EMPLOYMENT TRIBUNALS

Claimant: Mr S Ram

Respondent: DPD Group UK Limited

Heard at: Birmingham **On:** 30 September 2024
1, 2 & 3 November 2024

Before: Employment Judge Maxwell
Miss Outwin
Mr Sharma (remote)

Appearances
For the claimant: Mr Maini-Thompson, Counsel
For the respondent: Mr Bownes, Solicitor

JUDGMENT

1. The Claimant's protected disclosure detriment claim is well-founded and succeeds to the following extent:

    1.1 On 31 August 2021, Mr Baum confronting the Claimant on the shop floor, saying “I am not on drugs”, “you can piss test me” and he “could have been smarter about this”;

    1.2 On 2 November 2021, Mr Gaddu brushing aside the death threats the Claimant had allegedly received.

2. The Claimant’s other claims are either dismissed on withdrawal or because they were not well-founded.

3. We award the Claimant compensation for injury to feeling of £10,000 together with interest of £2,336.44. The total sum due to the Claimant is £12,336.44.

REASONS

Issues

1. The liability issues on the Claimant's claim are set out below.

Time

2. Whether the claims are in time.

Protected Disclosure

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

4. What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

    4.1 By telephone on or around 13 August 2021 to the Respondent's whistle blowing service;

    4.2 Verbally on 20 August 2021 to Alex Walstow;

    4.3 By letter on 23 August 2021.

5. Did he disclose information?

6. Did he believe the disclosure of information was made in the public interest?

7. Did he believe it tended to show that:

    7.1 a criminal offence had been, was being or was likely to be committed;

    7.2 the health or safety of any individual had been, was being or was likely to be endangered;

    7.3 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

8. Was that belief reasonable?

9. If the claimant made a qualifying disclosure, it was a protected because it was made to the employer.

Detriment

10. Did the respondent do the following things:

    10.1 On 31 August 2021, Lewis Baum, General Manager confronting the Claimant on the shop floor and saying:

10.1.1 'I am not on drugs, and you can piss test me';

10.1.2 the Claimant 'could have been smarter about this';

10.2 On 31 August 2021 Lewis Baum and Vijay Gaddu instructing the change of / changing the Claimant's job duties.

10.3 In September 2021:

10.3.1 an altercation with Mr Amir Sajid, Mr Viljay Gaddu;

10.3.2 Mr Lewis Baum refusing to provide witness statements as part of the disciplinary investigation with the Claimant regarding the incident on 15 September 2021;

10.3.3 Mr Gaddu being appointed as investigation manager.

10.4 On 2 November 2021, Mr Vijay Gaddu brushing aside the death threats the Claimant had allegedly received.

10.5 On 2 December 2021:

10.5.1 as part of dealing with Mr Amar Sajid's grievance, Mr Baum purposively providing short notice to the Claimant;

10.5.2 failing to appropriately update Matt Jones regarding Amar Sajid's grievance;

10.5.3 making the Claimant wait for transportation for 2 hours.

10.6 Failing to provide the Claimant with an update / outcome regarding the grievance dated 5 December 2021.

10.7 On 16 December 2021, Aggy instructing the Claimant to work in the trailer.

11. By doing so, did it subject the claimant to detriment?

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

Withdrawals

13. The Claimant withdrew several detriment complaints at the beginning of the hearing, namely:

13.1 In September 202, an altercation with Mr Amir Sajid, Mr Viljay Gaddu and Mr Lewis Baum refusing to provide witness statements as part of the disciplinary investigation with the Claimant regarding the incident on 15 September 2021 and Mr Gaddu being appointed as investigation manager.

13.2 On 2 December 2021, as part of dealing with Mr Amar grievance, Mr Baum purposively providing short notice to the Claimant, failing to appropriately update Matt Jones regarding transportation for 2 hours.

