THE EMPLOYMENT TRIBUNALS

Claimant: **Dr Arun Chind**

Respondent: **Working on Wellbeing Limited First Respondent**
Chief Constable of Northumbria Police Second Respondent

Heard at: **North Shields Hearing Centre** **On:** **Thursday 9th January 2020**

Before: **Employment Judge Johnson sitting alone**

Members:

Representation:

Claimant: **In Person**
First Respondent: **Mr A Sugarman of Counsel**
Second Respondent: **Mr R Stubbs of Counsel**

PUBLIC PRELIMINARY HEARING

JUDGMENT

The claimant's complaints of automatic unfair dismissal for making protected disclosures and being subjected to detriments because he had made protected disclosures have no reasonable prospect of success. Pursuant to Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, those claims are struck out and dismissed.

REASONS

1. This matter came before me today by way of a public preliminary hearing, the purpose of which was to consider the following issues:-

   (a) whether the claimant satisfied the definition of an employee in Section 230 (1) and (2) of the Employment Rights Act 1996, in respect of either of the respondents;

(b) whether the claimant satisfied the definition of a worker in Section 230 (3) of the Employment Rights Act 1996 or Section 43(K) of the Employment Rights Act 1996 in respect of either respondent;

(c) whether the claims should be struck out pursuant to Rule 37 of the 2013 Rules, on the grounds that they have no reasonable prospect of success, or alternatively that the claimant should be ordered to pay a deposit as a condition of being allowed to proceed with those claims on the grounds that they have little reasonable prospect of success;

(d) whether the response of each respondent should be struck out on the grounds that they have failed to comply with earlier orders for disclosure of documents.

2. The claimant attended in person and conducted the hearing himself. The first respondent was represented by Mr Sugarman of Counsel and the second respondent by Mr Stubbs of Counsel. The first respondent produced a bundle of documents marked R1, comprising an A4 ring binder containing 304 pages of documents. Witness statements had been prepared by the claimant and on behalf of the first respondent by Lucy Wright (Chief Medical Officer and Mr Jon Cooke (Service Delivery Manager) and on behalf of the second respondent by Lesley-Anne Knowles (Head of Human Resources). I took time to read those witness statements and to consider the documents referred to in those statements prior to the commencement of the hearing.

3. The claimant is a doctor, who was engaged by the first respondent (R1) from 6th December 2017 to provide occupational health physician advice and services on what is referred to as the "NPS Contract" – (NPS being Northumbria Police Service) for the second respondent (referred to as R2). The claimant worked under that contract until his engagement was terminated with effect from 14th April 2019, notice of termination having been given on 13th March 2019.

4. The claimant alleges that he was put under pressure by police personnel to assess them as unfit for work when, in Doctor Chind's professional opinion, they were in fact fit for work. The claimant alleges that he was put under pressure to comprise his own integrity by providing false reports, which he says he did on approximately 50 occasions. The claimant alleges that he made public interest disclosures about these matters and that as a result he was subjected to detriment and ultimately dismissed.

5. The two respondents do not accept that the claimant was either an employee or a worker. They say that he was an independent contractor in business on his own account and that any contract he had was with R1 and never with R2. Both respondents deny that the claimant ever made any protected disclosures and say that even if he did, the termination of his contract had nothing to do with the making of any such disclosures.

6. The claimant presented his claim ET1 to the employment tribunal on 20th July 2019. Following presentation of responses by each respondent, the matter was listed for a private preliminary hearing before Employment Judge Sweeney on 30th

September 2019. The claimant conducted that hearing himself. The first respondent was again represented by Mr Sugarman and the second respondent on that occasion by its solicitor, Mr McKernan. The case management summary and orders made by Employment Judge Sweeney on that occasion, run to just over 14 pages. It is clear that Employment Judge Sweeney took considerable time and great care to discuss with the claimant exactly what his claims were about. Employment Judge Sweeney carefully explained to the claimant the statutory provisions from the Employment Rights Act 1996 which are engaged by claims brought under what are commonly called the "whistleblowing" provisions. In particular, Employment Judge Sweeney explained to the claimant how whatever he said or wrote must contain "information", and that any such information tended to show at the time it was disclosed that a criminal offence had been, was being or was likely to be committed, that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject, that the health or safety of any individual had been, was being, or was likely to be endangered, that the environment had been, was being or was likely to be damaged or that information tending to show any of these had been or was being or was likely to be deliberately concealed.

7. Having gone through that exercise, Employment Judge Sweeney then made specific orders for the claimant to provide further information about his complaints, relating to his employment status and the protected disclosures themselves.

8. In paragraph 1 of his case management summary, under the heading "Background", Employment Judge Sweeney records that the claimant is a doctor "who explained to the judge that he had some background in law and in particular employment law and that he had researched the legal issues surrounding public interest disclosures." At various stages during today's hearing before myself, Doctor Chind reminded me that he remains a litigant in person and that I should not expect of him the same standard of legal or procedural matters that I would expect from a solicitor or barrister. I confirmed to Doctor Chind that I accepted that proposition and that I would apply to him the standard of a reasonably competent litigant in person. Doctor Chind is clearly an intelligent, educated and articulate man, who in my judgment would easily satisfy the definition of a reasonably competent litigant in person.

