Case No: 1401692/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr James Stuart Bilsbrough**

Respondent: **Berry Marketing Services LTD**

Heard at: **Southampton** **On: 2nd, 3rd, 4th of July 2019**

Before: **Employment Judge Dawson, Ms Sinclair, Mr Sanger**

Representation

Claimant: Ms Barrett, counsel

Respondent: Mr McFarlane, representative

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's claim of being subjected to a detriment on the ground of making a protected disclosure is well-founded.

2. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

3. The Claimant is awarded the sum of £2500 in respect of injury to feelings and the respondent is ordered to pay that sum to the claimant.

REASONS

1. The claimant brings claims of;

    a. being subject to detrimental treatment because he made a protected disclosure and

    b. unfair dismissal because he had made a protected disclosure.

    In both cases he relies upon an actual disclosure which he states was protected but also asserts that his employer acted because of a perception or belief that he had made a protected disclosure or considered making a protected disclosure or might make a protected disclosure in the future.

    Those are the only claims before the tribunal.

2. The parties had helpfully agreed a list of issues and a cast list and chronology. The list of issues is reproduced in the appendix to this judgment.

    Conduct of the Hearing

3. The case was listed for three days to include deliberations and remedy, if appropriate. At the outset of the hearing the timetable was discussed with the parties and it was agreed that liability and remedy would be dealt with within a single hearing and all of the evidence and submissions would be completed by the end of day two, to enable the tribunal to consider its decision on day three and send it's reserved judgment to the parties.

4. The claimant has both a hearing condition and an eye condition which meant that it was more difficult for him to participate in the hearing than would otherwise be the case. We permitted the claimant to use an iPad in his evidence which enabled him to see documents to which he was being referred and we noted that the respondent had provided the claimant with a clean electronic bundle for that purpose, for which we were grateful. We also rearranged the tribunal hearing room so that the claimant's hearing was optimised. The claimant indicated that he did not need any further adjustments. Following the

hearing the tribunal contacted the claimant's representative to ask if the judgment should be produced in any particular format to assist the claimant, as a consequence this judgment and the reasons are set out in 1.5 line spacing.

5. The parties agreed a detailed timetable for the time to be permitted for cross-examination of each witness and for submissions and largely stuck to that timetable, only going over the estimates given by a matter of a few minutes. Neither party had to be guillotined or ask for extra time and the tribunal was grateful to the advocates for their cooperation in this respect.

6. We heard from the claimant as well as Ms Swatkins, client services director of the respondent, Mr Begley, managing director of the respondent and Mr Clark, strategic development director of the respondent.

The issues

7. As indicated an agreed list of issues was provided to the employment tribunal and it was not necessary to modify that within the course of the hearing or submissions. We thus give our decision by reference to it.

Findings of Fact

8. We made the following findings of fact.

9. The respondent operates a directory of venues around the world and provides software for clients to search and book venues for conferences and events. It has two types of client, the venue itself, such as a hotel that can be hired, and what it calls "a meeting planner" being a business that books meeting space on behalf of clients. The respondent offers venues for corporate clients and booking software to intermediaries that book venues on behalf of the event organisers.

10. The respondent's business has a booking platform, "GRATIS", which stores venue information about the size and location of the venue, the details of the person making the booking, their name and business email address and the value of the booking.

11. The claimant was employed by the respondent from 5 December 2016 as a Client Service Executive. Ms Swatkins was the claimant's line manager

12. A Client Service Executive's role was to provide first line support with user issues or errors. The claimant worked alongside another Client Service Executive called Ms Dobbs. The claimant was clearly good at the technical side of the role.

13. Because of the claimant's eye condition he was allowed to use his personal laptop for work purposes since it had a superior accessibility option. That permission was recorded in a letter dated 22nd of December 2016 which also stated "as a condition of this decision we require you to create a separate profile for work purposes and agree to us witnessing the deletion of this profile should you leave our employment." The claimant signed his agreement to those conditions.

14. On 16 June 2017 that permission was extended to permit the claimant using his personal iPad as an additional screen.

15. On 2 October 2017, a GRATIS agent was able to add a user into an account of the Fazeley Studio. The user was an ex-employee which was unsatisfactory. A report of this was made to the respondent.

16. On 9 October 2017, the claimant was asked by Mr Begley to add his nephew, an employee at an hotel that he owned, called the Highworth, to the database as a user and to let him know what he found happened. Mr Begley asked him to do this because he perceived that there was a problem in the level of access that such a user would obtain. However, he did not tell the claimant that was the purpose of the request.

17. When the claimant carried out that task he found that the nephew was automatically given Venue Administrator rights at the Highworth which meant that he was able, at least when his Venue Administrator rights were confirmed, to see other information such as the statistics for the venue (for example the average enquiry value and the amount of business), the email address and names of other users, and, according to Mr Clark's witness statement, certain

financial information such as bank account and sort code details for paying an order.

