Case No: EA-2020-000432-JOJ
(previously UKEAT/0239/20/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 June 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR AYODELE MARTIN	**Appellant**
- and -	
1) LONDON BOROUGH OF SOUTHWARK	
2) THE GOVERNING BODY OF EVELINA SCHOOL	**Respondents**

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Mr R Kohanzad (instructed by Gunnercooke LLP) for the **Appellant**
Mr N Clarke (instructed by London Borough of Southwark) for the **Respondents**

Hearing date: 10 June 2021

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JUDGMENT

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The claimant brought a claim that he was subject to detriment done on the grounds that he made protected disclosures. The claim was dismissed at a full hearing on the basis that the claimant had not made qualifying disclosures. The Tribunal failed properly to analyse whether the claimant disclosed information and, if so, whether he believed that the information tended to show a breach of a legal obligation and was made in the public interest, and whether, if held, those beliefs were reasonable. The appeal was allowed.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of the employment tribunal sitting in London South from 23 to 26 September 2019, and then in Chambers from 10 to 12 February 2020, Employment Judge Martin, sitting with members.

2. The judgment was sent to the parties on 20 March 2020. A notice of appeal was presented by the claimant that was sealed by the Employment Appeal Tribunal on 1 May 2020. The matter was considered pursuant to the sift by Linden J, who allowed the appeal to proceed by an order with seal date 3 November 2020.

3. The factual background is relatively straightforward. The claimant taught at Evelina Hospital School. The claimant was concerned that teachers, including himself, were working in excess of "statutory directed time".

4. The claimant alleged that he made protected disclosures and as a result had been subject to detriment. The Tribunal focussed predominantly on the question of whether the claimant had made qualifying disclosures. Accordingly, it is helpful first to consider the relevant law in respect of qualifying disclosures.

5. Section 43B of the **Employment Rights Act 1996** (ERA) makes provision for disclosures that qualify for protection:

> "43B.— Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— …
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …"

6. The necessary components of a qualifying disclosure are clearly set out in section 43B **ERA**. They were summarised helpfully by HHJ Auerbach in **Williams v Michelle Brown AM**

UKEAT/0044/19/OO:

> "9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

7. The first stage involves a consideration of whether there has been a disclosure of information.

The correct approach to the disclosure of information is set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850, in which Sales LJ held:

> "30. I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.
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> 31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.
>
> 32. In my view, Mr Milsom is not correct when he suggests that the Employment Appeal Tribunal in *Cavendish Munro* at para 24 was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the appeal tribunal was seeking to say was that a statement which merely took the form, "You are not complying with health and safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the appeal tribunal was seeking to do is borne out by the fact that it itself referred to section 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the appeal tribunal's reasoning at para 24 is somewhat obscured in the headnote summary of this part of its decision in [2010] IRLR 38, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".
>
> 33. I also reject Mr Milsom's submission that the *Cavendish Munro* case is wrongly decided on this point, in relation to the solicitors' letter set out at para 6. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1). I think that the appeal tribunal in *Cavendish Munro* was right

so to hold.

> 34. However, with the benefit of hindsight, I think that it can be said that para 24 in the *Cavendish Munro* case was expressed in a way which has given rise to confusion. The decision of the employment tribunal in the present case illustrates this, because the tribunal seems to have thought that *Cavendish Munro* supported the proposition that a statement was either "information" (and hence within section 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 paras 20-26 about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1).
>
> 35. The question in each case in relation to section 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 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 subsection (1). The statements in the solicitors' letter in the *Cavendish Munro* case 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 section 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 Ltd v Nurmohamed* [2018] ICR 731, para 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."

8. In **Twist DX v Armes** UKEAT/0030/20/JOJ (V) Linden J returned to the question of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

9. It has long been established that it is necessary to consider whether the employer holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements.

10. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 Underhill LJ held that the same

approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. Underhill LJ considered the situation in which a worker discloses information that relates to his or her own contract of employment and whether that precludes the employee also holding a reasonable belief that the disclosure is made in the public interest:

> "37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para 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."

11. The structure for determining whether there is a qualifying disclosure is relatively straightforward, involving the five potential questions HHJ Auerbach identified in **Williams**, although that does not mean that in every case it is necessary to decide each question. For example, there could be a case in which there was no disclosure of information so that it is not necessary to go on and determine the other questions. However, it is important that a structured analysis to qualifying disclosures is adopted. HHJ Auerbach stated in **Williams**:

> "10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute."

12. It is not for me to reconsider the facts of the claim. I appreciate the importance of reading judgments of the employment tribunal fairly, not being excessively fastidious, as we were reminded recently by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 decision.

13. This leads me on to a consideration of the specific findings made by the Tribunal. The Tribunal dealt with the claim very briefly. The judgment is only 10 pages long after a four day hearing and three days of deliberation in chambers. Concision is to be applauded provided the relevant issues are properly considered.

14. The Tribunal directed itself to the relevant statutory provisions, save the Tribunal did not refer to section 43L **ERA** that provides that a disclosure of information can be made to a person that previously been informed.

15. The Tribunal gave a brief overview of some of the relevant decisions of the appellate courts. The focus was on the analysis in **Blackbay Ventures v Gahir** [2014] IRLR 416 which was not of particular assistance as it does not involve breaking down the section 43B **ERA** requirements for a qualifying disclosure into the components recommended in **Williams**.

16. The first disclosure was described in the judgment:

> "18. This is an email sent to the Head Teacher about working hours and Directed Time. The email starts "**I am looking at our working hours for teachers and seem unable to reconcile them to statutory guidance, and all my conservative calculations, clearly I may be missing something**". The Claimant then gives calculations and ends the email with "**the deductions and additions to the excess of Directed Time cancel. From my calculations the excess of directed time for each full-time teacher is in excess of 97.5 hours for this academic year 05/09/16-21/07/17, clearly I may be missing something. Please may we discuss this?**""

17. The Tribunal's analysis of this disclosure is dealt with at paragraphs 19 and 20:

> "19. Whilst the Tribunal accepts that this email relates to a legal obligation in relation to directed time and sets out some, the Tribunal does not find this to be a protected disclosure. …
>
> 20. On examination of this email the Tribunal finds that it is an email raising a potential concern. It is not alleging that there was a breach of a legal requirement or that there was a likelihood of a legal obligation being breached. It is clear from the wording that the purpose of the letter is to invite a discussion to see whether he has been "**missing something**", or whether the Claimant was correct in the assertions that he made. The Tribunal finds this to be an enquiry rather than a disclosure of information that tends to show that there has been a breach of a legal obligation or is likely to be a breach of a legal obligation. The Tribunal does not find this to be a protected disclosure."

18. Unfortunately, I consider that the Tribunal did not adopt the structured approach necessary to determine whether there had been a qualifying disclosure. The Tribunal elided a number of the

components required to establish a qualifying disclosure. The Tribunal stated that a protected disclosure must provide information "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …". It is not clear whether the Tribunal accepted that the claimant made a relevant disclosure of information. The Tribunal did not consider whether the claimant believed that the information he disclosed tended to show a breach of a legal obligation and, if so, whether that belief was reasonable. The Tribunal appeared to approach the matter by considering on a purely objective basis whether the information tended to show a breach of a legal obligation. The Tribunal did not consider what the claimant's subjective belief was or whether that belief was objectively reasonable. The fact that the disclosure was put in tentative terms, the claimant accepting that he might be missing something, did not mean that he could not have reasonably believed that the information tended to show a breach of a legal obligation. The Tribunal did not consider whether the claimant believed that the disclosure was made in the public interest and, if so, whether that belief was reasonable. The Tribunal did not apply the correct test in determining whether the first disclosure was a qualifying disclosure.

