Appeal No. UKEAT/0105/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 September 2018

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR S IBRAHIM — APPELLANT

HCA INTERNATIONAL LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELIZABETH GRACE (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR KEITH BRYANT QC (of Counsel) Instructed by: HCA International Limited 242 Marylebone Road London NW1 6JL

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

In a whistleblowing claim the issue was whether the Tribunal had correctly interpreted and applied section 43B(1)(b) **Employment Rights Act 1996** in two respects; (1) what amounts to an allegation of a breach of a legal obligation and (2) the public interest element in light of the guidance from the Court of Appeal in **Chesterton Global Limited (T/A Chestertons) v Nurmohamed** [2017] EWCA Civ 979.

The Tribunal erred in concluding that a complaint by an employee that others are falsely blaming him for breaches of confidentiality, of such seriousness that he has to "clear his name", is not a complaint that those others have failed to comply with a legal obligation to which they are subject in accordance with section 43B(1)(b). The provision is broad enough to include tortious duties, including defamation and breach of statutory duty such as those contained in the **Defamation Act 2013**. It is immaterial that he did not use the legal terminology of defamation when making his disclosure.

However, the Tribunal did not err in its analysis that the disclosure did not meet the public interest test. The Tribunal has to ask itself (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest and (b) if so, whether that belief was reasonable. The Tribunal found that the Claimant did not have a subjective belief in the public interest element of his disclosure - his concern was only that false rumours had been made about him, and the effect of those rumours on him. Those facts were the Tribunal's to make and open to it on the evidence before them. Since the Claimant did not have a subjective belief in the public interest of his disclosure, the Tribunal's enquiry ended there and there was no error in the conclusion that the Claimant had not made a protected disclosure.

Chesterton Global Limited (T/A Chestertons) v Nurmohamed [2017] EWCA Civ 979 followed and applied.

HER HONOUR JUDGE STACEY

1. This is an appeal against the Judgment of the Employment Tribunal sitting in the London (Central) region, before Employment Judge Ayre (sitting alone) on 14 and 15 June 2017 at an open Preliminary Hearing. The Reserved Judgment with reasons was sent to the parties on 28 September 2017. The consequence of the various findings made at that Preliminary Hearing was that all the Claimant's claims were dismissed. However, the only issue relevant in this narrow appeal is whether the Claimant's grievances of 15 and 22 March 2017, amounted to protected disclosures within the meaning of section 43(B) of the **Employment Rights Act 1996** ("ERA 1996"). His whistleblowing claim was dismissed because the Tribunal found that the Claimant's grievances were not protected disclosures since they did not tend to show that a person had failed to comply with a legal obligation and was not made in the public interest. Both conclusions by the Tribunal are under challenge today. Mr Bryant QC also takes the point that ground 1 of the appeal advances a new argument that was not before the Tribunal and should not be permitted to be raised now.

2. The Appellant today was the Claimant below and the Respondent to the appeal was the Respondent below. I shall continue to refer to the parties by reference to their status as they were before the Tribunal, consistent with the Appeal Tribunal's **Practice Direction** 16.4. The appeal was initially rejected on the sift under rule 3(7) by Her Honour Judge Eady QC. However, at a Rule 3(10) Hearing before His Honour Judge Richardson when the Claimant was very helpfully assisted by Mr Patrick Halliday from the ELAAS scheme, the Claimant was able to formulate his grounds of appeal into an arguable error of law in two respects concerning the protected interest disclosure. Firstly, whether the Tribunal was wrong to rule at paragraph 125 that the matter disclosed did not amount to a disclosure of information tending to show that a person had failed

to comply with a legal obligation. Mr Halliday argued that on the face of it, the disclosure tended to show a breach of the duty not to commit defamation. Secondly, whether the Tribunal erred in ruling at paragraphs 128 and 131 that the Claimant's disclosures failed the public interest test in section 43(B)(1) of the **ERA 1996**, on the basis that they were not made in the public interest, but rather made with a view to the Claimant clearing his name and re-establishing his reputation. The argument was framed as follows:

