EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Potgieter	v	Gee Ricci Ltd (1)
		Mr H Hendi (2)
		Mr M Wallis (3)

Heard at: Reading (in person and by video) **On**: 14, 15, 16 and 17 June 2021

Before: Employment Judge Hawksworth
Mrs C Baggs
Mrs C Tufts

Appearances:

For the Claimant: Mr S Martins (legal consultant)
For the Respondent: Mr C Murray (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The disclosures made by the claimant on 27 April 2018, 12 June 2018, 15 June 2018 and 25 June 2018 did not meet the legal requirements to make them protected disclosures. The claimant's complaints of protected disclosure detriment and dismissal therefore fail and are dismissed.

2. The claimant was not entitled to be paid for her full notice period because she did not attend work for all of her notice period and no concluded agreement was reached that she need not attend. The complaint of breach of contract in respect of notice pay therefore fails and is dismissed.

3. The respondent failed to give the claimant itemised pay statements in accordance with section 8 of the Employment Rights Act 1996 in respect of pay in July, November and December 2018.

4. The first respondent is ordered to pay the claimant the sum of £673.30 under section 12(4) of the Employment Rights Act 1996 in respect of unnotified deductions from the claimant's pay.

REASONS

Claim, hearing and evidence

1. The claimant was employed by the respondent to work as a manager at its store in Marlow from 3 February 2018 until 9 January 2019. She presented her claim on 11 March 2019 following a period of Acas early conciliation from 11 February 2019 to 11 March 2019. The response was presented on 9 June 2019. The respondent defended the claim.

2. The hearing before us was a hybrid hearing, meaning some people attended in person and some by video. The employment judge, the claimant, her representative and the claimant's husband attended Reading Employment Tribunal in person. The other members of the tribunal, the respondents' representative and the second and third respondents attended by video (CVP).

3. The respondent had applied for a postponement of the hearing because one of its witnesses, Mrs Wallis, was in hospital on the first day of the hearing and was unable to attend the hearing. Employment Judge George refused the postponement application, in short because Mrs Wallis was not the relevant decision maker and the hearing had already been postponed from October 2020. We told the parties that we would attach such weight as we thought appropriate to Mrs Wallis's statement. We invited the claimant's representative to outline the questions he would have asked if Mrs Wallis had been present.

4. There was a bundle which had 374 pages in the electronic copy (including the index). The claimant had an annotated index and an annotated copy of the bundle. She asked to use these during her evidence because of dyslexia and because the bundle had been prepared by the respondent and she was not familiar with the order of documents. There was no clean copy of the bundle available. We explained to the claimant that witnesses are not normally permitted to refer to notes when giving evidence as we need to hear their unassisted and unprompted evidence. We explained that she would not be expected to have an immediate recall of page numbers in the bundle and that instead of using her notes or annotated bundle, if she had difficulty in locating a document during her evidence she could ask the tribunal for help.

5. Mr Wallis was not able to attend the hearing on the first morning as he was at the hospital with his wife. We decided after discussions with the parties that (after time for reading) we would hear evidence from Mr Hendi first, on the afternoon of 14 June. This would allow Mr Wallis to be present while the claimant was giving evidence the following day, and it would also allow time for a clean copy of the bundle to be obtained for the witness table. In the event, Mr Wallis was able to attend by video on the afternoon of the first hearing and on subsequent days, so he was able to be present for all the evidence.

6. Mr Hendi's evidence was concluded on the afternoon of 14 June, and the claimant began giving evidence on the morning of 15 June 2021. Mr Wallis gave evidence on the afternoon of 15 June 2021 and the morning of 16 June.

7. Towards the end of the evidence an issue arose concerning a transcript of a meeting which was included in the bundle at pages 270a to 270cc. It was a transcript of a recording which had been made covertly by Mr Wallis at a meeting he attended with the claimant and her husband after the claimant's dismissal. The recording had been transcribed by a transcription services company. The claimant had been given a copy of the transcript in July 2020 but had not been provided with (and had not requested) a copy of the audio recording itself. She had already been asked questions about the transcript of the meeting in her evidence. Mr Martins applied for the transcript to be excluded from the evidence or alternatively for the tribunal to listen to the recording of the evidence.

