



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr Jan Tari
Respondent: Nursing & Midwifery Council
Heard at: in public by CVP
On: 15, 16, 19 August 2024
Before: Employment Judge Adkin

Appearances

For the claimant: in person
For the respondent: Ms H Barney, Counsel

REASONS

1. Reasons for the judgment dismissing the claim brought pursuant to section 103A of the Employment Rights Act 1996 have been requested by the Claimant.
2. By an oral decision, confirmed in writing on 19 August 2024, I dismissed the claim of automatic unfair dismissal because of a protected disclosure pursuant to section 103A of the Employment Rights Act 1996 on the basis that it was not well founded.

Summary

3. The Respondent is the regulator for nurses and midwives. There are more than 800,000 registered nurses and midwives nationally.
4. The Claimant is a Database Developer. He has very substantial experience in database work. He identifies among his skills and experience database tuning and providing training matters relating to databases. I understand in non-

technical terms that database tuning as being optimising databases making them running more efficiently.

5. In summary this case is about the Claimant's dismissal by a decision on 29 August 2023, which he says was as a result of making a protected disclosure 12 days earlier on 17 August 2023. The Claimant's case is that he was dismissed because he was whistleblower.
6. The Respondent denies that the Claimant made a protected disclosure and in any event denies that the content of the disclosure made by the Claimant on 17 August 2023 was the sole or principal reason for the dismissal.

Evidence

7. I have received a witness bundle of 37 pages and a bundle of agreed documents of 1,108 pages.
8. The Claimant was at pains to give accurate information, which included making sensible concessions even when this did not necessarily help his case. I found him to be an honest witness.
9. I found that the Respondent's witnesses were doing best to help the Tribunal. This is not a case that substantially turns on credibility, although of course I do need to scrutinise the mental process of Mr Cahill the dismissing manager.

Findings of fact

10. The Respondent provided a chronology, which I have used to structure my findings of fact. The Claimant has added to this chronology. The Respondent does not agree the significance of matters added by the Claimant.

Contract

11. By a letter dated 14 November 2022, the Respondent suggested 5 December 2022 as a proposed start date.
12. On 12 December 2022 the Claimant commenced employment after an agreed delay to the start date.
13. The contract was for a fixed term of 12 months with a probation period of 6 months. The possibility of an extension of the probation period is provided for in the contract of employment. Under clause 4 of the contract of employment the probation period cannot run longer than 9 months:

“.... The total probationary period, including any extension, cannot run for longer than nine months.”
14. Given a start date in December 2022, in the event of an extension of probation it would not run beyond the first or second week of September 2023.

Job description

15. The job description for this role is contained at page 743.

Patrick Cahill

16. The Claimant was recruited and commenced working at approximately the same time as Patrick Cahill.
17. The Claimant and Patrick Cahill had a corporate induction on the same day.
18. The Claimant initially reported to Mr Ijaz Ahmed, Lead Data & Business Intelligence Engineer
19. Mr Cahill ultimately became the Claimant's line manager and took the decision to dismiss him.
20. Mr Cahill's role was Head of Data & Analytics, in which he commenced on 28 November 2022. He was recruited to create and deliver a data strategy. He and the Respondent accepted that the management of data was, prior to his engagement suboptimal and required improvement.
21. There is evidence that the Executive Board of the Respondent was seeking to improve data accuracy what is described as "data maturity" – that is a concept designed to encapsulate the ability of an organisation to carry out analysis.

Informal concerns

22. On 23 December 2022 the Claimant says he started "quietly" [his word] raising concerns with his line manager Ijaz Ahmed over data practices. I understand this to mean that he was raising matters informally, without seeking these to be investigated formally as protected disclosures.
23. These are not said to be protected disclosures. I canvassed with the Claimant on Thursday of the hearing whether he was seeking to amend his complaint to introduce further protected disclosures. He said that he was not but that this was background and context to understanding the disclosure made in August 2023.
24. For example on 3 January 2023 the Claimant says that he sent an email raising a worry about where he should get the data from and ensure quality results. On 9 January 2023 he raised a server conversion error problem and gave some technical detail about what happened.