> **"(a). First, this elides the two stages of the public interest test which are, first, whether the worker genuinely believed that the disclosure was in the public interest and, secondly, whether that belief was reasonable. The Tribunal incorrectly applied a different test, namely whether the disclosure was in fact in the public interest.**
>
> **(b). Secondly, the Tribunal was wrong to rule that the public interest test was failed because the Claimant's motive was to clear his own name. The worker's belief that his disclosure is in the public interest need not form any part of the worker's motivation for making the disclosure: see *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979 at paragraph 30."**

3. Today, the Claimant is again represented on a pro bono basis, this time by Ms Grace from Outer Temple Chambers and the Tribunal is therefore especially grateful for her assistance, and Mr Bryant QC's assistance has also been invaluable today.

4. The Reasons for the matter being permitted to proceed to a Full Hearing were provided by His Honour Judge Richardson as follows:

> **"It is reasonably arguable that a complaint by an employee that others are falsely blaming him for breaches of confidentiality, of such seriousness that he has to "clear his name", is a complaint that those others have failed to comply with a legal obligation to which they are subject. It is reasonably arguable that duties which are recognised by the law of tort, such as the duty not to defame, are within the purview of section 43B(1)(b).**
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> **Although the Employment Judge correctly summarised the principles in *Chesterton Global Limited v Nurmohamed* [2017] IRLR 837, it is reasonably arguable that she did not apply them at the point of decision. There does not appear to be a finding whether the Claimant believed the disclosure to be in the public interest or whether it was reasonable to hold this belief. The fact that his motive was to clear his name does not answer these questions. The bare finding that the disclosure was not in the public interest does not on the face of it address the correct questions."**

The Tribunal Judgment

5. Briefly, the facts are as follows. The Claimant was employed with the job title International Patient Co-ordinator, to work as a bank interpreter at the Respondent private hospital to interpret for the Arabic speaking patients who required interpreting services. Much of the Tribunal Judgment concerns whether the Claimant was an employee or a worker. The Tribunal found that he was a worker. There is no appeal from that aspect of the Tribunal Judgment. Whilst the finding that he was not an employee was determinative of his section 103(A) **ERA 1996** automatically unfair dismissal complaint, his complaint of whistleblowing detriment under section 47(B) **ERA** was unaffected since workers as well as employees are entitled to the benefit of that provision.

6. A number of other complaints were also before the Tribunal, none of which is relevant for the purposes of this appeal. On the whistleblowing complaint the preliminary issue before the Tribunal was limited to whether he had made a protected disclosure. At a previous Preliminary Hearing the issue had been identified as follows:

> **"In his grievances of 15 and 22 March 2016, was information disclosed which in the claimant's reasonable belief tended to show one of the following?**
>
> **9.3.1 an unidentified person had failed to comply with a legal obligation to keep patient information confidential;**
>
> **9.3.2 there had been a miscarriage of justice in that the claimant had been falsely accused of breaching patient confidentiality."**

The Respondent conceded that if the disclosure amounted to a protected disclosure within the meaning of section 43B, it would also have been a qualifying disclosure under section 43C since it had been made to his employer. If the Claimant had been successful at the Preliminary Hearing, the case would have proceeded to a Substantive Hearing to consider if he had been subjected to a detriment on grounds of the protected and qualifying disclosure in accordance with section 47B **ERA 1996**.