19. The Tribunal described the second disclosure:

> "21. This email is also about the Directed Time issue which was the subject matter of the first disclosure to Ms Hamilton. There is reference to the email chain regarding this issue (ie disclosure 1) being sent with this email.
>
> 22. The Claimant sent this email in his capacity as school governor. In this email the Claimant says "**According to the 'governance handbook for academies, multiacademy trusts and maintained schools' - January 2017 page 69, we, the governing body, are responsible for "making sure that headteachers benefit from any statutory entitlements and comply with the duties imposed on them which are contained within the STPCD (School Teachers' Pay and Conditions Document). I am concerned we may be in breach of the second part of this. I have emailed the head about my concerns and the email trail is below.**"
>
> 23. The Claimant goes on to say "**it is likely that, over the past two years teaching staff of worked in excess of 212 hours over the statutory directed time. This is likely to be more if you look further back…..**" and that "**Issues to be discussed include: whether or not we are in breach of the statutory guidance and if so, by how much and for how long for each teacher…….**".
>
> 24. At the end of this letter the Claimant's sets out some of the statutory, legal and financial references which he thinks are relevant to this issue. The Claimant ends the

email: "**I would be grateful if you could confirm receipt of this email and advise me how we intend to proceed**"**.**"

20. The Tribunal analysed this disclosure briefly:

> "25. The Tribunal notes that the Claimant included the email which he had sent to Ms Hamilton which for the reasons set out above the Tribunal has found was an enquiry, and not a disclosure of information tending to show, a breach of a legal obligation or the likelihood of such a breach. Taking these two emails together (so as to form one chain) the Tribunal does not find that this email is a protected disclosure because it is not saying that there is a breach of a legal obligation but is querying certain data. It is simply a follow-on from the previous email."

21. The core of the Tribunal's reasoning was limited to holding that the disclosure was not what it describes as a protected disclosure, but presumably meant qualifying disclosure, because it was "not saying that there is a breach of a legal obligation but is querying certain data". That is not an application of the statutory test. The statutory test required the Tribunal to consider whether there had been a disclosure of information. The Tribunal should have then considered whether the claimant believed that the disclosure tended to show a breach of a legal obligation and was made in the public interest and whether, if he held those beliefs, they were reasonable.

22. The Tribunal described the third disclosure:

> "27. This disclosure was sent to various governors of the school at the same time as the committee meeting began. This was a committee meeting which was already going to discuss the Claimant's issues with Directed Time which was on the agenda for discussion. The Claimant was to attend that meeting in his capacity as staff governor.
>
> 28. The Respondent submits that the Claimant cannot contend that an email sent to governors for information about an existing agenda item was a disclosure in the public interest. The Tribunal has considered this email carefully. This email refers to statutory guidance in relation to directed time and sets out what many schools do in relation to this. At the end of this email the Claimant gives an "**explanation of directed time**" it is not clear, whether this was his view of what directed time was or was taken from any guidance or other statutory provisions. Within this document as an allegation that directed time has been exceeded by the Respondent over the previous two years and states "**I hope that this team will ensure that a budget of directed time' or similar instrument is used going forward so that we are come in compliance with statutory guidance**". He goes on to say that the governors are "**collectively responsible for this situation that has happened and is continuing to happen. It is therefore incumbent on us to do right by the teachers who help make the school what it is.**"

23. The Tribunal gave the alleged disclosure terse analysis:

> "29. The Tribunal does not find this to be a disclosure of information in the public interest

and it therefore does not attract the protection of the Act."

24. Other than the brief reference to the respondent's arguments, the only analysis seems to be that the disclosure was not made in the public interest. This was the wrong legal test. The Tribunal was required, after considering the prior questions properly, to determine whether the claimant believed that the disclosure was made in the public interest and, if so, whether that belief was reasonable. The Tribunal failed to consider the subjective element of the test at all.

