EMPLOYMENT TRIBUNALS

Claimant: Ms J Evans

Respondent: Docklands Restaurants and Bars Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford by CVP **On:** 3 August 2020

Before: Employment Judge Alliott (sitting alone)

Appearances
For the claimant: Mr Ian Wright (Counsel)
For the respondent: Ms Priya Nagar (Solicitor)

JUDGMENT

The judgment of the tribunal is that:

1. The respondent's application for a strike-out order and/or deposit order is dismissed.

REASONS

1. The claimant was employed by the respondent from 1 December 2002 until dismissal on 31 January 2019 undertaking book-keeping operations.

2. In this claim, the claimant includes claims of automatically unfair dismissal and/or detriment for making a protected disclosure. The strike-out/deposit order application is made in relation to these two claims.

3. There is a clear conflict of evidence as to what may or may not have been said by the claimant at the relevant times. However, for the purposes of this application, I take the claimant's pleaded case at its highest.

4. Under rules 37 and 39 of the Employment Tribunal's (Constitution Rules of Procedure) Regulations 2013, I have the power to strike out all or part of a claim and/or make a deposit order in relation to any allegation if I conclude that the

claim has no reasonable prospect of success or little reasonable prospect of success.

5. In its application, made in a letter dated 31 January 2020, the respondent sets out its understanding of the protected disclosures. These it characterises as follows:-

> "1. At a board meeting which took place in April 2018, the claimant alleges that she expressed concerns about her excessive work load and her health and the additional impact on both caused by the activities of Kerrie Evans. The claimant has alleged that no additional support or assistance was provided (aside from sending details of an alternative therapist) and no risk assessment was carried out ("Workload & Health Statement").
>
> 2. Following the April 2018 board meeting, the claimant alleges that during a car journey with Jacqui Sutton of the respondent, she raised concerns regarding Stephen Thomas, in particular that he was an undischarged bankrupt and the claimant considered that he was neither permitted nor suitable to be a manager or associated with the respondent's business ("Stephen Thomas Statement")."

The Workload & Health Statement

6. **T**he claimant seeks to rely on section 43B (1)(d) of the Employment Rights Act 1996, namely that the disclosure tended to show that the health or safety of any individual has been, is being, or is likely to be endangered. At paragraph 46 of the claimant's claim form this is advanced on the basis that the disclosure related to the claimant's own health and safety. However, in his response to the application, Mr Wright relies more on the lack of a risk assessment. He refers to regulation 3 of the Management of Health Safety at Work Regulations 1999 which requires an employer to make a suitable and sufficient assessment of the risks to the health and safety of its employees and he points to the failure to carry out a risk assessment being not only likely to endanger the claimant's health but also constituting a criminal offence.

7. The respondent contends that since the claimant's complaint related to her own health, so, both objectively and subjectively, she cannot have been making any such disclosure in the public interest. Further it is contended that, as the public interest test was introduced in order to stop employees complaining about breaches of their own contracts of employment, so the claimant's alleged disclosure should not be characterised as being in the public interest as it would be contrary to the intent of the whistleblowing protection.

8. As regards the claimant's complaints about her own health, the public interest requirement is address in the IDS Employment Law Handbook "whistleblowing at work" at paragraphs 3.54 and 3.55. These state:-

> "It remains to be seen how the new public interest requirements in section 43B(1) will affect disclosures under section 43B(1)(d). It may be that tribunals use that requirement to filter out the most trivial and minor disclosures about health and safety. However, as we outline below under "Unlawful detriment and unfair dismissal", section 43B(1)(d) is couched in different terms to the other provisions in the ERA dealing with health and safety – section 41(1)(c) and section 100(1)(c), which do require a test of seriousness and imminence. Moreover, the fact that the statutory health and safety regime is proactive in nature, going as far as to oblige employees to disclose health and safety concerns ….. lends

> support to the view that any disclosure which a worker reasonably believes shows that the health and safety of an individual has been, is being or is likely to be endangered is a disclosure made in the public interest.
>
> 3.55 (**Statutory obligation to disclose**). It is relevant to point out here that employees themselves are under a duty to report certain concerns they may have about health and safety issues. ….. this statutory obligation in effect requires employees to make disclosures which would then be protected under section 43B(1)(d)."

9. As regards the allegation that there was no risk assessment, in my judgment it is certainly arguable that a complaint about a lack of a risk assessment could serve the interests of all employees of the respondent, ie is in the public interest.

10. Accordingly, I find that the argument that the claimant's alleged disclosure was made in the public interest has reasonable prospects of success.

Steven Thomas statement

11. The claimant's claim is based on the fact that she disclosed that an undischarged bankrupt was involved in the management of the respondent's business and that this tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

12. Mr Wright cites section 1(1)(a) of the Company Directors Disqualification Act 1986 which apparently provides that disqualification prevents such a person from "being a director of a company, acting as a receiver of a company's property or, in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company" unless leave of the court has been granted.

13. I do not know and I was not told if being an undischarged bankrupt means that Mr Thomas was disqualified pursuant to the Company Directors Disqualification Act. In the claimant's response document, it is asserted that:-

> "The claimant does not believe it is disputed by the respondent that Mr Thomas was disqualified because he was undischarged bankrupt."

14. In paragraph 23 of its response, the respondent pleads:-

> " …. All the claimant stated was that Mr Thomas was a disqualified director (a fact that both Mrs Sutton and the respondent were well aware of) ….."

15. The respondent contends that other than in obvious cases, where a breach of a legal obligation is asserted the source of the obligation should be identified and capable of verification by reference, for example, to statute or regulation. A mere belief that certain actions may have been wrong is unlikely to be sufficient.

