Case Number: 2305191/2023

EMPLOYMENT TRIBUNALS

Claimant: Dr Tindo Manavalan
Respondent: Kingston Hospitals NHS Foundation Trust

Heard at: London South (by CVP)

On: 22nd, 23rd, 24th and 25th April 2025

Before: Employment Judge Tueje
Mr Cann
Mrs Christofi

REPRESENTATION:

Claimant: In person
Respondent: Ms Niaz-Dickinson (counsel)

JUDGMENT

The unanimous judgment of the Tribunal announced orally at the hearing on 25th April 2025 was that the complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

By an e-mail sent to London South on 6th May 2025, and forwarded to the Tribunal panel on 7th May 2025, the claimant requested written reasons under Rule 62 of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided.

REASONS

INTRODUCTION

1. The claimant was initially employed by the respondent from 10th October 2022 to 31st March 2023 as a consultant physician. In and around March 2023, the parties agreed to extend his employment until 28th June 2023. However, on 21st April 2023, Dr Ismail, the respondent's clinical lead, informed the claimant that his employment was to be terminated.

2. Early conciliation started on 18th July 2023 and ended on 29th August 2023. The claimant presented his ET1 claim form to the Tribunal on 27th September 2023. The respondent's ET3 response form was submitted on around 11th December 2023, and it relies on Amended Grounds of Resistance dated 14th March 2023.

3. At a preliminary hearing on 1st February 2024 Employment Judge Smith made case management orders including directing the parties to provide disclosure by 11th April 2024, and setting out the list of issues to be determined at the final hearing. The complaints comprised automatic unfair dismissal contrary to section 104C of the Employment Rights Act 1996, and a complaint under section 47B of that Act asserting that as a result of protected disclosures, he had been subjected to detriment. The detriment relied on was the respondent's failure:

   "… to investigate, adequately or at all the concerns the claimant had raised in respect of patient X and to inform him of [the] outcome so he could comply with his professional duty of candour to the patient's relatives"

4. In the Notes/Introductory section of the case management order (see page 62 of the hearing bundle), Judge Smith wrote:

   The tribunal specifically raised with the claimant whether he was bringing a complaint of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 (protected disclosures) and he confirmed that he was not.

5. Employment Judge Smith also made a deposit order in respect of the complaint brought under section 104C of the 1996 Act. The deposit order is dated 1st February 2024, it was sent to the parties on 26th February 2024, and required the claimant to pay the deposit within 28 days of the date the order was sent.

6. On 8th March 2024 the claimant e-mailed the Tribunal requesting the period to pay the deposit be extended until one week after the respondent has complied with a data subject access request that the Claimant made.

7. On 16th March 2024 the claimant e-mailed the Tribunal regarding corrections sought to the case management order. Additionally, he pointed out that he had been subjected to detriment due to the respondent's criticism of the treatment provided to a patient under the claimant's care. In an e-mail sent to the Tribunal on 18th March 2024 the respondent objected to the claimant's request to include in the claim any criticism regarding a patient's treatment on the grounds that it amounted to an amendment of the claim, yet there had been no formal request to amend the claim, and the claimant's request was not made in accordance with *Selkent v Moore* nor the Presidential Guidance on General Case Management.

8. The claimant subsequently decided he did not wish to pay the deposit; he e-mailed the Tribunal on 22nd March 2024 stating his reasons, which he also explained at the final hearing. Essentially, his reasons were that paying the deposit presented no real difficulty, but he was concerned about the risk that he would have to pay part of the respondent's costs if that complaint was dismissed after a final hearing.

9. In any event, by an order of Employment Judge Aspinall dated 18th April 2024 the claimant's request for an extension to pay the deposit was refused. Furthermore,

because the deposit had not been paid, and Judge Aspinall believed the automatic unfair dismissal complaint was the only extant claim, Judge Aspinall struck out the entire claim.

10. In a judgment dated 19th May 2024, EJ Aspinall confirmed the automatic unfair dismissal claim remained struck out, therefore confirming refusal of the claimant's request for an extension. However, Judge Aspinall amended his earlier decision to strike out the entire claim, accepting the claimant's submission that the complaint of whistleblowing detriment had not yet been determined.

THE FINAL HEARING

11. The final hearing was held on 22nd to 25th April 2025 by CVP before a 3-panel Tribunal. The claimant was not legal represented; the respondent was represented by Ms Niaz-Dickinson, counsel.

12. The Tribunal received the following documentation:

    12.1 A 579-page updated electronic hearing bundle (including the documents subject to the Tribunal's order for specific disclosure made on 23rd April 2025);
    12.2 Written closing submissions from the claimant;
    12.3 An application to amend the claim sent on 25th April 2025; and
    12.4 7-page closing submissions on behalf of the respondent

13. The Tribunal heard evidence from the following witness:

    13.1 Dr Manavalan, the claimant;
    13.2 Dr Aguado on behalf of the respondent; and
    13.3 Dr Ismail on behalf of the respondent.