18. Mr Begley confirmed in his evidence that it would also sometimes be possible for such a user to see lists of attendees who were attending the event in question but, by that stage, there would be a dialogue between the person using the system and the venue.

19. Whilst it was necessary to have administrator rights confirmed to see that data, those rights were conferred not by the venue in question but by the Venue Support Team of the respondent. Mr Begley agreed that new users were routinely activated by the Venue Support Team with the only qualification being that the team "might" contact the venue first.

20. Thus it was possible for someone to be added to the system and have access to data about a venue, including the names and email addresses of individuals, without the venue being aware that such access had been given.

21. After adding Mr Begley's nephew on 9 October 2017, whilst the claimant was aware that the nephew had been given administrator rights, the claimant did not know that it was necessary for the Venue Support Team to confirm those rights in order for them to be activated.

22. Further, the claimant did not know that Mr Begley had asked him to add his nephew because Mr Begley was already aware of certain risks in the system and was seeking to test them. Ms Swatkins was also aware of the issue but, again, had not informed the claimant that she was.

23. Upon discovering the issues set out above the claimant decided to speak to Mr Clark. He took the view that he could not report the matter to his line manager since she was not on the premises at the time and, in any event, Mr Clark was the director who dealt with technical matters and operated an open door policy. Thus, the claimant messaged Mr Clark and sought a meeting with him which took place on that day.

24. Mr Clark gave the appearance of being pleased that the claimant had brought

the difficulties with the system to his attention and said that he could see the problem. He told the claimant that he would come back to him, although he did not. The claimant gained the impression that he would tell Ms Swatkins about the issue.

25. The respondent's whistleblowing policy states "In the first instance, and unless the worker reasonably believes his/her line manager to be involved in the wrongdoing, or if for any other reason the worker does not wish to approach his/her line manager, any concerns should be raised with the worker's line manager. If he/she believes the line manager to be involved, or for any other reason does not wish to approach the line manager, the worker should proceed straight to stage 3." Stage 3 provides that the worker should inform a director of the company.

26. We find that what the claimant did was entirely in line with the whistleblowing policy given that he did not wish to approach his line manager because she was not on site.

27. On 11 October 2017, Ms Swatkins called the claimant and asked him to go to a conference room to speak to her. The conference room was busy and therefore he contacted her on his mobile phone. We find that she was irritated because she felt that the claimant had by-passed her in going straight to Mr Clark and she phoned to reiterate the "lines of command". Ms Swatkins was seeking to assert her authority was therefore very firm on the telephone and admonished the claimant for what he had done. Her own statement describes this as being the strongest conversation that she had had with the claimant. She told him that he should "engage [his] brain next time"

28. To some extent the tone of the conversation reflected Ms Swatkins management style and the claimant accepted that she had spoken to him in a similar vein in the past. However, he was particularly offended by the statement that he should engage his brain and we find that it was reasonable for him to be offended.

29. He then ended the conversation with Ms Swatkins and spoke about what had happened with his colleague Ms Dobbs. He was angry and said that he would

take the company down using the information he had. He then started to research, using Google, data protection principles and how to make a disclosure to the Information Commissioner.

30. We note from the claimant's statement that a similar admonishment had been given to Ms Dobbs by Ms Swatkins for speaking to Mr Clark on an unrelated matter.

31. The respondent took the issues revealed by the claimant to Mr Clark seriously and embarked upon a series of fixes in relation to the software.

32. On 13th of November 2017 the claimant obtained an offer of alternative employment and handed in his notice. The file note at page 71A of the bundle shows that he and Ms Swatkins were, at that point, operating in an atmosphere of goodwill towards one another and we find that the irritation Ms Swatkins had shown on 11 October 2017, had been left behind from that day.

33. The claimant then changed his mind about leaving the respondent and emailed Ms Swatkins on 17 November 2017, following a phone call with her, to withdraw his notice of resignation. That withdrawal was accepted and Ms Swatkins arranged for a meeting with the claimant with a view to developing his role within the company to maximise his talents.

34. The claimant was speaking about the upcoming meeting with Ms Swatkins in the canteen on or before 6 December 2017 and talking about it in terms of a promotion. His conversation was perceived as being boastful by those who overheard.

35. What the claimant had said was passed to Ms Dobbs who got upset that the claimant was being promoted over her and she left work early on 6 December 2017. As a consequence, Ms Swatkins telephoned Ms Dobbs (with a view to admonishing her for leaving work early) and Ms Dobbs told her that the claimant had said he would bring the company down and report it for data protection violations.

