EMPLOYMENT TRIBUNALS

Claimant: Mr S Ibrahim

Respondent: HCA International Limited

Heard: in public via CVP **On:** 10 and 11 October 2024

Before: Employment Judge Ayre, sitting alone

Representation

Claimant: Ms A Jabir, counsel
Respondent: Mr K Bryant KC, counsel

RESERVED JUDGMENT AT PRELIMINARY HEARING

1. At the time he made the disclosures about false rumours circulating, in March 2016, the claimant did not have a subjective belief that the disclosures were made in the public interest. The disclosures are therefore not qualifying disclosures and do not fall within section 43B of the Employment Rights Act 1996.

REASONS

Introduction and issues

1. The background to this claim is helpfully set out in the Record of the Preliminary

Hearing before Regional Employment Judge Freer on 1 August 2024. I do not propose to repeat it here.

2. The issue that fell to be decided at today's hearing was as set out at paragraph 30 of the judgment of Lord Justice Bean in the Court of Appeal:

   "*whether the Claimant had a subjective belief that the disclosures were in the public interest and, if so, whether such belief was reasonable.*"

3. The disclosures in question were disclosures made by the claimant on 15th and 22nd March 2016 that there were false rumours that the claimant was breaching patient confidentiality.

The hearing

Evidence

4. There were two bundles of documents before me. The first was a 'reconstituted' copy of the bundle used at the original Preliminary Hearing in June 2017, and ran to 533 pages. The second was a copy of the bundle prepared for the Preliminary Hearing before REJ Freer on 1 August 2024 and ran to 141 pages. Both counsel produced written skeleton arguments, for which I am grateful, and supplemented their written submissions with oral submissions. Mr Bryant produced a bundle of authorities.

5. I was provided with copies of the skeleton argument prepared by the claimant for the hearing in June 2017, together with his written closing submissions to that hearing. I was also provided with a witness statement for Troy Coldrick, who gave evidence for the respondent at the Preliminary Hearing in June 2017. Mr Coldrick was not present at the hearing. I have read his witness statement but placed no weight on it as it.

6. The claimant gave evidence. He produced three witness statements:

   1. His original statement produced for the Preliminary Hearing in June 2017;

   2. A supplemental statement dated 19 September 2024; and

   3. A second supplemental statement dated 8th October 2024.

7. The claimant also sought to introduce a witness statement for his wife, Mrs El Bassri.

8. In relation to the evidence to be considered at this hearing, the Court of Appeal held that:

   "*The findings of fact in paragraphs 43-45 of the existing judgment should be treated as binding. The Claimant should be at liberty to give further evidence. It does not seem to me that evidence on this limited issue will be required from any other*

witness, but if so an application can be made to the ET for appropriate directions."

9. The Record of the Preliminary Hearing before Regional Employment Judge Freer on 1 August 2024 records, at paragraph 19, that "*The remitted matter is to address the Claimant's own personal subjective beliefs and therefore it is currently difficult to see how the evidence of another person will assist in that respect.*" It goes on, at paragraph 20, to record that:

   "*It is my view that the Court of Appeal intended for the matter to be considered afresh on the narrow remitted issue under the same circumstances as the original hearing, save for potential of additional evidence from the Claimant. It was not anticipated that the matter would be freshly litigated with additional evidence. To do so would, in my view, undermine the Court of Appeal's direction that the findings of fact at paragraphs 43-45 of the existing judgment should be treated as binding. Therefore no further order will be made at this stage. However, Judge Ayre, at her discretion, may be in a better position at the hearing to consider whether further evidence will be allowed.*"

<u>Admissibility of the second supplemental witness statement for the claimant, and the witness statement for Mrs El Bassri</u>

10. The respondent objected to the introduction of the second supplementary witness statement for the claimant, and to the introduction of the witness statement for Mrs Bassri. I heard submissions from both parties at the start of the hearing on the admissibility of those statements.

11. Having considered carefully the submissions of both parties, I decided to admit into evidence the second supplemental witness statement for the claimant, but not the statement of Mrs Bassri. The reasons for my decision are as follows:

    1. In the leading judgment in the Court of Appeal, Lord Justice Bean commented that it did not seem to him that evidence on the issue to be decided today would be required from any witness other than the claimant, but that if so an application could be made to the Tribunal.

