EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MS S ASLETT**
MR R BABER

CLAIMANT **MR J LOGO**

RESPONDENTS **PAYONE GMBH (1)**
MS D VOGT (2)
MR A MORITZ (3)

ON: **27-29 June 2023**

Appearances:

For the Claimant: **In person**
For the Respondent: **Ms S Fraser Butlin, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant's claim of whistleblowing detriments contrary to section 47B of the Employment Rights Act 1996 does not succeed and is dismissed.

REASONS

1. The Claimant Mr Jerry Logo brings a claim of post termination detriment whistleblowing. He was employed by the First Respondent from 15th November 2016 until his resignation in February 2021.

2. The First Respondent is a German company operating as a European payment provider and regulated in Germany. The Second Respondent is the Executive Director of HR for Germany and Austria of the First Respondent. She is German and is based in Germany. The Third Respondent is the director of Data Protection for the First Respondent. He is German and is based in Germany.

3. It is not in dispute that the First Respondent failed to enrol the Claimant into a pension scheme during the course of his employment. The Claimant only became aware of that failure after he had left the First Respondent's employment.

4. In 2021 the Claimant brought a claim against the First Respondent for race discrimination and constructive unfair dismissal. That claim has been heard in the Watford Employment Tribunal and judgment is awaited. We are not concerned with matters arising during the Claimant's employment.

5. In addition there is a separate County court claim by the Claimant alleging breaches of data protection law in relation to the sending of personal data to an incorrect address and a claim has been threatened alleging a breach of contract for underpayment of pension contributions.

6. The First Respondent has also obtained an injunction in the High Court against the Claimant by order of Linden J in relation to the use, delivery up and deletion of the First Respondent's confidential information.

7. There are also appeals to the EAT relating to case management decisions made by both the Watford and London Central Employment Tribunals.

8. <u>The issues in this claim</u> were identified in a Preliminary hearing by Judge J Burns and are narrow. They are as follows:

    a. Does the Employment Tribunal have jurisdiction in relation to the Claimant's claims against the two individual Respondents?

    b. Did the Claimant make any protected disclosures? The claimed protected disclosures are:
        i. the Claimant's email of 16 May 2022 to the Respondent's solicitors;
        ii. the Claimant's email to the Pensions Regulator dated 19 May 2022; and
        iii. the Claimant's communication to the Pension Regulator dated 19 June 2022.

    c. Were those disclosures made in the public interest? The Respondent accepts that the Claimant made disclosures of information but does not accept that the Claimant made the disclosures with a reasonable belief that they were in the public interest.

d. Was the Claimant subjected to any detriment on the ground of his disclosures? The claimed detriments are:

i. a letter to the Claimant from the Respondent dated 15 June 2022;and
ii. the Respondent's omissions and or delay in failing to provide the Claimant with necessary information.

(During the hearing the Claimant clarified that the email from the Respondent's solicitors to the Claimant of 20 May 2022 and Ms Woellers email to the Claimant of 30 May 2022 were not pleaded as detriments but were relied on as evidence supporting the Claimant's claims.)

9. In particular it is the Claimant's case that the Respondent, in its letter of 15 June 2022, and subsequently by omission, had failed to provide the information which he required and that their failure to do this and the delay in providing him with information was deliberate and retaliatory because he had made disclosures as identified above.

10. The Tribunal heard evidence from the Claimant and from the Second and Third Respondents. Both the Second and Third Respondents gave their evidence via a German speaking interpreter. We had a bundle of documents.

11. The day before the start of the hearing a Preliminary Hearing took place before Employment Judge Goodman to deal with (i) an application by the Claimant for additional documents to be disclosed or added to the hearing bundle and (ii) an application by the Respondent to delete material from the Claimant's witness statement. The Respondent's opposition to the additional documents and to the material in the Claimant's witness statement was on a number of grounds; some related to relevance, some related to privilege and some was because the documents sought related to other proceedings. The Respondents were largely successful in that hearing and the parties worked hard overnight to ensure that the Claimant's witness statement was redacted appropriately, in line with the ruling of Employment Judge Goodman, in time for the hearing before us.

