Case No. 1305117/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms A Mahmood

Respondent: Jewellery Quarter Bullion Limited

Heard at: West Midlands (Birmingham) Employment Tribunal

On: 19, 20, 21, 22 and 23 June 2023

Before: Employment Judge Childe, Mr Icintosh and Mrs Bannister

REPRESENTATION:

Claimant: In Person

Respondent: Mr C Baran (Counsel)

JUDGMENT

1. The unanimous decision of the tribunal is that the claimant's claim that she was automatically unfairly dismissed on the basis that the principal reason for dismissal was that the claimant had made a protected disclosure, pursuant to section 103A Employment Rights Act 1996, is not well founded and is dismissed.

Summary of the case

1. The claimant raised what she says was a protected disclosure on 23 April 2021. The claimant says the reason she was dismissed on 29 July 2021 was because of the protected disclosure she raised. The respondent denies that the claimant raised a protected disclosure and says the principal reason for her dismissal was performance, not a protected disclosure.

Introduction

2. From the claimant we heard evidence from the claimant herself, Uzma Mahmood and Humzah Thorpe. From the respondent we heard evidence from Paul Canning, general manager; Anthony Smiley, Chief Financial Officer; and Claudia De Leonardis, People, Recruitment and Engagement Manager.
3. We were referred to a bundle of documents which ran to 160 pages.

Claims and Issues to be determined

4. The claimant brought a claim under section 103A Employment Rights Act 1996 ("**ERA 1996**") that she had been automatically unfairly dismissed because she had made a protected disclosure.
5. The employment tribunal took the time to discuss the issues on liability to be determined, at the start of the hearing. These were agreed as follows:
    a. Was the claimant's disclosure to Anthony Smiley on 23rd April 2021 a qualifying disclosure within the meaning of s43B ERA 1996? Specifically:
        i. Did the claimant make a disclosure of information?

ii. Did the claimant believe that the disclosure is made in the public interest?

iii. Was that belief reasonably held?

iv. Did the claimant believe that the disclosure tended to show:

1. the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject; or

2. that the health and safety of any individual has been, is being or is likely to be endangered?

v. Did the claimant have a reasonable belief that the information disclosed tended to show that a relevant offence or failure had occurred, was occurring or was likely to occur?

vi. Was that belief reasonably held?

b. If so, was the reason, or principal reason, for the dismissal of the claimant the fact that she had made a protected disclosure?

Relevant Law

Disclosure qualifying for protection

6. The relevant law is as follows:

43B Disclosures qualifying for protection ERA 1996.

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

7. As a consequence, for a disclosure to qualify there are five conditions:

a. there must be a disclosure of information;

b. the worker must believe that the disclosure is made in the public interest;

c. such a belief must be reasonably held;

d. the worker must believe that the disclosure tends to show one or more of the matters listed in s43B(1) ERA 1996 – the 'wrongdoing'; and

e. such a belief must be reasonably held.

Martin v London Borough of Southwark UKEAT/0239/20/JOJ (HHJ Tayler).

8. Turning to the issue of the disclosure of information. The most important principle here is that there must be the disclosure of information as such rather than simply making allegations. The key case in this area is *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, EAT which says the ordinary meaning of giving information is conveying facts. As Slade J put it in that case:

"… 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."

9. In *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, [2017] ICR 731, the court of appeal summed up the analysis that should be carried out when determining whether a protected disclosure is made in the public interest at paragraphs [36] and [37]:

"The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the

disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but [counsel for the employee's] fourfold classification of relevant factors

which I have reproduced … above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

10. The four factors adopted are as follows:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.'

Automatic Unfair Dismissal

11. The relevant law is as follows:

> *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.*

12. The principal reason is the reason that operated on the employer's mind at the time of the dismissal: *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA.
13. S.103A ERA 1996 requires the protected disclosure to be the 'primary motivation' for a dismissal – setting a relatively high bar for a claimant to prove the claim: *Fecitt and others v NHS Manchester (Public Concern at Work Intervening) [2012]* ICR 372, CA.