9. It has never been suggested by the claimant that he misunderstood in any way the orders made by Employment Judge Sweeney on 30th September. I note that at paragraph 7.1 of his Orders Employment Judge Sweeney stated as follows:-

> "The parties must inform each other and the tribunal in writing within 14 days of the date this is sent to them, providing full details, if what is set out in the Case Management Summary section below about the case and the issues that arise is inaccurate and/or incomplete in any important way."

The claimant has not done so.

10. At paragraph 24 of his Case Management Summary, Employment Judge Sweeney identified that Doctor Chind alleges in his claim form that he made protected disclosures on two occasions:-

    (i) on 20th February 2019 verbally to Mr Jon Cooke and Angela Evans of R1;

    (ii) on 4th March 2019, verbally to Mr Jon Cooke.

    Employment Judge Sweeney goes on at paragraph 25 to record that Doctor Chind said at the hearing on 30th September that he also wished to rely upon two further disclosures which he says were set out, in writing, in two separate e-mails, namely:-

    (iii) on 28th February 2019 in an e-mail timed at 22.51 to Angela Evans with subject heading "Request for 20th February 2019 meeting notes", and

    (iv) on 4th March 2019 in an e-mail timed at 11.02 to Lucy Wright of R1, subject heading "Request for meeting with Doctor Lucy Wright."

11. It was at that hearing acknowledged by Doctor Chind that the second of those e-mails dated 4th March may not have contained the correct e-mail address of the intended recipient. Doctor Chind before me today accepted that his e-mail had not contained the correct address and that it had not been received by Lucy Wright.

12. Employment Judge Sweeney then records that the legal representatives for both respondents on that occasion took exception to the addition of the third and fourth alleged disclosures, submitting that those would require an application by the claimant for permission to amend his claim form. Judge Sweeney agreed with both respondents` legal representatives that, by the claimant raising those issues, it should be treated as an application to amend. However, Employment Judge Sweeney made no decision on whether or not permission should be granted, taking the view that it was preferable in the first instance for the claimant to provide further information about all four alleged protected disclosures, following which consideration would be given by both respondents as to whether they would oppose such an application.

13. Employment Judge Sweeney took considerable care in requiring the claimant to set out in clear and unequivocal terms, exactly what he alleges he said at the meetings on 20th February 2019 and 4th March 2019, which he says form the subject matter of the two protected disclosures which are referred to in the original claim form. The claimant accepted that the words used at the first meeting were, "**They are being dishonest**" and that the words used in the second meeting were "**You can't have a contract to give fake reports to the police!".** The claimant accepted that those were the words used and that those words are what he alleges to have amounted to qualifying and protected disclosures.

14. Doctor Chind today confirmed that he would not be pursuing the allegation relating to PID4 (the e-mail of 4th March 2019) as he accepts that it is unlikely to have been received by its intended recipient, Lucy Wright. That leaves the third

PID as the contents of the e-mail dated 28th February from the claimant to Jon Cooke and Angela Evans. A copy of that was provided to Employment Judge Sweeney. The claimant had marked those parts which he considered to amount to qualifying and protected disclosures. It is unnecessary to recite those extracts here.

15. Employment Judge Sweeney ordered the claimant to provide further information about each of his alleged protected disclosures. In respect of the verbal disclosures on 20th February and 4th March the claimant was ordered to "clearly and succinctly explain how the information disclosed tended to show at the time it was disclosed:-

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

    (b) that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject;

    (c) that the health or safety of any individual had been, was being or was likely to be endangered;

    (d) that the environment had been, was being or was likely to be damaged;

    (e) that information tending to show any of the above had been, was being or was likely to be deliberately concealed;

    (f) in what way the claimant believed the disclosure to be in the public interest.

    In respect of the two e-mails, the claimant was required to "clearly and succinctly explain what information he disclosed in these e-mails and then to go on to provide the same information about how that disclosure tended to show one of the matters (a) – (f) above.

16. The claimant provided his further information on 28th October 2019. A copy appears at pages 71 – 80 in the bundle. In respect of the verbal disclosure on 20th February, the claimant says as follows:-

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

At the meeting, raising an objection to be hauled over the coals for giving honest reports, I pointed out that they (the police officers or applicants for police jobs) were being dishonest;

    (b) that a person had failed or was likely to fail to comply with any legal obligation to which he was subject

        In stating that "they (the police officers or applicants for police jobs) were being dishonest", I pointed out that the police officers were failing to comply with their legal obligation to be honest and not use their position to unduly influence my occupational health report;

(c) in what way the claimant believed the disclosures to be in the public interest.

As mentioned elsewhere, I believe that doctors have a duty to act with integrity and uphold the integrity of other professionals.

In respect of verbal disclosures on 4th March 2019;

At this meeting I was explicit to the first respondent's manager Jon Cooke about the duties of doctors to act with integrity. For his part, Jon Cooke volunteered that he had served on a doctors` fitness to practice or similar function at the General Medical Council/Medical Practitioners Tribunal Service. I pointed out that the first respondent should assist police staff in being honest and aid the effective functioning of the second respondent

(a) that a criminal offence had been, was being or was likely to be committed. I pointed out to SDM Cooke that it was expected of the first respondent as an occupational health provider of the second respondent to serve as a fiduciary. Furthermore, when SDM Cooke voiced the party line "That is the contract", I countered in exasperation "You cannot have a contract to give fake reports to the police". I believe that it is not controversial to state that a contract that has, if not the stated purpose to do so, nevertheless the effect of leading to the issue of fake reports to the police is illegal;

(b) that a person had failed or was likely to fail to comply with any legal obligation to which he was subject.

