EMPLOYMENT TRIBUNALS

Claimant: Miss Stephanie Davies

Respondent: The Chief Constable of Cheshire Police

Heard at: Liverpool **On:** 10,11,12 October and 31 October and 1 November 2022

Before: Employment Judge Aspinall
Mr J Murdie
Mr A Clarke

Representation
Claimant: Mr Ohringer, Counsel
Respondent: Ms Nowel, Counsel

JUDGMENT having been given orally on 1 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form dated 13 August 2021 the claimant, a serving senior coroner's officer, brought a complaint for public interest disclosure detriment and disability discrimination.

2. The matter came to a case management hearing before EJ Aspinall in November 2021 and was stayed pending resolution of the claimant's first grievance. The claim came to a second case management hearing again before EJ Aspinall on 4 May 2022 at which the complaints were clarified and a preliminary hearing was listed to determine whether or not the claimant's disclosures were qualifying disclosures. That hearing was due to have taken place in July 2022 but was postponed to allow time for an application made by the respondent for a restricted reporting order. That application was considered by consent on paper and was refused.

3. The claimant then instructed solicitors who indicated disclosure and

amendment applications and requested that the preliminary hearing be determined by a full panel. The preliminary hearing was relisted before a full panel and came before EJ Aspinall and non legal members Mr Murdie and Mr Clarke on 10 October 2022.

The Hearing

4. The hearing began with checking that everyone had the same documentation. There was a bundle of 7 level arch files. In addition, each counsel had prepared a skeleton argument and there was a joint bundle of authorities.

5. A timetable was agreed to accommodate two witnesses for the claimant, one of whom, Mr Chancellor would be giving evidence from overseas with permission having been obtained and the other, Mrs Hurst, who had other commitments.

List of Issues

6. A long list of issues had been submitted to the Tribunal but at the outset of the hearing the parties presented an agreed, more succinct list. The list included at 1(d) a disclosure that the respondent said was not before the Tribunal. The list was as follows:

> <u>The relevant disclosures</u>
>
> (1) It is agreed that C made the following disclosures;
>
> PID1
>
> (a) On 10 September 2018, emailing DCI Simon Price, a former DCI and policing lecturer no longer employed by R, the 2018 report without the photographs.
>
> PID2
>
> (b) On 12 September 2018, sending DCI Simon Blackwell, serving officer of R, the 2018 report with photographs.
>
> PID3
>
> (c) In March 2019, providing Mr Arthur Chancellor, external forensic expert, hard copy forensic photographs and holding a discussion with him about them.
>
> PID4
>
> ~~(d) At a meeting on 25 July 2019, informing DCI Blackwell about the progress being made to update the 2018 report~~
>
> PID5

(e) On or around 13 or 14 June 2020 providing a copy of the updated 2020 report with supplemental photographs to Mrs Christine Hurst, retired former senior coroner's officer

PID6

(f) On or around 13 or 14 June 2020 providing a copy of the updated 2020 report with supplemental photographs to Mr Chancellor

PID7

(g) On or around 13 or 14 June 2020 providing a copy of the updated 2020 report with supplemental photographs to Mr Colin Sutton, retired senior police officer

Disclosure qualifying for protection pursuant to Section 43B Employment Rights Act 1996 ERA

(2) Did all or any of the disclosures-whether considered individually or in aggregate-constituted disclosure of information which in C's reasonable belief tended to show:

(a) that a criminal offence had been committed, was being committed or was likely to be committed and or

(b) miscarriage of justice has occurred, is occurring was likely to occur

(3) Did C also reasonably believe that all or any of the disclosures were made in the public interest?

Protected disclosures pursuant to s43C ERA - disclosures to employer -

(4) It is agreed that section 43C was satisfied by PID 2 and PID 4.

Protected disclosures pursuant to S43G ERA - disclosures to other persons

(5) Were some or all of PID 3,5,6 and 7 made in accordance with s43G? This requires the Tribunal to determine in relation to each disclosure:

(i) Did C reasonably believe that the information disclosed, and any allegation contained in it, was substantially true?

(ii) Did C make the disclosure for the purposes of personal gain

(iii) was the disclosure of substantially the same information as have been made to the employer in PID2 or PID4?

(iv) In all the circumstances of the case, was it reasonable for C to make the disclosure taking into account the factors set out in 43G (a) to (f) namely:

(a) the identity of the person to whom the disclosure was made;

(b) the seriousness of the relevant failure;

(c) whether the relevant failure is continuing or is likely to occur in the future;

(d) whether the disclosures made in breach of a duty of confidentiality owed by the employer to another person;

(e) any action which the employer had taken all might reasonably be expected to have taken as a result of any previous disclosure;

(f) the extent to which C complied with any procedure whose use was authorised by the employer.

Protected disclosures pursuant to s43H - disclosure of exceptionally serious failure

(6) Were some all of PID 1,3,5,6 and 7 made in accordance with s43H ERA? This requires the Tribunal to determine in relation to each disclosure:

(a) Did C reasonably believe that the information disclosed, and any allegation contained in it was substantially true?

(b) Did C make the disclosure for the purposes of personal gain?

(c) Was the disclosure about the failure of an exceptionally serious nature?

(d) In all the circumstances of the case, was it reasonable for C to make the disclosure, with particular regard to the identity of the person to whom the disclosure was made?

The application for specific disclosure

7. At the outset of the hearing Mr Ohringer made his application for specific disclosure. There were two components to it.

8. The first was that the claimant wanted sight of 14 MG11 statements. They are statements of police officers taken in October 2020 when the respondent was considering charging the claimant with the criminal offence of misconduct in public office. The respondent was also, at that time considering internal investigation and possible disciplinary proceedings that might amount to gross misconduct, lead to dismissal and possibly employment litigation. Ms Nowel claimed litigation privilege

in relation to those statements. The Tribunal heard argument on the disclosure point.

9. The claimant said the content was relevant to both her reason for making the disclosures / what they tended to show and her reasonableness in disclosing to other persons, and necessary for fair disposition of the issues at preliminary hearing.

10. Ms Nowel had read those statements and said that the respondent could see that some of the content of the statements of three officers; DCI Blackwell, Price and Johnson, might be relevant as to the claimant's state of mind when disclosing. Ms Nowel said that their disclosure was not necessary for the determination of issues on the list. Ms Nowel claimed litigation privilege in relation to the statements and said that the respondent did not waive its litigation privilege in relation to any of the 14 MG11 statements.

11. The second component related to six months' worth of the claimant's sent emails between March 2019 and September 2019. The emails were sent from the claimant's University of Liverpool email address, she was at the time registered for phd. They were hosted through a University of Liverpool server but had been accessible via the claimant's laptop. The laptop was seized during a search of her home on 23 September 2020. It holds the report she alleges contains her protected disclosures (and possibly alternate iterations of the report disclosed to different parties) and which the respondent seized in relation to the potential criminal charge of misconduct in public office and wishes to protect for the purposes of its disciplinary investigation. Arrangements were made at the May preliminary hearing for case management for the claimant to view the content of the laptop. It was at that viewing that she identified that 6 months of sent emails were missing from the laptop. The respondent says further searches by its IT team failed to explain their absence or retrieve them.

