EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109653/2021

Held remotely by means of the Cloud Video Platform on 23 September 2021

Employment Judge W A Meiklejohn

Mr Steven Spear	**Claimant** **Represented by:** **Ms J Cradden – Solicitor**
Fonab Castle Hotel Ltd	**Respondent** **Represented by:** **Mr L Bronze of Counsel** **Instructed by:** **Ms S Marten – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that –

(i) The claimant made a protected disclosure to the respondent under section 43A of the Employment Rights Act 1996 ("ERA") being a qualifying disclosure within the meaning of section 43B ERA; and

(ii) The claimant brought to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety within the meaning of section 44(1)(c) ERA.

REASONS

1. This case came before me for an open preliminary hearing, conducted remotely by means of the Cloud Video Platform, to determine two preliminary issues. Ms Cradden appeared for the claimant and Mr Bronze for the respondent.

2. Those preliminary issues were as follows –

   (i) Did the claimant make a protected disclosure within the meaning of section 43A ERA?

   (ii) Did the claimant bring to the respondent's attention, by reasonable means, circumstances connected with his work which the claimant reasonably believed were harmful or potentially harmful to health or safety?

Applicable law

3. The statutory provisions in ERA relating to protected disclosures engaged in this case, so far as relevant, are as follows –

> ***"43A Meaning of 'protected disclosure'***
> *In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*
>
> ***43B Disclosures qualifying for protection***
> *(1) 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 –*
>
> *(a) ….*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(c) ….*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered….*

(e) ….

(f) ….

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer….

44 Health and safety cases

(1) An employee 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 –

(a) ….

(b) ….

(c) being an employee at a place where –

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety…."

Evidence

4. I heard evidence from the claimant and from Mr N Thompson, the respondent's General Manager. The evidence in chief of both witnesses was contained in written witness statements. These were taken as read in accordance with Rule 43 of the Employment Tribunal Rules of Procedure 2013.

5. I was provided with a joint bundle of documents extending to 174 pages to which I refer below by page number. This included a reference to the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020/344 (the "2020 Regulations"). The

claimant's representative provided the Tribunal with a link to the 2020 Regulations (being those in force at the relevant time for the purpose of this case) in advance of the hearing. Unfortunately I was unable to access this and, when I looked up the 2020 Regulations, I found that they had been revoked. Fortunately I was able to deal with the issues without needing to refer to the 2020 Regulations.

List of issues

6. Included in the joint bundle was a *"List of issues – to be agreed"* (76-80). This included issues relating to the two preliminary points I had to decide. While the list might have been "*to be agreed"* it did not appear to be controversial in relation to those two issues and I refer to it below in the discussion section of my Judgment.

Findings in fact

7. I have attempted deliberately to restrict my findings in fact to matters which were relevant to the issues I had to decide at this preliminary hearing.

8. The claimant was employed at Fonab Castle Hotel, Pitlochry from 29 September 2020 as Food and Beverage Manager. He was interviewed for this position in August 2020, when he met with Mr Thompson and also Mr and Mrs J Clark who were introduced to him as the owners of the hotel. At the time of the events described below, he had not met any other member of Mr and Mrs Clark's family and had no knowledge of their involvement, if any, with the hotel.

December 2020 visit

9. The claimant's evidence was that members of the Clark family had planned to stay at the hotel between Christmas 2020 and New Year. He referred to a party of 8-10 people including children. He said that a private dining area (the Whisky Room) had been reserved for their use and accommodation had been set aside.

10. Mr Thompson's evidence was that the Clark family had been due to visit the hotel at the time of the Etape Caledonia cycle event in 2020 but that visit (and the cycle event itself) had been cancelled. He disputed that

there was a family visit planned in December 2020. He said that the hotel was normally busy with paying guests from 23 December and the family would not occupy rooms at that time. He was unable to say why the claimant might believe there was to be a family visit in December 2020.

11. It was not possible to reconcile this conflict of evidence. It seemed to me probable that Mr Thompson was correct in saying that no Christmas visit was planned since he, as General Manager, would most likely be aware of any such visit. However, the claimant's evidence contained sufficient detail of the planned visit to persuade me that this was what he believed was to happen.