16. In my judgment the disclosure that an individual is an undischarged bankrupt and consequently is not permitted to be associated with the respondent's business is arguably a reference to someone's legal status and a legal prohibition on the activities that they may undertake, the source of which will be found in company

law. Consequently, I do not conclude that such an argument has no or little reasonable prospects of success.

17. As regards the detriment claim, the respondent contends that this is no more than an unjustified sense of grievance and so not enough to amount to a detriment. In particular, that she has not pointed to a deliberate decision on behalf of the respondent not to address her concerns.

18. In my judgment, the detriment relied upon is capable of constituting a detriment. Having raised a complaint of a health and safety nature, it is arguable that it is a detriment if the employer does not take any appropriate and reasonable action. Accordingly, I do not conclude that there is no or little reasonable prospect of success on this ground.

19. For the aforementioned reasons, I dismiss the application for a strike-out or deposit order.

CASE MANAGEMENT SUMMARY

Final hearing

1. All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting with members at the Employment Tribunals, Radius House, 51 Clarendon Road, Watford, Herts WD25 1HP, on a date to be fixed, starting at 10 am or as soon as possible afterwards. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30 am on that day. The time estimate for the hearing is **6 days**, based on the claimant's intention to give evidence and call six further witnesses and the respondents to call three witnesses, and on the following provisional timetable:

    1.1 Half a day for tribunal pre-reading and any preliminary matters;

    1.2 2½ days for the claimant's oral and other evidence on liability;

    1.3 1½ days for the respondent's oral and other evidence on liability;

    1.4 A maximum total of one hour (half each) for submissions on liability;

    1.5 The balance of day 5 and day 6 for the tribunal to determine the issues which it has to decide, reach its conclusions, prepare its reasons, give judgment and deal with remedy if appropriate.

2. The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The claim

3. The claimant was employed by the respondent from 1 December 2002 until dismissal with effect on 31 January 2019. By a claim form presented on 29 April 2019, following a period of early conciliation from 25 March until 8 April 2019, the claimant brought complaints of unfair dismissal, automatically unfair dismissal and/or detriment for making a public interest disclosure and a claim for notice pay. The respondent defends the claims.

The issues

4. The issues between the parties which potentially fall to be determined by the tribunal are as follows:

Unfair dismissal

4.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was gross misconduct.

4.2 Did the respondent genuinely believe in its reason for dismissal, based on reasonable grounds following a reasonable investigation?

4.3 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

4.4 In addition issues in relation to Polkey and compliance with the ACAS code of conduct may arise.

Public interest disclosure (PID)

4.5 Did the claimant make one or more protected disclosures (ERA sections 43B as set out below).

4.6 The alleged disclosures the claimant relies on are as follows:-

4.6.1 To be provided by the claimant.

4.7 What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure?

4.8 Did the respondent subject the claimant to any detriment? The alleged detriment relies on is that the respondent did not address her concerns so that the claimant became ill and suffered injury to feelings including distress and anxiety.

Notice pay/severance entitlement

4.9 What contractual notice pay and/or severance package was the claimant entitled to?

Remedy

4.10 If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded

Other matters

5. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: *www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/*

6. The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)…*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written**.

7. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.

8. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

9. The following case management orders were made.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

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

2. Judicial mediation

2.1 The parties are referred to the "*Judicial Mediation*" section of the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-

directions/. The claimant is interested in judicial mediation. The respondent must inform the claimant and the tribunal in writing by **4pm** on **14 September 2020** whether or not it is in principle interested in judicial mediation.

3. Dates to avoid

3.1 The parties are to send to the tribunal by **4pm** on **17 August 2020**, dates to avoid for the whole of 2021 for a six day hearing to be heard after 12 April 2021.

4. Further information

4.1 The claimant must provide to the respondent and the tribunal by **4pm** on **24 August 2020** all facts and matters relied upon in support of the protected disclosures contended for, including:-

4.1.1 What was said or done or the gist of what was said or done, when, where, to or by whom and who else was present.

4.1.2 Which parts of section 43B(1) ERA 1996, the alleged disclosures relate to;

4.1.3 Why the claimant states that the disclosure was in the public interest.

5. Amended reply

5.1 The respondent, if so advised, may amend its reply in light of the further information. Such amended reply is to be sent to the claimant and the tribunal by **4pm** on **14 September 2020**.

6. Statement of remedy / schedule of loss

6.1 The claimant must provide to the respondent by **4pm** on **1 September 2020** a document – a "Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amounts have been calculated.

6.2 If any part of the claimant's claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

7. Documents

7.1 On or before **4pm** on **12 October 2020** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the

final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so within 7 days of any such request.

8. Final hearing bundle

8.1 By **4pm** on **7 December 2020**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle within **14 days.** The bundle should only include documents relevant to any disputed issue in the case referred to below and should only include the following documents:

- the claim form, the response form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;

- documents that will be referred to at the final hearing and/or that the tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle;

- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

9. Witness statements

9.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **4pm** on **22 February 2021**. No additional witness evidence will be allowed at the final hearing without the tribunal’s permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant’s witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

10. Final hearing preparation

10.1 **On the first day of the hearing** the following parties must lodge the following with the tribunal:

10.1.1 Four copies of the bundle, by the respondent;

10.1.2 Four copies of the witness statements by whichever party is relying on the witness statement in question.

11. Other matters

11.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

11.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

11.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

11.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

11.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

11.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

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Employment Judge Alliott

Date:…17 August 20…

Sent to the parties on:

…9 September 20……………….

For the Tribunal: