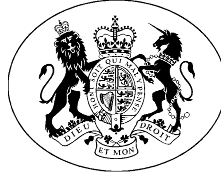
Case Number: 2207604/2021



EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Vahid Evazzadeh	**v**	**Troubador Properties Limited**

Heard at: London Central (by CVP) **On**: 21 January 2022

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Mr A Gunberg, lay representative

WRITTEN REASONS

Introduction

1. The claimant's application for interim relief was heard on Friday 21 January 2022. Judgment was issued on 7 February 2022. The claimant's application was successful. The respondent has requested written reasons. These are set out below.

2. The reasons are structured as follows. First, the issues for the hearing are set out. Second, the history of the claim. Third, the legal framework. Fourth, the background to the claim is set out, based on a summary assessment of the issues in light of the information placed before the tribunal by both parties. Fifth, the conclusions are set out in relation to the issues. A brief overall conclusion follows.

The Issues for the hearing

3. The claimant applied for interim relief on the basis that the sole or principal reason for his dismissal was that he had made protected disclosures. In order to succeed in his application, he needed to demonstrate that he has a 'pretty good chance of succeeding' in that complaint at the final hearing (alternatively, that it is 'clear cut' that he will be able to succeed). This means establishing the following elements of a whistleblowing dismissal claim to that 'pretty good chance of succeeding' standard:

3.1 that he made a disclosure to his employer (or other relevant person); and

3.2 that the disclosure was of "*information*"; and

3.3 that he believed that the information tended to show a s.43B Employment Rights Act 1996 factor; and

3.4 that belief was reasonable; and

3.5 that he reasonably believed the disclosure to be "*in the public interest*"; and

3.6 that belief was reasonable; and

3.7 that he was dismissed by the respondent; and finally

3.8 that his making a protected disclosure(s) was the reason, or if more than one, the principal reason, for his dismissal.

The history of the claim

2 The claimant was dismissed on 15 December 2021. The claim form was submitted on 22 December 2021. It included an application for interim relief. The claims for interim relief, 'ordinary' unfair dismissal and protected disclosure dismissal (s.103A Employment Rights Act 1996) have been accepted. The claim for 'ordinary' unfair dismissal is bound to fail because the claimant has less than two years' service and it is proposed that it be dismissed at the preliminary hearing listed on 25 March 2022 (see below), subject to any objections from the claimant. The Protected disclosure dismissal claim can still of course proceed.

3 The claims for notice pay, holiday pay and protected disclosure detriment were rejected, because unsurprisingly, an ACAS Early Conciliation Certificate had not been obtained prior to the claim being submitted. If the claimant intends to proceed with those claims, ACAS early conciliation will need to be commenced and concluded, and a further claim form submitted. If the claimant does so, he should ask in the claim form that the second claim be consolidated with the first claim and quote the case number.

4 The respondent was told on 21 January that since a second claim is anticipated, a 'holding response' (i.e. a brief response) can be submitted in response to the first claim, with a view to consolidated grounds of resistance being filed and served, following receipt of the second claim.

5 At the conclusion of the hearing, a further case management hearing was listed for 4.00 pm on Friday, 25 March 2022. The final hearing was listed between 19 July and 22 July 2022. This was because an order for interim relief lasts until the claim is settled by the parties or determined by the tribunal. It was considered that an early listing was appropriate in those circumstances. Separate Notices of Hearing should have been received from the tribunal since then.

The hearing

6 The respondent had asked for today's hearing to be postponed as it was not aware of the hearing. The tribunal was informed that Mr Hardeling, who made the decision to dismiss, had an important prior family commitment. Mr

Gunberg explained that whilst Notices of Hearing had been sent out in relation to today's hearing, the tribunal had sent out a further letter to the respondent saying that they had been sent in error. The tribunal checked with Mr Gunberg that he was nevertheless content to proceed on 21 January. He confirmed that he was. Mr Gunberg confirmed that he had spoken with Mr Hardeling, and was confident that he was able to put forward the respondent's defence to the application.

