Neutral citation Number: [2023] EAT 121

Case No: EA-2022-001397- BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 August 2023

Before :

HIS HONOUR JUDGE BARKLEM

- -

Between :

MR BRIAN KRISTENSEN

Appellant

- and –

PORTMAN HEALTHCARE LIMITED

Respondent

- -
- -

The Appellant appeared In Person
MR DAVID SILLITOE (instructed by **Robinson Ralph Ltd**) for the **Respondent**

Hearing date: 17 August 2023

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JUDGMENT

HIS HONOUR JUDGE BARKLEM:

1. This is an appeal from the decision of Employment Judge Emery sitting alone at a preliminary hearing held at London Central Tribunal in June and August 2022. The result of the hearing, as set out in a judgment with written reasons sent to the parties on 1st November 2022 was that, so far as relevant to today's hearing, the claim of automatic unfair dismissal by reason of a protected disclosure was struck out.

2. A single ground of appeal has been permitted to proceed to a full hearing which took place before me. Other grounds advanced were dismissed on the sift and there was no challenge to this. The hearing before me was expedited because the hearing of the remaining claims for unfair dismissal and wrongful dismissal will begin on 5th September 2023.

3. As was the case before the Employment Tribunal, the claimant represented himself and the respondent was represented by Mr. Sillitoe, a solicitor. I shall refer to the parties as they were below.

4. At the sift stage, Mr. Clive Sheldon, KC, sitting as a Deputy Judge of the High Court, commented that the appeal with regard to the protected disclosure was reasonably arguable in that the judge did not apply the principles in **Chesterton Global Limited v Nurmohamed** to the facts of the case. He mentioned the overall context of the case in which the respondent was subject to the regulatory regime of the General Dental Council, the fact that the respondent is a significant entity in, as he put it, the healthcare space, and that the judge failed to understand the involvement of the police.

5. In advance of the hearing before me, the EAT had been asked by the claimant to ask the Metropolitan Police for further details of a criminal complaint which he had lodged. It was explained that that was not the role of the EAT. However, the claimant had obtained a redacted version of the CHRIS report, as it is referred to, which was before me.

6. It transpired in the course of the hearing that there had been lodged, in addition to the core bundle, a supplementary bundle and a yet further bundle described by the claimant as the "New" bundle which existed only in electronic form, fortunately accessible by me in the course of the hearing. Each of these bundles was referred to by the claimant only in his reply in which I permitted him to go well beyond the normal parameters of what a reply normally contains. I have had regard to the totality of the documentation, which Mr. Sillitoe very sensibly and helpfully made no objection to my adopting this course.

7. At the nub of this case as it concerns me is a document which the claimant maintains is a forgery. It may help if I set out the basis for this belief by way of a brief history with which the claimant began his submissions. I told him at the outset that it is not my role to make findings of fact as to the various assertions which he makes. I am also conscious that some of the matters which I mention may well be live issues before the Employment Tribunal hearing which is shortly to begin. I stress that nothing in my summary of the issues is to be taken as suggesting that I have formed any concluded view of any matter in dispute between the parties which the forthcoming Tribunal alone must determine.

8. The claimant is a dental hygienist and was first employed by Mr. Vivian Ward, then practising as a dental surgeon at 90 Harley Street in London. He signed an employment contract in April 2008. Thereafter, the practice was sold by Mr. Ward to the remaining partners but with no change to the claimant's contract. However, in 2016 the then partners wanted to sell the practice to BUPA, the well-known healthcare provider and insurer. The claimant was asked to sign a new employment contract with his then employers in advance of this.

9. At page 1 of the supplementary bundle is an email exchange on 28th July 2016 between Julie Daley the practice manager, and Matthew Fisher, someone clearly working on the human relations side at BUPA. Ms. Daley records in the email that she had tried to get the claimant to sign a contract and

even to indicate the parts he did not agree with, but instead he wrote his own contract. She said that she was attaching both. Mr. Fisher replied in effect that that was fine. A copy of the draft contract headed: "90 Harley Street" with the handwritten words: "Amended by Brian" is at pages 35 to 37 of that bundle.

10. The deal with BUPA did not materialise, but rather the present respondent took the business over at some time in 2017. At pages 26 to 35 of the supplementary bundle is a document also headed: "90 Harley Street" but with the manuscript word "Original" above that. That is consistent with, and this is not a finding of fact by me but an observation, it being one of the two versions sent by Ms. Daley with the email of 28th July 2016. However, that version purports to have been signed by the claimant and Julie Daley on 21st April 2016.

11. In 2021, the claimant made a subject access request to a firm of solicitors which carried out due diligence for the respondent before the acquisition. Among the documents which they provided were documents which, on a quick reading, appear similar to the two mentioned above although neither had the manuscript amendments and one, which looks like the one marked "Original" mentioned at paragraph 11 above, omitted the "90 Harley Street" header.