Mr Ahmad struggling to manage Claimant

25. In January 2023 the Claimant's then line manager Mr Ahmad had a one-to-one meeting with his own line manager Mr Cahill. During that meeting he stated that he was struggling to manage the Claimant. Mr Ahmad suggested that the Claimant had a lack of understanding of what he was being asked to do.

26. The problems in the relationship seem to have arisen early and have been mutual. The Claimant raised with Mr Cahill that he struggled to work with Mr Ahmad and that the two of them had different styles of working.
27. Part of the difficulty viewed from the Claimant's perspective was that in his view too much information was contained within Mr Ahmad's head rather than being formally documented. The Respondent's position is that this is not in dispute but that it was a significant part of the Claimant's role to provide that documentation and this was the reason why he was recruited.

February 2023 1-2-1 meeting

28. On approximately 28 February or 1 March 2023 the Claimant and Mr Ahmad had a one-to-one management meeting.
29. Mr Ahmad followed up with a document setting what had been discussed. The first part of that deals with matters relating to the Claimant's health and also some matters relating to technical equipment. This seems appropriate management activity and is not relevant to this claim.
30. As to the Claimant's performance he wrote this:

“o It comes to my knowledge that you are not best to remembering the things, and needs everything to be documented. This is highlighted that communication made overtime either by email or MS Team may be forgotten as well and needs a way to refer these COMM in future. You need to maintain reference of things shared or discussed through email.

o This was discussed that to understand work priorities, you need to put thought process and if unsure reach me out that the work priorities are right and consider time frames and revisit the deadline earlier to make sure business expectation are right.

o You need to understand NMC way of working, development life cycle and can contact me if unsure or needs any assistance. You told me that you have fair knowledge of overall process but I can't understand why it's not being followed for example releasing a report in alpha release folder rather hosting on file server.

o You are not highlighted issues being faced which indicate lack of collaboration and unnecessary delay the work where you can get quicker input from myself or team member. Please have a frequent communication and feel free to share anything during 1-2-1 meeting if not actioned or highlighted in timely manner.

o Your work focus is limited seeing the task in isolation and not able to view the change in holistic manner. The baseline view/template used For example Excel report / existing view. In case of on unsure, you need to create new component (Report or View) using same logic and modify/adjust this to meet business requirement.

o The changes made without checking implication, peer review or impact in overall reporting landscape. You already told that you will be careful doing these in future.

31. The Claimant accepted some points made by his manager but wished to emphasise some of his strengths as well as weaknesses

Probation meeting – March 2023

32. In a meeting on 14 March 2023 the Claimant and Mr Cahill discussed the the Claimant’s probation objectives. Mr Cahill said that is probation objectives were not being achieved. At was at this time that the line management of the Claimant was changed from Mr Ahmad to Mr Cahill.
33. On 17 March 2023 Mr Cahill set new objectives for the Claimant to be achieved by June 2023. These are documented fully in an email from Mr Cahill. The Claimant accepted the objectives by email.
34. The new objectives were in place from 20 March 2023 onward and included the following:
- a. Documentation of Key Data Items and Areas', for the Claimant to create a scope and high level plan for the population of the Respondent’s Data Dictionary
 - b. Support for Data Governance Team: to develop the maturity of data governance within the organisation in order to identify and define critical data elements by identifying what areas they need to access, what tools they need to use to do so and how to use them.
 - c. Self-Development: for the Claimant to continue to develop his skills with PowerBI and to develop an understanding of Azure Data Factory to the same level as Power BI.

Concern about lack of team response

35. On 20 April 2023 the Claimant injured his back. He wrote to Mr Cahill say that he did not understand why he was getting anything back from the team about the training he’d offered to them. He signed off that email quite candidly:

“I haven’t got all that much of my probationary period left and I'm very aware that as an employee, I'm still on the wrong side of a cost/benefit analysis.”

