 2m could be maintained. It was equally, as indicated by one of the witnesses, a pharmacy which was obliged to remain open nonetheless. The Tribunal accepts this evidence;

18.25 On 6 April 2020, the Claimant was working once more at the Winter Hill pharmacy. That same day, he transmitted a text to Mr Nawaz:

"Morning Rehan, the two staff members who returned from long sickness are still coughing and should be wearing face masks as per the new regulations to protect those of us at the front line.

I have asked them to use the mask available but they have refused so please ask everyone to wear a mask to safeguard all of us since this COVID virus has gotten this worse in the country."

18.26 This communication did not generate any immediate response from Mr Nawaz. The Tribunal has received a good deal of evidence concerning the commercial commitments and responsibilities which Mr Nawaz seeks to discharge on behalf of the Respondent. It is clear from an examination of the WhatsApp Group and text messages that there can be occasions when Mr Nawaz delays in providing a response and, when doing so, has as his focus the matter of immediate *concern to him* as distinct from any immediately preceding message transmitted by the recipient. In the light of this practice the Tribunal is satisfied that Mr Nawaz did not provide any direct response to the issue raised by the Claimant. Later that morning he communicated to the Claimant a concern regarding locum cover and the availability of work for the Claimant that week. In the view of the Tribunal, these two communications were not in any way connected;

18.27 The Claimant last worked at the Winter Hill pharmacy on 6 April 2020;

18.28 Whilst the Claimant's concerns related to what he perceived to be compliance with emerging guidance regarding the pandemic, the colleagues with whom he was required to work had a decidedly operational focus. It was suggested by the Claimant that the Respondent's staff were disregarding COVID safety requirements. The Tribunal rejects that evidence. In the view of the Tribunal, the concern of the Respondent's employees was-from first to last-efficient delivery of an essential service during the course of the pandemic. It cannot be realistically gainsaid that these employees were working under increasing pressures and in exacting circumstances.

The Tribunal is satisfied that they shared a resolve to comply with the emerging COVID guidance whilst at the same time prioritising patient care;

18.29 The documentation provided to the Tribunal confirms that from 13 March 2020, Mrs Gent reported her concerns about the Claimant's operational efficiency. In short: that in her view, the Claimant was not "pulling his weight" as was required in the particular circumstances which faced the pharmacy. The sentiment expressed in the course of the text transmitted by Mrs Gent at 14:17 hours on that day is not, however, targeted against the Claimant. It is, in the view of the Tribunal, an expression of exasperation. Mr Gent believed that she was facing an uphill struggle; required to ensure the continuity of service in circumstances where she was being deprived of the resources which she needed to do so;

18.30 Mrs Gent expressed similar concerns on 19 March 2020. As with her earlier communication, this was not targeted to the Claimant. It was, in the view of the Tribunal, more in the nature of a plea to Mr Nawaz to ensure that adequate cover was provided. Appended to those messages were photographs depicting what Mrs Gent believed to be an unacceptable state of affairs, namely: an accumulation of prescriptions and/or other work requiring attention. It was Mrs Gent's evidence that there was a deluge of work. She described a situation in which there was consistent high demand. However, she considered this was exacerbated by the Claimant's lack of efficiency; with the result that other pharmacists were required to address work which, in her opinion, could and should have been processed during the Claimant's shift. The Tribunal accepts that these perspectives were the sole cause and justification for the transmission of her texts to Mr Nawaz regarding the Claimant and work related matters;

18.31 The documentation before the Tribunal confirms that other members of staff had formed a similar view regarding the Claimant's lack of efficiency. There was, in the view of the Tribunal, a growing concern that Claimant had failed to work with colleagues in meeting customer demand. These activities did not involve or require the Claimant to participate in menial tasks. They included answering the pharmacy telephone and addressing concerns from service users and patients. By contrast, the position presented by the Respondent's witnesses-which the Tribunal accepts-is that the Claimant was primarily concerned with his own safety and his ability to carry out his duties in a manner which did not expose him to personal risk;

18.32 By 26 March 2020, messages were being exchanged between Mr Nawaz and employed staff. These related to pharmacy cover at Winter Hill. It is clear from the terms of the texts that the members of staff concerned had significant reservations about the Claimant's contribution and effectiveness. Mr Nawaz responded at 18:04 hours expressing the sentiment that he had little option available to him but to send the Claimant to undertake that shift. He stated: "*I'm struggling*". This prompted the member of staff in question to request that the Claimant was spoken to with regard to his work ethic and commitment;

