EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123875/18

Held in Edinburgh on 28, 29, 30 May and 29, 30 July 2019

Employment Judge S. Cowen
Tribunal Member N. Henderson
Tribunal Member A. Allan

Mr L Kuliczkowski	**Claimant** **In Person**
Ingliston Hotels Limited	**Respondent** **Represented by** **Miss Hughes**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claim is dismissed.

REASONS

Introduction

1. The claimant worked for the respondent as Head Chef between 12 June 2017 and 14 August 2018. The Claimant was absent from work as he was ill from 23 March 2018. The Respondent terminated his contract by letter dated 14 August 2018.

2. At a Preliminary Hearing on 15 March 2019 EJ Buzzard identified two claims; s.103A ERA 1996 claim for automatic unfair dismissal and s.47B ERA 1996 claim for detriment, both in relation to a protected disclosure.

3. At the start of the hearing the parties identified four potential protected disclosures;

    a. On 26 September 2017 to Emma Hobson and Laura Henry about the number of hours the Claimant was working,
    b. On 23 February 2018 to Emma Hobson and Shannon Barr about the food costs and difference in figures,
    c. On 14 June a grievance letter to the Respondent about allegations of financial fraud,
    d. On 21 July 2018 in an email to Douglas McAllister about damage to the Claimant's knives;

    and three potential incidents of detriment, in addition to the allegation of automatic unfair dismissal;

    a. Not being provided with food tracker information,
    b. Emma Hobson opening the Claimant's letter from HMRC,
    c. The incident on 5 July with Maciej Maciejewski

4. The Tribunal heard evidence from the Claimant, and on his behalf Mr Wawrzyniak (a former colleague). On behalf of the Respondent, the Tribunal heard from Mr McAllister (HR adviser to the Respondent), Miss Hobson (General Manager), Miss Barr (Cluster Finance Manager), Mr Maciejewski (Guest Service Manager), Miss Henry (Senior Guest Service Manager) and Mrs Morgan (General Manager Holiday Inn Express Royal Mile). The Claimant was assisted by a court appointed

translator (Polish to English) throughout the hearing, as was Mr Wawrzyniak where necessary.

5. A bundle of agreed productions was referred to and additional documents were admitted as the trial proceeded where appropriate, in relation to mitigation and earnings. Both parties made closing submissions.

Findings of Fact

6. The Claimant was approached by the Respondent and invited to attend for interview for the position of Head Chef at the Respondent's hotel which trades as Holiday Inn Express at Edinburgh Airport. The Claimant attended the interview discussed the position, salary and bonus potential with Miss Hobson and Miss Henry.

7. The Claimant was told by Miss Hobson that a bonus was paid to managers in the December following the completed financial year (1 April to 31 March). The amount was at the discretion of the owners and was dependant on reaching departmental targets which would be set. As the Claimant did not commence work until June 2017; he was not therefore entitled to any bonus in December 2017.

8. The Claimant signed a contract which stated that his start date was 12 June 2017. It stated that his normal hours of work would be 40 hours, but that he may be "*required to work outwith (his) normal hours of work, depending on the needs of the business"*.

9. Included in the Claimant's duties were the ordering of food, tracking food costs and the drawing up of rotas for the kitchen staff.

10. The Claimant worked on average, in excess of his contractual 40 hours per week. The Tribunal finds that he worked on average for 48 hours per week. However, he was not entitled to receive any additional payment for this additional work, but could have claimed time off in lieu. The Claimant did not take this additional time off as the kitchen was understaffed at all times and it was not feasible therefore to do so.

11. The Claimant did take time off in September 2017 when his daughter was born. When he returned to work, he met with Miss Hobson, General Manager on 26 September 2017 to discuss his working hours. He told her that he wanted to work only his contractual hours i.e 40 hours per week and not the additional hours he had been working. Miss Hobson told him that he was employed as a manager and therefore he could not work set, limited hours, as he had to ensure that the business requirement was met.

12. The Claimant also took the opportunity to raise the issue of food costs with Miss Hobson, as he was concerned that his calculations of costs, were not the same as those of the Respondent and he was concerned this would impact his bonus. Miss Hobson has no recollection of the meeting.