Lockdown from 26 December 2020

12. Prior to Christmas 2020, due to an increase in Covid-19 cases, the Scottish Government announced that Level 4 restrictions would be introduced across all of mainland Scotland with effect from 26 December 2020. These restrictions were contained in Schedule 5 to the 2020 Regulations. They included closure of businesses (including those supplying food and drink), restrictions on travel and restrictions on gatherings of people. The restrictions were widely publicised in the media. They were also the subject of conversation between the claimant and members of his family involved in the hospitality trade.

13. The claimant's evidence as to his understanding of the impact of these restrictions was expressed in his witness statement in these terms –

> "*My basic understanding at the time was that under the Level 4 restrictions we could not be open for business and provide accommodation to the public other than for some types of worker. Workers who actually lived in the hotel were allowed to stay and did so. Under the government's "Stay at Home" guidance people were not allowed to leave their homes unless they had a "reasonable excuse". Work would be a reasonable excuse but* [only] *if it could not be done from home. Households could not mix in indoor public spaces. Finally the government had also issued a travel ban between Scotland and England and between various parts of Scotland to reduce the risk of the spread of Covid 19. This was all a result of the*

impact of the increase in cases of the Delta variant which was spreading extremely fast in Scotland."

14. The claimant's reference to *"the Delta variant"* was incorrect. While initially detected in late 2020, this coronavirus variant was not named as such by the World Health Organisation until 31 May 2021. However, the point was not material for the purpose of this case.

FaceTime conversation on 12 February 2021

15. A conversation took place on 12 February 2021 amongst Mr Thompson, the claimant and Mr R Preston who was the respondent's Executive Chef. Mr Thompson and Mr Preston participated from the hotel and the claimant participated remotely by FaceTime.

16. Mr Thompson's evidence about this conversation, per his witness statement, was as follows –

"I arranged a meeting with Steven and the Executive Chef, Rikki Preston on 12 February 2021. The meeting took place by Face Time. It was supposed to take place in person, but Steven said he couldn't come. However, I was in the hotel as was Rikki. Steven was at home. I agree that I did relay instructions to Steven regarding the arrangements for the visit. I deny describing it as a private party event, I can also confirm that I did relay that all the family members were employed for the hotel. I admit I didn't say who did what role as I believed this was common knowledge (please see para 3 above). As such it did not cross my mind to fully explain more than what was said. I also confirm that I did ask for this to remain confidential and that was because I did not want it to be common knowledge that private conversations were to be taking place for obvious reasons. Such conversations are naturally private as they are across-the-board in all companies."

17. The "*visit"* to which Mr Thompson was referring was one involving Mr and Mrs Clark and seven others, scheduled to be at the hotel between Thursday 18/Friday 19 February 2021 and Monday 22 February 2021. These others included members of Mr and Mrs Clark's family, three being

grandchildren. At paragraph 3 of his witness statement Mr Thompson referred to the positions of Mr and Mrs Clark, their daughter and their son and daughter-in-law relative to the hotel.

18. The claimant's evidence about this conversation, per his witness statement, was as follows –

> "*Niall then wanted to have another meeting on 12 February to talk about some follow up. It was primarily to discuss things like the impact of refurbishment of part of the hotel and menus as well as a new concept for afternoon tea for one of the restaurants. Again I was unable to go to the hotel but we had the meeting by FaceTime instead. Ricky who was the head chef did go in. Towards the end of the facetime call on the 12th, Niall said that Jed and Joanne Clark the owners were coming up the following weekend and bringing the family. They would arrive on the Thursday afternoon/early evening. Their daughter and son were arriving on Friday at 1 o'clock with two other adults (who I took to be their spouses) and three children. I can see in the notes from the grievance that Niall suggested that there might be others joining for lunch but I have no recollection of that at all. Niall said that we had to put the Brasserie back together and for there to be a full bar and brasserie service available. We were to set up as if ordinary customers were coming. The dining room was to be prepared. The family planned to stay in the modern wing of the hotel and we were to take one of those rooms and set it up as a breakfast room for the children. We talked about what was to be provided. That included lunch and dinner on Friday, breakfast, lunch and dinner on the Saturday and the same on the Sunday and breakfast before departure on Monday when they were leaving. Niall then went on to ask Ricky and I to put together a rota from the Fonab staff who were not on official furlough. We talked it through on the call and identified 4 front of house staff and 4 chefs who we would need to call on. We were to come in on the Wednesday before to be able to set up. Niall also asked us specifically to keep details of the visit confidential and to pass that on* [to] *any of the team who we organised to have present."*

19. The claimant's reference to *"another meeting"* related to a meeting, said to have taken place in the week before 12 February 2021, between the owners and the hotel's heads of department, excluding the claimant who did not attend. As acknowledged by the claimant in his witness statement, some members of staff who lived at the hotel continued to stay there during lockdown. Maintenance and development works were being carried out at the hotel at this time, of which the claimant would be aware.

20. I found that (a) Mr Thompson had not told the claimant that the visit by Mr and Mrs Clark was for business purposes and (b) Mr Thompson had not described it as a "*private event".* I made these findings because (a) the absence of any reference to the purpose of the visit was common ground between the witness statements of Mr Thompson and the claimant and (b) the claimant accepted that "*private event"* was his description of the proposed visit.

21. I also found that Mr Thompson did not tell the claimant that those who would be attending the visit to the hotel with Mr and Mrs Clark were employees of the hotel. In so finding, I preferred the evidence of the claimant. I considered that the claimant was sufficiently specific about what he was told by Mr Thompson during the FaceTime discussion on 12 February 2021 that it seemed unlikely he would omit such a material point. I noted that Mr Thompson believed that it was common knowledge that Mr and Mrs Clark's daughter and son, and their daughter-in-law, were employees of either the company which owned the hotel or the company (ie the respondent) which operated it (per paragraph 13 of his witness statement). His belief that this was common knowledge made it credible that he would not have mentioned it. However, the claimant had not met Mr and Mrs Clark's family and was not aware of their employment status relative to the hotel.

Claimant becomes concerned

22. The claimant did not raise any concerns during his conversation with Mr Thompson and Mr Preston on 12 February 2021. However, he began to have some issues with what he had been told/instructed to do. He believed that travel from England to Scotland, and between Scottish

regions, was not permitted. There had been no mention of the visit involving a business meeting and no reference to the attendees being employees. The claimant said in his witness statement –

> "*There was no mention whatsoever of the weekend involving any form of business meeting of any kind. Niall made no reference to the adults who were coming up being employees. The whole tenor of the discussion was that they were being properly entertained and that this was a weekend away."*

23. The claimant formed the view that this was a substitute event for the planned (as he understood it) family visit between Christmas and New Year. He believed that it coincided with the English schools' half term. The instruction to keep the visit confidential made the claimant "*suspicious and uncomfortable"* and reinforced his view that the visit "*was to be kept quiet because it was illegal".*

24. The claimant discussed the matter with his partner. He went for a walk and while doing so he telephoned Mr Preston. It was apparent from the claimant's evidence that Mr Preston did not share his concerns and was "*pleased to be out of the house".* The claimant spoke to Mr Preston about his concern that what had been requested was not safe and that he did not want *"to ask others to go and do it".*

Claimant writes to Mr Thompson

25. The claimant decided to write to Mr Thompson, rather than phone, and did so on 12 February 2021 (99) in these terms (headed *"RE: 18th – 22nd February")* -

> *"I feel deeply saddened but unfortunately compelled, to write this letter.*
> *Following our conversation today I am writing to let you know that I will be unable to work on the dates stated above.*
> *The task outlined this morning was; to put together a rota using people that are being supported financially by the company (not furlough). This would enable the F&B department to service a four-day private*

event for nine people, including the owners, to be held at Fonab Castle Hotel.

I am very unhappy that I have effectively been asked to break the law. I am not prepared to ask other members of the team to do likewise.

I also feel that I am being unfairly compromised given the company's current situation regarding furlough payments. I did not qualify because the paperwork was not submitted on time by the hotel and now feel that I am being obliged to carry out a task which unfortunately, I feel, is morally incorrect.

I am of course very grateful for the assistance provided by the company. I understand that paying 80% of my salary during this period of time is no small undertaking. I was however under the impression that this was implemented because the hotel wanted to retain the team that was put together between September and November 2019 to ensure the strongest possible re-opening when Covid-19 restrictions end."