7. The disclosures relevant to this appeal were found by the Tribunal in paragraphs 43, 44 and 45 as follows:

> **43. On 15th March 2016 the clamant met with Lesley Pope, the Director of Rehabilitation. The claimant asked her to investigate two issues that he was concerned about. The first was his belief that there were rumours that he (the claimant) had been involved in a breach or breaches of patient confidentiality, and the second was that Ilham Mohammed had behaved in an unprofessional manner towards him.**
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> **44. On 16 March the claimant sent an email to Lesley Pope to follow up on their meeting the previous day. In that email he wrote:-**
>
> > ***"…I would like you to launch a formal investigation into the following two matters, which might be linked to each other or totally different matters, only and investigation with tell!***
> >
> > ***First, to investigate into the rumours among the International patients and their families about my confidentiality and performance (I informed you before that I was blamed by some families for disclosing patients confidential information, but unfortunately they refused to make a complaint against me, although I tried with them to do so. I explained to you that I cannot accept this as a settlement and I need to clear my name otherwise I will not be able to do my work properly.***
> >
> > ***Second, I told you that I had a feeling that I was 'kicked out of my office' and as the time passes my feeling gets stronger and stronger. I accused Ilham of a major misconduct i.e. She took an action against me without giving me the chance to defend myself, and that she has been slandering me to my colleagues"***
>
> **45. Lesley Pope referred the matter to the respondent's HR team. On 22 March Sheila Johnson, Chief Human Resources Officer, met with the claimant and Nezha Elbassri. The claimant told Ms Johnson that he felt degraded, humiliated, shocked and confused, and that he believed there were rumours among patients and their families that he had been leaking patients' confidential information. He told her he wanted to clear his name and restore his reputation. Ms Johnson asked the claimant to prepare a document setting out the concerns that had been raised, and told him that she would then start an investigation."**

8. After setting out the statutory provisions of section 43B(1), the Tribunal records the parties' submissions in paragraphs 98-106:

> **"98. In his written submissions the claimant submits that he made two protected disclosures, the first to Lesley Pope on 15 March 2016 and the second to Sheila Johnson on 22 March 2016.**
>
> **99. He says that he complained of rumours accusing him of breaching patient confidentiality and that he was 'kicked out' of the International Relations Office.**
>
> **100. The claimant submits that patient confidentiality is a matter of public interest and the fact that his intention in raising the complaint was to clear his name does not affect this. He referred to *MS v Sweden [1999] 28 EHRR 313* as authority for the proposition that the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his/her right to respect for private and family life, and that respecting the confidentiality of health data is a vital principle.**
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> **101. He also submits that the respondent failed to investigate a serious breach of its legal obligation to maintain patient confidentiality.**
>
> **102. The respondent submits that it is only the first disclosure (15 March 2016) that can be relied on by the claimant.**

> **102. It further submits that the claimant's complaint, in essence, was that there were rumours amongst patients and their families that he had breached patient confidentiality but that he had not done so, and wanted to clear his name and restore his reputation. This does not, in the respondent's submission, amount to disclosure of information tending to show that someone had breached a legal obligation.**
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> **104. The respondent says that a rumour, even if untrue, is incapable of tending to show a miscarriage of justice, and that before there can be a miscarriage of justice there must be a judicial determination of a criminal or civil right.**
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> **105. The respondent also says that the claimant did not have a reasonable belief that the information he disclosed tended to show a breach of a legal obligation or a miscarriage of justice because what he was clearly saying was that he had not done anything wrong.**
>
> **106. Finally the respondent submits that the disclosure was not in the public interest as it was made purely for the claimant's benefit and his wish to clear his name. The respondent reffered in support of this submission to *Chesterton Global Ltd v Nurmohamed [2015] IRLR 614*. That decision has subsequently been appealed and the Tribunal has considered, in reaching its decision, the conclusions of the Court of Appeal which are at *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979*."**

9. The Tribunal then analysed its findings at paragraphs 125 and 126 of its Judgment as follows:

> **"125. In relation to the first allegation, the Tribunal accepts the respondent's submissions that complaining that false rumours have been made does not amount to a disclosure of information tending to show that someone has breached a legal obligation or that there has been a miscarriage of justice. The claimant has not identified any legal obligation that may have been breached when the false rumours were made, if indeed they were made.**
>
> **126. The Tribunal does not consider that false rumours are capable of amounting to a miscarriage of justice in the circumstances of this case."**

10. In addition, the Tribunal went on in the alternative to find that in paragraph 128, "In any event, the disclosures that were made by the claimant were not made in the public interest, but rather they were made with a view to the claimant clearing his name and re-establishing his reputation." The sentence is repeated at paragraph 131.

