



EMPLOYMENT TRIBUNALS

Claimant: Mr C Tilson
Respondent: Financial Ombudsman Service
Heard at: East London Hearing Centre
On: 18, 19 and 20 September 2024
Before: Employment Judge Gardiner
Members: Mr J Hutchings
Mr L O'Callaghan

Representation

Claimant: Mr I Wright, counsel
Respondent: Mr R Hignett, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's complaint of suffered a detriment on the ground that he had made a protected disclosure, under Section 47B Employment Rights Act 1996, is not well founded. It is accordingly dismissed.

REASONS

1. The Claimant, Mr Tilson, complains about the decision to refuse him an interview for a fee paid role as an Associate Ombudsman with the Respondent, the Financial Ombudsman Service Limited. His case is that this refusal was detrimental treatment on the grounds that he had previously made protected disclosures.
2. The Final Hearing has taken place over three days. Both parties have been represented by counsel. The issues to be decided are contained in the order of Employment Judge Moor, who conducted a case management hearing in November 2022. At the outset of this hearing, the particular legal obligations on which the Claimant relies were clarified. Mr Hignett, counsel for the Respondent, had prepared

a Skeleton Argument as well as a Cast List and Chronology. The Claimant confirmed that he agreed with the contents of this document.

3. The documents were contained in an agreed bundle of documents. At the start of the hearing, this comprised 368 pages. Four further pages were added on the first day. Witness evidence was given by the following witnesses – the Claimant gave evidence and called evidence from Mr Raymond Neighbour, a former ombudsman, working in the same transition team as the Claimant. The Respondent’s evidence came from Mr Paul Mills, who had responsibility for the Respondent’s whistleblowing scheme; Mr Paul Douglas, who was the Claimant’s line manager and Ms Zoe Kearns, Employee Relations Partner.
4. At the conclusion of the case, Mr Wright, counsel for the Claimant, sent in a written Closing Submission. Both parties made oral closing submissions. As it was indicated that the Claimant would be asking for written reasons regardless of the outcome, the Tribunal took the remainder of the third day to deliberate and reach its conclusions. There was insufficient time to announce the Judgment with oral Reasons before the end of the three-day listing.

Findings of fact

5. The Claimant had previously been employed by the Respondent or its predecessors since August 1989. He had worked for 31 years, latterly as a Senior Ombudsman. He had held this role for five years until he accepted voluntary redundancy from 31 August 2020.
6. In 2019 and 2020, the Respondent had a disciplinary procedure applicable to the Claimant and to all other employees. This set out examples of misconduct. These included “serious discourtesy to employees, suppliers or customers” and “wilfully or negligently causing harm or injury to another employee, client, customer or visitor, physical violence, assault, fighting, bullying or grossly offensive, threatening, abusive or aggressive behaviour or language.” It provided that a formal written warning would be held on the employee file for 6 months. It then added:

“A live warning has an impact on any collective reward scheme (CRS) payment, your performance rating and excludes you from being considered for any advertised internal job roles. If, shortly after a warning is served you are absent from work for a considerable amount of time, the date the warning is effective from will be reset on your return to work.”
7. The Respondent also had a Speak Up Policy which encourages employees to raise any concerns that they have about wrongdoing within the organisation. That can either be done by speaking to their line manager or another manager, or through a confidential helpline, called Safecall.
8. During 2019 and 2020, the Respondent’s document retention practice was that all emails were automatically deleted after two years, unless moved to a separate folder in order to be saved for a longer period.

9. The Claimant's original case as identified in the List of Issues was that he made four written protected disclosures between January and March 2020. In the course of evidence it transpired that one of the disclosures alleged to have taken place in January 2020 was in fact an email originally sent in October 2019. These disclosures were made by email to his line manager rather than through the confidential helpline. They were not identified at the time as whistleblowing disclosures.
10. The Claimant argues that it was these communications that had at least a material influence on the decision to deny him an interview when he subsequently applied for the Associate Ombudsman role. The Respondent accepts that the decision was taken based on an aspect of his previous employment, but disputes that it had anything to do with these emails. On 30 April 2020, four months before the end of his employment, he received a written warning for misconduct. It was this warning that, on the Respondent's case, was the entire reason why his application was refused before the interview stage.
11. The Respondent denies that the communications relied on by the Claimant were qualifying disclosures. Further, it denies that these communications had anything to do with the rejection of his Associate Ombudsman application in 2022.
12. The Financial Ombudsman Service was established by the FSMA 2000. It enables consumers impacted by the conduct of financial organisations to challenge the decisions taken by bringing a complaint to the Respondent. Two particular statutory provisions have been referred to in the course of this case as the legal obligations to which the alleged protected disclosures related. The first is Section 225(1). This is the first section which sets out the provisions concerning the creation of a Financial Ombudsman. It provides for a scheme to be established under which certain disputes may be resolved "quickly and with minimum formality by an independent person". The second is Section 228(2) which provides as follows:
 - (2) A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.
13. The operation of the scheme as it applied in 2019 was summarised in the following way in a written submission from Caroline Wayman, Chief Ombudsman, to the Treasury Select Committee on 20 March 2018:

"More broadly, our case-handling process itself provides for a series of checks and balances. As a first step, our casehandlers listen to both sides, carefully weigh up the facts and evidence, and suggest a fair way forward. If we think the consumer has been treated unfairly, then we will tell the business to put things right. But if either side disagrees with this initial view, then they have the right to ask for everything to be reviewed afresh by an ombudsman who will make the final decision."
14. Ombudsmen were expected to publish their decisions within a standard timescale as provided in management guidance. The timescale given by the Claimant in oral evidence was within four weeks from when the papers were first sent to the Ombudsman for decision, although we have not been taken to any particular document to confirm this.