12. At the start of the hearing, after a number preliminary point were dealt with, (including the Claimant's objection to the court-appointed interpreter), the Tribunal adjourned to read the witness statement and the accompanying documents. When we reconvened at 12.45 the Claimant made an application for a postponement of the hearing. The basis of that application was that he had now received Employment Judge Goodman's written reasons for her decision the previous day. He had also just received a signed order of the Court of Appeal which stayed an order made by Linden J, on the application of the First Respondent, to delete certain documents until the application for permission to appeal Linden J's Order had been determined.

13. The Respondent opposed the application to postpone. After hearing both parties we refused the postponement application.

14. The Claimant's application for a postponement was based on paragraph 12 of the written reasons provided by Employment Judge Goodman explaining her decision to refuse the Claimant's application to adduce documents and include material in his witness statement which related to events before he resigned. It had been his case that this material would be evidence of a pattern of behaviour from which the Tribunal should draw an inference about the reason for the delay in responding, and the content of the response to, his 16th May email.

15. In deciding not to allow that evidence EJ Goodman said this "*Evidence, oral or documentary, on the Respondent's attitude towards the Claimant before he resigned is clearly within the scope of the Watford proceedings. I cannot see how to avoid the difficulty of a London Central Tribunal making findings on evidence heard by the Watford tribunal which will have made, and perhaps already has made, findings on what the evidence, or inferences drawn from it, will show, except by postponing the final hearing in these proceedings until the Watford tribunal has sent its decision to the parties. There is no application to postpone the final hearing.*"

16. Further the Claimant says he had received only this morning an Order from the Court of Appeal granting him a stay of execution of Linden J's Order for the deletion of documents. He considered that some of those documents which he had been ordered to delete might be relevant to this claim, though he was unclear as to how they would be relevant or which documents he was referring to.

17. We asked the Claimant whether he wished to postpone this case pending the outcome of the Watford tribunal (only) or whether he wished to postpone ending the outcome of all the various proceedings (and related appeals in relation to interlocutory matters), including in particular the High Court action in which the order of Linden J been obtained. The Claimant said that he "mainly" wished to have a postponement until the outcome of the Watford Tribunal was known, as on that basis he would be able to use the documents which EJ Goodman had ruled could not be put before this tribunal.

18. Ms Fraser Butlin, on behalf of the Respondent, opposed the application to postpone. The Respondent had requested a stay pending the outcome of the Watford Tribunal in the Grounds of Resistance. The Claimant had opposed that application (74). In his objection the Claimant stated that the matter in the Watford Employment Tribunal was an entirely separate matter, with entirely separate issues and remedies. He said that "*there is absolutely no basis as to why this matter would support the Respondent's application for a stay and the Claimant does not know why they have added it."* On that basis the Respondent's application for a stay pending the Watford tribunal was refused by Regional Employment Judge Freer.

The Claimant also opposed the Respondent's application for a transfer of this case to the Watford Employment Tribunal.

19. Having objected to the stay as long ago as October 2022, and taken the view that the matters were separate, it is not now open to him, on the first day of the hearing, to resile from that position. The Respondent has flown its witnesses over from Germany, are ready for the hearing and Counsel is instructed and ready. In any event, for what it is worth, it is difficult to see that the pre-termination evidence which the Claimant wishes to adduce can have much evidential value in relation to the limited issues before us.

20. As to the order of the Court of Appeal, if the Claimant had considered that the documents which are the subject of that order were documents which were necessary for the fair disposal of this case, (and we do not know what those documents are) he should have made an application for a postponement well before today. While he may only have received the order of Lord Justice Newey this morning, the Claimant has been aware of the dispute in relation to these documents for some considerable time and was of course also aware of the order of Linden J and that he had applied for a stay of execution and for permission to appeal. It is too late now for an application for a postponement to be made at this very late stage.