36. On the following day, the claimant was suspended. The letter of suspension, at

page 72 of the bundle, does not set out the reasons for the suspension but there was an investigation meeting on 8 December 2017. At the outset that investigation meeting Ms Swatkins read a summary which stated, "you have been invited in for a meeting today to investigate claims that have been made against you that you were researching ways in which to "take the company down" in regards to an alleged breach in our data security that you reported to Tim Clark. It has been reported that you have said that you were going to use this information to report the company for data protection violations."

37. We find that summary sets out the reasons for the suspension. We find that the suspension was, at least significantly, because the claimant had been researching ways to make a protected disclosure and thus because the employer believed that he had considered making a protected disclosure. We find that the employer, at this stage, was more motivated by what the claimant had intended to do in the past rather than what he might do in the future.

38. In large part we find that Ms Swatkins, who we find made the decision to suspend the claimant, was motivated by her insistence that everything should come to her as the claimant's line manager. Thus, just as she was vexed when the claimant made a report to Mr Clark on 9 October 2017, she was vexed that the claimant had been considering reporting matters to the Information Commissioner thereafter rather than to her.

39. The research into reporting the company for data protection violations and the fact that the claimant was considering that he might do so, materially influenced (in the sense of being more than a trivial influence) the decision to suspend.

40. Ms Swatkins conducted the investigatory meeting on 8 December 2017 by following the script which appears at page 74 to 76 of the bundle (albeit the script now has the answers from the claimant interposed). The claimant's case is that she was abrupt rude and intimidating in that meeting. Ms Swatkins told us that she was somewhat nervous, never having conducted a disciplinary investigation before and simply wanted to stick as closely to the script as possible in order to avoid prejudicing any future proceedings. She attempted to avoid any conversation that was not scripted and, in evidence, indicated that

her tone would not have been particularly different to the way in which she was giving evidence before us.

41. We find that there was nothing offensive or particularly inappropriate in the way the meeting was conducted. If Ms Swatkins was curt, it reflected the fact that she had not been in that situation before, she was not comfortable and did not feel in control. However, we do not find that she was offensive or rude or intimidating.

42. In the meeting the claimant was asked to remove the profile from his laptop in respect of his work and, notwithstanding the letter which stated that it would be deleted upon his leaving employment with the respondent, we do not think the request by the respondent was surprising. An employee who had been suspended would not normally have access to the company computers or databases. The deletion of the profile on the claimant's laptop did no more than place him in the same position as any other suspended employee would have been in, in particular we do not find it was evidence of any predetermination of outcome. The removal of the profile was a natural consequence of the suspension rather than a discreet act motivated by any disclosure the claimant had or might have made. The respondent would have removed the profile of any employee in the claimant's position whatever the reason for suspension.

43. The claimant was also told in that meeting that he should not contact any other employees. A letter had been sent confirming the suspension on 7 December 2017 which stated, "if you have any queries in relation to this matter, please telephone me…". If the claimant had been concerned as to contacting a companion for any upcoming meetings we find that he could have telephoned the writer of the letter (the operations manager). Again, the requirement not contact other employees was a consequence of the suspension but not a discreet act motivated by any disclosure. Again, we find that the respondent would have required this of any employee, whatever the reason for suspension.

44. On 11 December 2017 the claimant was invited to attend a disciplinary meeting. The charge was "you have been researching ways in which to damage the company's reputation by reporting an alleged data security breach without

following appropriate internal processes".

45. On 15 December 2017 witness statements were taken from Michelle Dobbs and Philippa Johnson. They confirmed that they had heard the claimant say that he would take the company down.

46. Their statements were sent to the claimant before the disciplinary hearing.

47. The disciplinary hearing took place on 19 December 2017. It was conducted by Mr Clark. The claimant confirmed to him that he had said to Ms Dobbs that he would take the company down but said that he had said it in anger. The meeting was not a quick one, it lasted just over an hour and Mr Clark spent 40 minutes deliberating before the meeting was adjourned without a final conclusion.

48. Mr Clark made the decision to dismiss the claimant. We were impressed with his evidence. He said that, at the point when the claimant admitted that he had said he would take the company down, his heart sank since he valued the claimant as an employee and did not want to lose him. However, he said, and we accepted, that he felt that meant there were ongoing security implications. If the claimant became angry in the future he may, again, seek to take the company down, not by making protected disclosures, but in another way. The issue for Mr Clark, we accept, was not that the claimant had carried out research into making a disclosure to the Information Commissioner but that he had threatened to bring the company down because he was angry with an individual.

49. We find that evidence to be supported by the letter communicating the dismissal dated 21st of December 2017. Although it repeats the charge which he we have set out above, the actual reasoning in the letter states "… I consider that you had committed a gross misconduct by stating an intention that you would bring the company down. I note that you said you had no malice against the company, yet you admitted making the threat to take the company down, which I believe was motivated by ill will to the company. I have concluded that your conduct was sufficiently serious to warrant summary dismissal…"

50. The claimant was then given the opportunity to appeal, which he took, but which

was unsuccessful.