13.3 Failing to provide the Claimant with an update/outcome regarding the grievance dated 5 December 2021.

Evidence

14. we received witness statements and heard oral evidence (save where indicated) from:

14.1 Surinder Pal Ram, the Claimant;

14.2 Anthony Ross, Union Representative;

14.3 Agnieszka Ochocinska, Sortation Manager;

14.4 Alex Walstow, Hub Manager;

14.5 Ashley Habib, Operations Manager (statement only, not challenged);

14.6 Harvey Cheema, Hub Manager (statement only, not challenged);

14.7 Lewis Baum, General Manager.

Facts

Witnesses

15. We were satisfied that most of the witnesses we heard from were doing their best to give honest answers, according to the limitations of their recollection. Unfortunately, however, we were rather less impressed with the evidence given by Mr Baum. For reasons we will expand upon below, we came to the conclusion he was being deliberately evasive, which impacted upon his credibility and the weight we could attach to his evidence.

Background

16. The Respondent is a well-known parcel delivery business. The Claimant has been employed for many years as a Deckhand.

Disclosures

17. On 13 August 2021, the Claimant reported various matters to the Respondent's whistleblowing service. These included his concern about the supply and consumption of illegal drugs in the workplace.

18. On Friday 20 August 2021, the Claimant spoke with Mr Walstow, raising these same concerns, in similar terms. At that time, the Claimant had a draft letter but did not hand it over. The Claimant told Mr Walstow he would rewrite the letter, focusing on his main concerns.

19. Mr Walstow acted promptly, writing to one of the Respondent's People Business Partners, Jo Craig, in the early hours of 21 August 2021:

> **I've had a large scale grievance raised to me informally, with a wish to progress formally next week.**

It is complex so I would like to discuss it as a priority on Monday please.

20. Ms Craig replied the same day, explaining she would be available over the weekend if he wished to discuss the matter then.

21. On Monday 23 August 2021, the Claimant handed a grievance letter to Mr Walstow. Whilst one other matter was raised, almost all of this lengthy handwritten letter was devoted to the Claimant setting out how drugs, in particular cocaine, were being sold and consumed on the premises. He named various individual employees or agency workers as taking or supplying drugs. He described how and where these activities were taking place. He recounted a conversation with one of those alleged to have been involved in this supply, about the profit they had made. The Claimant wrote of his fear that someone would be killed in the workplace because they were using dangerous equipment whilst under the influence of drugs. He also named various managers as being complicit, if not consumers, then at least turning a blind eye to what was going on. Two of the managers so named were:

    21.1 Mr Gaddu, one of the Respondent's Hub Managers;

    21.2 Mr Baum, the General Manager.

22. For the avoidance of doubt, we have made no finding of fact that Mr Gaddu or Mr Baum did any of the things the Claimant alleged in his letter of 23 August 2021.

23. Once again, Mr Walstow, who was junior to both Mr Gaddu and Mr Baum, acted with commendable speed. Not only did he take the Claimant's report very seriously, he went about arranging immediate drug tests of those accused, which took place on 24 August 2021. This returned a number (5 from 7) of positive results. The relevant employees were suspended and escorted off site. The agency workers were terminated. Not only was immediate action taken, measures were put in place to address the problem which had been uncovered. Gavin Dolan, the Respondent's Associate Director wrote to Ms Craig and Mr Walstow in the early hours of 25 August 2021:

    Great work on jumping on this extremely quickly. Extremely concerning we've this level of issue.

    Do we need to implement random tests going forward if we've hit this level of non negative tests in such a small sample size?

24. Ms Craig replied:

    Alex and I spoke about this yesterday as we were organising this set of testing and agreed it would be appropriate to randomly test moving forward to ensure we capture any other individuals who we suspect may be in breach but were unavailable last evening.

    It also sends a very clear message out to the workforce that this will not be tolerated so I will work with Alex to plan accordingly.

25. Mr Baum was on annual leave at this time and the Claimant himself went on holiday very soon after raising his concerns.

31 August 2021

26. Both the Claimant and Mr Baum returned from leave on 31 August 2021. That same day, Mr Baum went to speak with the Claimant. Prior to so doing, Mr Baum had become aware of the Claimant raising his concerns and that he, Mr Baum, was one of those named as being complicit in this.