I pointed out to SDM Cooke that the first respondent as an occupational health organisation had a legal obligation to act in the best interests of the second respondent who I described as a "vulnerable public-sector organisation".

(c) in what way the claimant believed the disclosures to be in the public interest.

As mentioned elsewhere in this document, I believe that doctors (and healthcare organisations) have a duty to act with integrity and uphold the integrity of other professionals. Integrity of the pillars of society such as doctors, the judiciary and police officers is very much in the public interest of citizens of the UK and the UK as a whole, where the rule of law is upheld.

Provision of further information under order 2.1.5

In relation to the e-mail to Angela Evans on 28th February 2019 and the e-mail of 4th March 2019 to Lucy Wrigh information disclosed that amounts to qualifying disclosure:-

I am unsure if my e-mail to Lucy Wright reached her since it was incorrectly addressed. I submit my comments as regards my e-mail to Nurse Angela Evans on 28th February 2019:-

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

I believe that an FMA who is merely a sick-note validator or inability promoter leads to a reduction of operationally effective officers on duty and causes harm to the functioning of the second respondent's duties of upholding law and order.

(b) that a person had failed or was likely to fail to comply with any legal obligation to which he was subject

In my e-mail to Nurse Evans I wrote "that being a mere sick-note validator or inability promoter is not a worthwhile job for a doctor". I conveyed that I had a duty to uphold my own integrity and that this was being undermined under duress from Nurse Evans and staff of the second respondent.

(c) I wrote that harm to the community, due to our activities involving sick-note validation and inability is too great, for us as health professionals to merely serve our own self-interest of pecuniary gain, job stability and professional advancement in privately-owned health-related company

I pointed to the harm to the community (the public purse) and the tax-payer due to the self-interest seeking activities of occupational health companies such as the first respondent.

By referring to the first respondent as a health-related rather than a healthcare company, I expressed my dismay at the first respondent's role in facilitating inability and false claims of ill-health and the first respondent's failure to promote health.

(d) that the health or safety of any individual had been, was being or was likely to be endangered

I wrote "the motivation of the complainants was to cause defamation and professional harm to me and persuade me to commit corruption."

I thereby conveyed to Nurse Evans that the stress due to complaints and the character assassination was leading me to commit corruption.

(e) in what way the claimant believed the disclosures to be in the public interest

As mentioned elsewhere, I believe that doctors and medical organisations, especially such as the first respondent (a designated body entrusted with the responsibility of safe-guarding the integrity of doctors) have a duty to act with integrity and uphold the integrity of other professionals.

Provision of further information under order 2.1.6

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

The first respondent has a fiduciary duty to the second respondent who is a vulnerable public body entrusted with the duty of maintaining law and order. The first respondent's duty therefore included the provision of impartial and truthful reports to assist the second respondent in discharging its duty primary to the public, of maintaining law and order.

At pre-employment assessments, the failure to implement safeguards to prevent devious individuals and those with significant mental health problems from applying to train as police officers, the first respondent was failing in his duty to assess the second respondent in its primary duties towards the public. The toxic environment created by having a nurse line manger doctor and supporting abuse towards me undermined my credibility as FMA and my effectiveness as a guardian of public safety and trust.

At fitness assessments, by failing to implement safeguards and by bowing to pressure:-

(i) from police officers to issue fake reports to stay off work, avoid unpleasant duties (such as riot control training) and claim permanent disability and

(ii) from senior policy management to rebrand police officer misconduct as sickness absence, the first respondent was causing loss to the public purse

As an organisation regulated by the Medical Profession (Responsible Officers) Regulations 2010, the first respondent was in breach of its obligation to report the comprise of a duty to the public.

I submit that any measure however innocent it claims to be, that reduces the operational effectiveness of the police is a crime.

(b) that a person has failed or was likely to fail to comply with any legal obligation to which he was subject

Police officers attending for assessments had a duty to conduct themselves within integrity and to avoid misusing their position for personal gain as per the provisions of the Police (Conduct) Regulations 2008.

I found that police officers were abusing their position to intimidate me and to coerce me into providing reports that if not the stated purpose, had the effect of assisting police officers in dodging work and extending paid sick leave. For instance on 8th March 2019, PC2 who was accompanied by Inspector Graham, told Nurse Evans that he was aware of complaints made against me, successfully intimidating me into providing a report in his favour. I thereby failed in my legal obligation as FMA to safeguard the interests of the second respondent.

(c) that the health or safety of any individual had been, was being or was likely to be endangered

I was subjected to bullying and harassment by both attendees of the second respondent and my clinic line manager RGN Evans. Due to economic pressures,

I was forced to continue to work at the first respondent and second respondent, ignoring my own wellbeing and risk of enduring professional harm from the inappropriate and potential abuse of power by the first respondent whose medical backers were senior member of the regulatory body; fellows of the faculty of occupational medicine and responsible officers of the General Medical Council.

My own mental wellbeing was harmed whilst working for the first respondent and second respondent. Following the meeting on 20th February 2019 I pointed out by e-mail that I was in distress at the meeting. I complained of bullying to Nurse Evans verbally on a previous occasion and by e-mail on 20th February 2019. Nurse Evans acknowledged this conversation when she responded by e-mail on 1st March 2019. As my employers both the first respondent and second respondent had an implied term in our employment contracts, for providing a safe and secure working environment.