26. What the claimant said in his final paragraph was a reference to a *"furlough equivalent scheme"* operated by the respondent under which employees, including the claimant, who had been ineligible to participate in the Coronavirus Job Retention Scheme ("CJRS") were paid 80% of salary. The background to this was explained by Mr Thompson in his email to the claimant on 15 February 2021 (101-102) in these terms –

"*When the furlough scheme was extended new restrictions and rules had been put in place, for employers to be able to claim for employees: 'You can claim for employees who were employed on 30th October 2020, as long as you have made a PAYE RTU submission to HMRC between the 20th March 2020 and 30th October 2020, notifying a payment of earning for that employee. This may differ where you have made employees redundant, or they have stopped working for you on or after 23rd September 2020 and you have subsequently re-employed them.'*

As the date of 30th October 2020 was specified as the notional reporting deadline, this deemed our October RTI submissions to be too late, as our payroll is run by tax period, making the deadline the

5th of the month. Our pay date of 4th November 2020 was reported via an FPS submission on 2nd November 2020 in the normal way. Due to the guidance specifying the RTI deadline of 30th October, these employees are deemed ineligible and therefore excluded from a CJRS claim. This was not due to what you said as 'I did not qualify because the paperwork was not submitted on time by the hotel'.

As a company we never wanted to discriminate any of our team members, for those team members that were deemed ineligible and excluded from the CJRS claim, along with being dedicated to the future of Fonab we decided as a company to pay the 80% furlough payment."

Events of 15 February 2021

27. A number of things happened on 15 February 2021. I refer to them so as to provide context for the events of 12 February 2021 and in particular the issue of whether the claimant's letter of 12 February 2021 contained a protected disclosure.

28. There was a telephone conversation between the claimant and Mr and Mrs Clark during the morning of 15 February 2021. This was covertly recorded by the claimant. It was apparent from that recording that Mr and Mrs Clark understood that the claimant had asserted that they would be acting unlawfully if the visit went ahead, and were upset at the suggestion that they would do anything illegal.

29. The claimant then wrote to Mr and Mrs Clark on 15 February 2021 (143). His letter contained the following paragraphs –

"*At no time during my conversation with Niall and Rikki on Friday the 12th was it mentioned that this was a working visit to the hotel to discuss architectural plans and further development of the business. Neither, at any time, was it mentioned your son and daughter are employees of the hotel. It was explained that this was a family visit for yourselves, your children & your grandchildren.*

I was asked by Niall to produce a rota of four staff to provide the service of breakfast, lunch and dinner for your family group from Friday the 19th to Sunday the 21st of February.

Niall explicitly requested that when I was contacting team members, to ascertain their availability, I should request them to keep any details of your visit confidential."

30. Mr Thompson did not read the claimant's email of 12 February 2021 until the morning of 15 February 2021. He described his reaction to it in his witness statement in these terms –

"I was taken [a]*back by what was contained within the letter. My first thoughts were: I was shocked, dumbstruck and thought 'what are you on about'….*
I was also confused as I did not know what aspect of my request Steven had taken an issue with, there was both a reference to law and morals….There was no information [as] *to what the problem was, and I didn't understand what he was getting at. I spoke to Joanne and Jed and they were also confused as to what the problem was."*

31. Later in his witness statement Mr Thompson said (responding to the claimant's reference to being "*asked to break the law")* the following –

"Steven has not said what law has been broken. I cannot see….what 'law' is being referred to either. Again, I really didn't understand what he meant by unlawful and I kept thinking to myself 'what do you mean?'"

32. Mr Thompson replied to the claimant's letter of 12 February 2021 in the late afternoon of 15 February 2021 (101-102). His reply included the following –

"The term 'Private Event' was never used during our conversation. Everyone attending Fonab is employed by Fonab Castle Hotel Ltd who manage the business or JC Properties who own the property and are responsible for the future and development of the site.
As Fonab has recently been given planning permission to complete the final plans for the spa along with the continual rollout of lodges, it was felt that a site visit was required to finalise decisions and allow the progression of work.

As you can understand being a parent, childcare is challenging during lockdown, so those employees who have children had been expected to bring their children."