27. Whilst giving evidence at the Tribunal, Mr Baum was asked a number of simple questions about when, how and from whom he had learned of the Claimant's report and accusations. Mr Baum struggled greatly to provide any useful evidence in this regard. Many of his answers amounted to "I cannot recall". Other responses were difficult to follow. After one especially opaque response and so the parties would have an opportunity to address the point, the Judge said he did not understand the answer. Mr Baum gave an account of his first day back at work, which seemed to avoid him having any opportunity to be updated by the managers reporting to him about events during his absence, which struck us as unlikely. Furthermore, Mr Baum's professed equanimity in the face of the Claimant's allegation and being required to give immediate urine test (which was negative) lacked credibility. Unfortunately, we came to the conclusion Mr Baum was being deliberately evasive. Furthermore, it would seem the most likely explanation for such unsatisfactory evidence was Mr Baum's reluctance to admit that he knew of the Claimant's report and was annoyed by this on 31 August 2021, as that would appear consistent with the Claimant's complaint before the Tribunal about the way Mr Baum spoke to him.

28. We preferred the evidence of the Claimant about the fact and content of his conversation with Mr Baum, notwithstanding the absence of a contemporaneous grievance. Mr Baum's comments included "I am not on drugs, and you can piss test me". Mr Baum also said the Claimant "could have been smarter about this", which would appear to have been a suggestion that the Claimant should not have reported his concerns as he did. We are also satisfied Mr Baum's evident displeasure was conveyed not merely by his words but also aggressive gesticulation, as witnessed by Mr Ross, who was working nearby. Whilst Mr Ross could not hear what was said, he noticed the actions of Mr Baum. In his witness statement Mr Ross had said his observations related to 1 September 2021. In oral evidence he said it may have been the previous day. We are satisfied it was the same event as recounted by the Claimant. Mr Baum gave no evidence of remonstrating with the Claimant for a different purpose on 1 September 2021 and Mr Ross' credibility is supported by the limited nature of his evidence, in particular not saying he could actually hear the words when he could not.

29. The formal response to the Claimant's letter was him being told (we have not seen any letter in this regard) that appropriate action would be taken by the Respondent. Indeed, the Claimant was aware of the drug tests and dismissals. Whilst termed a "grievance", the Claimant's letter was in substance more a report.

Man Rider

30. The Claimant raised a second grievance in the first part of September 2021. On this occasion, his handwritten letter was a complaint about the way in which he had been treated. In particular, the Claimant was complaining about not being appointed as Man Rider.

31. The Deckhands, of which the Respondent employs many, have various duties. These can include operating a Man Rider, which is used to move pallets around the Respondent's site. This is similar to a pallet truck but the operator rides upon it. Deckhands are trained to use the Man Rider. Operating the Man Rider is a desirable duty because it is easier work, with less manual handling of parcels.

32. In his September grievance letter, the Claimant complained that following the departure of three employees from his section who had been Man Riders he should have been made the Man Rider and this had not happened. Instead he said he was told this duty would be rotated amongst the Deckhands.

33. As a Deckhand, the Claimant reported to a Sortation Manager. Ms Ochocinska became manager in the section where the Claimant worked at the end of August or beginning of September 2021. There had been no previous dealings between them.

34. Ms Ochocinska believed it was important to use the staff resources she had flexibly. Because of the recent departures (one of whom had failed a drugs test) new recruits had been taken on in her section. She wished to ensure they were all able to take on the Man Rider duties when necessary. They had been sent on the short one-day training course but needed practice to operate efficiently. Furthermore, the period from October to December, which the Respondent calls "Peak", is the busiest of the year, in particular from the end of November in the run-up to Christmas. As such, she was varying who carried out the Man Rider duties from time to time, rather than, say, leaving them with the most experienced operative.

35. Ms Ochocinska's approach in this regard had nothing whatsoever to do with receiving an instruction from Mr Gaddu or Mr Baum. There is no evidence to support a conclusion that she was acting upon the same. This assertion is based on speculation by the Claimant, when faced with an approach to the Man Rider duties he did not agree with. It appears to us most unlikely that Mr Gaddu or Mr Baum would do as the Claimant alleges. Ms Ochocinska does not report directly to either Mr Gaddu or Mr Baum, rather they sit above her line manager, who was Mr Higginbottom. It seems to us most unlikely that either Mr Gaddu or Mr Baum get involved in a small decision of this sort. The Claimant was not removed from Man Rider duties entirely, rather his complaint was about getting them less consistently. This would seem to be a very odd way for the two who are accused, to seek to "get at" the Claimant. They would have many more important things to focus upon instead.