51. We noted from the evidence of the respondent's witnesses that it appears there was some discussion between three of them at the different stages of investigation, dismissal and appeal. There was not a clear separation between the different stages and, therefore, it could not necessarily be said that the dismissing officer was independent of the investigation. Whilst that may present some difficulties if this case were an ordinary unfair dismissal claim (which it is not because the claimant lacks qualifying service) we are satisfied that Mr Clark made the decision to dismiss for the reasons we have given.

The Law

52. The law is found in different sections of the Employment Rights Act 1996 according to whether a person is claiming to have been subjected to a detriment or unfairly dismissed. S.103A Employment Rights Act 1996 provides that

> (1) An employee who is dismissed shall be regarded for the purpose of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure

53. S.47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

> (2) 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.

54. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

55. Section 43B(1) provides that 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, or is likely to be deliberately concealed.

56. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section and if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

57. Section 43F provides "

A qualifying disclosure is made in accordance with this section if the worker—

> (a) makes the disclosure . . . to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
>
> (b) reasonably believes—
>
> (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
>
> (ii) that the information disclosed, and any allegation contained in it, are substantially true

58. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

59. As the EAT has set out in *Dray Simpson v Cantor Fitzgerald* "the question in each case, as has now been made clear, 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 [relevant]matters]". However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a "sufficient factual content and specificity...". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (para 39).

60. In respect of a claim of detriment, Harvey on Industrial Relations states "The term 'detriment' is not defined in the ERA 1996 but it is a concept that is familiar throughout discrimination law … and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment, it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of"

61. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

62. In *Martin v Devonshires Solicitors* [2011] ICR 352, the EAT held, at paragraph 22 that

> "In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 a m. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say, "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed, it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint.... Of course, such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take

> steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.

63. In *Panayiotou v Kernaghan [2014] IRLR 500*, at para 49 the EAT held:

> "There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."

Unfair Dismissal

64. In respect of a claim of unfair dismissal, in *Kuzel v Roche* [2008] IRLR 530, the Court of Appeal held (taken from the headnote in the IRLR reports)

> "When an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must produce some evidence supporting the positive

case. That does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

Having heard the evidence of both sides relating to the reason for dismissal it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

The employment tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the employment tribunal that the reason was what he asserted it was, it is open to the employment tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or of logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must be that asserted by the employee. That may often be the outcome in practice, but it is not necessarily so".

65. Section 3 Human Rights Act 1998 provides "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

66. We accept that the claimant's counsel has accurately summarised the authority of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 on the application of section 3, in paragraph 24 of her skeleton argument namely that;

    a. such an interpretation can extend to giving the statutory wording a different meaning from what it would ordinarily bear, even where there is no ambiguity as to the meaning on an ordinary construction,

b. however, the modified meaning of the legislation must remain consistent with the fundamental features of the legislative scheme.

67. We have noted paragraph 32 of that judgment which provides "Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention – compliant."

68. Article 10 ECHR provides:

> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

69. The European Court of Human Rights in *Paleomo Sanchez v Spain* (2012) 54 EHRR 24 has held that in certain cases the state has a positive obligation to protect the right to freedom of expression, even against the interference of it by private persons.

70. Moreover in *X v Y* [2004] EWCA Civ 662, the Court of Appeal made clear that section 3 of the Human Rights Act 1998 is applicable in the case of private employers (paragraphs 57 & 66).

71. It is also been held in Heinisch v Germany (2014) 58 EHRR 31 that "… The Court has held that the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection." (Paragraph 63)

72. As Mr McFarlane for the respondent pointed out, that was a case where a disclosure had been made, not one which was anticipated and reliance was placed in that case on the Appendix to Article 24 of the Revised European Social Charter which specifies "3. For the purpose of this article the following, in particular shall not constitute valid reasons for termination of employment:…

    c the filing of a complaint…"

    It is noted that the Charter only refers to protection upon the filing of a complaint not the anticipated filing of one.

73. We have also noted the guidance in *X v Y* [2004] EWCA Civ 662 on the structured way an employment tribunal should approach an unfair dismissal case where a question of human rights law is raised. We acknowledge, of course, that the present case is not one of ordinary unfair dismissal, it is one of alleged detriment and alleged automatically unfair dismissal following a public interest disclosure. Nevertheless the structured way set out in the judgment is useful guidance. At paragraph 64 of the judgment, Mummery LJ stated

> As indicated earlier, it is advisable for employment tribunals to deal with points raised under the HRA in unfair dismissal cases between private litigants in a more structured way than was adopted in this case. The following framework of questions is suggested –.
>
> (1) Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.
>
> (2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private

persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?