Relevant Law

Interim relief applications

7 The relevant parts of *Section 129(1) Employment Rights Act 1996* provide:

> *where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—*
> *(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in ... section 103A,*

the tribunal is to order reinstatement, or if the employer is unwilling to accept reinstatement, make an order for continuation of the employee's contract until the final hearing. (There is also an option of reengagement in another role if the employee consents to take what is offered). There is no provision for refund in the event of the employee not succeeding in his claim.

8 What is meant by "likely" to succeed was said in *Taplin v C. Shippam Ltd (1978) ICR 1068* to be:

> *a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51 per cent probability of success and that an industrial tribunal should ask themselves whether the employee had established that he had a "pretty good" chance of succeeding in his complaint of unfair dismissal*.

9 This formulation was affirmed in *Dandpat v University of Bath (2009) UKEAT/0408/09/LA*, where it was said:

> *there were good reasons of policy for setting the test comparatively high… if relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not a consequence that should be imposed lightly".*

10 In *Ministry of Justice v Sarfraz (2011) IRLR 562* "likely" was said to mean a "*significantly higher degree of likelihood" than "more likely than not*"; further, that "*'likely' connotes something nearer to certainty than mere probability*" (paras 16 and 19). In *Parsons v. Airplus International Ltd UKEAT/0023/16/JOJ*, it was said that "*matters were not sufficiently clear cut at that stage for [the judge] to have sufficient confidence in the eventual*

outcome to grant interim relief" (para 18).

11 The test to be applied in an application for interim relief is undoubtedly therefore a difficult hurdle for a claimant to get over. Nevertheless, that is the hurdle which must be surmounted by the claimant if he is to succeed in this application and the test the tribunal is bound to apply.

12 The tribunal is not to hear oral evidence during such a hearing, unless it directs otherwise – see Rule 95, Employment Tribunal Rules of Procedure 2013. The task of the judge hearing an interim relief application is, according to London City Airport v Chacko (2013) IRLR 610 *(at para 23)* to carry out "*an expeditious summary assessment … as to how the matter looks to him on the material that he has"* doing the best he/she can with the untested evidence advanced by each party.

13 The tribunal is not required to make findings or reach a final judgment on any point - see *Parsons*. As stated in that case at para 8:

> *On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the* "essential gist of her reasoning*": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not [to] say anything which might pre-judge the final determination on the merits.*

Whistleblowing claims

14 To succeed in the claim of automatically unfair dismissal for making a protected disclosure, the claimant must establish that he made one or more protected disclosures.

15 Under section 43A Employment Rights Act 1996, a protected disclosure for the purposes of section 103A must be a *"qualifying disclosure"* as defined in section 43B:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*
>
> *(a) That a criminal offence has been committed, is being committed or is likely to occur:*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered…*

16 The claimant must therefore establish each of the following: (i) that he made a disclosure to his employer (or other relevant person); and (ii) that the

disclosure was of "*information*"; and (iii) that he believed that the information tended to show a s.43B factor; and (iv) that belief was reasonable; and (v) that he reasonably believed the disclosure to be "*in the public interest*"; and (vi) that belief was reasonable; and (vii) that the claimant was dismissed; and finally, (viii) the claimant must establish that making a protected disclosure was the reason, or if more than one, the principal reason for the dismissal – section 103A.

17 To succeed in the application, the claimant needs to demonstrate he has a 'pretty good chance' of succeeding in relation to <u>each</u> of those eight elements of his claim.

18 In relation to a disclosure of information, the Court of Appeal gave the following guidance on section 43B(1) in <u>*Kilraine v London Borough of Wandsworth*</u> [2018] ICR 1850 per Sales LJ:

> *"[30] I agree with the fundamental point made by [counsel for the appellant], that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below…and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other…*
>
> *[31] On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision…*
>
> *[35] The question in each case in relation to section 43B(1) (as it stood prior to the amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]. Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). <u>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)…</u>*
>
> *[36] Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is*

capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief." (emphasis added)

19 In ***Eiger Securities v Kurshunova*** [2017] IRLR 115 ("***Eiger***"), the EAT held at §46 that:

> *"… in order to fall within section 43B(1)(b) , as explained in Blackbay Ventures Ltd v Gahir [2014] ICR 747 , the tribunal should have identified the source of the legal obligation to which the claimant believed Mr Ashton or the employer was subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment the tribunal failed to decide whether and if so what legal obligation the claimant believed to have been breached."*

