



## EMPLOYMENT TRIBUNALS

**Claimant**  
Mr M Sivarayan

v

**Respondent**  
(1) Ipay Solutions Limited  
(in liquidation)  
(2) Mr S Kuganathan

**Heard at:** Central London Employment Tribunal

**On:** 2 - 4 November 2022

**Before:** Employment Judge Brown

**Members:** Ms M Pilfold  
Dr V Weerasinghe

**Appearances:**

**For the Claimant:** In person  
**For the First Respondent:** Did not appear and was not represented  
**For the Second Respondent:** Mr K McNerney, Counsel

## JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant did not make any protected disclosures.
2. The First Respondent did not automatically unfairly dismiss the Claimant.
3. The Respondents did not subject the Claimant to any detriment on the grounds of any protected disclosure.

## REASONS

**Preliminary**

1. By a claim form presented on 6 April 2021 the Claimant brought complaints of automatic unfair dismissal on the grounds of protected disclosures and protected disclosure detriment against the First Respondent, his former employer and the

Second Respondent, Director and Sole Shareholder of the First Respondent. Early conciliation started on 1 April 2021 and ended on 6 April 2021.

2. The First Respondent is now insolvent. It did not appear at this hearing. The Second Respondent appeared and was represented by Mr McNerney, Counsel.

*Issues*

3. The issues in the case had been established at a Preliminary Hearing in front of EJ Klimov on 1 April 2022 as follows:

*Unfair dismissal*

*1.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed*

*2. Remedy for unfair dismissal*

*2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:*

*2.1.1 What financial losses has the dismissal caused the claimant?*

*2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

*2.1.3 If not, for what period of loss should the claimant be compensated?*

*2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

*2.1.5 If so, should the claimant's compensation be reduced? By how much?*

*2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

*2.1.7 Did the respondent or the claimant unreasonably fail to comply with it?*

*2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

*2.1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*

*2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

*3. Protected disclosure*

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

3.1.1 *What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:*

3.1.1.1 *[date] – [in an email to her line manager];*

*[the claimant must list in chronological each disclosure he relies upon, giving the date, to whom it was made, if in writing identifying, the document and providing a copy if available, if orally stating what was said]*

3.1.2 *Did he disclose information?*

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

3.1.4 *Was that belief reasonable?*

3.1.5 *Did he believe it tended to show that:*

3.1.5.1 *[a criminal offence had been, was being or was likely to be committed;*

3.1.5.2 *a person had failed, was failing or was likely to fail to comply with any legal obligation;*

3.1.5.3 *a miscarriage of justice had occurred, was occurring or was likely to occur;*

3.1.5.4 *the health or safety of any individual had been, was being or was likely to be endangered;*

3.1.5.5 *the environment had been, was being or was likely to be damaged;*

3.1.5.6 *information tending to show any of these things had been, was being or was likely to be deliberately concealed.]*

*[the claimant must specify upon which of the above grounds he relies in relation to each disclosure]*

3.1.6 *Was that belief reasonable?*

3.2 *If the claimant made a qualifying disclosure, was it made:*

3.2.1 *to the claimant's employer? or*

3.2.2 *another person, in accordance with the relevant requirements of ERA sections 43C, 43D, 43E, 43F, 43G, or 43H [the claimant must specify on which of the above sections 43C – 43H ERA he relies in relation to his disclosures made to other persons]*

*If so, it was a protected disclosure.*

4. *Detriment (Employment Rights Act 1996 section 48)*

4.1 *Did the respondent do the following things:*

*4.1.1 Dismissal on 19 January 2021*

*4.1.2 [the claimant must list in chronological all other detriments he claims, giving the date, what was done or not done, or said, by whom]*