36. Mr Walstow dismissed the Claimant's grievance following a meeting on 15 September 2021, during the course of which the Claimant had agreed several times there were good reasons for the Man Rider duty to be rotated between the Deckhands.

Altercation

37. One of the Deckhands the Claimant had accused of being involved in drugs had tested negative and, therefore, not been dismissed. It appears the Claimant and this employee had a difficult relationship. This is, perhaps, unsurprising in the circumstances. There is also some evidence to suggest these difficulties may have predated the Claimant's disclosure. There was an altercation between these two on 15 September 2021, when there was physical contact between them. The other employee complained to management that he had been assaulted, in the form of a shoulder barge. The Claimant was suspended.

Sick Leave

38. The Claimant had two periods of certified sickness because of stress. These were between 27 September and 10 October 2021, followed by 21 October and 31 October 2021. There was a degree of overlap with his suspension.

Disciplinary

39. By a letter of 7 October 2021, the Claimant was required to attend a disciplinary hearing in connection with an allegation that he had physically assaulted a member of staff.

40. The Claimant's disciplinary hearing took place on 20 October 2021. Mr Cheema presided and the Claimant was represented. A first written warning was issued. The Claimant did not appeal against this decision.

Mediation

41. A mediation meeting between the Claimant and the colleague took place on 22 October 2021. This does not appear to have resolved matters.

Threatening Behaviour

42. At the end of October 2021, the Claimant received a large number of threatening phone calls from a withheld number, which included the caller saying:

    42.1 "you are a rat";

    42.2 "we are going to kill you";

    42.3 "we are coming around now".

43. The Claimant believed it was the same employee with whom there had been ongoing difficulties. The Claimant reported this matter to the police on 31 October 2021, who in turn contacted the Respondent.

44. On 2 November 2021, the Claimant told Mr Gaddu about the threats. Mr Gaddu's response was to tell Claimant he should ignore them. The Claimant was surprised at the lack of action and believed his serious complaint had been "brushed off".

45. Whilst we would not necessarily expect the Respondent to have investigated a matter involving work colleagues that had not occurred on site and which it understood the police were currently looking into, some holding action in the workplace would have seemed appropriate. The Respondent could have separated the Claimant and his colleague, perhaps by temporarily varying their work location or duties. The colleague could have been spoken to and reminded of the need for everyone to behave appropriately in the workplace. A warning that disciplinary consequences would follow if such activity was found to have taken place could have been given. In light of the seriousness of the drug misuse the Claimant had raised and the accusations of criminal behaviour made against named individuals, there was obvious scope for a backlash, whether or not there was pre-existing ill-feeling between the Claimant and his colleague. The Respondent's whistleblowing policy includes:

> **[…] Therefore, the business encourages anyone to raise genuine concerns, in good faith, about malpractice in the workplace without fear of reprisals and DPDgroup UK Ltd will protect them from victimisation and dismissal.**
>
> **[…] Anyone who victimises or retaliates against those who have raised concerns will be subject to investigation and any appropriate action taken.**

46. The Claimant went to Mr Gaddu reporting that which might have been expected and against which the Respondent's policy said he should be protected. We have no explanation from Mr Gaddu for his response to the Claimant or lack thereof. He was not called as a witness. We were told he is no longer the Respondent's employee.

47. There may have been a degree of frustration arising from the Claimant's frequent complaints about various matters. Mr Gaddu might have been influenced by an awareness of the history between the Claimant and his colleague. Nonetheless, we are satisfied that at least part of the reason for the lack of action on this occasion was the Claimant's disclosure. Mr Gaddu was named in connection with serious allegations of drug misuse. He is likely to have been very unhappy about this and not well-disposed toward the Claimant as a result. This fed into his passive response.

Colleague's Suspension and Transfer

48. On or about 10 November 2021, the colleague was suspended following further complaints of threatening behaviour by the Claimant, this time taking place at work and which were corroborated by others and CCTV. The individual was, subsequently, issued with a final written warning and moved to another section, such that he would no longer be working in the vicinity of the Claimant.