21. The balance of hardship and prejudice lies squarely in favour of refusing the postponement.

22. The facts. The Claimant worked for the First Respondent from 2016 until February 2021. During his employment he was not enrolled in a pension scheme. Deductions for pension contributions were made from his pay from April 2018, by the payroll provider to the First Respondent (Roedl) but were not paid into a pension scheme by the First Respondent.

23. When the Claimant was first employed by the First Respondent there were three employees based in the UK. From mid-2018 until the end of 2020 the Claimant was the only UK employee. At the end of 2020 a German based employee moved to the UK but did not interact with the Claimant. During his employment with the First Respondent the Claimant had very little interaction with either Ms Vogt or Mr Moritz, and had met them only in Germany. Both became involved with the Claimant after he left in handling the various pieces of litigation and DSARs.

24. In February 2021 the First Respondent was issued with a penalty notice by the Pensions Regulator for failing to fill in a declaration of compliance. It appears from the internal correspondence at the time (399 – 394) that the Respondent was not aware of its obligations regarding UK pensions at the time. We accept that none of the HR team had expertise in UK law, (though we have been rather surprised that they had not sought legal advice on matters). However steps were taken to rectify things and by May 2021, the First Respondent had become a Participating Employer in the Workers Pension Trust (WPT). (385-390). Despite this, contributions on behalf of the Claimant were not made to the WPT until January 2022.

No-one from the First Respondent communicated this to the Claimant at the time, or later. Ms Vogt said that they understood that WPT would be communicating with the Claimant, as he was no longer an employee. Back payments were also made around that time in respect of other former UK employees.

25. In May 2022, over a year after he had left, the Claimant received a letter from the Workers Pension Trust. That letter, which was dated 4 March 2022 (406) was sent to the Claimant's old address, and had been forwarded to him by a former neighbour. That letter welcomed the Claimant to the Workers Pension Trust and informed him that his membership began on 1 January 2022 as an occupational pension scheme "chosen by your employer" and referred to the contributions be made by both the Claimant and his employer. It is a standard letter and not very informative. There is no reference to the First Respondent by name. A second letter was sent on 6 May 2022 (409) in which the Claimant was informed that contributions to his WPT members accounts stopped on 1 February 2022 and that the current value of his pension savings was £9,096.

26. On 16th May Claimant wrote to the First Respondent. It is this letter which is the first claimed protected disclosure. In it he says this: *" It has been brought to my attention that I was not automatically enrolled into the Workplace Pension Scheme ("the scheme") pursuant to Pensions Act 2012. Following conversations with the Workers Pensions Trust ("WPT") and the Pension Regulator I have been advised to contact the HMRC in order to check that I have been receiving the correct amount of tax relief. It also appears that the pension contributions commenced somewhere around 2018. Yet the data disclosed in the Data Subject Access Request disclosed documents only commencing in 2019, in regards to the pension contributions. For the avoidance of doubt the amount declared to the Workers Pension Trust for the whole 4 year contribution was £9,096.49.*

27. He continues by asking a number of questions:

"*As this matter is obviously relevant to data protection the following concerns raised*

a) Why did the First Respondent not register me as per the legislation compelling it to do so?

(b) When did the First Respondent realise it was required to enrol me into the pension scheme?

(c) Why did the First Defendant fail to inform me of the situation once it had, I assume, realised?

(d) Upon opening the account with the WPT, why did they provide the WPT with an incorrect address for me?

Particularly as there are live data protection proceedings in relation to the sending of sensitive documentation to the incorrect address. This point further engages the existing H45YJ314 matter in regards to the continuing breach of Art.5(1)(f) UK GDPR.