12. The emails the claimant seeks are emails sent to her mother and friend Mrs Hurst and go to what she had said to DCI Blackwell at the time of her 2018 report and in and around July 2019 at the time of what she says is a verbal disclosure on 25 July 2019 (PID4). She says they are relevant to what her disclosures tended to show, the reasonableness of her belief and as to her reasonableness in disclosing to other persons.

13. EJ Aspinall had previously indicated that the claimant might make enquiries of the University of Liverpool or might obtain the emails from the recipients, her mother and Mrs Hurst. The claimant said she had not been able to obtain copies.

14. The respondent accepts the claimant's assertion that emails before the missing six months and after were viewable by the claimant. Mr Ohringer says he will invite the Tribunal to draw an adverse inference from the absence of the emails for the March to September 2019 window. He is entitled to do so in closing submission (in the event he did not). His client will give direct oral evidence at this hearing as to what she believed her disclosures tended to show and as to her reasonableness in disclosing to other persons, and Mr Ohringer will cross-examine DSI Blackwell on those points.

Decision on specific disclosure

15. The Tribunal adjourned to consider its decision. It had regard to the relevant tests of relevance and necessity and the law on litigation privilege.

16. The Tribunal noted that the statements of DSI Blackwell, Johnson and Price may have relevant content. The Tribunal finds that their disclosure is not necessary to determine the issues on the List because:

(i) In relation to DSI Blackwell, PID2 is written, PID4 is oral and the Tribunal will see the content of PID2 and hear oral evidence from the claimant and DSI Blackwell.

(ii) In relation to PID1 to Price it was written and the Tribunal will see that written disclosure and hear the claimant's evidence.

(iii) In relation to Johnson there is no alleged disclosure. The respondent says DSI Blackwell passed the 2018 report to Johnson. His evidence would not assist the Tribunal in determining the issues on the list. At best he might have an opinion as to the reasonableness of the claimant's belief as to what the disclosure to DSI Blackwell tended to show, and that it is a matter for the Tribunal. It could also be argued that the statement would assist the respondent if Johnson were able to confirm that he had seen the 2018 report, in relation to the determination at S43G(3)(e). But it is the respondent that claims litigation privilege and does not waive that privilege to make that point.

17. The Tribunal considered the litigation privilege point. The requirements for litigation privilege, from the House of Lords in ***Waugh v British Railways Board*** **[1980] AC 520** were as stated by Lord Carswell in ***Three Rivers (No. 6)*** at paragraph 102 as follows:-

> "communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
>
> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial."

18. More recently, **R (Jet2.com Ltd) v Civil Aviation Authority (Law Society intervening) [2020] QB 1027** restated the "sole or dominant purpose" test. The Tribunal also had regard to **SFO v. ENRC [2018] EWCA Civ 2006,** documents prepared for the dominant purpose of investigation are not covered by litigation privilege. But if a charge is contemplated and the dominant purpose is for the proceedings that might follow the charge, then litigation privilege is engaged.

19. The Tribunal found that the MG11 statements were made for dominant purpose of assessment by the Crown Prosecution Service as to whether criminal charges were to be brought against the claimant for misconduct in public office or not. Privilege attaches. The fact that subsequently the CPS decided not bring charges and wrote to tell the claimant so would not, in the Tribunal's provisional view, amount to a waiver though we did not hear full argument on waiver.

20. The specific disclosure request is denied. The MG11 statements are not necessary and if they were, would have been privileged.

21. In relation to the missing emails, the Tribunal accepts that the respondent does not have them. It cannot order the respondent to produce documents it does not have. Further, the claimant has not shown that their content is necessary for determination of the issues. The claimant will give direct oral evidence, as will Mrs Hurst. They can attest to what the claimant believed and said she believed at the time of her disclosures. The request is denied.

Amendment application

22. The claimant wished to amend to include a further instance of disclosure at PID4 on the List.

> *At a meeting on 25 July 2019 informing DCI Blackwell about the progress being made to update the 2018 report.*

23. The claimant said the factual matter was in the Claim Form dated 13 August 2021 and had been missed from the list of issues. This submission was made orally and at paragraph 23 of C's Skeleton Argument. The Tribunal rejects the submission that a) it was in the Claim Form and b) it was missed at case management when complaints were clarified.

24. The Claim Form recites a conversation but does not identify the conversation as containing a disclosure. It does not say what facts were conveyed. The claimant has never, until the application on 18 September 2022 by recently instructed solicitors, said that she made verbal disclosures to DSI Blackwell.

25. There was a detailed case management hearing on 4 May 2022 before EJ Aspinall during which the judge discussed the claimant's complaints with her. She was a litigant in person at that time, supported by Mrs Hurst. She was supported by the judge in accordance with the Equal Treatment Bench Book. The claimant was a most well prepared, well researched and able litigant in person at that hearing. She knew her case and was able to articulate it to the Judge fully so that it could be clarified. Mrs Nowel was also supportive of the claimant in the process of clarifying the complaint.

26. The conversation with the claimant as to which communications she relied on as disclosures began at the case management hearing in November 2021. The case management summary following that hearing said:

> *Which is the protected disclosure relied on?*

It is not clear which report, 2018 or 2020, the claimant relies on as her disclosure. She made the 2018 report to SB but says it was never read by him. She made the 2020 report to the three people named above Ms CH, Mr ASC and Mr CS none of whom, she accepts, were her employer.

I have ordered the claimant to provide additional information about how she says her disclosure is a qualifying protected disclosure.

27. The claimant complied in a document entitled Protected Disclosures sent to the Tribunal on 4 April 2022. It did not seek to rely on a verbal disclosure to DSI Blackwell. The May hearing was conducted in person. The disclosures relied on were clarified and finalised. Following that hearing EJ Aspinall's summary recited:

The claimant says these are the only occasions when she shared content and they are all the disclosures relied on:

	Date	*To whom*	*Content*
1	*10 .9.18*	*DCI Simon Price Former policing lecturer, not employed by R*	*The 2018 report but without the photographs* *Sent by email*
2	*12.9.18*	*DCI Simon Blackwell,* *Respondent serving officer*	*The full 2018 report with photographs* *Handed to him in hard copy*
3	*March 2019*	*ASC and GG External forensic experts*	*The photographs only* *Shown in hard copy at a meeting*
4	*13/14 June 2020*	*Mrs Hurst, Retired former senior coroner's officer*	*The 2020 report including photographs* *Sent by email*
5	*13/14 June 2020*	*ASC again*	*The 2020 report including photographs* *By email*
6	*13/14 June 2020*	*Former met police officer CS*	*The 2020 report including photographs* *By email*

28. The Tribunal does not accept Mr Ohringer's submission that a verbal disclosure to DSI Blackwell was either in the Claim Form or missed at case management.

