



EMPLOYMENT TRIBUNALS

Claimant: Mr A Gibson

Respondents: 1. Inglis Jane Limited
2. Mr Everett

Heard at: Liverpool

On: 23-25 October 2023

Before: Employment Judge Ainscough
Ms H D Price
Mr H Husain

REPRESENTATION:

Claimant: In person

Respondents: Mr Everett – second respondent

JUDGMENT having been sent to the parties on **8 December 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant began early conciliation on 28 April 2020 and the Employment Tribunal claim was issued against two respondents on 18 June 2020 via the claimant's solicitors.

2. In an attachment to the ET1, the claimant pleaded that he made a protected disclosure on 24 April 2020 which amounted to concerns about a breach of a legal obligation, a miscarriage of justice for concealing the breach of the legal obligation and the criminal offence. The claimant also pleaded that he had asserted a statutory right under section 104 of the Employment Rights Act 1996, namely the right to receive payments. The claimant pleaded that he had been summarily dismissed for raising these issues.

3. The claimant contended that the principal reason for his dismissal was the protected disclosures made on 24 April 2020 which was contrary to section 103A of the Employment Rights Act 1996.

4. The claimant also pleaded that the dismissal was also a detriment under section 47B of the Employment Rights Act 1996, and he pursued that claim against the second respondent.

5. The claimant sought a declaration of both detriment and a declaration of unfair dismissal because of protected disclosures, and in the alternative pleaded unfair dismissal in accordance with section 98 of the Employment Rights Act 1996.

6. Finally, the claimant confirmed that his claims were:

- (1) Automatic unfair dismissal as a result of a protected disclosure (section 103A Employment Rights Act 1996);
- (2) Detriment as a result of a protected disclosure (section 47B Employment Rights Act 1996); and
- (3) Wrongful dismissal.

7. At the case management hearing on 16 August 2021, at which the claimant was legally represented, Employment Judge Kurrein recorded that the claims brought by the claimant were protected disclosure detriment and dismissal and breach of contract, and that no other claims would be considered at the final hearing. The issues were set out from paragraph 10 onwards. No party subsequently wrote to Employment Judge Kurrein to say that those issues were wrong or objected to the record of the case management hearing.

8. At the outset of this hearing the Tribunal clarified the List of Issues with the parties. The claimant attended as a litigant in person but had been represented by solicitors up until 4.57pm on 20 October 2023.

Claimant's first amendment application

9. By way of a supplemental statement dated 18 October 2023 the claimant sought to amend the claim to include further protected disclosures.

10. The claimant said he was advised, approximately 12 weeks before the start of the final hearing by a different solicitor in the same firm, to rely upon additional disclosures. The claimant informed the Tribunal that documents to support that statement were served on 4 October 2023.

11. The claimant's legal representatives did not make any formal application to amend the claim. It was only when the Tribunal enquired about the issues in this case that the claimant has made an application to amend his claim to rely on the additional disclosures.

12. The statement does not set out the nature of the disclosures, why they qualify as protected disclosures, and how the claimant puts his position on reasonable belief.

13. The respondents objected to the application to amend. The respondents prepared their response on the basis of a disclosure that was allegedly made on 24 April 2020.

14. The Tribunal considered the relevant case law and the Presidential Guidance on case management matters.

15. The amendment was a substantial amendment. There was an introduction of new facts and a new cause of action which widened the claim to include commercial concerns. The time to include these claims expired by 23 July 2020. The claimant did not make an application to amend at the case management hearing that took place in August 2021 at which he was legally represented.

16. The Tribunal considered whether it is reasonably practicable for the claimant to have included this new cause of action within the three months from the last alleged detriment in April 2020 and if it was not reasonably practicable for him to do so, whether the claimant applied to amend within a reasonable time thereafter.

17. The claimant has had legal representation from the outset and confirmed under oath that his representatives had knowledge of the additional protected disclosures from the outset.

18. Therefore, the Tribunal concluded it was reasonably practicable for the claimant to include these disclosures at the time he lodged his claim. The application to amend was therefore, refused.

19. In addition, the respondents had not prepared a case to deal with the additional disclosures and the amendment would require a postponement of the final hearing. The witnesses on whom the claimant seeks to rely to support this additional claim were not going to attend the final hearing and therefore, the respondents would not have had an opportunity to challenge their evidence.

Claimant's second amendment application

20. At the outset of the hearing the claimant asserted that the claim of automatic unfair dismissal for asserting a statutory right should have been included in the list of issues.