11. The Tribunal also set out what the parties agree is an entirely accurate and succinct summary of the Court of Appeal Judgment in **Chesterton Global Limited (T/A Chestertons) v Nurmohamed** [2017] EWCA Civ 979:

> **"129.1. the tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable.**

> **129.2. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation.**
>
> **129.3. There are no hard and fast rules about what it is reasonable to view as being in the public interest.**
>
> **129.4. In a whistle-blower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter in which the worker has a personal interest) there may 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. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case.**
>
> **130. Whilst the Tribunal accepts that disclosure of information tending to show that patient confidentiality has been breached would be a matter of public interest, the claimant did not disclose information tending to show that patient confidentiality had been breached. Rather, he complained that others had falsely accused him of breaching patient confidentiality."**

12. The criticism today is whether the Tribunal applied its impeccable direction to its findings of fact.

The Grounds of appeal

13. The first ground of appeal is that the Tribunal was wrong to rule at paragraph 125 that the disclosure "does not amount to a disclosure of information tending to show that someone has breached a legal obligation" since it tends to show a breach of the duty not to commit defamation.

New points on appeal

14. Before considering the substance of the appeal, the Respondent submits that the Claimant needs permission of this Tribunal to advance ground 1 (which ought to be refused) because at the Tribunal the Claimant had principally put his case on the basis that the legal obligation that had not been complied with was the keeping of patient information confidential and there had been no mention of the tort of defamation. He is therefore now seeking to raise a wholly new argument, without permission, which ought to be refused, see **Kumchyk v Derby City Council** [1978] ICR 1116, EAT, **Secretary of State for Health v Rance** [2007] IRLR 665, EAT and **JJ Food Service Limited v Zulhayir** [2013] EWCA Civ 1226.

15. The general principle is that whilst the Appeal Tribunal has a discretion to allow a new point of law to be heard on appeal, the discretion is to be exercised only in exceptional circumstances. Relevant circumstances include "whether the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing" (**Rance** paragraph 50(6)(b)) and where "the issue raised is a discrete one of pure or hard-edged law requiring no or no further factual enquiry" **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719.

16. In the Claimant's ET1 he listed "damage to reputation/defamation" as a claim which the respondent correctly observed in its ET3 is not a cause of action listed in the **Employment Tribunals Act 1996** and the Tribunal has no jurisdiction to consider it. Nonetheless it articulates the Claimant's allegation that he has been defamed by what he described as "false rumours" about his having breached patient confidentiality.

17. It is apparent that even if it has not been framed in the exact and precise legal terms that the rigour of Mr Bryant, Mr Halliday and Ms Grace have achieved through the appeal process, it was in terms a live issue before the Tribunal – the Claimant's oft-voice complaint and allegation of damaging false rumours being spread about him in his claim form and thereafter is sufficiently consistent and in line with ground 1 of the grounds of appeal advanced today. The concern about him being falsely accused of breaching patient confidentiality is sufficiently expressed in paragraph 9.3.2 notwithstanding the puzzling reference to a miscarriage of justice, and was clearly the root of his concern and the Tribunal considered it and made findings upon it in any event. In my view he does not require the further permission of this Tribunal to advance the argument.

18. There is nothing to stop him from alleging a breach of more than one legal obligation. If the Claimant also relied on a more general point that the Respondent was not ensuring patient confidentiality, it does not alter his ability to allege that he has been defamed by the rumours. The Claimant may well have emphasised the importance of data protection, as he did in his skeleton argument before the Tribunal, but perhaps he did so partly in the context of addressing the public interest requirement in the definition of a protected disclosure.

19. If I am wrong about that and it amounts to a new point of law being raised for the first time in this Tribunal, I would have found that Ms Grace has established that this is one of the rare cases where, exceptionally, the circumstances support the exercise of the discretion to allow the matter to be raised. Firstly, it is almost indistinguishable from the issues raised below, secondly no further evidence would be required – the Tribunal has made all the findings of fact necessary to determine the point; and, thirdly it is a question of pure law. Had it been necessary for me to grant leave to the Claimant to raise a new point, I would have unhesitatingly exercised my discretion to allow the Claimant to raise the point.