14. The Tribunal received written closing submissions from both parties (see above). As to oral submissions, we gave the claimant the option of providing his submissions after the respondent, which he preferred to do, and that is the sequence in which we heard the parties.

15. On 25th April 2025, the Tribunal orally announced its unanimous judgment; the written judgment was subsequently sent to the parties.

16. The claimant subsequently requested written reasons. These are the Tribunal's reasons.

PROCEDURAL ISSUES

17. At various stages during the final hearing, the Tribunal considered a series of applications.

18. On 22nd April 2025 the claimant requested the order striking out the claim for automatic unfair dismissal is set-aside. In brief, his reasons were that after he reviewed the respondent's disclosure, he says it contains documents confirming the reason for his dismissal was that he had requested to work part time. The disclosure was not provided prior to the date by which he was required to pay the

deposit, nor when he made the decision not to pay the deposit. However, now that he has seen that evidence, he considers it would be unjust to deny him an opportunity to pursue that complaint. The Tribunal asked the claimant whether he could point to any of the Tribunal's procedure rules that authorised the Tribunal to set-aside the strike out judgment, however, he was unable to do so.

19. The respondent opposed the application on the grounds that the Tribunal does not have jurisdiction to revisit the strike out order, if the claimant wished to challenge the strike out decisions he should have appealed as the appropriate time, and the respondent has not prepared its case in respect of the automatic unfair dismissal complaint which had been struck out.

20. Having taken into account the submissions made by the parties, the Tribunal refused the claimant's request, and provided oral reasons for its decision at the hearing. In summary, the Tribunal considered it did not have jurisdiction to set-aside a decision that had been made by Judge Aspinall on 18th April 2024 to strike out the automatic unfair dismissal claim, and which Judge Aspinall confirmed in his judgment on reconsideration dated 19th May 2024. The matter already having been determined and reconsidered by the Employment Tribunal, meant we did not have jurisdiction to revisit this decision, and the claimant was not able to point to any rule that authorised us to do so. The covering letter sent with the judgment dated 19th May 2024 provided the claimant with the necessary information about appealing to the Employment Appeal Tribunal, which would have been the appropriate course if he wished to challenge the matter further. In any event, this was a very late application to reintroduce an additional complaint, which the respondent was (understandably) not ready to deal with. Therefore allowing the claimant's application would either cause the respondent substantial prejudice, or would necessitate an adjournment, incurring additional costs, and delay of this case and to other cases, and a disproportionate use of the Tribunal's resources.

21. The second procedural issue dealt with at the final hearing was the claimant reiterating the request made in his e-mail sent to the Tribunal on 16h March 2023, namely that he wanted to rely on the respondent's criticism contained in the SJR of his treatment plan for patient X as one of the detriments he was subjected to.

22. We took into account the parties' submissions, including that the claimant is a litigant in person: he explained that was the reason he was unaware of the need to make a formal application to amend his claim.

23. However, we have also taken into account that the claimant would have been aware from the respondent's e-mail replying to his request, sent on 18th March 2024, that firstly, his request was opposed, that secondly, the respondent stated he needed to make an application to amend his claim, and thirdly the respondent set out the relevant case law authority and Presidential Guidance.

24. We have also considered the nature of the amendment sought by the claimant, which essentially introduces a new limb to the claim for detriment. As required by *Selkent v Moore,* we have taken into account both the time limits and the timing of the application. In March 2024 and certainly now in April 2025, the claimant would be out of time to bring such a claim. Additionally, and notwithstanding him being a litigant in person, the application is very late.

25. The potential prejudice to the parties if we allow or refuse the request is also relevant. While the respondent's evidence refers to the SJR report, the respondent's evidential case does not treat its contents, as they relate to the treatment plan, as a detriment the claimant says he was subjected to. Introducing this issue at this stage would prejudice the respondent, who has not had the opportunity to address it substantively in the context of a detriment.

26. We therefore refused the claimant's request to include the respondent's criticisms of his treatment plan, as contained in the SJR, as one of the issues to be determined as a detriment he was subjected to.

27. A further issue related to the claimant's request for specific disclosure e-mailed to the Tribunal. The respondent's reply stated it would comply with any Tribunal order made for specific disclosure. However, it seems that the Tribunal did not deal with the claimant's request. He therefore renewed his request at the final hearing, in essence requesting Patient X's records from the date of her admission. The Tribunal considered that these records were potentially relevant, therefore it was in the interests of justice that the records are disclosed. Accordingly, the Tribunal granted the claimant's request for specific disclosure, and redacted copies of the records were disclosed, and available during the witnesses evidence, and the parties submissions.

28. The final procedural issue arose after the Tribunal had heard the parties' evidence. The Tribunal took an extended lunch break on 24th April 2025, to allow the parties an opportunity to finalise their written closing submissions. When the hearing resumed after lunch, the claimant made an application as set out in his e-mail sent to the Tribunal during the lunch break. His e-mail read:

In accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013, I would like to request an order for leave to amend my claim.