15. If an Ombudsman considered that a casehandler (referred to the parties in the evidence as an ‘investigator’) had carried out an insufficient investigation, it was open to the Ombudsman to send the case back to the investigator for further investigation. If an Ombudsman disagreed with the view formed by the investigator, they were expected to issue a preliminary decision. This allowed the parties to provide their comments before a final decision was taken. There are other circumstances in which an Ombudsman may take a preliminary decision. This might be in complex cases where there is insufficient information; it might be in high profile cases where legal submissions can be invited on the proposed outcome; or in cases where the law is uncertain, and this additional step may avoid the need for a judicial review to challenge the final decision. Judicial review is the only route by which an Ombudsman’s final decision can be challenged.
16. Because of the various different situations explaining why an Ombudsman might issue a preliminary decision, we do not accept that it is possible to draw any automatic conclusions about the standard of the investigators’ work from changes in the percentage of cases where a preliminary decision was issued.
17. Until about 2015, the role now carried out by investigators was performed by adjudicators. They were specialised in a particular type of financial complaint, for example in banking, insurance or pension disputes. Thereafter the Respondent decided that their function should be performed by ‘investigators’ rather than ‘adjudicators’. Investigators should be trained in a wide range of disputes between consumers and financial organisations. Over the next four years, adjudicators were replaced by investigators so that this function was performed by generalists rather than specialists.
18. There was also a change in the role previously performed by Ombudsmen. Under the new scheme, they were expected to manage the investigators and had a hybrid role which was part manager and part decision maker. They were referred to as Ombudsmen Managers. There was a transition period from around 2016 onwards when Ombudsmen applied for the new role of Ombudsmen Managers and started their new role. By late 2019, there were around 36 Ombudsmen who continued to work in what was referred to as the transition team. They continued to work under the old system with their role predominantly being decision maker, rather than as a manager of the investigators. However, the decisions taken by Ombudsmen in the transition team were decisions in cases where a view had already been provided by an investigator who was a generalist, expected to investigate a wide variety of different cases. The Claimant and two other Senior Ombudsmen managed around 12 Ombudsmen each who remained in the transition team. The two other Senior Ombudsmen were John Withington and Greg Barham. These three Senior Ombudsmen were in turn managed by Paul Douglas, who had the role of Interim Director.
19. The size of the transition team was described in evidence by Mr Douglas as ‘minute’ in comparison to the total number of ombudsmen working in the Respondent. The Tribunal has been taken to a page of the Respondent’s annual report which noted that in 2019 there were 359 ombudsmen and in 2020 it was 381 ombudsmen. It contained between 5 and 10% of the total number of ombudsmen working within the Respondent.

20. The wisdom of this reorganisation was not universally accepted. Increasingly, ombudsmen were required to make decisions in cases where the investigator was a generalist rather than a subject specialist. It was accepted by both sides that there were concerns amongst management about the quality of the investigators' views. The Claimant accepted that there were no concerns about the quality of the final decisions made by ombudsmen. The Claimant's case is that his qualifying disclosures were concerned with these transition arrangements. He contends that he reasonably believed that the information he was disclosing in his emails was a breach of Section 228(2).
21. On 10 October 2019, the Claimant emailed Paul Douglas, and his two fellow Senior Ombudsmen. In the List of Issues, this is referred to as the second alleged protected disclosure, although it is the first in time. It was worded as follows:

"Finally, after 4 goes, some usable data.

You can see some variations between ombudsmen year to year but some people's case mix will have changed, so I wouldn't use that as the basis for anything.

If you look at the cast type variation for the largest 5 groups you can see the following:

Case type	PD rate 2015/16	PD rate 2019/20
Admin	9.34%	19.42%
Advice	11.74%	22.14%
Sale	16.52%	37.70%
Claims	15.46%	25.38%
Mis-sale	V39%	16.36%

You can see that 3 have doubled, one has gone up by 60%, whilst the other has dropped 1%,

If you look at the summary on the complaint type totals you can see the PD rate is -

2015/16 - 13.86%
2016/17 - 12.93%
2017/18 - 14.23%
2018/19 - 14.29%
2019/20 - 21.02%

So that's a 50% increase this year, which might explain why so many people are off target. Looking for a deeper explanation as many of our cases are already 'old' I do wonder if this ties up with the expansion of"

22. The contents of the email continued onto at least one more printed page. That page was not before the Tribunal. The Claimant's evidence was that he no longer had that

page. Given that all emails on the Respondent's system are deleted after two years unless otherwise saved, the Respondent no longer has access to emails from 2020. As a result, the Tribunal has only been provided with an incomplete version of this document. No further factual findings can be made as to the contents of the second page.

23. The reference in the email to "PD" is to cases where there has been a provisional decision.
24. At the end of 2019, the Claimant raised the possibility of voluntary redundancy with Mr Douglas. Shortly after he first raised the issue, he decided not to pursue it at that point.
25. On 10 January 2020, John Withington sent an email to Paul Douglas. This is the second alleged protected disclosure in time, although the first alleged protected disclosure in the List of Issues. It was copied to the Claimant and to Greg Barham. The Claimant's case is that it represented the views of all three of the Senior Ombudsmen that were still working as part of the old regime. It is argued that this was effectively a joint email and that the Claimant was one of the authors. It was worded as follows:

"Just had an exchange with one of my omb about cases coming out of queue. She had to send 2 of 5 new ones back (see below). Second one needed full review of file to get to the point of sending back. These are fairly routine examples of investigator work, neither is old as only recently been put into decision queue. They're basic errors that could and should be eradicated by now.

The most common theme we're seeing, and most easily addressed, seems to be new information not being shared with parties. Investigators are routinely (and I do mean the word) ignoring new evidence and sending cases into the queue to get rid of them. You'll know that this is typical behaviour in environments where the focus is substantially on one measure of throughput without an appropriate weighting of focus on outcomes. All of the ombudsmen are seeing this behaviour and it's becoming a running joke. On Tuesday, two ombudsman near me had similar scenarios. One said to me "what should you do if " and described the situation facing the investigator. Before he could finish another sitting by me said "chuck it in the queue?". He was right!

Someone really has got to get to grips with this.

All we can do is flag them for others but I thought you'd find it helpful to have some examples should the opportunity to input arise."

26. In mid-January 2020, the Claimant happened to be speaking to Michael Fisher, Head of Quality and Risk. They discussed the standard of casework by investigators. Mr Fisher asked him to send him 50 examples. He contacted the 36 ombudsmen in the transition team and asked them to supply a short paragraph on two cases each. He received around 50 examples, including two cases supplied by Mr Neighbour. This he collated into a 200 line word document which he emailed to Mr Fisher, and copied

his email to Paul Douglas. This email forms the third alleged protected disclosure in the List of Issues.

