Neutral Citation Number: [2026] EAT 57

Case No: EA-2024-000514-TH

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 March 2026

Before:

THE HON. LORD FAIRLEY (PRESIDENT)

- -

Between:

MRS L CAPELING

Appellant

- and –

TFX GROUP LIMITED

Respondent

- -
- -

Miss L Price, of Counsel, for the **Appellant**
Mr S Devonshire K.C. and **Mr N Singer**, of Counsel, for the **Respondent**

Hearing date: 10 March 2026

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JUDGMENT

SUMMARY

Whistleblowing; Employment Rights Act, 1996, section 43B; whether qualifying disclosures made

The claimant was employed by the respondent as a National Sales Manager from 16 March 2022. She was dismissed with immediate effect on 8 September 2022 with a payment of one week's wages in lieu of notice. The stated reason for dismissal was poor performance.

The claimant complained to the Employment Tribunal that she had been automatically unfairly dismissed and subjected to detriment for making protected disclosures. She relied upon three separate alleged disclosures. Having heard evidence, the Tribunal found that the claimant had not made the first disclosure, and that the second and third disclosures did not qualify for protection.

The claimant appealed only against the decision that the third disclosure was not protected. The third disclosure was a statement that the respondent that did not have written contracts in place with some of its Dispensing Appliance Contractors ("DACs") and that this was putting the health and safety of end users at risk and that such risk had been or was likely to be deliberately concealed.

Held:

(1) The extent of the information given by the claimant to the respondent was simply that there were missing DCA contracts. That provision of information was combined with an unexplained and unspecified general assertion that the absence of DCA contracts was putting the health and safety of patients at risk. The Tribunal was entitled to conclude that mere general assertion of a health and safety risk was not enough to qualify as a disclosure of "information".

(2) In any event, the Tribunal was also entitled to conclude, on the evidence, that any belief the claimant may have had that there was a connection between DCA contracts and the health and safety of end users of the product was not a reasonable one for someone in the claimant's position and with her state of knowledge to have held.

The appeal was therefore dismissed.

THE HON. LORD FAIRLEY:

1. This is an appeal from a liability Judgment of an Employment Tribunal at Teeside (Employment Judge Johnson sitting with members). The Judgment was given on 27 March 2024, and reasons were provided on 10 May 2024. I will refer to the parties, as they were described below, as the claimant and the respondent.

Facts and issues

2. The respondent is a medical device manufacturer. It produces, amongst other things, urology products. The claimant commenced employment with the respondent as National Sales Manager for urology on 16 March 2022. The contract was subject to a six-month probationary period. Shortly before the probationary period was due to expire, the claimant was dismissed with immediate effect from 8 September 2022 with a payment of one week's wages in lieu of notice. The stated reason for dismissal was poor performance.

3. The claimant did not have the requisite period of qualifying service to bring a complaint of unfair dismissal in terms of sections 94 and 98 of the **Employment Rights Act, 1996** ("**ERA**"). Instead, on 28 November 2022, she presented an ET1 claim form in which she alleged that her dismissal was automatically unfair in terms of section 103A **ERA** and that she had been subjected to detriment contrary to section 47B **ERA**. The former section makes a dismissal automatically unfair where the principal reason for it is that the employee made a protected disclosure in terms of section 43B **ERA**. The latter makes it unlawful to subject an employee to detriment on the ground that they have made such disclosures.

4. It is clear from the Tribunal's reasons that establishing what disclosures the claimant said she had made and why she claimed that they were protected in terms of section 43B was not a straightforward process. There were two preliminary hearings on 21 March 2023 and 1 November 2023. Between these two hearings, the claimant produced further particulars of her allegations dated

18 April 2023 (CB 78-81). The end result of this was that the claimant's position was understood to be that she wished to rely upon three allegedly protected disclosures. The first of these was said to have been made on 28 July 2022, the second on 11 August 2022 and the third on 29 August 2022. These were set out in an agreed list of issues which the Tribunal summarised briefly at ET § 6 and thereafter considered in more detail in its reasons at ET § 15 to 29.

The disclosures relied upon and the Tribunal's reasons

The first disclosure

5. The first disclosure was said to have been made during a telephone call on 28 July 2022 between the claimant and a member of the respondent's marketing team, Ms Twinn and in an email dated 28 July 2022 from the claimant to an unnamed recipient (I assume Ms Twinn, but that does not matter for these purposes). There was an evidential conflict between the claimant and Ms Twinn over whether the telephone call ever took place. The Tribunal preferred the evidence of Ms Twinn to that of the claimant and found (at ET § 16) that no such call had ever happened. As to the email, the Tribunal concluded (at ET § 17) that this amounted to no more than a request by the claimant for information but did not include any disclosure by the claimant of information. Neither of those factual conclusions is challenged in this appeal.

The second disclosure

6. The second disclosure was said to have been made by the claimant on 12 July 2022 at a meeting in Rotterdam. The claimant was presenting a business plan. In the course of her presentation, it became apparent that there were two different sets of targets. She raised this with the respondent's Mr Vander Kaaden. She claimed that she thereby made a protected disclosure. At ET § 22, the Tribunal stated:

> "The Tribunal was not satisfied that the claimant genuinely believed that there had been a breach of any legal obligation on the respondent's part. The tribunal did not accept that a discrepancy in the claimant's target figures could reasonably be described as a matter of public interest. The tribunal did not accept that the claimant reasonably believed that this was a matter of public interest. The claimant failed to identify the

> source of any legal obligation and failed to identify any breach. The tribunal found that what was said by the claimant at the meeting did not contain "information" and could not and did not amount to a qualifying disclosure in accordance with section 43B."

The Tribunal's conclusions at ET § 22 were not challenged in this appeal.

The third disclosure

7. The third disclosure was said to have been made by the claimant on 29 August 2022. It was the claimant's position that, in the course of a Teams call with Mr Vander Kaaden on that date she had told him that the respondent did not have written contracts in place with some of its Dispensing Appliance Contractors ("DACs") and that this was putting the health and safety of end users at risk. In the further particulars of her claim produced by her in April 2023, the claimant alleged that the information provided by her about the absence of contracts tended to show her belief that the health and safety of individual patients / end users had been, was being, or was likely to be endangered and that such endangerment had been or was likely to be deliberately concealed.

8. The respondent's Mr Gideon Lake and Mr Vander Kaaden each gave evidence to the Tribunal that the absence of a written contract with DACs had no bearing whatsoever upon health and safety. The absence of a written DAC agreement was not unusual. In the absence of such a bespoke agreement, supplies to DACs would simply be on the respondent's standard terms and conditions of sale. The Tribunal accepted that evidence.

9. The Tribunal concluded (ET § 27) that, as a National Sales Manager, the claimant "either knew or ought to have known of the respondent's terms and conditions of trading". At ET § 28 it stated:

> "The Tribunal found that the claimant had failed to identify the nature and extent of any legal obligation, or that there had been any breach of any such obligation. The tribunal found that the claimant had failed to establish that the health and safety of anyone had been, was being or is likely to be endangered or that any information relating to any such matters was being concealed. Accordingly, nothing said by the claimant to either Mr Vander Kaaden or Mr Lake amounted to a qualifying disclosure in accordance with section 43B."

The ground of appeal

10. The single ground of appeal (as amended) is in paragraph 16 of the grounds of appeal and is in the following terms:

> "16. The Tribunal failed properly to consider the matters set out in the sub-paragraphs, particularly those relating to warranties and contractual obligations relevant to medical device regulations. This omission materially affected the outcome and requires appellate review."

11. In three sub-paragraphs (numbered 16.1 to 16.3) the appellant sets out the matters which she maintains that the Tribunal failed properly to consider. The focus of these sub-paragraphs is upon certain regulations the claimant says apply to the supply of medical equipment.

12. Paragraph 16 does not mention the tribunal's reasons in relation to the first disclosures, nor does the ground engage with the alleged significance of the presence or absence of a DCA contract. At sub-paragraph 16.3, however, the claimant states:

> "The Employment Tribunal Panel misunderstood the difference between a commercial agreement / contract Terms and Conditions and the significant differences of those for Medical Devices. The panel further misunderstood Medical Device Regulations and Health and Social Care Regulations pertaining to the risk of harm to patients."

Submissions

Claimant

13. In advance of the full hearing, a skeleton argument was lodged on behalf of the claimant. A substantial part of that document proceeds upon the basis that, within the first and second disclosures, the claimant disclosed matters relating to the health and safety of end users of the respondent's product. In relation to the third disclosure, the claimant submits that the Tribunal ignored the claimant's belief that the absence of DCA contracts was a breach of a regulatory regime, that it endangered the health of product users and that these were facts that were likely to be concealed.

14. Ultimately, in oral submissions, counsel's position was that the only challenge was to the Tribunal's conclusions on the first and third allegedly protected disclosures.

15. The claimant submits that the Tribunal failed properly to engage with her subjective beliefs as to the significance of the relevant regulatory regime and, in particular, the Medical Device Regulations.

Respondent

16. The respondent submits that the scope of this appeal extends only to the third disclosure. That was clear from correspondence from the claimant in the weeks leading up to this hearing in which she had unequivocally confirmed on several occasions that, following and as a consequence of the amendment of her grounds of appeal, her only challenge was to ET § 23 to 29 of the reasons. Those paragraphs related only to the third disclosure. Even if the scope of the appeal was widened to include the Tribunal's conclusions on the first disclosure, the points made in the single ground of appeal that remained before the EAT (para 16) did not engage with the unchallenged findings made by the Tribunal at ET § 16 and 17 and were therefore not a relevant basis to challenge those paragraphs of the Tribunal's reasons.

17. In relation to the third disclosure, the claimant had never suggested in her pleaded case or in her evidence that she had any belief in a breach of a regulatory obligation. The sole focus of her pleaded claim was upon her assertion that dangers arose to the health and safety of product users from the absence of 6 out of 10 DAC contracts. In her evidence to the Tribunal about her belief, the claimant had not put forward any coherent basis as to why an absence of DAC contracts was a disclosure of information that tended to show a health and safety risk to end users or a potential concealment of such dangers.

18. It was clear from what was said by the Tribunal at ET § 28 that the claimant had failed to discharge the burden of proving what she had believed at the material time or that she had imparted information of sufficient specificity to qualify as a disclosure of relevant information.

19. In any event, the Tribunal's findings of fact clearly indicated that it was not satisfied that any belief that the claimant may subjectively have held about the absence of DCA contracts on patient safety was not a reasonable applying the test in **Korashi v. Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 and having regard to the particular position held by her in the respondent's organisation.

Relevant law

20. Section 43B **ERA** defines a "protected disclosure":

> **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.
>
> (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

21. In **Chesterton Global Limited (trading as Chestertons) and another v. Nurmohamed** [2018] ICR 731, the Court of Appeal confirmed that the questions to be asked in applying section 43B (1) were:

> (a) did the worker believe, at the time when the disclosure was made, that it was made in the public interest? and
> (b) if so, was that belief reasonable? (para [27]).

A Tribunal must be careful not to substitute its view of reasonableness for that of the worker (para. [28]).

22. What is important, therefore, for the first part of the section 43B (1) test is the claimant's subjective belief: **Parsons v. Airplus International Limited** UKEAT/0111/17/JOJ. As was noted in **Korashi**, what is a "reasonable belief" involves an objective standard but viewed in the context of the personal circumstances of the discloser.

23. Section 47B states *inter alia* :

> **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.

24. Section 103A states:

> **103A Protected disclosure.**
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

25. Section 103A requires the Tribunal to consider "the reason" for the dismissal. By contrast, the broader causation test under section 47B is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower (**Fecitt and others v. NHS Manchester** [2012] ICR 372, at [45]).

Analysis and conclusions

Scope of the appeal

26. I will deal first with the scope of this appeal. Notwithstanding the attempts by the claimant's counsel to argue that the appeal before me today extends to the first disclosure, I see no basis for such an approach in the appeal papers.

27. In the pre-hearing correspondence about the scope of this hearing the claimant repeatedly stated that her only challenge was to the Tribunal's conclusions about the third disclosure. She did so in her amendment application on 5 January 2026, and in correspondence with the Tribunal and the

respondent on 26 January 2026 and 12 February 2026 about the necessary preparations for this hearing.