    2. In the Record of the Preliminary Hearing on 1 August 2024 Regional Employment Judge Freer commented that it was difficult to see how the evidence of anyone other than the claimant could help the Tribunal decide what the claimant's personal subjective beliefs were. He did not exclude the possibility of additional evidence, however.

    3. The introduction of additional evidence was therefore not excluded by the decisions of the Court of Appeal or the Regional Employment Judge, and both foresaw the possibility of an application to introduce such evidence. Both expressed their reservations however as to how relevant such evidence would be.

4. My primary consideration when deciding whether to admit both witness statements is whether the evidence contained within the statements will assist me in reaching my decision on the narrow issue that I have to determine. Is the evidence in the statements relevant, and what probative value does it have?

5. I have also considered whether it would be in the interests of justice and in line with the overriding objective to introduce the witness statements into evidence, and whether the respondent would be prejudiced if they were to be introduced. Both witness statements were produced late. The second supplementary statement for the claimant is dated 8th October 2024 and Mrs El Bassri's statement is dated 6th October 2024. On 1 August 2024 REJ Freer ordered that the claimant should serve any supplementary witness statements of his own on which he wished to rely, no later than 3 weeks before the first day of the hearing. The claimant complied with that deadline by serving his first supplemental statement on 19 September 2024. The statements which are in dispute were served considerably after that date, just a few days before this hearing.

6. I take note of the fact that, as Ms Jabir pointed out, the claimant has been a litigant in person during these proceedings. He has however had regular access to pro bono legal advice and has been represented by counsel at the hearings that have taken place since the original Preliminary Hearing in June 2017, including by senior counsel in the Court of Appeal.

7. Ms Jabir indicated that she had only been instructed 3 weeks ago and that it was following her instruction that the claimant had prepared the second supplementary witness statement. It was, largely, a matter for the claimant as to when to instruct counsel. In any event, the claimant has been aware of the issue that this hearing would decide since 2019. He has also been aware of the Case Management Orders since 1 August 2024. He was represented by counsel at the Preliminary Hearing in August 2024.

8. The claimant is clearly an intelligent and professional man whose wife, I am told by Ms Jabir, works for a law firm and is training to be a solicitor. The claimant has more access to legal advice and knowledge than many if not most litigants in person.

9. At the original Preliminary Hearing before me in June 2017, the claimant chose not to call his wife to give evidence.

10. Having read the witness statement of Mrs El Bassri, I am not persuaded that it will assist me in reaching my decision. The statement contains very little, if any, relevant evidence. The focus of my enquiry at this hearing is on the personal subjective belief of the claimant. I have no reason, having read Mrs El Bassri's statement and considered the eloquent submissions of Ms Jabir, to depart from the view expressed by the Court of Appeal and the Regional

Employment Judge (albeit without the benefit of having read Mrs El Bassri's statement) that the evidence of someone other than the claimant is unlikely to be of assistance.

11. The statement of Mrs El Bassri is, therefore, not admitted into evidence.

12. The second supplementary witness statement of the claimant does, in my view, contain evidence about the claimant's subjective belief at the time he made the alleged disclosures in March 2016. It is therefore relevant and of assistance to the Tribunal in reaching its conclusion. I am concerned that it has been submitted late but take account of the fact that the overriding objective requires me to deal with this case so far as practicable by avoiding unnecessary formality and seeking flexibility.

13. I am satisfied that the respondent will not be prejudiced by the late admission of this statement, which is relatively brief. The respondent is ably represented today by Mr Bryant, who will have the opportunity to cross examine the claimant on it.

14. It is therefore in my view in the interests of justice to admit the second supplementary statement of the claimant into evidence.

Documents before the Court of Appeal

12. At the start of the second day of the hearing, after the conclusion of the evidence and submissions, the claimant applied to introduce into evidence a further three documents:

    1. A skeleton argument prepared on behalf of the claimant by counsel Jeremy Lewis and Georgina Churchhouse for the Court of Appeal hearing on 7 November 2019;

    2. Supplemental submissions prepared by the same counsel for the Court of Appeal hearing; and

    3. A document headed "Combined notes of evidence and gist of evidence (unagreed)' (from the Preliminary Hearing in June 2017) prepared, it appears, by counsel representing the claimant at the Court of Appeal and/or by the claimant, for use at the hearing before the Court of Appeal.