27. This is what his email said:

“Michael, here’s 50 cases. Apologies for the mix of styles and the cut and paste nature of the document.

You will see some examples of poor work and cases that really shouldn’t have been in the queue. Equally there are a few listed that don’t seem that bad, but I asked the ombudsmen to pick their own examples. And if you could ignore some of the more emotive language, the issue clearly concerns some people a lot.

Chris”

28. The email attached a word document containing three or four lines of commentary about 50 cases. That word document was not included in the bundle of documents. This is because the Respondent no longer has access to the electronic version of this email, as it was sent more than two years ago. It had been printed by the Claimant during his employment and the printed version was returned to him when the contents of his locker were emptied. He had not printed a copy of the attachment. His witness statement does not detail the comments made on any of the cases. The witness statement from Mr Neighbour does not provide any detail either. Neither Mr Neighbour nor the Claimant could recall the specific detail that was included in the attachment when giving their oral evidence. As a result, whilst the email refers to “examples of poor work and cases that really shouldn’t have been in the queue”, the Tribunal does not have any detail about this work, and therefore cannot make detailed factual findings about any poor work.

29. At the start of the year, the Claimant had concerns about the performance of one of the members of his team, MO. Without consulting HR, he placed MO on a 4 weeklong Performance Improvement Plan. This was not in accordance with standard practice, which was that Performance Improvement Plans should last for 12 weeks. As a result, HR advised that the Performance Improvement Plan should be rewritten. A meeting was organised for 4 March 2020 to reconsider this PIP. It was attended by the Claimant, by MO and by Zoe Kearns from HR. During the discussion at the meeting, Ms Kearns observed the Claimant losing his temper and shouting at MO. The Claimant disputes that he lost his temper. He says that he forcibly made his points to MO because he was not getting the message.

30. We do not need to decide whether he lost his temper and was shouting at MO for the purposes of the Claimant’s Tribunal claim.

31. In February 2020, one of the ombudsmen working in the transition area, known as G, raised a number of concerns through the Speak Up Policy. These concerns related to how the work was being handled in the transition area and how people were being managed. He said that he was raising wider concerns that were shared by other ombudsmen. He used language such as mistreatment, bullying and age discrimination, saying that staff were stressed and working long hours. Paul Mills

started looking into the issues that he was raising. His ongoing investigation was delayed by the national lockdown in response to the Coronavirus Pandemic.

32. On 11 March 2020, the Claimant sent the following email to Mr Douglas. This is the fourth alleged protected disclosure:

“Paul, I have received another statement from 25 ombudsmen (I assume it's the same 25, I don't know for sure) They don't seem to have copied in they did last time. I've told the ones I know I will pass this on, but after this they need to find some other channel, either direct to you or via HR or via the whistle blowing service, as I don't think it's fair me being used for this any further.

Chris”

33. The same day, Paul Douglas sent the following response:

“Chris,

Thanks, The statement is addressed to me and I guess the reason it is going through you is they trust you will maintain their anonymity which is important to them and I or perhaps they think you are sympathetic.

My answer to the group is:

A - further meetings are being set up to answer any questions or concerns
B - they can speak to me and I have available slots in diary to make that easier
C - the approach being used is to raise the same concerns / issues via a number of different routes (with me (via you), the ICC (who I have met with and answered questions on most of concerns in statement), the CEO and HR (without me) and I suggest they stop this scatter gun approach as it is unhelpful and either follow hr grievance advice, speak to me or go through just one route which as they want anonymity is the ICC

My answer to you is you:

- tell them A, B, C above

- also tell them how you feel and ask them to stop using you as a communications conduit

I hope this helps and happy to discuss further before or after today's team meeting.

Thanks

Paul”

34. ICC stands for the Information and Consultation Council, which is a staff body representing the interests of employees, in circumstances where employees were not members of trade unions.

35. Although the Claimant's email of 11 March 2020 was in the bundle, the statement from 25 ombudsmen that was attached to the email was not included. This was

because the Respondent no longer has access to the electronic version of this email. The Claimant had printed a copy of this email which was returned to him when he was sent the contents of his locker. He had not printed a copy of the attachment.

36. As can be seen from Mr Douglas' response, he was concerned to receive a statement from 25 ombudsmen in this way. He decided to discuss this statement with Caroline Nugent, the HR Director. We accept his evidence that he did not name the Claimant as the person who had forwarded the statement to him. We accept this because the Claimant had made it clear in the email that he did not want to get involved himself in taking this issue any further.
37. In none of the alleged protected disclosures was any information provided about the proportion of those views reached by investigators that were successfully reviewed by an Ombudsman. Neither the Claimant nor Mr Neighbour had any concerns about the quality of the ombudsmen's final decisions. At no point did the Claimant specifically comment in his protected disclosure emails on the quality of those views reached by investigators that were never reviewed by ombudsmen. The theme if there is one in the four emails appears more about the dissatisfaction of his team members with their workload, targets and duties, rather than the implications for members of the public.
38. On 27 April 2020, the Claimant had his annual appraisal. A written record of the annual appraisal was placed on the Claimant's personnel file. This document is still available because HR records are retained for six years.
39. On 30 April 2020, the Claimant attended a disciplinary hearing to consider whether the Claimant's conduct during the meeting on 4 March 2020 amounted to misconduct. It was conducted by Marcus Brissenden. Written evidence was provided by Miss Kearns as to her recollection of that meeting. The outcome of the disciplinary hearing was that the Claimant's behaviour during the meeting on 4 March 2020 was held to be misconduct.
40. The disciplinary outcome letter was sent to him on 6 May 2020. Mr Brissenden wrote that his actions amounted to conduct towards MO which was unprofessional and aggressive and caused distress. The outcome letter included the following words, which we accept was standard HR wording included in all disciplinary outcome letters where a formal warning has been issued:

"We'll put this warning on your employee file, but will disregard it for disciplinary purposes after 29 October 2020, as long as there's no further misconduct within that time.

