



EMPLOYMENT TRIBUNALS

Claimant: Miss A Bukhari

Respondent: Newday Cards Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (by CVP) **On:** 8 May 2024

Before: Employment Judge O'Neill

Appearances

For the claimant: Mr Ed Beever of Counsel

For the respondent: Ms S Tharoo

RESERVED JUDGMENT ON A PRELIMINARY POINT

The claims for Whistleblowing detriment section 47B ERA 1996 and Automatic unfair dismissal section 103 A ERA 1996 fail and are dismissed as the Claimant has failed to show that she has made a Public Interest Disclosure under S43B Employment Rights Act 1996.

Reasons

Purpose of Hearing

1. The claimant having made claims inter alia for
Whistleblowing detriment section 47B ERA 1996
Automatic unfair dismissal section 103 A ERA 1996
Victimisation section 27 Equality Act 2010

At a previous preliminary hearing on the 12th of March 2024 the matter was set down for this preliminary hearing to

- 1.1 Decide whether the claimant made protected disclosures on 12 April 2023, 19 April 2023 and 6 June 2023;
 - 1.2 If not conceded by the respondent, decide whether the claimant did a protected act within the meaning set out in section 27 of the Equality Act 2010 on 6 June 2023;
 - 1.3 Discuss the length of and fix a date for the final hearing; and
 - 1.4 Make such Case Management Orders as the Employment Judge considers appropriate.
2. The respondent in its amended grounds of resistance concedes that the claimant by raising allegations of discrimination within her grievance on or about the 6th of June 2023 took a step capable of being a protected act. However, the respondent contends that by virtue of section 27 (3) EQA 2010 this was not a protected act because the allegations were made in bad faith. Both parties were in agreement that the question of bad faith would be more appropriate for the tribunal at the final hearing.
3. At the previous preliminary hearing the following issues were identified in relation to protected disclosure to be determined today
- 3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
 - 3.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:
 - 3.1.1.1 On 12 April 2023 verbally during a Microsoft Teams call with her line manager, Francesca Rea, when she raised concerns about the respondent's decision to change its CX reporting methodology and start using automated analytics to calculate its performance statistics, which the claimant believed resulted in errors, inaccuracies and variances in the respondent's performance statistics that would be reported externally;
 - 3.1.1.2 On 19 April 2023 in an email to members of the respondent's Corporate Finance Team, when she disclosed similar concerns; and
 - 3.1.1.3 On 6 June 2023 in a grievance about the way in which the claimant says she was treated, and in which the claimant says she alleged she had been subject to unlawful discrimination?
 - 3.1.2 Did she disclose information?

3.1.3 Did she believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did she believe it tended to show that:

3.1.5.1 the respondent had failed, was failing or was likely to fail to comply with the legal obligations to which it and/or its officers were subject, namely the Financial Conduct Authority rules and regulations (including: the FCA Code of Conduct and PRIN principles for businesses); and/or

3.1.5.2 that information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Evidence

4. There was an agreed bundle of documents, paginated and indexed, of nearly 400 pages.
5. The claimant gave evidence and was cross examined, as was the respondent's director of customer services Francesca Rae. Each provided a written statement which was taken as read.
6. The parties agreed that I was not required to listen to the covert recording.
7. The claimant withdrew her request for specific disclosure.

Law

8. Section 43B ERA 1996 defines protective disclosure. It must comprise a disclosure of information which in the reasonable belief of the claimant is made in the Public Interest and shows one or more of the matters listed in section 43 B (1) a to f.
9. I note the guidance in the following cases
Cavendish Monroe Professional Risk Management Ltd v Geldald 2010 1RLR 38
Kilraine v the London Borough of Wandsworth 2018 IRLR 846
10. **Williams v Michelle Brown AM UKEAT/0044/19**. *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of*

the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Unless all five conditions are satisfied there will not be a qualifying disclosure.”

