EMPLOYMENT TRIBUNALS

Claimant: **Mr. A Dobbie**

Respondent: **Paula Felton t/a Feltons Solicitors**

Heard at: **London Central Employment Tribunal (in public, by CVP)**

On: **12-13 September 2022**

Before: **Employment Judge Gordon Walker (sitting alone)**

Representation:

Claimant: Mr. A Ohringer, counsel

Respondent: Ms. S Chan, counsel

RESERVED JUDGMENT

1. The claimant's first and third disclosures (dated 29 February 2016 and 4 March 2016, respectively) are protected disclosures, as defined in section 43A of the Employment Rights Act 1996.

RESERVED REASONS

1. The claimant issued a claim form on 21 July 2016, claiming (1) automatic unfair dismissal following protected disclosures (section 103A Employment Rights Act 1996 ("ERA"); (2) protected disclosure detriment (section 47B ERA); (3) unauthorised deductions from wages (section 13 ERA); and (4) breach of contract.

2. The judgment of Employment Judge Spencer dated 5 October 2017 was that the claimant was not an employee of the respondent, but that he had worker

status (within the meaning of section 230(1) and 230(3) ERA). The claims for automatic unfair dismissal and breach of contract were dismissed.

3. The protected disclosure detriment claim was heard before Employment Judge Gordon and members ("the Gordon Tribunal") in June 2019. The claim was dismissed. The Gordon Tribunal found that the claimant had not made protected disclosures.

4. In December 2020 Employment Judge Elliott heard the claimant's unauthorised deductions from wages claim. The claim was successful in part. The claimant applied for reconsideration. The reconsideration application and remedy hearing are listed before Employment Judge Elliott in November 2022.

5. The claimant appealed the judgment of the Gordon Tribunal. HHJ Tayler allowed the appeal (***Dobbie v Paula Felton t/a Feltons Solicitors*** UKEAT/0130/20/OO). The matter was remitted for consideration by a different Employment Tribunal.

6. On 21 April 2022 there was a case management hearing before Employment Judge Spencer, listing this open preliminary hearing.

The issues

7. The issues are set out in the case management order of Employment Judge Spencer dated 21 April 2022.

8. As per paragraph 3 of that order, the parties accept that it has already been determined that the claimant made the following disclosures to his employers (the respondent):

    a. A disclosure on 29 February 2016, that the respondent was billing client A incorrectly ("the first disclosure");

    b. A disclosure on 4 March 2016 ("the third[1] disclosure") that the respondent:

        i. Was billing client A incorrectly; and

[1] I have referred to this as the third disclosure to be consistent with the judgment of the Gordon Tribunal and ***Dobbie***

ii. That the claimant had suffered unlawful detriment on 3 March 2016 as a whistleblower.

9. As per paragraph 6 of that order, the issues for me to decide are:

   a. Whether it has already been determined that the third disclosure, part (ii), tended to show the claimant's reasonable belief that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which it is subject ("the respondent had breached a legal obligation") for the purposes of section 43B(1) ERA;

   b. If that question has not already been determined, whether the third disclosure, part (ii), tended to show that the respondent had breached a legal obligation;

   c. Whether the claimant also reasonably believed that all or any of the disclosures were made in the public interest; and consequently

   d. Whether the claimant had made protected disclosures as defined in section 43A ERA.

10. An issue arose during the hearing regarding the admissibility of new evidence. The respondent objected to the claimant's new evidence, namely letters to the claimant from the Solicitors Regulation Authority dated 5 December 2017 and 19 May 2021, respectively. However, in closing submissions, Mr. Ohringer stated that the claimant did not need to rely on the letters, given the respondent's answers under cross examination. Given this concession, it was not necessary to determine the admissibility issue. I did not consider the claimant's new evidence.

Procedure, documents, and evidence heard

11. The claimant produced the following documents for the hearing:

   a. AD1 bundle (287 pages);
   b. ADN bundle (123 pages);
   c. The judgment of Employment Judge Spencer dated 5 October 2017.

12. The ADN bundle contained new evidence. The claimant only sought to rely on the two letters from the Solicitors Regulation Authority dated 5 December 2017 and 19 May 2021, respectively. As explained at paragraph 10 above, I did not consider any new evidence.

13. The respondent produced the following documents:

    a. A core bundle (487 pages); and
    b. A supplementary bundle (32 pages).

14. The claimant relied on the entirety of his witness statement dated 29 August 2017 (75 pages, 266 paragraphs).

15. The respondent relied on the:

    a. Witness statement of the respondent dated 7 June 2019 (paragraphs 7-52 and 57-64); and
    b. Witness statement of Claire Duncan dated 6 June 2019 (paragraphs 26-33).