21. The Tribunal determined that this was not a case that had been pleaded, and it was not clarified with Employment Judge Kurrein at the case management hearing. The claimant's witness evidence did not deal with such a claim and as a result, it was not a case to which the respondents had responded.

22. The Tribunal determined that the List of Issues as was finalised by Employment Judge Kurrein at the case management hearing on 16 August 2021 were the issues for the final hearing.

Issues

Unfair dismissal

23. Was the claimant dismissed?

24. If so, was the reason or principal reason for the dismissal that the claimant made a protected disclosure?

If so the claimant will be regarded as unfairly dismissed.

Protected disclosure

25. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

- a) What did the claimant say or write on 24 April 2020?
- b) Did they disclose information?
- c) Did they believe the disclosure of information was made in the public interest?
- d) Was that belief reasonable?
- e) Did they believe it tended to show:
 - (i) A criminal offence had been committed;
 - (ii) A person had failed to comply with any legal obligation
 - (iii) A miscarriage of justice had occurred;
 - (iv) Information tending to show any of these things had been or was likely to be deliberately concealed.
- f) Was that belief reasonable?

26. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Detriment

27. Did the respondent subject the claimant to a detriment?

28. If so, was it done on the ground that they made a protected disclosure?

Wrongful dismissal

29. What was the claimant's notice period?

30. Was the claimant paid for that notice period?

31. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Evidence

32. The Tribunal considered the claimant's witness statement and heard the claimant's evidence under oath. The Tribunal also considered the witness statement of the second respondent on behalf of the first and second respondent and heard the

second respondent's evidence under oath. The Tribunal were provided with a file of papers prepared by the claimant's legal representative.

Findings of Fact

33. The claimant's employment with the first respondent began on 15 April 2019 as the Managing Director, albeit he was not officially registered as a director on Companies House. The contract signed by the claimant and on behalf of the first respondent provided for a six month notice period. The Tribunal determines that Mr Kneafsey had the full authority of the owner, Mr Seabridge, to negotiate and agree terms with the claimant during the early part of April 2019, and the contract signed by Mr Kneafsey was on behalf of the first respondent.

34. In May 2019 the claimant asked not to be included in the first respondent's pension scheme because he had his own private pension. The first respondent agreed to pay the employee contributions into the claimant's private pension scheme. However, whilst the first respondent continued to deduct the claimant's own contributions from his monthly salary, the first respondent failed to pay that amount into the claimant's private pension scheme on a monthly basis. Instead, on 2 March 2020 the first respondent paid the claimant a lump sum of £6,866.24 which equated to the total sum of the employee contributions deducted up to the end of February 2020.

35. On 30 March 2020 the claimant confirmed to the first respondent that the full amount had been transferred to Aviva, the administrators of the private pension scheme.

36. On 30 March 2020 the claimant queried whether future deductions would be paid into his scheme, either by standing order or manual transfer as had previously occurred the month before.

37. On 31 March 2020 the claimant was paid full salary by the first respondent and the employee pension contribution was deducted. As of that date, the first respondent had not provided the claimant with clarity as to how the deduction would be paid into his private pension.

38. The claimant's contract provided for 35 days' annual leave inclusive of Bank Holidays. The first respondent's holiday year ran from January to December. On 30 March 2020 the first respondent agreed with the claimant that any untaken holiday from January 2019 through to December 2019 could be carried over into January 2020 to December 2020 leave year or paid in lieu of untaken leave.

39. On 2 April 2020 the second respondent took over ownership of the first respondent.

40. On 6 April 2020 the claimant emailed the second respondent setting out his concerns that he had about the financial health of the first respondent, and the concerns he had in regard to the claimant and a fellow employee (Mr Hutton) receiving monies owed.

41. On 15 April 2020 the claimant forwarded to the second respondent an email in which Mr Hutton expressed concern about future payments, and the claimant echoed those concerns.

42. On 17 April 2020 the claimant and the second respondent were involved in a conference call with a major contractor after which the second respondent confirmed to the claimant that he was impressed with his performance during the call.

43. On 23 April 2020 the claimant sent an email to the second respondent raising concerns about the financial health of the first respondent and also about the monies that were owed to the claimant by the first respondent. The claimant asked the second respondent to set up a conference call between the claimant, the second respondent and Mr Seabridge. The second respondent agreed to do this, and a conference call was set up for 3.00pm on 24 April 2020.