Relevant Background

20 Bearing in mind the issues for the hearing as set out above, the contents of the documents considered (these were, the claim form; the tribunal correspondence; an email from the claimant to the respondent dated 7 December 2021; an email from the claimant to the respondent dated 15 December 2021; the claimant's minutes of the meeting of 15 December 2021; and a WhatsApp screenshot dated 15 December 2021), answers to questions put the claimant and Mr Gunberg by the tribunal, and the submissions made, the relevant background to this application is found to be as follows.

21 It is to be noted however that none of what follows is established fact which binds any further tribunal considering this claim. It is open to a tribunal in due course to come to different conclusions on any of the matters set out below, having considered all of the relevant witness and documentary evidence, and having heard live evidence at the hearing.

The claimant's role

22 The claimant was employed from 16 June 2021 as a chef, on a zero hours contract, until his dismissal on 15 December 2021. The working hours were not specified. For the first few weeks, the claimant worked two days a week. He then came to an agreement that he would work one day a week, on Sundays. He normally worked from 2.30 pm to 10.30 pm. He received an hourly rate of £11 per hour.

23 The respondent employs about 35 people, on a mixture of full time and part time contracts.

The claimant's line manager

24 The claimant's line manager was Dominic Silverside. He was not formally given the title of Head Chef until just before the claimant was dismissed. There is however no dispute that Mr Silverside was in charge of the kitchen in which the claimant worked. Up to nine people worked in the kitchen.

25 The claimant did not book off any formal holidays during his employment but he did take a few days off, including two days sick leave. He was not paid sick

pay. The longest period when he did not work was a period of three weeks for a combination of sick leave and holiday.

5 December disagreement

26 The respondent says that there was an altercation between Mr Silverside and the claimant on 5 December 2021 which resulted in the claimant's contract being terminated. Mr Gunberg understands that the claimant's shift on Sunday 12 December had already been cancelled following the meeting on Sunday 5 December, as had the shift the claimant was due to work on 6 December. This is denied by the claimant. He says he was working on 5 December, his usual shift. There was a disagreement, originally caused by a kitchen porter leaving without notifying Mr Silverside. This meant that Mr Silverside's behaviour was, according to the claimant, 'even more challenging than usual'.

27 The claimant continued his duties to the end of the shift. When he had finished his duties, he went to get changed. Mr Silverside burst into the changing room as the claimant was getting ready to go home. Mr Silverside wanted the claimant to do what the kitchen porter had been meant to do. The claimant told Mr Silverside they were not his duties. Nevertheless, he still went back downstairs and carried them out before leaving. Mr Silverside told the claimant to 'get lost, go away, never come back'. The claimant had heard Mr Silverside say similar things to other members of staff in the past and did not consider that he had been dismissed by the use of those words.

28 The claimant did not consider that Mr Silverside had the authority to appoint him or dismiss him. The claimant says that he was not booked to work a shift on Monday 6 December. Mr Silverside did not cancel the shift on Sunday 12 December 2021 on or about 5/6 December 2021. He says that the deletion of his shift happened on December 10, after his email of 7 December was sent. The reason for the claimant writing that email was Mr Silverside's behaviour on 5 December.

29 The tribunal finds the account given by the claimant in relation to the incident on 5 December more credible at this stage.

7 December 2021 email

30 An email was sent by the claimant on 7 December to Mr Hardeling, Operational Manager, and others. This stated, amongst other things:

> "*stocks are either missing or goes bad after long time of lying dormant in the Gallery; equipments are broken and dangerous to work with; there is no routine for preps and when it comes to quality, anything goes*!".

31 The reference to equipment is to broken tools such as graters with sharp edges. There were no oven gloves provided to handle the contents of a very hot oven which heats food to a temperature of over 300 degrees. This made the taking of trays out difficult - fabrics were used instead to handle them. Knives were said by the claimant to be in a dangerous shape because they are blunt; plus, any knife could be used for any purpose. If boiling a pot of water, for which there no lids, cling film had to be used to cover the pot. Taking the cling film off was said to expose people to extremely hot steam. Whenever Mr Silverside had been told about such matters, he had told the claimant that management did not want to pay for improvements.