(e) Please take this email as a Data Subject to Access request in regards to all email in regards to the alleged breach of the Pensions Act 2012. All documents and correspondences relate to emails and decisions on calculating the aforementioned figure, and any measures taken.
(f) Please confirm if there was any such scenario in relation to the below colleagues:
1. Mike Carew Gibbs
2. David Pugh
3. Dawn Clift
Again the Employment Tribunal matter namely 3303093/2021 is engaged as evidence in that matter.
(e) Why were the contribution payments not made before the 22nd of each month as per the obligatory requirements?

28. The letter as a whole is couched as a Data Subject Access Request, and he refers to the First Respondent in their capacity as litigants, rather than as his former employer. We also consider that the Claimant sought information about other former employees primarily because he thought it might assist his claims in the Watford Tribunal.

29. On 20th May the First Respondent's solicitors replied to the Claimant (366) in response to DSAR request to the effect that the First Respondent would not disclose information about other individuals. However, they made it clear that they were not instructed on issues relating to his pension. On 30th May Ms Woellner of the First Respondent acknowledged his message "regarding the pension fund" and told him that he would be given detailed feedback in the coming days (367).

30. On 19 May the Claimant wrote to the Pension Regulator (362) to complain that he had received no information about the pension from PayOne, that Payone had taken pension payments from his account but not made any contributions to a pension fund and had not brought any of the above to his attention. He also complained that WPT had tried contacting him in February about the scheme but used the wrong address and the earlier documents had been lost. This is the second claimed protected disclosure.

31. On 23 May 2022 Ms Nhantumbo of the First Respondent wrote to Roedl (433) instructing them not to provide any information to the Claimant about contributions to the WPT and that communication with the Claimant should be through the First Respondent's HR department only.

32. On 19 June 2022 the Claimant wrote a further letter to the Pensions Regulator (the third claimed protected disclosure) to complain about the response he had received from PayOne (see below), the deductions from his pay and the Respondent's failure to contact him on the subject of his pension.

33. On 16 June 2022 the First Respondent wrote to the Claimant (370). The letter is sent as an attachment to an email from the First Respondent's

solicitors and signed by Ms Vogt and Mr Moritz. It is described as a response to the Claimant's DSAR and attaches what is purported to be copies of his "personal pensions data" (including emails to the Pensions Regulator) and then provides what is said to be an "explanation of the pensions position".

34. The First Respondent informed the Claimant that the failure to enroll him in the pension scheme resulted from "an error within their human resources team" and that as the relevant individuals who handled the issue were no longer with the company "we are not able to provide any additional information as to why this error occurred."

35. The letter then goes on to say this "PayOne became aware of the general error regarding pension scheme enrolment in April 2021. At that time, we began the process of enrolling you in the Workers Pension Trust. Because of administrative issues between PayOne and the Workers Pension Trust, payment of your pension contributions was made in January 2022. A lump sum of £9,463.99 has now been paid into the Workers pension trust on your behalf. This represents the employee (£3,601.20) and employer £5,862.79) contributions that should be made to your pension during your employment with PayOne. PayOne has notified the Pensions Regulator of its error. We have also informed the Pensions Regulator that the position has been rectified. The Pensions Regulator is satisfied with the actions that PayOne has taken in this regard.

36. The letter was correct as far as it went. It answered some of the Claimant's questions but not all of them. It does not give a breakdown of how the contributions were calculated. It does not answer the Claimant's query about why, once they realised that they had not enrolled him into a pension scheme, they did not contact him.

37. It is the Respondent's case that the letter of 15th June is the first of two letters which were intended to respond to the Claimant's 16 May email and was not intended to be a complete reply. They say the second letter came in September via the First Respondent's Solicitors. We do not accept that. There is nothing in the letter to suggest that further information about the Claimant's pension would be forthcoming. A reference to an investigation into whether further documents and material are held in archive clearly refers to the data subject access request. Ms Vogt said they had been waiting for more information before they could provide the Claimant with a breakdown of how his contributions had been calculated, but was wholly unclear as to what that information was. It must be immediately apparent that in order to have provided Claimant with the global sums which were paid into the pension scheme, a calculation of the individual contributions must already have been made.