8. We decided that the transcript should not be excluded. The claimant had had the document for almost a year, and the application was being made very late in the day, especially when the claimant had already been asked about it without any objection. Mr Wallis's evidence had not yet concluded, and he could be questioned about the meeting and the transcript, as the claimant had been. There was insufficient time for the tribunal to listen to the whole recording, and no specific inaccuracies were raised.

9. In addition, in response to a question raised by Mr Murray about an allegation in the claimant's witness statement that the respondent or its legal representatives had tampered with a document she disclosed, the claimant clarified that this referred to document 29 in her disclosure. The document was not included in full in the bundle, and the page numbering in the copy in the bundle appeared to have been altered. We were provided with a full copy of document 29. The pages which were omitted were not of direct relevance to the issues we have to decide. We decided, looking at the copy in the bundle, that a photocopying error was most likely to be the explanation for the numbering change. We decided that it was not in line with the overriding objective to postpone the hearing to investigate this any further.

10. On 16 June we heard submissions and deliberated. We gave our judgment and reasons on 17 June 2021, explaining our findings of fact and our conclusions.

The issues

11. The claimant brought claims of protected disclosure detriment and dismissal, breach of contract in respect of notice period, and failure to provide itemised pay statements. A holiday pay complaint was resolved between the parties and was not pursued before us.

12. The issues for determination by us were set out in case management summaries following preliminary hearings on 30 October 2019 and 21 August 2020 and were confirmed at the start of the hearing before us.

13. The claimant relies on four protected disclosures (as defined in section 43A to 43H of the Employment Rights Act 1996):

    13.1 A disclosure made at a staff meeting on 27 April 2018. The respondent accepted that the claimant raised the payslip issue at that meeting;
    13.2 An email dated 5 June 2018. It was agreed that this meant to refer to an email of 12 June 2018 (page 77 of the bundle). The respondent admitted that the email was received;
    13.3 A conversation with Mr Hendi on 15 June 2018. This was neither admitted nor denied by the respondent as Mr Hendi has no recollection; and
    13.4 An email to Mr Hendi on 25 June 2018. The respondent admitted that this email was received.

14. The claimant alleges three detriments (contrary to section 47B of the Employment Rights Act 1996):

    14.1 Dismissal (in respect of the second and third respondents, Mr Hendi and Mr Murray);
    14.2 An email sent to her by Mr Hendi on 26 June 2018 (page 145); and
    14.3 A failure to pay tax and national insurance contributions to HMRC.

15. In respect of the first respondent, her employer, the claimant complains of automatic unfair dismissal because of making a protected disclosure (contrary to section 103A of the Employment Rights Act 1996).

16. The claimant also complains of breach of contract in respect of pay for the second two weeks of her four week notice period. The respondent said that the claimant was not entitled to be paid for those two weeks as she did not attend work.

17. The claimant also complains of failure to provide itemised payslips in July, November and December 2018. The respondent accepted that payslips had not been provided for those months.

Findings of fact

18. The claimant began working for the respondent on 3 February 2018. The respondent is a shop selling designer clothes in Marlow. The claimant was the only permanent employee at the time. The respondent is a small family business and the claimant worked closely with Mr and Mrs Wallis and Mr Hendi. The claimant prepared her own contract of employment which the parties signed. In respect of notice, the contract said that the claimant was entitled to four weeks' notice of dismissal, and that there was an expectation to work the notice period.

19. The claimant was paid £1,520 each month but she did not receive any payslips. She chased this up with Mr Hendi and with Mr and Mrs Wallis. Mr Hendi's accountant was unwell at the time and was unable to prepare payslips immediately. Mr Hendi had arranged to pay the claimant £1,520 each month by setting up a standing order to her, based on a figure he had been given by the accountant for the claimant's net pay.

20. On 22 March 2018 the claimant first chased the respondent for payslips and provided a copy of her P45 from her previous employer. On 27 April 2018 there was a staff meeting with Mr Hendi and Mr Wallis at which the claimant said that her payslips were still outstanding from February 2018. On 30 April and 23 May 2018 the claimant had some correspondence with the accountant. He had trouble reading the scanned copy documents she sent and she re-sent the P45.

21. On 12 June 2018, the claimant sent an email to the respondent to say that she still had not received any payslips. This was the first of the claimant's email disclosures which was alleged to be a protected disclosure.

