

Samad v Spicerhaart Group Services and others**Case Numbers: 3200006/2015 & 3200654/2015****-Case Comment-**

Carolyn D'Souza successfully represented the Claimant in a claim for protected disclosure detriment contrary to s.47B Employment Rights Act 1996 (ERA) before the Employment Tribunal. The judgment and reasoning of the Tribunal serves as a useful illustration of how to approach whistleblowing cases.

Background

The Claimant was an employee of the estate and letting agency Felicity J Lord ("FJL"), one of a number of companies that collectively made up the First Respondent. Three further Respondents were attached to the claim, all of whom were senior employees of Felicity J Lord.

Before resigning from the company, the Claimant had risen through the ranks to become the Senior Branch Manager at the First Respondent's Bow office. As is typical in the property sector, the Claimant would receive a bonus calculated on the number of homes he sold. In the summer of 2014, suspicions were raised that the Claimant had received unusually high commission payments. MR, the Claimant's line manager, believed that the Claimant was claiming commission to which he was not entitled, by changing the name of the salesman involved in several transactions to his own. Subsequently, the First Respondent initiated an investigation into potential gross misconduct and disciplinary proceedings were commenced.

The Claimant, a Muslim of Asian heritage, argued that:-

- other people in his position were doing the exact same thing, and by being the only person investigated, he was being discriminated against because of his race and religion;
- his line manager and FJL continued to market properties which had already been sold, on its website and other online platforms, including Rightmove, which had the effect of misrepresenting the company's stock and market share to the public.

Investigations were launched into the Claimant's grievances regarding discrimination and the company's market share misrepresentation. The various investigations were protracted and

the bad-blood between the parties festered until the Claimant was forced to resign in February 2015.

The Claim

Following his resignation, the Claimant brought several claims against the First Respondent: (1) direct discrimination because of race and/or religion or belief, (2) victimisation, (3) whistleblowing detriment, (4) constructive dismissal (both ordinary and/or by reason of a protected disclosure), (5) breach of contract, and (6) unauthorised deduction from wages.

The claim for whistleblowing detriment related to the following two allegedly protected disclosures made to the First Respondent:

- 1) that the First Respondent had discriminated against the Claimant and had thereby breached its statutory duty¹; and
- 2) that the Claimant had been instructed to misrepresent the First Respondent's available estate agency stock levels, and in turn market share, for the purpose of misleading customers.

The Law

S.43B ERA confirms that for a disclosure to be protected it must be made in the reasonable belief that it tends to show an individual's failure or likely failure to comply with a legal obligation², and in the reasonable belief that the disclosure is in the public interest. S.47B ERA establishes that a worker should not suffer any detriment from his employer on the ground that he has made a protected disclosure.

Judgment

It was held that Claimant did suffer a whistleblowing detriment and that the conduct of the employer amounted to a repudiatory breach of contract. The remaining five claims failed and were dismissed.

The discrimination disclosure

¹ Equality Act 2010, Section 13

² Employment Rights Act 1996, Section 43(B)(1)(b)

The Tribunal found that the Claimant made the discrimination disclosure/allegation in an “attack is the best form of defence” response to the disciplinary proceedings. The Tribunal held that the allegations were false and had been made in bad faith. The claim for protected disclosure detriment failed under this heading because the Claimant’s allegations were made in the knowledge that they were untrue; thus the *reasonable belief* requirement was absent.

The market share misrepresentation disclosure

The Tribunal accepted on the evidence that:-

- the Claimant reasonably believed that the information he revealed under this heading was true, and disclosed wrongdoing;
- the Respondent’s conduct was potentially a breach of obligations under the Property Ombudsman Code of Conduct, and trading standards requirements;
- the Claimant’s failure to expressly identify the legal obligation or its source when making his disclosures was not fatal to his claim. Applying **Western Union Payment Services v. Anastasiou** UKEAT/0135/13, the breach was ‘perfectly obvious and apparent to all as a matter of common sense’.
- given that the disclosure involved a misrepresentation to the public, the public interest requirement was also satisfied.

The accepted detriments were:

- 1) Pressure to recant the whistleblowing grievance. As a finding of fact it was held that the Claimant was informed that the disciplinary proceedings against him would be discontinued if he were to withdraw his discrimination and market share grievances;
- 2) Unreasonable delay in the disciplinary proceedings. The First Respondent failed to wrap up the disciplinary proceedings until December 2014 despite it being obvious in October 2014 that there was insufficient evidence to support the gross misconduct claim made against the Claimant.

As such, the four whistleblowing hurdles were cleared and the claim for protected disclosure detriment was successful.

Comment

This case illustrates a number of practical points of interest for lawyers. Firstly, there is no need to show that a whistleblower knew which specific legal obligation his or her employer had breached. In this case, applying ***Western Union***, the legal obligation engaged was found to be obvious. Secondly, the fact that there may not have actually been a breach of legal obligation is not determinative. A reasonable belief in a disclosure that tended to show a failure to comply with an obligation is sufficient. Finally, in assessing what is reasonable, the courts will consider what an objectively reasonable worker in that Claimant's position would believe. A knowingly false disclosure is afforded no protection under the ERA.

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