Case No: EA-2020-000590-AT
(previously UKEAT/0001/21/AT)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 September 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR T LUMB	**Appellant**
- and -	
CHIEF CONSTABLE OF GREATER MANCHESTER POLICE	**Respondent**

- -
- -

Ms J Duane (instructed by Blacks Solicitors LLP) for the **Appellant**
Miss C Widdett (instructed by Greater Manchester Police Legal Services) for the **Respondent**

Hearing date: 2 September 2021

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JUDGMENT

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The claimant alleged that he had been subject to detriment and dismissal because he had made public interest disclosures. The only relevant disclosure for the purposes of the appeal was one alleged to have been made orally at a meeting on 4 October 2017. The employment tribunal failed to determine what the claimant had said at the meeting and properly analyse whether he made a disclosure of information for the purposes of section 43B **Employment Rights Act 1996**. The matter was remitted to be considered, if possible, by the same employment tribunal.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of the employment tribunal sitting in Manchester on 17 February to 2 March 2020 and in chambers between 3 and 6 March 2020 (Employment Judge Tom Ryan, sitting with lay members).

2. The claimant worked as an investigative support officer (ISO) within the Firearms Licensing Unit of the respondent. It is clearly an important role.

3. The claimant brought a claim that he had been subject to detriment done on the ground that he had made protected disclosures contrary to section 47B of the **Employment Rights Act 1996 ("ERA")** and that he had been dismissed for the reason, or principal reason, that he had made protected disclosures, contrary to section 103A **ERA**. The claimant asserted that he had made three protected disclosures. In this appeal the claimant relies only on the first disclosure that he contends he made orally in a meeting on 4 October 2017. The real issue in this appeal is whether the Tribunal permissibility concluded, or concluded at all, that he had not made a relevant disclosure of information in that meeting.

4. The disclosure was asserted to be one that qualified for protection pursuant to subsections (a), (b) and/or (d) of section 43B **ERA** which provide:

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

5. Had the claimant made qualifying disclosures, it was accepted by the respondent that they

would be protected pursuant to section 43A **ERA**. The Tribunal held that if protected disclosure had been made the claimant was subject to detrimental treatment as a result of having made the disclosures.

6. In **Williams v Michelle Brown AM** UKEAT/0044/19/OO HHJ Auerbach considered the questions that arise in determining whether a qualifying disclosure has been made:

> 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.
>
> 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.

7. While assessment of whether there has been a qualifying disclosure involves five questions, in certain circumstances it may not be necessary to answer all of them. For example, if it is decided that there has not been a disclosure of information it is not necessary, and may not be possible, to answer the remaining four questions.

8. In **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 Sales LJ considered what constitutes a disclosure of information:

> 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.
>
> 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.
>
> …
>
> 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.

9. Sales LJ concluded that for a disclosure of information to fall within section 43B **ERA** it has to have sufficient factual content and specificity such as to be capable of tending to show one of the matters listed in subsection 43B(1) **ERA**. Those matters are the various forms of what Lord Justice Underhill described as "wrongdoing" in **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731.

10. The approach to disclosures of information has been subject to further consideration in **Twist DX v Abbott (UK) Holdings Ltd** UKEAT/0030/20/JOJ in which Linden J held that there need not be a specific reference to a particular legal provision for there to be a relevant disclosure of information.

11. The response to the appeal is based solely on the contention that on a proper reading of the judgment it should be inferred that the Tribunal concluded there was no disclosure of information that had the necessary factual content and specificity.

12. In considering this appeal, I have had particular regard to the approach to be adopted by the EAT in considering the judgment of the employment tribunal. These were recently robustly set out by the Court of Appeal in **DPP v Greenberg** [2021] EWCA Civ 672.

13. In analysing this matter I started with the list of issues set out at paragraph 7 of the judgment. At paragraph 7.1 the Tribunal directed itself that it must consider whether there had been disclosures of information and then set out the occasions on which it was alleged that such disclosures had been made. The following issues set out the requirements that must be met for a disclosures of information to be qualifying disclosures.

14. The Tribunal's direction to the law was brief. The statutory provisions were not set out, although section 43B was referred to at paragraph 177.1. At paragraph 178 the Tribunal set out a number of authorities to which they had been referred, including **Kilraine**. However, within the analysis of law there was no specific consideration of what constitutes a disclosure of information, particularly the requirement for a disclosure of information that has sufficient factual content and specificity to be capable of tending to show one of the relevant forms of wrongdoing.