33. Notwithstanding Mr Thompson's assertion that he and Mr and Mrs Clark did not understand *"what the problem was"*, I found that (a) the terms in which the claimant wrote to Mr and Mrs Clark after their telephone conversation on 15 February 2021 and (b) the terms in which Mr Thompson wrote to the claimant on 15 February 2021 indicated that they (Mr and Mrs Clark and Mr Thompson) were aware that the "*problem"* was the legality, during lockdown, of the visit to the hotel by Mr and Mrs Clark and members of their family and the instruction that hotel employees should travel to the hotel to provide hospitality services to this group.

34. I made this finding for the following reasons. In his letter to Mr and Mrs Clark the claimant referred to the purpose of the visit ("*working visit"*) and to the employment status of the attendees. This reflected the telephone conversation on 15 February 2021 and was directed to the applicability of exceptions to the lockdown rules. The recording of that conversation confirmed that Mr and Mrs Clark were aware that this was the alleged illegality as they sought to explain to the claimant why he was not correct.

35. That contradicted Mr Thompson's assertion that Mr and Mrs Clark were "*confused as to what the problem was".* That Mr Thompson also understood the nature of the *"problem"* was confirmed by his challenging the claimant's use of the phrase "*private event"* and referring to the employment status of the proposed attendees. He described the visit as a *"site visit"* which indicated an intention to differentiate this from a "*private event"* which would be in breach of lockdown rules.

36. The claimant responded to Mr Thompson later on 15 February 2021 (100). Insofar as it provides context for the events of 12 February 2021, the claimant's response included the following –

"*At no point was it made clear to me that this was to be a business meeting. At no point was I made aware that the children attending were related to hotel employees….*

With regards to the phrasing 'Private Party'. I used this phrase as this was the only way I could describe what you had outlined in our meeting on the 12th of February. To summarise what was mentioned: Jed and Joanne would arrive on Thursday the 18th. On Friday the 19th at around 1pm Becky (Daughter) Jed (Son) plus two other adults and three children would be arriving. Nine people in total."

Investigations

37. Subsequent to the events described above, the claimant submitted a grievance and then resigned. The respondent appointed Ms C Mellor, HR Consultant, to conduct (a) a grievance investigation and (b) a whistleblowing investigation. These were outwith the scope of the matters I had to determine. However, her reports were included in the joint bundle – grievance (148-160) and whistleblowing (161-170) – and I noted the matters set out in the next two paragraphs.

38. At the start of section 5 of her grievance report ("*Investigation Conclusion and Outcome"*), Ms Mellor said the following (158) –

"*It is noted that at the point SS submitted his protected disclosure he may have had a legitimate belief that the actions of NT and the owner of the hotel were not in accordance with the regulations in force at the time."*

39. At the end of section 5 of her whistleblowing report (*"Findings and Outcome"*), Ms Mellor said the following (170) –

"I do not find it reasonable for SS to have concluded, on the basis of the information he had, that a breach was going to take place, nor do I find it reasonable that SS continues to hold this view."

40. I considered that the key phrases here were "*at the point SS submitted his protected disclosure"* and "*on the basis of the information he had".* The former relates to the claimant's state of knowledge as at 12 February 2021. The latter relates to his state of knowledge after the nature and purpose of the visit had been explained to him. Ms Mellor confirms this in her whistleblowing report when she states (169) –

> "*On the next working day, both the line manager and the owner reassured SS that there was no breach and explained the reasons for the planned visit."*

41. My reading of Ms Mellor's whistleblowing report was that this reassurance was part of the *"information"* the claimant had. She was saying in effect that what might have been a *"legitimate belief"* on 12 February 2021 was not a *"reasonable….view"* once further information was provided on 15 February 2021 and thereafter.

Comments on the evidence

42. Both the claimant and Mr Thompson were credible witnesses. Their evidence was given to the best of their recollection. Where there was conflict between their versions of events, I believed this reflected their differing recollections of what was said. I found the terms of the correspondence of 12 and 15 February 2021 helpful in determining whose recollection was the more accurate.

Submissions

43. Ms Cradden and Mr Bronze each provided a written submission, supplemented orally at the hearing, and I express my thanks to both for the evident care taken in the preparation of those submissions. The written submissions are available in the case file and I do not propose to rehearse them here. Instead, I will refer to their competing arguments in the discussion section below.