Findings of fact, analysis and conclusion

14. Where there is a dispute in facts, we explain how we have resolved that dispute. We have only made a finding in respect of relevant facts.
15. The claimant, Ms Amina Mahmood, was employed as a as high value packer by the respondent from 11 February 2020 to 29 July 2021. The claimant worked in the respondent's packing department. Her role involved packing goods to be delivered to customers via courier networks.

16. The respondent, Jewellery Quarter Bullion Limited, is an organisation that now employs approximately 90 staff. The company experienced rapid growth during the covid period as it previously employed around 45 members of staff. The company supplies gold, silver and platinum bars and coins to customers.
17. The claimant signed the respondent's mobile phone policy on 27 August 2020. This policy said, "*mobile phones should not be used … when they distract from work tasks*" and "*Any personal use deemed to be excessive during working hours may lead to disciplinary action*."
18. The claimant had a positive appraisal with Mr Canning on 18 February 2021.
19. On 8 April 2021 a meeting took place between an employee named Eram Idress and Mrs De Leonardis, People, Recruitment and Engagement Manager. Eram Idress was the claimant's friend.
20. The contents of this meeting are disputed. Mrs De Leonardis says Eram Idress raised a mental health concern with her. Mrs De Leonardis says Eram Idress said the reason for that concern was she being moved to a specific team and in particular she was not given notice to move teams. Mrs De Leonardis claims these concerns were addressed in the meeting. We do not need to make findings of fact about what was discussed in the meeting.
21. The claimant wasn't present in the meeting, but she did see Eram Idress shortly after the meeting and Eram Idress shared details of the meeting with her. The claimant described Eram Idress as being very upset after the meeting. After the meeting, Eram Idress agreed to move to the Jewellery team.
22. Eram Idress returned to work on Friday 9 April 2021 and then left sometime during the course of the day, due to panic attack. The claimant had a

conversation with Mr Canning after Eram Idress left work and raised concerns with him. The claimant didn't think he took those concerns seriously.

23. Early on Monday 12 April 2021, Eram Idress resigned from the respondent and complained about how she was treated, in an email of resignation sent at 6.37am.
24. The claimant sent an email to Mr Smiley on 23 April 2021. This is an important document as it is said to be a protected disclosure. In this document, the claimant raises concerns about the way she perceived Eram Idress's mental health condition had been dealt with by Mr Canning and Mrs De Leonardis. We'll refer to this as the **23 April 2021 Email**.

Was the 23.4.2021 Email a protected disclosure?

25. Mr Barran's skeleton argument sets out accurately the questions the tribunal must ask itself (set out in the list of issues at paragraph 5 above) and the relevant law in this area.
26. The issues in paragraph 5 above set out the six questions we must ask ourselves in order to determine whether the 23 April 2021 Email was a protected disclosure. We refer to as six headings and the findings we have reached in connection with each of them.
27. Counsel for the respondent takes issue with only two of these points.
    a. The first is that the claimant did not disclose information in the 23 April Email, rather she simply set out allegations.
    b. The second is that the matters disclosed in the 23 April 2021 Email were not made in the public interest.
28. Turning to the six questions in turn.

Did the claimant disclose information?

29. As we have said, the most important principle here is that there must be the disclosure of information as such rather than simply making allegations. The key case in this area is *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, EAT which says the ordinary meaning of giving information is conveying facts.
30. We find the claimant was providing information in the 23 April 2021 Email, rather than simply making allegations. The key information provided is set out as follows:
    a. In the penultimate and final paragraph: *"Claudia had stated Eram agreed to move to jewellery side and when asked by Paul who assumed the situation was resolved to move to jewellery side that day it resulted in her having a panic attack and leaving the building. At this point I felt I should raise the issue with Paul who seemed to be unaware of her rib injury and somewhat agreed with the way Claudia dealt with it. I feel this situation has been brushed under the carpet."* Here the claimant is giving specific information, based on her own experience of (1) what happened on 9 April 2021 (2) how management had caused Eram Idress to have a panic attack and had then (3) how management had not dealt with that issue properly.
    b. Fifth paragraph: *"I've personally dealt with Claudia and a similar situation has happened with me when I raised a query about my payroll, I was getting different answers via email than I was over the phone."* Here the claimant provides information about her own

experience of dealing with Mrs De Leonardis and compares it to Eram Idress's experience.

c. Fourth paragraph: "*The best way I can explain how her meeting with Claudia went was Eram had felt attacked*". The claimant said Eram Idress was told in the meeting she was *"playing the victim card'*. Here the claimant was relaying information that she had received from Eram Idress about what Eram Idress said Mrs De Leonardis had said to her in the meeting.