44. On 24 April 2020 at 1.02pm the claimant sent an email to the second respondent informing the second respondent that he had been in receipt of legal advice and had spoken to ACAS about monies owed. The claimant complained of unpaid expenses in March and April. He also complained that the employee pension contribution deducted from the March salary had not been paid to him to pay into his private pension scheme. He also complained of outstanding annual leave payments. The claimant raised concerns about the possible non payment of his salary in April. He informed the second respondent that he considered his contract had been breached and that he was going to pursue legal action unless all monies owed were paid by 30 April 2020. The second respondent never formally responded to this email.

45. At 1.49pm the claimant sent an email to the second respondent querying if the 3.00pm meeting scheduled for that day was going ahead. In response the second respondent cancelled the meeting and said he would respond later.

46. The claimant responded at 2.17pm urging the second respondent to have the meeting to discuss the email that had been sent on 23 April 2020 and confirmed that the email at 1.02pm from that day (24 April) had nothing to do with the financial picture. The claimant said the 1.02pm email was about protecting a breach in his contract.

47. At 2:28pm the second respondent responded and said that as the claimant no longer worked for the first respondent there was no point to the meeting.

48. At 2.41pm the claimant responded stating he had not received notice of termination of employment and he maintained he was still employed as the Managing Director.

49. At 2.53pm the second respondent said, "it's over" and that there was no way he could afford the salary or terms on which the claimant was employed, and the claimant was asked to stop making contact. The second respondent offered to be fair about the monies owed to the claimant.

50. At 3:45pm the claimant responded and reiterated he was owed monies and would be taking appropriate advice.

51. By March 2022 the first respondent had paid the claimant all monies claimed in the email from 1:02pm on 24 April 2020.

The Relevant Law

Part One: Protected Disclosures

52. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(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) ...
- (e) ...
- (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."

53. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

54. In **Chesterton Underhill LJ** addressed the question of the motivation for the disclosure in paragraph 30, saying that:

"... 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 or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

Part Two: Detriment in Employment

55. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

“A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure.”

Part Three: Unfair Dismissal

56. Section 103A of the Act deals with protected disclosures and reads as follows:-

“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”.

57. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

58. In **Beatt** the Court of Appeal described the reason for dismissal as

“the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so...”

59. In **Royal Mail Ltd v Jhuti [2018] ICR 982** the Court of Appeal considered situations where others are said to have influenced the decision maker. Only the mental processes of the decision-maker are relevant under section 103A (paragraphs 57 and 58), even where that person has been manipulated by a line manager of the claimant due to a protected disclosure (paragraph 61). Where the person motivated by protected disclosures undertakes the investigation (such as a disciplinary investigation) which causes the decision-maker to dismiss, that investigator's mental processes may be part of the “reason” for dismissal (paragraph 62). The Court left open whether that would be the position where the manipulator was not an investigator but the person at the head of the organisation (paragraph 63)

60. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, in such cases it is for the claimant to establish that the Tribunal has jurisdiction, so the claimant bears the burden of showing that the sole or principal reason for dismissal was the protected disclosure: **Jackson v ICS Group Ltd UKEAT/499/97.**

Discussion and Conclusions

Terms and Conditions of claimant's employment

61. The Tribunal has determined that the contract of employment with the first respondent was signed by the claimant on 11 April 2019 which provided for in particular, that the claimant was the Managing Director, he had a six month notice period, he was entitled to 35 days' annual leave, that the annual leave year ran from January to December, he was entitled to join (if he wanted to) a stakeholder pension scheme, and that he would be in receipt of a salary of £85,000. There is also a reference to an employee handbook which the Tribunal has not seen.

Did the claimant make a protected disclosure?

62. The claimant asserts that by his email to the respondents on 24 April 2020, he made a disclosure that was in the public interest; and had a reasonable belief that there was going to be a breach of a legal obligation, a miscarriage of justice; an attempt to conceal any breach of the legal obligation; and potential criminal offence.

Reasonable belief of S43B(1) provisions

63. The Tribunal has considered whether the claimant had a reasonable belief that the disclosure tended to show each of the provisions in S43B(1) and whether the claimant had a reasonable belief it was in the public interest.

a) Failure to comply with legal obligation

64. The claimant asserted that the respondent had failed to comply with a legal obligation to make the necessary payment of monies owed to the claimant.