I wish to request leave to amend my claim, by adding a new claim for unfair dismissal due to whistleblowing. This claim was not included in the original ET1 because I only recently became aware of certain information from the evidence disclosure on 23/4/25 which was of a large volume on pages 498 and pages 521, proving the whistleblowing concerns raised.

In addition following todays news witness testimony of Dr Aguado who requested to change her witness statement and the persistent refusal to provide duty of candour to patient affected. This new evidence I believe shows that the conclusion is unfair dismissal secondary to whistleblowing.

The effect of the amendment sought is merely to add a new label to facts already pleaded.

The purpose of this amendment is to clarify the issues between the parties. I consider that an order in the terms requested would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective.

The prejudice to me from a refusal of the application and depriving me of part of my claim would be greater than any prejudice to the respondent flowing from permitting the amendment.

There are time limit issues with my claim but for the reasons stated above, I believe that it should be granted.

29. The respondent opposed the application arguing there is no causal link between the evidence the claimant seeks to rely on to support the application, and in accordance with *Selkent v Moore,* it would be unjust to allow him to amend the claim at this late stage.

30. Having taken into account the submissions of both parties, in our judgment it would be contrary to the interests of justice to grant the claimant's application. We disagree with the claimant that the amendment is re-labelling, in our judgment, it would introduce a new cause of action, namely automatic unfair dismissal. We also note that Judge Smith had specifically asked the claimant whether he was making a claim under section 103A of the 1996 Act, and he told Judge Smith he did not wish to do so. Having regard to *Selkent v Moore,* we consider the application is very late: it is outside the statutory time limit, and is being made after all evidence has been heard at the final hearing. This provides no opportunity for the Tribunal to hear evidence on the proposed complaint, unless the final hearing is adjourned part heard. In our judgment, it would be disproportionate to adjourn the matter part heard because of the delay, additional costs and the Tribunal's resources that such a course would entail.

THE ISSUES FOR DETERMINATION

31. Following all applications and case management orders, the remaining issues to be determined at the final hearing are set out below.

32. Protected disclosure

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

33.1.1 What did the claimant say or write? When? To whom?

The claimant says that at a meeting held on or about the date in February 2023 between the claimant and Dr Aguado, at which Dr Isabel was present, a discussion took place in respect of patient X. The claimant raised concerns that according to the patient notes patient X had been placed on a non-invasive ventilator. Dr Aguado responded "they sometimes do that". The claimant considered that was wrong and the matter should be investigated and documented his concerns in the patient's notes. Patient X died.

33.1.1.1 Did the claimant disclose information?

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

33.1.1.3 Was that belief reasonable?

33.1.1.4 Did they believe it tended to show that:

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

33.1.1.6 Was that belief reasonable?

33.2 If the claimant made a qualifying disclosure, was it made:

33.2.1 to the claimant's employer?

33. Detriment (Employment Rights Act 1996 section 48)

34.1 Did the respondent do the following things:

13.1.1 Fail to investigate, adequately or at all the concerns the claimant had raised in respect of patient X and to inform him of his outcome so he could comply with his professional duty of candour to the patient's relatives

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

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

FINDINGS OF FACT

34. The following findings of fact were reached on a balance of probabilities, having considered the witnesses' evidence, including documents referred to in that evidence, and taking into account my assessment of the evidence.

35. Only findings of fact relevant to the issues, and those necessary to determine the issues, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. We have not referred to every document that we read and/or were taken to in the findings below, but that does not mean it was not considered if it was referred to in the evidence and was relevant to an issue.

36. Unless otherwise stated, the facts below are either agreed or unchallenged.

37. The respondent is a provider of NHS healthcare, including within its acute medical unit, where Dr Tuan Ismail is a consultant and the clinical lead. Dr Aguado is a permanent consultant, also working in the respondent's acute medical unit. The claimant was employed on a series of two fixed term contracts in the acute medical unit; the second contract which had been due to expire on 28th June 2023, was terminated early, on 21st April 2023.

38. The claimant's case is that he was subjected to detriment because of the disclosure he made regarding the treatment of patient X, who was admitted to the respondent hospital on 8th January 2023, and subsequently transferred to the care of the acute medical unit where the claimant was responsible for her treatment.

39. On 13th January 2023, non-invasive ventilation ("NIV") treatment was administered to patient X without entrained oxygen. Patient X then died. Following her death, the patient's family complained to the hospital that there had been poor communication around the "Do Not Attempt Resuscitation" order that was in place.

40. As a result of the family's complaint, on 17th January 2023 the hospital initiated a Structured Judgement Review ("SJR") to be conducted by Dr. Aguado.

