EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Prof N Kapur	**v**	The Disabilities Trust

Heard at: Cambridge **On**: 29 August 2023

Before: Employment Judge Conley

Appearances
For the Claimant: Mr K Sonaike, counsel
For the Respondent: Mr L Bronze, counsel

JUDGMENT

Each of the claims made are struck out, pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013, in that they have no reasonable prospect of success.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 16 June 2021, following a period of ACAS early conciliation between 5 May 2021 and 27 May 2021, the Claimant pursues complaints against the Respondent that he suffered a detriment as a result of having made a 'protected disclosure' within the meaning of section 43A of the Employment Rights Act 1996, and that he was 'automatically' unfairly dismissed contrary to section 103A of the same Act as a result of making the same disclosure.

2. The brief background facts are these. The claimant was employed by the respondent under a fixed term contract, initially from 21 April to 21 July 2020 but subsequently extended to 14 June 2021, as a Locum Clinical Neuropsychologist with the Brain Injury Rehabilitation Trust (BIRT) based at Thomas Edward Milton House (TEM).

3. Without rehearsing his extensive experience and academic credentials, it is beyond doubt that the claimant is eminent in his field.

4. On 5 February 2021, the claimant became aware that a former colleague, Dr Brian O'Neill, a consultant clinical neuropsychologist, had failed in his appeal against his dismissal by the respondent as a result of alleged fraud. As a result, he decided to draft a 'Letter of Concern' (described by the respondent as a 'Letter of Support', hereafter referred to neutrally as 'the Letter') to send to the Chief Executive of the respondent, Irene Sobowale, and invited a number of senior colleagues to be co-signatories to the letter.

5. The Letter was sent to Ms Sobowale on the 19 February 2021. The were nine co-signatories to the letter, in addition to the claimant, all of whom were senior academics and/or clinicians from within the field of psychiatry, psychology and neuropsychology. Five of them were either current of former employees of the respondent, including Professor Rodger Wood, a former Clinical Director of BIRT.

6. The claimant submits that the Letter amounts to a 'Qualified Protected Disclosure' pursuant to s43B(1) of the Employment Rights Act 1996.

7. Paragraph 9 of his Particulars of Claim states the following:
   > 'The claimant avers that [the Letter] amounted to a qualifying disclosure within the meaning of section 43B(1) Employment Rights Act 1996 since it disclosed information, which in the reasonable belief of the claimant was made in the Public Interest, and tended to show that a miscarriage of justice had occurred and/or that the respondent had failed to comply with its legal obligations.'

8. His case is that, as a result of sending the Letter, he was subjected to a number of detriments short of dismissal (relating to false statements made to him in relation to the recruitment of his eventual replacement and the restriction of his access to email) and, ultimately, he was dismissed by way of the early termination of his fixed term contract.

9. In their Grounds of Resistance, the Respondent identified that the question of whether the Letter constituted a protected disclosure for the purposes of these proceedings was a live issue. The Grounds of Resistance state the following:
   > 'The Respondent denies that the Claimant made any protected qualifying disclosures as alleged or at all. Specifically, the Respondent denies that [the Letter] amounts to a qualifying disclosure. The Respondent denies that:
   > (a) [the Letter] made any disclosure of information of a relevant failing;
   > (b) [the Letter] was made in good faith;

(c) [the Letter] was made in the public interest; and/or
(d) any belief the Claimant had that any disclosure of information in the Letter of Support was true and in the public interest was reasonable.'

10. This matter came before Employment Judge Ord on the 31 January 2023 for a Preliminary Hearing. EJ Ord set down this matter for a Public Preliminary Hearing in order for the question of whether or not the Letter was capable of amounting to a Qualifying Disclosure as defined by section 43B to be determined as a preliminary issue.

11. The single question that I have to determine in hearing this matter is whether the Letter written by the claimant and his colleagues is a qualifying disclosure. If I decide that it is, then the matter will proceed to a full merits hearing which is listed to take place over 4 days from the 19 February 2024.

12. However, if I decide that the Letter does not so qualify, then the effect of that decision would inevitably be that the claim would be struck out in its entirety as having no reasonable prospect of success, under rule 37 of the Employment Tribunal Rules.