29. In the alternative then, an amendment application was made. The claimant and respondent each made submissions. Mr Ohringer submitted that the balance of prejudice would lay with the claimant if she was not allowed to pursue this aspect of her complaint. That submission is rejected.

30. The Tribunal had regard to the timing and manner of the application to amend. It is written, made late, some 13 months post Claim Form, 10 months post the first case management hearing, four months post the second case management hearing, (and several weeks post the claimant becoming represented). The nature of the amendment is that it is a new PID and requires addition of factual allegation. No submissions were made about time limits but the Tribunal notes the detriments alleged to flow from the disclosures, taken together, include the suspension from work which is continuing.

31. In weighing relative hardship and injustice the Tribunal considered that the claimant may have some hardship in not being allowed to expand her complaint because it may impact on her ability to show, in relation to disclosing to other persons, what she had already disclosed to her employer (though this would be minimal as she has the 2018 report disclosure to rely on, around 70 pages, which must be fuller than any verbal disclosure on 25 July 2019. The Tribunal will hear her oral evidence on that and can take into account what she says her employer knew and what action it had taken (for Section 43G and H and more broadly in determining the issues)) without her having to have that conversation pleaded as a PID in its own right. The claimant already has other disclosures pleaded so it does not in effect preclude her bringing complaints about the detriments.

32. The respondent would be put to cost and time if it faced an expansion of the claimant's complaint post case management, when it could reasonably expect to rely on the statement. *The claimant says these are the only occasions when she shared content and they are all the disclosures relied on* made in the case management order and not challenged by the claimant until 18 September 2022. The respondent would need to take more detailed evidence of DSI Blackwell and revisit its position in response to arguments on reasonableness of the claimant disclosing externally (because of a change in the argument as to the prior internal disclosure) and would need to do this immediately prior to the preliminary hearing. This would be a difficult thing to do because DSI Blackwell's memory will have faded over time. He would be asked to attest to what he had been told, or not, in a conversation over three years ago. This extra work might necessitate a postponement of the preliminary hearing. The Tribunal decides that prejudice would lie with the respondent. The amendment application is denied.

Restricted reporting and press access to documents

33. A member of the press attended the hearing and asked to inspect the documents. The respondent requested redactions to the bundle of documents to be seen by the press to protect what it argued were the convention rights of DSI Blackwell.

34. The Tribunal heard argument, adjourned to consider and refused the request for any restricted reporting or redaction on that issue, no article rights having been engaged. Full oral reasons were given.

35. A Restricted Reporting Order was made to protect the identity of an individual named in the case but whose identity was not relevant to the matters for determination.

36. The press were then able to inspect the documents seen by the Tribunal in hard copy. The parties agreed to provide the bundle of documents electronically for inspection, but not copying, by the press including submissions and skeleton arguments so that they might better understand the issues in the case.

37. Those documents were subsequently provided in electronic format to the Tribunal administrative team by the respondent

38. A further email request was received for sight of what was described as "the press bundle" by a documentary maker. The request was shared with the parties who had no objection to the same documents as provided, redacted, for the press who had attended to inspect being provided to the non-attendee following **Guardian Media News Limited v Rozanov**, **EFG Private Bank and Media Lawyers Association EA-2020-000185**.

39. The documents were provided by email to the three members of the press; a freelance journalist engaged by the Sunday Times and a BBC journalist, who had attended the hearing and the documentary maker who had not on 10 November 2022.

The Facts

40. The claimant was employed as a coroner's officer from 2007. She was appointed senior coroner's officer in 2017. Her predecessor, Mrs Christine Hurst knew that the claimant had an interest in equivocal death and planned to do a PhD in that area. Mrs Hurst told the claimant about two files which she had kept in her office because the verdicts in those cases had troubled her.

41. In March 2018 the claimant was supported by the coroner and police to do the PhD at the University of Liverpool and to have access to historic coroners officer files for the purposes of her PhD provided at all times that she:

> *"Be mindful of how you / we use police / coroner investigations and the data control / share issues."*

42. She looked at historic coroner's officer files including the two Mrs Hurst had told her about. Case A had been through police investigation, coronial investigation and coronial judicial process at inquest resulting in a verdict. Case B had been through police investigation including active and in-depth investigation as a double murder, coronial investigation and coronial judicial process at inquest resulting in a verdict in each of the cases of murder suicide. A male was found to have killed a female and then himself.

43. The claimant thought Case A and Case B may have had incorrect verdicts. She thought that they may be unsolved double murder cases. She looked at death scene photographs in each of the cases. She wrote a report about the cases (The 2018 Report). Her hypothesis was that the males in each of the cases had not

killed the females and then themselves but that, in fact, both victims in each case had been killed by a third party. The claimant made disclosures to that effect.

PID1: On 10 September 2018 the claimant emailed the 2018 Report without any photographs to retired Detective Chief Inspector Price. He did not contact his former force with any concerns about the safety of the verdicts in Cases A and or B.

PID2: On 12 September 2018 the claimant gave the 2018 Report in hard copy to serving officer Detective Chief Inspector, now Detective Superintendent, Simon Blackwell.

44. DSI Blackwell was an officer of over 25 years standing, nationally accredited as a Senior Investigating Officer, experienced in leading murder investigations and with managerial responsibilities for a team of over 100 with over 20 managers. At that time, he was leading seven murder enquiries.

45. DSI Blackwell had an initial look at the report and realized he would need to set aside time to read it thoroughly. He read the report in detail taking about 2 hours to do so in autumn 2018. He assessed for tangible content to justify reinvestigation. He found nothing.

46. In his experience if a coroner has concerns then a case will be passed back to the police, even where that means halting an inquest for further investigation and that had not happened in those cases.

47. The respondent had access to areas of expertise such as forensic expertise in blood spatter analysis and staged crime scenes, through internal and vetted external experts. A due diligence process has to be undertaken to verify expertise then contracts are entered into between the police and appropriate experts to cover, amongst other things, issues such as appropriate use of data and confidentiality.

48. He was also part of a senior team of colleagues at Cheshire Police that keep concerning deaths or undetected murders under regular review. The senior team held regular panel review meetings. The claimant, as a civilian employed at comparable grade to a detective chief inspector, also sat on some of those panels. DSI Blackwell had heard nothing about Case A or Case B through the flow to that panel. The claimant could have, but had not, asked for Case A or Case B to be taken to panel review.

49. He passed the report to a colleague MJ. MJ had access to the national database. MJ did not communicate any concerns arising from the report to DSI Blackwell.

50. DSI Blackwell spoke to the claimant on the telephone shortly after reading the report, in late autumn 2018. He told her that there was nothing there to justify a reinvestigation. It was a very short discussion. The claimant was embarrassed, she said it was an initial draft and she would do more work.

PID3: In March 2019 the claimant self funded a trip to Utah, USA to attend a

course on staged crime scenes led by Mr Chancellor and his colleague Grant Graham. She took with her photographs of the death scenes from Case A and Case B. She also took autopsy photographs. She showed them to the course tutors Mr Chancellor and Mr Graham in the presence of a female course delegate at a dinner table one evening. The materials she showed identified the deceaseds in Cases A and B.