The Claimant's Case

11. The claimant relies on three disclosures
 - Disclosure A - a verbal disclosure made by telephone on the 12th of April 2023 to Ms Rae.
 - Disclosure B - An email disclosure made 19th of April 2023 to Aaron Huq, Stephen Nell and Garav Patel (Corporate Finance Team)
 - Disclosure C - A grievance raised on the 6th of June 2023 to Sanjay Sharma CEO
12. The claimant asserts that
 - the disclosures A and B contain information relating to S43B (1) (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
 - and in respect of Disclosure C that the information tending to show any matter falling within any one of the paragraphs a toe has been or is likely to be deliberately concealed.
13. The claimant argues that the respondent company is governed by the Code of Conduct set by the Financial Conduct Authority, that Ms Rae as a senior manager has a personal duty to comply with the Code but has been in breach of it because of the manner in which she has reported certain matters within the company and which reports in turn are published externally. The claimant alleges that the reported data has been dishonestly manipulated by Ms Rae.
14. The claimant argues that the fact that reports are published externally brings them into the public domain and thus if they are being compiled dishonestly that is in the public interest.
15. The claimant says that after she alerted Huq and others with her concerns about the compilation of the reports Ms Rae entered into an email correspondence with them during which she sought to conceal what she had done by dismissing it as rounding.

Findings

16. Having considered all of the evidence both oral and documentary the Tribunal makes the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider the particular matter assisted in determining the issues. Some of the

findings are also set out in the conclusions below in an attempt to avoid unnecessary repetition. Conversely, some of the conclusions are set out in the findings of fact adjacent to those findings.

17. The claimant was employed as a 'senior manager customer experience' in a team under the management of Ms Francesca Rae, the director of customer services and delivery. The respondent is a company which provides credit products to the public and is regulated by the Financial Conduct Authority (FCA).
18. Ms Rae's duties and that of her team include customer service and FCA care, complaints and fraud. She oversees the collection and analysis of data and the production of reports relating to customer satisfaction and experience. The claimant was involved in the preparation of those reports.
19. Some years ago Ms Rae introduced a computer programme (VOC) to record and analyse customer experience satisfaction. In 2022 steps were taken to introduce a new and more automated method of recording and analysing customer satisfaction data.
20. Ms Rae told me, and I accept, that the FCA does not require a company such as the respondent to conduct such work ie customer satisfaction surveys and reports. Should a company choose to do so then the FCA imposes no express rules as to how such data collection, analysis and reporting should be undertaken. It is entirely a matter for the company to determine whether to have such a programme how it should be run or its metrics calculated and reported. The FCA code was before me and I was referred by Mr Beever to a section which requires a person to act with integrity. Otherwise, I was not referred to any section which prescribed the work being done by the claimant or Ms Rae.
21. Under the respondent's system key metrics such as NES (net easy scores), and NPS (net promoter scores) are reported to the Corporate Finance Team (CFT) on a monthly basis and amongst other things included in the annual report and in a report published to the company's investors, the sustainability report.
22. The claimant joined the respondent in September 2022 on a 12 month fixed term contract to cover maternity leave. In her role she was primarily concerned with producing the NES and NPS metrics and analysing trends and producing reports under the supervision of Ms Rae. The new system the respondent intended to introduce is called Power B-1. In the months leading up to its implementation the respondent was operating the old VOC system and the new system in parallel in order to test Power B-1 against the VOC system to identify any apparent inconsistencies or variations between the data produced by the two systems and the reasons for those disparities.
23. The claimant was involved in that transitional stage, working with her then line manager Mr Baxter and a colleague Ms Hazelgrove and it was part of her role to expose and explore those variations. As might be expected when introducing a new system inconsistency between the figures produced by the old and new methods did arise but by the time the B-1 power system was ready for introduction I accept Ms Rae's evidence that the differences between the figures produced were negligible and I have seen charts to that effect.
24. The B-1 power system did not adopt exactly the same parameters as the old VOC system. Because there were changes to the basic parameters eg new starter dates for filtering the customer experience data and the transaction date,

variations were bound to follow. I find that such changes were introduced in good faith and that the claimant did not have any serious concerns about them.

25. The claimant described her first disclosure at paragraphs 35 to 37 of her statement. This was a disclosure said to be made in a telephone conversation with Ms Rae on the 12th of April 2023.

A regular part of the claimant's role included reporting to the CFT with updated data, annotated as required, after having it approved and signed off by Ms Rae. In that telephone conversation of the 12th of April 2023 the claimant says she highlighted the variances she had identified, noting that the figures using the new B-1 system would be higher for 2023 and in that respect she used the word 'inflated'. In her evidence before the tribunal the claimant suggested that such higher figures would benefit the management team bonuses and suggested that Ms Rae may have manipulated the figures for that purpose. This is not an allegation made by the claimant during her employment and is not contained in any disclosure relied on. Ms Rae doubted that it would make any significant difference to bonuses.