22. On 14 June 2018 the claimant received correspondence from HMRC and became aware that there was an issue with her tax, in that she had not been recorded with HMRC as an employee of the respondent. She had a conversation with Mr Hendi the following day at which he said that the company was to be audited and the accountant had not been doing his job properly. During the conversation on 15 June 2018, the claimant complained about the non-receipt of payslips.

23. On 25 June 2018 the claimant emailed the respondents again. She said that she needed to make them aware that she had not received a payslip and that the respondent had not made any income tax or national insurance payments to her account.

24. In her evidence to us, the claimant accepted that in her conversations and emails with the respondent about her payslips, she was, prior to September 2018, only raising concerns about her own payslips and her own position with HMRC. She said it had nothing to do with the other staff. It was not until September 2018, when the respondent took on another permanent member of staff, that the claimant first raised concerns on behalf of that colleague as well. Prior to September 2018, the respondent's other staff all had different working arrangements to the claimant, and the claimant did not know how the respondent was paying them.

25. On 26 June 2018 Mr Hendi sent the claimant an email response to her email. Mr Hendi's email was in capital letters throughout. The claimant found the terms of the email unhelpful, aggressive and threatening. On the same day she made a report to HMRC about the tax issues. We accept the evidence of Mr Hendi that he was in discussion with HMRC and was making payments to HMRC on account, in respect of tax and national insurance, but these payments were not being allocated to individuals.

26. On 12 July 2018 some payslips were sent to the claimant for the period February to June 2018. This was very late. We find this was as a result of delay and lack of competence on the part of the respondents, a small business, in the context of the ill health of their accountant, not as a result of a deliberate act.

27. In the second half of 2018 the relationship between the claimant and Mrs Wallis began to deteriorate. They had very different management styles, the claimant being much more focused on organisation, and Mr and Mrs Wallis, who were less experienced in retail and management, being more focused on keeping staff happy.

28. Mr and Mrs Wallis had no issue at all with the claimant's management skills or performance and that was reflected in the letter they gave her confirming the completion of her probation period. However, we accept the evidence of Mr Wallis that Mr and Mrs Wallis perceived there to be a difficulty with the claimant's management style (as opposed to her management skills) and that they sought to raise this with the claimant. Because of their lack of experience, they may not have been sufficiently clear with her about this.

29. We accept Mr Wallis's evidence about the deterioration of the relationship between the claimant and Mrs Wallis, because it is consistent with the few records that there are of meetings and discussions between Mrs Wallis and claimant, such as a discussion on 27 April 2018 which the claimant confirmed in an email, in an exchange of WhatsApp messages on 14 November 2018, in a meeting on 29 November 2018 (recorded in an email by the claimant), in a WhatsApp exchange on 23 December 2018 and in a meeting on 28 December 2018 at which the claimant and Mrs Wallis agreed to try and improve their working relationship and exchanged a hug.

30. In mid-December 2018, payslips for August and September were received by the claimant. She did not receive payslips for July, November and December 2018.

31. On 9 January 2019 Mr Wallis gave the claimant a dismissal letter. We find that it was his decision to dismiss the claimant. He began considering dismissing the claimant in December 2018, at the time of the meetings with the claimant.

32. On 10 January 2019 the claimant attended work. Towards the end of the day, she and Mr Hendi went for a meeting in a nearby café. After the meeting they returned to the shop and had a discussion which included Mr Wallis, Mr Hendi and the claimant. In that discussion, Mr Hendi told Mr Wallis that the claimant's dismissal letter was to be withdrawn, to allow the claimant to resign. Mr Hendi had told the claimant in their meeting that he was willing to agree to this arrangement, and to pay the claimant four weeks' notice without her needing to work. He understood this to have been accepted by the claimant but at a meeting the following day the claimant made clear that she had not accepted this offer.

33. On 17 January 2019 there was a further meeting between the claimant and her husband and Mr Wallis at which the claimant again made clear that she had not accepted the offer proposed by Mr Hendi on 10 January 2018. The claimant did not work her notice other than on 10 January 2018.

The law

Protected disclosure

34. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

    34.1 a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'types of wrongdoing' set out in section 43B has occurred, is occurring or is likely to occur);

    34.2 which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

35. The claimant says that she made disclosures about the types of wrongdoing set out in sub-sections 43(1)(a), 43(1)(b) and 43(1)(f), that is that she made disclosures which tended to show:

    35.1 that a criminal offence had been committed, was being committed or was likely to be committed (sub-section 43(1)(a));

    35.2 that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they are subject (sub-section 43(1)(b)); and

    35.3 that information tending to show any of the other 'relevant failures' had been or was likely to be deliberately concealed (sub-section 43(1)(f)).