28. By way of example, in a submission dated 26 January 2026, under the heading "scope of the appeal", the claimant stated that the appeal turned on "the ET's reasoning on the DAC / contracts disclosure in the Written Reasons (paragraphs 23-29)". In her email of 12 February 2026, the claimant stated:

> "In light of the Tribunal's order granting permission on paragraph 16 only, I maintain that any supplemental material should be strictly confined to documents necessary to determine the permitted ground, namely the Tribunal's treatment of the DAC contracts disclosure."

29. Even if the claimant is not bound by the apparent concessions made in that correspondence, it is also impossible to see any connection between paragraph 16 of the amended grounds of appeal and any part of the Tribunal's reasons for concluding that the first disclosure was not protected. The claim based upon the first alleged disclosure failed because the Tribunal rejected the claimant's evidence that she ever made a telephone call on that date, and accepted instead the evidence of Ms Twinn. It also and concluded that the email of 28 July 2022 was a request for information rather than a disclosure of information (ET § 16 or 17).

30. That being so, I agree with the respondent that the sole focus of the single ground of appeal that is before me is the third disclosure.

The third disclosure

31. The scope of the case made below on the third disclosure was defined by the further particulars provided by the claimant on 18 April 2023 and by the list of agreed issues at para 4.3. In combination, these documents unequivocally demonstrate that the claimant sought to engage only sections 43B (1)(d) and (f): respectively health and safety and concealment.

32. It does not appear that the claimant provided the Tribunal with any evidence that, at the material time, she genuinely held a belief that the absence of DCA contracts tended to show a

regulatory breach of a legal obligation such as to engage section 43B (1)(b) **ERA**. That is unsurprising as that was not her pleaded case.

33. In relation to the pleaded case, the claimant required to prove two things. First, she had to prove what (if any) belief she genuinely held about at least one of the two section 43B matters upon which she relied. Secondly, she had to show that any such belief was reasonably held. It is clear from the Tribunal's reasons that she failed to do either of those things in terms of her pleaded case.

34. The extent of the information given by the claimant to the respondent was simply that there were missing DCA contracts. She combined that provision of information with an unexplained and unspecified general assertion that the absence of DCA contracts was putting the health and safety of patients at risk. She does not seem to have given evidence to the Tribunal that her alleged disclosure on health and safety or concealment went beyond that level of assertion. I accept the respondent's submission that the Tribunal was entitled to conclude that mere general assertion of a health and safety risk was not enough to qualify as a disclosure of "information". As Choudhury P pointed out in **Simpson v. Cantor Fitzgerald Europe** UKEAT/0016/18 (at para. 43), for a statement or disclosure to be a qualifying disclosure it must have sufficient factual content and specificity as to be capable of tending to show one of the matters referred to in section 43B (1) **ERA**. The Tribunal here was entitled to conclude (as it plainly did at ET § 25 to 28) that information about an absence of contracts coupled with a general assertion about health and safety did not cross that low bar.

35. Even if that is wrong, it is clear from ET § 27 that the Tribunal concluded, again as an evidence-based factual finding, that a belief in a perceived connection between DCA contracts and the health and safety of end users of the product was not a reasonable one for someone in the claimant's position and with her state of knowledge to have held. That conclusion flowed as a matter of reasonable inference from the Tribunal's acceptance of the respondent's evidence that DCA contracts have no bearing whatsoever upon patient safety (ET § 26) and from its assessment of what

the claimant ought reasonably to have understood having regard to the position that she held in the respondent's organisation. That approach was correct in law having regard to the partly objective and partly subjective nature of the reasonableness test as described in **Korashi**.

36. These were all factual conclusions that the Tribunal was perfectly entitled to reach on the evidence. The challenges to the Tribunal's conclusions on the third disclosure are, therefore, on a careful examination, simply an attempt to re-try fact without identifying any material error of law. I do not accept the suggestion that the Tribunal made any error of law on the case that was made before it or on the evidence presented that would justify interference with its decision.

37. The appeal is, therefore, refused.