31. We find that this was specific information to support the claimant's claim that the way the company, specifically HR and management, had handled Eram Idress's mental health was completely unprofessional, as she set out in the 23 April 2021 Email.

32. We would also add that Mr Smiley appeared to consider the 23 April 2021 Email to be information rather than a mere allegation. He said in his email of that day "*I clearly take the welfare of everyone in the business very seriously and always want to ensure that we are supporting people where we can*." He goes on to say "*I would like to take some time to understand the full background to this*" and "*I will take some time to speak to other individuals.*" This indicates that he understood this to be the sharing of information, which he in turn decided to investigate.

33. In reaching this conclusion we have rejected the submissions of the respondent that this was not the disclosure of information. We don't find that the claimant just made an allegation about the way she perceived an ex-employee had been spoken to at a meeting. It wasn't just the feelings of Eram Idress that the claimant was conveying. It was specific information about (1)

what was alleged to have been said at the meeting, (2) the impact on the Eram Idress and (3) what was observed by the claimant about the panic attack and (4) what she said to Mr Canning the next day and his reaction.

Did the claimant believe that the disclosure is made in the public interest

34. We have considered carefully the guidance given in the Court of Appeal case of *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, [201 7] ICR 731 at paragraphs 36 and 37. Our findings are as follows.
35. First, the complaint is not about the claimant, even though she draws comparisons with herself. It is about a colleague. It is not therefore a matter personal to the claimant.
36. The claimant's concern was the way in which the respondent handled mental health of employees generally. The claimant was concerned if it wasn't dealt with properly by HR or management, it could lead to negative outcomes. The claimant had personal experience of family members experiencing mental health issues.
37. The subject matter of the claimant's concern was therefore the mental health and well-being of not only Eram Idress, but of all other employees within the respondent's organisation. Looked at from this perspective, the claimant's disclosure could potentially impact all ninety employees within the respondent's organisation.
38. Ensuring the mental health and well-being of staff is in our judgement a matter of importance, to both the respondent and its employees. Mental health and wellbeing are now recognised within the workplace as being a serious matter that should be handled properly, particularly in the aftermath of the pandemic.

The respondent appears to recognise this as it has gone on to invest significantly in the provision of support, by way of an online portal, counselling and GP support, to support the mental health and well-being of staff.

39. The nature of the wrongdoing is relevant. The potential of Mr Canning trivialising what was clearly a very important matter is significant. We can see no response from the respondent to the concerns about mental wellbeing that Eram Idress raised in her resignation letter, suggesting the matter was not followed up with her.

40. In this case, given the serious nature of the concerns, the number of employees and the nature of the wrongdoing we conclude this disclosure was in the public interest.

41. For completeness he set out our findings on the remaining four questions we need to answer to determine whether the 23 April 2021 Email was a protected disclosure, even though these were not strictly disputed by the respondent.

Was that belief reasonably held?

42. We find the claimant genuinely held the view that this matter was in the public interest. It was reasonable of her to hold this view, taking the all of the circumstances into account.

Did the claimant believe that the disclosure tended to show:

The respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject; or

that the health and safety of any individual has been, is being or is likely to be endangered?

43. Yes. The claimant believed the mental health and well-being of Eram Idress had been endangered by the company. She also genuinely believed that the mental health and wellbeing of others within the organisation could be impact by HR and management's approach to handling mental health and well-being issues. In other words, the claimant also believed the health and safety (mental health) of other employees within the respondent was likely to be endangered.

Did the claimant have a reasonable belief that the information disclosed tended to show that a relevant offence or failure had occurred, was occurring or was likely to occur?

44. Yes, based on the experience of Eram Idress that had been relayed to her, together with the response of Mr Canning to the concerns she had raised.

Was that belief reasonably held?

45. Yes it was. It was reasonable of the claimant to rely on the information provided by Eram Idress. It was reasonable of the claimant to draw a

conclusion that the company did not take mental health issues as seriously as they ought to, based on Mr Canning's response to the concerns the claimant had brought to him.