36. It is clear that that stage the Claimant understood that his probation was handing in the balance

Concern about meeting objectives

37. On 31 May 2023 the Claimant emailed Mr Cahill stating that he did not see how he could meet his objectives. He also raised that he felt that the wider team, including Ijaz Ahmad and others were not coming back to him which was hampering his ability to meet his objectives.
38. Mr Cahill's oral evidence in the employment tribunal was he regarded it as a requirement of the Claimant to be able to engage with colleagues and speculated that the Claimant had intimidated less technically minded members of staff with very technical material relating to databases. This comment applied in particular to the regulatory teams which was not staff by database specialists.

Probationary review

39. Mr Cahill held a probationary review meeting on 9 June 2023, which the Claimant attended. The Claimant's probation was extended by 6 weeks to 21 July 2023.

Second probationary review

40. On 13 July 2023 Mr Cahill held a second probationary review meeting which the Claimant attended.
41. The Claimant's probation period was again extended. The extension was to 1 September 2023. This was very close to the maximum extension allowed for the probation period under the contract of employment set out above.

Grievance (alleged protected disclosure)

42. On 17 August 2023 the Claimant raised a formal grievance which begins "This is a formal complaint against Ijaz Ahmed." This was a 35 page document which summarised the complaint and contained a lot of detail copying emails and communications.
43. This included the following complaint made by the Claimant:

I consider the behaviour of Mr Ahmad has been unacceptable towards me, has damaged beyond recovery my ability to pass my probation (therefore destroying any possible career at the NMC, and possibly leaving a stain on my professional reputation that will follow me), and has caused serious personal upset to me. I have tried to reconcile with him, to find a working relationship, I do not feel he has reciprocated (see Withholding information and Obstructive behaviour for recent examples where he showed no good faith). I have my flaws but I believe I am easy to work with, willing to share knowledge, generally considerate and supportive of others

The best part of the year I have delivered almost nothing of value. My physical and mental health has suffered, my reputation here is an embarrassment to me.

This has been the saddest experience of my working life.

44. Summary of the criticisms of Mr Ahmad appear on page 495:

“• Not building a culture of documentation/knowledge/skills transfer

• Repeated reference to documentation which doesn't exist, or is minimal or otherwise utterly inadequate

• Not supporting other team's members

• Saying that "you should have asked" or "I can't read your mind" or similar, placing responsibility onto the other person when often Mr Ahmad's just hasn't provided necessary information (this is not rare)

• Providing insufficient information (note in the following his very brief answers which are often not sufficient).

• Avoiding answering questions altogether

• Poor communication

• Not using skills he knows I have

• Blaming others for the failures that stem from his own lack of clarity

• Giving knowingly incorrect information”

45. Elsewhere in the grievance the Claimant criticised “poor working practices”. He queried whether accurate correct business critical reports could be produced. He reported finding pieces of code which he criticised as being likely to generate inaccurate results.

46. The Claimant also quoted at some length various emails or exchanges between himself and Mr Ahmad which he says demonstrates that the latter was being unhelpful

Final probation review meeting (dismissal)

47. On 21 August 2023 the Claimant was invited to final probation review meeting to take place on 29 August 2023.

48. During the course of that meeting the Claimant admitted that his performance had not been good enough but flagged up that he had an outstanding formal

complaint. He said he accepted some criticism but also mentioned that the DGT did not interact with him, and asked what more he could have done. Mr Cahill suggested that it was not just the DGT team that represented a problem. The Claimant countered of the DGT's non-engagement was 33% of the problem.

49. At the conclusion of the meeting which took a little under 90 minutes, the decision was taken by Mr Cahill to dismiss the Claimant.

Second part of grievance

50. On 29 August 2023 the Claimant submitted a second document which he describes as the second part to his grievance.
51. It is common ground that this was submitted after the decision to dismiss already taken therefore cannot have been causative of it. Much of the following history which postdates termination plainly cannot have been causative of the dismissal. I have recorded it however for the sake of completeness and to the extent to which it has a bearing on what the Claimant's reasonable beliefs were at the time when he made his grievance in August 2023.

Written outcome of probationary review (dismissal)

52. By a letter dated 31 August 2023 the probation review meeting outcome was confirmed to the Claimant, which summarised why the claimant had failed to pass his review and therefore was dismissed. The Claimant was notified in this letter of his right of appeal.