13. Ms Jabir indicated that the claimant wished to introduce these documents to show that the claimant had previously asserted that when he made the disclosures in March 2016 he had the interests of other people, and the reputation of the hospital in mind. Mr Bryant accepted that these matters had been raised before the Court of Appeal by Jeremey Lewis and did not object to the introduction into evidence of the skeleton argument and submissions for the sole purpose of showing that the matters had been raised in the Court of Appeal. The skeleton argument and supplemental

submissions were therefore admitted by consent.

14. In support of her application to submit the 'Combined notes of evidence' from 2017 into evidence, Ms Jabir submitted that the document showed that the claimant had always been concerned by the reputation of the hospital and the hospital's staff when he made his disclosures, and that the evidence he gave to the Tribunal during this hearing was remarkably similar to the evidence he gave in 2017.

15. Mr Bryant objected to the introduction into evidence of the 'Combined notes of evidence'. The document was, he said, produced at a very late stage, after the conclusion of the claimant's evidence and submissions. It was, he said, not possible to say whether the notes of evidence were correct or not. If the Tribunal was minded to take the notes into account further evidence would be required in terms of the original notes of evidence taken by both parties and the Employment Judge during the Preliminary Hearing in 2017, and evidence of how the 'combined notes' had been produced. The combined notes had been before the Court of Appeal who had commented that they were not of any assistance.

16. Having considered the submissions made by both parties, and reviewed the parts of the 'Combined notes' to which I was taken by Ms Jabir, I decided not to admit them into evidence for the following reasons:

    1. The notes were not an agreed record of the evidence and appear to have been produced, at least in part, by counsel who was not present at the Preliminary Hearing in 2017;

    2. The notes are unlikely to be of any assistance to the Tribunal in reaching its decision. It is not clear from the notes what questions were put to the claimant in cross examination, or what the full answer was. It is not clear what alleged disclosure the evidence relates to, and whether it was to the disclosures about false rumours of breaches of confidentiality or other alleged disclosures;

    3. It would be inappropriate, and indeed a dangerous road for this Tribunal to go down, to reconsider evidence that was given more than 7 years ago, in respect of which findings of fact have already been made.

    4. The notes have been produced at a very late stage in the proceedings, despite the claimant's counsel having been instructed three weeks ago. The submissions made yesterday by Mr Bryant cannot have come as any surprise to the claimant.

    5. The practical consequences of allowing the document into evidence would be further delay and cost to both sides. The claimant would have to be recalled to give evidence on them.

Findings of fact

17. As set out in the judgment of the Court of Appeal, the findings of fact in paragraphs 43-45 of my judgment following the Preliminary Hearing in June 2017 are binding. Those findings are as follows:

"*43. On 15th March 2016 the claimant met with Lesley Pope, the Director of Rehabilitation. The claimant asked her to investigate two issues that he was concerned about. The first was his belief that there were rumours that he (the claimant) had been involved in a breach or breaches of patient confidentiality, and the second was that Ilham Mohammed had behaved in an unprofessional manner towards him.*

44. On 16th March the claimant sent an email to Lesley pope to follow up on their meeting the previous day. In that email he wrote:-

"…I would like you to launch a formal investigation into the following two matters, which might be linked to each other or totally different matters, only an investigation will tell!

First, to investigate into the rumours among the international patients and their families about my confidentiality and performance (I informed you before that I was blamed by some families for disclosing patients confidential information, but unfortunately they refused to make a complaint against me, although I tried with them to do so. I explained to you that I cannot accept this as a settlement and I need to clear my name otherwise I will not be able to do my work properly.

Second, I told you that I had a feeling that I was 'kicked out of my office' and as the time passes my feeling gets stronger and stronger. I accused Ilham of a major misconduct i.e. She took an action against me without giving me the chance to defend myself, and that she has been slandering me to my colleagues"

45. Lesley Pope referred the matter to the respondent's HR team. On 22nd March Sheila Johnson, Chief Human Resources Officer, met with the claimant and Nezha Elbassri. The claimant told Ms Johnson that he felt degraded, humiliated, shocked and confused, and that he believed there were rumours among patients and their families that he had been leaking patients' confidential information. He told her he wanted to clear his name and restore his reputation. Ms Johnson asked the claimant to prepare a document setting out the concerns that had been raised and told him that she would then start an investigation."