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

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

*5. Remedy for Protected Disclosure Detriment*

*5.1 What financial losses has the detrimental treatment caused the claimant?*

*5.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

*5.3 If not, for what period of loss should the claimant be compensated?*

*5.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?*

*5.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?*

*5.6 Is it just and equitable to award the claimant other compensation?*

*5.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

*5.8 Did the respondent or the claimant unreasonably fail to comply with it?*

*5.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

*5.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?*

*5.11 Was the protected disclosure made in good faith?*

*5.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?*

4. At the outset of this hearing the Tribunal noted that the List of Issues was incomplete. It asked what were the protected disclosures relied on and what were the alleged detriments.
5. EJ Klimov had ordered the Claimant to provide particulars of List of Issues paragraphs 3.1.1, 3.1.5, 3.2.2 and 4.1.2 by 25 April 2022.
6. On 25 April 2022 the Claimant had replied. In response to 3.1.1 he had said, "*I contacted the Director Mr Senthoran Kuganathan on the 10th of August 2020 via email to notify him that merchants are asking for their money and why we are still*

*operating a company that has been ordered by the courts to be liquidated.*” The Claimant had said he was relying on s43C, 43F and 43H ERA 1996.

7. In response to 4.1.2 the Claimant said, “I first notified the Director Mr Senthoran Kuganathan about using a company that is being liquidated in August 2020 but was advised to continue with my job. Contacted, the Court appointed Liquidator Arvinder Singh in December 2020 and gave her information about the company still operating and the company structure.”
8. Mr McNerney for the Second Respondent said that the Claimant had clearly stated that the protected disclosure on which he relied was the alleged disclosure to the Director on 10 August 2020. He said that the Claimant should not be permitted to rely on any disclosure to the Liquidator, because the Claimant had not said that this was a protected disclosure, but had relied on it as a detriment. The Claimant had been able to comply with the order and was clearly an intelligent man. Mr McNerney said that further cross examination would be necessary if the Claimant were permitted to change his case at this stage.
9. The Claimant asked to be able to rely on an alleged protected disclosure to the Liquidator as set out in his 25 April 2022 response. He said he was a litigant in person and that he did not understand the technicalities and had had to look up the law on the internet.
10. The Tribunal permitted the Claimant to rely on his alleged disclosure to the Liquidator as set out in his email of 25 April 2022, as an alleged protected disclosure in the case. Insofar as it was necessary for the Claimant to amend his case in order to do so, the Tribunal gave him permission to amend. The amendment was minor; the Claimant had set out the facts of the alleged disclosure in his further particulars, albeit apparently as a “detriment”. The amendment would attach a different legal label to facts already pleaded. Time limits did not apply. On the balance of hardship and injustice, it would cause considerably more hardship and injustice to the Claimant if the amendment was refused. He had notified the Respondents of the facts of it at an early stage, before disclosure and exchange of witness statements. The Tribunal considered that, on any fair and objective reading of the email, the Claimant was alleging he made a protected disclosure to the Liquidator, rather than that this was a detriment. Refusing the amendment could mean the Claimant was unable to advance his claim. On the other hand, there would be little hardship or injustice to the Respondents, who had been aware of the Claimant’s allegation. The Second Respondent would be able to cross examine the Claimant and address the allegation in oral evidence. The Second Respondent had not suggested that there was any particular prejudice to the Respondents caused by the amendment.
11. The Tribunal also asked the Second Respondent if he alleged that he had another reason for dismissing the Claimant, apart from any protected disclosure, as this was not clear from the list of issues.
12. The Second Respondent said that the Claimant was dismissed because he was not doing any work. He said that he would contend, regarding Polkey and contributory fault, that the Claimant’s performance was so poor that even a fair procedure would have led to his dismissal.

13. The Tribunal said that it would determine those arguments regarding Polkey and contributory fault at the liability stage of the proceedings. The facts of those issues were bound up with the reasons for dismissal and could not be excluded from consideration at the liability stage.
14. The Second Respondent also said that he would argue that all employees had been made redundant by May 2021 in any event, on account of insolvency. The Tribunal said that that argument would be heard at any remedy hearing.