51. The claimant continued to think about and work on her report on Cases A and B.

52. In early March 2020 the claimant made contact with Mr Colin Sutton through LinkedIn. She knew Mr Sutton to be a retired detective senior investigating officer with the Metropolitan Police. He served on high profile serial killer cases, retired in 2011 and has since written a book about his role in a murder investigation and acted as adviser to TV dramatisations of serial killer cases. In an email to the claimant, he told her:

> *Best case would probably be to update the report…and resubmit it officially….*
>
> *…..The alternative I guess is to have pressure put on the force from elsewhere…… Essentially the only way for us to make an impact is to team up with some sort of journalist or media…… I am currently for example working on a podcast series with a pretty famous and well regarded documentary maker ….. That would be an option as might be a friend of mine who covers the North of England for a "quality" newspaper. However, to do so effectively we would need access to more detail of the victims and locations….. I appreciate that to give us access to that sort of detail might well compromise your position in any case. Also it will be almost impossible to take this route without compromise if you have tried and failed at the official route. What I can offer I think at this stage is complete confidentiality for you, if you think it would help for me to look at the detail of what you have.*

53. The claimant replied:

> *I completely agree with you, I need to formally resubmit my report and give my force the opportunity and time to look into it themselves first…… Before I submit the updated report, yes I would be immensely grateful if you could take a look at it and give me your honest opinion, especially with your experience as a former DCI and SIO.*

54. By June 2020 the claimant had written up an expanded report, the 2020 Report. It was considerably longer than the 2018 Report and it contained more photographs. It also contained eight pages about a named potential suspect in what she said were the double murders in the cases.

PID5: On 13 or 14 June 2020 the claimant sent an iteration of the 2020 Report with the photographs to Mrs Hurst, her predecessor as senior coroner's officer, now retired. Mrs Hurst had been the senior coroner's officer at the time of

the deaths.

PID6: Also, on or around 13 or 14 June 2020 the claimant sent an iteration of the 2020 report with photographs to Mr Chancellor.

PID7: The claimant also sent an iteration of the 2020 report with photographs on or around the 13 or 14 June 2020 to Mr Sutton.

55. The claimant subsequently brought complaints in the employment tribunal claiming detriment as a result of protected disclosures.

Relevant Law

Protected Disclosures

56. In **Jesudason v Alder Hey Children's NHS Foundation Trust** [**2020] ICR 1226** Sir Patrick Elias noted the origin of the statutory protections:

> **"1 Ever since the introduction of the Public Interest Disclosure Act 1998, the law has sought to provide protection for workers (colloquially known as whistleblowers") *who raise concerns or make allegations about alleged malpractices in the workplace.* Too often the response of the employer has been to penalise the whistleblower by acts of victimisation rather than to investigate the concerns identified. The 1998 Act inserted a new Part IVA into the Employment Rights Act 1996 designed to prevent this. The long title to the Act describes its purpose as follows:**
>
> **"An Act to protect individuals who make certain disclosures of information in the public interest: to allow such individuals to bring action in respect of victimisation; and for connected purposes."**
>
> **The law which gives effect to the simple principle enunciated in the long title is far from straightforward. The basic principle, set out in section 47B of the Employment Rights Act 1996, is that a worker has the right not to be subject to a detriment by any act of his employer on the grounds that he has made what is termed a "protected disclosure". [*emphasis added*]"**

57. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act"). The relevant sections are as follows:-

> **"s43A: 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.**
>
> **s43B(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 has been committed, is being committed or is likely to be committed**
>
> **(b) …**
>
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur**

(d) …

(e) …

(f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be, deliberately concealed.

58. The necessary components of a qualifying disclosure are clearly set out in section 43B ERA. They were summarised helpfully by HHJ Auerbach in **Williams v Michelle Brown AM UKEAT/0044/19/00**:

> **" 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."**
>
> **The first stage involves a consideration of whether there has been a disclosure of information. The correct approach to the disclosure of information is set out in the decision of the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] ICR 1850, in which Sales LJ held:**
>
> > **"30. I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other.**

Information

59. In **Parsons v Airplus International Ltd UKEAT/0111/17,** the EAT said

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**

60. In **Kilraine** in the EAT, Langstaff J said at [30] "reality and experience suggest that very often information and allegation are intertwined. The claimant argued for a bright line distinction between the two. The statute had no such dichotomy.

61. In the Court of Appeal in **Kilraine,** Sales, LJ held that whatever is claimed to be a protected disclosure must contain "sufficient information" to qualify under Section 43B(1). There is in effect a spectrum so that pure allegation would not qualify but a disclosure may contain *sufficient* information even it if it also includes allegations. Context and background to the disclosure may be relevant but the information must, in itself, be sufficient. The **Kilraine** sufficiency point was applied in the Court of Appeal in **Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601.**

62. The information disclosed need not be true **Darnton v University of Surrey EAT [2003] IRLR133.** The worker may be wrong about the matters disclosed but that is not material, what matters is what the worker reasonably believed the information disclosed tended to show. It is for the Tribunal to assess the employee's state of mind on the facts understood by her at the time.

What the worker reasonably believes the information tends to show

63. The individual characteristics of the claimant are to be taken into account when considering what the claimant reasonably believed the disclosure tended to show, **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR4.** It may be that a higher test is set for an expert with insider knowledge as opposed to a lay person's reasonable belief as to what the information tended to show.

Reasonable belief that it was made in the public interest

64. In **Chesterton Global Ltd and another v Nurmohamed [2017] IRLR 837** the Court of Appeal approved the following factors that would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

65. More recently, in **Dobbie v Feltons 2021 IRLR 679 EAT** HHJ Tayler quoted from the **Cavendish** decision:

> **First, {the tribunal}… thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**
>
> **28 Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured….**
>
> **29 Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence…..**
>
> **30 Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase *"in* the belief*"* is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.**
>
> **31 Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression…"**

To whom the disclosure is made

66. A disclosure may be made to the employer.

> **s43C(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—**
>
> **(a) to his employer...**

67. A disclosure may be made to other persons. Where that is the case there are additional requirements for the disclosure to be a protected disclosure;

> **s43G(1) Disclosure in other cases**
>
> **A qualifying disclosure is made in accordance with this section if—**
>
> **(a) …**
>
> **(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,**

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are —

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information —

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

Reasonable in all the circumstances to make the disclosure

68. A disclosure in other cases, to someone other than the employer must meet the requirements of section 43G. It must be reasonable in all the circumstances to make the disclosure.

69. The factors to be taken into account are set out in section 43G(3)(a)-(f) above and include the identity of the person to whom the disclosure is made and any action the employer might reasonably have been expected to take in relation to a previous disclosure.

Disclosures may be made in cases of exceptionally serious failure.