16 December 2021

49. The Claimant alleges that on 16 December 2021, Ms Ochocinska removed him from the Man Rider and required him to work in the trailer with the parcels and conveyor belt instead. Ms Ochocinska has no particular recollection of this day but accepts it may have occurred. She says and we accept, if this did occur it will have done so for one of two reasons. Either it was simply a matter of deploying

her staff resource efficiently or it was because of her concerns about the Claimant's behaviour. He and Ms Ochocinska did not always see eye to eye. The Claimant was a long-standing employee of 20 years with clear views about how things should be done. Ms Ochocinska had started as a temp and worked her way up to a management position. She believed the Claimant sometimes took unauthorised breaks. The Man Rider operative moves around the Respondent's premises and the Sortation Manager will not always see what they are doing. This contrasts with the position when a Deckhand is working in the trailer. We do not find that Ms Ochocinska received any instruction in this regard from Mr Gaddu, Mr Baum or anyone else. Deciding how to deploy staff within her section is precisely what would be expected of the Sortation Manager.

Law

Protected Disclosure

50. The making of a protected disclosure involves three elements. Firstly, there must be a "disclosure". According to section 43B(1) of the **Employment Rights Act 1996** ("ERA") a disclosure is constituted by "any disclosure of information".

51. Secondly, the disclosure must be "qualifying" which is determined by the content of the information disclosed. Section 43B(1), as recently amended, and so far as material provides:

> **(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,**
> >
> > **[…]**
> >
> > **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.**

52. Thirdly, the qualifying disclosure must be made to a specified recipient, within ERA sections 43C-H, which includes at 43C, the employer.

Information

53. In some circumstances, disclosing information for these purposes might be distinguished from the making of an allegation; see **Cavendish Munro Professional Risks Management Limited v Geduld [2010] IRLR 38 EAT**, per Slade J:

> **23. It can be seen that the victimisation provisions of the discrimination legislation set out different ways in which an individual can assert victimisation. Giving 'information' and making 'an allegation' are treated differently in that legislation as well as in the Employment Rights Act.**

> **24. Further, the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that 'you are not complying with Health and Safety requirements'. In our view this would be an allegation not information.**
>
> **25. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act s.43.**

54. Caution in this regard must, however, be exercised. A single disclosure might amount to both the provision of information and the making of an allegation. Furthermore, a rigid dichotomy between giving information and making allegation is not reflected in the language of ERA section 43B. The statutory question is whether information was disclosed (which in the employee's reasonable belief tended to show one of the necessary matters); see **Kilraine v London Borough of Wandsworth [2018] IRLR 846 CA**, per Sales LJ:

> **34. However, with the benefit of hindsight, I think that it can be said that para [24] in Cavendish Munro was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that Cavendish Munro supported the proposition that a statement was either 'information' (and hence within s 43B(1)) or 'an allegation' (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in Cavendish Munro also tends to lead to such confusion by speaking in [20]–[26] about 'information' and 'an allegation' as abstract concepts, without tying its decision more closely to the language used in s 43B(1).**
>
> **35. The question in each case in relation to s 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). 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 sub-s (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is**

> **likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.**

Reasonable Belief

55. Whilst a belief need not necessarily be correct in order reasonably to be held, see **Babula v Waltham Forrest College [2007] IRLR 346 CA**, the test is ultimately an objective one; per Wall LJ:

> **75. […] a belief may be reasonably held and yet be wrong. I am reminded, in a different context, of the well-known speech of Lord Hailsham of St Marylebone LC in the adoption case of Re W (an infant) [1971] AC 682 at 700D when discussing whether or not a parent could be said to be unreasonable in withholding consent to adoption. He said: – 'Two reasonable parents can perfectly reasonably come to opposite conclusions without either of them forfeiting their title to be regarded as reasonable.' In my judgment, the position is the same if a whistleblower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute.**
>
> **[…]**
>
> **77. […] the word 'likely' in s.43B(1)(b) does not affect my conclusion that what the whistleblower must show is a 'reasonable belief' that the disclosure tends to show that a criminal offence is likely to be committed, or that a person is likely to fail to comply with any legal obligation. In other words, what remains relevant is the whistleblower's reasonable belief, and not whether or not it turns out to be wrong. The use in the statute of the word 'likely' does not, in my judgment, import an implication that the whistleblower must be right, or that, objectively, the facts must disclose a likely criminal offence or an identified legal obligation.**
>
> **[…]**
>
> **79. It is also, I think, significant that s.43B(1) uses the phrase 'tends to show' not 'shows'. There is, in short, nothing in s.43B(1) which requires the whistleblower to be right. At its highest in relation to s.43B(1)(a) he must have a reasonable belief that the information in his possession 'tends to show' that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact**