36. The method of disclosure relied on by the claimant is section 43C. This section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.

37. Section 43B(1) requires both that the worker has the relevant belief, and that their belief is reasonable. This involves a) considering the subjective belief of the worker and also b) applying an objective standard to the personal circumstances of the worker making the disclosure. In Chesterton v Nurmohamed [2017] IRL 837, the Court of Appeal considered the test to be applied when considering the public interest element of the belief, which was added to the test for disclosures made after 25 June 2013, by amendment of section 43B(1).

38. In paragraphs 36 and 37, the court said:

"…The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers - even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

39. The relevant factors set out at paragraph 34 are:

"(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 - a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed - disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
(d) the identity of the alleged wrongdoer … "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest""

Protected disclosure detriment

40. Section 47B of the Employment Rights Act says that:

> "*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."*

41. The test for whether a detriment was done 'on the ground that' the worker has made a protected disclosure is set out in Fecitt and others v NHS Manchester [2012] IRLR 64. What needs to be considered is whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower. This is a different test to the test for automatic unfair dismissal because of a protected disclosure where the focus is on the reason or the principal reason for dismissal.

42. Section 47B does not apply where the detriment is a dismissal within the meaning of Part X of the Employment Rights Act (section 47B(2)). However, in a claim against an employee respondent, dismissal may amount to a detriment for which the employee is personally liable and for which the employer may be vicariously liable under section 47B(1B) (Timis v Osipov 2019 ICR 655, CA).

Burden of proof

43. In a complaint of detriment, section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. Where the claimant can show that there was a protected disclosure, and a detriment to which she was subjected by the respondent, the burden will shift to the respondent to show that the detriment was not done on the ground that the claimant had made a protected disclosure.

Time limit

44. The time limit for complaints of detriment including protected disclosure detriment is set out at section 48 of the Employment Rights Act. This provides at sub-section 3 that:

> *"(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

<u>Automatic unfair dismissal</u>

45. Section 103A of the Employment Rights Act provides that the dismissal of an employee is unfair where the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

46. A dismissal which is contrary to section 103A is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

47. Where there is more than one reason for a dismissal, the tribunal must be satisfied that the principal reason is that the employee made a protected disclosure. The protected disclosure must be the 'primary motivation' for the dismissal (<u>Fecitt and others v NHS Manchester</u>). This is a different (and stricter) test than in a claim for unlawful detriment under section 47B, where a decision will be unlawful if a protected disclosure 'materially influences' the decision-maker.

<u>The right to itemised pay statements</u>

48. Section 8 of the Employment Rights Act provides that

(1) "A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,
(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,
(c) the net amount of wages or salary payable,
(d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment, and
(e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—
(i) a single aggregate figure, or
(ii) separate figures for different types of work or different rates of pay."

49. A worker may complain to an employment tribunal about the failure to provide an itemised pay statement. Section 12(3) provides that if a tribunal finds that a worker has not received a pay statement, it must make a declaration to that effect. Section 12(4) says that where the tribunal finds that any unnotified deductions have been made during the 13 weeks immediately preceding the tribunal application, the tribunal may also make a monetary award to the worker. The maximum award is the aggregate of unnotified deductions made during those 13 weeks (whether or not the deductions were made in breach of contract).

Conclusions

50. We heard a lot of evidence in this case, some of which was on areas which went beyond the issues we have to decide. Our role is limited to considering the legal complaints and issues which were set out in the claimant's claim and clarified at the preliminary hearings, not to consider everything that happened during the employment relationship or to consider whether there should be any criticism of the respondents' other actions. The sorts of issues we would have considered had the claimant been making a complaint of ordinary unfair dismissal, such whether the respondent followed a fair dismissal procedure, were not part of the matters for us to consider. As Mr Murray put it, the scope of our lens is quite confined. We do not look at the conduct of the respondent any more widely than we need to in order to determine the legal issues that arise in the complaints that are before us.

<u>Protected disclosure detriment and dismissal</u>

51. The first of the complaints for us are protected disclosure detriment and dismissal. The first issue in relation to those complaints is whether the claimant made a protected disclosure or disclosures. There are three main requirements for a disclosure to be a protected disclosure. They are set out in sections 43A to 43H of the Employment Rights Act.