This may affect your appraisal rating and you won't be eligible to receive the collective reward scheme while your disciplinary warning is live. Please read our appraisal guide and guidance on CRS on myHR for more details."
41. The Claimant chose not to appeal against this disciplinary sanction. His explanation for not appealing was that he was expecting that the transition team would be shortly disbanded, given what he had already been told about the proposed end date for the transition arrangements. It is not suggested by the Claimant that the disciplinary sanction was influenced by any previous protected disclosures.

42. As a result of the ongoing reorganisation of the Ombudsman Service, the Claimant had been advised in January 2020 that on present plans, the transition team in which he was currently working was due to close in June 2020. As a result, it was likely that he would be made redundant.
43. Both Mr Withington and Mr Barham accepted voluntary redundancy and left the Respondent at some point in the first half of 2020. In Mr Withington's case he accepted an enhanced redundancy payment that prevented him from returning to work for the Respondent within a period of 12 months. Mr Barham did not accept enhanced redundancy, but ordinary redundancy. As a result, there was no restriction on when he could apply for further work with the Respondent.
44. The Claimant chose to take enhanced voluntary redundancy on the same basis as Mr Withington. His last date of employment was 31 August 2020. He was paid for 12 weeks' notice in lieu of working his notice. As part of his termination, he accepted he would not be engaged by the Respondent for a period of 12 months.
45. In the second half of 2020, Mr Mills resumed his investigation into the concerns that had been raised by G. His analysis was that they covered two issues – concerns about the quality or outcomes of cases in the transition area and about management within the transition area. He analysed and compared decision outcome across the service; reviewed performance data; and interviewed a number of colleagues to obtain clarification. His review was finalised in October 2020 and he produced a report setting out his findings to the Audit Committee on 8 February 2021. The report identified areas where there were valid concerns, although noted that there were controls already in place to compensate.
46. Before the Claimant's employment ended, he had a conversation with Mr Douglas about his plan to return in an Associate Ombudsman role. Ombudsmen who have previously been employed by the Respondent are eligible to apply to the Respondent for the Associate Ombudsman role unless there any time restrictions on doing so as a result of their redundancy arrangements. It was quite common for Ombudsmen to apply for Associate Ombudsmen roles following the end of their employment.
47. Having waited the 12 months required by his redundancy package, in March 2022 the Claimant applied for an Associate Ombudsman role working with the Respondent. Associate Ombudsmen are fee paid self-employed contractors, who are appointed on a three-year contract and who are offered work as the need arises. There is no minimum level of work guaranteed.
48. All applications are subjected to satisfactory background checks. An approach was made to Mr Douglas to ask him for his views as to the Claimant's ability to perform the Associate Ombudsman role. He gave a favourable assessment of the Claimant's ability to undertake the role. He did not mention at the time of this assessment that the Claimant had been issued with a formal warning. He would have no reason to refer to the communications relied on as protected disclosures. Having heard his evidence, we do not find that he did so.
49. As part of the background checks, it is routine practice for the Respondent to check its databases for information about applicants who had previously been employed by

the Respondent. This is done on receipt of the application and before any decisions are taken as to whether to invite the candidate for interview. This practice is not documented in any written policy before the Tribunal. As a result, it is not widely communicated to the Respondent's employees. It was not a practice that the Claimant knew about at the time he was issued with a written warning.

50. The HR check made in the Claimant's case noted that the Claimant had a previous disciplinary warning. The Respondent's practice at that point was not to progress an application from a former employee who had a warning recorded on their file, even if it was not a current warning.
51. The Claimant was unaware of this practice.
52. The issue was escalated to Caroline Nugent, the Chief People Officer. The Respondent's case is that she decided that the previous disciplinary warning meant that the Claimant was not suitable to be appointed to the Associate Ombudsman role. Ms Nugent is no longer an employee of the Respondent. She has not given evidence. We were told she was quite unwell when she left the Respondent's employment, and a decision was taken not to approach her in relation to her involvement in this issue.
53. Evidence as to Ms Nugent's involvement was given by Ms Kearns, who is an Employee Relations Partner who was working in the Respondent's HR Team at the time of the Claimant's application for the role. She recalls overhearing a discussion with her colleague, John Upsdale, in which the Claimant's candidacy was discussed. There are no documents evidencing Ms Nugent's involvement.
54. On 22 March 2022, the Claimant was sent an email informing him that his application had been rejected. It was written by Lucy Dobbie, who was a recruitment partner dealing with the recruitment exercise. The reason given was as follows:

"Thank you for making your application to the Associate Ombudsman role that we are currently recruiting for. We have taken time to carefully review your application and complete the relevant checks and balances that we carry out for all internal and ex-internal employees. Your employment file states that you left us with a live warning. Unfortunately, our min criteria does stipulate the following: Able to start providing your services as soon as possible (subject to satisfactory background, referencing and any relevant internal HR checks). On this basis we will not be able to consider your application any further."
55. In her evidence, Ms Kearns accepted that the wording of this email was not accurate. The warning that the Claimant had been given on 30 April 2020, as confirmed in the disciplinary outcome letter on 6 May 2020, lapsed when the Claimant's employment ended. She did not seek to argue that it was still a live warning when the Claimant applied for the Associate Ombudsman role.
56. When a decision is taken to reject an applicant for an Associate Ombudsman role, this would normally be recorded on a timeline prepared by the recruitment team. This would record the reason why the applicant was rejected. For whatever reason, this timeline document applicable to the Claimant was not disclosed here.

57. The Claimant responded to this rejection email on 23 March 2022. His email was worded as follows:

“Hello. I wonder if you could clarify this. My warning was time limited to September 2020, as confirmed by HR and Paul Douglas (my manager at the time). This wasn't dependent on my not leaving for an unconnected matter (FOS making me redundant), so that warning has expired. Are you are now saying that my redundancy in effect means I can never be employed by FOS again ? I feel this should have been included in the redundancy information you passed my employment lawyer, particularly as you paid me in lieu of notice, a time period that took me past the warning expiry. I would add I discussed coming back as an AO then with Paul and HR and this was not mentioned as a problem at all.”