Discussion

44. I will deal with matters by working through the points contained in the list of issues (76-80) so far as relevant to the matters I have to determine.

Did the claimant make a protected disclosure to the respondent?

45. It was common ground that the purported protected disclosure was the claimant's letter to Mr Thompson of 12 February 2021 (99).

46. I reminded myself that in terms of section 43B(1) there required to be a disclosure of information which in the reasonable belief of the claimant

was made in the public interest and tended to show one or more relevant failure. In ***Williams v Michelle Brown AM UKEAT/0044/19*** the EAT (per Auberach HHJ, at paragraph 9) set out what have been referred to as the "*section 43B(1) questions"* –

> *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

Disclosure of information

47. Was there a disclosure of information? Ms Cradden's position was that the claimant's letter of 12 February 2021 disclosed information by referring to the private event that was to take place the following weekend and alleging that this was unlawful. Mr Bronze's position was that there was no information contained in the claimant's letter and so it could not be a disclosure of information.

48. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38*** where the Employment Appeal Tribunal said that *"the ordinary meaning of giving 'information' is conveying facts".* In ***Kilraine v London Borough of Wandsworth 2018 ICR 1850*** the Court of Appeal in England contrasted *"information"* and "*allegation"* and accepted the argument that it was wrong to suppose that the categories of "*information"* and *"allegation"* were mutually exclusive. Referring to the language of section 43B(1), the Court said –

> "*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."*

49. Ms Cradden referred to ***Twist DX Ltd and others v Armes and another UKEAT/0030/20***. I understood she did so to steer me away from the decision of the EAT in ***Fincham v HM Prison Service UKEAT/0925/01*** where, at paragraph 33, Mr Justice Elias (as he then was) said –

> "*….there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the employer is relying….*"

50. At paragraph 59 in ***Twist***, the EAT said –

> "*….the question whether a written communication discloses information which is capable of satisfying section 43B(1) will often require the determination of issues of fact as to context, and consideration of all of the relevant facts in the case….*"

51. I considered what the claimant had said in his letter to Mr Thompson of 12 February 2021. He referred to being instructed that the respondent's food and beverage department should "*service a four-day private event for nine people, including the owners, to be held at Fonab Castle Hotel".* He said that he was "*very unhappy that I have effectively been asked to break the law".*

52. I considered the context in which this had been said. That context included the Level 4 restrictions introduced by the Scottish Government with effect from 26 December 2020 in response to the ongoing Covid-19 pandemic. It included the wide media coverage of those restrictions. It included the claimant's understanding of those restrictions as described in his witness statement (see paragraph 13 above) which I found no reason to doubt.

53. It also included what the claimant had been told by Mr Thompson during their FaceTime conversation on 12 February 2021, and the claimant's understanding of that. I believed that the claimant understood (a) that Mr Thompson was talking about a private, as opposed to business, event, (b) that members of Mr and Mrs Clark's family would be attending but not that they were employees or otherwise connected with the hotel in a business sense, (c) that children were also attending which was more

indicative of a family gathering than a business meeting and (d) that there was a need for confidentiality.

54. What the claimant was saying to Mr Thompson in his letter of 12 February 2021 was that his department was being asked to service an event, the family visit, at the hotel which would involve breaking the law. The claimant did not specify which law (the ***Fincham*** point) but, given the context (ie the matters referred to in the two preceding paragraphs), I considered that it was sufficiently clear that the claimant meant lockdown restrictions. I found that this was a disclosure of information.

Public interest

55. Ms Cradden and Mr Bronze both referred to ***Chestertons Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979***. Ms Cradden's argument was that the sole purpose of the lockdown restrictions was to protect the health and safety of the public, and so they were inexorably linked to the public interest. Mr Bronze referred to the factors identified in ***Chestertons*** –

- The numbers in the group whose interests the disclosure served.
- The nature of the interest affected and the extent to which they are affected by the wrongdoing disclosed.
- The nature of the alleged wrongdoing disclosed.
- The identity of the alleged wrongdoer.

56. Mr Bronze pointed out that in his letter of 12 February 2021 the claimant made no mention of health and safety. This was, he argued, retrospective justification.