18. Further on in the judgment following the Preliminary Hearing in June 2017 the Tribunal made the following finding of fact :

"*46. The claimant wrote to Ms Johnson on 28th March summarising his main concerns as being – "the rumours around the hospital accusing me of breaching the patient confidentiality policy" and "my relationship with my line manager"*"

19. Later on in the email of 28th March 2016 the claimant wrote: "*I also explained that I am very interested to clear my name. I really do not feel comfortable when I interact with the International patients and their families*".

20. In paragraph 130 of the Judgment at the previous Preliminary Hearing the Tribunal reached the following conclusion, which was not overturned on appeal:

    "*Whilst the Tribunal accepts that disclosure of information tending to show that patient confidentiality has been breached would be a matter of public interest, the claimant did not disclose information tending to show that patient confidentiality had been breached. Rather, he complained that others had falsely accused him of breaching patient confidentiality."*

Claimant's evidence

21. The claimant has produced three witness statements during the course of these proceedings. The first statement, provided for the Preliminary Hearing in June 2017, contains very limited information about the protected disclosures. It merely says that "*On Tuesday 15th March 2016, I met Lesley in her office and I raised my concerns and asked her to investigate into two issues; the rumours involving me in breach of patient confidentiality and Ilham's unprofessional behaviour and actions against me*" [paragraph 34]. This wording repeats what the claimant said about the disclosure in his claim form.

22. The first witness statement does not specifically say whether the claimant believed the disclosure he made on 15th March was in the public interest. Later on in the statement the claimant does refers to his motivation, albeit in the context of a grievance he subsequently raised about the issues, when he said, in relation to a meeting he had on 22nd March, "*I informed Sheila that I want to raise a Formal Grievance, as I felt really degraded, humiliated and was shocked and confused. Moreover, because there were rumours among patients and their families that I had been leaking patients' confidential information and I wanted to clear my name and restore my reputation…*" [paragraph 38] This evidence was accepted by the Tribunal and is reflected in paragraph 45 of the Reserved Judgment following the June 2017 Preliminary Hearing. It also repeats what the claimant said about the disclosure in his claim form.

23. The claimant's second witness statement, dated 19 September 2024 and prepared specifically for this Preliminary Hearing, ran to five pages and 21 paragraphs, and was accompanied by a number of exhibits. At the start of the statement the claimant says, "*the Claimant in this supplementary witness statement highlights some important points supporting his argument that he genuinely believed that his disclosures were made in the public interest and that it was reasonable to believe so.*"

24. It is clear from this comment that the claimant understood the issue that he needed to address in the statement. He says very little however about why the protected

disclosure about false rumours that he was breaching patient confidentiality was in the public interest. His evidence on the question of public interest was :

"*the Claimant holds a certificate in Health Interpreting; and in this community health interpreting course a great emphasis is put on patient confidentiality, therefore, it is unlikely that the Claimant did not have the public interest element in his mind when he made his protected disclosures…*

The Claimant is also a dentist and it is beyond doubt that he was aware of the seriousness of any breach of patient confidentiality, and that investigating such a breach would be in the public interest…

The Claimant worked in the health sector for more than two decades, as a dentist in Syria and as an Interpreter in the UK, and anyone works in the health sector no doubt knows that breaching patient confidentiality is illegal and a crime. The Claimant acted based on this fact and reported the leak of patients' confidential information to the hospital management and chased them to investigate. The Claimant had firm conviction that he was reporting a crime and expected the Respondent to deal with his concerns as such. Reporting a crime can not be anything but in the public interest. The Claimant says that he finds it very awkward to be put in a position where he needs to prove what is considered an axiom in the health sector. Yes as a dentist and an experienced medical Interpreter it would be unreasonable if the Claimant argues that he did not know that breaching patient confidentiality is illegal and a crime, however, our situation is sort of surrealism because the norm is to know the axiom and the exception is not to know it….In our case the Claimant is being challenged to prove that he knew that breaching the patient confidentiality is illegal/ a crime….

The Claimant discussed with the Respondent on several occasions the importance of a thorough investigation into the leak of the patients confidential information and the rumours linking him to those breaches….

The leak of patient confidential information was a matter of fact, but blaming the Claimant for this breach was a false rumour. The patients and their families accused the Claimant of leaking their confidential information; they were very upset because their confidential information was disclosed and spread…

The investigation itself, and of course its outcome, is in the public interest. The patients and their families were very keen to know who was responsible for the leak. The hospital also had interest in a thorough investigation to get to the bottom of this matter….