> **that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer made in good faith (s.43C(1)(a)).**
>
> **80.[…] The purpose of the statute, as I read it, is to encourage responsible whistleblowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute.**

Public Interest

56. In **Chesterton Global Limited v Nurmohamed [2017] IRLR 837 CA**, the Court addressed the correct approach to the public interest, per Underhill LJ:

> **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 s.43B(1) where the interest in question is personal in character 5), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at paragraph 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph.**

The potentially relevant factors referred to were:

> **(a) the numbers in the group whose interests the disclosure served;**
>
> **(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;**
>
> **(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;**
>
> **(d) the identity of the alleged wrongdoer […] the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest […]**

Motive

57. An ulterior motive will not avoid the making of a protected disclosure, where the Clamant had a belief that this was in the public interest at the time; see **Chesterton**, per Underhill LJ:

> **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.**

Detriment

58. As whether an employee has suffered a detriment, the question is not an entirely subjective one; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**, per Lord Hope:

> **34. […]The word 'detriment' draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated. Res noscitur a sociis. As May LJ put it in De Souza v Automobile Association [1986] IRLR 103, 107, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.**
>
> **35. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in *Ministry of Defence v Jeremiah* [1979] IRLR 436, 440, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'[…]**

Causation

59. Whereas for the purposes of an automatic unfair dismissal claim the ET must be satisfied that reason or principal reason for dismissal was an inadmissible reason, the test for causation in whistleblowing detriment cases is whether the protected disclosure materially influences, in the sense of being more than a trivial influence, the employer's treatment of the whistleblower; see **Fecitt v NHS Manchester [2012] IRLR 64 CA**.

Limitation

60. ERA section 48(3) & (4) provide:

> **(3) An employment tribunal shall not consider a complaint under this section unless it is presented—**
>
> > **(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures , the last of them, or**
> >
> > **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)—**
>
> > **(a) where an act extends over a period, the "date of the act" means the last day of that period, and**
> >
> > **(b) a deliberate failure to act shall be treated as done when it was decided on;**
> >
> > **and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.**

61. The Court of Appeal addressed a series of similar acts in **Arthur v London Eastern Railway Ltd [2007] ICR 193**, per Mummery LJ:

> **35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period. […] It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find "motive" a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts**

> **being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.**

Conclusion

Protected Disclosure

62. The Claimant handed a letter to Mr Walstow on 23 August 2021. We have summarised its contents and a copy of the letter was included in the hearing bundle. The Claimant had spoken about the drugs issue in similar terms to Mr Walstow on 20 August 2021 and to the Respondent's whistleblowing service on 13 August 2021.

63. Quite plainly, the Claimant discloses information. His letter in particular, provides much detail of what he had seen for himself or been told by others about the consumption and supply of drugs in the workplace. He named various specific individuals as being involved in this. We find he also provided similar information on the 13 and 20 August 2021.

64. The Claimant believed this tended to show that criminal offences were being committed, health and safety of individuals being endangered and information about it all was being deliberately concealed. He wrote to this effect in his letter of 20 August 2021. The Claimant's belief was a reasonable one. He saw what appeared to be the misuse of illegal drugs in the workplace. This would involve various criminal offences. Operating vehicles or machinery under the influence of drugs would create an obvious risk of danger to employees in the workplace. Furthermore, the Claimant was reporting concealed activities, albeit he alleged management complicity.

65. The Claimant also believed his disclosure was made in the public interest. Whilst his letter was termed a 'grievance' in substance it was a report of serious criminal activity in the workplace, involving a large number of employees and agency workers, with management connivance. This is far removed from the scenario where an individual is complaining about their own treatment or matters personal to them. The Claimant believed there was real danger in this regard. He said a blind eye had been turned to this problem for many years but the situation had now "got out of control". He also wrote:

> **[…] I am fed up going to work on watching people riding Man Riders, soon someone will get killed.**

66. The Claimant finished his letter with:

> **I had to write this because I do actually care how drugs affect people's lives we can all change guys and make DPD a good place to work for the people who come after us. In case you says lose this letter I have 20 copies.**

