



EMPLOYMENT TRIBUNALS

Claimants: Mr. T. Howes

Respondent: Thanet District Council

PUBLIC PRELIMINARY HEARING

Heard at: London South

On: 17th, 18th, 19th, and 20th September 2024¹

Before: Employment Judge Sudra

Appearances

For the Claimant: In Person (unrepresented)

For the Respondent: Mr. A. Ohringer of Counsel

(References in the form [MB/XX] are to page numbers in the Main Hearing bundle and [SB/XX] are to pages in the Supplementary bundle. References in the form [XX,para.X] are to the paragraph of the named witness' witness statement)

JUDGMENT

- (i) The Claimant's claims of Whistleblowing detriments under s.47B of the Employment Rights Act 1996 ('ERA') and whistleblowing unfair dismissal under s.103A ERA are not well founded and are dismissed.
- (ii) The Claimant's claims of ordinary unfair dismissal under s.98 ERA and wrongful dismissal will proceed to a Final Hearing

¹ In person on 17th to 19th September 2024 and via CVP video conference on 20th September 2024.

REASONS

Introduction

1. This matter came before me at a Preliminary Hearing held in public to determine the following issues:
 - (i) Whether the Claimant had made protected disclosures; and,
 - (ii) whether elected Councillors are workers or agents of the Respondent. [MB/1-10]

2. The Claimant began Acas early conciliation on 24th March 2022 ('Day A') and was issued with an Acas early conciliation certificate on 28th March 2022 ('Day B'). The Claimant presented his ET1 on 13th June 2022. The Respondent defended the claims by way of an ET3 and Grounds of Resistance on 21st July 2022.

The Issues

1. The Claimant's claims are for:
 - (i) Protected disclosure detriment (s.47B Employment Rights Act 1996 ('ERA');
 - (ii) automatic unfair dismissal (s.103A ERA);
 - (iii) ordinary unfair dismissal (s.98 ERA); and
 - (iv) wrongful dismissal.

An List of Issues was contained within the Case management Order of Employment Judge Elliot [MB/1-10] and is appended to this judgment.

Procedure and Documents

2. I had before me:
 - (a) A Main Hearing bundle consisting of 344 pages;
 - (b) A Supplementary Hearing bundle consisting of 531 pages;

- (c) an opening skeleton argument from the Claimant;
- (d) an opening skeleton argument from the Respondent;
- (e) a cast list and chronology from both the Claimant and Respondent.

3. The Tribunal also had written witness statements and heard live evidence from:

For the Claimant

- (i) The Claimant;

For the Respondent

- (ii) Christopher Blundell.²

4. At the conclusion of the Hearing the Claimant provided written closing submissions and the Respondent supplemented its written closing submissions with oral submissions.

Findings of Fact

- 3. The following findings of fact were reached by me, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account my assessment of the witness evidence.
- 4. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. I have not referred to every document I read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

² Due to ill health Mr. Blundell was unable to attend the Hearing to give evidence. Therefore, I attached as much weight as I felt appropriate to his witness statement and acknowledge that the Claimant did not have an opportunity to test Mr. Blundell's evidence or cross-examine him.

5. The factual matrix of this case is not complex and much of it is agreed. Therefore, and on that basis, I can summarise the facts as follows.

Background

6. The Respondent is a Local Authority in Thanet and performs all the services expected of a Local Authority in the UK.
7. The Claimant was employed by the Respondent on 28th September 2015, as a Director of Corporate Governance and Monitoring Officer, until his summary dismissal for gross misconduct on 5th April 2022. The Claimant's line manager was Madeline Homer (Chief Executive). The Claimant is a qualified solicitor and was admitted to the Law Society Roll on 1st November 1986 and had had a career in local government for approximately forty years. He had occupied senior positions such as Solicitor Director and Chief Executive.
8. Tim Willis (Deputy Chief Executive) was also line managed by Ms. Homer until 6th February 2020 after which he was line managed by the Claimant in certain aspects of his role. Mr. Willis believed that the Claimant had line management responsibility for matters related to expenses. The Claimant did not share Mr. Willis' understanding.
9. On 14th August 2019, the Respondent began a disciplinary investigation into Mr. Willis' alleged conduct during a grievance which had been brought against him by a member of the Respondent's staff.
10. The disciplinary matter against Mr. Willis was considered, on 9th October 2019, by a General Purposes Committee which found that Mr. Willis had no case to answer and he was exonerated.
11. Mr. Willis had engaged legal and trade union services to represent him in the disciplinary matter and he had outlaid £2,337.50p ('the fees') for these services.