32 The email also stated:

> *He creates such a toxic and unpleasant environment that is absolutely unacceptable and needs to be addressed. … We are entitled to have a safe working place. ….*
>
> *It is a shame that such a great venue like Troubadour with such tremendous potential has such a poorly managed kitchen. It can and should improve as we go forward. But having an abusive member of staff, creating a toxic environment is the last straw and should be dealt with immediately. We are entitled to have a safe working place and the management is responsible to provide that.*

33 Mr Gunberg was asked what he understood by reference to quality in the email of 7 December. He replied that it could be for example a reference to an allergen issue for example – which could result in an allergic reaction. Or it could be dates when food was stored were not checked, temperature checks were not done – you could read a lot into it.

The S.43B factors

34 The claimant was asked whether he considered that any of the above amounted to a criminal offence being committed. The claimant answered yes, if bullying was a criminal offence. The tribunal took it from that response that the claimant did not reasonably believe that a criminal offence was being committed at that time.

35 As for a breach of a legal obligation, the claimant said that he thought his email showed that the following legal obligations were being breached: (1) the obligation to create a safe working environment for staff; and (2) public health and safety was being breached, since the restaurant is providing the public with food. Further, the claimant believed there was a breach of health and safety obligations towards him and his fellow kitchen workers.

The public interest

36 The claimant was asked what the public interest was in these matters being raised. The claimant said that there are nine people working in the kitchen and all were affected by the matters he raised, not just him. About 35 to 40 people work for the business as a whole.

37 Further, the claimant said that given the nature of workplace, which is serving food to the public, the email implies danger to the public too as the restaurant is dealing with food.

38 Mr Gunberg did not accept there was a public interest in raising these concerns, save for the public interest in staff being safe.

10 December - WhatsApp group message

39 The claimant did not receive a response to his email. On 10 December he noticed that his 12 December shift had been deleted. He noticed this on the company's portal, Home Base. All issues regarding shifts are reported on the portal. Usually employees can see their upcoming shifts. The claimant noticed that his Sunday 12 December shift had been removed. He therefore posted a message on the respondent's Kitchen WhatsApp group. The group includes Mr Silverside, Mr Hardeling and Mr Gunberg.

40 The contents of the message were placed by the claimant in the CVP chat and were copied and pasted into the note of the hearing. The message reads:

> *Hi colleagues I have sent an email to the managers of Troubadour about the mis-management of the kitchen. I am yet to receive a reply. In my email I have proposed a meeting for full kitchen team to discuss what I consider a chaotic, unsafe and unpleasant working condition. In it I have furthermore pointed out the incompetence of Dominic Silversides which is the underlying factor that has left the kitchen in such abhorrent disarray, let alone his erratic, abusive, infantile behavior which adds insult to injury. I brought this to the attention of the management after having failed to establish any meaningful conversation with Dominic. I hope the managers will initiate a meeting soon. I would like to encourage the rest of you to call for a all-staff meeting too if you share my concerns. I have been working on Sundays regularly in the kitchen. Now I have just noticed that Dominic has unilaterally deleted my shift for this week at his own whim and without any communication whatsoever. This is yet another sign of being unfit for the job of managing a kitchen: just deleting shifts, brushing problems under the carpet, hoping that bullying would work. It wouldn't! He apparently does not have a clue about contracts and rules of employment. I will remain eager to hear what the management of the venue has to say. Meanwhile I hope others will also voice their concerns if they have any. Such toxic environment should not be tolerated. Regards Vahid*

<u>Deletion of shift – S43B matters and public interest</u>

41 The claimant thought the deletion of his shift could be a breach of a legal obligation, namely his employment contract. The claimant was asked what public interest there was in relation to his shift being deleted. He told the tribunal that his concern was that the same kind of treatment was taking place towards other colleagues. He also thought it was a collective matter, of public interest. The claimant was not aware of the implied term of trust and confidence when he wrote his email.