The investigation was in the interest of the Claimant and also in the interest of the patients and their families….The Hospital also had interest in the investigation because as a health provider it has duty by law to maintain high level of patient confidentiality….

…there were three parties that had interest in a thorough investigation, the Claimant, the Respondent and the patients and their families….

25. The focus of this witness statement is on breaches of patient confidentiality, rather than on the false rumours that the Tribunal found to be the disclosures made by the claimant. The bulk of the evidence on public interest in this statement is on matters which were not part of the disclosures in question. The claimant does however mention, albeit briefly, that patients, their families and the hospital had an interest in an investigation into the false rumours.

26. The claimant's third witness statement, dated 8 October 2024 and prepared on the advice of Ms Jabir, runs to 6 pages and 17 paragraphs. It contains the following:

"*…what concerned me the most was what the mother of the patient staying in the 4th floor said about me. I was very concerned about the leak of patient confidentiality and the rumours linking me to the leak, and this is why my priority was to speak with the patients and their families…."*

27. This evidence contradicts what the claimant said previously, about his main concern being to clear his name and restore his reputation. The statement goes on to state that:

"I put my right hand on Al- Quran and sworn that I had nothing to do with the leak of patient confidentiality and that I was totally innocent…I then told the relatives that this was not going to solve the matter, and that they must report their concerns to the hospital management. I explained that it was a very important matter affecting them, the hospital as a whole, and myself as well because I was the one accused of the leak…They were very unhappy because of the leak….

On 15th March 2016, I met with Lesley and informed her that he wanted to go for a formal grievance for two issues, the 1st issue was about the leak of patient confidentiality and the rumours accusing me of the leak, the 2nd issue was about the treatment I was receiving from Ilham….I was very clear that there was a breach of patient confidentiality and that I was blamed by the patients and their families of the leak. I asked Lesley to investigate because I wanted to clear my name so I can work with the patients again. I explained that the patients and their families lost trust in me and that was not good for the hospital reputation as well. I explained that an investigation is a must to address the patients concerns and it will help regaining their trust in me and the hospital…..

I was aware that my reputation as an Interpreter is very crucial and that it was in the patients' interest to clear his name. Working with the patients would be impossible if they did not have trust in the interpreter. I strongly believed that it was in the patients' interest to identify the person who was responsible for the leak if there was leak, and even if the investigation concluded that there was no leak, the investigation would still be in the patients' interest….the patients had interest in the investigation, the hospital as a whole had interest in the investigation, I myself had interest as well

because I was accused of the leak."

28. During his evidence to this hearing the claimant suggested that the disclosures he made in March 2016 were not just about rumours that he had breached patient confidentiality, but rather were also about breaches of confidentiality generally. He acknowledged that there is a difference between the two. I am however bound by my previous findings that the disclosures were about the rumours about the claimant, which the EAT found to be allegations of defamation, rather than about breaches of patient confidentiality per se.

29. The claimant said in his oral evidence that the false rumours were the core of the problem, that he could not do his work because the trust between the patients and him had gone, and that he wanted to rebuild his relationship with the patients. On two occasions however he said that he did not know whether this was in the public interest or not.

30. The claimant also told the Tribunal that the public interest was not in his mind when he made the disclosure, and that what he had in mind was to be able carrying on doing his job. The focus of his oral evidence was on the issue of a breach of patient confidentiality, which he said was the most important thing for him, and interlinked with the false rumours that he was responsible for the breach.

31. Later on in his oral evidence the claimant said that it was in the interests of everyone in the hospital to know whether the rumours about him were true or not and suggested that making the disclosure was in the interests of patients and the hospital's reputation.

32. The claimant also gave evidence that the patients were not concerned about the hospital's reputation, but he was. He suggested that all those working with him and the patients at the hospital had an interest in his reputation.

33. In response to a specific question from the Judge about whose interests he believed he was making the disclosures for, the claimant replied for himself, the patients and their families and everyone in the hospital.

34. The claimant's evidence in relation to whether he believed, at the time of the disclosures about false rumours, has been inconsistent and has changed over time. The most telling evidence, in my view, is the evidence he gave under cross examination at this hearing, that the public interest was not in his mind when he made the disclosures. This evidence is consistent with what little contemporaneous documentary evidence there is from March 2016, namely the emails of 16th March 2016 in which the claimant referred to clearing his name, and the of 22nd March 2016 in which he referred to clearing his name and restoring his reputation.