74. In *Keppel Seghers UK Ltd v Hinds* [2014] ICR 1105, the Employment Appeal Tribunal stated "It is common ground that, in construing these provisions, its is relevant to have regard to the fact that section 43K was explicitly introduced for the purpose of providing protection to those who have made protected disclosures. Given that background, it is appropriate to adopt a purposive construction, to provide protection rather than deny it, where one can properly do so: see per Wilkie J in Croke v Hydro Aluminium Worcester Ltd [2007] ICR 1303, para 33 (and, in saying this, I note the warning given in Redrow Homes (Yorkshire) Ltd v Wright [2004] ICR 1126 against the determination of cases by reason of policy consideration rather than the correct application of the law)." We have taken note of the fact that case refers to protection for those who have made disclosures, but also that it is appropriate to provide protection rather than deny it, where one can properly do so , but that one should not determine case by reason of policy consideration rather than the application of law.

75. We also note, and accept, the point made by counsel for the claimant that section 49B(1) Employment Rights Act 1996 provides that the Secretary of State may make regulations prohibiting discrimination because it appears to an NHS employer that the applicant has made a protected disclosure, which allows for the possibility of protection where the applicant has not made a protected

disclosure but is perceived to have done so.

76. In *Mezey v South West London and St Georges Mental Health NHS Trust* [2007] IRLR 244 it was held that suspension was not a neutral act and that decision was approved by the Court of Appeal in *Agoreyo v London Borough of Lambeth* [2019] IRLR 560, 90-92.

Conclusions

77. We state our conclusions by reference to the list of issues. We have abbreviated the issues in the headings below, but reach our conclusions by reference to the entirety of the issues agreed.

Issue 1 – Did the claimant make a protected disclosure by informing Mr Clark of the data issue in or around October 2017?

78. In his closing submissions Mr McFarlane for the respondent conceded, correctly in our view, that the claimant reasonably believed that the disclosure to Mr Clark tended to show that the respondent had failed to comply with its legal obligations under the Data Protection Act 1998 and/or that a criminal offence had been or was likely to be committed.

79. Mr McFarlane did not accept, however, that the claimant reasonably believed that the disclosure was in the public interest since, he said, the claimant's perception of the size of the problem was out of all proportion to the actual size. We find that even if the claimant's perception was somewhat out of proportion, there was a real risk that the respondent was failing to comply with its legal obligations under the Data Protection Act 1998 and personal data could be misused as a consequence. In those circumstances it was, in our judgment, plainly in the public interest for the matter to be reported to Mr Clark and the claimant reasonably believed that.

80. Thus we find that the claimant did make a protected disclosure on 9 October 2017.

Issue 2 – Do ss 47B and 103A Employment Rights Act apply to protect an employee from a detriment or dismissal on the grounds of:

a) An employers perception or belief that the employee had made a protected disclosure?

b) An employer's perception or belief that the employee had considered making a protected disclosure?

c) An employers perception or belief that the employee would or might make a protected disclosure in future?

81. The claimant contends that such a reading of ss 47B and 103A is necessary in order to give effect to the claimant's rights under article 10 ECHR or alternatively 14 ECHR.

82. The claimant's counsel advances a powerful argument that without such an interpretation, effective protection in the context of whistleblowing is not given. She submits that if employers are permitted lawfully to sanction workers whom they perceive to have considered making or be liable to make a protected public interest disclosure this would have a chilling effect on the making of public interest disclosures. She submits that it would also create a perverse incentive for employers to sanction workers in order to deter them from making public interest disclosures before they actually do so.

83. Mr McFarlane did not particularly challenge those arguments, but cogently argued that even the case law relied upon by the claimant limits protection to those who have actually made disclosures.

84. It seems to us that Ms Barrett's arguments are persuasive. In a case such as this, if an employee does not know how to make a disclosure to a regulator, he or she will have no option but to research how to do so. If such research is discovered before the disclosure is made and an employee can legitimately be subjected to a detriment or dismissed as a result then the ability to make a protected disclosure is greatly diminished. The same would apply in respect of an employee who looked into making a protected disclosure but then decided, for whatever reason not to do so. If a person cannot consider making a disclosure without the risk of sanction, even if that consideration leads to a decision not to make a disclosure, then there will be a chilling effect on the

making of protective disclosures. We note, of course, that a dismissed employee may have a claim of ordinary unfair dismissal, but only if they have been employed for 2 years or more. It seems to us that the ability to find out how to make a public interest disclosure and to consider whether or not to make it, is an integral part of making it.