13. Due to a lapse in staff in the accounts department, the payment of invoices was delayed for approximately three to four months in late 2017 and early 2018. The consequence of this was that the Claimant's food cost budget appeared to be overspent. The Claimant once again raised his concerns with Miss Hobson in October 2017. She told the Claimant not to worry about the apparent overspend.

14. The Claimant remained concerned about this, as he thought that one of the targets in order to achieve his bonus was that he had to remain within his department's budget. He requested details of the way in which the food costs were calculated. Miss Barr provided the Claimant with a spreadsheet referred to as a food tracker, so that the Claimant could keep his own record of food costs.

15. The Claimant's view was that there was something fraudulent going on with the food costs. He asked to meet with Miss Barr to discuss the costs in February 2018 as his monthly calculation was once again different to that of the Respondent. He met Miss Bar on 23 February 2018, Miss Hobson was present for part of the meeting. During the meeting Miss Barr told the Claimant that his food costs were 35%. The Claimant had calculated them to be 27% and so the Claimant indicated that once again he was concerned about this difference.

16. Miss Hobson left part way through the meeting. When the Claimant returned to his computer, the spreadsheet he had been using had been deleted. The Tribunal makes no factual finding as to how the information was deleted from the Claimant's computer as there is no evidence of how this occurred, and it does not form part of the pleaded detriments and is not therefore of relevance to the outcome of the case.

17. In late February 2018, the Claimant received a letter from HMRC, addressed to him at his workplace. Miss Hobson, as General Manager opened all the post addressed to the hotel, unless it was marked private and confidential. She opened this letter without seeing or considering that it was private and confidential to the Claimant. The letter, without an envelope, was placed in the Claimant's pigeonhole. The Claimant was upset to receive private correspondence with HMRC in this way and accused Miss Hobson of purposely opening his private mail. When the Claimant subsequently complained to Mr McAllister about this, he was told that Miss Hobson had made a mistake and Mr McAllister apologised on behalf of the Respondent.

18. The Claimant was absent from work from 22 March 2018 until his dismissal on 14 August 2018 due to anxiety and depression.

19. The Claimant first attended at the Citizens Advice Bureau at the end of April and discussed with them the issue of the food costs. They assisted the Claimant to write his grievance letter.

20. On 17 May 2018 the Claimant wrote to the Respondent raising a number of grievances including the fact that he disputed the food cost calculations. In that letter the Claimant asserts that "I am deeply concerned that at best there is poor accounting practice going on within the organisation and that at worst this could be a matter of serious fraud. I ask that you immediately fully and thoroughly investigate these incidents, my budget figures and whether or not I am entitled to any bonus and provide me with an outcome to this".

21. Mr McAllister met with the Claimant on 30 May 2018 to hear his grievance. The matter of the food costs was addressed only with reference to the Claimant's entitlement to a bonus.

22. The outcome letter dated 8 June 2018 did not address the issue of the difference in the calculations of the food costs, but explained to the Claimant that due to his length of service he would be entitled to a bonus, if one was paid, in December 2018.

23. On 14 June 2018 the Claimant wrote to Mr McAllister. He referred to his previous grievance and said that it had not been "investigated or answered" and that "I can only believe from this that the organisation is attempting to cover up a matter of fraud, or my complaint regarding fraud. I have no option now but to raise this matter as Whistleblowing under the Public Interest Disclosure Act".

24. On 26 June 2018 Mr McAllister replied to the Claimant indicating that he had contacted Wendy Miller, Finance Manager at Interstate (the Respondent's administrative/HR support company) and Shannon Barr, Cluster Finance Manager for the Respondent. He indicated that the Respondent was satisfied that there was

no financial fraud and did not uphold the grievance. At this time he also asked the Claimant to contact him to arrange a meeting with himself and Miss Hobson with regard to his "return to work [and] any reasonable adjustments which may be achievable".

25. On 5 July 2018 the Claimant attended at the Respondent's hotel to provide a fit note indicating that he continued to be unfit for work due to depression and anxiety.

