EMPLOYMENT TRIBUNALS

Heard by CVP arranged by Newcastle Hearing Centre on: 1/6/2021

Claimant: Mr G Lynch

Respondents: Middlesbrough DP Ltd

Before: Tribunal Judge Mr J S Burns

Representation
Claimant: in person
Respondent: Ms L Tarran (Chief Operating Officer)

JUDGMENT

(i) By consent, the name of the Respondent is changed from RACZ Group Ltd to Middlesbrough DP Ltd.

(ii) The claim of unfair dismissal contrary to section 103A Employment Rights Act 1996, is dismissed.

REASONS

1. I heard evidence from Ms L Tarran (Chief Operating Officer of Racz Group Ltd which is a holding company of the Respondent, which is a Dominos franchisee) and Ms H Briggs (a member of the Racz Group Ltd HR team) and then from the Claimant and was referred to documents in a 25 page bundle. I was sent in addition a copy of the emails dated 24/3/20 referred to below, the Respondent's employee handbook and the Claimants contract. The trial was held by CVP. There were no technical problems.

2. The Claimant presented a claim on 22/5/2020 against RACZ Group Ltd claiming unfair dismissal. It is agreed that in fact he was employed by Middlesbrough DP Ltd and, with the parties' consent, the name of the Respondent has been changed.

3. The Claimant's employment as a part-time delivery driver started on 26/9/2018 and ended with his summary dismissal on 19/5/2020.

4. He claimed automatic unfair dismissal under section 103A ERA 1996 – ie that he had been dismissed because he had been a whistleblower, having made protected disclosures by email dated 24/3/2020 and then by social media blogs from 27/3/2020 onwards.

5. The Respondent defended on the basis that the Claimant had been dismissed for gross misconduct consisting in *"(i) breach of social media policy as described in his contract of employment and handbook, (ii) (that he) tried to close down the business with social media posts that can be detrimental to the company and (iii) (that he) threatened an employee (with) physical violence via social media, with police involvement"*.

Findings of fact

6. From 14/3/2020 the Prime Minister announced that everyone should stop non-essential

contact and travel.

7. The Claimant on 24/3/2020 at 09.50 sent an email to a collective Respondent HR email inbox – which was managed by a three-person HR team. The email reads as follows "*Hi my name is Geoff Lynch and I am a delivery driver for dominos at south shields branch clocking in number is 1053. Just to inform you I will not be coming to work until our prime minister says it is safe to do so. This country is on full lock-down and so am I. I cannot believe you are staying open in this situation. Dominos is not essential to the people people will not die if they don't get a pizza for a few weeks. I am not putting my life at risk. And if I may suggest your totally irresponsible to put money and profit before lives. As a former business owner myself. Your actions will cost dominos respect and customers in the long run so I ask you to do the right thing and close all dominos stores in this time of crisis and save lives its as simple as that yours sincerely Geoff Lynch.*"

8. At 10.47 on 24/3/2020 Ms Briggs, (one of the three-person team who monitored the HR inbox) sent the following response email to the Claimant "*Hi Geoff. If you do not feel safe to work or feel you need to choose to self-isolate for the Safety of your family, you are more than welcome to do so. You can fill in a self-isolation form using the link below. Please can you return this to us within 30 minutes "* (a link was then provided).

9. The first UK lockdown came into legal force on 26 March 2020. As the Respondent's business was principally food delivery it was not legally obliged to close and it remained open with social distancing and other safeguards in place.

10. The Claimant thereafter posted social media Facebook messages (hereafter referred to as "blogs").

11. He was previously ordered to send to the Respondent copies of any such blogs that he relied on as protected disclosures by no later than 21/10/2020. The blogs which the Claimant has produced in evidence are as follows.