65. The Tribunal determines that the claimant did have a reasonable belief based on evidence from the claimant and this was confirmed in the second respondent's evidence. There had been conversation between the claimant and the second respondent, but the second respondent did not have access to the bank account to make any payments.

b) Miscarriage of Justice

66. The Tribunal determines that there was no reference to any belief held by the claimant about this matter in his email of 24 April 2020. The claimant gave evidence that paragraph 2 of that email made reference to protecting others, but that this was not information disclosing a reasonable belief about a miscarriage of justice of any of those other people.

c) Concealment of breach of legal obligation

67. The Tribunal determines that the claimant would also not have had a reasonable belief about this because the second respondent had told the claimant that he did not have access to the bank account and had not confirmed such access to the claimant on 24 April 2020 and therefore the payments were unlikely to be made. The second respondent did not conceal this fact.

d) criminal offence

68. The Tribunal determines that the claimant did not have a reasonable belief that the non payment of monies owed to the claimant would amount to a criminal offence. The claimant did have a reasonable belief of a civil remedy and did make reference to this in the email of 24 April 2020, by saying that he was going to take it further with ACAS and/or an Employment Tribunal.

Reasonable belief in public interest

69. The Tribunal has considered whether the claimant had a reasonable belief that that breach of the legal obligation was in the public interest. The Tribunal considered the case of **Chesterton Global Limited v Mohamed Nurmohamed, Public Concern At Work (intervener) [2017] EWCA Civ 979** in which the Court of Appeal identified four factors:

- (1) whether the numbers in the group whose interests the disclosure served amount to being in the public interest;
- (2) Whether the nature of the interests affected by wrongdoing have been disclosed;
- (3) What the nature of the wrongdoing was that was disclosed; and
- (4) The identity of the alleged wrongdoer.

70. The identity of the alleged wrongdoer is a private limited company. This is not a public company operating in the public sector. The major contractor was another private entity.

71. The nature of the interest that was affected by the likely breach of the legal obligation was a contractual right to payment. The extent which those that would have been included within the disclosure were affected by that wrongdoing was a potential for non payment. There was also a lack of clarity for the claimant over the use of the deducted employee pension contribution.

72. The nature of the wrongdoing disclosed was the possible non payment of monies and the repayment of the pension contribution that had been deducted from the March salary.

73. The numbers of the groups whose interests the disclosure served was two – the claimant and Mr Hutton. There is reference to Mr Hutton in the email from the claimant, but the large majority of that email is from the claimant's perspective. The emails from 6 April 2020 and 15 April 2020 did raise concerns more squarely on behalf of the claimant and Mr Hutton, who were the only two employees left who could be affected by a possible non payment.

74. The Tribunal has determined, having considered those factors, that on the balance of probabilities the disclosure made by the claimant of the likelihood of a breach of the legal obligation was not in the public interest. The claimant was primarily complaining about his own contractual position and the disclosure was about potential wrongdoing.

75. The second respondent was not refusing to pay the claimant or Mr Hutton but had informed them of an inability to do so until he had access to a bank account.

The Tribunal determines that at the time the claimant sent the email, the second respondent had not failed to pay the claimant or Mr Hutton but indicated he may do so. Equally, on 17 April 2020 the second respondent had also indicated that he may have access to the bank account. On that basis the Tribunal has determined that this is not a protected disclosure and therefore has not determined if the claimant was subsequently subject to a detriment or dismissed because of a protected disclosure.

76. The claims for dismissal and detriment because of a protected disclosure are unsuccessful and are dismissed.

Wrongful dismissal

77. The Tribunal determined that the claimant was wrongfully dismissed by the first respondent. The Tribunal determined that the claimant's email of 24 April 2020 was not a resignation because the Tribunal concluded that 40 minutes later the claimant was chasing the second respondent about the 3.00pm meeting as the claimant remained concerned about the financial health of the business. Had the claimant intended to resign he would not have continued to engage about this issue.

78. The Tribunal concluded that the second respondent's email of 2:28pm saying "as no longer working for Inglis Jane" was a dismissal of the claimant. The position taken by the second respondent in evidence was that he admitted he was confused, making poor decisions and not getting to grips with the respondent's business. The second respondent admitted that he was out of his depth and did not know where the claimant's loyalties lay.

79. The Tribunal determined that by the time the second respondent bought the first respondent, the first respondent was in some commercial difficulty as a result of poor management. The second respondent does not appear to have carried out any real due diligence on the acquisition. The second respondent admitted that he had bought the company following his mother's death when he needed something to do. The second respondent admitted to being emotional at this time. The email from the second respondent at 2:28pm was a reaction to his feelings about the claimant and to remove the claimant from the business.

80. The Tribunal has determined that the claimant is entitled to six months' notice pay. In light of the limits on the Tribunal's jurisdiction, the amount will be limited to £25,000 payable by the first respondent.

Employment Judge Ainscough
Date: 31 January 2024

12 February 2024

FOR THE TRIBUNAL OFFICE

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