41. In his witness statement, Dr Ismail explains an SJR as follows (see paragraph 5):

This is a review by a doctor who has not been involved in the treatment of the patient. They look at the steps taken in the treatment of the patient and determine if there is any learning to be taken from the treatment and the patient's death.

42. Although the claimant said he was initially unaware a review was being carried out as no one contacted him for his input, from Dr Ismail's witness statement that is the standard practice. Dr Ismail was not challenged on this point during cross examination Dr. Aguado's evidence, was that she completed the SJR on around 6th or 7th February 2023. Paragraph 7 of her witness statement states that she finalised the review on 10th February 2023. At the hearing, when amending her witness statement to correct this date to 6th or 7th February 2023, Dr Aguado explained that when originally making her statement, she erroneously stated she completed the SJR on 10th February 2023 because that is the date that she e-mailed the SJR to the Senior Medical Group ("SMG"). However, she subsequently realised she completed the SJR a few days prior, and corrected her witness statement according.

43. It's now common ground that Dr. Aguado and the claimant did speak about the review on 7th February 2023. In her witness statement Dr Aguado stated the discussion took place on a date she could not recall between 10th February 2023 21st April 2023. Although she stated it was likely to have been before 1st March 2023, because that was the date the SJR was originally due to be presented to the SMG. In other words, she believed the discussion took place between the date she mistakenly thought she had completed the review and the date the claimant's employment ended. We accept the correction Dr Aguado made to her witness statement, amending the date she completed the SJR. Our reasons are that she has explained why she made the initial error, and we find it is a credible error to initially proceed on the mistaken belief that she completed the SJR on the same day she sent it to the SMG. Secondly, notwithstanding her amendment, Dr Aguado's evidence is consistent regarding the discussion taking place on a date between her completing the SJR and the claimant's employment ending. This lends credibility to the amendment.

44. The claimant says it was not made clear to him that the review being conducted was an SJR. Furthermore, he says during the discussion Dr. Aguado relayed what

he considered to be inaccurate information about Patient X's care, and that Dr Aguado was critical of the patient's treatment.

45. Dr Aguado's evidence is that the claimant became defensive in response to what he perceived as criticism of the patient's care. She stated that he appeared visibly upset. It is common ground that Dr. Ismail was present during at least part of that discussion, and that he did not participate in the discussion. He described the discussion as tense.

46. The claimant accepts that he became upset during the discussion. He explained that this was because during the discussion he reviewed the patient's medical records and discovered that NIV had been administered without oxygen. He found this concerning and so raised it with Dr Aguado during the discussion. He says Dr. Aguado's response was that "they sometimes do that." In other words, she was saying hospital staff sometimes administer NIV without oxygen entrained. This also concerned him because her comment suggested this was not an isolated incident. He said as a result of this concern he entered on the patient's records that:

"Asked by Dr. Aguado to review notes regarding NIV and care. Air team documentation noted of patient on NIV with no oxygen entrained – this needs Datix/incident form completion."

47. In her witness statement, Dr. Aguado accepted that was her response. In her oral evidence, she stated her comment was sarcastic. She says that aside from this patient, where NIV is being administered to a patient without oxygen (who has consented to the treatment), that would be a matter of concern.

48. Dr. Aguado sent the SJR to the SMG on 10th February 2023. She says that was the standard practice, that it would not be sent to the treating consultant at that stage. The conclusions and action plan would be sent to the consultant after the report was presented to the committee and the contents approved, which in this case didn't happen until 7th June 2023, by which time the claimant had left the hospital. It seems the time that elapsed between Dr Aguado submitting the SJR and the committee approving the contents was due to industrial action by doctors during this period.

49. The claimant first received a copy of the SJR when it was disclosed in these proceedings further to the case management order made. He deals with the contents in his witness statement as follows (see paragraph 16):

I also to my surprise found out that instead of investigating the concerns raised, that my patient was not connected to oxygen, Dr Ofelia Aguado had decided that the patients treatment of non-invasive ventilation should not have be given even though this was suggested by the respiratory consultant on admission, and was agreed to by the patient on admission. Her review was I believe unfairly critical of the patients treatment while making no mention of the fact oxygen was not entrained to the NIV prior to the patients death, and no investigation of events surrounding this. The

issue of the patient non invasive ventilation not being connected to oxygen which possibly resulted in her death a few minutes later was simply ignored and I believe covered up, instead the report attempt to state the patient who was being actively treated was approaching the end life, and perhaps should not have been treated with non-invasive ventilation. How she came to this conclusion without ever having been directly involved in care is beyond me.

50. Dr. Aguado acknowledged she did not deal with the administering of NIV without oxygen in the SJR. She explained that was because she didn't consider it relevant to the reasons why the SJR had been instigated, namely the family's complaint about communication regarding the DNAR. She also explained that in her clinical judgment, this issue was not relevant because, in her judgment, NIV should not have been administered to this patient at all, with or without oxygen. That is because in her view, the patient had not consented to this treatment. The claimant's view is that the patient had consented.