58. From the Claimant's point of view, there was a delay of almost seven weeks in replying to this query. The delay is explained by the Respondent's evidence. Lucy Dobbie was not called to give evidence even though she is still employed by the Respondent.

59. A further email was sent to the Claimant on 12 May 2022 which was worded as follows:

“Hi Chris,

Thank you for your email.

When an ex-employee applies for a position within the financial ombudsman, we conduct the relevant internal checks which include reasons for leaving, appraisal ratings, disciplinary/capability warnings for example.

As you're aware, when you left us in September 2020, this was because of redundancy. Your redundancy is not the reason that we're not proceeding with your application for the associate ombudsman role, but because you were issued with a disciplinary warning. As a result, I'm afraid you don't meet the minimum criteria for the role. This information is kept on record for 6 years. After this period, it will be removed from your record.

I appreciate that this is not the outcome you were hoping for, but the decision has been made.”

60. This email had been drafted by Mr John Upsdale. He was the ER Partner who was involved in advising on the rejection of the Claimant's application. He also was not called by the Respondent to give evidence. As indicated in the communication, the practical effect of the Claimant's formal warning is that it would be a bar to his engagement as an Associate Ombudsman for a six-year period from the date on which it was issued.

61. The evidence is unsatisfactory as to the process by which the Claimant was refused an interview for the Associate Ombudsman role. There is no documented evidence showing how the decision was reached apart from the letters that were sent to the Claimant. The Respondent accepted during the course of the oral evidence that the

decision ought to have been recorded on a timeline which would have identified the decision maker and the reason for the decision. It cannot explain why this document has not been produced to the Tribunal as part of disclosure. The explanation given to the Claimant in the letter, namely that he was subject to a live warning, was not an explanation that was maintained by Ms Kearns in oral evidence.

62. On 19 June 2022, the Claimant contacted ACAS to request Early Conciliation. On 4 July ACAS issued an Early Conciliation Certificate.

63. When the Claimant issued his Tribunal claim on 19 July 2022, he alleged that he was claiming a remedy for whistleblowing. At that point, he was representing himself. He did not set out the particular legal basis on which he contended he had made protected disclosures. This was addressed during the Preliminary Hearing conducted by Employment Judge Moor on 25 November 2022. The Claimant represented himself during that hearing. He clarified that he was relying on four protected disclosures, which were itemised at paragraphs 1.1 to 1.4 of the List of Issues in her record of the Preliminary Hearing. He identified that his belief that the information disclosed tended to show a breach of a legal obligation in the following terms:

“the Respondent had failed, was failing or was likely to fail to comply with a legal obligation to make correct decisions and/or not ignore evidence because such decisions are legally binding unless judicially reviewed”

64. For the first time, shortly before the scheduled start of the Final Hearing timetabled to start in March 2024, the Claimant explained his belief was that his disclosures tended to show a breach of the legal obligation imposed by Section 225(1) Financial Services and Markets Act 2000, namely that a scheme should be established under which certain disputes may be resolved “quickly and with minimum formality” by an independent person. In addition, he relied on the legal obligation imposed by Section 228(2) Financial Services and Markets Act 2000 that a complaint is to be determined in a way “that in the opinion of the ombudsman, fair and reasonable in the circumstances of the case”.

65. At the start of the Final Hearing, the Tribunal decided that this was not an amendment to the case as it had originally been presented. Rather it was a clarification of the particular legal obligations on which the Claimant was relying for his protected disclosure detriment claim.

Applicable law

66. Section 48(1A) Employment Rights Act 1996 entitles a worker or former worker to present an employment tribunal complaint that he has been subjected to a detriment in contravention of Section 47B. The Tribunal has jurisdiction to hear a complaint of post termination detriment based on a disclosure made during employment (*Woodward v Abbey National plc* [2006] IRLR 677).

67. Section 47B provides a right not to be subject to a detriment by an employer on the ground that the worker has made a protected disclosure. A protected disclosure is a qualifying disclosure made in accordance with Section 43C – 43H. Here the alleged

disclosures were made to the Respondent as his former employer. Therefore, if they were qualifying disclosures, they were protected disclosures.

68. Section 43B defines qualifying disclosures as follows:

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, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) 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, is being or is likely to be deliberately concealed.

69. As was made clear in *Williams v Michelle Brown AM* UKEAT/0044/19/OO, there are essentially five separate requirements that need to be met for a qualifying disclosure:

a. There must be a disclosure of information;

b. The worker must believe that the disclosure is made in the public interest;

c. If the worker does hold such a belief, it must be reasonably held.

d. The worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f).

e. If the worker does hold such a belief, it must be reasonably held.

70. To be a disclosure of information, the information must be information which in the claimant’s reasonable belief tends to show that a person has failed or is likely to fail to comply with any legal obligation to which it is subject. This means that the information has to have “sufficient factual content and specificity such as is capable of tending to show one of the matters listed in Section 43B(1)” (*Kilraine v London Borough of Wandsworth* EWCA Civ 1436 at paragraph 35). This is a matter for the evaluative judgment of the tribunal in the light of all the facts of the case.

71. The worker must have both the belief that the disclosure is made in the public interest and the belief that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) at the time that the disclosure is made. These are subjective

questions. Whether these were reasonable beliefs in an objective question to be answered in the light of all relevant evidence. This can include matters that were not in the worker's head at the time of the disclosure.

72. A belief can be a reasonable belief even if it is incorrect (*Babula v Waltham Forest College* [2007] EWCA Civ 174). The reasonableness of the belief is to be judged by the information that would be available to a Senior Ombudsman at the time of the disclosure and his ability (given his qualifications and training) to assess the information and reach reasoned conclusions about it (see the discussion in *Korashi v Abertawe Bro Morgannwg University Local Health Board* UKEAT/0424/09/JOJ).
73. There is no need for the disclosure to allege that the Respondent has acted in breach of a particular legal obligation. However, in *Twist DX Limited v Armes* [2020] UKEAT 0030/20 at paragraph 87, Linden J added the following:

“This is not to say that the questions whether the worker mentions, for example, criminality or illegality or health and safety in their disclosure, or whether it is obvious that they had these matters in mind, are irrelevant if the link to the subject matters of any of section 43B(1)(a)-(f) is not stated or referred to, and is not obvious, an ET may see this as evidence pointing to the conclusion that the worker did *not* hold the beliefs which they claim, or that the information is not specific enough to be capable of qualifying.”