#### *Case Management*

15. The Second Respondent asked that the Tribunal to order the Claimant to produce original copies of emails and messages that he had sent, so that the full details of the messages were displayed, including the dates they were sent. The Second Respondent asked that the Claimant produce the original of the email he allegedly sent on 10 August 2020; Mr McNerney said that the Claimant had only produced a Word document with the alleged contents of emails in it.
16. The Tribunal agreed that the original messages should be produced, with their dates. The Claimant said that he only had screenshots of messages. He said that he had sent the original email of 10 August 2020 to the Respondents' solicitors. The Tribunal ordered the Claimant, by 1 pm on 2 November 2022 to send to the Respondents and the Tribunal the full original copies of his documents, including the 10 August 2020 email, an email he had received from the Liquidator and an email the Claimant sent to VISA, with their dates, or screenshot details of those documents, showing the date the screenshot was taken.
17. The Claimant produced emails with dates from the Liquidator and to VISA. He did not produce the original email sent from him to the Second Respondent on 10 August 2020. The Second Respondent produced metadata of the Word document with that email in it, allegedly showing that the Claimant created it on 25 April 2022. The Tribunal admitted these documents in evidence. The Claimant was cross examined as to the authenticity of his alleged email of 10 August 2022. He then said that he had sent an email with the screenshot of the 10 August 2022 to the Respondent's solicitors and that he had the email to the solicitors and the screenshot in his gallery on his phone. The Tribunal adjourned and ordered the Claimant to provide that email and the screenshot, with the date it was taken. The Claimant again failed to provide those documents.
18. The Tribunal heard evidence from the Claimant. It heard evidence from the Second Respondent. There was a bundle of documents. The Second Respondent had prepared a chronology and cast list.

#### **Relevant Facts**

19. There is a necessary preamble to these findings. This was a highly unusual case, in that almost everything was in dispute – including the nature of the employer's business and the job which the Claimant was employed to do. Further, the Second Respondent asserted that almost all the documents which the Claimant had produced had been fabricated. Likewise, the Claimant asserted that an email on which the Second Respondent relied, allegedly sent by the Claimant on 19 January 2021 at 3.08PM,

p125, was also fabricated. Another feature of the case was that Second Respondent produced very few documents at all, saying that the rest were with the First Respondent's Liquidator.

20. Having heard all the evidence, the Tribunal was sceptical about the authenticity of the Respondent Company's business and the veracity of both parties' evidence.
21. Nevertheless, the Tribunal was able to make the following findings.
22. The Claimant was employed from 15 June 2020 to 25 February 2021 by the First Respondent, "the Company". It was not in dispute that the Claimant worked remotely from home during his employment.
23. The Claimant told the Tribunal he was made an offer of employment by the Company dated 10 June 2020 in the role of "Client Advisor" with "iPaySolutions LTD". He produced a written offer letter, document 82. The offer said that the Claimant would be paid a basic salary of £24,000 per year and that he would be eligible to be considered for a discretionary 'bonus of up to £3,000 per year. The offer said that the Claimant's normal place of work would be 7 Bell Yard, London, England, WC2A 2JR and his normal hours of work would be 10:00am to 6:00pm Monday to Friday.
24. The Second Respondent said that the offer of employment was a fabrication. He said that the Claimant had also produced a fabricated contract which was apparently for a much more senior position, p246. This included duties such as "review reports by subordinate managers..".
25. The Claimant denied he had fabricated the contracts. Whether or not either of the contracts was genuine, it was not in dispute that the Claimant and the First Respondent agreed that he would be paid £24,000 per annum.
26. The Claimant told the Tribunal that his role was as a sales advisor for the First Respondent's payment gateway business. He said that this involved searching LinkedIn for high risk businesses which needed a payment gateway. He would obtain their email address and inform them that the Respondent could provide a payment gateway service for their business. He would say that he simply needed a passport and utility bill to pass on to the Company's underwriting team, who would open the payment gateway and the high risk business could start processing payments straight away. The high risk business would sell their products online and customers wanting to buy their product would be directed to the "iPay Total" payment gateway. The customer would pay "iPay Total" – "iPay Total" would inform the merchant that the payment had been made and would direct the merchant to release the item to the customer. After 2 weeks, the money from the customer would be released to the merchant. He told the Tribunal that Paypal operates like "iPay Total".
27. The Second Respondent told the Tribunal that the Claimant was employed in a sales position to contact small businesses to offer them help with developing their websites and graphic design on their websites. He denied that the First Respondent provided payment gateway services at all.
28. The Claimant produced evidence of a video recording in which the Second Respondent described the First Respondent's payment gateway product for high risk

businesses. In it, the Second Respondent asserted that the Company had a 24/7 customer support service to deal with merchants' queries and problems associated with the payment gateway. The Claimant also drew the Tribunal's attention to a letter from Addleshaw Goddard, instructed by the Company, dated January 2021, in which Addleshaw Goddard described the First Respondent Company's business as providing "advice on and assistance in setting up payment processing merchant accounts." P218.