I submit that the 20th February 2019 meeting (acknowledged by the first respondent as a disciplinary meeting in an e-mail to their insurer) was a direct consequence of illegal activities of the first respondent and the second respondent acting in collusion.

(d) that the environment had been, was being or was likely to be damaged

I submit that the first respondent and second respondent had created a toxic work environment for me. Their design of the work plan that I was required to follow and the duties I was assigned and their own work practices had created an environment that was inimical to integrity. I was almost constantly living in dread to being subjected to vile abuse almost on a monthly basis. The only times when I worked for the second respondent without fear of mortal harm to my employment and career was when I was administering vaccines to police officers.

I further submit that the model environments for safeguarding the integrity of police officers was being damaged by the first respondent's failure to keep in check the power and undue influence of police officers to make damaging strategic complaints. I wish to add that doctors and nurses should aim to perform their duties so as to support the integrity and functioning of public servants such as police, not collude to undermine it for their own pecuniary gain.

I submit that the moral environment for FMAs to work at the OHU without fear or favour were being compromised since FMAs were in intimidation of police staff including HR. As Doctor Moothadeh (who had resigned/dismissed as FMA) tactfully put it, his reason for only performing non-contentious police diver medicals for the second respondent was due to lack of support from the Northumbria Police HR.

As a direct result of befoulment of the moral environment, my own integrity was compromised and I issued around fifty integrity compromised medical reports. I am prepared to reiterate this under oath.

(e) that information tending to show any of the above had been, was being or was likely to be concealed

I realised that despite my declaration at the meetings of 20th February 2019 with Nurse Evans and subsequent follow-up e-mail of 28th February 2019 detailing my concerns, Nurse Evans ignored the primary subject matter completely. In fact she wrote back defending her decision not to provide minutes of 20th February 2019 meeting claiming that the meeting was informal. I realised that the first respondent was deliberately concealing illegal practices at the occupational health unit. I therefore invited Jon Cooke to the 4th March 2019 meeting to explain to him in detail about my concerns about illegal practices. I requested him to set up a meeting with Chief Medical Officer Doctor Lucy Wright so that I could chalk out a plan for reform. Once again he substantiated my fears of concealment of illegal practices by refusing to provide me with minutes of our 4th March 2019 meeting – he merely sent me an e-mail that the first respondent was following the terms of the contract with the second respondent.

(f) in what way the claimant believed the disclosures to be in the public interest

The police are a public body charged with maintaining law and order. Of perhaps all organisations whose integrity and good functioning should be safeguarded, I believe that in a civilised society, the police (jointly with the judiciary) are uppermost in priority. I believe that the actions of the first respondent and second respondent managers in failing to curb corruption are illegal.

I made the internal disclosure to the first respondent in the public interest as provided for by PIDA 1998 to safeguard the functioning of the police. After Enterprise and Regulatory Reform Act 2013 I also confirm that I remain firm in my belief that I made the disclosure in the public interest.

17. By letter dated 25th November 2019, the claimant requested the employment tribunal to make what was effectively a specific disclosure order in respect of the following documents:-

(i) I have not received any material from the second respondent in respect of my written subject access request. They are claiming that they sent me a request for ID to send the requested material. The second respondent knows my e-mailing address and ID details full-well. I see this as a devious ploy to delay the requested information and waste my time and the time of the employment tribunal. Later today I'm sending a copy of my driving licence and passport as demanded with a copy to Counsel for the second respondent, Mr McKernan.

(ii) I have not received any material from the first respondent in response to my written request for specific e-mails. The requested documents are especially related communications (a) between the first respondent and second respondent relating to me, and (b) between Nurse Evans, Jon Cooke, Santu Bhudia and Lucy Wright and between Lucy Wright and Peter Moon relating to me (c) documents relating to me between the first respondent and second respondent to external organisations.

18. The second respondent replied on 25th November, in the following terms:-

> "For the avoidance of doubt, to the best of the writer's knowledge information and belief, the second respondent has disclosed all documents relevant to the preliminary issue in the above case in accordance with the tribunal's order of 30th September 2019 and has informed the claimant that this is the case."

19. On the same day, solicitors for the first respondent replied in the following terms:-

> "We also confirm that we have disclosed all documents pursuant to the tribunal's order of 30th September 2019. We will be circulating copies of all party documents for the preliminary hearing to both parties today. Additional documents which the claimant seeks are not relevant to the preliminary hearing and are merely a fishing expedition. We have explained to the claimant in the attached e-mail correspondence that documents need to be relevant to the issues to be determined at that hearing."

20. By letter dated 3rd December, as directed by Employment Judge Garnon, the following letter was sent to the parties:-

> "Employment Judge Garnon states that it is not for either party to determine whether a document is relevant. If it relates to the case its existence should be disclosed by list. If the document transpires not to be necessary it should not be included in the bundle. The claimant must specify which documents he requires to be copied to him to see, and why.