70. Section 43H provides the conditions relating to disclosures of exceptionally serious failure.

> **43H(1) Disclosure of exceptionally serious failure**
>
> **A qualifying disclosure is made in accordance with this section if —**
>
> **(a) …**
>
> **(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,**
>
> **(c) he does not make the disclosure for purposes of personal gain,**
>
> **(d) the relevant failure is of an exceptionally serious nature, and**
>
> **(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.**
>
> **(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.**

Applying the Law to the Facts

71. Turning first to section 43B to determine whether or not the disclosures were qualifying disclosures.

<u>Disclosure qualifying for protection pursuant to Section 43B Employment Rights Act 1996 ERA</u>

Q2 from the List of Issues: Did all or any of the disclosures, whether considered individually or in aggregate, constitute disclosure of information which in C's reasonable belief tended to show:

> *that a criminal offence had been committed, was being committed or was likely to be committed and or a miscarriage of justice has occurred, is occurring or was likely to occur?*

72. The respondent did not dispute that each of the disclosures contained information, nor that they were each made in the public interest.

The 2018 report and "information"

73. Turning first to the disclosure of information. The 2018 report as seen by the Tribunal was 69 pages long. 24 pages were focused on Case A and 45 pages were focused on Case B. The report contained information, that was not disputed. Some examples of the information are set out here for the purposes, later, of assessing what had already been disclosed to the employer when the claimant discloses externally. The information included the following:

> "There is no record that the plastic bag, hammers or knife were ever fingerprinted".
>
> "The inquest verdicts were; female unlawfully killed, male took his own life".
>
> "He appears to be lying on his left hand".
>
> "A small amount of blood spatter on his pyjamas".
>
> "Her nightdress is rolled up".
>
> "The note is (very unusually) addressed to the Coroner.
>
> "The grazes on her knees (assuming they were fresh) are indicative of her being awake at the time"

74. Applying **Cavendish**, the 2018 Report was not mere allegation. It included a mixture of information and allegation. The allegations included:

> "The forensic patterns (blood spatter and wound patterns) along with the psychological expressions at the scenes, led me to believe that these scenes may in fact have been staged and possibly by the same offender"
>
> "Absence of blood underneath his body could also indicated that (Male A) was lying on the bed at that time (Female A) was injured.
>
> There was a page of "13 similarities" which were a mixture of information and allegation.
>
> *"The bodies of both males were possibly rearranged or moved after their death"*

75. The claimant said that the similarities could be entirely coincidental or "*could be indicative of a serial murderer".* The overarching allegation in the 2018 report was that the verdicts in the deaths of the males in Case A and Case B were unsafe and that a third party, serial murderer, had committed the offences in both cases.

The 2018 report and the claimant's "reasonable belief that it tended to show that"

76. On this point there was not a unanimous decision of the Tribunal.

Dissenting Decision

77. Mr Clarke's decision was that the claimant did not reasonably believe the information contained in PID's 1,2 and 3 tended to show a criminal offence or miscarriage of justice. He found that there would need to have been more information before the claimant, with her knowledge and experience, before she could be said to have objectively reached a reasonable belief. His reasoning is as follows:

(1) The claimant was at the time of each of the disclosures a senior coroner's officer. She had served as a coroner's officer from 2007 and was appointed senior coroner's officer in 2017. She had a BSc in forensic science and a BSc in applied psychology and a masters degree in forensic behavioural science. She had investigated over 5000 deaths in her coroners role, attended death scenes, trained police officers and coroner's officers and given evidence at coroner's inquests. She was employed at an equivalent grade to detective chief inspector, though a civilian. She had an interest in equivocal death and had expressed interest in undertaking a PhD in that area. In applying **Korashi v Abertawe** Mr Clarke found that the claimant was more akin to the "surgeon" in the example given by the EAT in that case, than the lay observer. He found she is therefore held to a higher standard in forming a reasonable belief than a lay observer would be and it was not reasonable for her to believe, in the absence of more investigation, and in the knowledge of the investigations that had been undertaken by the police, coroner's office and the outcome of the coroner's verdict at the time, that the information disclosed tended to show a criminal offence or miscarriage of justice.

(2) He also had regard to the language used by the claimant in her 2018 Report. The claimant had said:

Please note this report is neither an academic nor an expert report. It aims to offer an alternative hypothesis based on observations and opinion only.

(3) Mr Clarke understood hypothesis to mean, *a supposition or proposed explanation made on the basis of limited evidence as a starting point for further investigation.* He found that a hypothesis was not enough to meet the language of the statute *reasonably believed it tended to show.*

(4) Further in cross-examination when it was put to the claimant that her report contained only a hypothesis, the claimant accepted that was a fair point, that she did not know everything she needed to know. She said "*I'm saying please can we get experts*". Mr Clarke took that to be an admission that the claimant did not have enough information to reasonably believe that her disclosures in the 2018 report tended to show a criminal offence or miscarriage of justice. Later, in cross-

examination on the 2020 report the claimant said "*once I had consulted experts I was confident enough to say that it was consistent with double murder".* He found that her reasonable belief that the 2020 report tended to show a criminal offence or miscarriage of justice was made out (but those disclosures PID 5,6 and 7, fail to attract protection for other reasons, below) and that the change in her position after having, in her words, consulted experts, corroborated his view that in the 2018 disclosures she did not have a reasonable belief that the information tended to show a criminal offence or a miscarriage of justice.

(5) Mr Clarke formed the view having heard her give evidence that the claimant was someone who imagined things and then applied her knowledge so as to articulate them as if they were a result of analysis. He contrasted this with the evidence of DSI Blackwell which he found compelling, in terms that the claimant's suppositions were unsafe, that she looked for equivocal death because she was interested in it for her PhD and she found it. Mr Clarke found she could not have a reasonable belief that what was no more than her suppositions or imaginings in 2018, having looked at some photographs and speculated about them, could amount to something that tended to show a criminal offence or a miscarriage of justice had occurred.

(6) For those reasons, Mr Clarke found that disclosures 1,2 and 3 were not qualifying disclosures within Section 43B.

78. In relation to PID 1 and PID 3, the Section 43G disclosure in other cases, and the Section 43H disclosures of exceptionally serious failure (so this is PID1 to Simon Price as an external disclosure and PID1 to Simon Price as a serious failure; and PID 3 as an external disclosure and as a serious failure, Mr Clarke found that the claimant could not meet the additional requirements in Section 43G(1)(b) and Section 43H(1)(b) that the information disclosed and any allegation contained in it are substantially true. His view was that the claimant could not believe the information disclosed to be substantially true, if she had not yet formed a reasonable belief that they tended to show a miscarriage of justice.

79. The majority disagreed with Mr Clarke's reasoning and found that the claimant genuinely believed, and still believes at this hearing, that the information she disclosed was substantially true.

The Majority View

80. The Employment Judge and Mr Murdie disagreed with Mr Clarke's application of the test in Section 43 and as to the application of **Korashi.** They found that the claimant did have a reasonable belief that the information contained in each of the disclosures, PID's 1,2,3,5,6 and 7 (the central allegation that the verdicts were unsafe, that the male had not killed the female, that there was a third party suspect) tended to show a criminal offence and or miscarriage of justice.