26. The claimant also produced an annotated slide setting out the 5 likely underlying reasons for the variances that she had found which were transmitted to the CFT in the notes.

1. Tenure based exclusions - associates who are under 40 days are not included (previously would exclude anyone reporting into Graham Whitehead)
2. Numbers are now reported from transaction date (previously reported on response received date)
3. Weightings have been applied for JLP... which are then built into the overall weighting V-one weighting for combined overall only
4. Removed fraud and disputes from JLP v all touch points for JLP (which also included in the overall score)
5. JLP data has been included from week 44 in October only (prior to PBI - manual process in Excel and data for the full month of October was included)

27. The claimant tells us that Ms Rae asked her to "Reword the commentary slightly" in the slide, although the commentary remained in full in the notes to the CFT. It was part of Ms Rae's role to oversee the production of the reports and slides, the annotations were to be overseen by her, and in the claimant's own words the amendment Ms Rae required was slight and there appears to be no hint of any concerns on the claimant's part. As the comments were included in the notes in full there appears to be no question of concealment.

28. The description provided by the claimant in her statement of the conversation with Ms Rae on the 12th of April falls short of being information and in particular information flagging up potential law breaking. The claimant herself says that at the time she "Didn't think it was much of an issue". The claimant confirms that Ms Rae agreed to the adjusted graph which the claimant says "Clearly shows the performance statistics were updated and aligned with the new automated power BI". In those circumstances her belief as to legal breach or concealment was not reasonable.

29. The description provided by the claimant of the exchange on the 12th of April 2023 does not constitute a disclosure that the respondent or Ms Rae had breached or was likely to breach a legal obligation nor does it make out what that legal obligation was.
30. Under cross examination the claimant accepted that she had no knowledge of the FCA code and had taken no steps to consider whether a breach had taken place or was likely. She relies now on an assertion that Ms Rae had acted without integrity. This appears to be a view that the claimant expressed in hindsight and not one she held as at the 12th of April 2023. Having considered the criticism now levelled by the claimant against Ms Rae I find it unreasonable of her to have concluded that this was some kind of lack of integrity when it was reasonable to expect differences between the two systems in the Transitional stage, when Ms Rae had encouraged the team including the claimant, to find those variances, when the variances and the reasons therefor were reported and explained in the notes drafted by the claimant.
31. The second disclosure the claimant relies on is said to be contained in an email dated the 19th of April 2023 to the corporate finance team. That email has not been produced. The respondents says that they have instructed their technical team to search all the possible email boxes of the claimant and of the corporate finance team members Mr Huq Mr Nell Mr Patel but that no such email has come to light
32. In the period 12th of April 2023 to the 19th of April 2023 there are many messages passing between the claimant, the CFT and Ms Rae. It begins with the preparation of the reporting slides for the monthly March report described above. Reports are sent by the claimant to the corporate finance team on the 12th and the 13th of April 2023. She highlights various comments about variances, weighting and changes in methodology. The tone and content of this exchange is businesslike and reassuring on the part of the claimant and there is nothing claimant, discernible to the effect that she has a concern about a possible breach of a legal obligation or a lack of integrity on the part of Ms Rae.
33. The exchange with the claimant prompted Mr Huq to ask for comparative figures for 2022 which the claimant produced, to the apparent irritation of Ms Rae. She considered that this was unnecessary and had diverted the claimant from the priorities Ms Rae has set as her manager. This led to an instruction to the claimant that all communications with the CFT should go through Ms Rae and Ms Rae similarly reinforced this procedure with the CFT and went on to meet with them to explain the new system, the variances and their causes.
34. Notwithstanding the instruction the claimant emailed Mr Huq on the 19th of April in the following terms
“ Hi guys, please ignore the stats below – Fran doesn’t want the 2022 numbers to be changed in any way they need to remain the same as they were reported externally. She is happy for 2023 to be updated as per the new methodology. The group table we agreed will need to remain the same to ensure consistency with what was reported externally in 2022 therefore the numbers below are not correct so please do not use them.”
35. Had the claimants had a concern at that point about the likelihood of a legal breach or any concealment by Ms Rae then it would have been logical to have

included it in that email of 19 April 2023, whereas there is not a hint of any criticism of Ms Rae or any concerns of the claimant in that email or any that had gone before and nothing to suggest the existence of a missing email. The chain does not come across as building up to a PID it is business like and ordinary. In the circumstances I infer that the claimant, who I found to be an earnest witness, misremembers and there was no separate email of the 19th of April 2023 containing words which might constitute a public interest disclosure.