15. The Tribunal considered the evidence about the alleged disclosure of information from paragraphs 40 through to 55:

> 40. At 7.30 a.m. on 4 October 2017 the claimant had a meeting with Mr Millett and Ms Watson which lasted until 9 a.m. It was the claimant's case that during this meeting he made his first protected disclosure.
>
> 41. There were no substantive contemporaneous notes of this meeting. The claimant said that he had prepared some "trigger notes" of the matters that he wanted to raise at the meeting. Although prepared in manuscript these were transcribed by the claimant afterwards. The typescript appears at pages 1014A & B.
>
> 42. Mr Millett's daybook records that meetings were held with the claimant and then with Lee Parkin, Alan Whitten, Debbie Collins and Jerry Pointon. According to that entry the subsequent meetings continued between 9 a.m. and 12 noon. No individual notes were recorded by Mr Millett but at the conclusion of the list he wrote:
>
> > "Aforementioned were instigated as a result of identified issues which required management interdiction but did not require consideration of discipline."
>
> 43. Jackie Watson's note at page 1012 records:
>
> > "0730 meeting with Tim Lumb and Mr Millett

List of addresses

Send for merging

Security vetting

NOM - edit needs DOB. Tim will send guide again."

44. The claimant's account of this meeting as set out in paragraph 56 of his GoC ("GOC") is as follows:

"I had made some notes about all the issues over the previous 18 months or so, and took them with me to the meeting. … These notes included examples of other researchers not checking the files properly and in the meeting I again voiced my concerns over potentially dangerous people having access to firearms. I reminded AM of the implications for the department should somebody get hurt, or worse, from a firearm which got into the wrong hands and that, as manager, it was ultimately his responsibility to make sure that did not happen. I explained that my role had changed, and it was virtually impossible for me to do any research now (which is what I was contracted to do) because I was constantly being given other researchers files to check and discovering issues with most of them. I was also discovering an increasing amount of files with things missing when they came to me for PND checks. AM listened to what I had say (sic) and said it was totally unacceptable and promised that things would be changing and for the better. For the first time I actually believed that something would get done. AM then went on to warn me that DC was 'on the warpath' for me and to 'watch my back'. In addition, I also told him that HD had recently started vetting a certificate holder who was a senior police officer with GMP; she told me that JP had snatched the file from her, saying that 'corrupt senior officers needed special attention' and that he was 'supposed to be given those files for research'. A fact I knew to be untrue."

45. In his witness statement at paragraphs 243-249 the claimant described the events of that meeting. He referred to the notes that he had made that we have described in paragraph 41 above. He said that he took them with him to the meeting. He also referred to an explanation document to accompany those notes (pages 1015-1021). In oral evidence the claimant said that the explanation document was produced some time later for the purposes of these proceedings. We were not referred to them in evidence, nor were they relied upon by either counsel.

46. The claimant said this:

"244. These notes included examples of how some researchers were not checking all the information available to them. In the meeting I again explained the potential of firearms licences being issued to unsuitable individuals due to the lack of proper vetting procedures. I explained to AM about the implications for the department should somebody get hurt or, worse, from a firearm which got into the wrong hands due to poor and inadequate research, and that, as manager, it was ultimately his responsibility to make sure that did not happen.

245. The examples in this statement of persons CH/1, CH/2, CH/3, CH/4 and CH/7 were brought to AM's attention (and JW reminded) during this meeting along with the issue of GPs reports not being checked.

> 246. The meeting was from 0730 hrs to 0900 hours that day. I explained that my role had changed, and it was virtually impossible for me to do any research now (which is what I was contracted to do) because I was constantly being given other researchers' files to check and discovering issues with most of them. I was also discovering an increasing amount of files with things missing when they came to me for PND checks.
>
> 247. AM listened to what I had say (sic) and said it was totally unacceptable and promised the things would be changing and for the better, AM stated that he was going to take the issues I raised to a higher chain of command and asked if I would like to make an official complaint. I stated that I did. For the first time I actually believed that something would get done."

47. We observe that, except for paragraph 245, the claimant repeats there almost word for word the passages from his GoC.

48. In paragraph 410 of his witness statement, under the heading "disclosure summary (non-exhaustive)", the claimant stated:

> "On 4/10/17 I disclosed AM and JW information that:
>
> - TEL items were not being researched;
>
> - Business ADDs were not being researched;
>
> - NOM records and duplicate records were not being researched;
>
> - Certificate holders' written files were not being researched; and
>
> - Certificate holders' associates and duplicate ADDs were not being researched.
>
> - Examples CH1, CH2, CH3, CH4 and CH7 were referred to."

49. The claimant did not assert in any of these written documents, even in the most general terms, that he had mentioned the commission of any criminal offence, or breach of any legal obligation. Moreover, the issue of the common law offence of misconduct in public office appeared for the first time in the LOI on the first day of the hearing.

50. When the claimant was asked to explain how he had stated that the actions or omissions of his colleagues might amount to misconduct in public office he said he had mentioned it in the meeting because he thought it applied to all those in police service whether officers or civilians.

51. The claimant relied upon what he called his "trigger notes" (pages 1014A & B) as evidencing what he had said in the meeting. He accepted that he had not provided a copy of the notes to Mr Millett or Ms Watson either at the meeting or thereafter. Although the notes covered a multiplicity of matters the claimant identified the following entries as supporting his assertion that he had disclosed information to them which amounted to protected disclosures.