51. Although Dr. Ismail was not involved in the SJR, he gave evidence during the hearing that, in his view, if NIV was administered to a patient in the condition this patient X was in, he would expect that to have been dealt with as part of the SJR. It was also Dr Ismail's evidence that it is the responsibility of a doctor who raises a concern to complete the Datix incident form, rather than to simply request the form is completed, as the claimant had done on 7th February 2023. Dr Ismail also gave evidence as to the difference between matters recorded on Datix, which relate to a specific aspect of a patient's treatment, compared to the broader SJR.

52. The claimant's evidence was that he considered it sufficient that he recorded an incident form needed to be completed, which he believed would be done as part of the review Dr Aguado was conducting.

53. During her evidence to the Tribunal, Dr Aguado added that in hindsight she would have mentioned in the SJR the reason why her conclusions were not based on the administration of NIV without oxygen. But in her oral evidence she firmly stood by the reasoning and conclusion in the SJR.

54. However, the factual account regarding the reviews are in dispute. Namely, on 7th February 2023 the claimant entered on the Datix that NIV was administered to Patient X without oxygen entrained, and he had told Dr Aguado about this. What is also not disputed is that Dr Aguado did not deal with this in the SJR.

55. The claimant did not seek any update or further information regarding the review from Dr. Aguado before his employment ended. However, after his employment ended, his BMA representative made enquiries about this on his behalf, but those enquiries were unanswered. Consequently, he contacted Dr. Aguado via WhatsApp in September 2023, following which they had a telephone discussion,

where she discussed the SJR, although at the time she did not have the SJR in front of her.

56. The claimant first received the SJR when it was disclosed during these proceedings pursuant to the Tribunal's case management order.

57. He says that the detriment he was subjected to was that the respondent failed to investigate, adequately or at all, the concerns the claimant had raised in respect of patient X, and failed to inform him of the outcome. He states this prevented him from fulfilling his professional duty of candour to the patient's relatives. During cross-examination, he acknowledged that he had not been subjected to any disciplinary or regulatory sanctions which could potentially have arisen from any duty of candour he had in relation to this patient. However, he maintains that he was actively trying to understand what had happened so that he could comply with his professional obligations.

58. At paragraph 17 of his witness statement, he says:

To this day I do not know if the duty of candour has been performed. My understanding is that it has not happened, and the events have not been properly investigated, which causes me some anxiety. I do not have access to the electronic medical record, which is accessed from the hospital computers, so I have no contact details for the patient's next of kin. I made many attempts to complete my duty of candour without success. The reason for this is the way the matter has been handled by the respondent, and staff members employed by the respondent The usual process of the review is that once the outcome is available all people are informed, and lessons are learnt, but this did not happen. When patient concerns are raised by staff members there is a responsibility to acknowledge, investigate, learn and feedback to the staff. This did not happen to me after I raised specific patient concerns.

59. When asked during his oral evidence what he believed were the respondent's reasons for failing to carry out an adequate investigation, and failing to inform him of the outcome, he said he didn't know what their reasons were. Although he referred to the explanation Dr. Aguado had given in her evidence, which he repeated, namely that by the time the committee had approved the SJR he was no longer working at the hospital, and that she had already discussed the review with him on 7th February 2023.

60. Also, when asked during closing submissions what evidence he wished to rely on to show that any detriment he was subjected to was on the grounds of a protected disclosure, the claimant repeated Dr Aguado's above-mentioned explanation.

61. As stated, Ms Niaz-Dickinson presented the respondent's closing submissions first, relying on her written submissions. The claimant's written closing submissions were as follows:

This submission is regarding the claim of detriment secondary to raising patient safety concerns during employment, and post employment injury to feelings, it is submitted by a litigant in person and the tribunal is respectfully asked to take this into consideration when reading it.

The patient records showing NIV treatment without oxygen connected and concerns being raised by the claimant regarding what was picked up following review, and verbal and written documentation to the staff concerned. This confirms the fact of the claimant raising patient safety concerns.

The respondent witness (Dr Aguado) alleges poor care via an SJR report and then does not inform family as required by statutory duty of candor regarding the SJR findings. I believe this leads to detriment to the claimant proving what amounts to unfair criticism of care, and ignoring the patient safety concerns. When highlighted on multiple occasions during testimony and through various correspondence of need for duty of candor there is still persistent refusal to provide duty of candor.

There is no attempt to Datix/incident investigate further. The claimant's patient safety concerns are still being ignored and not acted on causing ongoing distress.

I believe the case of detriment arising from whistleblowing has been proved on the balance of probalitites. I believe the whistleblowing led to my dismissal, the changing of witness statement dates by the respondent witness Dr Aguado during testimony clouds tribunal judgement. I would like to amend the claim to include that of unfair dismissal secondary to whistleblowing. There is post dismissal injury to feelings by email communications to the claimant included in the evidence bundle. The respondent believes the entire dismissal was unfair and in breach of employment contract. There was no fair process, no reasonable employer treats employees in this manner.