57. I was with Ms Cradden on this. In the context of the pandemic, a disclosure which related to compliance with lockdown restrictions designed to prevent the further spread of Covid-19 was in the public interest. A breach of those restrictions carried the risk that infection could be spread by an attendee at the proposed event to anyone who was in contact with that attendee. This was a public health issue which, in my view, necessarily engaged the public interest.

Reasonable belief

58. Ms Cradden reminded me that there are two stages to assessment of reasonable belief –

(a) Did the claimant genuinely believe that the disclosure was of information tending to show a relevant failing?

(b) Was it objectively reasonable for him to hold that belief?

Although expressed by Ms Cradden with reference to a relevant failing, I considered that this approach applied equally to reasonable belief that the disclosure was made in the public interest.

59. Ms Cradden relied on ***Babula v Waltham Forest College [2007] EWCA Civ 174***. In that case Wall LJ said the following (at paragraph 75) –

> "*….I agree with the EAT in* ***Darnton*** that a belief may be reasonably held and yet be wrong…." (a reference to ***Darnton v University of Surrey 2013 IRLR 133***)

and (at paragraph 82) –

> *"….in my judgment, the word 'belief' in section 43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test…."*

60. Ms Cradden submitted that the evidence indicated that the claimant did hold a genuine belief about the information he disclosed (that the visit would be unlawful). She invited me to discount as speculation Mr Thompson's assertion that the claimant was motivated by a reluctance to return to work. Ms Cradden argued that the claimant's belief was objectively reasonable. This was what the respondent's own grievance investigation had concluded.

61. Mr Bronze submitted that, for it to be reasonable, the claimant's belief had to go beyond a general belief in the broad gist of the content of the disclosure – ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4***. It had to be more than an expression of

opinion, as in ***Goode v Marks and Spencer plc UKEAT/0442/09*** and ***Easwaren v St George's University of London UKEAT/0167/10***.

62. The disclosure should not be made out of personal interest – ***Parsons v Airplus International Ltd UKEAT/0111/17***. Mr Bronze argued that the claimant's real concern was an issue about furlough pay.

63. My view of this was that the claimant did have a reasonable belief that his disclosure was (a) in the public interest and (b) tended to show a relevant failure. I was satisfied that the claimant, given his understanding of the lockdown restrictions, did believe that the proposed visit would be unlawful and a risk to the health and safety of his team members and himself, and those with whom they might come into contact. Viewed objectively, that was a reasonable belief. There was sufficient information in the public domain as at 12 February 2021 for any reasonable person to believe that a breach of lockdown restrictions would be both unlawful and a risk to public health.

Tending to show a relevant failure

64. I have already covered some of the ground here under *"Disclosure of information".* That is not surprising as the disclosure needs to be one that tends to show a relevant failure *"albeit not in strict legal language"* (per ***Fincham***). However, Ms Cradden argued, it was not necessary for the person making the disclosure to have stated explicitly that he/she reasonably believed that the disclosure tended to show one or more of the matters set out in section 43B(1)(a) to (f).

65. Mr Bronze referred to ***Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/0449/12***. The EAT in that case, dealing with the approach which should be taken by Employment Tribunals when considering claims by employees for victimisation for having made protected disclosures, said (at paragraph 98, sub-paragraph 5) –

> "*Save in obvious cases if 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."*

66. Mr Bronze argued that the matters complained of by the claimant were far from meeting the "*obvious"* threshold. In support of this he referred to ***Eiger Securities LLP v Korshunova UKEAT/0149/16***, a case in which the EAT found that the disclosure did not meet the *"obvious"* threshold.

67. My view of this is that whether the "*obvious"* threshold is met is dependent on the facts of each case. In the present case, those facts include the contextual matters I have referred to at paragraph 52 above. The claimant referred to the *"four-day private event"* at the hotel and being "*asked to break the law".* This was at a time when there was daily media coverage about lockdown restrictions and their impact. I considered that what the claimant said in his letter of 12 February 2021 was a clear statement that the event at the hotel would be unlawful (ie in breach of a legal obligation) and, despite Mr Thompson's evidence to the contrary, that should have been clear to the respondent.

68. I considered that the endangerment of health and safety was also obvious, without being expressly stated. This was because the purpose of the lockdown restrictions was widely understood. They were to protect public safety in the midst of a pandemic. To act unlawfully in relation to those restrictions is self-evidently to endanger health and safety by increasing the risk of exposure to infection.