36. On the 19th of April 2023 MS Rae and the claimant had a telephone conversation in which Ms Rae expressed her displeasure about the fact that the claimant had recalculated the 2022 figures and had entered into direct discussions with the CFT without going through herself. Ms Rae was then away on annual leave but on her return on the 15th of May 2023 she had a further telephone conversation with the claimant which did not go well. The claimant then went off sick and remained off sick until her dismissal on the 30th of June 2023.
37. A meeting was arranged for the 6th of June 2023 to discuss the early termination of the claimant's fixed term contract (according to the respondents, by reason of reorganisation but I make no finding about that today). The claimant lodged a grievance on the 6th of June 2023 and asked that her meeting be deferred until the completion of the grievance. The Meeting took place on the 30th of June 2023 and the contract was terminated.
38. The claimant relies on her grievance letter of the 6th of June 2023 as the third disclosure. In the grievance she claims that performance data was being manipulated due to changes in calculation.
Under a heading of key points and a subheading whistleblowing there is some reference but no clear statement as to what the disclosure is said to be, specifically what has been done when and by whom which may be breaking the law or concealing the breach. There is a reference to rounding. The claimant says "there are so many new calculations that have been built by Claire Hazelgrove following Fran's direction and request which is pure manipulation of data and not just automation and a clear difference in how we report our data in 2023 V 2022 in some places inflating the performance" but no specification is given.
39. She gives as examples of changes to calculations "weightings being applied to JLP, AO which are then added to overall weighting in power B automation. Removed fraud and disputes from JL, JLP data has only been included from week 44 in October 2022. Changes to tenure based exclusions, changes to numbers being reported by transaction date v first response dateI highlighted these changes in March 2023 monthly VOC report in the notes.
40. The grievance is unclear as to precisely what is alleged to have been done which amounts to a breach of a legal obligation and what that legal obligation is. There is no mention of the FCA for example. I find at best it refers the same matters as allegedly raised as PIDs on the 12th of April and the 19th of April set out above.
41. The claimant says that after she alerted Mr Huq and others with her concerns about the compilation of the reports, Ms Rae entered into an email correspondence with them during which she sought to conceal what she had done by dismissing it as rounding.

I accept the evidence of Ms Rae to the effect that rounding was an inappropriate word to have used in the email to the CFT of 19 April 2023 and what she really meant to say was that the differences fell within small margins and were negligible, schedules have been produced before me to demonstrate that. This was a sloppy use of English but I do not find that it evidences more than that. Given all the other information Ms Rae authorised to be sent to the CFT about the transition and the differences between the two systems and the anomalies I find it improbable that she was seeking to conceal anything.

42. In the grievance the claimant says

‘She (Ms Rae) advised no one else needed to know that we had changed the way we report hence why she told the commercial team it’s a rounding of numbers’.

Given that the claimant herself in the grievance acknowledges that Ms Rae had signed off and approved the updated graph, the slides and notes prepared by the claimant which had highlighted the variances and some of the reasons therefor, then I find it is not a reasonable belief on the part of the claimant that Ms Rae was seeking to conceal the changes, the CFT were expressly informed of the changes and their effect and it flies in the face of the facts to suggest concealment.

Conclusions

1. The claimant relies on three disclosures
 - Disclosure A - a verbal disclosure made by telephone on the 12th of April 2023 to Ms Rae.
 - Disclosure B - An email disclosure made of the 19th of April 2023 to Aaron Huq, Stephen Nell and Garav Patel (Corporate Finance Team)
 - Disclosure C - A grievance raised on the 6th of June 2023 to Sanjay Sharma CEO

Disclosure A

2. Disclosure A – what did the claimant say to Ms Rae on 12 April.2023

I was directed to paragraph 37 of the claimant’s statement to identify what was said to Ms Ray by way of a disclosure.

