EMPLOYMENT TRIBUNALS

Claimant: Mr R Jonker

Respondent: QBE Management Services (UK) Limited

Heard at: Leeds **On:** 23, 24 and 25 May 2022

Before: Employment Judge S Shore

Appearances

For the claimant: In Person
For the respondent: Mr T Cordrey, Counsel

JUDGMENT ON LIABILITY

The decision of the Tribunal is that:

1. The claimant's claim of automatic unfair dismissal (contrary to section 103A of the Employment Rights Act 1996) was not well-founded and is dismissed.

2. The claimant shall forfeit the £500 deposit he paid by the Order of EJ Little. The £500 shall be paid to the respondent.

REASONS

Introduction

1. The claimant was employed as a Claims Adjuster by the respondent from 13 May 2019 until 18 December 2020, which was the effective date of termination of his employment. The claimant started early conciliation with ACAS on 18 December 2020 and obtained a conciliation certificate on the same date. The claimant's ET1 was presented on 24 December 2020. The respondent provides insurance services and employs approximately 1,800 staff in the UK as a whole and approximately 300 staff at the office where the claimant worked.

2. The claimant presented a claim of:

2.1. Automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996.

3. The case was heard by Employment Judge Little on 18 March 2021 at a Public Preliminary Hearing after he had refused the claimant's application for interim relief and the respondent's application for a strike out. However, EJ Little made a Deposit Order of £750 against the claimant because he considered that the claimant's claim that he had made a protected disclosure and that he had been unfairly dismissed for the reason (or if there was more than one reason, the principal reason) that the claimant had made protected disclosures had little reasonable prospect of success. I set out the reasons given by EJ Little, as I found against the claimant and ordered that the deposit paid be forfeited:

> *1. The claimant contends that he made a qualifying protected disclosure on 23 April 2020 about sexual misconduct and/or a sexual offence allegedly committed by a male colleague against a female colleague. The allegation was that, although not directly witnessed by the claimant, the claimant believed that the male colleague had ejaculated on the female colleague possibly in the toilet area of the workplace.*
>
> *2. It appears that the alleged victim did not report the matter at the time, nor formally did the claimant. When the alleged victim was subsequently interviewed, she denied that any such incident had occurred. Eleven other witnesses who were questioned about the alleged perpetrator's general demeanour and behaviour towards women all indicated that they had not witnessed any such behaviour.*
>
> *3. There are other alleged discrepancies and inconsistencies with the claimant's account which are set out in the respondent's skeleton argument for today's hearing.*
>
> 4. *Nothing referred to in paragraph 2. above is to be regarded as a finding of fact, but it is probable that at trial the Tribunal is likely to make such findings. I consider that the claimant will have considerable difficulty at trial in establishing that he made a qualifying protected disclosure, particularly with regard to the requirement for reasonable belief.*

4. On 17 August 2021, at a Telephone Preliminary Hearing, EJ Evans made a Restricted Reporting Order and Anonymisation Order in respect of four individuals in the proceedings, who are referred to s W, X, Y and Z in these reasons. Neither party or any third party made any application to vary the Orders.

5. EJ Evans also made case management orders dated 18 August 2021 that, amongst other things, set out a list of the issues that were to be determined in the case (questions that I needed to find the answers to).

Issues

6. The case management order of EJ Evans dated 18 August 2021 set out the following issues:

1. *Was there a qualifying disclosure within the meaning of ERA s. 43B?*

    1.1. *Was there a disclosure of information? The Claimant relies on his e-mail of 23/4/20 in which he stated that [Person X] "might have ejaculated on [Person W] in the disabled toilets on her last day here". The Claimant also relies on his meetings with Ms Gray on 4 May 2020, a Skype meeting with Ms Wilson on 14 August 2020 and meetings with Ms Kahney on 8 and 11 September 2020. In each of those meetings he stated that he believed [Person X] might have ejaculated on [Person W] in the disabled toilets on her last day of employment.*

    1.2. *If so, did the Claimant have a reasonable belief that the information disclosed tended to show that a criminal offence had been committed or that the health and safety of an individual had been endangered;*