18.33 On 2 April 2020, Mrs Gent was once more complaining to her colleague "Dan" regarding the length of the Claimant's absence from the pharmacy. This specific complaint arose out of a decision on the part of Mr Nawaz to close the pharmacies for a two hour period each day. It was the Claimant's evidence that he understood this translated to an extended 2 hour lunch break. The Tribunal is unable to accept that evidence. In the view of the Tribunal it was and/or ought to have been apparent to the Claimant that the two hour closure was to enable all pharmacy staff to ensure that administrative tasks were undertaken and that workload could be accommodated. It was a period of time intended to insulate members of pharmacy staff against

accumulated demand at a time when they were facing the risk of backlog. It was the Respondent's witnesses' evidence-which the Claimant did not challenge-that the Claimant utilised these periods for extended absences from the pharmacy. The Tribunal makes no judgement about whether it was appropriate for him to do so. The reality remains, however, that this generated resentment on the part of his colleagues and expressions of dissatisfaction to Mr Nawaz. It was this concern which prompted Mrs Gent's text on 2 April 2020;

18.34 In the view of the Tribunal, staff concerns regarding the Claimant's performance were mounting and were being shared with Mr Nawaz. Unfortunately, he did not share these sentiments with the Claimant. The Tribunal is satisfied that they nonetheless informed the sentiments expressed by Mr Nawaz in his text to the Claimant on 6 April 2020:

> *"hi Efe I'm struggling to find any work for this week for you. I'll keep trying but not sure if I can…"*

18.35. Later that day Mr Nawaz transmitted a further text:

> *"I seem to be struggling. Not sure what's going on Efe but every shop you have been to has complained. I really don't know what to say here. Green arbour have complained. Rotherham rd and so on. I'm not sure what's going on."*

18.36 The response of the Claimant was to refer to junior staff not really recognising the risks with which the practitioners were required to engage. Despite these exchanges, Mr Nawaz continued to offer the Claimant shifts. It is clear that from 6 April 2020 those shifts were undertaken at the Dinnington pharmacy.

18.37 On 20 April 2020, there was a text exchange between the Claimant and Mr Nawaz. The Claimant was querying the proposed start date at Rotherham Road. Within the course of this exchange: Mr Nawaz stated:

> *"hi-I have had complaints every single shops [sic] so far… Wickersley, Rotherham rd, Dinnington, Winter Hill. I'm not sure what is going on but wherever you have worked staff have complained Efe. If you were going to employ someone what would you do in my role?*
> *Everyone is saying that you check few scripts/speed is slow/ etc, etc- staff have threatened to walk out of if I employee you. It's serious"*

18.38 The Claimant undertook eight further shifts at Dinnington pharmacy following this exchange.

18.39 On 22 April 2020, the Claimant transmitted a further text to Mr Nawaz. He stated:

> *"The 2 meter* [sic] *distance role is not being observed here in Dinnington pharmacy between staff. This is a safety risk to myself and other staff members. Especially as I learnt from staff that two staff members had been on self isolation.*
>
> *I have as such decided to use the consultation room for my clinical checks. It's important staff are following the covid 19 distancing rule and current they are not. "*

18.40 On 4 May 2020, the Claimant transmitted a text to Mr Nawaz enquiring as to whether he was "still starting" at Rotherham. Mr Nawaz responded:

"Hi, I already told you that Rotherham/Barnsley isn't happening due to reasons given before. If any managers want to book you direct they may so [sic]…"

18.41 The claimant worked three further shifts at Dinnington after this exchange; and

18.42 The Tribunal is satisfied that by the beginning of April 2020, the Respondent's staff were becoming increasingly dissatisfied with the contribution and participation of the Claimant. Contrary to the Claimant's assertion, their concerns were not intended to target him personally but featured as part of a wider challenge to Mr Nawaz to ensure that services and support would be provided so that the pharmacy service could remain open and the needs of local patients met.