Expenses Claim

12. On 14th October 2019, Mr. Willis raised a grievance seeking a public apology from the Respondent and the reimbursement of the fees he had expended. He made further requests on 10th November 2019, 11th December 2019, and 21st December 2019. The Respondent did not agree to reimburse Mr. Willis nor did it tell him that his fees claim had been rejected. The Respondent remained silent and kept the fees request in abeyance.
13. The Respondent has an IT system to enable staff to claim work expenses called 'EKPeople.' Upon Christopher Blundell's (Deputy Chief Executive and Section 151 officer) advice, on 12th February 2020 Mr. Willis submitted a claim for his fees on EKPeople.
14. The EKPeople system is an on-line tool which features some 'drop down' options for users to choose from. One of the questions on EKPeople relates to what expenses are being claimed for. None of the options on the 'drop down' menu had a category for the fees Mr. Willis sought reimbursement. Therefore, Mr. Willis choose the category labelled '*professional fees and subscriptions*' which he felt was the most suitable.
15. However, Mr. Willis was alert to the fact that the fees he had claimed on EKPeople were not for professional fees and subscriptions and therefore, he emailed the Claimant on 12th February 2020 stating,

'Tim

You will know that Madeline has directed me to you regarding line management responsibilities.

Can you please authorise my expenses claim dating back to last November, regarding my CIPFA professional fees. This unreasonable delay is causing me hardship.

I have submitted a further claim for £2337.50 representing my legal and union fees in relation to staffing matters. You will be aware of my claim, it relates to my costs regarding the failed disciplinary action taken against me. I have classified these costs as "professional fees" in EK People as there was no category more suitable, but I want to be clear that they do not relate to my CIPFA professional subscription. If the council reimburses me through some other route, then this EK People claim can be cancelled.

I wish to attend CIPFA conference this year.

Can you please authorise this - it will involve
the conference fee and two nights'
accommodation.

Regards

Tim Willis'

16. It was explicit in Mr. Willis' email [SP/242] that he had made a claim for the fees on EKPeople and chosen the category of professional fees and subscriptions as there was no other category representative of the type of expenses for which Mr. Willis sought reimbursement. Mr. Willis was also precise in stating that the sum he sought was not for his CIPFA professional subscription. Finally, Mr. Willis told the Claimant that if the Respondent could reimburse him via an alternative route, then his EKPeople claim could be cancelled. Mr. Willis was aware that his EKPeople claim would go to the Claimant by virtue of him being Mr. Willis' line manager.
17. Mr. Willis' email caused the Claimant considerable chagrin. He felt that Mr. Willis making a claim for expenses under the wrong category, was an act of dishonesty, misrepresentation and fraudulent conduct. The Claimant was also irked that Mr. Willis was trying to recoup from the Respondent – a public body – monies which he had personally expended during a disciplinary process. The Claimant believed, and indeed still believes, that Mr. Willis acted with audacity.

First to Third Disclosures (to the Respondent)

18. Such was the Claimant's annoyance with Mr. Willis' actions, that on 14th February 2020 he sent a comprehensive report to Ms. Homer stating that Mr. Willis had acted fraudulently and in breach of the Respondent's Financial Procedure Rules ('FPR') [MB/100]. This was the Claimant's first disclosure.
19. At around the end of February/beginning of March 2020, the Claimant spoke to Mr. Blundell and told him that Mr. Willis had committed fraud and misconduct and he was mentioning this to Mr Blundell as he was a deputy s.151 officer. This was the Claimant's second disclosure. Mr. Blundell said to the Claimant that he did not share his view and he would not be taking the matter further as he did not believe it was a disciplinary matter or the commission of a fraud. Mr. Blundell's response further exacerbated the Claimant's irritation.

20. On 14th May 2020, the Claimant made his third disclosure. He emailed Mr. Blundell a report regarding Mr. Willis' fees claim and what he considered to be a breach of the FPR [228]. As with the Claimant's first disclosure, the report sent to Mr. Blundell was detailed and thorough.