16. I heard evidence from the claimant and the respondent.

Findings of fact

Findings of the Gordon Tribunal

17. I am bound by the findings of the Gordon Tribunal, except insofar as they have been remitted by the EAT.

18. The Gordon Tribunal found that:

    a. Client A was an important client of the respondent. It was by far the respondent's largest client and had been a client for many years. Over the relevant time, the claimant had conduct of the file and was being paid on the basis of 50 hours per month receiving 40% of the fees by client A (paragraph 22 of the Gordon Tribunal reasons);

b. The claimant made the first disclosure on 29 February 2016 (paragraph 24);

c. The first disclosure disclosed information that the respondent had overcharged client A for the work done (paragraphs 29-31);

d. The claimant believed that the information disclosed in the first disclosure (the overcharging of client A) tended to show that the respondent had breached a legal obligation. The legal obligations were the respondent's legal obligations to the client and a possible breach of the Solicitors Accounts Rules. The possible breach of the Solicitors Accounts Rules would have arisen from the need to ensure that the amount charged on an interim bill corresponded with the amount of work that had actually been done (paragraphs 32);

e. That belief was reasonable because the claimant was the solicitor with the conduct of the file over the period to which the bills applied, and he had no reason to believe that other fee earners were doing any work on the case of which he was unaware (paragraph 33). The claimant was aware that the respondent and Claire Duncan were doing a lot of work on the case for client A, and that he was being more closely supervised by the respondent in his work for client A. However, he was aware that this work was largely not to be billed to client A (paragraph 34);

f. The claimant held the view that there was less work done for client A in the team than had been submitted on the invoices to client A (paragraph 34);

g. The claimant made the third disclosure in an email dated 4 March 2016 (paragraph 42);

h. Paragraph 4 of the third disclosure is a restatement of the allegation made in the first disclosure (paragraph 43);

i. The third disclosure suggests there were certain detriments suffered by the claimant, such as not being fully paid, being locked out of his emails, and no longer being invited to attend witness interviews (paragraph 45).

The disclosures

19. The first and third disclosures are in the respondent's bundle at pages 366-368 and pages 378-382, respectively. The relevant parts are also set out at paragraphs 11 and 15 (respectively) of ***Dobbie***.

Further findings of fact

20. Client A is a group of insurance companies. The unchallenged evidence of the claimant (in his witness statement at paragraphs 162 and 167) was that the client A companies comprise a series of companies behind the lead insurer, ultimately backed by shareholders, creditors, employees, and consumers. The lead insurer is one of the largest companies in the world. The client A insurers have over 150,000 employees.

21. There was a meeting with the respondent and client A in Stuttgart on 28 October 2015 (findings of fact are made about this at paragraph 35 of the Gordon Tribunal's reasons). An updated client care letter was sent to client A on 2 November 2015 (which is at pages 269-280 of the respondent's bundle).

22. In November 2015, December 2015, and January 2016, the respondent billed client A 100 hours per month at a rate of £250 per hour. The bills stated that this was made up of 50 hours of the claimant's work, and 50 hours for work done by the team.

23. The disclosures about the overcharging of client A were about the sums that client A had been billed from October 2015, specifically the amount that had been billed as team hours. In the three invoices from October 2015 to January 2016, the total billed for team hours was £37,500.

24. I make no finding that the respondent did in fact overcharge client A. The case is about what the claimant reasonably believed.

Submissions

25. The parties produced written submissions and made short oral submissions. I have not set out the submissions in detail as the written documents speak for themselves.

26. In summary, the claimant submitted that:

    a. The use of the phrase *"certain detriments"* by the Gordon Tribunal at paragraph 45 necessarily refers to a breach of a legal obligation, namely the whistleblowing legislation (section 47B ERA). The Gordon Tribunal therefore determined that the claimant reasonably believed that the third disclosure part (ii) tended to show that the respondent had breached a legal obligation;

    b. Alternatively, in complaining that he had been mistreated as a whistleblower, the claimant was making a complaint that the respondent was subjecting him to detriments in breach of section 47B ERA. This tends to show that the respondent had breached a legal obligation; and

    c. Having regard to the factors in ***Chesterton Global Ltd t/a Chestertons v Nurmohamed*** [2018] ICR 731 (paragraph 34), the information disclosed was, in the reasonable belief of the claimant, made in the public interest. It was not a purely private matter.