21. By letter dated 18th December 2019, the first respondent submitted its application to the tribunal for orders that the claimant's claims against the first respondent be struck out on the grounds that they have no reasonable prospect of success, or alternatively that the claimant be ordered to pay a deposit on the grounds that they have little reasonable prospect of success. That application is based upon what the claimant alleges in his claim form ET1 and the further information which is set out above. The application states:-

> "PID1
>
> Regarding the 20th February 2019 alleged disclosure, the claimant explained to Employment Judge Sweeney and confirmed in his further information that his reference to comments made that "they (the police officers or applicants for police jobs) were being dishonest" was his disclosure of information. The first respondent disputes that this comment is a disclosure of information.
>
> PID3
>
> Regarding the 4th March 2019 alleged disclosure, the claimant explained to Employment Judge Sweeney that the words used "You can't have a

contract to give fake reports to the police", constituted his disclosure of information. The claimant confirms in his further information that this was his disclosure of information. Having regard to the clarifications given in the claimant's further information, we remain of the view that the claimant has failed to demonstrate that there was in fact a disclosure of information. The comments made by the claimant alleged to be disclosures of information are in fact mere statements in which the claimant was voicing concerns and/or making allegations and not conveying information.

PID2

In the order from the preliminary hearing, Employment Judge Sweeney identified from the claimant that he relied upon the paragraphs marked with the square brackets in his e-mail of 28th February 2019. In the claimant's further particulars:-

- He fails to identify what information he conveyed in order to support his contention that a criminal offence had been, was being or was likely to be committed.

- His information in support of the contention in that a person had failed or was likely to fail to comply with an illegal obligation to which he was subject is that he wrote "that being a mere sick-note validator and inability promoter is not a worthwhile job for a doctor". However, this comment is not contained in the e-mail of 28th February which the claimant relies on.

- He also identifies that he wrote "that the harm to the community due to our activities involved in sick-note validation and inabilitiy is too great for us as health professionals to merely serve our own self-interest to pecuniary gain, job stability and professional advancement in privately owned health-related companies." Similarly to the comment above, this comment is not contained in the e-mail of 28th February the claimant relies on.

- The information the claimant states he conveyed in relation to the contention of the health or safety of any individual had been, was being or was likely to be endangered is that he wrote "the motivation of the complainants was to cause defamation and professional harm to me and persuade me to commit corruption". As before, this comment is not contained in the e-mail of 28th February the claimant relies on.

It is the first respondent's position that the alleged PID2 does not disclose any information amounting to a qualifying disclosure and in fact the e-mail the claimant relies upon (28th February 2019 to Angela Evans) does not contain the comments the claimant claims were made.

PID3

> Concerning the alleged PID3 the claimant has yet to provide any further information in light of the acceptance that the e-mail relied upon, being the e-mail to Lucy Wright of 4th March 2019 was incorrectly addressed to her and that he did not receive a reply to it. If, which is not admitted, it was received by Lucy Wright, then again we submit that the claimant has not identified a disclosure of information.

22. By letter dated 20th December, Employment Judge Maidment informed the parties that the first respondent's application for a strike out or deposit order would be considered at the public preliminary hearing already listed for 9th and 10th January 2020.

23. By letter dated 20th December 2019, the claimant informed the employment tribunal and the parties that he was writing to oppose the order for a strike out or deposit, stating as follows:-

    23.1 To oppose the application of the first respondent for strike out/deposit dated 18th December 2019, that was received by me on 18th December 2019 at 17.28.

    23.2 To make an application to strike out the defence of Working on Wellbeing (first respondent) and Chief Constable of Northumbria Police (second respondent) on the grounds of contempt of court.

    23.3 If a strike out of the defence is not granted, to request a witness order seeking the attendance of Nurse Angela Evans and Chief Medical Officer Doctor Lucy Patricia Wright at the 9th-10th January 2020 public hearing.

24. The claimant's grounds for his strike out application relate to each respondent's alleged failure to comply with his request for disclosure of documents, namely:-

    (i) e-mails between the first respondent and second respondent from 1st October 2018 to 8th July 2019 relating to the claimant;

    (ii) internal correspondence amongst the first respondent's employees from 1st October 2018 to the 8th July 2019 relating to the claimant;

    (iii) internal correspondence amongst the second respondent's employees from 1st October 2018 to 8th July 2019 relating to the claimant.

    The claimant refers to the respondents` refusal to comply with his request disclosure. He specifically refers to paragraph 8.6 in Employment Judge Sweeney's order stating:-

    > "Under Rule 6 if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include:
    >
    > (a) waiving or varying the requirement;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings; and/or

(d) awarding costs in accordance with rule 47-84."

The claimant goes onto state:-

"I submit that the respondents` wilful obstruction of justice and failure to make full disclosure is a deliberate attempt to diminish the effect of the effectiveness of the employment tribunal in the administration of justice and defeat the very purpose of the employment tribunal. I wish to remind the employment tribunal that after Peach Grey and Company v Summers [1995 IRLR363-QBD] an individual could be in contempt of court in relation to an employment tribunal.

I am therefore hereby making an application to strike out the defence of the first respondent and the second respondent on the grounds of contempt of court for failing to obey a direct order from the employment tribunal for full disclosure.

25. The claimant's opposition to the application to strike out his own claims is set out towards the end of that letter and appears at page 80J-K in the bundle. The claimant states:-

"Strike out

It is my position that neither the first respondent nor the second respondent have any prospect of defending their poorly put together their defence and the first respondent is making its application out of desperation. This is the second time that the first respondent is making such an ill-founded application to the tribunal.