> "Merging - led to - never given any by Jerry, Gary, Alan, Lee – DCCs orders - all told + PND ….
>
> Covering the last 18 months, advising, helping - led to hostility from all ….

> Alan … Misses/does not even bother with several checks - virtually every file ….
>
> Summary …
>
> Going on for 18 months - nothing being done ….
>
> Jerry deleting PND results"

52. In his witness statement Mr Millett stated that he did not recall many of the things that the claimant had alleged he had said. On a number of occasions he said that the claimant might have mentioned some of those things.

53. In paragraph 42 of his statement Mr Millett said he recalled that issues were discussed "around standards of research, merging of nominals and vetting addresses".

54. In his oral evidence Mr Millett accepted additionally that:

> 54.1. the claimant voiced concerns over potentially dangerous people having access to firearms;
>
> 54.2. the claimant reminded him of the implications for the department if someone should get hurt, or worse, from a firearm which got into the wrong hands; and
>
> 54.3. that as he was the FLU manager it was ultimately his responsibility to make sure this did not happen;
>
> 54.4. he told the claimant that it was totally unacceptable and that things would be changing for the better;
>
> 54.5. the claimant may have alluded to the risk to public safety.

55. The thrust of Mr Millett's evidence was that if the claimant had raised anything of significance he would have expected to have documented the facts within his daybook but if it was generic and lower-level attention to detail that he and Ms Watson would have reiterated the requirements and standards.

16. The Tribunal's analysis and conclusion was very brief. It was set out at paragraph 189 of the judgment:

> For the reasons that we have set out at paragraphs 119, 120 and 138 above we have concluded that the claimant did not make disclosures on the latter two occasions. Having regard to this and also to the unspecific evidence that the claimant gave in respect of the first occasion we have concluded that we cannot say, even on the balance of probabilities, that the claimant has established that he made protected disclosures [to] Mr Millett and Ms Watson on 4 October 2017. [my emphasis]

17. The respondent accepts there is no express finding of fact as to what was said on 4 October 2017. There could be circumstances in which an employment tribunal is unable make a finding of

fact about what was said at a meeting on the basis of the evidence before it. In such a case the employment tribunal might conclude that the claim must fail because the claimant has failed to establish that there was a disclosure of information. That is not what the Tribunal did in this case. The Tribunal did not say that it could not reach any conclusion on the basis of the evidence it heard. The Tribunal carefully recited the evidence but made no finding of fact on this issue. I do not consider that there are implicit findings of fact. The respondent conceded that comments had been made in the meeting, in particular that Mr Millet had accepted that the claimant voiced concerns about potentially dangerous people having access to firearms, the risk that people could be hurt if firearms got into the wrong hand, that there was a potential risk to public safety. The claimant contended he stated that checks were not being properly conducted. The Tribunal failed to make a specific finding about what information the claimant disclosed, whether it was limited to that conceded by the respondent or went further as asserted by the claimant.

18. I conclude that the Tribunal did not make the necessary findings of fact upon which a proper analysis could be made of whether there had been a relevant disclosure of information. That is a failing that necessarily means that the appeal must be allowed.

19. Furthermore, I am not persuaded that this is a case in which the Tribunal had the correct legal test in mind, applied it, but failed properly to set out its factual findings and conclusions in sufficient detail. There was no express consideration of the test set out in **Kilraine**. At paragraph 189 the Tribunal stated that the claim in respect of the alleged disclosure on 4 October 2017 was dismissed because the claimant could not establish that he had made "protected disclosures" rather than that he could not establish any disclosure of information. It is impossible to know from that paragraph whether the Tribunal determined that there was no disclosure of information or that it was not protected for some other reason, such as the claimant not reasonably believing that the information disclosed tended to show wrongdoing and was made in the public interest.

20. I consider the appeal must be allowed. The claimant accepts that questions 2 to 5 as set out by His Honour Judge Auerbach in **Williams** were not answered. It seems to me, even bearing in mind

the extent of the concessions made by the respondent, it is not overwhelmingly clear that there was a disclosure of information on 4 October 2017, so that there could only be one answer on that issues. While I consider there was a significant failure to make necessary findings of fact and in the analysis of what constitutes a disclosure of information, they were in the context of a lengthy and otherwise carefully reasoned judgment; a judgment made after a lengthy hearing. It would be proportionate, subject to the availability of Employment Judge Ryan, who may now have fully retired, for the matter to be remitted to the same Tribunal, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. There will be saving of cost if it can be sent back to the same Tribunal. To do so, if possible, is proportionate. The Tribunal made findings of fact that the claimant relies upon. There is no reason to doubt the professionalism of the Tribunal in carrying out its duties on remission.

21. In those circumstances the appeal is allowed. The claim is remitted for consideration before the same Tribunal, if practicable, or otherwise as directed by the Regional Employment Judge.