35. I therefore find that what was in the claimant's mind at the time he made the disclosures about false rumours in 2016 was clearing his name and restoring his reputation, and not the public interest in the fact that he was potentially being

defamed.

The Law

36. The relevant statutory provisions are set out in sections 43A and 43B of the Employment Rights Act 1996 as follows:

"***43A Meaning of "protected disclosure"***

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.

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…."

37. In order for a disclosure to be a qualifying disclosure, the worker must reasonably believe that it tends to show one of the relevant matters. He must also reasonably believe that the disclosure is in the public interest.

38. The test for 'reasonable belief' is both objective and subjective. The Tribunal must focus on what the claimant believed (rather than what a hypothetical reasonable worker may believe) but there must also be some objective basis for the claimant's belief (***Korashi v Abertawe Bro Morgannwy University Local Health Board [2012] IRLR 4***). In ***Phoenix House Ltd v Stockman [2017] ICR 84***, the EAT, endorsing the approach taken in ***Korashi***, held that, on the facts that the claimant believed to exist, a judgment must be made firstly as to whether the belief was reasonable and secondly whether looking at matters objectively, there was a reasonable belief that the facts tend to show one of the relevant matters.

39. In the leading judgment in ***Chesterton Global Ltd (t/a Chesterton) v Nurmohamed [2017] EWCA Civ 979*** Underhill LJ held:

"*27…. The tribunal thus has 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.*

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured…. All that matters it 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. That does

not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view if not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it….

30. Fourth, 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…. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation….

31. Finally by way of preliminary….I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression….

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 in 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. 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…."

40. The Court of Appeal also held that when considering whether a disclosure is in the public interest, factors that may be relevant include:

    1. The number of people whose interests the disclosure served;

    2. The nature of the interests affected and the extent to which they are affected by the wrongdoing that is being disclosed;

    3. The nature of the wrongdoing disclosed; and

    4. The identity of the alleged wrongdoer.

Submissions

41. I summarise briefly below the submissions made by each party. The fact that a point raised in submissions is not mentioned below should not be taken as any indication that it has not been considered.

Respondent

42. Mr Bryant submitted that the evidence does not support a finding that the claimant subjectively believed that a disclosure that could amount to defamation (as opposed to a disclosure that patient confidentiality was in fact being breached) was in the public interest. Further, even if the claimant did hold such a belief, that belief was not reasonable.

43. Further, to the extent that the claimant's case was based on a breach of patient confidentiality, Mr Bryant submitted that it must fail, because of the uncontested conclusions reached in June 2017 that the claimant did not disclose information about a breach of patient confidentiality. The claimant had, he said, repeatedly addressed the question of whether patient confidentiality was in the public interest, rather than the question of whether a disclosure about spreading false rumours was in the public interest.

44. Mr Bryant referred to ***Gestmin v Credit Suisse (UK) Ltd and another [2013] EWHC 3560*** and ***Kogan v Martin and others [2019] EWCA Civ 1645*** which he says suggest that, although it is for the Tribunal to assess all of the admissible evidence when making its findings of fact, it should be cautious about placing much, if any, weight on a witness's recollection of events some years earlier, and that the better approach may be to rely on inferences drawn from contemporaneous documentary evidence.

45. The Tribunal should, in Mr Bryant's submission, be very cautious about accepting what the claimant is now saying for the first time 8 years after the disclosures were made. The most recent witness statement of the claimant was, Mr Bryant submitted, self-serving, and when assessing its credibility, the Tribunal should bear in mind that the claimant had been told by the Court of Appeal and the Regional Employment Judge what will be considered today and had received advice from counsel. Memory is, he says, fallible, and can be sub-consciously changed to suit what the litigation requires.

46. The evidence, Mr Bryant says, does not support a finding that the claimant was thinking about anything in the public interest at the time he made the disclosures. Even if, the claimant did have a subjective belief that his disclosures were in the public interest, that belief was not reasonable. The claimant is not someone with a highly public profile, but rather wanted to clear his own name and it is 'neither here nor there' whether someone was spreading false rumours about him.

Claimant

47. Ms Jabir invited the Tribunal to conclude that, when the claimant made his disclosures in 2016, he had a subjective belief that they were in the public interest and that this belief was reasonable.