In response to Employment Judge Sweeney's order, I have clarified to the employment tribunal in my submission dated 28th October 2019 that my public interest disclosures involved a series of actions commencing 20th February 2019, including verbal disclosure on 20th February to its service delivery manager Jon Cooke and Nurse Angela Evans, as well as a detailed meeting with Jon Cooke on 4th March 2019. I have followed this up with a series of e-mails detailing how the employees of the first respondent were facilitating this conduct by and assisting police staff including police officers in committing misconduct in public office. These communications have sufficient gravity and national importance to merit a full hearing. It is the first time in UK legal history that a former force medical advisor has summoned the courage to face up to professional abuse by police officers and the corrupt occupational health company. It is important that the employment tribunal ensure that this claim should succeed in the national interest."

With regard to PID1, the claimant goes on to say that "making a disclosure on intimidation of an expert witness is a disclosure of wilful misconduct by police officers and is very much in the public interest." The claimant then adds, "I respectfully submit that I cannot fulfil to a nicety, how to time and create a public interest disclosure and set out each and every single act commencing 20th February 2019". The claimant adds, "There is no prescribed format for a public interest disclosure issued by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 or by Parliament in the Public Interest Disclosure Act 1998. With regard to PID2 the claimant says, "As a litigant in person, I do not have the luxury of admin support and legal wherewithal to present an impeccable case. The employment tribunal needs no reminding that the purpose of establishment of tribunals (as opposed to courts) for employment disputes was to allow the presentation and disposal of cases in an informal setting without the incumbence and petty point scoring."

26. All these matters came before me this morning. Having set out which matters were listed to be dealt with today, I inquired of the claimant, Mr Sugarman and Mr Stubbs as to their preferred order of dealing with the various applications. Mr Sugarman (with Mr Stubbs` support) submitted that I should first of all deal with the first respondent's strike out application, as that could be dealt with without the need for any witness evidence and would involve no more than an examination of the claimant's pleaded case (his claim form and further information) and consideration of the respondents` submissions on whether (on the claimant's best case) what he is alleged to have said or written could ever amount to a qualifying and protected disclosure. If the application to strike out on those grounds were to succeed, it would be a "knock-out point" and there would be no need to go into the far more complex issue of the claimant's employment status. If the tribunal were to deal with the employment status issue first, it would not necessarily bring this two-day hearing to a conclusion. I took time to explain that to the claimant and invited his comments. The claimant confirmed that he had no objection to dealing with the first respondent's strike out application first. I record that at this stage, no mention was made of the claimant's application to strike out both responses due to the alleged non-disclosure of documents.

27. Mr Sugarman`s submissions on his strike out/deposit order application are concisely set out in his skeleton argument marked R1SA, containing 55 paragraphs over 11 pages. Mr Sugarman took me through that document, allowing me to pause on several occasions so that I could explain to the claimant the basic legal principles involved and to invite the claimant to comment at that stage on each of those principles insofar as they applied to his case. At each stage, the claimant confirmed that his description to Employment Judge Sweeney as to what he had actually said on 20th February 2019 and 4th March 2019, was accurate, as was what was contained in his e-mail of 28th February 2019 to Angela Evans. The claimant conceded that his e-mail of 4th March 2019 had been incorrectly addressed, therefore was unlikely to have been received and therefore could not amount to a qualifying and protected disclosure.

<u>The law</u>

28. The relevant statutory provisions engaged by the claims brought by the claimant are contained in the Employment Rights Act 1996.

Section 103A Protected disclosure

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

Section 43A Meaning of "protected disclosure"

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.

Section 43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following--

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Section 43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--

(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to--

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Section 47B Protected Disclosures

(1) A worker has the right not be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not be subjected to any detriment by any act or any deliberate failure to act, done-

(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purpose of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker –

(a) from doing that thing, or
(b) from doing anything of that description

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subject W to detriment if –

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
(b) it is reasonable for the worker or agent to rely on the statement

But this does not prevent the employer from being liable by reason of subsection (1B)

(2) This section does not apply where –

(a) the worker is an employee, and
(b) the detriment in question amounts to a dismissal (within the meaning of Part X)

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K

29. The first requirement of a "qualifying disclosure" is that the employee or worker must disclose **information** and not merely state an opinion or make an allegation. It is accepted that sometimes the provision of information and the making of an allegation are intertwined. In **Cavendish Munro Professional Risks Management Limited v Gedduld [2010 IRLR38**] and **Kilraine v London Borough of Wandsworth [2016 UKEAT/0260/15/JOJ]** the question of what constitutes disclosure of "information" was considered. Langstaff J in the Employment Appeal Tribunal in **Kilraine** stated:-

> "I would caution some care in the application in the principle arising out of Cavendish Munro. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other, when reality and experience suggests that very often information and allegation are intertwined."

The Court of Appeal went on to say in **Kilraine:-**

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity which is capable of intending to show one of the matters listed in subsection (1). Whether an identified statement or disclosure in any particular case does or does not meet that standard, will be a matter for an evaluative judgment by the tribunal in the light of all the facts of the case. It is a question that is likely to be closely aligned with the other requirement set out in **Section 43B (1),** namely that the worker/employee making the disclosure should have the reasonable belief that the

information that he or she discloses, does tend to show one of the listed matters."