Submissions

19. The Tribunal has received submissions from both the Claimant and Counsel for the Respondent. It means no discourtesy to either party by failing to repeat them here in detail. For present purposes, it may be noted that the Claimant contends that he made protected disclosures and that in direct retaliation, members of staff employed by the respondent made groundless complaints and criticisms of him. These, he says, "infected" Mr Nawaz against him and led to the withdrawal of the offer of a permanent locum manager position at Rotherham Road. It is also the Claimant's case that the other aspects of detriment were carried out in direct response to the COVID related concerns which he had communicated.

20. On behalf of the Respondent, Counsel submitted that there were no qualifying protected disclosures. Insofar as any concerns were raised by the Claimant at all, they were in the nature of the sharing of information intended to protect his own personal position. It is said that the Claimant did not at the material have time any authentic or sincere belief that there was a breach of any legal obligation on the part of the Respondent. Finally, it is submitted that there were no detriments visited upon the Claimant. Insofar as there was any criticism, challenge or conflict, with other members of staff, they were the product of the Claimant's working practices and entirely unconnected with any expressions of concern which he had raised in respect of COVID.

The Law

21. **Section 43B of the Employment Rights Act 1996** (**ERA**) provides:

(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 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, 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."

22. The Tribunal must be satisfied of a number of matters before it may conclude that a *qualifying disclosure* has been made. Where those conditions are met, the maker of the putative disclosure is provided with protection. The primary form of protection is the right not to be subjected to a detriment on the ground that the relevant disclosure has been made. **Section 47B(1) of ERA** provides:

"A worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

24. It is not every exchange between a worker and an employer which qualifies for protection under Part IVA of ERA. Further, since the PIDA regime does not have its provenance in EU Law, its provisions are subject to the conventional rules of statutory interpretation: **Gilham v Ministry of Justice [2017] IRLR 23**. The mere raising of expressions of discontent and/or unhappiness will not suffice. As noted in **Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38:**

*"24**….**Further, the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information.*
*27. Even if we are wrong in our conclusion that the Employment Tribunal erred in holding that the letter of 4 February 2008 disclosed information within the meaning of the ERA, we consider whether the Employment Tribunal erred in considering whether the letter of 4 February 2008 amounted to or contained a **disclosure** within the meaning of the section. The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However section 43L(3) provides that "disclosure" for the purpose of section 43 has effect so that "bringing information to a person's attention" albeit that he is already aware of it is a disclosure of that information. There would no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication". (per Slade J)*

25. In **Kilraine v London Borough of Wandsworth [2016] IRLR 422** it was observed:

*"30. I turn now to the cases in respect of the third and the fourth disclosures. These were rejected. So far as the third is concerned, this was upon the basis that it was an allegation and not a matter of information. I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was*

one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but 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 is nothing to the point."

26. The analysis of Langstaff J outlined above was affirmed by Sales LJ in the Court of Appeal **[2018] EWCA Civ 1436**:

"30. I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.
31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.
32. In my view, Mr Milsom is not correct when he suggests that the EAT in Cavendish Munro at [24] was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the EAT was seeking to say was that a statement which merely took the form, "You are not complying with Health and Safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the EAT was seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the EAT's reasoning at [24] is somewhat obscured in the headnote summary of this part of its decision, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".
33. I also reject Mr Milsom's submission that Cavendish Munro is wrongly decided on this point, in relation to the solicitors' letter set out at [6]. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the EAT in Cavendish Munro was right so to hold.
34. However, with the benefit of hindsight, I think that it can be said that para. [24] in Cavendish Munro was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that Cavendish Munro supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in Cavendish Munro also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).

35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

27. Clearly, the statement relied upon must be made in the public interest. In any event, at the time of making the statement, the Claimant must hold a reasonable belief that the information tends to show one of the eventualities provided for in section 43B ERA: **Korashi v Abertawe Bro Morganwg University Local Health Board [2012] IRLR 4**:

"17. The introduction into the **Employment Rights Act 1996** of protection for whistleblowers by reason of the **Public Interest Disclosure Act 1998** ("PIDA") provided rights to workers amenable in the Employment Tribunals. Part IVA and V deal with the law and the procedure. For the purposes of this case, a "protected disclosure" by section 43A must be a "qualifying disclosure" for the purposes of s43B: it is a disclosure which in the reasonable belief of the worker making the disclosure tends to show one or more of matters such as a criminal offence or a failure to comply with a legal obligation. It is common ground that the disclosures relevant in this appeal are qualifying disclosures under s43B". (per HHJ McMullen)