12. It would be a reasonable inference to draw, although it is not one which I need to or do, that the absence of a signed copy of an employment contract in the documents suggests that none such existed as at the date that the respondent became the claimant's employer. Taken with the email of 28 July 2016 which suggests that the claimant had refused to sign the contract as at that date, that would plainly support the claimant's contention that his signature was not applied by him to an employment contract on 21 April 2016.

13. The claimant learned of the alleged forgery only when the respondent wrote to him in the course of a dispute unrelated to the narrow issue before me and which I assume will form part of the issues in

the forthcoming hearing, in terms which suggested that there was indeed a signed contract. The claimant asked to see a copy of his personnel file on 12th August 2021, following which he saw, on 13th August, for the first time what he says is the copy bearing his forged signature.

14. I turn to the Employment Judge's findings from which it is clear that the matters raised above were all before him. At paragraph 8 he made clear that he regarded the scope of the claimant's case to be that he had made repeated claims that a criminal offence had been committed by the forging of his signature on the employment contract from 16th August when the claimant, accompanied by a uniformed police officer, sought access to his personnel file again. The judgment then records that having seen the document bearing his signature on 16th April, the claimant researched the law, discovering the offences of forgery and use of a forged instrument. The judge went on:

> **"24. The claimant's evidence was that he "managed to convince" the police to send someone to check the contents of his personnel file. His rationale for doing so was that it would be harder to prove that forgery had taken place if the contract and associated emails "should mysteriously disappear"**
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> **(paragraph 49 statement).**
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> **25. The police and the claimant attended his work address on Monday 16 April and the claimant asked for access to his personnel file. At this point, the claimant informed Ms Ferguson that there is a forged document on his file, Ms Ferguson accepts that he was 'vocalising' to all that a crime had been committed. She said that the police officer came into the office and "I asked the PC what about and he responded that he was not quite sure, but [the claimant] made a complaint".**
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> **26. The claimant argues that he would not be the first or the last victim of such forgery by the respondent – that it was likely to have happened, or would happen, to another employee. He accepted that when he said his contract had been forged, he did not refer to any other employee this may have happened to; he said "I did not know this - I was not thinking of this…". He argued that when he saw the contract "I knew forgery had been committed towards me…".**

> **27. On 27 July 2021 the claimant made what he contends is a whistleblowing complaint in writing to the respondent's CEO Mark Hamburger. This states that he considers a criminal offence had been committed, also one had been covered up. He says that while he does not know who forged his signature, but that Ms Stevens had used a false instrument against him by stating that he had signed a copy of his contract of employment in her email on 10 August 2021."**

15. The relevant law was set out by the Employment Tribunal and I will do so here.

> **Section 43(a): "Meaning of 'Protected disclosure'. In this Act a protected disclosure means a qualifying disclosure as defined by section 43(b) which is made by a worker in accordance with any of sections 43(c) to 43(h)".**
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> **43(b), "Disclosures qualifying for protection. 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, and (b) that the person is failing or is likely to fail to comply with any legal obligations to which he is subject".**

16. In **Chesterton Global Limited v Nurmohamed** mentioned above, Lord Justice Underhill considered the effect of the words: "Is made in the public interest" which had been added in 2013. At paragraphs 27 and following he explained that the Tribunal has first to ask, (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest, and (b) whether if so that belief was reasonable. When looking at element (b) the exercise required the Tribunal to recognise that there may be more than one reasonable view as to whether a particular disclosure is in the public interest. What matters, he said, is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker.

17. The particular reasons why the worker believes the disclosure to be in the public interest are not of the essence. That means such a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the

Tribunal finds were not in his head at the time he made it. What matters is that his subjective belief was objectively reasonable. While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his predominant motive in making it.

18. Lord Justice Underhill described as a useful tool four factors which in that case had been said to be relevant. These were set out at paragraph 34 of the judgment of the Court of Appeal and are as follows:

> **"(a) the numbers in the group whose interests the disclosure served – see above;**
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> **(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;**
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> **(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;**
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> **(d) the identity of the alleged wrongdoer – as Mr Laddie 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".**

20. He then said, paragraph 37:

> **"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[5]), 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. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably**

be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 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".

21. The Employment Judge made the following conclusions:

"59. I accepted that throughout, the claimant had a genuine belief that his signature had been forged on the April 2016 contract.

60. The claimant at the time said "I do not know if any others" are at similar risk of having their contract tampered with; that the respondent could "choose" to put in measures to protect other employees contracts "or just to mine" (120).

61. I accepted that the claimant only believed that his contract had been tampered with, that at best he did "not know" if anyone else could be affected. I also accepted that while a potential criminal offence, the Police were evidently not interested in ascertaining if a crime had been committed, despite being led to the alleged crime. The claimant did not want a crime investigating, he wanted a Police officer to witness what was on his personnel file.

62. I did not accept that the claimant genuinely believed that his contract being forged had any public interest element. It was a private contractual matter, the police were called as a witnesses to what was in his contract. Even if the contract's signature was forged, this at best (or worst) amounted to a breach of the claimant's contractual rights and may go to issues of a repudiatory breach of contract. There is the issue of what was the valid contract and what are its terms and has it been breached. These are all private contractual issues, and at the time I concluded that the claimant simply did not know if they were in the public interest.