    1.3. *If so, did the Claimant have a reasonable belief that the disclosure was made in the public interest?*

    1.4. *If the Claimant made a qualifying disclosure as set out above, the Respondent accepts that that was a protected disclosure because it was made to the Claimant's employer.*

2. *If a protected disclosure was made, was the disclosure the sole or principal reason for the Claimant's dismissal?*

Law

7. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 is section 103A. The claimant could not bring a claim for "standard" unfair dismissal because he did not have two years' continuous service with the respondent. By virtue of section 108(3)(ff) of the Employment Rights Act 1996, where the dismissal was because the employee made a protected disclosure within the meaning of ERA s 103A, the need for a period of two years' qualifying service is dispensed with.

8. Section 103A of the Employment Rights Act 1996 states:

    103A Protected disclosure.

    "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

9. A 'protected disclosure" is defined by section 43B of the Employment Rights Act 1996:

    Disclosures qualifying for protection.

    "(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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

10. I find that the skeleton argument produced by Mr Cordrey contained an accurate and neutral summary of the relevant law in this case, so reproduce much of it here. I have left in the bold underlining from Mr Cordrey's skeleton, as they identify the parts of the relevant Judgments that apply to this case. I decided on this course of action because it saved time and cost and was, therefore in furtherance of the overriding objective.

11. The burden of proof is on the claimant to show that he falls within the exception to the 'two-year rule' and can bring an unfair dismissal claim despite lacking two years' qualifying service (**Smith v Hayle Town Council** [1978] ICR 996 *per* Eveleigh LJ, at page 1002 of the Judgment: "the burden of proof must be upon the employee" and *per* Sir David Cairns at page 1003). This decision was endorsed

by the Court of Appeal in **Maund v Penwith District Council** [1984] ICR 143 (see Stephenson LJ at pages 156-157 of that Judgment).

12. As stated by Cairns LJ in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 (quoted with approval by Lord Bridge in **West Midlands Co-operative Society Ltd v Tipton** [1986] ICR 192): "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

13. It is well established that just because a protected disclosure formed the background to a dismissal (and even where it can be said that the dismissal would not have happened "but for" the protected disclosure) that does not mean the sole or principal reason for the dismissal was the protected disclosure. That was the conclusion of the EAT in **Martin v Devonshires Solicitors** [2011] ICR 352 (approved by the Court of Appeal in **Page v Lord Chancellor** [2021] EWCA Civ 254). **Martin** was decided in the context of the victimisation provisions of the Equality Act 2010 but was subsequently approved in **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500 (per Lewis J) as having equal applicability to the whistleblowing provisions of the ERA. In **Martin**, the president of the EAT, Underhill J, held at §22-23:

> *"[…] The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not.* ***In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the*** **manner** ***of the complaint.*** *Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 a m.* ***In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it****". […]*
>
> *We accept that the present case is not quite like that. What the tribunal found to be the reason for the claimant's dismissal was not the unreasonable* manner *in which her complaints were presented (except perhaps to the extent that Mr Hudson referred to the fact that some of the grievances were repeated). Rather,* ***it identified as the reason a combination of inter-related features—the falseness of the allegations, the fact that the claimant was unable to accept that they were false****, the fact that both those features were the result of mental*

*illness and the risk of further disruptive and unmanageable conduct as a result of that illness. **But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself**. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint".*

14. In **Panayiotou**, the EAT endorsed this distinction in a whistleblowing case, describing (at §49):

*'There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. **An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable**. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."*

15. The EAT in **Martin v London Borough of Southwark** *(*UKEAT/0239/20) (10 June 2021, unreported) reiterated that there are five stages in establishing the existence of a qualifying disclosure: "First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

16. As to the fourth and fifth limbs of the test, the reasonable belief, Wall LJ in **Babula v Waltham Forest College** [2007] IRLR 346, at §75, explained that:

"Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute".