    (i) A message dated 27/3/2020 posted on Facebook which reads *"This might sound harsh but to all DOMINOS employees still going to work you're a disgrace to your country. NONE ESSENTIAL".*
    (ii) A post later that day in which the Claimant wrote to Mr C Love (a fellow employee who had written abusive messages to the Claimant in response to his first message (ie (i))) The Claimant wrote: *"I will fuckin stab you in your ugly face it will then look better than it does now you can count on that*"
    (iii) A long message posted on 27/3/20 at 22.56 in which the Claimant set out his arguments as to why the South Shield branch of Dominos should be closed down. The Claimant suggested that the shop was small and congested for the number of staff working there so social distancing was impossible. The message is stated to be addressed to *"the people who have never set foot in a Dominos*" and was responded to by a number of third parties including an employee and ex-employee
    (iv) On 28/3/2020 The Claimant wrote *"cant wait for testing kits to drop through the door if I am clear. I will immediately volunteer for NHS. fuck dominos*" and later *"When yav done ya best to protect fellow workers at dominos. Nows the time to move on NHS HERE I COME TO VOLUNTEER*"
    (v) On 29/3/2020 the Claimant posted a statement he had seen in a local newspaper namely Coventrytelegraph.net publicizing a statement the Respondent had made under the title "*Domino's statement after concerns about kitchen staff working too closely*". The Claimants comment was "*I am not the only one bring this up then*."
    (vi) On 4/5/2020 the Claimant posted "*Just got my Corona test back and I am negative given me great peace of mind going back to work this week. Sheer bliss"*
    (vii) On 5/5/2020 the Claimant posted "*This lockdown has cost me about £1500 with being off work and not getting paid for it. But hears (sic) the thing I am still ALIVE*"
    (viii) On 11/5/2020 the Claimant posted *"Back to work from Friday night after nearly two*

months off. Never thought I would miss work but cant wait to get back"

12. The Claimant continued to post messages on and after 20/5/20 but as these post-date his dismissal, they are irrelevant and are not reproduced here.

13. Blogs (i) and (ii) were brought to the attention of the Respondent's management by Mr C Love on or shortly after 27/3/20.

14. I reject the Claimants suggestion, apparently made for the first time during his oral evidence during the hearing, that he had sent blog (i) specifically by Facebook messenger to numerous managers including Glyn Dalton (the manager at South Shields Dominos).

15. The Respondent's management in the persons of Ms Tarran and Ms Briggs were unaware of blogs (iii) to (viii) above when investigating disciplining and dismissing the Claimant. I reject the Claimant's unsubstantiated suggestion that the management monitored the Claimant's Facebook postings.

16. The Respondent, having found out about blogs (i) and (ii) on or about 27/3//2020, reported the Claimant to the police. The police phoned the Claimant and gave him an informal warning about the threat he had made, but did not take any further action against him.

17. The Respondent did not take any further action against the Claimant until 12/5/20 because during the interim period the Claimant was on leave and self-isolating.

18. When the Respondent found out that the Claimant was preparing to return to work, the Respondent suspended the Claimant from his employment on 12/5/20. The letter of suspension refers specifically to blogs (i) and (ii) but not to the email of 24/3/20 or to any other blogs. On the same day the Claimant was invited to an investigatory meeting on 14/5/20 to discuss "*making threats towards your Domino's colleagues".*

19. The Claimant attended the meeting by recorded telephone call on 14/5/2020 with Ms Tarran. The Claimant did not deny making blogs (i) and (ii) and he confirmed that the police had phoned and warned him as a consequence of him making them. No other blogs were referred to during the investigatory meeting.

20. The Claimant was invited to and attended a Zoom disciplinary meeting on 19/5/20. This was conducted by Ms Briggs, and it was recorded and a transcript produced. The Claimant admitted he had been at fault in making the abusive/threatening blogs and apologized. He was told he was summarily dismissed because *"the threats you make are quite severe and due to that I would not be comfortable having you back in the store with the employees*". Ms Briggs rebutted the Claimant's claim that Dominos should have closed, by stating that safety measures had been put in place and that it was the Claimant who had threatened staff members lives. Ms Briggs also referred to the Claimant having breached the Respondent's social media policy. The dismissal was confirmed by letter the same day. Ms Briggs confirmed in her oral evidence during the hearing that although she referred to threats (plural) the Claimant was dismissed because of one threat only, namely the threat he had made to Craig Love on 27/3/20.

21. The Respondent's employee handbook at the time included the following:
"8.8. Social media This policy is in place to minimise the risks to our business through use of social media. We require employees to understand the potential for breaches of confidentiality when using Internet social networking websites (such as 'Facebook, twitter'). This policy deals with the use of all forms of social media, including Facebook, LinkedIn, Twitter, Google+, Wikipedia, Instagram, Vine, Tumblr and all other social networking sites, internet postings and blogs. It applies to use of social media for business purposes as well as personal use that may affect our business in any way. Personal use of social media is never permitted during working hours or by means of our computers, networks and other IT resources and communications systems. You must avoid making any social media communications that could damage our