38. On 27th June the Claimant made a formal complaint to the Pensions Ombudsman.

39. On 2 August 2022 he notified ACAS to comply with the early conciliation requirements.

40. This claim was issued on 22 August 2022.

41. On 20 September 2022 the Respondent's solicitors sent a letter to the Claimant explaining how the sums credited to the pension scheme on behalf of the Claimant had been calculated and sought to explain the tax position. He was informed that a further £200 had been credited to his pension om 4 August 2022.

42. In the Claimant's witness statement he complains that PayOne had chosen "to conceal the whole process". In response to a question from the Tribunal as to what would have happened if the Claimant not sent his letter of 16 May 2022, the Claimant said that the Respondent would have continued to conceal all the pensions information from him.

Submissions

43. For the Respondent Ms Fraser Butlin submitted that:

a. The Tribunal had no jurisdiction in relation to the Claimant's claims against the two individual Respondents. The relationship between the Claimant and the individual respondents as individual co-worker's was not sufficiently connected with Great Britain. (*Bamieh v FCO 2020 ICR 465).*

b. The Claimant had not made a qualifying disclosure because the Claimant did not have a genuine belief, at the time of making the disclosure that it was in the public interest, nor did he have reasonable grounds for so believing. This was a private workplace dispute which did not engage in any form of public interest. Disclosures were not, in the reasonable belief of the Claimant made in the public interest.

c. There was no detriment. The Claimant simply had an unjustified sense of grievance. On the Claimant's own case he was in a better position by making the disclosure than he would have been without it.

44. The Claimant submitted that the Respondent had sought to conceal his pensions rights from him. When he found out about the fact that they had not enrolled him in a pension scheme in May 2022, the Respondents were embarrassed and retaliated by delaying its response and by providing wholly inadequate information. The letter of 15th June omitted key data that would have alleviated the distress and injury caused by the Claimant's discovery that they had failed to pay into a pension scheme on his behalf. They had acted in bad faith by deliberately concealing the pension issue and retaliating against him for making a protected disclosure.

The law

45. The term "protected disclosure" is defined in Section 43A of the Employment Rights Act 1996 as a "qualifying disclosure" which is made in accordance with sections 43C to 43H. A "qualifying disclosure" (as defined in Section 43B) 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 … (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which it subject; …or
(f) that information tending to show any matter falling within any of the above paragraphs has been, or is likely to be, concealed."

46. The qualifying disclosure must also be made to one of the categories of person set out in section 43C – H. These categories include the worker's employer and the Pensions Regulator.

47. Section 47B(1) gives a worker the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done.

48. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

49. In *Onyango v Adrian Berkeley T/A Berkeley Solicitors UKEAT/0407/12* the EAT held that protected disclosures made after the termination of employment can be relied upon to found a claim under section 47B of the Employment Rights Act 1996 if the disclosure is causatively linked to the detrimental treatment.

50. The requirement for disclosures to be made in the public interest was the result of an amendment to the legislation made in 2013. It's intent was that private employment disputes should be excluded from the scope of whistleblowing protection. However, in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979 the Court of Appeal stated that where the disclosure relates to an interest which is personal in character, it may still be reasonable to regard the disclosure as being in the public interest. The Court of Appeal suggested that the following factors might be relevant.

    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 - "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" but that should not be taken too far."

51. The worker must have a genuine belief at the time of making the disclosure that it was in the public interest. Secondly the worker must have reasonable grounds for so believing. However, in making the disclosure, the worker does not need to be motivated by the belief that it is in the public interest. So long as the worker has a genuine and reasonable belief that the disclosure is in the public interest, that does not need to form part of his reason for making the disclosure.