52. The first requirement concerns the subject matter of the disclosure. It must be a disclosure of information which in the reasonable belief of the claimant tends to show one of six types of wrongdoing. The claimant relied on three types of wrongdoing, those set out at subsections 43B(1)(a), (b) and (f), that is information tending to show that a criminal offence had been committed, that a person had failed to comply with a legal obligation or that information about the relevant types of wrongdoing had been deliberately concealed. It is enough if the information tends to show one of those types of wrongdoing, and we focused on the failure to comply with a legal obligation.

53. We found that on each of the four occasions relied on by the claimant as protected disclosures, the claimant said that she had not received her payslips. She did so at a staff meeting on 27 April 2018; in an email to Mr Wallis, copied to Mr Hendi and others on 12 June 2018; in a conversation with Mr Hendi on 15 June 2018 and in an email to Mr Hendi on 25 June 2018. We have concluded that on each of these occasions the claimant disclosed information which in her reasonable belief tended to show that

there had been a failure by the respondent to comply with its legal obligation as her employer to provide her with payslips.

54. In her email of 25 June 2018 the claimant also said that the respondent had not made any income tax or national insurance payments to the claimant's account with HMRC, and we find this information was also information which in the claimant's reasonable belief tended to show that a legal obligation had been breached, namely the legal obligation on an employer to pay tax and national insurance to HMRC in respect of its employees.

55. The second requirement for a disclosure of information to be a protected disclosure concerns the person to whom the disclosure is made. Here the claimant made the disclosures to her employer which is one of the possible routes for making a protected disclosure (under section 43C) and so that condition is also met.

56. The third requirement is that, in the reasonable belief of the claimant, the disclosure must be made in the public interest. This is the least clear cut of the conditions in the claimant's case. We have to consider whether the claimant actually believed there was a public interest, that is the subjective element of the test, and if she did, whether her belief was reasonable, that is the objective element of the test.

57. Starting with the claimant's belief, we have found that the information that the claimant disclosed in each of her four disclosures only related to her. She referred only to her payslips and her tax position. She was clear in her evidence to us that her disclosures only concerned her. She did not give any explanation either at the time of the disclosures or in evidence to us as to why she considered the disclosures to be in the public interest.

58. We have concluded that the claimant did not have a belief that the disclosures were in the public interest.

59. If we had found that the claimant did have a belief that the information she disclosed was in the public interest, we would have had to go on to consider the objective part of the test, that is whether that belief was reasonable. We have gone on to that question for the sake of completeness.

60. In Chesterton v Nurmohamed, the Court of Appeal set out some factors which it accepted are relevant to assessing whether a disclosure has the required public interest element. They include the number of employees involved, the nature of the interests involved, the nature of the wrongdoing and the identity of the wrongdoer.

61. In this case, as far as the number of employees was concerned, the claimant accepted that she was disclosing information about herself only and that she was not aware of whether the position was the same for other employees until September when she raised the issue on behalf of another employee as well. The claimant was the only permanent member of staff in the Marlow shop and there was no evidence before us that at the time of the

claimant's disclosures any other employees, other than Mr Hendi and Mr Wallis themselves, had not received their payslips.

62. As to the nature of the interests, the right to an itemised payslip is an important employment right, but it is a personal right and a failure to provide a payslip relates to the individual employee themselves, and only indirectly affects anyone else. The nature of the interest is personal in character, it is not for example, the same as information in the employer's public accounts or anything of that nature.

63. As to the nature of the wrongdoing, we have concluded that there were delays, albeit very lengthy, and incompetence by the respondents rather than a deliberate failure to comply with their legal obligation.

64. Finally, the identity of the wrongdoer is important here. As a small family business, the respondent is at the opposite end of the scale to the large prominent employer who was the respondent in the Chesterton case.

65. So, weighing up those factors, we have concluded that the disclosure of wrongdoing about the respondents' failure to provide the claimant's payslips was not capable of being regarded as being in the public interest. The small number of employees involved (when the second and third respondents themselves are taken into account), the personal nature of the interest, the nature of the wrongdoing and the identity of the wrongdoer have led us to conclude that this was a private workplace dispute rather than a matter of public interest.