67. Mr Bownes argued the Claimant did not make his disclosure in the public interest because he was trying to get at the colleague with whom he had ongoing difficulties. We were referred to the transcript of an interview with the Claimant on 16 September 2021, in which the Claimant said this person was:

> **[…] off his head off drugs all the time and that's why I subsequently reported the drugs, ok he got away with the drug test because he was. ..well probably not taking them then I don't know but it is common knowledge that he is on drugs and he shouts his mouth off, that's what people on the floor think. I know you lot don't think that but that's what everyone else thinks**

68. We are not persuaded that the Claimant's only or indeed his predominant motive for making this disclosure was because he sought to target a particular individual. This is inconsistent with the grievance letter, in which that person features to only a modest extent and very many others are also accused. Furthermore and in any event, per **Chesterton** the Claimant's motive in this regard does not prevent him from making a protected disclosure. The relevant statutory question is whether he had a reasonable belief that his disclosure was in public interest, which we find he did.

31 August 2021

69. On 31 August 2021, Mr Baum confronted the Claimant on the shop floor, saying "I am not on drugs, and you can piss test me" along with "could have been smarter about this". He did so whilst gesticulating in an aggressive manner.

70. This was plainly a detriment. Having made a protected disclosure about workplace drug misuse, which was proven correct at least to the extent of several employees being suspended and then dismissed for failing drug tests, far from being protected from victimisation, Mr Baum, the most senior manager on site berated the Claimant and suggested he should not have made his disclosure as he did. It was entirely reasonable for the Claimant to believe he was put at a disadvantage in the workplace in such circumstances.

71. Whilst a feeling of indignation as a result of being on the receiving end of a false allegation of such a serious character is entirely understandable, Mr Baum should have kept that to himself and behaved professionally in his dealings with the Claimant that day, which he failed to do.

72. Mr Baum did this detriment because of the Claimant's protected disclosure, in which Mr Baum himself had been accused of complicity in serious criminality and workplace danger. Mr Baum's conduct was expressly referable to the content of the Claimant's disclosure. He refuted the Claimant's allegation and referred to the urine test he was required to undergo as a result. The words "could have been smarter" must be a reference to the content and / or method of the Claimant's disclosure. The detriment done was a direct response to the disclosure made.

Job Duties

73. Mr Baum and Mr Gaddu did not instruct a change of job duties. This detriment did not occur. Ms Ochocinska made the decisions about which the Claimant complains and this was not, to any extent whatsoever, because of his protected disclosure.

2 November 2021

74. On 2 November 2021, Mr Gaddu did brush aside the Claimant's report of death threats being received from a work colleague. This is precisely the sort of occurrence against which the Claimant ought, according to the Respondent's policy, have been protected. Mr Gaddu could have sought to limit the workplace contact between these two or simply given a reminder of the importance professional behaviour at work and the disciplinary consequences that would follow should that not be adhered to. The lack of a meaningful response, Mr Gaddu simply telling the Claimant to ignore the threats he had received, was a detriment. The Claimant, reasonably, felt more vulnerable in the workplace as a result.

75. As set out above, our finding is that Mr Gaddu's lack of action was at least in part because of the Claimant's protected disclosure, in which he like Mr Baum had been accused of serious wrongdoing.

16 December 2021

76. It is likely the conduct complained of occurred, in that the Claimant was instructed by Ms Ochocinska to work in the trailer rather than the on the Man Rider.

77. This was not a detriment. This was done for proper reasons, either the efficient allocation of staffing resources or because of the appearance of the Claimant's workplace behaviours. As such, a sense of grievance in this regard on the part of the Claimant would not be reasonable.

78. Further and separately, this conduct was not done because of the Claimant's protected disclosure, to any extent whatsoever.

Limitation

79. We are satisfied the comments of Mr Baum on 31 August 2021 and Mr Gaddu's lack of action in on 2 November 2021 are a series of similar acts or failures within ERA section 48(3). Whilst the conduct differed on those two occasions and we do not find they were organised in concert, there are striking common features. Both detriments stem from the same disclosure made at the end of August 2021. Both perpetrators were senior managers at the site where the Claimant worked, well above him in the management chain. Both detriments resulted from anger or annoyance on the part of the perpetrators that the disclosure made expressly named them as complicit, at least turning a blind eye, to serious criminal wrongdoing. Both detriments were contraventions of the Respondent's policy which encouraged whistleblowing and required the whistleblower to be protected rather than victimised. These threads draw the acts together.