As was explained by Underhill LJ in **Chesterton Global Limited v Nurmohamad**, this has both a subjective and objective element. If the worker subjectively believes that the information that he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a significant factual content and specificity such that is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief. In **Babula v Waltham Forest College [2007 IRLR346]** the Employment Appeal Tribunal held that the fact that the information disclosed turns out to be wrong may be relevant, but is not fatal to the claimant's case. The tribunal's task is to determine whether the employee's belief is reasonable in all the circumstances. The Employment Appeal Tribunal said in **Phoenix House Limited v Stockman [2017 ICR84]** that it is possible for disclosure to be made in good faith, but without good reason to believe that they were correct. In those circumstances, the statutory test would not be satisfied.

30. **Section 43B (1)** (a) refers to a **criminal offence**, which had been, was being or was likely to be committed. "Criminal offence" is not defined in the Employment Rights Act 1996. It is for the claimant to establish that what he alleges could amount to a "criminal offence". **Section 43B (1) (b**) refers to a failure to comply "with any legal obligation". If such a breach is alleged, then the source of the obligation should be identified and should be capable of verification, as actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance, without being in breach of a legal obligation. **[Igur Securities v Cautionova – 2017 IRLR115].** In relation to **Section 43B (1) (d),** if it is alleged that the safety of any individual has been, is being or is likely to be endangered, then the term "likely" requires more than a possibility of a risk. [**Kraus v Penna Plc 2004 IRLR260].** Finally, the 1996 Act contains no definition of "environment". Whilst it is likely that the word should be given a broad definition, in my judgment "environment" means the complex of physical, chemical and biotic factors (such as climate, soil and living things) that act upon an ecological community and ultimately determines its form and survival. It may be impossible to establish the precise point at which environmental concerns would be so minor, that disclosure about them would not be covered by the legislation. Where such a stage is reached, it may well be that the "disclosure" about the environment is so minor that the worker could not reasonably believe it to be in the public interest.

31. It is Mr Sugarman's submission that nothing said or written by the claimant amounts to the disclosure of "information", but at best amounts to no more than the making of an allegation. In reply, the claimant says that what he said must be taken in context, so that for example the words "(police staff in making complaints)" should be read into the words "**They are being dishonest".** The claimant insists that his phrase was directed towards the police officers alleged dishonesty in seeking to avoid onerous duties by giving misleading information about their symptoms. In his submissions to me, the claimant argued that the conduct of these police officers amounted to "Fraud as defined in the Theft Act 1968". Therefore, it would amount to both a criminal offence and a breach of a

legal obligation. The claimant submitted that allegations of that nature involving police officers must be a matter of public interest.

32. In my judgment, the phrase "**They are being dishonest"** does not in all the circumstances of this case contain any factual content or specificity such as is capable of tending to show that either a criminal offence has been committed, or that there is any breach of a legal obligation. The claimant is simply making an allegation, expressing his opinion as to the behaviour or attitude of the police officers who had complained about the claimant's conduct. There are no specifics as to which officers are involved, what they are said to have done, or how that amounts to dishonesty. I find that by the objective standards of an ordinary, reasonable and honest person, what is alleged could not amount to a criminal offence. I am not satisfied that there is any "legal obligation" on police officers to be honest, and not to use their position to influence an OH report. I do not consider that the claimant has any reasonable prospect of succeeding in persuading a full employment tribunal that this was a disclosure of information which satisfies the statutory definition.

33. The second alleged verbal disclosure involved the use of the phrase, "**You can't have a contract to give fake reports to the police**". This was allegedly said by the claimant to Mr Cooke, after the claimant had alleged that the first respondent was not helping Northumbria Police, among other things, with reducing sickness absence to which Mr Cooke had replied, "That is the contract". Looking at what was said and examining the circumstances in which it was said, I am not satisfied that words used by the claimant disclosed any "information". It did not contain any factual content or specificity such as is capable of tending to show any of the matters in Section 43B (1). The claimant submitted that I should imply into the contract for OH services between the first respondent and the second respondent, a "fiduciary relationship", which would be breached if the individual police officers were dishonest about their symptoms or the senior staff on either side were willing to overlook such dishonesty. The claimant made no mention as to why such a term should be implied into a contract to which he is not a party. I am not satisfied that such a term should be implied, as I cannot presume that it was the intention of the parties to include it. The claimant referred to the integrity of police officers and doctors "to act with integrity and uphold the integrity of professionals". The claimant referred to his own personal legal obligation as force medical advisor, to safeguard the interests of the second respondent. The claimant submitted that his words used were sufficient to show a breach of that, or those, legal obligations. The claimant also referred to the Police Conduct (Regulations) 2008, breach of which he said amounted to committing a criminal offence. In my judgment, the claimant is stretching beyond all reasonableness, the true meaning of the phrases "criminal offence" or "legal obligation". In my judgement, what was said by the claimant in all the circumstances of this case not and could not amount to a disclosure of "information". It did not contain sufficient factual content or specificity so as to fall within the definition of the legislation, nor does it show any of the matters in **S.43(B) (1).**