74. Here the two specific legal obligations that are relied upon by the Claimant are as follows:

Section 225(1) Financial Services and Markets Act 2000 which requires that a scheme be established under which certain disputes may be resolved “quickly and with minimum formality” by an independent person.

Section 228(2) Financial Services and Markets Act 2000 which provides that a complaint is to be determined by reference to what is “in the opinion of the ombudsman, fair and reasonable in the circumstances of the case”.

75. In *R (IFG Financial Service Limited) v Financial Ombudsman Service* [2005] EWHC 1153, Stanley Burnton J (as he then was) said this about Section 228(2) FSMA 2000:

13. It is to be noted that it does not require, as it might have done, a complaint to be determined in accordance with the law. The ombudsman is required to determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case. The words “in the opinion of the ombudsman” themselves make it clear that he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case. Of course, if his opinion as to what is fair and reasonable in all the circumstances of the case is perverse or irrational, that opinion, and any determination made pursuant to it, is liable to be set aside on conventional judicial review grounds.

74. The challenge made to the final decision turns entirely on the application of Rule 3.8.1 of the scheme. Mr Pooles (counsel for the claimant) accepted,

and indeed in my judgment had to accept, that the scheme does not require the ombudsman to make a decision in accordance with English law. If the ombudsman considers that what is fair and reasonable differs from English law, or the result that there would be in English law, he is free to make an award in accordance with that view, assuming it to be a reasonable view in all the circumstances.

76. In *R (Heather Moor & Edgecomb Limited) v Financial Ombudsman Service* [2008] EWCA Civ 642 at paragraphs 40 and 41, as Stanley Burnton LJ, he quoted what he had written in the earlier judgment. He said that having considered the matter afresh, he had come to the same conclusion as to the intended effect of the statutory provisions.
77. At this hearing, the Claimant does not allege (as had been indicated in the list of issues recorded by Employment Judge Moor) that there was a legal obligation to make “correct decisions” and/or a legal obligation not to ignore evidence because such decisions are legally binding unless judicially reviewed.
78. So far as a reasonable belief that disclosure is made in the public interest, there may be more than one reasonable view as to whether the disclosure is made in the public interest. The Tribunal must be careful to avoid substituting its own view of whether the disclosure was in the public interest for that of the worker.
79. In *Chesterton Global Limited v Nurmohamed* [2017] EWCA Civ 979, Underhill LJ said (at paragraph 37) that a useful tool in deciding whether a disclosure was in the public interest is to consider the following four factors:
- 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;
 - c. The nature of the wrongdoing disclosed;
 - d. The identity of the alleged wrongdoer.
80. The question of public interest only needs to be considered if the disclosure of information was capable of being a qualifying disclosure (*Nicol v World Travel and Tourism Council* [2024] ICR 893).
81. The statutory wording of the right not to suffer detriment for making a protected disclosure is as follows:

47B Protected disclosures

(1) A worker has the right not to 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.

82. A detriment will be on the ground that the worker has made a protected disclosure if the protected disclosure materially influenced the detrimental treatment (*Fecitt v NHS*

Manchester [2011 EWCA Civ 1190]. The decision maker must have knowledge of the substance of what the employee was complaining or expressing concerns about (*Nicol v World Travel and Tourism Council* [2024] ICR 893).

83. Section 48(2) ERA 1996 provides that “on a complaint under subsection (1) ... it is for the employer to show the ground on which any act, or deliberate failure to act, was done”.
84. In *International Petroleum Limited v Timis* UKEAT/0058/17/DA (19.7.17) Simler P summarised the proper approach to inference drawing and the burden of proof in a protected disclosure detriment case as follows (at paragraph 115):
- “(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
- (b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them ...
- (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.”
85. This approach was approved by Choudhury J in *Malik v Cenkos Securities Plc* [2018] (UKEAT/0100/17/RN) (17.1.18) at paragraph 80(c), relying on the discussion carried out by Underhill J in *London Borough of Harrow v Knight* [2003] IRLR 140 at paragraphs 19-21. Underhill J expressed the view that section 48(2) ERA 1996 is not to be read as deeming the employer to have acted on the ground of the protected disclosure where he does not prove any other reason.
86. There are circumstances where an employer is entitled to have regard to an expired disciplinary warning in deciding whether an employee should be fairly dismissed following further misconduct (see *Airbus UK Limited v Webb* [2008] EWCA Civ 49; *Stratford v Auto Trail VR Limited* UKEAT/0116/16). As a result, the fact that a disciplinary warning has expired does not mean that it cannot be legitimately relied upon when considering whether to re-employ a former employee. The issue is whether the Respondent did so here.

The parties' submissions

87. In his closing submissions, Mr Hignett, counsel for the Respondent, indicated that, whilst the point was not conceded, he would not be positively asserting that the alleged disclosures were not reasonably believed to be in the public interest. The focus of his submissions was on whether the communications were disclosures of information, and on whether the Claimant had a genuine and reasonable belief that

these disclosures tended to show a breach of a legal obligation in the respects now advanced. He relied on the absence of any reference to these specific legal obligations in the disclosures themselves, on the alleged lack of detail in the specified emails, and on the apparent mischaracterisation of the legal obligation during the Preliminary Hearing before Employment Judge Moor and in the subsequent record of Hearing. He also argued that it was implausible to suggest a link between a historical communication not made to the decision-making officer. The most obvious reason was the one given at the time, namely the existence of the Claimant's previous disciplinary sanction.

88. Mr Wright, for the Claimant, maintained that there was sufficient factual detail in the emails themselves. If particular passages or attachments had not been provided to the Tribunal then, he argued, that the Tribunal can infer the contents of the passages or attachments from the surrounding context. He also referred to certain evidential features to argue that the burden of proof had passed to the Respondent to show that none of the alleged protected disclosures had a material influence on the decision. This had not been discharged in circumstances where the decision maker, Ms Nugent, had not been called as a witness and there was no credible document chain explaining the reason for the rejection.
89. By way of reply, Mr Hignett emphasised that the burden of proof remained on the Claimant to show that the failure to short list the Claimant for an Associate Ombudsman role, notwithstanding section 48 Employment Rights Act 1996.