46. Our conclusion therefore is that the 23 April 2021 Email is a protected disclosure.

47. Mr Smiley met with the claimant after she sent the 23 April 2021 Email. He took the claimant's complaints seriously. He considered that the focus of the claimant's concern was how Eram Idress had been treated. He spoke to both Mrs De Leonardis and Mr Canning over the course of a week in April 2021. He was satisfied that Mrs De Leonardis and Mr Canning had handled Eram Idress's change of workplace appropriately. No further action was taken against them.

48. The claimant was late for work on 29 March, 6 April, 13 April and 30 April 2021. The instances of lateness ranged from 15 minutes to 2 hours 30 minutes.

49. The issue of lateness was raised with the claimant by her line manager, Maxim Pichter Tennenberg, who we will refer to as Max.

50. In May 2021 the claimant made two packing errors.

51. The first error was raised with the respondent by Matthew Foster on 24 May 2021 (we'll call this the "**First Error**"). A customer complained that she had only received nine silver eagle coins instead of ten. This matter was investigated. Mr Canning looked at the CCTV footage of the packing floor which he said showed the claimant had made this error. The claimant accepted she had made a mistake and sent the wrong number of coins to the

customer. Mr Canning said that this mistake had annoyed customers and was taking up a lot of time.

52. The second error was raised with the respondent on 27 May 2021 by Robert O'Donoghue (we'll call this the "**Second Error**"). Here a customer received two x 2.5g Umicore bars, rather than 2 x 5g Umicore bars ordered. This matter was investigated. Mr Canning looked at the CCTV footage of the packing floor which he said showed the claimant had made this error. The claimant accepted she had made a mistake and sent the wrong bars. Mr Canning said this had annoyed another customer, as this order was for a birthday present.
53. Mr Canning said the CCTV footage showed that in connection with the First Error, the claimant had been on her mobile phone for ten minutes.
54. Mr Canning said the CCTV footage showed that in connection with the Second Error, the claimant had been on her mobile phone intermittently.
55. On 1 June 2021, the claimant had a telephone conversation with Mr Canning and Peter Walden, another director of the respondent. Mr Canning and Peter Walden discussed the silver coins and bars and the First and Second Errors. Mr Canning explained the company policy regarding phones and packing. Mr Canning said if there were further breaches of the mobile phone policy or repetition of lack of care or attention, a disciplinary sanction would follow. Mr Canning offered the opportunity to see the CCTV. The claimant said that she would like to see the CCTV, but this offer was subsequently withdrawn by Mr Canning.
56. The claimant doesn't dispute that she was using her mobile phone during the First Error but disputes the length of time she was using the mobile phone. It's

not clear what the claimant's position is regarding mobile phone use on the Second Error.

57. We find as a matter of fact that the claimant was using her mobile phone when the First and Second errors occurred.

58. On 2 June 2021 Mr Canning sent an email to all staff, including the claimant, to say that "*no mobile phones should be used during working hours*." The email said, "*usage of phones during working hours can lead to warnings and formal disciplinary procedures*."

59. The claimant was then absent from work from 24 June 2021 until 28 June 2021, because she got pinged on the COVID app and was required to isolate. The claimant's evidence was that after isolating, she came back to work. She then got COVID and was absent from work from the second week in July 2021. She then returned to work towards the end of July 2021.

60. What happened next is disputed. The respondent says the claimant breached the mobile phone policy again. The claimant denies this.

61. We have found, on balance, that the claimant did not use her mobile phone again on the shop floor after 1 June 2021 when she was given her warning. None of the respondent's witnesses, in particular Mr Canning, could give the tribunal an example of when this was said to have taken place. There was no documentary evidence to support this. The claimant was adamant that she did use her mobile phone after receiving the warning. We accept the claimant's evidence on this.

62. On 29 July 2021, at the end of the working day, the claimant was brought into a breakout room by Mr Canning and Max. The claimant was told in this meeting that she was being dismissed. The claimant was informed by Mr

Canning that due to her performance, skill set and attitude, she was being let go with immediate effect.