Grievance investigation

53. On 31 August 2023 an investigation into the Claimant's grievances was commissioned. Mr James Jafari, Customer Enquiries & Complaints was appointed as the investigating officer.

Elegance dismissal

54. On 4 September 2023 the Claimant appealed the decision to dismiss him.

Grievance investigation

55. On 11 September 2023 the Claimant was invited to a meeting to investigate his grievance and informed his grievance would be concluded before his appeal against dismissal is considered.
56. A meeting to investigate the grievance took place on 15 September 2023.
57. On 1 November 2023 Mr Jafari completed his investigation into the Claimant's grievance. He produced a 10 page report which in summary concluded that the factors which had lead to the grievance were: first, A lack of clarity regarding what was expected of JT when he joined the NMC, and how he could achieve the original objectives. Second, the Claimant's desire to implement improved ways of working at the NMC which fell outside the scope of what was

expected of him; and third a fundamentally different communication style between Mr Ahmad and the Claimant, which was not adequately addressed or mitigated.

Grievance hearing

58. Following the investigation report, the hearing of the grievance was handed over to Mr Andrew McNulty, who invited the Claimant to a hearing on 10 November 2023.

Protected disclosure

59. The Claimant sent an email on 3 November 2023 in which he was critical of the grievance report. In that email the Claimant explicitly used the word “whistleblowing” for the first time:

“.. I was whistleblowing, albeit informally, about the unacceptable working practices. You seem to have missed that.”

60. On 8 November 2023 the Claimant submitted a response to Mr Jafari’s investigation report.

61. The grievance hearing took place on 10 November 2023.

Whistleblowing emails

62. On 15 November 2023 the Claimant sent an email to the Respondent’s dedicated whistleblowing email address. In that email he stated:

“The NMC's data management practices are unacceptable. I consider them to be dangerous and potentially putting nurses/midwives at risk.

63. The Claimant agrees that he did not refer to legal obligations before this.

64. The following day, 16 November, the Claimant wrote to Mr McNulty who was hearing the grievance and wrote

I made a serious potential allegation about someone being forced to work unreasonably long hours.

I didn't provide evidence of this initially, when I had access to emails/Teams because I assumed the previous investigator would do his job. He didn't.

Therefore I'm relying on you to do this. Since you clearly want to give consideration to all my points, I am trying to get you the evidence you need for that. Hence my SAR.

Grievance outcome

65. On 17 November 2023 Mr McNulty provided an outcome to the grievance. That outcome included the following conclusions:

“The evidence provided suggests that whilst there is a difference in communication styles between yourself and Mr Ahmad there is no evidence to suggest that Mr Ahmad’s actions were deliberately obstructive, incorrect or with an intention to purposefully withhold information.”

66. He did not uphold criticisms against Mr Ahmad, and considered that he had appropriately raised with his line manager the difficulty in communication working style leading to the Claimant’s reporting line being changed.

Grievance appeal

67. On 21 November 2023 the Claimant appealed the grievance outcome.

Email to the secretary

68. By an email dated 22 November 2023 the Claimant wrote to Matthew Heyday, Secretary to the Council/Assistant Director, Governance of the NMC. In that email he stated that he was explicitly detailing whistleblowing concerns and emphasised that he had explicitly used the word whistleblowing.

Grievance appeal hearing

69. A hearing of the grievance appeal took place on 5 December 2023, heard by Peter Boyce, Head of Case Presentation & Appeals.
70. Mr Boyce provided an outcome in which he upheld the grievance outcome decision of Mr McNulty, as communicated on 14 December 2023.

Further email to Mr Hayday

71. In an email dated 3 January 2024 the Claimant told Mr Hayday that Emphasising that he had a concern about the Respondent’s data management practices and consider them completely inadequate. As a result he stated that he believes the NMC are in breach of a specific GDPR clause

“Article 5(1) requires that personal data shall be:

(f) processed in a manner that ensures [...] against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’).”

72. He wrote

I believe under this clause a strong case could be made that the NMC is not managing data per its legal obligation, I believe you are in violation of this clause of GDPR (at least).