13. The evidence presented during the course of the hearing was as follows:
    (1) The written and oral evidence of the claimant;
    (2) A statement from Ms Irene Sobowale, the Chief Executive Officer of the Respondent, who did not attend the hearing and was not cross-examined; although given that, at this stage of the case it is for the claimant to satisfy the Tribunal on the balance of probabilities that there was a qualifying disclosure, I can understand why it was felt that Ms Sobowale's attendance would not take matters much further;
    (3) A bundle of documents consisting of 400 pages, although it must be said that this contained a very significant number of duplicate documents (due mostly to the reproduction of email chains); and in any event most of the bundle related to the consequential detriments allegedly suffered by the claimant. The documents relevant to the matters that I was concerned with were relatively few.

14. I have also been greatly assisted by the focussed written and oral submissions made by Counsel, Mr Sonaike and Mr Bronze for the claimant and respondent respectively.

LAW AND CONCLUSIONS

15. The relevant statutory provision which defines Protected Disclosures is Employment Rights Act 1996 43B, which reads as follows:

Section 43B 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.

16. As stated above, the claimant originally pleaded that the Letter 'qualified' under s43B(1)(b) and s43B(1)(c); whereas according to the Case Management Summary (paragraph 7, at page 51), the claimant relies upon s43B(1)(c) and s43B(1)(d).

17. Mr Sonaike submits that, in fact, all three paragraphs are applicable to the Letter, and in the circumstances, I have considered each of them.

Test to be applied

18. Various different authorities have identified different tests to apply in order to determine whether a disclosure satisfies section 43B. The five stage test set out by HHJ Auerbach in the case of *Williams v Michelle Brown AM* UKEAT/0044/19/OO is perhaps the definitive one:

> '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.'

19. In reaching this decision I have considered carefully this test and the case from which it derives; and I have also considered carefully the case of *Twist DX Ltd & others v Armes & another* [2020] UKEAT 0030/20, to which both Counsel have referred me. I note that in the latter case, when conducting its analysis of the disclosures, Linden J, dealt with questions in the order 1st, 4th and 5th.

20. I propose to do likewise; or to put it another way, I will apply the simpler 3 stage test identified in the case of *Easwaran v St George's University of London* UKEAT/0167/10/CEA (Underhill J)

    (A) Did the Appellant disclose any information to Dr Murphy?

    (B) If so, did he believe that that information tended to show either of the matters specified at section 43(1)?

    (C) If so, was that belief reasonable?

'Disclosure of Information'

21. Before turning to each of the three paragraphs referred to above, it is first necessary to consider whether the disclosure itself has been one which conveyed 'information', which would be protected, as opposed one which merely made 'allegations', which would not.

22. In the case of *Cavendish Munro Professional Risks Management Ltd v Geduld* UKEAT/0195/09, the EAT stated (at para 24) that

    '...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.'

23. This is not so rigid a dichotomy as it may appear at first glance. As was stated in the case of *Kilraine v LB Wandsworth* [2018] EWCA Civ 1436, in its analysis of the *Cavendish* dictum,

    'although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.'

24. The key distinction between a bare allegation and one which is also capable of amounting to a disclosure of 'information' is, according to *Kilraine*, the distinction between one which is 'so general and devoid of specific factual content that it could not be said to fall within the language of s43B' and one which 'has sufficient factual content and specificity such that it is capable of tending to show' one of the six listed categories of protected disclosure.

25. In his written submissions, Mr Sonaike has sought to identify those aspects of the Letter that, he says, amount to disclosures of information, as follows:

    a. Dr O'Neill had been dismissed;
    b. The processes used to effect that dismissal were unfair;
    c. The term fraud was used as part of his dismissal, but that its use did not accord with the definition of fraud in the Fraud Act 2006;
    d. There was no member who was external to the Trust and therefore there was no compliance with the principle of independence;
    e. There was no member on the panel with an expertise in Neuropsychology and therefore there was no compliance with the principle of expertise;
    f. The sanction of dismissal was unfair under what written warning or salary deduction should have been applied instead.

26. Dealing with paragraph a. above, whilst strictly speaking it is a statement of incontrovertible fact that Dr O'Neill had been dismissed, I am of the view that it is so fundamentally axiomatic to, and provides the underlying context for, the content of the Letter which follows that it could not possibly be a matter that needs any further analysis in terms of whether it constitutes a disclosure of information for these purposes.

27. Moving on to paragraph b: in my judgment it would be more accurate to bracket together this allegation that the disciplinary processes were unfair with the alleged failure of those processes to comply with the recommendations of the NHS Advisory Panel (paragraphs d, e and f above) as being a single purported disclosure of information. If I were to consider paragraph b. in isolation then I would have to conclude that this was nothing more than a bare unsupported allegation and a matter of opinion rather than fact, of the kind that *Cavendish* identified. However, taken together with the other three paragraphs, the allegation is set in context which contains sufficient factual content and specificity to render this a disclosure of information for the purposes of section 43B.