17. In **Darnton v University of Surrey** [2003] ICR 615, the EAT had also held that an employee may hold a reasonable belief even where it is subsequently shown that the allegations made were factually incorrect. However, the EAT described that the accuracy of the allegations is nonetheless of relevance, stating (at §29) that:

> *''[…] the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the worker held reasonable belief that the disclosure tended to show a relevant failure.* ***Thus if an employment tribunal finds that an employee's factual allegation of something he claims to have seen himself is false, that will be highly relevant to the question of the worker's reasonable belief. It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part****. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s. 43B(1).''*

18. The **Darnton** approach was endorsed by the Court of Appeal in ***Babula*** (at §82) when describing the mixed subjective and objective aspects of the s 43B tests:

> ***"In this context, in my judgment, the word 'belief' in s.43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test. Furthermore, like the EAT in* Darnton*, I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false".***

Housekeeping

19. The parties produced an agreed joint bundle of 1245 pages, which had been redacted to remove the names of W, X, Y and Z. If I refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [23-26]). If I refer to numbered paragraphs in a document, I will use the pilcrow symbol and the paragraph number(s) in brackets (e.g. (§23)).

20. I had not finished reading the bundle when the hearing was due to start at 10:00am on the first morning, so I invited the parties in to discuss some preliminary issues. I reminded Mr Jonker, of the overriding objective of the Tribunal Rules, which I set out here:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*

> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

21. We discussed the bundle that had been produced. Mr Jonker raised the matter of some PICC documents that had been excluded from the bundle, but agreed that these were not of any relevance. Mr Jonker agreed the Neutral Chronology and Cast List that had been produced by the respondent. We discussed the list of issues that had been set out by EJ Evans. Neither party sought to amend the list.

22. We discussed the witness evidence that would be heard. Neither side requested any adjustments be made to the way in which the hearing was to proceed. The claimant was to give evidence first. We agreed the draft timetable for the hearing produced by the respondent and kept to it. I then adjourned the hearing until 14:00pm to enable me to complete my reading.

23. On the resumption, the claimant gave evidence in person and produced two witness statements: the first consisted of 323 paragraphs. The second consisted of 5 paragraphs.

24. Evidence was given in person on behalf of the respondent by:

    24.1. Luke Thomas, who is Enterprise Risk Management Director for the respondent and was the dismissing officer. His witness statement consisted of 38 paragraphs.

    24.2. Grant Clemence, the Head of Casualty for the respondent and was the appeal officer. His witness statement consisted of 35 paragraphs.

    24.3. Georgi Beasley, Employee Relations Specialist for the respondent. Ms Beasley carried out the investigation into the disciplinary matter concerning the claimant. Her witness statement consisted of 24 paragraphs.

25. At the end of the evidence, I received written closing submissions from Mr Cordrey. On the third morning of the hearing, Mr Cordrey and Mr Jonker made oral submissions. I considered my decision and gave an oral judgment and reasons in

which I dismissed the claimant's claim. I heard submissions about the deposit that the claimant had been ordered to pay and decided that the claimant should forfeit the whole of the £500 he had been ordered to pay. I made that decision because Rule 39(5) states that where the Tribunal decides the specific allegation or argument against the person who has been ordered to pay a deposit for substantially the same reason given in the Deposit Order (which I had), the paying party (Mr Jonker) has to be treated as having acted unreasonably in pursuing the specific allegation or argument for the purpose of Rule 76 and the Deposit Order should be paid to the other party. Mr Cordrey applied only for the Deposit to be forfeited. I granted his application because the reasons that EJ Little made the Deposit Order were almost exactly the same as my findings in the hearing.

26. Mr Jonker asked for written reasons. I apologise that it has taken me longer than 28 days to produce these written reasons, which is due to my personal circumstances and pressure of work.

Findings of Fact

27. All findings of fact were made on the balance of probabilities, which is the standard of proof required. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents produced to me. We make the following findings.

Background

28. The following matters under this heading are findings of fact because they accord with the evidence of both sides. This section is for background only, so does not go into as much detail as the disputed parts of the evidence. The claimant was employed by the respondent, an insurance company, as a claims adjuster from 13 May 2019 until 18 December 2020 when he was summarily dismissed. Early conciliation started and ended on 18 December 2020. The claim form was presented on 24 December 2020.