> **63. The same with the grievance of 27 August and other communications with his employer: at its highest the grievance complains about the forgery to his contract and says that this is a serious issue. It does not refer to other employees, or any wider public interest.**
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> **64. The highest the documentary evidence goes "I do not know" if others are at risk of having contracts tampered with.**
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> **65. This was not, I concluded, a matter which the claimant believed was in the public interest at the time he made his disclosures. His sole concern was about the impact on him and his contractual rights in what was becoming a protracted dispute with his employer about (amongst other issues) his utilisation.**
>
> **66. It follows that the claimant did not, either verbally on 16 August or subsequently in writing on 27 August, make qualifying protected disclosures."**

22. In his grounds of appeal and skeleton argument, the claimant argues that the importance of an allegation of forgery of an employment contract with reliance placed on that forgery is such as to render it a matter of public interest and that he certainly believed that to be the case. He points out that he had reported the forgery to the police and wanted an officer to accompany him to his workplace to prevent the employer subsequently denying that a chain of emails existed which makes clear, he says, that the employer was aware that no signed copy of his contract was in existence at the time of the takeover.

23. For the respondent, Mr. Sillitoe argues that the alleged criminal offence was targeted only at the claimant and in the context of an employment dispute affecting him only. The claimant had no reason to believe that any other employee had been affected. This was a classic private workplace dispute, he submits, and personal in character. He points to the Tribunal's finding that the claimant did not have a belief that his disclosure was in the public interest.

24. As to the claim that dentists are subject to regulation, he points out that the matters alleged do not affect dentists as distinct from administrators and that the Tribunal had thus implicitly rejected the

claimant's argument in the ET1 that the GDC would be concerned by such behaviour. It was again, he submits, implicit that the Tribunal was aware of the size of the respondent as an entity operating in the healthcare industry.

25. As to the involvement of the police, Mr. Sillitoe cites passages from the judgment as to: "Managing to convince the police to check the contents of the file" and that the police were: "Evidently not ascertaining if a crime had been committed", going on to cite paragraph 61. He concludes that the Tribunal's decision was one open to it on the evidence.

26. I have read the pleadings in the case. Paragraph 19 of the grounds of claim note the finding of a forgery and paragraph 21 of: "Reporting this information to the police who subsequently attended". It is notable that, perhaps for good reason, the grounds of resistance skirt the issue as to whether and for what reason there had been a forgery or, if it was not a forgery, how the document in question came to be signed. However, at paragraph 11 of the grounds of resistance it is asserted that the claimant attended the office with the police officer and asserted that there had been fraudulent activity in relation to his personnel file.

27. I have seen the police file, which I accept that the Tribunal did not, which confirmed that the claimant had indeed reported to the police the day before the visit that his contract of employment had been forged. It is evident that the police ceased the investigations simply because there were no active leads. There was no finding that there was no offence committed.

28. At paragraph 25 of the judgment, it is recorded that it was made clear by the respondent's witness that the claimant was: "Vocalising to all" that a crime had been committed when he attended with the police officer.

29. Taking all this into the round, I do not understand how the judge could have concluded that the police were not interested in ascertaining if a crime had been committed. Even without the CRIS

report, the judge had before him the ET1 which had asserted the reporting to police of a forgery and the grounds of resistance which confirmed that allegations of fraudulent activity by the claimant had taken place in the presence of the officer, reinforced by the oral evidence to which I have just referred.

30. The conclusion that the claimant did not want a crime investigating, rather, he wanted a police officer to witness what was on his personal file is, I conclude, not a finding that was open to the judge on the evidence and was thus perverse. This finding, reinforced in paragraph 62, inexorably led to the judge's conclusion that the claimant did not genuinely believe his disclosure was in the public interest. I find that on the material before the judge, so excluding the CRIS report, the judge could only have concluded that the claimant genuinely believed that a crime had been committed, but he wished the matter to be investigated and had contacted the police to that end.

31. A key question for the judge, as he had identified, was whether in a case where there were mixed motives there were nevertheless features of the case that make it reasonable to regard disclosures as being in the public interest as well as in the personal interest of the worker. As I have held, the judge erred in making the finding that he did as to the claimant. I ask whether it is possible or appropriate for me to resolve this issue myself pursuant to **Jafri v Lincoln College** [2014] EWCA Civ 449. Reluctantly, I have concluded that it is not so open on the basis that I did not hear what, if any, submissions were made as to the other points which were raised by Mr. Sheldon, KC, on the sift and which I accept to be of considerable relevance.

32. Whether it is possible for the Employment Tribunal hearing this matter to redetermine those matters at the outset of the hearing starting shortly, as well as dealing with the substance of the claim, is not something on which I can comment. The Employment Tribunal at such a redetermination will be fixed with my finding as to the involvement of the police being pursuant to a report of fraud having been made by the claimant. So, to that extent the appeal succeeds.