66. We have concluded as a result of that assessment that the claimant did not believe that there was a public interest in the information she disclosed about her payslips and that, even if she had done, that belief would not have been a reasonable belief.

67. The position in relation to the email of 25 June 2018 is different, because we have found that in that disclosure that the claimant also said that the respondent had not made any income tax or national insurance payments to her account with HMRC. If we had concluded that the claimant believed there to have been a public interest in relation to the email disclosure on 25 June 2018 we would have reached a different conclusion in respect of the reasonableness of her belief in relation to that disclosure, because it related to a failure to make tax and national insurance payments on her account to HMRC. We consider there to be a general public interest in companies properly paying tax and national insurance, and would have concluded that a belief that a disclosure of information about that was in the public interest, would have been a reasonable belief.

68. However, we have concluded that the claimant did not believe that disclosure to have been in the public interest. The claimant confirmed that the email of 25 June 2018 was about her own position only. Because of our finding in relation to the claimant's belief, we have concluded that the email of 25 June 2018 was not a protected disclosure.

69. For completeness, we went on to consider whether the claimant was subjected to any detriments by any of the respondents, and, if she was, whether any of those detriments were done on the ground of any of the four disclosures that she relied on, such that, if we had found any of the disclosure to be protected, the detrimental treatment would have been unlawful.

70. We considered each of the detriments in chronological order. We concluded that the non-payment of tax and national insurance to HMRC against the claimant's account did amount to a detriment. Only detriments by an act or deliberate failure to act are unlawful. The date of any deliberate failure by any of the respondents to properly notify HMRC is not clear, but if there had been one, it must have happened by 14 June 2018 when the claimant received correspondence from HMRC that did not include the respondent amongst the names of her employers.

71. The second detriment relied on by the claimant was the email of 26 June 2018. The respondent suggested that that could not amount to a detriment but we consider that the terms of the email overall and in particular the suggestion that the claimant could leave if she did not like the respondent's procedures did amount to a detriment. It was in terms which the claimant found aggressive and threatening.

72. Finally, the dismissal is considered as a detriment in respect of the individual respondents, Mr Hendi and Mr Wallis. It was accepted that the claimant was dismissed on 9 January 2019 and dismissal amounts to a detriment in this context.

73. We have found that the claimant was subjected to those three detriments and, if she had made a protected disclosure, we would have looked to the respondent to satisfy us that those detriments were not on the ground of any or all of the disclosures either individually or combined. The test is whether the disclosure materially influenced the treatment of the claimant.

74. The decision not to pay tax and national insurance to the claimant's HMRC account was an unusual arrangement but we have accepted that it was an agreement reached with HMRC because of disorganisation on a large scale with the respondents' financial arrangements, arising from their accountant's ill health. We do not conclude that the respondent decided not to make these payments to the claimant's account because of any of the disclosures she made. That seems very unlikely to us. Importantly and in any event, the failure to register the claimant as an employee of the first respondent had already happened by the time of the first of the two disclosures, so it cannot have been caused by them.

75. Secondly, the email by Mr Hendi and tone of his email on 26 June 2018 does seem to us to have been prompted by the claimant's comment about her HMRC account and had we found the claimant's email of 25 June 2018 to have been a protected disclosure, we would have found that it played a part in this detriment.

76. We accept that the dismissal was not because of any of the four disclosures made in April or June about the claimant's payslips or tax and national insurance position. We reach this conclusion because of the time that passed between the disclosures and the dismissal. The dismissal decision was first being considered in December 2018 and took place in January 2019, six to seven months after the disclosures. In the context of the claimant's employment by the respondent, which was a period of 11 months in total, that period of six to seven months was a long time. We do not accept that the respondent was strategically planning to dismiss the claimant between April or June 2018 until December or January 2019. Mr Wallis accepted that he was naïve about employment rights and management. We think that if the respondents had wanted to dismiss the claimant because of her disclosures they would have done so at the time and would not have waited six to seven months to do so.

77. We accept that the reason for the dismissal of the claimant was because Mr Wallis perceived there to be difficulties in the working relationship between the claimant and Mrs Wallis, and in a small business such as the respondents' shop, that was a very important factor for them.