29. The factual basis of the claim is that the claimant alleges that at a social event on Friday 21 June 2019, attended by work colleagues, including three male managers, X, Y and Z, a group ended up at a hotel in central Leeds, Y told the claimant and others that X had tried to rape a woman in the hotel lift.

30. The claimant also made numerous other allegations about X's inappropriate behaviour at work.

31. The central allegation in this case was that on Friday 4 October, the claimant was at work when a female colleague, W, left the room followed by X. W returned shortly afterwards looking flustered. The claimant says he saw a deposit of semen on W's sleeve when she reached across him to use his computer mouse. The

claimant did not ask W about the incident, but asserts that she had been the victim of a sexual assault by X.

32. The claimant raised a formal compaint about X with the respondent on 16 April 2020, although he says that he had complained informally before then. The claimant then made a specific formal complaint about the alleged assault by X on W, that he said happened on 4 October 2019 on 23 April 2020. He says that this was protected disclosure 1.

33. A video meeting was held between the claimant and Julie Gray of the respondent on 4 May 2020 [102-105], in which the claimant says he made protected disclosure 2.

34. The claimant raised a formal grievance about X on 14 August 2020 [110], which he says is protected disclosure 3.

35. A grievance investigation meeting was held by video on 8 September 2020 [142-154], in which the claimant says he made protected disclosure 4.

36. The meeting of 14 August 2020 was reconvened on 11 September 2020 [155-165]. The claimant says he made his fifth and final protected disclosure in that meeting.

37. The respondent rejected the claimant's grievance by a letter dated 19 November 2020 [583-596].

38. The respondent then alleged that the claimant had committed acts of misconduct that arose out of his complaints against X. It was alleged that the claimant had:

    38.1. Been dishonest in fabricating grievance allegations against colleagues (including X);

    38.2. Behaved inappropriately towards female colleagues, including a specific allegation of pressuring W to get into a taxi with him in September 2019; staring at colleagues; and acting in an over-familiar manner; and

    38.3. Made inappropriate comments relating to race, including comments that: Muslim women look like letterboxes; people of different ethnicities should leave the country; and that if he was on his deathbed, the claimant would not want to be treated by a black doctor.

39. The respondent then held a disciplinary meeting with the claimant on 14 December 2020 [999-1017] that was chaired by Luke Thomas. The outcome letter dated 18 December 2020 [992-996] found the first two allegations proven in their entirety and made no determination on the third matter. The claimant was summarily dismissed on 18 December 2020.

40. The claimant appealed his dismissal on 22 December 2019 [1019-1022]. His appeal was heard on 21 January 2021 by Grant Clemence [1049-1073], after which, the appeal was dismissed by letter dated 17 February 2021 [10751082].

Protected Disclosures

41. I find that there were disclosures of information by the claimant as set out in the list of issues. I make that finding because the respondent conceded the point.

42. I find that the claimant did not have a reasonable belief that the information disclosed tended to show that a criminal offence had been committed or that the health and safety of an individual had been endangered. I make that finding because:

    42.1. I find the disclosure to be a work of unsustainable fantasy. That is not to say that the claimant does not believe it subjectively, but I find his belief not to be objectively reasonable. I find that the belief has overwhelmingly turned out to be wrong when the evidence was tested.

    42.2. I also find that the information which the claimant believed to be true does not, in law, amount to a criminal offence. I find the finding that the acts alleged were not criminal to be sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute (per **Babula**).

    42.3. I find the timings of the events in this case to be of significance. The alleged assault on W supposedly took place on 4 October 2019. The claimant waited six month, until 23 April 2020 [96], to first raise it. I find that the claimant's evidence that he reported it to Y on the day of the assault to be wholly implausible because the claimant's evidence at its highest was that he reported what he alleges was a serious sexual assault to a manager who he described as being a "funny sort of person" at the end of an evening out when Y was, according to the claimant, incapable because of a mixture of drink and drugs. The fact that the claimant never enquired of Y as to the progress of the complaint is corroborative of the respondent's position that no complaint was ever made.