THE LAW

62. Whistleblowers are protected from being subjected to any detriment from their employer as a consequence of making a public interest disclosure of alleged wrongdoing.

63. Sections 43A and 43B of the Employment Rights Act 1996 deal with qualifying and protected disclosures.

64. They read:

43A - Meaning of protected disclosure

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B - Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

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

65. By section 43C, a qualifying disclosure made to an employer is protected.

66. Only those disclosures that meet the statutory requirements set out in section 43B qualify for protection. There are five requirements to satisfy section 43B, which were summarised by HHJ Auerbach in Williams v Michelle Brown UKEAT/0044/19/00, as set out below.

67. Firstly, that the disclosure must be a *"disclosure of information"* made by the worker bringing the claim. This is not disputed.

68. Secondly, the worker believes the disclosure tends to show a 'relevant failure' in one of five specified respects; or deliberate concealment of that failure. In other words, the worker's belief must be genuine. The definition is concerned with what the worker believed at the time when they made the disclosure, not what they may have come to believe later on *(Dodd v UK Direct Solutions Limited at para 55 [2022] EAT 44).*

69. Thirdly, in addition to being genuine, the worker must also reasonably believe that the disclosure tends to show a relevant failure in one of the five specified categories at section 43B(1)(a) to 43B(1)(e). Reasonableness involves applying an objective standard to the personal circumstances of the discloser. Amongst the five categories at section 43B(1)(a) to 43B(1)(e), two are relevant in this case. They are disclosures that tend to show a failure to comply with a legal obligation (section 43B(1)(b)). Although Tribunals should consider the particular wrong that the claimant alleges they believe has been breached, there is no requirement that

the worker should expressly accuse the employer of acting in breach of a legal obligation, or identify a particular legal obligation in the disclosure. Also relevant are disclosures that tend to show the health and safety of any individual is being or is likely to be endangered (section 43B(1)(d)). The nature of the health and safety danger needs to be specified, but this can be done in general terms (see *Fincham v HM Prison Service EAT 0925/01).*

70. Fourthly, at the time of making the disclosure, the worker believes the disclosure is made in the public interest. Again, this belief must be genuine.

71. Finally, the worker's belief that the disclosure is made in the public interest must be reasonable. What amounts to a reasonable belief that disclosure was in the public interest was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed [2018] ICR 731.*

72. Underhill LJ, giving the leading judgment, refused to define *"public interest"* in a mechanistic way, but provided the following fourfold classification of relevant factors as a *"useful tool":*

- The numbers in the group whose interests the disclosure served – although numbers by themselves would often be an insufficient basis for establishing public interest.

- The nature and the extent of the interests affected – the more important the interest and the more serious the effect, the more likely that public interest is engaged.

- The nature of the wrongdoing – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing.

- The identity of the wrongdoer – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

73. While the Respondent maintains that the claimant's disclosures were neither qualifying or protected disclosures, in answering the Tribunal's questions, Ms Niaz-Dickinson accepted that in law, to qualify for protection, the public interest need not be the only reason for a disclosure being made.

74. Section 47B of the Employment Rights Act 1996 prohibits an employee being subjected to any detriment on the grounds of having made a protected disclosure. And by section 48 an employee may present a claim to the employment tribunal where these provisions have been breached. So far as is relevant, sections 47B and 48 state:

47B – Protected disclosures

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

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done-

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

75. There is no statutory definition of the term *"detriment".* However, in *Jesudason v Alder Hay Children's NHS Foundation Trust [2020] IRLR 374*, the Court of Appeal stated: *"It is now well established that the concept of a detriment is very broad and must be judged from the viewpoint of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment."* However, according to the unreported first instance decision of *Chattenton v City of Sunderland City Council ET Case No.6402938/99* it may be difficult for an employee to show she has suffered detriment where she has been treated no differently to others.

76. In addition to the employee being subjected to detriment, the detriment must be on the ground that the employee made a protected disclosure. In *Harrow LBC v Knight [2003] EAT/0790/01,* the Employment Appeal Tribunal held that:

It is thus necessary in a claim under s 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of.

77. And in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL the House of Lords stated an employee may be subjected to detriment even where there are no economic or physical consequences resulting from the employer's deliberate act or failure to act.

78. In Osipov v Timis [2017] EAT, Simler P summarised the proper approach to inference drawing and the burden of proof when considering causation as follows (at paragraph 115):

"(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them …

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

CONCLUSION ON THE ISSUES

79. Reflecting the procedural history outlined above, the final disputed issues which we need to determine relate to the complaint that the claimant was subjected to detriment as a result of making a protected disclosure.

80. Our conclusions on each element of this complaint is set out below.

Did the claimant believed the disclosure of information was made in the public interest?

81. The claimant's evidence was that he was concerned about patient safety because the NIV had been administered to patient X without oxygen entrained, and in light of Dr Aguado's comment that that sometimes happens, he was concerned that what happened with patient X may not have been isolated.