27. In summary, the respondent submitted that:

    a. The Gordon Tribunal's finding at paragraph 45 was just a factual pronouncement on the detriments the claimant claimed in the third disclosure;

    b. As the first disclosure was not a qualifying disclosure, there was no assertion at third disclosure part (ii) of a breach of legal obligation. The whistleblower's protection was not triggered. Therefore, the claimant did not reasonably believe that the third disclosure part (ii) tended to show that the respondent had breached a legal obligation;

    c. On analysis of the factors at paragraph 34 of ***Chesterton***, the information disclosed was not, in the reasonable belief of the claimant, made in the public interest. It was a purely private matter:

        i. In respect of the disclosures about overcharging client A, all potential interests that were served were private or personal in nature: (1) the respondent's interests; (2) client A's interests vis-

à-vis its opponent in any contentious litigation costs; and (3) the claimant's own financial interests;

ii. The claimant was not trying to stop the alleged wrongdoing and therefore the disclosure was not made in the public interest (as analogous to the more extreme example at paragraph 28 of ***Dobbie***);

iii. In his witness statement, the claimant did not address the public interest issue in respect of the third disclosure part (ii). The claimant's statement in the third disclosure: *"I even went so far …. to research what protection I might have under the whistleblower legislation"* shows that the claimant was simply *"casting around… for an appropriate legal hook to hang his complaints on"*.

The law

28. Section 43B ERA states, so far as is relevant:

> *(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 of more of the following –*
>
> *…*
>
> *(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *…*

29. ***Babula v Waltham Forest College*** [2007] ICR 1026 provides guidance on the meaning of "reasonable belief". A mistaken belief can still be a reasonable one.

30. A disclosure tending to show a breach of legal obligation does not need to refer to a specific legal provision: ***Kilraine v Wandsworth London Borough Council*** [2018] ICR 1850.

31. ***Chesterton*** is the leading case on the meaning of "in the public interest". The key paragraphs of that judgment are 9-13, 16-17, 26-34 and 36-37. At paragraph 37 Underhill LJ stated that the fourfold classification of relevant

factors at paragraph 34 of the judgment may be a useful tool for a tribunal to use. Those four factors are:

a. The numbers in the group whose interests the disclosure served;
b. The nature of the interests affected;
c. The nature of the wrongdoing disclosed; and
d. The identity of the alleged wrongdoer.

32. The EAT in ***Dobbie*** provided further guidance on the meaning of "in the public interest", particularly at paragraphs 27-30. Paragraphs 29-30 explain that disclosures about certain subjects are, by their nature, likely to be "made in the public interest" (***Okwu v Rise Community Action*** UKEAT/0082/19/OO and ***Simpson v Cantor Fitzgerald Europe*** [2020] EWCA Civ 1601).

Conclusions

1. The first disclosure

33. The first disclosure was, in the reasonable belief of the claimant, made in the public interest.

1.1 The claimant's belief

34. At the time he made the disclosure, the claimant believed that the information he disclosed was made in the public interest. My reasons for reaching this conclusion are set out below.

35. The Gordon Tribunal found that the claimant believed that the information disclosed tended to show that the respondent had failed to comply with its legal obligations to client A and that there was a possible breach of the Solicitors Accounts Rules.

36. A disclosure of information about a possible breach of the Solicitors Accounts Rules is a very serious matter, which can result in breach of regulatory requirements and disciplinary proceedings. The regulations are in place to protect the public. A disclosure of their potential breach is a subject that is likely, by its nature, to be made in the public interest.

37. The respondent submitted that the claimant was not trying to stop the wrongdoing, rather, his aim was to protect the respondent's fees from a challenge by client A, and that this was analogous to the example at paragraph 28 of ***Dobbie***. I do not accept that submission. The claimant's suggestion in the first disclosure that *"an honest and frank discussion with [client A[2]] be held imminently on costs"* indicates that the claimant was trying to rectify the alleged wrongdoing.

38. The claimant may also have been motivated by a desire to increase his fees. This is consistent with his suggestion in the first disclosure that *"the retainer be officially adjusted, if any retainer is agreed going forward, explicitly to show more of my worked hours and less of the 'team' hours to protect the position on detailed assessment"*. However, the claimant's belief that the disclosure is in the public interest does not have to be his predominant motive in making it, and Underhill LJ doubted whether it needed to be any part of the worker's motivation (see paragraph 27(a) of ***Dobbie***).

1.2 Reasonableness of belief

39. Applying the four-fold test from ***Chesterton***, I conclude that the claimant's belief (that the disclosure of information was made in the public interest) was a reasonable one.

40. First, a large number of people had interests that were potentially served by the disclosure:

    a. The disclosure served the interests of client A. On the basis of my findings at paragraph 20, the number whose interests could be served by the disclosure could include the shareholders, creditors, consumers, and employees of a number of insurance companies, including one of the largest companies in the world. Given the size of client A, it is unlikely that employees or creditors would be directly affected by the alleged overcharging of up to £37,500. However, the disclosure would affect the interests of shareholders and customers, as the very fact of

[2] The claimant suggests a discussion with MR, who works for MB, who is an agent for the lead insurer of client A

overcharging could potentially affect their dividends and insurance premiums;

b. The disclosure would also serve the interests of all potential clients of the respondent. Although there was no allegation that the respondent was overcharging other clients, it would be in their interests that the respondent complied with the Solicitors Accounts Rules;

c. The disclosure refers to client A's opponent in the litigation. If client A was successful and its costs were recovered from their opponent, the alleged overcharging of client A by the respondent could affect the value of that costs award. The disclosure therefore serves the interests of client A's opponent in the litigation. As the disclosure serves the interests of all potential clients of the respondent, it follows that the interests of all their potential opponents would be served too.