    42.4. The fact that the clamant therefore waited for six months is utterly inconsistent with his account being true. The claimant was at pains to express in vivid language the outrage he felt at the conduct he alleged X had engaged in and was adamant that a crime had been committed. If so, I can only assume that the reason that he did not report the incident to the police was that he did not believe his own story.

43. The claimant made an official complaint to management that X was "deliberately trying to make me look deficient" [67] on 16 April 2020. I find it significant that the claimant made no reference to the alleged assault on W at the same time as he made what I consider to be less serious accusations.

44. The sexual assault allegation that the claimant made in respect of X on 23 April 2020 appears to me to have been an afterthought to add weight to his previous complaint of 16 April. I find it significantly damages the claimant's case that he did nothing further about the 23 April email until August 2020.

45. I find that it is no coincidence that the claimant renewed the assault accusation shortly after the respondent's decision to promote X in preference to the claimant on 10 August 2020 [107]. I find the claimant's explanation of the delay: he had been busy, to be simply implausible.

46. I find that it is also no coincidence that W was the victim in the claimant's fabricated allegation of a sexual assault. I make that finding because I find that just a few days before the claimant claimed the assault took place, W had spurned the claimant's advances outside a nightclub and then complained about him to the respondent's management.

47. I agree with Mr Cordrey's submission that the language of the disclosure, was crude and salacious rather than the wording that would be used by someone genuinely reporting the facts of a serious sexual assault on a colleague. I make that finding because the claimant referred to X's behaviour on the day of the incident as "erratic and weird like a nervous rapist" [110], described X as an "absolute pervert" [160] and said in one of the interviews relied on as part of the alleged protected disclosure, that "he [X] is the sort of person who, for all he says, he is the sort of person who would come up behind you ejaculate then run away" [153]. He also said that W had returned from the toilets with "a face looking like she'd just been raped" on 4 October 2019 [632].

48. I find that the claimant consistently employed the tactic, method or strategy making wild accusations about colleagues (not just X) that sought to undermine the fact that they may not have supported his view of events that had no discernible basis in fact. The most egregious examples were the slurs he made of X and W. X was described variously as a paedophile, perverted, aggressive, predatory, promiscuous bully (that is not an exhaustive list). Whilst W was described as promiscuous, a recreational drug user and a woman who may have enjoyed or encouraged a serious sexual assault.

49. I also find that the claimant has frequently demonstrated an unfortunate habit of making judgemental comments about colleagues and others that have no seeming basis in fact, such as (this list is not exhaustive):

    49.1. His assertion that people become obsessed with him;

    49.2. That random strangers knocked on his door in order to get to know him; and

    49.3. That another colleague had predatory perversions towards him [140].

50. I was also concerned that the claimant frequently appeared to make remarks (mainly about X but also about others) that were implicitly racist. The most obvious of these were the long and convoluted explanation that X's ethnicity meant that he was more likely to be carrying HIV/AIDS and that he may have sought to deliberately infect W.

51. The claimant also frequently used phrases and concepts that I found demonstrated an innate attitude of misogyny, such as his preoccupation with characterising W and others as 'promiscuous' when the only evidence he was able to cite of W's

alleged promiscuity was that she told a male college that she would like a glass of red wine. The claimant conflated this into an opinion that this had been a "come on".

52. I found the claimant's evidence to be vague, internally inconsistent and inconsistent with the documents produced. It was implausible. I found the claimant's evidence to be untrue.

53. I find that the claimant's various descriptions of what he witnessed on 4 October 2019 to have been internally inconsistent. In his first disclosure on 23 April 2020, the claimant expressly said that the interaction between X and W had taken place "in the disabled toilets" [96]. A few days later, on 4 May 2020, the claimant said "[I] don't know where it happened" [102]. Notwithstanding that admission, on 10 August 2020, the claimant contacted a colleague on LinkedIn and alleged that "X followed a girl into the toilets and ejaculated on her up in Leeds" [107].