28. In relation to paragraph c. namely the assertion that the term fraud was used as part of Dr O'Neill's dismissal, but that its use did not accord with the definition of fraud in the Fraud Act 2006, is in and of itself a statement of fact although I query whether it is necessary to deal with this aspect of the disclosure in its own right or whether it could also be dealt with under the umbrella of examples of where it is submitted by the claimant that the disciplinary processes were defective.

'Tends to show'

29. Having identified those aspects of the Letter which disclose information, I must turn to the second of Underhill J's questions: did he believe that the information tends to show a failure to comply with a legal obligation; a miscarriage of justice has occurred or is likely to; or that the health and safety of an individual had been or was likely to be endangered.

30. I make it clear at the outset that I am aware of the fact that the threshold for 'belief' in this context is a low one.

'Failure to comply with legal obligations'

31. It is clear that the main thrust of the Letter is based upon the belief that the respondent was wrong to have dismissed Dr O'Neill, and that the reason for that decision lay in the respondent's failure to adopt the recommendations of the NHS Advisory Panel - which he now avers to have been a failure to comply with legal obligations.

32. I accept that in certain circumstances, wrongdoing within the internal procedures of an organisation may amount to 'legal obligations' for the purposes of this provision, even if the precise obligation has not be identified within the original disclosure, or even expressly pleaded as part of a claim, and that the authorities have moved on considerably since the early decision in the case of *Fincham v HM Prison Service* UKEAT/0991/01.

33. However, I am nevertheless required to identify the source of the legal obligation concerned, and how it is submitted that the claimant believed that such obligation (if it existed, or more accurately, if he *believed* it existed) had been breached (*Eiger Securities LLP v Korshunova* UKEAT/0149/16). I must therefore by guided by the evidence.

34. Firstly, under cross-examination the claimant said this: "I understand that [the respondent] is not an NHS body and that there is no obligation to adopt NHS guidance, but they should have the same standards".

35. In my judgment this gives rise to a strong inference that the claimant knew that there was no legal obligation on the respondent to apply the various recommendations set out by the Advisory Panel, and by extension that he did not believe and indeed could not have believed that the respondent was in breach of any such obligations.

36. Secondly, I would have expected that the claimant would have been aware of the existence of the whistleblowing policy of the respondent and would have adopted it, had he genuinely and reasonably believed that he was seeking to identify wrongdoing as opposed to merely taking up the cause of a former colleague whom had been dismissed. I of course accept that

the intention of the claimant is not the decisive factor, but it is certainly an important factor that I bear in mind when considering what he believed.

37. Thirdly, his co-signatories to the Letter consisted of a number of senior figures within the respondent, and so even if the claimant did not appreciate that the respondent was not obligated to adopt the Advisory Panel's recommendations, or that a whistleblowing policy existed, I would have expected that one of the co-signatories would have been well aware of it and would have sought to deal with this matter via the appropriate channels.

'Miscarriage of justice'

38. I can deal with this aspect of the claim shortly. In the absence of any authority that can assist me, I simply cannot accept that the circumstances of this case, which dealt solely with internal disciplinary procedures, could lead the claimant, a man of obviously high intellect, to conclude that there had been a 'miscarriage of justice'.

39. Taken at its highest, and adopting as generous a view as I can of the claimant's case, I find that the evidence is of a colleague sticking up for a former colleague whom he felt was hard done by.

40. In the claimant's particulars of claim, the claimant stated that Dr O'Neill had been dismissed for having 'seen a private patient during working hours, that he had inappropriately used to trust resources, and that he had breached a duty regarding disclosure of confidential information including a data breach'.

41. He also stated that he was aware that Dr O'Neill had submitted a claim to the Employment Tribunal alleging that he had been unfairly dismissed.

42. In the circumstances, the claimant would have been well aware that if the procedures which led to Dr O'Neill's dismissal had been in any way unfair, then he had recourse to the justice system to put those matters right.

43. As far as the sanction is concerned, it beggars belief that the claimant could have considered that, if the allegations against Dr O'Neill were proved, the sanction of summary dismissal amounted to a 'miscarriage of justice'. It seems to me that these assertions undermine the credibility of the claimant more generally.