Dismissal appeal hearing

73. There was a probation appeal hearing on 11 January 2024. This hearing was chaired by Jonathan Twidle.
74. Mr Twidle was aware that there had been a grievance process but did not consider the substance of it when considering whether the decision to dismiss the claimant was fair, notwithstanding that the Claimant during the appeal against dismissal on more than one occasion said that the appeal should take account of matters which arose during the grievance and Mr Jafari's report.
75. The appeal was not upheld by Mr Twidle.

Investigation report whistleblowing concerns

76. On 19 January 2024 Mr Heyday provided an Investigation Report into the Claimant's whistleblowing concerns.
77. In that report a distinction was drawn between complaints about personal treatment (personal grievances) and matters which were of wider public interest.
78. The report took the concerns raised by the Claimant about data management at face value and explained that these had been raised with Tom Moore:

"Tom recognised that as an organisation the NMC needs to improve its data maturity and literacy and that the storage of some data is disorganised and does not map well."

79. It was explained that some of these concerns had already been addressed to the Respondent's executive board in November 2023 in relation to data vision & strategy and data maturity, which had led to significant further investment for the three year business plan from 2023/2024.

80. Mr Hayday wrote:

"I also sought assurance on your concern that these poor practices could lead to the harm of a registrant or put the public at risk. Tom set out that, as with any database, there will always be data quality issues, and that these are unavoidable. Generally, these are down to human manual entry error. Our Register will have some of this, but it does not affect the integrity of the register, as the information is checked against the evidence provided

during registration and at other points in the Registrant's lifecycle with the NMC.

The issues you have raised concerns about centre on our Reference or Master Data and the structure of it, which affects the NMC's ability to report on the data and hence why data reporting is difficult and requires manual intervention and checking to produce.

The impact of the concerns you highlight is on our reporting and not the Register itself. Therefore, the risk of harm to Registrants and the public is low and comparable with any other database system that requires manual input.

Following the concerns you raised about data practices, you subsequently raised a concern that the NMC was in breach of UK GDPR and, specifically, that the NMC's data management practices contravened Article 5(1)(f):

Personal data shall be:

processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

I have raised this concern with our Data Protection Officer who is going to respond to you directly as this is their specialist area of expertise. I am sorry that we cannot address your GDPR concern at this point in time.

External whistleblowing to ICO

81. On 22 January 2024 the Claimant formally made a disclosure to the Information Commissioner's Office.
82. The Respondent also provided a letter to the Claimant about GDPR from Marion Owen, Head of Information Assurance and Compliance and Data Protection Officer

"Our Chief Information Officer, Tom Moore has already recognised that the NMC is working to improve its data maturity. Having reviewed your concerns, my view is that the areas of data management which Tom has acknowledged need improvement are unlikely to give rise to an increased risk to the security of personal data.

Afzal/Rise report

83. In a development which was separate to the Claimant's case, but nevertheless which he says supports his claim, Nazir Afzal OBE and Rise Associates

consultancy carried out an independent review of the culture of the Respondent organisation.

84. That review led to a report published in July 2024 which was critical of aspects of the Respondent's culture.
85. In a part quoted by the Claimant in his witness statement the authors of the report describe the culture in which whistleblowers experience anger from senior management and are treated as having behaved "inappropriately" rather than concerns being taken on and addressed. It identifies a culture of bullying and concluded that there is not a culture of learning from mistakes.

The present claim

86. Stepping back in the chronology, on 4 January 2024 ACAS issued a certificate at the conclusion of a period of early conciliation.
87. On 12 January 2024 the Claimant presented his claim to the Employment Tribunal.
88. At 18 April 2024 there was a preliminary hearing at which the list of issues were identified for the hearing before me. At that hearing Employment Judge Klimov stated:

"the claimant confirmed that he relies on his 17 August 2023 grievance document as containing a protected disclosure. He also confirmed that he believed that the information in that document tended to show that the respondent was breaching a legal obligation, because he thought the respondent's handling of nurses' data was "legally wrong", although, he admitted that at the time he did not know the precise nature of that legal obligation"

THE LAW

Legislation

89. The Employment Rights Act 1996 contains the following provisions:

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-

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

Burden

90. The burden of proving each of the elements of a protected disclosure is on a claimant (**Western Union Payment Services UK Ltd v Anastasiou**, 13 February 2014 per HHJ Eady QC at [44]).