82. Dr Aguado's written evidence confirmed that was her response, but there was no indication in her statement that she was being sarcastic; that was only stated in her oral evidence to the Tribunal. We accept the claimant's evidence that when he discovered what had happened to patient X, and hearing Dr Aguado's comment, that this raised concerns in him for patient safety. We consider such a concern amounts to a matter that is in the public interest. We consider the treatment that patients receive in the acute department of a busy London NHS hospital would be an evident matter of public concern, particularly having regard to the criteria set out by Underhill LJ in *Chesteron Global Ltd.*

83. As to whether the public interest was the claimant's only reason for making the disclosure, we agree with Ms Niaz-Dickinson's answer to our question, that it need not be the only reason. We consider this concern for patient safety was a sufficient part of the claimant's reasons. We also accept the claimant's argument that if his main motivation was to deflect criticisms made against him, that would be inconsistent with him bringing and pursuing this claim, which is being heard in public. This supports our conclusion that concern for public safety was the reason or a sufficient part of the reasons why the claimant made the disclosure..

Was that belief reasonable.

84. We consider that the claimant's belief that the disclosure was made in the public interest out of patient safety concerns was reasonable. This is fortified by the fact that he accepted at face value Dr Aguado's comment that this sometimes happens, leading him to believe it was not an isolated incident. Furthermore, both Dr Aguado and Dr Ismail's evidence was that if NIV without oxygen entrained was administered to a (consenting) patient in patient X's condition, it would be a matter of concern. Therefore, in all the circumstances, we consider the claimant's concern for patient safety was a reasonably held belief.

Did he believed the disclosure tended to show the health and safety of any individual had been, was being or was likely to be endangered.

85. Again, for the reasons already stated, we consider the claimant believed the

disclosure tended to show the health and safety of any individual had been endangered, in this case patient X. Dr Aguoda's comment suggesting this was not isolated, also suggested that patient safety was likely to be endangered. We consider issues of patient safety and health and safety are inextricably linked, and so we conclude the requirements at section 43B(1)(d) are satisfied.

Was that belief reasonable.

86. Again, because it was a view which Dr Ismail and Dr Aguoda effectively shared, we consider in light of the patient safety concerns the claimant held, it was reasonable that he believed this tended to show the health and safety of any individual had been, was being or was likely to be endangered.

87. It follows that we consider the claimant made a qualifying disclosure. We have also taken into account that although the respondent's position was put to him, there was no direct challenge in cross examination to the claimant's contention that he made the disclosure due to concern for public safety.

If the claimant made a qualifying disclosure, the Tribunal needs to decide whether it was protected.

88. A qualifying disclosure is a protected disclosure if it is made to the claimant's employer. The relevant sections of IDS which Ms Niaz-Dickinson referred the Tribunal to during the hearing, state that the disclosure may be protected even where the disclosure is not made in accordance with an employer's disclosure policy. Also having regard to that commentary, we note that the disclosure during the conversation on 7th February 2023 was made to Dr Aguoda, who the claimant explained in his evidence was senior to him as a permanent employee of the respondent. Ms Niaz-Dickinson did not demur.

Did the respondent act or fail to act in the manner complained of

89. The Tribunal will also consider whether the claimant has been subjected to an unlawful detriment. In deciding what detriment, if any, the claimant was subjected to, the Tribunal will consider whether the respondent failed to investigate, adequately or at all the concerns the claimant had raised in respect of patient X and to inform him of the outcome so that he could comply with his professional duty of candour to the patients relatives.

90. The claimant complains the respondent failed to investigate, adequately or at all, the concerns he raised in respect of patient X, and to inform him of the outcome so he could comply with his professional duty of candour to the patient's relatives.

91. Our conclusions on this issue are set out below.

92. It is not disputed that the claimant made this disclosure on 7th February 2023, and he made an entry in the patient's records that NIV was administered without oxygen.

93. We find that Dr Aguado did not investigate the concerns the claimant raised regarding patient X, namely that NIV was administered without oxygen

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entrained. Again, this is not disputed. In her oral evidence Dr Aguado accepts that she did not investigate this issue. In her explanation she reiterated her written evidence, stating (see paragraph 13):

That was irrelevant for me as the NIV should not have been started with or without O2 (oxygen) and I don't think it had any relevance for the outcome of the patient.

94. Although we note Dr Aguado's reasons, and we accept those are her genuine reasons, we nonetheless take into account that her own oral evidence was that the administration of NIV without oxygen (where the patient had consented) was a concern. It was something the claimant was evidently deeply concerned about, also taking into account his view that the patient had consented. Furthermore, Dr Ismail considered that where an SJR is being carried out on a patient who receives NIV treatment without oxygen, he would expect that to be addressed as part of the SJR, which is supposed to entail scrutiny of every aspect of the management of the patient's care.