29. The Second Respondent gave evidence that the Company was "exploring options" on developing payment processing at the time, but had not been successful in doing so. He described himself as a "social media influencer" and said that the Company believed the video would gain positive attention. He said, "I did suggest that we had relationships and systems in place but this was solely a marketing campaign for something we wanted to venture into in the future."
30. The Second Respondent said that the Company's turnover was under £100,000 in the tax year April 2020 – April 2021 which was about enough to pay salaries. The Second Respondent apparently had 17 employees, which was surprising on the basis of its turnover.
31. The Claimant told the Tribunal that he had no knowledge of website design. He said that he did not know what the term metadata meant and had to google it. He did not know that docx was a Word document. He appeared to have very little knowledge that might be relevant to a web-based IT-offering business.
32. In the absence of any concrete supporting evidence on either side, the Tribunal was only able to conclude on the evidence, that the Respondent Company was engaged in offering some sort of IT solution to small companies and the Claimant was employed to generate introductions of these small businesses to the Respondent Company.
33. The Claimant contended that he had made 2 protected disclosures, one to the Second Respondent on 10 August 2020 and another to the Liquidator of a Company called ipay Total Limited in December 2020. The Second Respondent told the Tribunal that there was no link between ipay Total Limited and the First Respondent Company, even though the First Respondent used the trading name "ipay Total".
34. The Claimant relied on a Word document which contained an apparent email exchange between him and the Second Respondent on 10 August 2020. The document showed an email from the Claimant to the Second Respondent at 14.30 saying,  
  
*"Sen why are we using ipaytotal in our emails when the company is being liquidated?  
It's not fair on these businesses and why are we not returning their money, they keep asking for their money.  
Will we get in trouble for misleading these merchants and keeping their money?"*
35. The Word document showed a reply from the Second Respondent at 15.25 saying,  
  
*"If any merchants, ask you about ipaytotal just block them and find new merchants.  
Leave the legal issues with me and concentrate on your job which I hired you for*



*Bro I'll call you after work and don't think I'm having a go at you but you need to stop worrying about these merchants."*

36. Mr McNerney told the Tribunal that the Second Respondent's solicitors had asked for the original emails from the Claimant, but that they had not been provided.
37. The Claimant told the Tribunal, in evidence, that he had taken a screenshot of the August 2020 emails and had sent that to the Second Respondent's solicitors. He said that he still had that email. On the first day of the hearing the Tribunal had ordered the Claimant, to produce the original August 2020 emails, or the later email to the solicitors with the screenshot attached to it and the screenshot itself and the details of the screenshot, including the date it was taken. He did not comply with the order.
38. When the Claimant said, during evidence on the second day, that he still had the email he had sent to the solicitor attaching the screenshot and he still had the screenshot on the gallery in his phone, The Tribunal gave him a second opportunity to produce these things.
39. The Claimant never produced the original August 2020 emails, or his email to the Respondent's solicitors attaching a screenshot of them, or the screenshot. He said he had sent the screenshot to the Tribunal on 25 April 2022. However, it was clear from the 25 April 2022 email to the Tribunal that the only attachments to it were Word "docx" documents, not screenshots.
40. The Second Respondent denied that the Claimant had sent him the email on 10 August 2020, or that the Second Respondent had replied to it. He said that the Claimant had only produced these supposed emails in a Word document during these proceedings.
41. The Tribunal took into account the fact that the Claimant never produced the screenshot of the August 2020 emails, or his email attaching the screenshot allegedly send to the solicitors, despite repeatedly saying that he retained these document. He failed to produce them despite orders from the Tribunal to do so. The Tribunal decided, on the balance of probabilities, that the Claimant did not take a screenshot of the August 2020 emails. It decided that he did not because the August 2020 emails were never exchanged between the Claimant and the Second Respondent.
42. The Claimant did not make the disclosure he alleged on 10 August 2020.
43. At the start of the hearing, before evidence, the Claimant told the Tribunal he was contacted by the Liquidator of iPay Total Limited, Arvinder Singh, in December 2020. He told the Tribunal that he spoke with her by telephone and said that the First Respondent was using iPayTotal email addresses and that merchants were being onboarded onto iPay Total's payment gateway as iPay Total clients.
44. In oral evidence, he was cross examined about his communication with Ms Singh. He told the tribunal that he had given Ms Singh the Second Respondent's contact details and address by Whatsapp in December or January 2021. He then withdrew that evidence when he said that he had not, in fact sent, any such Whatsapps in that period. He said he must have spoken to her by telephone.