42 Mr Gunberg said that he was aware that there was a message but he did not read it. He told the tribunal that he thought that the claimant's contract of employment had already been terminated by then. Mr Gunberg left the matter to Mr Hardeling, as Operations Manager to deal with, together with Mr Silverside as the Head Chef. Mr Gunberg was busy trying to ensure the restaurant survived, following the effect of the pandemic. He barely has time to look at text messages and there are about 4,000 unread emails.

43 As to the suggestion that he had already been dismissed, the claimant told the tribunal that nothing said at the meeting on 15 December (see below) suggested that this was what Mr Hardeling or Mr Silverside thought.

<u>13 December – message from Mr Hardeling</u>

44 The claimant's message received the following response from Mr Hardeling. In the group WhatsApp chat he said he would contact the claimant to talk it over. He then separately messaged the claimant. The texts between them read:

> *Hi Vahid, Hope you're well. Can you come in for a meeting on Wednesday? What time suits you? Kind regards Richard*

Hi Richard Good to hear from you. I can be there on Wednesday at around 11 – 11:30am. How is that for you? Regards Vahid

Hi Vahid, I'll try to change my meeting I already have at 11 AM. Will confirm soon

Hi Vahid, All good. I have postponed the other meeting. See you on Wednesday 15th of December 11 AM. Kind regards Richard

15 December meeting

45 The meeting duly took place on Wednesday 15 December 2021. When the claimant arrived, Mr Hardeling was there, as was Mr Gunberg and Ian Screeton, the Sales Manager. There was no discussion with them, they just said good morning and then they left to continue with their own work.

46 Mr Gunberg was asked whether there was any discussion with Mr Hardeling, prior to the meeting taking place. Mr Gunberg said he understood the meeting was essentially to find out if there could be a fruitful relationship with the claimant going forward, or whether they would try and find someone else. He thought that the key issues was about flexibility.

47 The claimant was asked what concerns were raised at the meeting on 15 December by the claimant about issues such as dangerous equipment, safety of staff, or safety of the public. The claimant confirmed that he did not raise any such concerns because he was not given the chance to do so. The meeting was very brief. It appeared to the claimant that Mr Hardeling was upset about the WhatsApp group message and had already made up his mind to get rid of him. According to the claimant, Mr Hardeling was not interested in hearing about any of the issues the claimant had raised in his 7 December email.

48 The claimant's notes record that Mr Hardeling confirmed:

Dominic's role has not been clear but now he is officially the head chef in writing'.

Richard said they are trying to improve kitchen and find more full-time staff who are flexible with their time.

Richard also said that there were "complaints" about Vahid taking "breaks without notifying anyone". …

Vahid said that it was always crystal clear that he was available only one day a week on a fix rota. No concern with that arrangement has ever been expressed before.

Vahid furthermore explained that this is first time that any "complaints" were expresses; never before such issue has ever been mentioned because it is not true.

Vahid explained that the problems are twofold: the disorganization of the kitchen and Dominic's unacceptable behavior such as deleting shifts without communication.

Dominic said "it is my kitchen and I can decide who can work in it".

Vahid said "that is not acceptable. You are not the king. That is exactly the kind of behavior we are here to discuss".

At this point Richard got up from his chair and asked Vahid to leave. He was upset and emotional. Vahid ask him if he would calm down and sit down. He refused to continue the conversation.

Dominic too said, "there is no need for conversation. The outcome of the meeting was already clear".

Vahid asked that Richard send him a notice of dismissal in writing.

Richard said "there is nothing to write".

Email to senior management team after the meeting

49 The claimant prepared his note of the meeting immediately after he left. He emailed the notes to the management team so they had the chance to respond. His covering email sent the same day states:

Hi Andreas

I am addressing this to you in good faith as it is your signature that is under my contract.

I had an unproductive and disappointing meeting with Richard today at the unarranged presence of Dominic. See the minutes. The problem in the first place began by Dominic thinking that he could fire me on the spot. I told him he cannot, without due process. Richard tried to do the same. I have asked him to give me a letter of dismissal. He seems to be trying to refuse to do so; at least he did not confirm whether he would or wouldn't. It is at your discretion to dismiss employees if you wish but are obliged by law and the letter of my contract to notify me if you want to terminate my employment.