78. For the same reasons, the automatic dismissal complaint against the first respondent fails. That has a different legal test to the complaint of detriment. The automatic unfair dismissal test under s.103A is whether the reason for dismissal (or if more than one the principal reason for dismissal) was the fact of making a protected disclosure. For the reasons set out above, even if we had found that there was a protected disclosure, we would have concluded that it was not the principal reason for the dismissal because the principal reason was Mr Wallis's perception of the difficulties in the working relationship between the claimant and Mrs Wallis.

79. Finally, if we had made a finding of protected disclosure detriment in relation to either of the non-dismissal detriments, the tax and national insurance account issues and the email of 26 June 2018, those detriments would have been out of time. They had happened by 14 June 2018 and on 26 June 2018. ACAS were notified by the claimant on 11 January 2019, that meant that anything that occurred more than three months before that date, which is 12 October 2018 would have been out of time for the complaint of protected disclosure detriment.

80. The rules on extending time in detriment complaints are set out in section 48 of the Employment Rights Act. The claimant would need to show that it was not reasonably practicable for her to present her claim in time, and that the claim was presented within such further period as we consider reasonable. We did not hear any evidence about this which would have enabled us to make any findings to extend time.

81. In conclusion on the protected disclosure dismissal and detriment complaints therefore, we have decided that the claimant did not make a protected disclosure because the disclosures did not have the required

public interest element. We went on to conclude that if there had been a protected disclosure, we would have found that two of the detriments (including the dismissal) were not materially influenced by them. If we had found that either of the alleged non-dismissal detriments were because of a protected disclosure, we would have concluded that it was brought out of time.

82. We would also have found (if we had decided that the claimant had made a protected disclosure) that a protected disclosure was not the reason or the principal reason for the claimant's dismissal.

Breach of contract

83. The claimant's breach of contract complaint was in relation to the failure by the respondent to pay the claimant her full four weeks' notice pay during her four week notice period. We found that the claimant was entitled to four weeks' notice, that she did not work her notice after 10 January 2019 and that the respondent paid the claimant for two weeks of her notice period.

84. Our starting point is that the claimant's contract says that there is an expectation to work the notice period. We have considered whether there was an agreement varying that, so the claimant did not need to work her notice period. We have decided that there was not.

85. There were discussions about the claimant not having to work her notice period, for example in emails between the parties during the period 11 to 16 January 2019 (pages 261-270). However, those emails were all in the context of the discussions about a resolution involving the withdrawal of the dismissal letter followed by resignation. That proposal was not accepted by the claimant. We have concluded that there was no freestanding agreement outside that proposal that the claimant need not work her notice period.

86. There may have been some confusion about whether the claimant was being required to work, but it was certainly clear from 28 January 2019 when Mr Hendi emailed the claimant that she had been asked to come back to work for the remainder of her notice period. We have some sympathy with the claimant about this complaint given that there was a lack of clarity on whether she was required to work. However, this is a contractual claim which requires us to look at the legal entitlements under the terms agreed between the parties. That leads us to conclude that the claimant had no entitlement to pay for the remainder of the notice period which she did not work, in circumstances where there had not been a concluded agreement that the claimant need not attend work. For those reasons the breach of contract complaint fails and is dismissed.

Itemised pay statements

87. The reference under section 12 regarding the failure to provide itemised pay statements succeeds. The respondent accepted that the claimant was not given itemised payslips as required by section 8 of the Employment Rights Act in either July, November or December 2018.

88. The claimant's claim was presented within three months of the end of the employment and is in time in respect of these payslips. In respect of remedy, which we come on to next, the tribunal is limited to focusing on the period of 13 weeks before the claim was presented.

Remedy

89. We have decided that the claimant should be awarded the sum of £673.30 under section 12(4) of the Employment Rights Act in respect of the failure to provide payslips in July, November and December 2018.

90. Section 12(4) requires us to consider unnotified deductions during the 13 week period immediately preceding the date of the claim. This period includes the November and December pay periods only, not the July pay period. The unnotified deductions in November and December were £336.65 in each of those months. For the two months the total of the unnotified deductions was £673.30.

91. We have concluded that it is appropriate to award the full award in this case, given the extent of the failings and the respondents' failure to take any steps to remedy them despite the claimant raising the issue numerous times. We accept that the respondents had problems with their accountant. However, they should have taken steps to make alternative arrangements for payslips to be provided.

____
Employment Judge Hawksworth

Date: 25 June 2021

Sent to the parties on: ..13 July 2021..
THY

....
For the Tribunal Office