20. Section 43B(1) provides as follows:

> **43((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."**

21. I agree with Ms Grace's submission that section 43B(1)(b) is broad enough to include tortious duties, including defamation and breach of statutory duty such as those contained in the **Defamation Act 2013**. It is apparent that the Claimant's complaint of damaging false rumours about him that he has breached patient confidentiality is clearly an allegation that he is being

defamed. The Tribunal has erred in concluding that the Claimant has not identified any legal obligation that may have been breached. He may not have used the word defamation at the time but his allegation was clear in all but name and use of the precise legal terminology.

22. Ground 1 of the appeal succeeds. As Mr Bryant correctly observed however, it is necessary for the Claimant to succeed on both grounds in order to disturb the Tribunal's conclusion.

In the Public Interest?

23. The second ground of appeal is that the Tribunal erred at paragraphs 128 and 131 in ruling that the Claimant's disclosures failed the "public interest" test in section 43B(1) **ERA 1996** and that the Tribunal failed to apply the correct public interest test. The Tribunal concluded that the disclosures "were not made in the public interest, but rather with a view to clearing the Claimant's name".

24. As set out in **Chesterton** by Underhill LJ there are a number of important general points relevant to the exercise of the Tribunal's Judgment in considering the 2013 amendment and the public interest requirement in a protected disclosure. The Tribunal has to ask itself (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest and (b) whether if so, that belief was reasonable. To satisfy limb (a) a Claimant must have a belief that the disclosure is in the public interest, why s/he considers it to be so may be relevant as to the genuineness of the professed belief, but "the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence" (paragraph 29 **Chesterton**). To satisfy limb (b) it is to be remembered that there may be more than one reasonable view as to whether a particular disclosure is in the public

interest. Whilst the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant, or indeed any part of the motive in making it. Finally, Parliament deliberately chose not to define the expression "in the public interest" and therefore left it to Tribunals to consider and apply as a matter of educated impression.

25. Ms Grace submits that the Tribunal has elided the subjective and objective elements of the test and should instead have firstly considered whether the Claimant believed that his disclosure that there were false rumours about him having breached patient confidentiality was in the public interest, and secondly, whether his belief was objectively reasonable. Ms Grace has articulately argued that by using the phrase that the Claimant made his disclosure "with a view to" the clearing of his name, the Tribunal has wrongly focussed on the Claimant's motif in making the disclosure which is not a complete answer to whether he believed it was in the public interest to disclose it. As Underhill LJ observed, it would be odd if the public interest did not form at least some part of their motivation in making it, but the belief does not in fact have to form any part of the worker's motivation.

26. The difficulty however, for the Claimant, is twofold. Firstly, the Claimant's belief or otherwise is a finding of fact for a Tribunal to make having heard all the evidence. The Tribunal found that the Claimant's concern was only that false rumours had been made about him, and the effect of those rumours on him. He did not have a subjective belief in the public interest element of his disclosure. Ms Grace took me to the evidence that was before the Tribunal in the supplementary bundle, but it did not assist her argument. For example, in his statement he said "On Tuesday 15th March 2016, I met Lesley in her office and I raised my concerns and asked her to investigate the rumours involving me in breach of confidentiality" or in his grievance appeal.

"My argument was that my reputation was damaged and in my attempt to clear my name, I told Lesley..." The evidence reinforces, rather than undermines, the Tribunal's conclusion that the Claimant was seeking to protect his personal interest. The development of the argument that his concern was for the integrity of data protection appears later, but is not evidenced as being in his mind at the time.

27. Mr Bryant correctly observes that it is also clear from the Tribunal's findings at 43, 44 and 45, that it was a personal concern of the Claimant that he was being defamed. I agree that the Tribunal's conclusions could have been more clearly expressed and it would have been helpful if they had firstly addressed the Claimant's subjective belief by reference to the guidance in paragraphs 26-31 of **Chesterton** and separately considered if the subjective belief was reasonable, as suggested by Ms Grace. But it is clear from the body of their Judgment that they found against the Claimant in relation to his subjective belief in the public interest of his disclosure. That was a decision open to them on the evidence in this case.

28. Therefore, for the above reasons I dismiss the appeal and uphold the Tribunal's Judgment.