80. The last act was on 2 November 2021. The Claimant contacted ACAS on 4 January 2022, which was before the expiry of the 3-month limitation period. A conciliation certificate was issued on 14 February 2022 and this had the effect of extending time for a claim to 14 March 2022. The Claimant's claim was presented on that latter date and was in time.

81. Accordingly, the Tribunal has jurisdiction.

Claims Succeed

82. The Claimant's protected disclosure detriment succeeds to the following extent:

    82.1 On 31 August 2021, Mr Baum confronting the Claimant on the shop floor, saying "I am not on drugs", "you can piss test me" and he "could have been smarter about this";

    82.2 On 2 November 2021, Mr Gaddu brushing aside the death threats the Claimant had allegedly received.

83. The Claimant's other claims are either dismissed on withdrawal or because they were not well-founded.

Remedy

84. Awards for injury to feelings are intended to be compensatory rather than punitive. Whilst the Vento bands are illustrated by reference to the conduct of the employer, that is intended only to guide the hurt feeling which might be expected in such circumstances. In every case, it is the actual injury which must be ascertained and assessed.

85. The Claimant was extremely upset about the sequence of events referred to in his witness statement. He was signed off work by his GP for two periods with stress. If the Claimant fell to be compensated for this hurt in its entirety, we would have little hesitation in agreeing with Mr Maini-Thompson that an award in the middle of middle band was appropriate. In particular, we were struck by the description at paragraph 81 of the Claimant's witness statement about the fear and torment he suffered as a result of threatening phone calls.

86. Our task, however, is to compensate the Claimant for the injury to feeling caused by the matters upheld. Aside from the detriments we found, there are at least three other matters, which were very upsetting for the Claimant, namely: being removed from Man Rider duties; being subject to disciplinary proceedings following an altercation with his colleague; and receiving threatening phone calls. We cannot compensate him for the injury caused by those matters.

87. We did not uphold the Claimant's complaint about Man Rider duties. The Claimant's claim did not include either the imposition of disciplinary proceedings or his colleague's threatening behaviour as alleged protected disclosure detriments. Furthermore, as was pointed out by Mr Bownes in the course of argument, whilst the Claimant speaks a great deal about these other matters in his witness statement, he says relatively little about the detriments we upheld. We also noted the timing of the Claimant's sickness certification would suggest his illness was not triggered by the detriments found. Nonetheless, we accept the Claimant was also very hurt by the matters we are concerned with.

88. Whilst he did his best to get on with things, the Claimant was upset by the conduct of Mr Baum on 31 August 2021. At a time when he was entitled to expect protection, instead the Claimant was berated. The Claimant had only just returned to work that day and was concerned about the matters he had already

raised with the Respondent. The fact he did not put in a complaint about Mr Baum does not mean he was not upset.

89. Similarly, we accept the Claimant was upset and disappointed by Mr Gaddu's dismissive response on 2 November 2021, to something as serious as alleged death threats. As we have already found, this left the Claimant feeling vulnerable. Whilst we cannot proceed on the basis the Respondent is responsible for the actions of the Claimant's colleague, this sense of vulnerability will have fed into the very difficult time the Claimant had during this period. It would seem likely the Claimant was more concerned at that point about what might happen to him or his family, than putting in a complaint about Mr Gaddu. This does not mean, however, the lack of protection, at a time when the Respondent's policy said it should have been given, was not upsetting for the Claimant.

90. The Claimant mental heath deteriorated. He felt crushed and unable to cope at work. His mood dropped. He had difficulty sleeping. He became less physically active outside of work. He worried about his family. The matters we upheld made a material contribution to his feelings in this regard.

91. Doing our best in the circumstances, we have come to the conclusion that an award just above the lower band and at the bottom of the middle band, is appropriate, in the sum of £10,000.

92. The Claimant is entitled to interest upon this sum at the rate of 8%. There have been 1,066 days since 2 November 2021. The interest calculation is 1066/635 x 8% x £10,000 = £2,336.44. The total sum is due of £12,336.44.

EJ Maxwell

Date: 3 October 2024