41. Second, the nature of the interests affected were economic, namely the alleged overcharging of up to £37,500. This is a large sum of money, even if the effect of the overcharging on such a large commercial entity is unlikely to have been significant.

42. Third, and as explained at paragraph 36 above, the nature of the wrongdoing disclosed was very serious, as it was about a possible breach of the Solicitors Accounts Rules.

43. Fourth, the alleged wrongdoer was a solicitor. Solicitors, as officers of the Court, are held to high standards of conduct, including requirements of honesty and integrity. This is in the public interest. It is important for the public to have trust in the profession.

44. Contrary to the respondent's submissions, I do not find that the disclosure was about a purely private or personal matter. The disclosure was about potentially very serious wrongdoing by a solicitors firm, which could potentially affect a large number of people.

2. The third protected disclosure

2.1 Part (i)

45. This repeats the first disclosure. For the reasons as set out above (at paragraphs 34-44), this disclosure was, in the reasonable belief of the claimant, made in the public interest.

2.2 Part (ii) – legal obligation

46. The Gordon Tribunal did not determine that, in the reasonable belief of the claimant, the third disclosure part (ii) tended to show that the respondent had breached a legal obligation. If they had made this finding, they would have set it out explicitly and explained their reasons.

47. The information disclosed in the third disclosure part (ii) did, in the claimant's reasonable belief, tend to show that the respondent had failed, was failing or was likely to fail to comply with her legal obligation under 47B ERA. I reach this conclusion because:

a. The claimant referred to the relevant legislation in colloquial terms, as *"whistleblower legislation"*;

b. The claimant disclosed information pertaining to each constituent part of that legal obligation, namely: (1) that he had been subject to acts or deliberate failures to act by the respondent; and (2) that this was *"unfair treatment of workers who raise important issues to their superiors"*;

c. The respondent's defence is that the claimant cannot avail himself of the whistleblowing legislation as he had not previously made a protected disclosure. However, (1) I have found that the claimant's first disclosure was made in the public interest, and it will therefore be protected; and (2) a mistaken belief can still be a reasonable one. It would have been reasonable for the claimant to have believed that the respondent had breached the legal obligation at section 43B ERA, even if his belief that he had previously made a protected disclosure was mistaken. This would have been a reasonable belief because this first disclosure disclosed information about a potentially serious breach of legal

obligations (the Solicitors Account Rules) which are in place to protect the public;

d. I do not accept the respondent's submission that the claimant was *"casting around"* for a *"legal hook to hang his complaints on"* and therefore lacked the requisite belief. I interpret the claimant's third disclosure part (ii) as saying that matters between himself and the respondent had become so grave, that he had had to research his legal rights.

2.3 Part (ii) – public interest

48. This disclosure was, in the reasonable belief of the claimant, made in the public interest.

49. I find that, at the time he made the disclosure, the claimant believed that the information he disclosed was made in the public interest. The claimant made a clear statement alleging that the respondent had subjected him to detriments for blowing the whistle. Given the purpose of the legislation is to protect whistleblowers, this is a subject that is likely, by its nature, to be a matter in the public interest.

50. The claimant's belief was reasonable. The four-fold factors in ***Chesterton*** support this conclusion:

a. The disclosure served the interests not only of the claimant but of all potential workers of the respondent, who could potentially be subjected to the same alleged wrongdoing. Although the numbers are smaller than in respect of the disclosure of the alleged overcharging of client A, there are still a number of individuals whose interests would be served;

b. The disclosure concerned serious allegations of detrimental treatment at work, on grounds of making protected disclosures. This included an allegation that the claimant was being removed and sidelined from working for client A (which was his main or sole source of income from the respondent), and that he had not been paid for the work he had done;

c. The nature of the alleged wrongdoing is against the very purpose of the whistleblowing legislation. It is serious and alleged to be deliberate;

d. The identity of the alleged wrongdoer is a solicitor. It is in the public interest that she is held to high standards of conduct.

3. Protected disclosures

51. The first and third disclosures were made to the respondent and are therefore protected pursuant to section 43C ERA.

52. The first and third disclosures are protected within the meaning of section 47A ERA.

Employment Judge Gordon Walker

Date 22 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 23/09/2022

FOR EMPLOYMENT TRIBUNALS