Health and safety case

69. I reminded myself that the language of section 44(1)(c) ERA differed from that of section 43B(1) ERA. In terms of section 44(1)(c), what I had to decide was whether the claimant had brought to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. This provision was only applicable where (i) there was no health and safety representative or committee or (ii) there was such a representative or committee but it was not reasonably practicable for the employee to raise the matter by those means.

70. I heard no evidence as to the existence or otherwise of a health and safety representative or committee but I did not understand the respondent to argue that section 44(1)(c) was not engaged because there was such a

representative/committee and that it had been reasonably practicable for the claimant to raise matters through that representative/committee.

71. Ms Cradden's position was it was self-evident that the claimant's complaint was directly concerned with health and safety. He was concerned about an event which was going to involve contact between people, which was widely known to increase the chances of spread of the virus. He reasonably believed that the arrangement was harmful. His conversation with Mr Preston had included reference to a colleague (Kenny) travelling from Glasgow.

72. Mr Bronze invited me to consider carefully what it was that the claimant was asking the Tribunal to find. Merely alleging that it was not safe to return to work due to Covid-19 did not equate to a health and safety concern. Mr Bronze referred to ***Accattatis v Fortuna Group (London) Ltd ET/3307587/2020***. The Tribunal in that case accepted that Mr Accattatis reasonably believed the danger from Covid-19 to be serious or imminent but held that he had not taken appropriate steps to protect himself or others from the danger. The Tribunal found that he had been dismissed because he was perceived to be a difficult employee and the employer wanted to prevent him from achieving two years' service, not because he was reluctant to come into work or use public transport.

73. Mr Bronze submitted that ***Accattatis*** was on all fours with the present case "*in that the claimant has cited 'Covid-19' and latterly 'health and safety' and expected the Tribunal to join the dots".*

74. I had some difficulty with both of these submissions. From the claimant's side, when I looked at what he said in his letter to Mr Thompson of 12 February 2021, it was not immediately clear from the language used that he was bringing to his employer's attention circumstances connected with his work which he believed were harmful or potentially harmful to health or safety. That letter referred to (a) an instruction relating to an event and (b) the claimant's unhappiness that he had been asked to break the law.

75. From the respondent's side, I did not agree with Mr Bronze that ***Accattatis*** was on all fours with the present case. ***Accattatis*** was an unfair dismissal

case brought under section 100(1)(e) ERA. That subsection applies where "*in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger".* That language is materially different from the language of section 44(1)(c) ERA (which is replicated in section 100(1)(c) ERA).

76. I came to the view that it was appropriate to consider the context in which the claimant wrote his letter of 12 February 2021 in deciding whether it came within section 44(1)(c) ERA. This included the matters mentioned at paragraph 52 above (level 4 lockdown restrictions, media coverage etc). If it was appropriate to consider *"issues of fact as to context"* (per ***Twist***) in relation to section 43B(1) ERA, I saw no reason why it should not be equally appropriate to do so in relation to section 44(1)(c) and/or section 100(1)(c) ERA.

77. Approaching the matter in that way, I came to the view that what the claimant said in his letter of 12 February 2021 did amount to bringing to the respondent's attention, by reasonable means, circumstances connected with the claimant's work which he reasonably believed were harmful or potentially harmful to health and safety. As stated at paragraph 68 above, to act unlawfully in relation to lockdown restrictions was self-evidently to endanger health and safety by increasing the risk of exposure to infection. I found support for this in the conversation the claimant had with Mr Preston on 12 February 2021 where the claimant spoke about his concern that what had been requested was not safe.

Disposal

78. For the reasons set out above, I decided that the claimant had made a protected disclosure to his employer under section 43A ERA which was a qualifying disclosure under section 43B ERA. I also decided that the claimant had brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety in terms of section 44(1)(c) ERA.

Further procedure

79. The case should now proceed to a final hearing. A closed preliminary hearing for the purpose of case management should now be fixed so that arrangements for the final hearing can be discussed.

Employment Judge : WA Meiklejohn
Date of Judgment: 01 October 2021
Date sent to parties: 05 October 2021