54. I agree with Mr Cordrey's submission that the claimant's assertions on 23 April 2020 and 10 August 2020 were knowingly false. I make that finding because the floor plan [661], from the claimant's desk, where he said he was at the time of the assault (claimant's first witness statement §43), he could not possibly have seen whether W or X went into the toilets, disabled or otherwise. I find that, in the interview on 11 September 2020, the claimant admitted he had not been able to see where X and W went because W had walked "around the corner and off", continuing "they could have gone through those doors and gone anywhere" and "I did not see him follow her into the toilets. All I know is they went through those double doors" [155].

55. I find that the claimant's allegation about the incident on 4 October 2019 depended on his claim that he had become aware of the assault by seeing and smelling semen on W's sleeve when she had stood right next to him to quality check (QC) his work, immediately after the alleged assault had happened. However, in her statement to the respondent, W denied that she had QC'd the claimant's work that day or that she had gone anywhere near the claimant, stating that due to the incident the previous week where C had harassed her at a nightclub, trying to force her into a taxi with him (a claim corroborated by Y [362]), she had "outright" refused to undertake any further work with C and "had no interaction at all with Ross during her last week, did not QC his work at all at this time" [420]. I found the written evidence of W to be far more internally consistent and plausible than that of the claimant.

56. I find that W's account was corroborated by her manager, who confirmed that he had spoken to W on 30 September 2019 as she had complained that following the taxi incident the previous Friday that she did not want to QC the claimant's work during her final week at the respondent [781]. I also find that W's evidence was corroborated by the claimant's own QC records, which show that W, having QC'd the claimant's work on 19 occasions during the first weeks of September 2019 [737-770], she then did not QC it at all after the nightclub incident.

57. The respondent's records also corroborate that, in her final week at the end of September into early October, W did not QC the claimant's work [772-775]. I find

that the claimant did not show to the required standard of proof that W "did QC me in her final week" [916]. I find that, on the day of the alleged assault (4 October 2019) there were only two QCs of the claimant's work, neither of which were by W [774-775].

58. In his first disclosure, on 23 April 2020, the claimant claimed that following the assault in the toilet, W had mumbled to him that "he followed me in" [102]. The claimant explained these words as a distressed reference by W to X having followed her into the toilets before assaulting her. This was another fabrication. In all of the many detailed investigation meetings following that first disclosure, C never once repeated this allegation.

59. I find the following allegations made by the claimant about X did not meet the standard of proof required:

    59.1. "He [X] told me about the sexual things he would do to her [W]";

    59.2. X had told C he (X) was going to "get with" W after work;

    59.3. X had simulated assaulting W with his fingers; and

    59.4. X had asked W whether her boyfriend would be interested in a black man [X] having sex with her [117] and [153]; did not meet the standard of proof required.

60. I make that finding about those accusations because:

    60.1. X denied them;
    60.2. W denied them;
    60.3. The claimant was an unreliable witness and;
    60.4. He had no corroborative evidence for any of them.

61. I find that the claimant did not have a reasonable belief that his disclosure tended to show a criminal offence had taken place because he knew, or ought to have known the "information" he had disclosed was untrue. On my findings:

    61.1. X had not been acting erratically on the day in question;
    61.2. X was not the hypersexualised person that the claimant painted him as;
    61.3. X did not make any references to intended sexual acts with W on the day of the alleged assault;
    61.4. X did not follow W into the toilets;
    61.5. W did not stand next to the claimant to QC his work; and
    61.6. W did not have semen on her sleeve.

62. Further, even taking the claimant's case at its highest, if the account he gave was true, I find that he still had no reasonable belief that the disclosure of information tended to show a criminal offence had been committed. Taken at its highest, at the time of the disclosure, the claimant knew that:

62.1. W had got up from her desk and walked around the corner, with X walking after her, both then went out of the claimant's sight;
62.2. The claimant did not know where either of them had gone;
62.3. W returned to her desk a few minutes later looking flustered, X did not return to his desk;
62.4. W went over to the claimant's desk, having been beckoned by him. She made no reference to anything untoward having happened;
62.5. The claimant noticed a substance on W's sleeve which he believed looked and smelled like semen but he did not ask W about it; and
62.6. In the six months or so between the incident and the disclosure, W had made no allegation that X had mistreated her in any way whatsoever.