48. Ms Jabir referred to the following extract from Volume 16, Chapter 3, paragraph 3.42 of the IDS Employment Law Handbook:

    "*A tribunal is not tasked with asking itself the objective questions of what the public interest is, and whether a disclosure served it; the legislation poses the altogether more difficult challenge of gauging: i) what the worker considered to be in the public interest, ii) whether the worker believed that the disclosure served that interest, and iii) whether that belief was held reasonably …*

    case law has been clear that, when considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. So, in relation to 'public interest', a tribunal might take into account the fact that the average man or woman in the street will have a less clearly defined concept of the 'public interest' than a lawyer or civil servant, and will not deprive a worker of protection simply because his or her genuine belief was wrong."

49. She also referred to the judgment of the EAT in ***Okwu v Rise Community Action UKEAT/0082/19/00***, a case involving disclosures about breaches of data protection legislation, in which the EAT confirmed that making disclosures in the claimant's own interest did not prevent the disclosures being in the public interest, and that the public interest need not be the only motivation for making the disclosure, and suggested that disclosures about certain subjects are likely to be in the public interest.

50. Ms Jabir submitted that there is a public interest in defamation, citing paragraph 3.35 of Chapter 3 of Volume 16 of the IDS Employment Handbooks:

    "*Defamation cases have identified a number of matters that may legitimately be regarded as engaging the public interest: the conduct of any person seeking a public office or a position of trust (in so far as that conduct is relevant to the fitness to hold office or perform the duties thereof*"

51. Ms Jabir further submitted that 'belief' is a low threshold to meet as it is entirely centred upon a subjective consideration of what was in the mind of the claimant. Circumstances which explain the claimant's understanding of what is in the public interest, she says, include the following:

    1. The claimant is from Syria and only came to the UK in 2005;
    2. The claimant is not a legal practitioner and therefore has a less legally precise concept of public interest;

3. Whilst in Syria the claimant worked in the health industry as a dentist; and
4. He was a qualified health interpreter who placed a great emphasis on patient confidentiality.

52. The claimant was, in Ms Jabir's submissions, concerned when he made the disclosures about the public at large and not just himself, in particular he was concerned that patients might lose trust in him as a result of the false rumours, and that the rumours would damage the hospital's reputation. In relation to the four 'tests' set out in ***Chesterton***, Ms Jabir submitted that:

    1. The disclosure served several people: the claimant, his patients and the hospital;
    2. The nature of the interests affected was important: it is important that patients trust their interpreters and that a hospital's reputation is protected;
    3. The wrongdoing disclosed could have been deliberate; and
    4. The identity of the alleged wrongdoer was likely to be a member of hospital staff.

53. There were, in Ms Jabir's submissions, traces of the evidence that the claimant gave to this hearing throughout, for example his reference to his ability to carry out his work, which relates to the trust between him and the patients.

54. In relation to the respondent's submission that the Tribunal should treat with caution evidence given so long after the event, Ms Jabir submitted that the claimant should not be penalised for the delays in arranging this hearing, given that there had been a 5-year delay on the part of the Tribunal.

Conclusions

55. In reaching my conclusions in this case I have considered carefully the evidence before me, the legal principles summarised above, and the submissions of both parties.

56. The findings as to what information was disclosed by the claimant on 15th and 22nd March 2016 are not overturned by the Employment Appeal Tribunal or the Court of Appeal. Her Honour Judge Stacey, in her Judgment at the EAT, found that:

    "*16. In the Claimant's ET1 he listed "damage to reputation/defamation" as a claim which the respondent correctly observed in its ET3 is not a cause of action listed in the **Employment Tribunals Act 1996** and the Tribunal has no jurisdiction to consider it. Nonetheless it articulates the Claimant's allegation that he has been defamed by what he described as "false rumours" about his having breached patient confidentiality.*

17…..The concern about him being falsely accused of breaching patient confidentiality …was clearly the root of his concern…

21….It is apparent that the Claimant's complaint of damaging false rumours about him that he has breached patient confidentiality is clearly an allegation that he is being defamed. The Tribunal has erred in concluding that the Claimant has not identified any legal obligation that may have been breached…."

57. In the Judgment from the Preliminary Hearing in June 2017, under the heading 'Qualifying Disclosures' the Tribunal found that:

"*124. The matters complained of by the claimant were that:-*

124.1 He was the subject of false rumours that he had breached patient confidentiality; and that

124.2 Ilhan Mohammed had behaved badly towards him."

58. Those findings have not been overturned. Accordingly the disclosures that I have to consider are not ones about breaches of patient confidentiality generally, but rather disclosures that the claimant was the subject of false rumours that he had breached patient confidentiality which are potentially defamatory.