95. We have also considered whether the claimant was informed of the outcome of the investigation. In her witness statement Dr Aguado says she provided feedback on the investigation on two occasions: firstly during the 7th February 2023 meeting, and secondly during their September 2023 telephone conversation.

96. The claimant maintains he was not informed of the outcome until the SJR was disclosed to him further to the case management directions made in these proceedings.

97. In our judgment, Dr Aguado did not inform the claimant of the outcome of the investigation in their the discussion on 7th February 2023, therefore we accept the claimant's evidence on that point. Dr Aguado says she wasn't able to say very much during the meeting, which according to her, lasted around 5 to 10 minutes, because during the meeting she mainly listened to the claimant's complaints about the criticisms of his work. This may well explain why there was insufficient opportunity to adequately inform the claimant of the outcome. But whatever the reasons, it's out conclusion that Dr Aguado did not inform the claimant of the outcome of the SJR during their discussion on 7th February 2023. We consider subsequent events support the claimant's account that he was unaware of the outcome of the SJR, in particular, the fact that he messaged Dr Aguado via WhatsApp and then spoke to her, seeking more information about the investigation. Also, between April 2023 when his employment ended, and September 2023 when they spoke, the claimant's union representative was also requesting the outcome of the investigation on his behalf. We find this is consistent with the claimant being unaware of the outcome.

98. That said, we accept that the timing of events provides a credible explanation as to why the claimant was not formally told about the outcome of the investigation. There was no real dispute that the respondent's practice is to send the treating consultant and clinical lead the SJR conclusions and action points after the SJR has been approved. In this case, due to strikes within the NHS, the SJR was not approved until June 2023, by which time, the claimant was no longer working for the respondent.

99. As a result of the timing of these events, that is the claimant's employment being terminated in April 2023, and the SJR being approved in June 2023, he was unable to comply with his duty of candour to the patient's relatives by informing them of the outcome of the SJR within a reasonable period.

If the Tribunal finds the respondent did or failed to do any of those things, and by doing so, did it subject the claimant to detriment.

100. In light of the above findings, we need to consider whether this resulted in the claimant being subjected to detriment.

101. The claimant says that he found it stressful not being to comply with the duty of candour. Paragraph 17 of his witness statement reads:

To this day I do not know if the duty of candour has been performed, my understanding is that it has not happened, and the events have not been properly investigated, which causes me some anxiety.

102. In our judgment, this amounts to detriment as set out at section 47B of the 1996 Act, which is also defined in the case of *Shamoon,* which states that while an unjustified sense of grievance would not amount to detriment, the House of Lords held:

If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice.

103. There was no serious challenge during cross examination of the claimant that he found it stressful to be unable to comply with the duty of candour. And bearing in mind that there may be detriment even if the claimant were not subjected to physical or economic detriment, we consider his uncontested stress amounts to a detriment. That it was a detriment, is further supported by the fact that potentially, a failure to comply with the duty of candour may result in disciplinary and/or regulatory action. The potential risk of such sanctions, in our judgment, is a detriment.

If so, was it done on the grounds that the claimant made any of the protected disclosures referred to above.

104. Finally, we need to consider whether the detriment the claimant was subjected to was on the grounds of him making a protected disclosure.

105. We are not satisfied that the reason the claimant was subjected to detriment was due to him making a protected disclosure.

106. One aspect of the detriment the claimant says he was subjected to was the stress arising from being unable to comply with his duty of candour because he was not informed of the outcome of the investigation, and that investigation did not look into the patient safety concerns that he raised. We do not consider there is any causal link with the disclosure he made.

107. We accept Dr Aguado's evidence she did not investigate NIV being administered without oxygen because she considered it was irrelevant to the SJR. Whether that was correct or incorrect is not for us to say. The important point is that we find the claimant's disclosure played no part in Dr Aguado's decision to omit this from her investigation.

108. We also accept her evidence that following approval of the SJR, it was decided the claimant would not be informed of the outcome because there had already been a discussion with the claimant regarding the investigation, and because he no longer worked at the hospital. While we do not consider the discussion actually informed the claimant of the outcome, we accept Dr Aguado's evidence, that the SMG took that discussion into account when deciding that as a former employee, there was no need to inform him of the outcome.

109. Furthermore, during oral evidence the claimant was unable to provide any reasons why Dr Aguada did not investigate this issue or inform of the outcome. During closing submissions, he was unable to point to any evidence supporting a view that the reason was due to him making a protected disclosure. On each occasion, when asked, the claimant only referred to the above reasons given by Dr Aguada, without offering any alternative reasons of his own. This is a fundamental element of the claim, which the claimant repeatedly was unable to establish when asked. Without being able to evidence or explain, and therefore being unable to establish, that the detriment he was subjected to was a result of the protected disclosure,

Conclusion

110. For the reasons stated above, the claimant's claim is dismissed.

Employment Judge Tueje
3rd June 2025

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