28. Where the Claimant relies upon multiple disclosures, it is necessary for the Tribunal to engage with each putative disclosure discretely: **Barton v Royal Borough of Greenwich UKEAT/0041/14. (adopting Bolton School v Evans):**

"80. A protected disclosure must be a disclosure of information; a linked point is that one cannot convert a disclosure that does not qualify, for example because it is not a disclosure of information, by associating it with another disclosure that does qualify." (HHJ Serota)

29. In consequence, it is for the Claimant to satisfy the Tribunal that the putative disclosure: (i) was made in the public interest; and (ii) tends to show' one of the statutory categories of failure (i.e. those detailed in **section 43B(1) ERA**. The burden

of proof is clear: **Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06**"

> *24. "As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following.*
> *(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.*
> *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
> *25. "Likely" is concisely summarised in the headnote to Kraus v Penna Plc [2004] IRLR 260 EAT Cox J and members:*
>
> *"In this respect "likely" requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply":". (per HHJ McMullen)*

30. The Tribunal has reminded itself that the six categories detailed in section 43B ERA are not synonymous (**Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540**) that the act or failure relied upon may relate to the act or omission of a third party (**Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198**) and each putative disclosure and detriment must be considered separately(**Blackbay Ventrures Ltd v Gahir [2014] IRLR 416**).

31. In this respect, whilst there is no statutory definition of the term 'detriment', the Tribunal should engage with the concept in a similar manner to that encountered in discrimination cases: (e.g. *Shamoon*). However, it remains clear that the Tribunal must be satisfied that the act or omission in question said to constitute the detriment must have been "*on the ground that*". In discharging the burden of proof upon it, the Respondent must show that the protected acts did not materially influence the decision(s) (**Fecitt v Manchester [2011] EWCA Civ 1190**).

32. Further, and on the question of causation, clear guidance was provided in **Bolton School v Evans [2006] EWCA Civ 1653**, namely:

> *"18. But even assuming, contrary to what he has said in paragraph 17, that Mr Evans's whole course of conduct should be regarded as a continuing act of disclosure, the employer's reason for the warning, as found by the ET, was its belief that Mr Evans had at the same time committed an act of misconduct. That was, in the terms of section 103A, the reason (or, if more than one, the principal reason) for what turned into a constructive dismissal. While I agree that the tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself, in this case there is no reason to attribute ulterior motives to the employer. Although not seized of this point, the EAT made observations that are very pertinent to it in paragraph 64 of its determination:*
>
> *"In this case the employee had not been subject to any discipline proceedings when he had earlier forcibly expressed views about the security system that should be adopted, nor is there any reason to suppose that he would have disciplined if he had simply informed the school that someone else had hacked into the system.*

The employers acted because of their belief that it was irresponsible for him to have done so even if the purpose was to demonstrate the force of his concerns." (per Buxton LJ)

Discussion and Conclusions

Did the Claimant make any qualifying disclosure?

33. Given these legal principles, the first question for the Tribunal is whether or not the communications transmitted by the Claimant are capable of satisfying the legal test for qualifying disclosures are set out in section 43B ERA. In approaching this question, the Tribunal is mindful of its obligation to consider each of the alleged disclosures in turn. Having done so it has concluded as follows:

PIDA 1 *12 March 2020*

33.1 The communication transmitted by the Claimant to Mr Nawaz was an authentic expression of concern regarding health and safety in the workplace. The Claimant held the belief that Mrs Gent was not complying with the emerging guidance regarding self-isolation. He raised this with her and met with resistance. The Claimant's concern was reasonable given the symptoms acknowledged by Mrs Gent. The Tribunal acknowledges that the concern was raised in the public interest given the role undertaken by Mrs Gent within the pharmacy. The information provided by the Claimant to Mr Nawaz tendered to show non-compliance with a legal obligation; namely the guidance issued by Public Health England. In these circumstances, the communication may properly be classified as protected disclosure.

PIDA 2 *30 March 2020*

33.2 In the view of the Tribunal, this communication was issued by the Claimant in order to communicate to his own operational preferences. The Claimant did not hold the belief that the Wickersley Pharmacy (any particular member of staff, or anyone else) was acting in breach of any legal obligation. Nor did the Claimant have any reasonable grounds to conclude otherwise. This communication was not made in the public interest. It was directed to the Claimant's own preference and concern for his safety. In the view of the Tribunal this communication was in the nature of the expression of a personal preference and interest and does not qualify as a protected disclosure.