business interests or reputation, even indirectly. You must not use social media to defame or disparage us, our staff or any third party; to harass, bully or unlawfully discriminate against staff or third parties; to make false or misleading statements; or to impersonate colleagues or third parties. You must not express opinions on our behalf via social media. You must not discuss or make indirect reference to the Company, your work, your colleagues, suppliers or any associated business on social networking sites. This is essential so as to preserve the confidentiality and security of all concerned. Anything posted that is deemed to damage the company reputation will result in disciplinary action. Entering into discussions about your activities at work when you are outside of work may be misinterpreted and, therefore you are required not to make any comments if they could be related to the Company or your work in any way. Even making general comments about your time at work could be misconstrued. You must not post comments about sensitive business-related topics, such as our performance, or do anything to jeopardise our trade secrets, confidential information and intellectual property. You must not include our logos or other trademarks in any social media posting or in your profile on any social media. Any misuse of social media should be reported to your Store Manager. You should make it clear in social media postings, or in your personal profile, that you are speaking on your own behalf. Write in the first person and use a personal e-mail address. Be respectful to others when making any statement on social media and be aware that you are personally responsible for all communications which will be published on the internet for anyone to see. If you disclose your affiliation with us on your profile or in any social media postings, you must state that your views do not represent those of your employer. You should also ensure that your profile and any content you post are consistent with the professional image you present to clients and colleagues. If you are uncertain or concerned about the appropriateness of any statement or posting, refrain from posting it until you have discussed it with your Store Manager. If you see social media content that disparages or reflects poorly on us, you should contact your Store Manager. Breach of this policy may result in disciplinary action and in serious cases, your summary dismissal. You may be required to remove any social media content that we consider to constitute a breach of this policy. Failure to comply with such a request may in itself result in disciplinary action."

22. The Claimant's written employment contract which he signed on 21/9/2018 required him to read and comply with the policies and procedures in the Employee handbook.

Relevant law

23. Section 43B(1) ERA 1996 defines what a protected disclosure is as follows:
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—

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

that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

that a miscarriage of justice has occurred, is occurring or is likely to occur,

that the health or safety of any individual has been, is being or is likely to be endangered,

that the environment has been, is being or is likely to be damaged, or

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.

24. A qualifying and protected disclosure requires the claimant to show that he made a disclosure on information either to his employer or in one of the circumstances covered by sections 43C to 43H. The words used must communicate information rather than opinion or a question.

25. The word *"disclosure*" means "*The action of making new or secret information known"* or *"a fact, especially a secret, that is made known"* (Oxford English Dictionary). Hence referring to

information which is already known and in the public domain or complaining about facts already well-known to the recipient of the complaint cannot be a protected disclosure because nothing is thereby disclosed.

Conclusions

26. The Claimant sent his email dated 24/3/2020 because he held the opinion that the South Shields branch of Dominos remaining open, endangered the health and safety of individuals. However the Prime Ministers announcement a few days earlier, and the fact that the Dominos outlet in South Shields was still open on 23/3 was widely known and in the public domain and I do not find that the Claimant's complaint about this can be properly described as a disclosure of information.

27. In any event Ms Briggs prompt and appropriate response to the Claimant's email dated 24/3/2020, indicates that the Respondent was not offended or unhappy to have received it. The email was not referred to at all when the Claimant was suspended, investigated and dismissed in May 2020. Even if the email should be regarded as a protected disclosure, I do not find that the Claimant was dismissed because he sent it.

28. Blog (i) is a piece of abuse coupled to an expression of opinion ("*NONE ESSENTIAL*") specifically and expressly addressed to the Respondent's employees. Blog (ii) is an abusive threat of violence addressed to a specific individual employee. I find that neither of these blogs disclosed information and also neither were addressed to the employer or other responsible person as required by section 43C ERA 1996. I find that sections 43D to 43H do not apply.

29. Hence, I accept the Respondent's submission that none of the relevant claimed disclosures were in fact disclosures protected under the statute.

30. Both blogs (i) and (ii) were serious breaches of the Respondent's social media policy, which matter was also relied on as a supplementary point by Ms Briggs in dismissing the Claimant.

31. The main and operative reason for the Claimant being dismissed was the fact that he had made blog (ii) above, which consists in a serious threat against Mr C Love. This was gross misconduct justifying summary dismissal.

32. The provisions of the ERA 1996 which protect whistleblowers do not provide protection against an employee being dismissed for making a serious and public threat of violence against another employee.

33. Hence the claim must be and is dismissed.

J S Burns Employment Judge
1/6/2021
For Secretary of the Tribunals