63. The claimant raised a complaint with Mr Smiley and others by email, on 3 August 2021, about the unfairness of her treatment and in particular that the respondent had not followed the procedure outlined in the employee handbook. The claimant said that she thought the reason for her dismissal was either the April 2021 Email or a previous complaint in February 2021 that she had made about her pay.
64. Mrs De Leonardis played no part in the decision to dismiss. However, on 3 August 2021 she sent an email to the claimant and provided some details about the claimant's last day of employment, notice, holiday and overtime balance. She did not provide details about the reason for dismissal.
65. On 7 August 2021 Mr Smiley emailed the claimant to say, "*my understanding of the circumstances here is that there were sufficient concerns around ongoing performance, however these were not the only reasons for dismissal.*"

Decision to dismiss and reason for dismissal

66. We turn now to the final issue, set out in paragraph 5 above.

Was the reason, or principal reason, for the dismissal of the claimant the fact that the claimant had made a protected disclosure?

67. As we have said, the principal reason is the reason that operated on the employer's mind at the time of the dismissal and s.103A ERA 1996 requires the protected disclosure to be the 'primary motivation' for a dismissal.

68. We have asked ourselves why the dismissing officer acted as they did. What, consciously or unconsciously, was their reason or reasons for dismissing the employee?
69. We remind ourselves that the burden of proof is on the claimant. The protected disclosure has to be the primary motivation for dismissal, for the claimant's claim to succeed.
70. It wasn't entirely clearly set out by the respondent in their witness statements, who made the decision to dismiss. Having heard the evidence, and on the balance of probabilities, we find that Mr Canning took the decision to dismiss and made this recommendation to Mr Smiley. Mr Smiley approved or ratified this recommendation. Mr Smiley accepted what Mr Canning told him. We have therefore focused our attention on the reason Mr Canning had to dismiss the claimant.
71. The respondent followed no proper process and did not give the claimant proper notification of the reason it was considering dismissing the claimant and the reason for dismissal itself.
72. However, having heard evidence from Mr Canning, we accept that there are a number of reasons that he had for dismissing the claimant, which fall under the general heading of conduct or performance. These are the claimant's lateness, the First and Second mistake and the phone use whilst packing. The claimant accepts she was late and made the First and Second mistakes, and accepts at least part of the allegation on mobile phone use. We will collectively refer to these as the Performance Issues.
73. We find that the Performance issues were the primary motivation or principal reason for the claimant's dismissal.

74. We find the protected disclosures raised in the 23 April 2021 Email were not the primary motivation or principal reason for the claimant's dismissal. We cannot rule out the possibility that the protected disclosure played some part in Mr Cannings reasoning, but we find that it was not the primary motivation or principal reason. In doing so we reject the claimant's case that the primary reason for dismissal is the protected disclosure.
75. As we have said, we have accepted Mr Cannings evidence that that the primary motivation or principal reason for dismissal was the Performance Issues. In addition, we have taken the following factors into account in reaching this conclusion:

Timing

76. The lateness and mistakes occurred shortly after the protected disclosure was made. Mr Canning could have dismissed for these events had he been motivated to so by the protected disclosure.

Impact on Mr Canning of the 23 April Email

77. There is no suggestion that there were any consequences for Mr Canning following the claimant making her protected disclosure in the 23 April 2021 Email. There was therefore no obvious motivation for him to respond to the protected disclosure by dismissing the claimant.
78. We find Mr Canning didn't attach significance to the contents of the 23 April 2021 Email.
79. In conclusion as we have said, we find that the principal reason Mr Canning dismissed the claimant was not the protected disclosure. The primary

motivation and principal reason for the claimant's dismissal is the Performance Issues.

80. The respondent accepted they had not followed fair procedures, as acknowledged by counsel for the respondent at the start of his submissions. Had this been an ordinary unfair dismissal case, these would have been very relevant matters. However, this is not an ordinary unfair dismissal.

81. The claimant's complaint of automatic unfair dismissal is therefore not well founded as the principal reason for dismissal was not the protected disclosure made by the claimant on 23 April 2021.

Employment Judge Childe, Mr McIcintosh, Mrs Bannister

5 July 2023

JUDGMENT SENT TO THE PARTIES ON

14th July 2023

Gulfaraz Amjad for the tribunals

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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