PIDA 3. *22 April 2020*

33.3 During the hearing, an issue arose as to whether the third putative disclosure was said to have occurred on 6 April 2020 or 22 April 2020. However, the judgment of Employment Judge Smith of 1 March 2021 records the final putative disclosure to have been made on 22 April 2020. The issues in the proceedings have been defined accordingly and this Tribunal has proceeded upon this basis; and

33.4 This communication was transmitted by the Claimant to Mr Nawaz on 22 April 2020. It refers to non-adherence to the 2m rule in Dinnington Pharmacy. It confirms that in response, the Claimant has decided to utilise the consultation room for clinical checks. The Tribunal is satisfied that the Claimant held a reasonable belief that the necessary safety obligations (i.e. the 2m principle) were not being adhered to. Within the dispensary. However, it does not accept that the provision of information was in the nature of a disclosure or made in the public interest. The Claimant was

communicating to Mr Nawaz his own decision concerning his workplace practices at Dinnington and how they might impact upon his own routines.

Was the Claimant subjected to a detriment?

34. In addressing this aspect of the case, it is necessary for the Tribunal to consider first that the Claimant was *in fact* subjected to the treatment complained of and thereafter, whether such treatment was on the ground of his having made a protected disclosure. In this respect, the Claimant relies upon what he considers to be the negative treatment from Mrs Gent and others, the failure to allocate the Claimant shifts and the decision on the part of the Respondent to withdraw from the in principal negotiations around the permanent locum manager role.

35. As previously noted, The tribunal is required to consider each of the alleged detriments in turn and ascertain whether or not, on the evidence before it, those matters occurred on the grounds of the Claimant having made a protected disclosure. In this respect, the Tribunal has reminded itself that the burden of proof rests with the respondent.

36. Having considered each in turn, the Tribunal is satisfied that the detriments relied upon by the Claimant were unconnected to any protected disclosure which he had previously made. In relation to the complaints generated by staff (including Mrs Gent) the Tribunal is satisfied that they represented authentic and sincere expression of dissatisfaction as to the level of the Claimant's contribution to the pharmacies in which he worked. It is no part of the Tribunal's function to determine whether or not those concerns were justified. However, the evidence which the Tribunal has heard, it is clear that those concerns emanated from individual employees who perceived the Claimant to be either shirking his responsibilities or simply failing to contribute to resolving the operational demands which each of the pharmacies faced.

37. In the cases Mrs Gent, her concern was driven by a desire to meet the needs of patients. She was also concerned that the activities-as she perceived them-of the Claimant were depriving the pharmacy of a much-needed resource and, in operational terms, increasing the workload of others.

38. Mr Nawaz made the decision not to commit to the Claimant's position at Rotherham Road. He did so for reasons which were unconnected to any putative disclosures. Mr Nawaz is commercially responsible for the operation of these pharmacies. His chief concern was that the pharmacy service provided by them would be continued through the course of the pandemic for the ultimate benefit of patients. The reception of complaints from members of staff raised a legitimate operational concern regarding working relationships and the performance of the pharmacies in which the Claimant had been invited to work. Any doubt in this respect is removed when consideration is given to the shifts offered the Claimant. They continued after each of the alleged disclosures. In the view of Mr Nawaz, he was desperate to retain pharmacists as far as possible. His decision regarding the previously discussed position for the Claimant was, in the view of the Tribunal, wholly attributable to the legitimate concern that the Claimant's performance would continue to be perceived negatively by his colleagues and would serve as an impediment to the service which he was obliged to deliver and the collaboration of members of staff in that regard.

39. In all the circumstances the Tribunal is satisfied that the allegations of whistleblower detriment are not well founded and must be dismissed.

40. Had it been necessary to do so, the Tribunal would have concluded that insofar as the matters relied upon by the Claimant pre-dated 6 April 2020, they would have been out

of time. They did not form part of a course of conduct. The acts in question were isolated acts. They were not continuing in nature. The Claimant has not laid before the Tribunal any material upon which to conclude that he was in doubt with regard to his legal entitlements or the means by which to pursue them.

Employment Judge Morgan QC

Date: 17 March 2022