45. The Tribunal noted that, in the Claimant's witness statement, he said that he contacted the Liquidator himself, due to bad reviews on Trust Pilot, rather than that she had contacted him.
46. The Claimant's evidence was not convincing regarding whether he spoke to Ms Singh in December 2020 or January 2021 at all, or, if he did, what he said. There was no evidence that he sent any information to her in writing.
47. On the balance of probabilities, the Tribunal found that the Claimant did not convey any information to Ms Singh, before he was given notice of dismissal on 19 January 2021.
48. Further, the Claimant had no evidence that Arvinder Singh contacted the Second Respondent, or that the Second Respondent knew that the Claimant had spoken to Ms Singh, at any time before the Claimant was given notice of dismissal in January 2021, p144. The Second Respondent produced a letter showing that Ms Singh had first contacted him in May 2021, introducing herself, p144. Her letter did not mention the Claimant, or the source of any information she had about the Second Respondent.
49. On the facts, the Tribunal decided that the Claimant did not send an email to the Second Respondent on 10 August 2020. He did not communicate any information to Ms Singh before he was told by the Second Respondent that he would be dismissed on 19 January 2021.

### **Relevant Law**

50. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, by reason of having made such a protected disclosure.
51. Protected disclosure is defined in s 43A ERA 1996: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."
52. "Qualifying disclosures" are defined by s 43B ERA, which provides,  
  
"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 had been, was being or was likely to be committed; or  
  
(b) that a person had failed, was failing or was likely to fail to comply with a legal obligation;  
  
...  
  
(f) that information tending to show any matter falling within any one of the preceding paragraphs had been, was being or was likely to be deliberately concealed."

53. Protection from being subjected to a detriment is afforded by *s47B ERA 1996*, which provides:

" 47B.— Protected disclosures.

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

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

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

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

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

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer...."

### **Automatically Unfair Dismissal**

54. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed (see section 103A):

"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."

55. In order for an employee to have been automatically unfairly dismissed under *s103A ERA*, the reason or principal reason for dismissal must be that the Claimant had made one or more protected disclosures.

56. Since *Timis and anor v Osipov (Protect intervening)* [2019] ICR 655, however, a worker or agent may also be held personally liable for the dismissal of an employee or worker as a detriment under *section 47B(1A)* and their employer can be vicariously liable for this detriment.

### **Discussion and Decision**

57. The Claimant relied on 2 alleged protected disclosures; one to the Second Respondent by email on 10 August 2020 and another to Ms Singh, a Liquidator, in December 2020. The Tribunal decided that the Claimant did not send the Second Respondent the alleged email on 10 August 2020 (or at any other time). The Tribunal decided that he did not convey any information to Ms Singh before he was given notice of dismissal on 19 January 2020.

58. The Claimant did not convey any information as alleged. He did not make protected disclosures. He did not have the requisite 2 years' service to bring an ordinary unfair dismissal claim. His claim under s103A for automatic unfair dismissal must fail because he did not make protected disclosures. His claim for protected disclosure detriment must also fail. His claims are dismissed.

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Employment Judge **Brown**

Date: 4 November 2022

SENT to the PARTIES ON

11/11/2022

FOR THE TRIBUNAL OFFICE