It was part of the claimant’s job in the transition between the old VOC system and the new B-1 power system to identify the disparities if any between the two systems and the data they produced and identify the reasons therefor. In this she was encouraged by Ms Rae who on the 12th of April 2023 signed off her work and her reports, making only a minor alteration to the wording the claimant proposed and the more detailed comments she made were included in the notes. At the time the claimant did not think it was much of an issue.

From paragraph 37 I can discern nothing which would amount to a disclosure under section 43 B. The conversation described by the claimant with her manager on the 12th of April 2023 appears to me to be no more than an ordinary exchange between an employee working on a transitional scheme and her manager, pointing out the variances as she was expected to do. There was not enough information pointing to a failure of a legal obligation to amount to a PID.

3. I accept that the FCA does not require a company such as the respondent to conduct such work ie customer satisfaction surveys and reports. Should a company choose to do so then the FCA imposes no express rules as to how such data collection, analysis and reporting should be undertaken. The FCA code was before me and I was referred by Mr Beever to a section which requires a person to act with integrity. I was not referred to any other section which prescribes the work being done by the claimant or Ms Rae. In the circumstances I conclude that there was no legal obligation likely to be breached under the FCA code.
4. The claimant believed that the FCA code applied to their work but I conclude that this belief was unreasonably held in that she accepted under cross examination that she did not know anything about the FCA code and had taken no steps to investigate the code and consider the position carefully.
5. The F C A Code requires senior managers in the financial sector such as the respondent business to act with integrity. Given the nature of the exchange between the claimant and Ms Rae on the 12th of April 2023 and given the claimants own statement that at the time she did not think it much of an issue, given the fact that Ms Rae signed off the material produced by the claimant for onward transmission to the CFT then I consider it doubtful that the claimant had a genuine belief that Ms Rae lacked integrity and if she did I conclude it was not a reasonable belief.
6. In the circumstances I conclude that there was no PID made on 12 April 2023 in a telephone conversation between the claimant and Ms Rae.

Disclosure B

7. Disclosure B - An email disclosure made 19th of April 2023 to Aaron Huq, Stephen Nell and Garav Patel (Corporate Finance Team). What did C say in the email.

That email has not been produced. The respondents says that they have instructed their technical team to search all the possible email boxes of the claimant and of the corporate finance team members Mr Huq, Mr Nell, Mr Patel but that no such email has come to light.

There is an email chain from the 12 April 2023 to the 19th of April 2023 between the Claimant, Ms Rae and the CFT including an Email from the claimant to the CFT of the 19th April 2023 the contents of which are set out above.

There is not a hint of any criticism of Ms Rae or any concerns of the claimant in that email chain, no suggestion of a legal breach and nothing to suggest the existence of a missing email. The chain does not come across as building up to a PID it comes across as an ordinary exchange in the course of business.

In the circumstances I infer that the claimant, misremembers and there was no separate email of the 19th of April 2023 containing words which might constitute a public interest disclosure.

Further in none of the emails in the chain does the Claimant make a disclosure suggesting a likely legal breach and or a failure of integrity on the part of Ms Rae or that she is covering up the legal breach.

8. In the circumstances I conclude that there was no PID made on 19 April 2023 by email to the CFT.

Disclosure C

9. Disclosure C - A grievance raised on the 6th of June 2023 to Sanjay Sharma CEO. The claimant says that after she alerted Mr Huq and others with her concerns about the compilation of the reports Ms Rae entered into an email correspondence with them during which she sought to conceal what she had done by dismissing it as rounding.

I accept the evidence of Ms Rae to the effect that rounding was an inappropriate word to have used in the email to the CFT of 19 April 2023. This was a sloppy use of English but I do not find that it evidences more than that given all the other information sent to the CFT about the transition and the differences between the two systems and the anomalies.

10. I find it is not a reasonable belief on the part of the claimant that Ms Rae was seeking to conceal the changes, the CFT were being expressly informed of the changes, and their effect among other ways in documents prepared by the claimant, and it flies in the face of the facts to suggest concealment.
11. In the circumstances I conclude that there was no PID made on 6 June 2023 in the Claimants grievance letter.

Case Number: 1808549/2023

21 May 2024

Employment Judge O'Neill