Disclosure

91. In **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 the Court of Appeal held that a sharp distinction between “allegations” and “disclosures” which appeared to have been identified in earlier authorities was a false dichotomy, given that an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

“In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a **sufficient factual content and specificity** such as is capable of tending to show one of the matters listed in subsection (1).”

[emphasis added]

Reasonable belief in relevant failure

92. Whether a belief is reasonable is to be assessed by reference to “what a person in their position would reasonably believe to be wrongdoing”: **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 per Judge McMullen QC at [62]. In that case Mr Korashi was a specialist medical consultant and an assessment of what was reasonable needed to be by reference to what someone in that position would reasonably believe. HHJ McMullen QC said this:

“61 There seems to be no dispute in this case that the material for the purposes of s.43B(1)(a)–(e) would as a matter of content satisfy the section. In our view it is a fairly low threshold. The words 'tend to show' and the absence of a requirement as to naming the person against whom a matter is alleged put it in a more general context. What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word 'reasonable'.

62 This filter appears in many areas of the law. It requires consideration of the personal circumstances facing the relevant person at the time. Bringing it into our own case, it requires consideration of what a staff grade O&G doctor knows and ought to know about the circumstances of the matters disclosed. To take a simple example: a healthy young man who is taken into hospital for an orthopaedic athletic injury should not die on the operating table. A whistleblower who says that that tends to show a breach of duty is required to demonstrate that such belief is reasonable. On the other hand, a surgeon who knows the risk of such procedure and possibly the results of meta-analysis of such procedure is in a good position to evaluate whether there has been such a breach. While it might be reasonable for our lay observer to believe that such death from a simple procedure was the product of a breach of duty, an experienced surgeon might take an entirely different view of what was reasonable given what further information he or she knows about what happened at the table. So in our judgment what is reasonable in s.43B involves of course an objective standard – that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but **is expected to look at all the material including the records before making such a disclosure**. To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. **Since the test is their 'reasonable' belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing.**”

Public interest

93. The Court of Appeal in **Chesterton Global Ltd & Anor v Nurmohamed & Anor** [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot relate solely to the interest of the person making the disclosure. The following guidance was given on that case as to reasonable belief in the public interest, per Underhill LJ:

“27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). 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. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters 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. 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 is 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. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

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: otherwise, as pointed out at para. 17 above, the new sections 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."

CONCLUSIONS

1. Protected disclosure

94. 1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?
95. The Tribunal will decide:
96. 1.1.1 What did the claimant say or write?
97. 1.1.1.1 on 17 August 2023 in his formal grievance document;

Information

98. 1.1.2 Did he disclose information?
99. Yes I find that information was contained in the 17 August grievance document.

Public interest

100. 1.1.3 Did he believe the disclosure of information was made in the public interest?
101. I note that from the case law it is not a requirement to find that the disclosure was motivated by the public interest, but that it was made in the public interest.
102. The Claimant admits in his submission that he did fail to distinguish properly between his own personal treatment and the failures of the Respondent. I find that much of the disclosure is very specific to the Claimant and his treatment and the circumstances in which he was failing to pass his probation.
103. There are elements, however, such as for example build a culture of documentation/knowledge/skills transfer, which do relate to a broader critique of the way the organisation working.
104. Given the context that the Respondent is a public regulator I am, just, satisfied that the Claimant believed that elements of his disclosure were broader than just his own situation and that this was raised with a belief in the public interest.

Reasonable belief?

105. 1.1.4 Was that belief reasonable?
106. Taking account of the fact that one of the reasons why both the Claimant and Mr Cahill was brought into the organisation was that the data management the organisation was underdeveloped (my word) and needed improvement, and that the Respondent admits that the documentation needed work it seems to

me that it was reasonable of the Claimant to believe the critique he made for example of the absence of documentation knowledge and skills transfer.

107. I find it was reasonable for him to believe that this is an issue that was broader than himself and in fact represented a broader issue such that he reasonably believed it was in the public interest.