Conclusions

First protected disclosure: 10 October 2019

90. The Tribunal accepts that there is a disclosure of information in what is written in the email of 10 October 2019. The email contains statistics. However, the information disclosed by these statistics does not state, either expressly or implication, that there is a problem with the quality of the initial views issued by investigators. There is no reference expressly to the initial views made by investigators or the implications of this for the statutory ombudsman scheme.
91. The focus of the Claimant's 10 October 2019 email is on ombudsmen rather than investigators. The statistics appear to be put forward to explain why ombudsmen are not meeting expected targets. It says nothing about the quality of the investigator's initial views. However, due to the missing second page, the full text of the email has not been provided in the bundle of documents. The Claimant does not fill this evidential gap by explaining the missing wording in his witness statement. Paragraph 19 of his witness statement does not adequately explain his belief. Insufficient detail was given during cross examination.
92. The most plausible analysis of this email is that the Claimant is complaining to his manager about the volume of his team's workload to explain why his team are off target and so explain why his own job has become more difficult. Mr Neighbour's

evidence was that the output expected of ombudsmen had increased as a result of the issuing of provisional decisions.

93. There is no suggestion in the wording used that the information disclosed tends to show that ombudsmen or investigators are not making fair and reasonable decisions or that their decisions do not meet the required timescales. That cannot be implied by importing an unstated extrapolation from an increase in the percentage of ombudsmen provisional decisions, given there are several reasons why provisional decisions may be issued.
94. The Tribunal does not find the Claimant genuinely believed at the time he sent the email that the information it contained tended to show a breach of a legal obligation in the manner he now alleges, namely in relation to Section 225 or Section 228 FSMA 2000. It is significant that this legal obligation was not stated or implied in the email itself, in the ET1 or during the course of the Preliminary Hearing held on 22 November 2022.
95. Even if the Claimant did have this genuine belief, the Tribunal does not find that this was a reasonable belief that the information disclosed tended to show a breach of either of the legal obligations now identified, given the limited extent of the information disclosed.
96. As a result, the Tribunal rejects the Claimant's argument that the 10 October 2019 email was a qualifying disclosure.

Second alleged protected disclosure: 10 January 2020 email

97. The Tribunal rejects the Claimant's argument that this email of 10 January 2020 was a joint email, written by John Withington on behalf of himself, Greg Barham and the Claimant. It does not say that it was a joint email on behalf of others including the Claimant.
98. There is no evidence that the Claimant encouraged him to write it or that the Claimant followed up to endorse its contents. In fact, the Claimant's statement is silent about this particular email.
99. Throughout the email Mr Withington uses the first person singular – "one of my omb[udsmen]"; "and I do mean the word"; "two ombudsmen near me"; "One said to me"; and "another sitting by me". The wording of the last paragraph makes it clear that the initiative for the email comes from Mr Withington alone, even if he may believe that the contents are supported by others: "All we can do is flag them for others but I thought you'd find it helpful to have some examples should the opportunity to input arise" [underlining added for emphasis].
100. Furthermore, the Tribunal does not find that the word "we" in the second and fourth paragraphs is a reference to Mr Withington, Mr Barham and the Claimant alone. Rather the Tribunal concludes it is a reference to ombudsmen generally rather than to those two specific individuals copied to the email. This is most evident from the phrase: "All of the ombudsmen are seeing this behaviour and it's becoming a running joke", followed by providing specific examples from "two ombudsmen near me". These individuals were not the two Senior Ombudsmen copied into the email.

101. The standard reason for copying a person into an email is to enable them to see what is being written, so that they are informed about the sender's communication. That is exactly what was happening here, given that the Claimant and Mr Barham performed the same Senior Ombudsman role as Mr Withington, and the email was being sent to person who line managed each of them.
102. Because the email of 10 January 2020 was not sent by or on behalf of the Claimant, it does not fit within the statutory wording of what amounts to a protected disclosure. To satisfy section 47B Employment Rights Act 1996, the detriment must be done "on the ground that the worker has made a protected disclosure". The Claimant did not make any disclosure in being copied into this email.
103. Therefore, this email was not a protected disclosure.

Third alleged protected disclosure: 24 January 2020 email

104. The 24 January 2020 email lacks the necessary factual specificity to amount to a qualifying disclosure. It speaks in the most general terms about "some examples of poor work and cases that really shouldn't have been in the queue". It appears to accept that a few of the examples given in the attachment "don't seem that bad".
105. The Tribunal is unable to make any factual findings as to the contents of the attachment, beyond that it was referring to the quality of the work of investigators rather than ombudsmen given that the information it contained had been provided by ombudsmen. As a result, this was not a qualifying disclosure.
106. Furthermore, the Tribunal does not find that the Claimant genuinely believed that in writing this email he was disclosing information tending to show a breach of a legal obligation in the respects alleged owed by the Respondent to the members of the public for whom the Ombudsman Service was being provided. The email does not say so. Rather the Claimant ends his email by saying "the issue clearly concerns some people a lot". The Claimant is registering the dissatisfaction felt by the ombudsmen he was managing about the quality of the investigators' work, rather than adopting that dissatisfaction on behalf of the section of the general public bringing cases before the Financial Ombudsman Service.
107. Even if he had had such a genuine belief, then this was not a reasonable belief - given the lack of detail in the Tribunal's findings of fact about this email and its attachment. It does not have the necessary degree of factual specificity. As a result, it does not satisfy several requirements that need to be present in order for the Tribunal to conclude that this was a qualifying disclosure.

Fourth alleged protected disclosure: 11 March 2020 email

108. As with the Claimant's email dated 24 January 2020, his email of 11 March 2020 lacks the necessary factual specificity to be capable of amounting to a disclosure of information which is capable of being a protected disclosure. The email itself does not provide any statistical analysis or specific examples of poor quality of work. The

statement attached to the email has not been provided and the Tribunal is unable to make any factual findings about its contents, other than that it expresses some level of dissatisfaction by the individuals who have populated the attachment's contents.