Conclusions

52. Although borderline perhaps, the tribunal is satisfied that the Claimant made a qualifying disclosure. We do not accept that the Claimant did not have a reasonable and genuine belief at the time of making the disclosure that it was in the public interest. While this plainly was a private workplace dispute primarily affecting the Claimant, it was also a matter which engages the public interest. This is a large employer. Although it employed very few employees in the UK, the right to a workplace pension is an important right, and failure to provide a pension can have long lasting consequences on individuals. Moreover deductions had been made from the Claimant's salary without being paid into a scheme. It was in the public interest to ensure that this particular employer did not make the same mistake again. The Claimant may have been motivated by his own personal interests, (both in relation to his pension and his dispute with the First Respondent) but that does not mean he could not have had a genuine belief that the disclosure was in the public interest.

53. On the other hand, we do not accept that the delay in providing the Claimant with a response to his letter of 15th May or the inadequacy of that information – (and we accept that that information was inadequate), was influenced by the fact that the Claimant had made a disclosure.

54. In this case the Claimant has been particularly aggrieved, not only by the failure to set up a pension scheme, but by the fact that once the Respondent became aware that it was in breach of UK pensions legislation it failed to write to the Claimant to explain the position. In fact it did nothing at all, leaving it entirely to the Workers Pension Trust to write to the Claimant, and at an incorrect address. As the Claimant has said, because of the litigation in which both parties were engaged at the time,

the Respondent was in constant email contact with the Claimant. It would have been straightforward and simple to have asked him to confirm his address. Given the failures that had occurred, including the deduction of pension contributions from the Claimant's salary without paying it into a pension fund, it is surprising that the Respondent did not think it appropriate to write to the Claimant at the earliest opportunity to explain what happened, rather than leaving it to the Workers Pension Trust to write a letter to the Claimant which left him in the dark as to what had occurred, and why it had occurred.

55. On the other hand, by the time the Claimant had made his disclosures the Respondents had taken steps to rectify the position. The Claimant found out about the pensions position because of the steps that the Respondent had taken. We do not accept that the inadequacy of the letter was a deliberate attempt to withhold information on the ground that the Claimant had made protected disclosures. While the Respondent took insufficient steps to keep the Claimant informed, this was not because of his disclosures, but predated them. The Respondent had been slow to rectify the position. They were told about their non compliance in February 2021 and only paid into a scheme in January 2022.

56. As the Claimant has said, it is likely that had he not written his letter of 16th May, or complained to the Pensions Regulator on 19th May, the First Respondent would have taken no further steps to keep him informed. In that sense the Claimant was better off from having made his disclosure not worse off. It cannot therefore be said that the Claimant had been subjected to a detriment because he had made protected disclosures. The Respondent sought to answer his queries, and while we consider that the Respondent could have done better, the response to the letter was in keeping with the slowness of their actions in this matter generally.

57. As for the disclosures to the Pensions Regulator on 19 June, the letter post dated the 16th June letter for the Respondents, and was a complaint about it. The evidence does not suggest that the Respondent would have done more to assist the Claimant had he not written to the Pensions Regulator. We accept that, as Ms Vogt said, they had not been particularly concerned by the content of the Claimant's disclosure because, by that time, the Pensions Regulator was already aware of the position and steps had been taken to put things right.

58. We note the email to Roedl asking them not to pass any information on to the Claimant and that communication should come thorough the First Respondent, but we do not regard that instruction as unusual. There was an on going dispute and it was better to keep the lines of communication in one place. Roedl was simply an agent of the Respondent for payroll purposes and no more. The obligations lay with the First Respondents.

59. We conclude that the Claimant was not subjected to a detriment on the ground of having made a protected disclosure and his case fails. For that reason we do not consider it necessary to consider the question of whether or not the Tribunal has jurisdiction to consider a claim against the

individual Respondents.

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Employment Judge Spencer
05/07/2023

JUDGMENT SENT TO THE PARTIES ON

05/07/2023

FOR THE TRIBUNAL OFFICE