Look forward to hear from you.

50 The claimant accepts that he was not expressly told that he had been dismissed. The word used was 'leave'. Given the context however, he assumed he had been asked to leave permanently. He did not receive a reply to his email of 15 December. He was not told that he was mistaken and that he had not been dismissed. Further, on 15 December 2021, the claimant was removed from the Kitchen WhatsApp Group by Mr Silverside. Evidence of that was provided by the claimant during the hearing.

51 The tribunal accepts, for the purposes of this hearing, that the issue of flexibility had not previously been raised with him, prior to the meeting. Nor had the allegation that he was taking unauthorised breaks.

52 Mr Gunberg accepts that he did not respond to the email. At the time, nearly 50 per cent of staff were unavailable due to Covid and Mr Hardeling and he were covering shifts on the floor of the restaurant rather than looking at and responding to emails.

Conclusions on the application

53 In considering whether or not the claimant has a 'pretty good chance' of establishing each of the eight elements of a whistleblowing dismissal claim identified above, this decision deals first with the protected disclosures, and second with the reason for dismissal.

<u>Protected disclosures</u>

54 The information relied is set out in the email of 7 December and the WhatsApp message of 10 December. The email states:

‘*equipments are broken and dangerous to work with; there is no routine for preps and when it comes to quality, anything goes! … But having an abusive member of staff, creating a toxic environment is the last straw and should be dealt with immediately. We are entitled to have a safe working place and the management is responsible to provide that.’*

55 In addition, there is reference in the 10 December message to alleged abusive behaviour by Mr Silversides.

56 There is no dispute that these disclosures were made to the claimant’s employer (issue 3.1). The tribunal is satisfied that the claimant has a pretty good chance of establishing that fact.

57 The tribunal concludes that taken in context, the claimant was not just making mere allegations without any factual content (Issue 3.2). He makes reference to dangerous equipment, to issues with quality, and to an allegedly abusive member of staff (Mr Silverside). The tribunal is satisfied that the claimant has a pretty good chance of establishing that he disclosed information. That judgment is reinforced by Mr Gunberg’s expressed understanding, as a manager of the respondent, as to what the issue regarding quality could entail.

58 As to issue 3.3, the section S.43B Employment Rights Act 1996 matters, the tribunal concludes that s.43B (a) (i.e. that a criminal offence has been committed etc) is not engaged. As to (b), breach of a legal obligation, the respondent is under a legal duty to provide a safe place of work. (d) is also potentially engaged for the same reason, ie, that the health and safety of any individual has been endangered etc. The tribunal is satisfied that the claimant has a pretty good chance of establishing that. The information suggests that both Mr Silverside’s behaviour and his alleged failure to properly manage the kitchen means that potentially, the respondent was in breach of its duty to provide a safe place of work for kitchen staff, and/or that their health and safety or the health and safety of users of the restaurant were being endangered.

59 As to a reasonable belief that the information disclosed tends to show one or both of those things (Issue 3.4), again, the tribunal is satisfied that the claimant has a pretty good chance of establishing that. The claimant’s subjective belief in that appears to the tribunal to be a reasonable one.

60 As for public interest (Issue 3.5), it is apparent that the claimant believed that it was not just his health and safety that was being endangered, but the health and safety of all of the nine or so staff working in the kitchen; and possibly, other members of the 35 or so staff working for the respondent too. In the tribunal’s judgement, the claimant has a pretty good chance of persuading the tribunal that nine staff amounts to a section of the public. Further, in the tribunal’s judgment, there is a public interest in the health and safety of customers. The tribunal is therefore satisfied that the claimant has a pretty good chance of establishing Issue 3.5.

61 As for Issue 3.6, a reasonable belief in the public interest raised by the allegations, the tribunal concludes that the claimant has a pretty good chance of establishing that. Again, the claimant's subjective belief in the public interest appears to the tribunal to a reasonable one.