109. Furthermore, the Tribunal does not find that the Claimant genuinely believed he was disclosing information tending to show a breach of a legal obligation. There is no reference to a particular legal obligation or to specific responsibilities on investigators or ombudsmen. Rather than stating or inferring that he believed that the information in the attachment was true, he goes out of his way to distance himself from the attachment's contents. He says: "I was received another statement from 25 ombudsmen", thereby indicating he himself had not contributed to the statement. He added: "I've told the ones I know I will pass this on, but after this they need to find some other channel, either direct to you or via HR or via the whistleblowing service, as I don't think it's fair me being used for this any further". This indicates that he was effectively acting as messenger rather than endorsing the contents of the message.
110. In any event, given the lack of factual detail in this email and the Tribunal's inability to make any findings of fact as to the contents of the attachment, a belief that the limited information before the Tribunal tended to show a breach of a legal obligation would not be a reasonable belief.
111. Therefore, the fourth alleged disclosure is not in law a qualifying disclosure and therefore not a protected disclosure.

Causation

112. Because the Tribunal has rejected the Claimant's arguments that he made protected disclosures in the four respects he alleges, it is not necessary for the Tribunal to go on and consider whether the decision to refuse him an interview was influenced by these communications.
113. In case we are wrong in our analysis of whether there was a protected disclosure, we go on to consider the issue of causation. In so doing, we need to decide whether the rejection of the Claimant's Associate Ombudsman application was influenced by any of the communications said to be a protected disclosure. We apply the guidance on the application of the burden of proof to protected disclosure detriment claims as recorded at paragraph 115 of *Osipov v Timis* [2017] EAT by Simler P.
114. The decision to reject the Claimant's application for an Associate Ombudsman role was that of Caroline Nugent. We are very conscious that Ms Nugent has not been called to give evidence. We are also very aware that Ms Kearns, the Respondent's HR witness, accepted in the course of her oral evidence that the reason for his rejection given in correspondence was incorrect.
115. However, we need to decide whether the Claimant has proved facts from which we could conclude in the absence of any other explanation, that the communications on which he relies influenced the decision to reject his application. As we now explain, we do not find that there are any factual findings that could entitle the Tribunal to draw the inference that the rejection of his application was influenced by the identified previous communications in the absence of any other explanation.

116. The communications on which the Claimant relies as protected disclosures occurred more than two years before the decision was taken to reject his Associate Ombudsman application. We have made no findings (nor have been invited to do so) that the Claimant received any detrimental treatment during the eight months or so between the alleged protected disclosures and the end of his employment prompted by those alleged disclosures. This includes the decision to issue him with a written warning and the decision to make him redundant.
117. The emails containing the alleged protected disclosures were not sent to Caroline Nugent but to different individuals (Paul Douglas and Michael Fisher). Mr Douglas discussed the contents of the statement attached to the 11 March 2020 email with Ms Nugent but did not disclose the identity of the person who had sent it to him. There is no factual basis for inferring that this email or any of the other emails would have been forwarded to Ms Nugent or would otherwise have come to her attention so as to identify the Claimant as the author. Only Mr Douglas was involved in the Associate Ombudsman application process. He provided a favourable assessment of the Claimant's abilities to undertake the role. He did not mention at the time of this assessment that the Claimant had previously been issued with a formal warning. He would have no reason to refer to the communications relied on as protected disclosures. We do not find that he did so. As a result, we find that Ms Nugent did not know that the Claimant had sent three of these four emails.
118. We have found the Respondent carefully investigated G's concern about working practices he had raised through the Speak Up policy. This indicates the Respondent is likely to have properly investigated any comparable concerns raised by the Claimant if they had been raised through the same channel, rather than informally through emails to his line manager.
119. Furthermore, we have found that the Respondent had a general practice that previous disciplinary sanctions on an ex-employee's file would preclude their consideration for the role of Associate Ombudsman, even if those sanctions had expired.
120. In the light of these factual findings, the absence of Ms Nugent as a witness does not entitle us to draw an inference that her decision was materially influenced by these emails said to be protected disclosures. An appropriate explanation has been given for her absence as a witness, which the Tribunal accepts. The absence of Mr Upsdale as a witness is also not an appropriate basis for potentially drawing an inference that the rejection was materially influenced by the alleged protected disclosures. Although Lucy Dobbie, Resourcing Partner, was not called to give evidence and she was the author of the email communicating the rejection, she was not the decision maker. The Respondent chose to rely on a single HR witness to cover all HR issues.
121. Furthermore, the Respondent's failure to disclose any contemporaneous document recording the reason why the Claimant was not appointed to the Associate Ombudsman role, without providing an adequate explanation, is also not a sufficient basis for potentially drawing an inference that the Claimant's rejection was influenced by those alleged protected disclosures. We accept that this is more likely to have been an oversight during the disclosure process, rather than a document that has been deliberately withheld. There had been no prior application for specific disclosure of such documents.

122. Finally, we do not consider that the partially incorrect explanation given to the Claimant in email correspondence, namely that he was subject to a live warning, is a sufficient basis for drawing such an inference. Insofar as the explanation referred to the existence of the warning, it was correct. We accept it was a genuine mistake to refer to it as a live warning. The Respondent had a practice of not progressing the applications of those with any disciplinary sanction on their personnel files, but this was not documented. Therefore, it was not readily understood by all at the Respondent involved in corresponding with the Claimant about the reasons for the rejection of his application. Furthermore, six months had not passed by the time his employment ended. So the warning had not expired at that point and was in that sense still “live”.
123. As Ms Nugent did not know that the Claimant had sent the emails or (in relation to the first three) of their contents, she could not have been influenced by their in making her decision. We find that the most likely explanation for Ms Nugent’s decision to reject the Claimant’s application was that she was applying the Respondent’s practice not to progress an application from a former employee who still had a warning on their file.
124. As a result, even if we had found that the Claimant had made a protected disclosure, we would have concluded that this formed no part of the reason for the rejection of his application to be an Associate Ombudsman. This would have been a further reason why the Claimant’s complaint of protected disclosure detriment would not have succeeded.

**Employment Judge Gardiner
8 October 2024**