85. At risk of pre-empting the upcoming issues, however, it is necessary for us to be clear as to the context in which we are considering this question. It is not necessary to consider this question in respect of the disclosure on 9 October 2017 since that was an actual protected disclosure within the current legislation. Moreover, the facts of this case do not give rise to the question of whether sections 47B and 103A protect an employee in respect of an employer's perception or belief that the employee had made a protected disclosure. In this case the employer knew that no disclosure had been made to the Information Commissioner.

86. The question only arises in respect of the suspension on 7 December 2017, the meeting of 8 December 2017 and the dismissal. However, we have found that the way the claimant was spoken to in the meeting on 8 December 2017 was not inappropriate and being asked to remove his user account from the laptop and being told that he was unable to contact anyone one from work were a consequence of the suspension on 7 December 2017.

87. Thus, this issue really arises in relation to the suspension on 7 December 2017 which we have found was largely because the respondent believed that the claimant had been researching ways to make a protected disclosure and, had therefore, been considering making a protected disclosure and the dismissal.

88. We have noted that none of the cases to which we have been referred require anything other than protection in circumstances where a disclosure has been made. Thus the claimant cannot by reference to case law show that his article 10 right to freedom of expression includes the right to research and consider making a protected disclosure.

89. As the claimant accepts, before any question of a particular interpretation of the relevant sections of the Employment Rights Act 1996 arises, he has to

persuade this tribunal that the article 10 right which he enjoys includes a right not only to make protected disclosures but also to consider making them.

90. On the facts of this case, despite the fact that the claimant had stated, in anger, that his intention was to bring down the company, he had behaved appropriately in his preparation for making a disclosure under section 43F Employment Rights Act 1996. He would, if he had made the disclosure, have made it to a person prescribed by an order made by the Secretary of State (the Information Commissioner) and he would have reasonably believed that the relevant failure fell within the description of matters in respect of which that person was prescribed and that the information to be disclosed was substantially true.

91. It seems to us that if an employee is behaving responsibly in preparing to make a disclosure under section 43F Employment Rights Act 1996, and he or she cannot make that disclosure without researching how to go about it (which was this case), then the dismissal of such a person or subjecting them to a detriment because of that research would be an interference with that employee's right to freedom of expression, where the right to freedom of expression clearly includes the right to make a protected disclosure. In such case the research is an integral part of making the disclosure.

92. Thus if we follow the structured approach set down in *X v Y* we reach the following conclusions:

    a. For the reasons we have given, the circumstances of the suspension do fall within the ambit of article 10 of the Convention, since the claimant was suspended for considering how he might make a disclosure to the Information Commissioner. The same would be the case if the claimant had been dismissed for such research.

    b. The State does have a positive obligation to secure enjoyment of the article 10 convention right between private persons. The right to make a public interest disclosure applies, in our judgment, whether a person is employed by a public employer or a private employer.

    c. The interference with the claimant's article 10 right, by subjecting him to

the detriment of suspension when he had carried out research because he was considering making a protected disclosure or dismissing him was not justified.

d. If the suspension or dismissal was not justified then we are obliged to read into section 47B(1) Employment Rights Act 1996 that a worker has the right not to be subjected to any detriment on the ground that he has considered making a protected disclosure and into section 103A that he may not be dismissed for that reason.

93. We do not consider that reading section 47B(1) or 103A in this way conflicts with the fundamental features of the public interest disclosure legislation and we accept the point made by Ms Barrett in her submissions that section 49B(1) Employment Rights Act 1996 allows for the possibility of protection where the employee has not, in fact, made a protected disclosure (albeit that under that section must appear to the employer that it has made one).

94. Ms Barrett made clear that it was only necessary for us to consider article 14 in the event that we were against her arguments in respect of article 10. In those circumstances we have not considered her arguments in this respect.

Issue 3 – Did the respondent believe that the claimant had, would or might make, or had considered making a further disclosure of the data issued to the Information Commissioner?

95. We have already answered this question, but the purpose of the clarity we find that the respondent did believe that the claimant had considered making a disclosure of the data issued to the Information Commissioner. We find that the Information Commissioner was a prescribed person for the purposes of section 43 F Employment Rights Act 1996 and the claimant did reasonably believe that the issue fell within that category and the information giving rise to his concerns was true.

Issue 4 – Was the claimant subjected the following detriments

(a) Being upbraided by Ms Swatkins on or around 11th of October 2017

96. The claimant was subjected to a detriment in this respect, particularly in so far as she told him to "engage his brain" and he, reasonably, felt upset by that comment.

(b) Suspension on 7 December 2017

97. The suspension on 7 December 2017 was bound to be perceived by the claimant as being to his detriment. He was clearly a person who took pride in his work and saw himself as dedicated to it. A suspension would be known to his colleagues and most employees would regard it as somewhat humiliating to be suspended. The consequences of his suspension in terms of the removal of his work profile on his laptop and being informed that he could not speak colleagues would cause some further distress.