'Health and safety…endangered'

44. I have no doubt that the claimant had a genuinely-held *concern* that Dr O'Neill may have been negatively impacted by the decision to dismiss him from his former position. With respect to the claimant, that would be obvious - the summary dismissal for gross misconduct of a senior clinician

with (as the claimant stated) 'a young family to support' would inevitably be a difficult and upsetting experience.

45. What is much harder to accept is the extent to which the claimant has sought to conflate the circumstances which befell Nurse Amin Abdullah and the circumstances of Dr O'Neill. Clearly the case of Nurse Abdullah was a tragedy. I acknowledge that the circumstances of Nurse Abdullah's case arose from a disciplinary procedure resulting in summary dismissal. But, on the evidence presented before me, that is where the similarity ends.

46. The claimant has provided absolutely no evidence whatsoever of how he came to the conclusion that Dr O'Neill's health and safety would be endangered. I do not accept the proposition, absent some other evidence, that it is reasonable to believe that in every case in which results in summary dismissal, the health and safety of the person dismissed is likely to be endangered. The impact or likely impact of which the claimant speaks is, on the evidence before me, wholly speculative.

47. Furthermore, the claimant has not satisfied me that he believed that it was the information that he disclosed that would have had any impact upon Dr O'Neill, as opposed to the mere fact of his summary dismissal.

48. I note of course the complete absence of any reference to the health and safety of Dr O'Neill in the Letter. I have considered the passage from the case of *Twist* in which Linden J rejected the submission that 'in a written communication case the issue can always be decided and, indeed, may only be decided, by looking at the words of the written communication', which of course I accept, and have considered the following passage in *Kilraine:*

> 'Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case'

49. I have considered all the facts of the case as I am required to - and I do not feel satisfied of a genuine belief on the part of the claimant.

'Reasonableness'

50. Even if I am wrong in relation to any of my findings regarding the claimant's belief, I would still have to go on to consider whether it would be reasonable for him to hold such beliefs.

51. It is important to note that in relation to the reasonableness of a belief of the informant, the wording of S43B(1) states that it is 'the reasonable belief of the worker making the disclosure', rather than the belief of a hypothetical reasonable worker. This introduces a requirement that there

should be some objective basis for the worker's belief, as confirmed by the EAT in the case of *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 EAT, which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

52. In my judgment this is significant in the context of this case for a number of reasons. Firstly, the claimant is a very senior, very experienced, very highly qualified academic and clinician, and to that extent it is reasonable to expect him to have a high level of understanding of the distinction between the respective structures of the NHS and the respondent, which existed independently of the NHS; and also the distinction between non-binding *recommendations* of an Advisory Panel and binding legal obligations; the difference between an unfair disciplinary procedure and a 'miscarriage of justice'; and the difference between the normal negative effects upon an individual of being summarily dismissed and the actual endangerment of that person's health and safety.

53. Acknowledging once again that the threshold for 'belief' is low the reasonableness test clearly requires the belief to be based on some evidence — rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief.

54. It was a notable feature of the evidence - the claimant's witness statement in particular - that there was a paucity of evidence as to *how* the claimant came to know of the circumstances of Dr O'Neill's disciplinary process and *why* it was that the claimant had formed the beliefs that underpin this claim. There is no evidence that these were matters within his own knowledge or that he had played some integral part in the process such as would give rise to any well-founded cause for concern.

55. All that his witness statement says on the subject is that 'around 5th February 2021 I became aware that the appeal of Dr O'Neill had been unsuccessful and on learning more about his case I became highly concerned about the procedure that had been followed during the disciplinary proceedings against him'.

56. In my judgment, absent some other evidence or explanation, I am left to draw the conclusion that there is no basis for the claimant to have reasonably formed the belief that he claims he did.

Conclusion

57. As Linden J did in the judgment of *Twist*, I too remind myself of the underlying purpose of the protected disclosure legislation, as set out in the case of *ALM Medical Services v Bladon* [2002] IRLR 807:

> "The self-evident aim of the provisions is to protect employees from unfair treatment (ie victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees…."

58. I find that in this case, the purpose of the Letter was not to achieve those objectives but was instead a perfectly properly show of collective support for Dr O'Neill by the claimant and a number of his esteemed colleagues.

59. However for all of the reasons set out above, this claim is struck out as having no reasonable prospect of success.

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Employment Judge Conley

Date: 11 October 2023

Sent to the parties on: 12 October 2023
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For the Tribunal Office