26. The Claimant entered the hotel via the reception, along with Mr Wawrzyniak, a friend and former colleague who had previously been dismissed from the Respondent. The Claimant handed over his fit note and asked if he could retrieve his kitchen knives from the kitchen. The receptionist told him he would need to be escorted to the kitchen and called upon the duty manager to accompany the Claimant. The duty manager, David Winning, went with the Claimant and Mr Wawrzyniak to the kitchen. Mr Winning did not prevent either of them from entering the private areas of the hotel. The Claimant retrieved his toolbox containing his kitchen knives and found that the padlock on the box had been broken and the box was open. He considered that some of his knives inside the box were damaged and/or dirty and was upset by this.

27. At this point Mr Maciejewski arrived in the kitchen and told Mr Wawrzyniak that he should not be in the hotel at all. The Claimant said to Mr Maciejewski that he would "see him on Leith", which Mr Maciejewski took as a threat. The Tribunal finds as a fact that the situation became heated and tense and that Mr Maciejewski did touch the Claimant, to encourage and steer him out of the kitchen and the hotel. This upset and angered the Claimant who felt the gesture to be a push. Ultimately, the situation eventually calmed down sufficiently for the Claimant and Mr Wawrzyniak to leave the hotel peacefully.

28. This incident further upset the Claimant who took advice on the situation from the Citizens Advice Bureau and also reported it to his GP.

29. On 20 July Mr McAllister sent the Claimant a letter and a consent form for a medical report to be obtained from his GP.

30. On 21 July the Claimant wrote an email to Mr McAllister saying that "Maciej Maciejewski pushed me out of the premises on 05.06.18 (sic) saying "just walk away man, you are not allowed to be here". I'm not going to wright (sic) another grievance, because you do not know how to deal with it properly. I'm going to add it to whistleblowing, personal data protection, breach of contract, money froud (sic), covering money froud (sic), also you and Emma make fals (sic) allegation to exploit me".

31. There was correspondence by email during the remainder of July and up to 3 August with regard to the Respondent obtaining authorisation for an OH report on the Claimant, which the Claimant did not consent to. He did continue to pursue his complaint about the damage to his knives. A date was also set for a disciplinary investigation meeting with regard to the Claimant's behaviour when he went to retrieve his knives.

32. On 3 August Mr McAllister wrote to the Claimant to outline the three outstanding matters; the medical authority form, the investigation into the Claimant's behaviour and contact with him during his absence. This letter also contained an invitation to a meeting on 9 August to " discuss your medical condition and whether you may be able to return to work. Please note that following on from this meeting we intend to make a decision about your continued employment with us".

33. The Claimant attended for the meeting on 9 August, but did not agree to Mr McAllister being present in the room. The meeting was conducted by Mrs

Morgan. When asked about his health and returning to work, the Claimant told her that he would be able to return “soon”, but could not give her a date. She asked the Claimant why he was not willing to engage in obtaining a medical report from OH. The Claimant repeatedly said that as the company had previously broken data protection rules, he was not prepared to engage with them. The Claimant did not provide any additional medical information or evidence himself. Mrs Morgan therefore ended the meeting.

34. The Claimant received a letter on 14 August dismissing him from his employment on grounds of his ill health. It stated that apart from his GP fitness certificates, his employer had no details of his health condition and that although requested to provide consent to obtain a medical report, or to provide evidence to the meeting, he had failed to do so. The Respondent also stated that the Claimant said that he would not return to work prior to his forthcoming Employment Tribunal hearing.

35. The Claimant did not pursue his appeal of his dismissal by way of the internal procedure, although he initially indicated he wished to do so.

Application on Time Bar

36. The Respondent asserted at the outset of the hearing that the Claimant’s case in relation to the s.47B (1) Employment rights Act 1996 (ERA) that he was subject to a detriment, was out of time, having been filed beyond the three month statutory time limit set out in s.48(3)(a) ERA.

37. The Respondent asserted that s.207B ERA would not assist the Claimant in this case, as the time limit expired prior to the start of the ACAS early conciliation.