25. The Tribunal described the fourth disclosure:

> "30. The Respondent accepts that this disclosure was made to a prescribed person as required under the provisions in the Employment Rights Act 1996. The Tribunal has examined this disclosure carefully. The Tribunal notes that this is the only disclosure made to Ms Cole and it did not include the previous disclosures he had made to the Respondent. This email starts "**I am writing to you as a teacher in a local authority school, concerning the allocation of directed time for teaching staff in my school**". He refers to "**the accumulation of excess directed time over and above the statutory 1265 hours a year for the periods mentioned is greater than 220 hours for all full-time teaching staff**". From this part it could be said, at first glance, that he is writing on behalf of all the teachers in the Respondent's employment. However, the focus of the remainder of the email relates to the Claimant's own personal situation. For example, he writes:
>
> "**I am a good teacher and work considerably harder than the statutory directed 1265 hours**." This refers to him only and not to teaching staff more generally.
>
> "**Please could you advise me on the best way of securing the outcomes below?**
>
> **• Wages to be paid to me for time the head teacher has directed me to work in excess of the statutory 1265 hours each academic year and the first half term of this academic year.**
>
> **• Historic performance/appraisal documents to include statements to indicate that they were written whilst contracted hours of being exceeded and by how many hours and to be reviewed in that light**
>
> **• to be treated fairly and in line with policies and procedures going forward"**
>
> **• "Please could you offer the best advice on how to secure the outcomes mentioned?""**

26. The Tribunal's analysis was limited again to the question of whether the Tribunal considered the disclosure was in the public interest.

> "31. The Tribunal accepts the Respondent's submission that the language relates to the Claimant's personal claim for compensation rather than to a wider issue affecting all

> teachers. The outcome the Claimant wants is an outcome for him personally. As set out above, he was referring to "**wages to be paid to me…**" And not for wages to be paid for teachers more generally in the Respondent's employment.
>
> 32. The Tribunal does not find that this disclosure was made in the public interest but rather to further the Claimant's personal grievance with the Respondent. In the letter the Claimant asked for help in securing the "**outcomes mentioned**". The outcomes relate only to the Claimant's personal situation. The Tribunal does not find this disclosure to be protected as it is not in the public interest."

27. The Tribunal accepted that the disclosure was made not only in respect of the hours that the claimant was teaching but also in respect of other teachers, but the Tribunal focused on the motive of the claimant for making the disclosure, rather than considering whether there had been a relevant disclosure of information and, if so, whether the claimant reasonably believed that making the disclosure was in the public interest and reasonably believed that it tended to show that there was a breach of a legal obligation. The claimant could reasonably believe that the disclosure was made in the public interest even if his motive for making the disclosure was predominantly to advance his interest in not being required to work excessive hours. The Tribunal once again failed to apply the correct legal test.

28. The Tribunal described the fifth disclosure:

> "33. This is an email written to advise the Respondents that the Claimant had engaged with the ACAS early conciliation process to resolve his issues which he then sets out briefly. The Tribunal finds that this was an email for information purposes only and in relation to the claim that the Claimant was proposing to bring in the Employment Tribunal and not for the benefit of the teachers more widely employed by the Respondent."

29. The Tribunal analysed the disclosure, again focusing on its view of the public interest:

> "The Tribunal does not find this disclosure to be protected as it is not in the public interest."

30. Once again, the Tribunal failed properly to consider whether the claimant believed that the disclosure was made in the public interest and, if so, whether the belief was reasonable.

31. The Tribunal in analysing some of the disclosures appeared to consider that where information was already before the respondent there could not be a further disclosure of information to it. That approach disregards the provisions of section 43H **ERA** that makes it clear that a disclosure can be a

disclosure of information even when made to a person that already knows the information.

32. I consider that the Tribunal erred in law in failing to apply the proper statutory test in determining whether there were qualifying disclosure and, accordingly, its decision in that respect must be set aside.

33. Grounds five and six of the appeal dealt with the issue of causation. The Tribunal expressed what the respondent accepted were some preliminary views on causation, stating in explicit terms that they were not based on detailed findings of fact. In those circumstances the causation issue was not determined and nothing said by the Tribunal at paragraph 35 would be binding on remission. The matter must be remitted to be determined afresh.

34. Having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 I consider that the matter should be remitted to a differently constituted employment tribunal. There would be likely to be practical problems in bringing the same panel back together without further delay. There is no real saving of costs in remitting to the same Tribunal as all factual issues will have to be considered again. I also consider that the errors of law were fundamental and it is better that the claimant has the benefit of a new tribunal considering these matters afresh.

35. The appeal is allowed, the decision of the Tribunal is set aside and the claim is remitted for hearing before a newly constituted employment tribunal.