



EMPLOYMENT TRIBUNALS

Claimant: Mr J Celia

Respondent: Hafal

Heard at: Cardiff **On:** 15 May 2019

Before: Employment Judge Moore

Representation:

Claimant: In Person

Respondent: Mr R Shepherd

JUDGMENT

The Judgment of the Tribunal is:-

1. The Respondent's application to strike out the Claimant's claims brought under s. 103(a) and 47(b) of the Employment Rights Act 1996 ("ERA") succeeds on the basis that there is no reasonable prospect of those claims succeeding.
2. The Respondent's application to strike out the Claimant's claims brought under National Minimum Wage Act 1998 is refused.

REASONS

Background

1. This is an application made by the Respondent on 10 May 2019. In summary, the applications were based on the following;
 - a. In respect of the protected disclosures, that those relied upon by the Claimant were not qualifying disclosures as set out in s.43(B) ERA 1996.
 - b. The claim brought under the National Minimum Wage Act 1998, regarding whether the Claimant's role of appropriate adult amounted

to an employee or worker already been determined by the Employment Appeal Tribunal in the case of **Hafal Ltd v Miss K Lane-Angell UKEAT/0107/17**. Further, time spent 'on call' at home was well established under ECJ case law not to be working time (**SIMAP v Conselleria de Sanidad y Consume de la Generalidad Valenciana [2000] IRLR 845** and **Landeshauptstadt Kiel v Jaeger [2003] IRLR 804** cited).

2. In order for a disclosure to qualify for protection under s.43(B) ERA 1996, the qualifying disclosure must any disclosure of information which, in the reasonable belief of the employer making the disclosure, is in the public interest and tends to show one or more of the circumstances set out in S43(B) (1) (a) – (f).
3. I was referred to the caseS of **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325, EAT** and **Kilraine v London Borough of Wandsworth [2018] ICR 1850, CA**.
4. The subsections relied upon by the Claimant were S43(B) (1) (a), that a criminal offence had been committed, is being committed or was likely to be committed and S43(B) (1) (b), that a person has failed or failing or is likely to fail with any legal obligation to which he is subject.
5. Employment Judge Povey made an order at the previous Preliminary Hearing on 15 February 2019 for the Claimant to set out the qualifying disclosures he relied on. The Claimant duly set these out in a document titled "Claimant's response to Respondent's request for additional information" dated 14 March 2019. The Claimant confirmed during these proceedings that he was not relying on a third disclosure set out in the document, namely a disclosure to the National Lottery and therefore there were two qualifying disclosures I was required to consider as part of the Respondent's application.

Disclosure 1

6. The first qualifying disclosure relied upon was a report described as an evaluation of the Let's Talk Project (the "Let's Talk report") prepared by the Claimant attached to an email from the Claimant to Mr Michael Harvey and Ms Alexandra Martin dated 11 April 2018. The Claimant confirmed during the proceedings that the covering email was not relied upon as part of the qualifying disclosure; it was the attachment to that email in its' entirety that was relied on.
7. The Let's Talk report was a three-page report in table format. It had a number of columns namely Target No, Outcome, Target, Timescale, Current Status and Notes. The targets had been set in accordance with

- funding from the National Lottery in respect of this particular project. Under 'outcomes' were the Respondent's suggested activities necessary to meet the targets.
8. Target 1.1 was specified as "Service users with serious mental illness will report better and faster access to psychological therapies". Under the column 'Notes' the Claimant had written "**Unable to monitor as the full evaluation questionnaire (to measure this target) was submitted March 2016, Still awaiting go ahead**". These were the first words relied upon the Claimant as amounting to a qualifying disclosure.
 9. Target 1.1 second outcome was "Develop and bring together the Advocacy for Psychological Therapies community, including establishing the dedicating observatory, webpage and self-help material." Under the column 'Target' the Claimant had written "**Dedicated observatory cancelled by Alun**". References to three more outcomes were also recorded as having been 'cancelled by Alun'. There references to cancellations were also relied upon by the Claimant as amounting to a qualifying disclosure.
 10. The Claimant relied upon this report and in particular the information that certain activities had been cancelled or they had been unable to be monitored as information amounting to a qualifying disclosure.
 11. This wording could be read as factual information; namely that a number of outcomes have not been delivered as either the questionnaire was waiting the go ahead or meetings had been cancelled. However, in my view they there was not sufficient factual information as to how that information tended to show either that a criminal offence had been committed or was being committed or that there was a breach of legal obligation. There was also no information as to what the actual legal obligation was which was said to have been breached.
 12. For these reasons I find that the attachment to the email relied upon by the Claimant for disqualifying disclosure number 1 was not a qualifying disclosure.

Disclosure 2

13. This was contained in an email that the Claimant had sent to Elin Jones of the Respondent on 17 May 2018 and the particular element of the wording relied upon by the Claimant was as follows;

"Dear Elin Jones,

It is with heavy heart and on the advice of Nia Murphy that I have to report to you as, Chair of Hafal's Trustees, some disturbing news about the misappropriation of Lottery funds, by senior Hafal Directors."

14. In my judgment this falls squarely within the meaning of an allegation rather than information. It is a statement that contains no factual information or content about why or how there is a misappropriation of lottery funds. This does not amount to a qualifying disclosure.
15. I therefore strike out the Claimant's claims under S103A and S47B ERA 1996 on the grounds they have no reasonable prospect of success, pursuant to Rule 37 (a) of the Employment Tribunal Rules of procedure 2013.
16. Turning now to the element of the application in respect of the National Minimum Wage claim. The Claimant entered into a separate arrangement with the Respondent as an Appropriate Adult. This was part of a service between South Wales police and the Respondent whereby the Respondent would supply appropriate adults to assist vulnerable adults in police custody. The Claimant's case is that he should have been paid the national minimum wage for all time on call whilst he was at home.
17. The Respondent relied upon a decision from the EAT decision in **Hafal Ltd v Miss K Lane-Angell UKEAT/0107/17**. In that case although it was held the appropriate adult was not an employee, the EAT did not deal with an appeal from the Employment Tribunal's decision about whether or not the Claimant in that particular case was a worker. Therefore, it is my view that this aspect of the case cannot said to have been already determined by the EAT decision. There was enough before me to suggest that there is evidence that requires to be tested. Therefore I do not find the claim has no reasonable prospects. It needs to be determined by hearing all of the evidence which will need to be done at a full hearing.
18. For the reasons I have set out above, I also decline to make a deposit order in respect of the National Minimum Wage claim.

Employment Judge S Moore
Dated: 20 June 2019

JUDGMENT SENT TO THE PARTIES ON

.....20 June 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.