62 The tribunal is less convinced by the information in the 10 December message, referring to the claimant's shift being deleted. It is accepted that could amount to a breach of contract, and therefore a breach of a legal obligation, and the claimant's belief in that is reasonable. However, the tribunal concludes that the claimant does not have a pretty good chance of establishing that he reasonably believed that there was a public interest in raising that particular matter. That is not to say that the tribunal is concluding that he cannot succeed in relation to that disclosure as well; just that at this stage, on the basis of the information before the tribunal, that the tribunal concludes that the claimant does not have a pretty good chance of doing so.

63 In summary, in relation to the issues relating to whether or not protected disclosures were made, the tribunal concludes that the claimant has a pretty good chance of establishing that, in relation to the contents of the 7 December 2021 email quoted above and the reference to abusive behaviour in the 10 December 2021 message.

64 Issue 3.7 is whether the claimant was dismissed. On the basis of the information that has been provided to the tribunal, and further, on the basis that the claimant's dismissal by the respondent does not appear to be in dispute, the tribunal concludes that the claimant has a pretty good chance of establishing that he was dismissed. Further, that the dismissal took place on 15 December, not 5 December as suggested by Mr Gunberg. That may have been his understanding, but on the basis of the information before the tribunal so far, including that the claimant was not removed from the WhatsApp group until after the meeting on 15 December; that his shift does not appear to have been cancelled until after the 7 December message was sent; and no notification or indication of dismissal was sent to the claimant between 5 and 15 December 2021; the tribunal considers that unlikely.

65 The final issue, 3.8 is the reason for the dismissal. At the meeting on 15 December, issues were raised about the claimant taking unauthorised breaks, which appear not to have been raised with him before. An issue was raised in relation to 'flexibility', which again had not been raised with him before. The agreement as that the claimant work one day a week, on Sundays, and there appears to have been no suggestion previously that was causing any problems for the respondent.

66 Whilst it is understandable that the respondent may have been concerned about the contents of the 10 December WhatsApp message, that has to be seen in the context of the claimant raising serious health and safety issues with the respondent, which did not appear to him to be being taken seriously. Instead, his shift was cancelled. The tribunal is far from convinced that the WhatsApp message would provide a reason for the claimant's summary dismissal on 15 December, without any prior warning. Further, the messages sent to the claimant by Mr Hardeling on 13 December 2021, prior to that meeting, did not in any way suggest that the claimant's employment was at risk, for any of the purported issues raised on 15 December.

67 In circumstances in which the tribunal is not at all convinced by the explanation put forward by the employer, the tribunal concludes that the claimant has a pretty good chance of succeeding in persuading a tribunal at the final hearing of his claim that the reason for his dismissal, or if more than one, the principal reason, was the protected disclosures contained in the 7 December 2021 email and 10 December 2021 WhatsApp group message.

Overall conclusion

68 The claimant's application for interim relief succeeds for the reasons set out above. Mr Gunberg was asked whether in the circumstances the respondent would be willing to ask the claimant to work for the respondent. Mr Gunberg stated that would cause difficulties because they had already employed somebody else to cover his work. Not did re-engagement appear to be a realistic possibility. In those circumstances, it appears to the tribunal to be just to order that the claimant's employment be continued, until the final hearing, or until the claim is otherwise settled or resolved. Since the tribunal acknowledges that this means that the respondent will have to continue to pay the claimant until that time, a final hearing date has been set, together with a case management hearing, to check the progress of the claim by 25 March 2022.

69 It is perhaps worth repeating that none of the background set out above will bind the Employment Tribunal at the final hearing of this claim. Further, the fact that the claimant has succeeded in his interim relief application, does not mean that he is more likely than not to succeed in his claim in due course. Nor does it inevitably mean that the respondent is likely to lose. The judgment at the final hearing will depend on the witness and documentary evidence presented to the tribunal at that stage, and the legal arguments made by or on behalf of both parties.

70 Finally, it appears to the tribunal that the value of the claimant's claim is potentially limited, because he usually only worked one day a week, and was paid a relatively modest hourly rate. There would appear to be some commercial advantage to both parties in resolving their differences sooner rather than later. Unless and until that happens, the tribunal will do what it can to ensure that the claim is progressed towards a final hearing as soon as reasonably possible.

Employment Judge A James
London Central Region

Dated 11 February 2022

Sent to the parties on:

14 February 2022

For the Tribunals Office

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