59. In the Court of Appeal Judgment in this case, handed down on 19 November 2019, Lord Justice Bean commented that "*a claimant's predominant motive in making the disclosures is not the same thing as his subjective belief*." [para 17] and that: "*The narrative at paragraphs 43 to 45 of the ET judgment shows clearly that nothing was said by the Claimant at the time about the public interest, nor even about the reputation of the hospital at which he had been working. But, while that is a point to be made against the Claimant's case on subjective belief, it does not dispose of it altogether.*" [para 26]

60. In reaching my conclusions on the question of whether the claimant had a subjective belief that the disclosures he made were in the public interest, I have had to weigh up the evidence given by the claimant, which has changed over time. It is clear from the balance of the evidence before me that the claimant's motivation in making the disclosures about false rumors on 15th and 22nd March 2016 was to clear his name and rebuild his reputation. That however does not prevent the disclosures he made being in the public interest as a disclosure may be made in the public interest even if the public interest does not form any part of the claimant's motivation for making the disclosure. Motivation for making a disclosure and subjective belief in the public interest of the disclosure are two distinct concepts.

61. Considering all of the evidence before me, I find that the first time that the claimant suggested in his evidence in any meaningful way that his disclosures about the

false rumours were made in the interest of the patients, their families and the hospital, was in his third witness statement and during oral evidence to today's hearing. His first witness statement does not address the issue and the emphasis in the second witness statement is on the claimant's belief that disclosures about breaches of patient confidentiality are in the public interest.

62. His evidence to this hearing that he did not know whether the disclosure about the false rumours was in the public interest, and that it wasn't in his mind whether it was in the public interest or not is, in my view, telling. It is also consistent with the contemporaneous evidence in terms of the emails he sent in March 2016 that his concern was his reputation and to clear his name. There is no contemporaneous evidence whatsoever to suggest that the public interest was in the claimant's mind when he made the disclosures.

63. Nor in there any such evidence in his claim form, which he presented to the Tribunal on 24 January 2017 or the witness statement that the claimant prepared for the Preliminary Hearing in June 2017, that he believed the disclosures he made to be in the interest of patients, their families and the hospital.

64. Whilst I have no hesitation in finding that disclosures about breaches of patient confidentiality in a hospital would be in the public interest, there is a clear distinction between disclosures about breaches of patient confidentiality and disclosures about false rumours of breaches of patient confidentiality. It is the latter that I have to consider.

65. In reaching my conclusions I have, as Ms Sabir suggested, taken account of the particular circumstances which might affect the claimant's understanding of the public interest. The claimant is from Syria but has worked in the medical profession in both the UK and in Syria. He is an intelligent and articulate individual who is able to clearly express his views, obtain legal advice and assert his rights. He was and is familiar with the importance of patient confidentiality and demonstrated through his evidence his understanding of the public interest in patient confidentiality. He also referred in his claim form to defamation. Whilst I accept Ms Jabir's submission that disclosure of information about defamation can potentially be in the public interest, I find that in this case the public interest was not in the claimant's mind when he made the disclosures.

66. It is in my view likely that, if the claimant had a belief at the time of his disclosures, that they were in the public interest, he would have said so. Instead, he referred in the contemporaneous evidence only to his personal interest in making the disclosures.

67. The references to the public interest came at a much later stage in the proceedings. Whilst I accept in its entirety Ms Jabir's submission that the claimant should not be penalised for delays in arranging this hearing, the reasons I place less weight upon his third witness statement are that:

1. The statement was his third attempt at evidence and produced shortly after the second statement on the advice of counsel. It is therefore largely self-serving; and
2. The statement was directly contradicted by comments made by the claimant in oral evidence during the hearing that the public interest was not in his mind at the time of the disclosures.

68. For the above reasons I find that, at the time of the disclosures about the false rumours in March 2016, the claimant did not subjectively believe that the disclosures he was making were in the public interest. Rather, be believed that they were in his own personal interest, and he did not consider the public interest at the time. The disclosures do not, therefore, fall within section 43B of the Employment Rights Act and, as such, are not qualifying disclosures.

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Employment Judge Ayre

Date: 4 November 2024

JUDGMENT SENT TO THE PARTIES ON

13 November 2024

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FOR THE TRIBUNAL OFFICE