Grievance against the Claimant

21. On or around 12th March 2020, the Respondent begun a disciplinary investigation into the allegations the Claimant had made about Mr. Willis. On 16th March 2020, Mr. Willis submitted a grievance against the Claimant and the Claimant had sight of the full grievance on 23rd June 2020.
22. On 29th June 2020, Mr. Blundell emailed the Claimant to inform him that he had commissioned Internal Audit ('IA') to investigate the facts in respect of Mr. Willis' alleged breach of the FPR [SB/267].

Fourth to Fifth Disclosures (to Kent Police)

23. On 6th July 2020 the Claimant made his fourth disclosure, this time to Kent police [MB/113] and stated that he had prepared a report which he could send to them. The Claimant had discussed reporting Mr. Willis to the police with Ms. Homer who advised that the Claimant should do what *he* thought was appropriate. Ms. Homer did not *encourage* the Claimant to approach the police.
24. On 24th July 2020, the Claimant made his fifth (and final) disclosure again to Kent police [MB/116; 118-134]. The Claimant sent the police a detailed pack which he called '*The Fraudulent Expenses Claim.*' The Claimant approaching the police *after* he learned of Mr. Willis' grievance was not a coincidence.
25. On 13th August 2020 the police sent the Claimant an email asking him to send them '*a copy of any investigation report...*' An hour or so after receipt of the email from the police, the Claimant responded and said that the Investigation and Disciplinary Sub-Committee ('IDSC') were dealing with the matter and

had arranged to meet on 10th March 2020. The Claimant advised that as the IDSC had not completed the process, no report was available.

26. The next day (14th August 2020) the police emailed the Claimant stating that they had asked him for ‘any’ report, that they had been made aware of the existence of a fact-finding investigation commissioned by Mr. Blundell, and that the Claimant had failed to mention this report to the police. The Claimant did not bring the IA report to the police’s attention as it found that Mr. Willis had not committed a fraud.
27. The police were not impressed at the Claimant’s failure to fully disclose all relevant matters to them and wrote to the Respondent on 12th October 2020 stating,

‘Mr HOWES did not reveal to Kent Police information/reports/conversations that seriously undermine his position and allegations until challenged by the OIC who had conduct of this matter. Of particular note, Mr HOWES did not reveal the existence of the Fact-Finding Investigation/Report until asked twice by the OIC, also Mr HOWES failed to disclose a conversation with the Head of East Kent Partnership Audit Team – Christine PARKER. Both the Fact-Finding report and File note provided to the OIC by Ms PARKER seriously undermined Mr HOWES allegations against Mr WILLIS.

That the allegations of fraud made by Mr HOWES against Mr WILLIS would likely be highlighted by any defence as being both malicious and vexatious. The evidential points to prove a substantive fraud under Section 2 of the Fraud Act 2006 have not been met, consequently, those under a Section 4 offence must also fail.’

[SB/524]

28. Following on from the report from the police regarding the Claimant’s conduct, the Respondent began a disciplinary investigation into the Claimant’s conduct, vis-à-vis the disclosures made to the police, and the investigation culminated into a disciplinary hearing being held.
29. The IDSC found that the Claimant was guilty of gross misconduct and recommended that he should be dismissed. On 28th February 2022, the Respondent’s Independent Persons Panel (‘IPP’) held a hearing to consider the IDSC’s recommendation; the Claimant was in attendance and made submissions.

30. On 5th April 2022 the Respondent summarily dismissed the Claimant for gross misconduct.

Relevant Law

S.43B ERA:

31. (1) Disclosures qualifying for protection:

In this Part a “qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

32. S.43B ERA requires consideration of whether the Claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed above (subjective test) and if so, was that belief a reasonable one (objective). Chestertons Global Ltd v. Nurmohammed 2018 ICR 731 CA and Babula v. Waltham Forest College 2007 EWCA Civ 174.

33. In Williams v. Michelle Brown AM, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

'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.' (emphasis added).