38. The Claimant did not make any specific submissions, but asked the court to consider his claim.

39. As this is a matter of fact, the Tribunal considered that it would be better placed to decide this point at the end of all the evidence, in order to understand both his medical position, his knowledge of his rights and the full circumstances of the case. The Tribunal therefore considered the point at the start of its deliberation on the full merits of the claim.

The Law

Time bar

40. S.48(3)(b) ERA sets out test which the Tribunal must consider as firstly, whether it was reasonably practicable for the Claimant to have filed his claim in time and if not, what was the reasonable time.

41. The Tribunal must take into account all the circumstances of the case when considering the explanation provided by the Claimant. The burden of proof in this matter lies on the Claimant. But a liberal construction of the statutory time limit in favour of the employee should be adopted by the Tribunal.

42. The three month time limit starts to run on the day on which the detriment occurred.

Protected Disclosure

43. In order to assert a detriment or dismissal based on a Public Interest Disclosure protection, the Claimant must satisfy the Tribunal that he has in fact made a qualifying disclosure under s. 43(B)(1) employment Rights Act 1996. That requires the Tribunal to consider whether the Claimant has provided information to an appropriate person, with regard to one of the categories of malpractice outlined in s. 43(B)(1) ERA.

44. The Tribunal was reminded that any disclosure must involve information and not merely the raising of an allegation, as set out in Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38.

45. In this case, the Claimant alleged that he provided information that the accounts of the Respondent were being fraudulently manipulated, the result of which was to prevent the Claimant receiving his bonus. This would fall into either of s. 43(B)(1)(a) a criminal offence is being committed, or (b) failing to comply with a legal obligation.

46. The Tribunal must also consider whether the Claimant reasonably believed that the disclosure was made in the public interest. The test for this is whether the employee subjectively believes at the time that the disclosure is in the public interest and if so, whether objectively the belief was reasonable. The Tribunal were referred to Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979 and in particular the factors to be taken into account when considering public interest:
    i) the numbers in the group whose interests the disclosure served,
    ii) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed,
    iii) the nature of the wrongdoing disclosed, and
    iv) the identity of the alleged wrongdoer.

47. Finally, the disclosure must be made to an employer or other responsible person under s. 43C(1) ERA.

Dismissal

48. In considering whether the Claimant's dismissal was due to having made a protected disclosure, the Tribunal must consider whether the protected disclosures was the reason, or a principal reason for the dismissal of the Claimant. The Tribunal also must bear in mind that the burden is on the Claimant to satisfy the Tribunal of the reason for dismissal.

Decision

Detriment claim and time bar

49. The Tribunal first considered the issue of the time limit on the detriment (s.47B ERA) claim. The date of the latest detriment which was asserted by the Claimant in the ET1 was 5 July 2018. The Claimant registered the claim with ACAS under the early conciliation process on 22 October 2018, which was completed on 6 December 2018. The ET1 was issued on 29 December 2018. The statutory limitation date for the claims of detriment was therefore 4 October 2018. His claims were beyond the time limit and out of time when the ACAS early conciliation was commenced. The rules under s.207B ERA as to extension of time as a result of the early conciliation process do not assist the Claimant in this case.

50. The Claimant had raised a previous ET1 on 31 July 2018, in relation to issues of detriment in connection with raising financial concerns about the business, although not exactly the same claims as he made in the current proceedings. At a preliminary hearing of the first claim, before Judge McLeod on 12 October 2018, the Claimant confirmed that he wished to withdraw the first ET1, as he had subsequently been dismissed and wished to make a second (the present) claim.

51. The Tribunal also took into account that at that preliminary hearing, the Respondent's solicitor quite correctly and appropriately did not insist that the claim was dismissed.

52. This Tribunal considered that the Claimant had taken advice from the Citizens Advice Bureau in April 2018. He had clearly understood that it was possible to bring a claim before the Employment Tribunal as he had done so, including a claim under s.47B ERA for detriment as a result of a protected disclosure. This occurred prior to the Claimant's dismissal in August 2018. The Claimant provided no explanation in his evidence as to why it had not been reasonably practicable for him to file his claim within time. Nor had he explained why he chose to withdraw his first ET1 and submit a second claim.