(c) In a meeting on 8 December 2017

(i) Being treated in an abrupt rude and intimidating manner by Ms Swatkins

98. We do not find the claimant was treated in that manner by Ms Swatkins and we do not find he was subjected to a detriment in this respect. We have applied the test of whether a reasonable worker would or might take the view that the detriment accorded to them had, in all the circumstances, been to their detriment that we do not consider that he or she would do so.

(ii) Being told he was suspended…

99. We do not find that the claimant being told that he was suspended was an act of detriment, the fact of suspension was the act of detriment.

(iii) Being asked to move his venuedirectory user account from his laptop

100. As we have indicated we find that this was a consequence of the suspension rather than a separate act of detriment. Nevertheless it made the suspension worse, in terms of the way the claimant viewed it. Anticipating the answers to the later issues, we have, therefore, taken this into account in considering the appropriate injury to feelings award.

(iv) Being told that he was unable to contact anyone from work with the

result that he was unable to bring a companion to the disciplinary meeting.

101. Whilst the claimant was told that he was unable to contact anyone from work, we find that was a consequence of being suspended and normal in the circumstances. The claimant could have requested permission to contact somebody if he wished to approach them as a companion and we do not find that this was a separate detriment, it was simply a consequence of the suspension itself, and, again, we have taken this consequence into account when considering the injury to the claimant's feelings.

Issue 5, Was the detrimental treatment materially influenced by the disclosures.

102. Being upbraided on 11 October was materially influenced by the disclosure made to Mr Clark. Whilst we acknowledge that Ms Swatkins states that she was motivated by the fact he had gone behind her back, and we accept that is true, the claimant was entitled to do that as part of the respondent's own whistleblowing policy. He was permitted to go direct to Mr Clark if, for any reason, he did not wish to go to his line manager. His approach to Mr Clark was part of the making of the disclosure and, in our judgment, it is not possible to separate the making of the disclosure from the person it was made to where there was nothing wrong with the disclosure being made to Mr Clark.

103. In those circumstances we find that the upbraiding he received was materially influenced by the disclosure made.

104. We also find that the suspension was because the claimant had considered making a protected disclosure and, therefore, materially influenced by that the reasons set out in paragraphs 36 to 39 above.

Issue 6- The Dismissal

105. The claimant was not dismissed wholly or principally because he had made a protected disclosure or considered making one. He was dismissed because he had threatened to take the company down when he became angry with Ms Swatkins. That threat was separate to researching how to make a disclosure and gave the respondent legitimate cause for concern as to how the claimant

would behave in the future if he became angry with his manager. For the purposes of clarity we find that by the time the claimant had resigned and been invited back to work, the disclosure of 9 October was no longer operating on Mr Clark's mind at all. Whether the dismissal would have been fair or otherwise under section 98 (4) Employment Rights Act 1996 is not a material question for us, the reason for the dismissal was neither the original disclosure to Mr Clark in October nor the fact that the claimant had researched making a disclosure to the Information Commissioner, it was because of his threat to bring the company down because of his anger with a manager.

Issue 7- Were any allegations of detriment brought outside the primary time limit? If so, did such allegations form part of a series of similar acts?

106. The detriment on 11 October 2017 was more than 3 months before the claim form was presented (even taking account of the early conciliation period). The commencement of the suspension was also more than 3 months before the claim form was presented, however the suspension finished at the date of dismissal, which was within the relevant time limits. An act of suspension is a continuing act (*Tait v Redcar and Cleveland Borough Council UKEAT/0896/08*).

107. The question for us is whether taken together the detriment of 11 October 2017 and the suspension form part of a series of similar acts.

108. We find that there was such a series since both the upbraiding on 11 October 2017 and the act of suspension were caused, at least substantially, by the fact that Ms Watkins believed that all reports should be made to her directly as the claimant's line manager and not to others. Further, both acts of detriment were a response to the claimant making or considering making a protected disclosure.

Issues 8 and 9

109. The claimant was not automatically unfairly dismissed and therefore issue 8 does not arise. Whilst the claimant was subject to detriments, neither detriment that we have found proved were detriments where a statutory code would have been relevant and, therefore, no uplift under section 207A of the

Trade Union and Labour Relations (Consolidation) Act 1992 is appropriate.

Overall conclusions on Liability

110. The claimant's claims of being subjected to a detriment on 11 October 2017 when being upbraided by Ms Swatkins and by being suspended on 7 December 2017 are well-founded. Those detriments were as a consequence of making a protected disclosure (in respect of the October incident) or being perceived as having considered making a protected disclosure (in respect of the suspension).

111. The claimant was not subjected to detriments in other respects and was not dismissed because he had made a protected disclosure or because the respondent perceived him as having considered making a protected disclosure.