34. With regard PID3, the claimant makes specific reference to words which he says were used in an e-mail to Lucy Wright dated 4th March 2019. That has been the claimant's consistent position throughout these proceedings. It was pointed out to

the claimant in the first respondent`s application letter dated 18th December 2019 that the e-mail the claimant refers to "does not contain the comments the claimant's claims were made". The claimant has been alive to that issue since he received that letter. However, it was only today that he suggested that the disclosures to which he refers were not in fact contained in the e-mail of 28th February 2019 to Angela Evans, but were in fact contained in a different e-mail bearing a different date. The claimant was unable to identify that e-mail today, insisting however that it must be in the possession of the respondents and therefore that they had an obligation to disclose it. I pointed out to the claimant that he had now had 4 opportunities to properly identify the protected disclosures upon which he seeks to rely. The first was in his claim form ET1, the second was at the hearing before Employment Judge Sweeney, the third was in the further information which he provided pursuant to the orders of Employment Judge Sweeney and the fourth was he received the respondents letter of 18th December and then prepared his own witness statement for today's hearing. Despite that, the claimant could not today identify the e-mail in which he says these disclosures were recorded.

35. The claimant of course requires permission from the employment tribunal to amend his claim form to include reference to any alleged disclosures which had not been referred to in his original claim form. That is clearly set out in the case management summary by Employment Judge Sweeney. I today discussed with the claimant the **"Selkent"** principles, which give guidance to the employment tribunal about whether or not to grant permission to amend a claim form. Those factors include:-

    (a) the nature of the amendment

    (b) the applicability of time-limits

    (c) the timing and manner of the application

    (d) the prospects or success if the amended claim is allowed to proceed

36. For the purposes of this discussion, giving the claimant the benefit of the doubt regarding permission to amend, I am still not satisfied that what the claimant alleges was written in this other e-mail, amounts to the disclosure of "information". It does not contain sufficient factual content or specificity to satisfy the definition. The phrase used was, "I then stated that the complainants were in breach of professional standards in making such malicious and strategic complaints". No mention is made of exactly what are those "professional standards" or how anything said or done by those people could amount to a breach. There is nothing to identify a legal obligation or how any such has been breached. No material is included which could amount to a criminal offence. A "duty to uphold law and order" (even if one exists) does not impose any such criminal liability. "Reducing the operational effectiveness of the police" is not a crime.

37. The claimant today again said that he recognised that the tribunal would be "making new law" by upholding his complaints. He frequently asserted his belief that the respondents had collectively behaved towards him in an unfair and

unreasonable manner. His belief must however, be reasonable and his assertion of it is not enough to persuade me to interpret the statutory definitions in the way he seeks. I do not see that it is the function of the Employment Tribunal to "make new law" – its role is to apply the law as set out in the legislation and in accordance with guidance from the higher courts. The claimant`s definition of "the environment" so as to include his own "toxic working environment" and his description of a "criminal offence" are unrealistic and cannot support the requirement for a "reasonable belief".

38. As was accepted by Mr Sugarman and Mr Stubbs, only in the most obvious and plain cases should the employment tribunal strike out a claim which involves allegations of any kind of discrimination. For the purposes of today's application, I take the view that an allegation of being subjected to detriment or being automatically unfairly dismissed for making protected disclosures, should be treated no differently. Caution must be exercise in relation to pleadings – even a very badly pleaded claim may not be appropriate for striking out, since it may not represent the final position as there may be other ways of refining or defining in the issues and such reverse burden of proof provisions as may exist, may operate to assist the claimant. The tribunal must follow a two-stage process. Firstly it must ask itself whether the ground for striking out has been established (in this case whether there is a reasonable prospect of success) and then, even if that is established, at the second stage the tribunal must ask itself whether it is just to proceed to strike out in all the circumstances, which would include lesser measures designed to elucidate the possible claims.

39. The issue for my consideration today therefore is whether there is any reasonable prospect (alternatively little reasonable prospect) of the claimant establishing at a full hearing that what he said, or wrote, could amount to a qualifying and protected disclosure. Bearing in mind the history of these proceedings so far, and in particular the opportunities which have been given to the claimant to properly set out his case, I am satisfied that these claims have no reasonable prospect of success. Even on his best case,I am not satisfied that the claimant will be able to establish that what he did write or say did or could amount to a qualifying and protected disclosure. Accordingly, as the claims have no reasonable prospect of success, they are hereby struck out and dismissed.

40. Having informed the claimant of my decision, the claimant then submitted that I should first of all have dealt with his cross-application to strike out the response of both respondents because of their "contempt of court" in failing to comply with Judge Sweeney's order for disclosure and Employment Judge Garnon's "further order for disclosure". The claimant of course had not raised that possibility when invited to comment upon the order in which the various applications should be dealt with. The claimant had clearly and unequivocally agreed to the first respondent's strike out application being dealt with first. Nevertheless, I consider it appropriate to deal with the claimant's observations in this regard. Having examined the earlier orders and correspondence, I am not satisfied that either respondent is in breach of any order for disclosure or indeed any continuing obligation of disclosure. Even if either respondent were found to have been in breach of an earlier order, it is highly likely that the tribunal would first of all have made an order for specific disclosure, relating to those specific documents which

the claimant had identified. That is effectively what Employment Judge Garnon was saying in his letter of 3rd December, when he invited the claimant to "identify which documents he requires to be copied to see and why". It is possible that the tribunal would today have made an "unless order", by which the respondents would be warned that unless they complied with their obligations for disclosure, their responses may be struck out. I cannot see how either response would have been struck out today, had the claimant's application been dealt with before those of the second respondent.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 17 January 2020