34. Dealing with the fourth and the fifth matters identified in Williams a number of points need to be made.
35. A worker can make a qualifying disclosure even if the content of the disclosure is in fact wrong Darnton v. University of Surrey [2003] I.C.R. 615.
36. The worker must subjectively hold the belief in question. This was described as a fairly low threshold: Korashi v. Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4 at [61].
37. The belief in question must be objectively reasonable. In Korashi the EAT suggested that this *'requires consideration of the personal circumstances facing the relevant person at the time'* and thus, that, e.g. in relation to a disclosure about a surgical matter, in assessing what is objectively reasonable it would be important to take into account whether the person making the disclosure was surgeon or a lay person.
38. In Phoenix House Ltd v. Stockman [2017] ICR 84, [27], Mitting J said this:

'if by that the tribunal meant that the claimant's subjective belief alone sufficed, it would, in my judgment, have been a clear error of law. In Korashi

v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR this tribunal, in a panel presided over by Judge McMullen QC, observed correctly that what is a reasonable belief under section 43B “involves ... an objective standard”. So it does. There is no such creature, in my judgment, as a subjective reasonable belief. On the facts believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints. In circumstances in which the claimant was personally involved in all of the events that gave rise to her complaint, the reasonableness of her belief can be judged by reference to objective facts. It was, in my judgment, the duty of the tribunal to do that.’ [emphasis added].

Conclusions and Analysis

39. I attached very limited weight to Mr. Blundell’s witness statement. This was proper as the Claimant was denied the opportunity to cross-examine Mr. Blundell because of his non-attendance due to ill-health. I do not criticise Mr. Blundell for failing to attend the Hearing; people become unwell and these things happen.
40. The Claimant is an intelligent and educated individual experienced in the workings of local government.
41. The Respondent agrees that all five of the Claimant’s disclosures were disclosures of information and that the Claimant genuinely believed that Mr. Willis had acted dishonestly and fraudulently.
42. The crux of this matter rests on one point and one point only; looking at the issue objectively, was it reasonable for the Claimant to believe that Mr. Willis had committed an act of fraud or dishonesty.
43. It is undisputed that,

- (i) Mr. Willis made an expenses claim on EKPeople using a heading from a drop down menu which did not align with the nature of the expense claimed.
- (ii) Mr. Willis, very soon after submission of the claim on EKPeople, emailed the Claimant explain what he had done and why. Mr. Willis spelt out that his claim did not relate to professional subscriptions but he chose that category out of expediency.

44. I now turn to the matter raised in *Korashi* which *'requires consideration of the personal circumstances facing the relevant person at the time.'* Taking into account the Claimant's qualifications, seniority, and years of experience, it is surprising that he concluded that Mr. Willis had acted fraudulently and dishonestly. Notwithstanding this, it was apparent from the documentary evidence and the Claimant's oral evidence that he genuinely believed and continues to believe, that Mr. Willis had perpetrated a fraud and had been dishonest.

45. However, this is not enough. I remind myself of what Mitting J said in *Phoenix*, *'There is no such creature, in my judgment, as a subjective reasonable belief. On the facts believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints.'*

46. Looking at the issue through an objective lens, it cannot be the case that it was reasonable for the Claimant to hold the belief that Mr. Willis had acted fraudulently and dishonestly. The Claimant was aware that Mr. Willis had been seeking reimbursement from the Respondent. If a lay-person had read Mr. Willis' email of 12th February 2020, the only reasonable conclusion they could have arrived at was that Mr. Willis had made an expenses claim under an unrelated category because he could not find a fitting category. When one also bears in mind that in his email Mr. Willis specifically stated that, *'...I want*

to be clear that they (the expenses) do not relate to my CIPFA professional subscription. If the council reimburses me through some other route, then this EK People claim can be cancelled,' the person on the Clapham omnibus could not have reasonably held a belief that there was fraud or dishonesty at play.

47. In respect of whether councillors of the Respondent are workers or agents, the parties agree that when doing work delegated to them, councillors are agents of the Respondent and I find that this is the case.
48. For these reasons, the Claimant's disclosures do not attract the protection of the legislation and his protected disclosure detriment claim and whistleblowing unfair dismissal claim are dismissed.
49. The Claimant's ordinary unfair dismissal claim and wrongful dismissal claim remain intact and will be decided at a Final Hearing to be listed.

Endnotes

50. You can appeal to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here <https://www.gov.uk/appeal-employment-appeal-tribunal>. Any appeal must be made within 42 days of the date you were sent the decision / these written reasons.
51. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent the decision / these written reasons.
52. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the

same points again, or even to raise points which could have been raised earlier but which were overlooked.

**Employment Judge Sudra
20 September 2024**