Remedy

112. We have considered the appropriate award in this case in respect of injury to feelings (there being no financial loss as a result of the matters we have found proved) and reminded ourselves of the guidance in the Presidential Guidance in relation to injury to feelings dated 5th of September 2017.

113. We are not awarding damages in respect of injury to feelings in respect of the dismissal. The injury to feelings on 11 October 2017 would have been short lived given that, we find that quickly thereafter, relationships returned to normal and the claimant was allowed to rescind his resignation. The act of suspension would be, to a greater extent, upsetting but only lasted for a period of 2 weeks. Although the claimant should not have been suspended for considering making a protected disclosure, the suspension meeting was conducted reasonably as was the period while the claimant was suspended.

114. We have taken account of everything the claimant has said in his statement and noted the lack of any need to seek medical intervention.

115. In our judgment the appropriate award for injured feelings is £2500.

116. We enter judgment accordingly

Employment Judge Dawson

Date: 5th of July 2019

JUDGMENT SENT TO THE PARTIES ON

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Date:.....31 July 2019……

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FOR THE TRIBUNAL OFFICE

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APPENDIX TO JUDGMENT

Claim No: 1401692/2018

IN THE EMPLOYMENT TRIBUNAL SOUTHAMPTON

BETWEEN:

JAMES STUART BILSBROUGH

Claimant

-and-

BERRY MARKETING SERVICES LTD

Respondent

AGREED LIST OF ISSUES

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1. Did the Claimant make a protected disclosure by informing Mr Clark of the Data Issue in or around 9 October 2017? Did the Claimant reasonably believe that his disclosure to Mr Clark tended to show:

   (a) that the Respondent and/or its employees had failed to comply with their legal obligations under the Data Protection Act 1998 (s.43B(1)(b) ERA) and/or that a criminal offence had been or was likely to be committed under s.55 of the Data Protection Act 1998 (s.43B(1)(a) ERA); and

   (b) the disclosure was in the public interest because sensitive data of the Respondent's clients relating to approximately 15,000 venue locations could be viewed and manipulated without oversight, with potentially far reaching and disastrous consequences for those clients?

2. Do ss. 47B and 103A ERA apply to protect an employee from detriment or dismissal on the grounds of:

   (a) an employer's perception or belief that the employee had made a protected disclosure?

   (b) an employer's perception or belief that the employee had considered making a protected disclosure?

   (c) an employer's perception or belief that the employee would or might make a protected disclosure in future?

   The Claimant contends that such a reading of ss. 47B and 103A ERA is necessary and possible in order to give effect to the Claimant's rights under Article 10 ECHR, alternatively Article 14 ECHR read with Article 10.

3. Did the Respondent believe that the Claimant had, would or might make, or had considered making, a further disclosure of the Data Issue to the Information Commissioner?

   (a) The Information Commissioner is a prescribed person for the purposes of s.43F ERA in respect of compliance with the requirements of legislation relating to data protection (The Public Interest Disclosure (Prescribed Persons) Order 2014).

   (b) Did the Claimant reasonably believed that the Data Issue fell within that category and that the information giving rise to his concerns was true?

4. Was the Claimant subjected to the following detriments:

   (a) being upbraided by Ms Swatkins on or around 11 October 2017;

   (b) suspension on 7 December 2017;

(c) in a meeting on 8 December 2017:

i. being treated in an abrupt rude and intimidating manner by Ms Swatkins ;

ii. being told he was suspended due to allegations he had been "researching ways in which to damage the company's reputation by reporting an alleged data security breach without following internal processes";

iii. being asked to remove his venuedirectory user account from him laptop;

iv. being told he was unable to contact anyone from work, with the result that he was unable to bring a companion to his disciplinary meeting.

5. If so, was said detrimental treatment materially influenced by the protected disclosure to Mr Clark and / or the Respondent's perception that the Claimant had or had considered making, a protected disclosure to the information Commissioner and / or the Respondent's perception that the Claimant would or might make a protected disclosure to the Information Commissioner? (Contrary to s.47B ERA).

6. Was the Claimant was dismissed wholly or principally because he made a protected disclosure to Mr Clark and / or because of the Respondent's perception that he had, would or might make, or had considered making, a protected disclosure to the Information Commissioner? (Contrary to s.103A ERA, taking into account the construction advanced by the Claimant.)

7. Were any allegations of detriment brought outside the primary time limit? If so, did such allegations form part of a series of similar acts for the purposes of s.48(3)(a) ERA?

8. If the Claimant was automatically unfairly dismissed, is any reduction in compensation warranted in respect of:

   (a) Contributory fault?

   (b) Polkey?

9. If the Claimant was unfairly dismissed, and/or subject to any detriment, is any award liable to be adjusted taking into account the provisions of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992? If so, by what factor?

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