Legal obligation

108. 1.1.5 Did he believe it tended to show that:
109. 1.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;
110. I have not been able to identify a legal provision within the disclosure itself.
111. There is a retrospective reference to GDPR article 5(1) – which emerges in early January 2024, i.e. approximately 4 ½ months after the original disclosure and 4 months after the dismissal.
112. The Claimant admits that he did not have this in mind at the time that he made his disclosure.
113. My finding is that the Claimant genuinely believed that there were elements of the way that data was managed that were poor practice and below his own personal standards. He was plainly frustrated. I do not find however, the burden being on the Claimant, that he believed that the information he disclosed in August at that time tended to show breach of obligation.

Reasonable belief in legal obligation

114. 1.1.6 Was that belief reasonable?
115. Given that I have not found that the was the Claimant's belief it is difficult for me to evaluate whether it was reasonable or not.

Qualifying protected disclosure

116. 1.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.
117. It follows that this claim cannot succeed.

Causation of dismissal

118. 2.1 Was the reason or principal reason for dismissal that the claimant made the above protected disclosure? If so, the claimant will be regarded as unfairly dismissed.
119. Although I do not find that the email of 17 August 2023 amounted to a protected disclosure, in case I am wrong about that, I have nevertheless gone on to evaluate whether that email was the sole or principal reason for dismissal.

Claimant's arguments on causation

120. The claimant relies upon the chronology and the proximity of the decision to dismiss him to the protected disclosure. Absent the earlier history in relation to the probation process that might have been sufficient to draw that inference.
121. The Claimant also relies upon the Rise report. While the publication post-dates the material events, I find that it was likely describing the cultural of the organisation that the Claimant was working for. It is evidence which might the Claimant's case of unsympathetic treatment of whistleblowers. While that is background evidence which generally support the Claimant's case, I do have to look at his specific circumstances when it comes to causation.

Performance

122. This is a case in which performance concerns were raised early and more than one occasion and predated the making of the 17 August 2024 disclosure.
123. In an attempt to remedy the situation, the Respondent changed the reporting line. Mr Cahill reformulated objectives and agreed that with the Claimant in an attempt to give him another chance. He extended the probation period more than once. The Respondent was right up against the limit of 9 months' probation provided by the contract.
124. The Claimant himself admitted that he was failing probation on more than one occasion, although he considered that the blame lay in part with others as well as himself.
125. I also accept Mr Cahill's evidence that the criticisms of the organisation made by the Claimant were part of the reason that Mr Cahill and the Claimant were there. In other words criticisms of the quality of the database and practice were not a surprise to anyone, nor were such criticisms likely to influence Mr Cahill's behaviour in relation to the Claimant.
126. I found Mr Cahill to be a careful and honest witness. He was plainly dealing with a difficult situation, and trying unsuccessfully to make it work. I accept his evidence about the reasons for dismissal.
127. Even had the Claimant not raised the grievance on 17 August 2023, I find that he would have been dismissed at the end of August in any event.

Management

128. It might be said that Mr Ahmad did not adapt his management style and there was a wider failure of management (including perhaps Mr Cahill) to ensure cooperation by members of the team with the Claimant. I recognise that the Claimant may have suffered something of an injustice in that respect. He had I find a genuine frustration that his undoubted expertise in relation to database management was not being put to best use by the Respondent. This is part of the picture, but ultimately not factors which cause the claim to succeed.

129. I find that the principal reason for the Claimant's dismissal was that the Respondent concluded, not unreasonably given the Claimant's own concession in this respect, that he was not succeeding during the probation period. Whether or not the Claimant submitted the grievance on 17 August 2023 I find that he would not have had his probation extended beyond 9 months.

Summary

130. In summary I find that the Claimant did not make a protected disclosure prior to dismissal and in any event the reason for dismissal was a failure to pass probation and not the grievance raised on 17 August 2023.

131. For these reasons the claim is dismissed.

Employment Judge Adkin

Date 19 December 2024

REASONS SENT TO THE PARTIES ON

19 December 2024

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FOR THE TRIBUNAL OFFICE