81. The majority view was that Mr Clarke wrongly placed his emphasis on the reasonable belief *that there had been a miscarriage of justice*, which is not what the statute says. The majority view was that the claimant's belief (subjectively held) that the information disclosed (the hand under the body, the absence of blood spatter, the note to the Coroner, by way of example*) tended to show* (our emphasis) *that there had been a criminal offence or miscarriage of justice* was objectively reasonable having regard to the characteristics of the claimant, including her qualifications and expertise.

82. For the majority it was enough that she reasonably believed the information *tended to* show. She did not have to be right about that and she did not have to meet a standard of proof as posited by Mr Clarke such that she might need to have more information before her, or be absent information about investigations and inquests that had taken place, before she could reasonably believe that the information disclosed tended to show a criminal offence or miscarriage of justice.

83. By the majority decision that means that PID2 attracts protection and so the claimant achieves the protection of a whistle-blower.

The 2020 Report and reasonable belief that the information tended to show

84. The respondent did not dispute that the 2020 Report contained information. The Tribunal notes that it contained more information than the 2018 Report; it included more photographs and more allegation than the 2018 Report. It included speculation as to the identity of the perpetrator of the hypothesised murders.

85. The Tribunal was unanimous in concluding that the claimant reasonably believed that the disclosures of the 2020 Report, PIDs 5,6 and 7 tended to show a criminal offence or miscarriage of justice.

The public interest

Did C also reasonably believe that all or any of the disclosures were made in the public interest?

86. The Tribunal finds, unanimously, that the claimant reasonably believed each of the disclosures 1,2,3,5,6,7 was made in the public interest. She thought that if the deaths were not murder suicides, but double murders, that might mean that the verdicts were wrong and that there might be a murderer at large. Applying **Chesterton**; the numbers in the group whose interests the disclosure served would be huge, the whole of society would be affected by an unsafe verdict and a killer at large, the nature of the interests affected would be of a most important and serious nature; that the police and coroner may have reached wrong conclusions, and the alleged wrongdoers against whom she was blowing the whistle would be the police and coroner. The claimant reasonably believed it would be in the public interest to disclose that information. This was not disputed by the respondent.

Protected disclosures pursuant to s43C ERA - disclosures to employer

87. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that **PID 2** was made to the employer (section 43C). **PID 1, 3, 5, 6** and **7** were disclosures in other cases (section 43G).

Protected disclosures pursuant to S43G ERA - disclosures to other persons

88. The list of issues asked were some or all of PID 3,5,6 and 7 made in accordance with s43G? This requires the tribunal to determine in relation to each disclosure.

89. (s43G(1)(b)) Did C reasonably believe that the information disclosed, and any allegation contained in it, was substantially true?

90. (s43G(1)(c)) Did C make the disclosure for the purposes of personal gain?

91. (s43G(2)(c)(ii)) was the disclosure of substantially the same information as have been made to the employer in PID2 or PID4?

92. (s43G(1)(e)) In all the circumstances of the case, was it reasonable for C to make the disclosure taking into account the factors set out in 43G (a) to (f) namely:

(a) the identity of the person to whom the disclosure was made;

(b) the seriousness of the relevant failure;

(c) whether the relevant failure is continuing or is likely to occur in the future;

(d) whether the disclosures made in breach of a duty of confidentiality owed by the employer to another person

(e) any action which the employer had taken or might reasonably be expected to have taken as a result of any previous disclosure,

and in a case where the previous disclosure was to the employer

(f) the extent to which C complied with any procedure whose use was authorised by the employer.

Substantially True

93. The Tribunal, by a majority on PID's 1, 2 and 3 and unanimously in relation to PID's 5 ,6 and 7 found that the claimant reasonably believed that the information disclosed in each of the disclosures was substantially true. Mr Clarke dissented on this point in relation to PID's 1,2 and 3. His reasoning is set out above.

94. The majority view was that the claimant reasonably believed that the information she disclosed as tending to show a criminal offence or miscarriage of justice was true. She acted and has continued to act, with utter conviction that she

has detected double murders where the respondent through its senior investigating officer and major incident team at the time, and HM Coroner found murder suicides.

Personal gain

95. Did the claimant make the disclosure for the purposes of *personal gain?* This was not an argument that was advanced by the respondent. The Tribunal found that the claimant, although engaged in a PhD and keen to develop her own career, did not make the disclosures for personal gain. There was a sub-text to some of the evidence to the effect that the claimant was looking for equivocal death so as to further her own career or PhD and found it, or was motivated to impress DSI Blackwell, this might be inferred from the fact that she did not present her information to any other DCI or DSI in the respondent force but went away, when DSI Blackwell found nothing to justify reinvestigation in her 2018 Report, committed to making it more compelling. The Tribunal found that whilst those may have been factors; it is not uncommon to want to further your career and impress a colleague you respect, the claimant's motivation in making the disclosures was to expose a miscarriage of justice and criminal offences committed.

Substantially the same information

96. Was the disclosure of *substantially the same information* as had been made to the employer in PID2?

97. The disclosure at PID 1 preceded any disclosure to the respondent and so could not be of substantially the same information. PID 2 was the disclosure to the employer. The disclosure at PID 3 was both verbal and documentary; the conversations at the dinner table in Utah and the production of photographs of both death scenes and autopsies. The Tribunal did not have exact copies of the content of written disclosures in PID's 5,6, and 7. They may have been exactly the same as the content of the 2020 Report or may have been an iteration or iterations of it. The 2020 Report was longer than the 2018 Report, included speculation about a suspect and more photographs but was, as the claimant put it, an attempt to be more compelling about the overarching allegation made in the disclosure at PID2.

98. The Tribunal concluded that the information disclosed in PID's 1,3,5,6 and 7 was substantially the same as the overarching allegation in the 2018 report provided to DSI Blackwell in PID2 which was that the verdicts Cases A and B were unsafe.

Reasonable in all the circumstances

99. Q5(d) on the List of Issues asked; in all the circumstances of the case, was it *reasonable* for the claimant to make the disclosure taking into account the factors set out in 43G (a) to (f). The Tribunal considered each PID and the factors in Section 43G (a) to (f) separately and found that in relation to factors (b) (c) (d) and (f) the same reasoning applied to each of the PIDs, as follows:

99.1 *Seriousness of the relevant failure:* For PID's 1,3,5,6 and 7 the Tribunal found that the seriousness of the relevant failure was of the utmost seriousness, it related to criminal offences of murder and to possible erroneous inquest verdicts.

99.2 *Continuing failures:* The failure was continuing in that the cases continued, and had continued since their verdicts in the late 1990's to be classified as murder suicides, not as the claimant supposed, double murders. This was likely to continue, on the claimant's thinking, until the matters were reinvestigated and possibly had their verdicts overturned. They were as she saw it long-standing wrongs that had not been put right.