63. I find that because there was no complaint from W and no witnesses that once around the corner W and X had any contact whatsoever and no evidence confirming what substance was on W's sleeve, the claimant relies on speculation and conjecture about what, if anything, had happened. I find that even if the claimant's belief was genuine (which I have found it was not), it was fundamentally unreasonable.

64. I find that the claimant's case consisted of a fundamentally unlikely sequence of events: that X would risk a daytime sexual attack on a colleague in a busy office, knowingly leaving DNA evidence on his victim's sleeve, and that the victim of such a heinous assault would then have continued with her work, going over to the claimant's desk and using his computer mouse, without either noticing or attempting to clean a large quantity of semen from her arm first and without contacting the police, raising any sort of complaint with her employer or even confiding in her close and would then remain in touch with her attacker after she had moved to a new workplace [318]. At times, the claimant admitted he was guessing about what might have happened on the day in question: when asked in the investigatory meeting "Do you think what happened was consensual", he said "If it did occur, I would probably so no" [156].

65. I find that even if X had ejaculated on W, it would only be a criminal offence if this was unwanted. At one point, the claimant referred to W having got "more than she bargained for". I find this to be implying that there had been an element of consent from W [102]. The claimant also stated in a meeting that "It is my thought with W if he did ejaculate on her it was not welcome" [150] and "I don't think she would have agreed to meet and be ejaculated on" [156].

66. When the claimant was confronted with W's denial that there had been any assault, he concocted a narrative that was different again regarding consent, suggesting, that with the passage of time, W might have convinced herself that X having forced himself on her was in fact something "she enjoyed" [617].

67. I find that the claimant had absolutely no evidence or basis to know whether or not W objected: he did not ask her, she did not say that she objected and her alleged flustered attempts to wipe a substance off her arm are at least as consistent with embarrassment at something she had consented to, rather than horror at an assault. I find that the claimant had no reasonable belief that the information he disclosed tended to show a criminal offence had been committed.

68. I find that the claimant has not shown to the required standard of proof (or, indeed, anywhere close to it) that on 4 October 2019, W left the workspace, was followed by X and returned with semen on her sleeve as a result of a serious sexual assault.

69. I find that the claimant's assertion that he had informed Y about the sexual assault on W on the day it had taken place did not meet the required standard of proof. In the 4 May 2020 investigatory meeting, the claimant said "I told it to Y" [102]; on 11 September 2020, the claimant said he had raised the incident with Y on the day [157]; and on 30 November 2020 the claimant confirmed he had informed Y "in person" [620]. Y denied this [361] and there are no e-mails or other documentary evidence to support the claim. I find that Y's denial is more credible than the claimant's bare assertions to the contrary.

70. I find that the claimant's assertions about the character and behaviours of X were not corroborated by any other evidence. The claimant suggested in interviews that X's behaviours were overt and known to all. An example is "The way [X] behaves sexually is in everyone's faces, he does it publicly […] when he says things sexually people are in earshot" [145] and "Everybody is hearing everything [sexual] that X is saying. There are dozens of people who can corroborate what he says" [149]. None of the many witnesses interviewed during the grievance or disciplinary investigations corroborated any of these claims. The witnesses, who worked in close proximity with X over a lengthy period of time, denied that X was generally crude or used sexualised language.

71. I find that the claimant did not prove to the required standard of proof that X, over a period of time, harassed W and pressured her to form a sexual relationship with him [X]. I make that finding because W flatly denied any such behaviour by X. She had no reason to defend X, as she no longer worked for the respondent and her written statements are more credible than the claimant's evidence. She described feeling entirely comfortable around X and having never witnessed inappropriate sexual behaviour or language from him. No other witness who worked with the claimant, X or W corroborated what the claimant suggested was obvious to all in the office.