53. The Tribunal concluded that it was both possible and reasonably practicable for the Claimant to have brought his s.47B ERA claim for detriment within time and that he had failed to do so. The Tribunal concluded that the claim under s. 47B ERA was therefore out of time and could not be progressed. The claim under s.103A for automatic unfair dismissal due to a protected disclosure was in time and could be considered by the Tribunal.

Protected Disclosures

54. The Tribunal considered each of the four alleged protected disclosures, to establish whether a protected disclosure within s.43B had been made. The Tribunal understood the Claimant's case to be that all four of his protected disclosures were relevant to his dismissal. The Tribunal noted that the Claimant did not assert that his email of 17 May 2018 was a protected disclosure.

55. The Tribunal considered that the Claimant complied with s.43C(1)(a), by making his disclosure to his employer.

56. The Tribunal considered that in relation to each of the protected disclosures, the Claimant had a genuine belief in what he was saying, at the time he said it.

26 September 2017 meeting

57. The Claimant asserted that he made a qualifying disclosure to Miss Hobson and Miss Henry on 26 September 2017 with regard to the hours which he worked. Ms Hobson did not remember this meeting specifically. A conversation between Ms Hobson and the Claimant took place, where he spoke about his working hours and said he did not want to continue to work more than his contractual hours. This conversation was soon after he returned from paternity leave. This conversation was specific to the Claimant and it was not therefore a matter of public interest. Further, the Claimant was not providing the Respondent with information which showed that any breach of a legal obligation had taken place, or would take place.

58. The food cost was also discussed on 26 September 2017, but there was no evidence that the Claimant provided information which might indicate a criminal act or breach of a legal obligation on the part of any employee or the Respondent.

59. The Tribunal does not accept that the conversation on 26 September 2017 included any qualifying disclosure by the Claimant.

14 June 2018 letter

60. In relation to the grievance raised on 14 June 2018. The Claimant wrote a letter on 14 June 2018 which was received by Mr McAllister on behalf of the Respondent. The Claimant said that his previous grievance in relation to financial fraud had not been addressed and that “I can only believe from this that the organisation is attempting to cover up a matter of fraud, or my complaint regarding fraud. I have no option now but to raise this matter as Whistleblowing under the Public Interest Disclosure Act”. This was information being provided by the Claimant to his employer about a matter which could be a criminal act, or could be the covering up of a criminal act. This is inline with s. 43B(1)(a).

The matters he had raised previously had not been addressed by Mr McAllister in his letter of 8 June 2018 and the Claimant was of the view that there was financial fraud being committed.

61. However, this complaint was not in the public interest; taking into account that the effect of potential fraud was in relation to bonus payments and the only person who's bonus would be affected would be the Claimant himself. The Tribunal concluded that this letter did not include a qualifying disclosure.

21 July 2018 email

62. The remaining protected disclosure suggested by the Claimant was the email of 21 July 2018 in which he outlined the incident on 5 July between himself and Mr Maciejewski. The email did not assert damage to his kitchen knives (i.e criminal damage), but it did assert that he had been pushed out of the premises (i.e assault). This may amount to a criminal act, but the Tribunal is satisfied that this was raised as an allegation and not as information to the employer.

63. The email also does not provide any evidence of the Claimant acting in the public interest in making this allegation. It is clearly a personal dispute between the Claimant and Mr Maciejewski which he wishes his employer to investigate. The email did not therefore include a qualifying disclosure.

Dismissal

64. Having decided that none of the disclosures meet the requirements of s.43B, the Claimant's dismissal could not therefore be for the reason of any protected disclosure.

    The Claimant's case is dismissed.

I confirm that this is my judgment or order in the case of Kuliczkowski v Ingliston Hotels Limited and that I have signed the judgment by electronic signature.

Date of Judgement: 6th September 2019

Employment Judge: S Cowen

Copied to Parties: 9th September 2019

And Entered in to the Register