99.3 *Breach of confidentiality;* In relation to confidentiality it was not necessary for the Tribunal to determine what duty of confidentiality was owed by the respondent and to whom and whether or not the claimant broke it in making her disclosures at PID 1,3,5,6 and 7 because her disclosures were not made reasonably in all the circumstances of the case in relation to other factors which the Tribunal took into account. However, in considering the broader circumstances of the disclosures the Tribunal had regard to the content of an email exchange between the claimant and DSI Blackwell. It was a relaxed email but still clear, about the basis on which she might access police and coroner's files. It said:

"Be mindful of how you / we use police / coroner investigations and the data control / share issues."

It was sent by a then DCI, to an equivalent civilian grade colleague senior coroner's officer, reminding her of her duties in relation to sharing information. The claimant shared information, as set out in each PID, in breach of obligations of confidentiality. She accepted in evidence that in PID 3 she could have anonymised the photographs and not shared the identity of the victims but did not do so. The Tribunal finds that this was irresponsible and unreasonable of her. The Tribunal makes further findings in relation to confidentiality and the reasonableness of the disclosures in relation to PIDs 5,6 and 7 which contained the additional information about a named individual that the claimant identified as a suspect below.

99.4 *Compliance with procedure.* The respondent did not put its whistleblowing procedure and proper steps for disclosure to the claimant in cross examination. The Tribunal heard about a process for review of cases where there might be concern about investigations or verdicts through a panel. The claimant did not put her concerns about Cases A and B to that panel. The Tribunal also heard about procedures whereby both internal and external experts can be called upon. The claimant did not approach a DSI internally within Cheshire or go to the National Crime Agency herself to seek access to those experts.

100. These factors were taken into account in considering the broader circumstances of the disclosures. The Tribunal found it was not reasonable of the claimant to make disclosures to Price, Hurst, Chancellor and Sutton, before raising

the cases for review through the panel and not reasonable of her to seek expert advice on the cases from Price, Hurst, Chancellor and Sutton when the respondent had a process for accessing expert advice which she had not tried to access before going outside of the respondent. Further there was no evidence that the claimant had brought her concerns to the attention of the Coroner at the time.

101. The reasoning in relation to (a) and (e) is considered for each PID:

S43G(3)(a) Identity of person to whom the disclosure was made and any action which the employer had taken or might reasonably be expected to have taken

S43G(3)(e) any action which the employer had taken or might reasonably be expected to have taken as a result of any previous disclosure,

PID1: **On 10 September 2018, emailing DCI Simon Price, a former DCI and policing lecturer no longer employed by R, the 2018 report without the photographs**

102. (a) The claimant said that she wanted former DCI Price's expert opinion before going to DSI Blackwell. She was going outside of the respondent before she had disclosed internally. She chose a retired DCI which lent credibility to her position that she wanted to make her report as good as it could be, but she could and should have gained that expert input, if she felt she needed it, from internal colleagues or experts accessed through internal processes. Disclosing outside of the employer first, was not in all the circumstances of the case, and considering the range of other options internally for disclosing or acquiring expert contribution, a reasonable thing to do.

103. (e) The claimant had not had regard to any action which the respondent had taken or might reasonably have been expected to have taken as a result of any previous disclosure because she has not gone to them yet. She had not raised the cases for review through the panel that DSI Blackwell told us about and had not raised them with her superior coroner's officer or the Coroner himself. She had not gone to DSI Blackwell or any other SIO within the major investigation team.
For those reasons her disclosure at PID1 was not reasonable in all the circumstances of the case.

S43G(3)(e) Action the employer had taken or might reasonably be expected to take and PIDS 3, 5, 6 and 7

104. Having regard to the action the employer might reasonably be expected to take, the claimant had disclosed to DCI Blackwell in autumn 2018. He had read the report, shared it with MJ and having considered it fed back to the claimant that there were no grounds for reinvestigating. The Tribunal accepted his evidence about the (lack of) calibre of the report. He gave a number of examples to support his view of the report. The Tribunal accepted his evidence that the claimant had concluded from grazes on Female A's knees that her body had been moved. DSI Blackwell explained that grazing could have been explained by Female A having done some gardening, as was common for that demographic of deceased. He was sceptical about the use of language such as "victimology" and said that the claimant was not a detective and had looked for equivocal death and found it. He

knew the cases to have been through police investigation and coroner's investigations and verdicts. When he had given her feedback he had told the claimant there was nothing to justify the use of resource in reinvestigation. DSI Blackwell had tried to be kind to a colleague in conveying to her gently what he told the Tribunal robustly, that her report lacked rigour. Since having received that feedback the claimant had not made another disclosure to the respondent. She had not given the respondent a chance to take further action. Her perception of the outcome of the conversation in autumn 2018 was that she was to go away and do more work on the cases. There was no expectation of DSI Blackwell nor the claimant that the respondent was to take any action following the conversation in autumn 2018 when DSI Blackwell had told her that there was nothing to meet the criteria for reinvestigation.

105. For that reason, that she was not acting as someone whose employer had failed to take action on her initial disclosure, the PID's at 3,5 6 and 7 fail to attract protection. The employer had taken action, DSI Blackwell had read the report and found it lacking. The legislation exists to protect the whistleblower and support those who suspect wrongdoing, the Tribunal does not suggest that the claimant should have left it there. She could, and as someone who the Tribunal has found reasonably believed that information tended to show a criminal offence or miscarriage of justice, should have pursued it but it was to whom she went next that makes her disclosures as PID,3,5,6 and 7 unreasonable. The claimant was unreasonable in all the circumstances and in each of PID's 3,5,6 and 7 in disclosing outside of the respondent.

PID3: **In March 2019, providing Mr Arthur Chancellor, external forensic expert, hard copy forensic photographs and holding a discussion with him about them**

106. The Tribunal considered that it was not reasonable for the claimant to make the disclosure at PID3 because:

106.1 *Of the identity of the recipient, the setting and manner of disclosure:* She disclosed to someone who was operating in a profit making setting, charging fees for a training course (though he waived the fee for the claimant). The claimant disclosed in an inappropriate setting, showing a lack of sensitivity for the subject matter of her disclosure. She showed photographs of the deceased in cases A and B to Mr Chancellor, Mr Grant and another lady (unnamed) at a dinner table following a training event in Utah in March 2019.

106.2 She had not gone back to the respondent first. The Tribunal's reasoning is set out above.

106.3 She did not ensure that she had permission to disclose the photographs in that context. The claimant was attending the event in Utah in March 2019 privately and not in her capacity as senior coroner's officer on behalf of the respondent. She did not establish that she had permission to show the photographs. The only permission she had for the use of the content of coroner's files was in relation to her PhD.

106.4 She disclosed more than she needed to disclose to gain the expert information she said she was seeking. The claimant accepted that she had not anonymised the cases, for example; shown photographs without providing identifying detail. Her argument was that the cases could have been found through internet searches even if she had anonymised. The Tribunal rejects that argument and finds that was a retrospective attempt to seek to justify something that she had not done and had not considered doing at the time.