72. I find that the claimant's assertion that X had attempted to rape a woman in a hotel lift on 21 June 2019 does not meet the standard of proof required. This part of the evidence has little to do with the issues in the case. I find that the claimant's allegations are fabricated. At its very highest, the claimant's evidence is that Y came into the hotel room and said that X had tried to rape a woman [161]. No other witness comes close to corroborating the claimant's story.

73. In his witness statement the claimant says he extrapolated from that incident that any interaction between W and X on the day in question was also non-consensual (WS/C §68). I find that the claimant admitted that he did not witness the incident in the lift. He relied on what he was told about it by Y, who had been present in the lift. I find that the claimant's account was unreliable because in the 4 May 2020 investigation meeting, he only claimed that Y told him "X was behaving

inappropriately with her in the lift" [104], not that X had attempted to rape her in the lift.

74. I find that the claimant cannot rely on any of his 5 disclosures as protected disclosures. It therefore follows that I find that the claimant has failed to show on the balance of probabilities that the sole or principal reason for his dismissal was that he made protected disclosures.

Applying the Facts to the Law and Issues

75. For the reasons set out above, I find that the claimant did not make a qualifying disclosure within the meaning of section 43B of the Employment Rights Act 1996.

76. I find that there was a disclosure of information as this was conceded.

77. I find that the claimant did not have a reasonable belief that the information disclosed tended to show that a criminal offence had been committed or that the health and safety of an individual had been endangered because the information was false.

78. I find that the claimant did not have a reasonable belief that the disclosure was made in the public interest because the information he disclosed was false.

79. In making the two findings concerning the belief of the claimant, I considered he EAT decision in **Martin v London Borough of Southwark**, which affirmed the tests to use:

    79.1. First, there must be a disclosure of information.
    79.2. Secondly, the worker must believe that the disclosure is made in the public interest.
    79.3. Thirdly, if the worker does hold such a belief, it must be reasonably held.
    79.4. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f).
    79.5. Fifthly, if the worker does hold such a belief, it must be reasonably held."

80. As to the fourth and fifth limbs of the test, the reasonable belief, Wall LJ in **Babula v Waltham Forest College**, at §75, explained that:

    "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute".

81. In **Darnton v University of Surrey** it was held that an employee may hold a reasonable belief even where it is subsequently shown that the allegations made

were factually incorrect. But, the EAT described that the accuracy of the allegations is nonetheless of relevance, stating (at §29) that:

> *''[…] the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the worker held reasonable belief that the disclosure tended to show a relevant failure. Thus if an employment tribunal finds that an employee's factual allegation of something he claims to have seen himself is false, that will be highly relevant to the question of the worker's reasonable belief. It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s. 43B(1).''*

82. The Darnton approach was endorsed by the Court of Appeal in **Babula** (at §82) when describing the mixed subjective and objective aspects of the s 43B tests:

> *"In this context, in my judgment, the word 'belief' in s.43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test. Furthermore, like the EAT in Darnton, I find it difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knows or believes that the factual basis for the belief is false".*

83. On my findings, the claimant's account was fabricated. I therefore find that he knows (and knew) the factual basis for his beliefs are false. On my findings, there was no 'honest mistake' by the claimant. I find that in this case, a forensic investigation of factual accuracy of the disclosure was necessary to decide whether the belief of the claimant that the disclosures were in the public interest was reasonably held or that he had a reasonably held belief that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1) of the Employment Rights Act 1996.

84. No protected disclosure was made. Therefore, a protected disclosure cannot be the sole or principal reason for the claimant's dismissal. The claim fails.

85. Rule 39(5) states that where the Tribunal decides the specific allegation or argument against the person who has been ordered to pay a deposit for substantially the same reason given in the Deposit Order (which I had), the paying party (Mr Jonker) has to be treated as having acted unreasonably in pursuing the specific allegation or argument for the purpose of Rule 76 and the Deposit Order should be paid to the other party. Mr Cordrey applied only for the Deposit to be forfeited. I granted his application because the reasons that EJ Little made the Deposit Order were almost exactly the same as my findings in the hearing.

Employment Judge Shore
11 July 2022