106.5 The claimant acted irresponsibly given the sensitive nature of the content of the disclosures. The Tribunal took into account the claimant's seniority and experience and the extremely sensitive content of the photographs. Somewhere in the UK were families, photographs of whose deceased parents, relatives, friends were being shown at a dinner table at a training course without their knowledge or consent. Also, in the UK was a respondent police force and coroner whose photographs taken as part of the exercise of statutory duties in major investigations (and, it transpired) autopsies were being shown to Mr Chancellor his business partner Mr Grant and an unidentified female delegate on the course. It emerged during Mr Chancellor's evidence that the claimant had shown him and the others at the table photographs from autopsies. This was not something that the claimant had said in her evidence or claimed as part of her disclosure. The Tribunal concluded that she had taken care as to exactly what she was disclosing to whom and why in PID3. The fact that the claimant did not recollect that she had shown autopsy photographs and did not know who that unnamed female delegate was spoke to the Tribunal of the wholly irresponsibly way in which she made this disclosure.

107. In all the circumstances of the case it was not reasonable for the claimant to make PID3 disclosure externally at all, nor in the manner in which she made it. It is therefore not a protected disclosure.

PID5: On or around 13 or 14 June 2020 providing a copy of the updated 2020 report with supplemental photographs to Mrs Christine Hurst, retired former senior coroner's officer

108. In relation to identity the Tribunal finds that it was not reasonable in all the circumstances for the claimant to disclose the 2020 Report to Mrs Hurst because Mrs Hurst was not employed by the respondent at the time of disclosure, not bound by confidentiality and as set out above the claimant had not gone back to the respondent first and she had not attempted to access expertise internally.

109. The Tribunal noted that in the 2020 report the claimant was disclosing additional content which included 8 pages of commentary in which the claimant named an individual and speculated as to why his profile would fit the crimes she alleged had been committed. The Tribunal finds it was wholly irresponsible of her, if she thought she could identify a suspect, to disclose that to anyone other than the police. The sensitive nature of the additional content of the 2020 Report is a relevant factor as to whether or not it was reasonable for the claimant to make the disclosure. The Tribunal finds that the inclusion of that allegation (if it were not

already unreasonable for other reasons) would make the disclosure to an external party without having first disclosed this serious allegation to the police, unreasonable.

110. For those reasons PID 5 is not a protected disclosure.

PID6: On or around 13 or 14 June 2020 providing a copy of the updated 2020 report with supplemental photographs to Mr Chancellor

111. The claimant sent a full report including additional photographs and the speculation about the identity of her suspect, to Mr Chancellor. The Tribunal finds that the claimant was not reasonable in all the circumstances to have made that disclosure because, as set out above, she had not been to the police with the updated more compelling disclosure information. She had not attempted to access expertise internally. The claimant was disclosing, to an external course leader, operating in a profit making setting (though he waived the fee for the claimant) someone not bound by confidentiality, extremely sensitive content. She did not take care to frame her disclosure in a responsible way, ensuring so far as possible that the identities of the deceased and her alleged suspect were protected. She had not gone to the respondent with her content about her suspect.

PID7: On or around 13 or 14 June 2020 providing a copy of the updated 2020 report with supplemental photographs to Mr Colin Sutton, retired senior police officer

112. The Tribunal repeats its reasoning in relation to: not going back to the respondent first, not going to the respondent first with the suspect allegation, not having attempted to access internal expertise first, disclosing more than was necessary (lack of anonymisation) to obtain the expert opinion the claimant said she was seeking.

113. The Tribunal also had regard to the context of this disclosure and the identity of the individual to whom the disclosure was made. On this occasion the claimant was disclosing extremely sensitive content to a contact she had met through LinkedIn and who had told her he had contacts with press and documentary makers. Mr Sutton was a retired detective whose career, at that time, was press and media related. The Tribunal saw the exchange of email correspondence between the claimant and Mr Sutton, and whilst she is clear in what she writes, that she is not asking him to take the disclosures to the press, the Tribunal does not accept that she has the level of naivety that she would have us believe. This is a senior coroner's officer who would have us believe that even though Mr Sutton has told her in an email that he has good press contacts and even though she knows his is now a media career, and he has made an offer to use leverage through the media,(and offered confidentiality) it was reasonable for her to send him this extremely sensitive and newsworthy content including photographs of deceaseds and speculation as to the identity of her alleged serial killer whilst believing the content would remain confidential.

114. The Tribunal considered as part of "all the circumstances of the case" the manner of disclosure. This is an extreme set of facts. The Tribunal wished to tread very carefully because of any potential overlap with internal investigations and disciplinary processes, the claimant remains suspended and under investigation. It also treads carefully because the Tribunal finds that the claimant has a genuine belief, and the majority of us think a reasonable belief, that the material that she saw and the disclosures she made tended to show a criminal offence had been committed and a miscarriage of justice. However, the Tribunal finds that the manner of disclosure here in sending by email such sensitive content to Mr Sutton, knowing him to have expressed interest in the case and set out his press connections, was wholly irresponsible for a senior coroner's officer. Her choice of recipient, when she could have gone to the coroner, or DSI Blackwell or any other senior investigating officer, was wholly irresponsible for a senior coroner's officer and led the Tribunal to conclude that it was not reasonable for the claimant to make that disclosure.

Protected disclosures pursuant to s43H - disclosure of exceptionally serious failure

115. Were some all of PID 1,3,5,6 and 7 made in accordance with s43H ERA? This requires the Tribunal to determine in relation to each disclosure:

115.1 Whether the claimant reasonably believes the information disclosed to be substantially true. The Tribunal repeats its reasoning on each of the disclosures above in relation to s43H(1)(b), including the dissenting view on PIDS 1 and 3. The majority view being that the claimant reasonably believed the information disclosed to be substantially true.

115.2 That the claimant does not make the disclosures for personal gain. The Tribunal repeats its reasoning above. The claimant did not make the disclosures for personal gain.

115.3 That the relevant failure is of an exceptionally serious nature. The Tribunal expands on its reasoning above on s43G(3)(b) regarding the seriousness of the relevant failure. Each of the disclosures in this case (the overarching allegation in the 2018 report was that the verdicts in the deaths of the males in Case A and Case B were unsafe, and this was expanded upon and added to in the 2020 Report in its various iterations) is of an exceptionally serious nature.

115.4 In all the circumstances of the case, was it reasonable for C to make the disclosure, with particular regard to the identity of the person to whom the disclosure was made. The Tribunal finds that the identities of the persons to whom the disclosures at PIDs 1,3,5,6 and 7, makes it unreasonable for the reasons set out above (paragraphs102,106,108, 111, 113 and 114) for the claimant to have disclosed to them and therefore they do not qualify as protected disclosures. PID2 is a qualifying disclosure. The claimant was reasonable in disclosing to the respondent.

Conclusion

116. The claimant's disclosures at PIDs 1, 3, 5, 6 and 7 are not qualifying protected disclosures.

117. The claimant made a qualifying protected disclosure within Sections 43B and 43H ERA 96 when on 12 September 2018, she disclosed to DCI Simon Blackwell, serving officer of R, the 2018 report with photographs.

Employment Judge Aspinall
Date: 14 November 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
18 November 2022

FOR EMPLOYMENT TRIBUNALS