EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Anja McCormick	**v**	BusinessF1 Magazine Ltd

Heard at: Bury St Edmunds (by CVP)

On: 24, 25 and 26 January 2022
02 March 2022 (In chambers – no parties present)

Before: Employment Judge KJ Palmer

Members: Ms KL Johnson and Ms S Goding

Appearances
For the Claimant: In person.
For the Respondent: Mr Tom Rubython (Director).

RESERVED JUDGMENT

1. It is the unanimous Judgment of this Tribunal that the Claimant's claim for unfair dismissal due to a protected disclosure under s.103A of the Employment Rights Act 1996 fails and is dismissed.

2. The Claimant's claim for an unlawful deduction of wages and holiday pay succeeds and she is awarded the sum of £1,227.59 payable to her by the Respondent.

REASONS

1. This matter came before us today listed for a 3 day hearing by CVP. Prior to the commencement of the Full Merits Hearing we heard and dealt with a Strike Out Application from the claimant.

2. The claimant's claims are for unfair dismissal under s.103A of the Employment Rights Act 1996 and a claim for unlawful deduction of wages and holiday pay. The matter has some history.

3. The Claimant first presented a claim to the Tribunal on 7 February 2021 claiming unfair dismissal arising out of protected disclosures under s.103A of the ERA.

4. She then presented a second claim for arrears of pay on 25 March 2021.

5. Both claims were consolidated on 16 April 2021 by EJ R Lewis.

6. We had before us a bundle put together by the respondent. There are various witness statements included in that bundle. Prior to commencement of the hearing we heard a submission from the claimant to strike out the respondent's response on the basis of an application under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. Rule 37 states as follows:

> "(1) At any stage in the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

7. In considering any application under rule 37 as we have to have due cognisance to the overriding objective which is at rule 2 of the same rules of procedure, the overriding objective reads as follows:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with cases fairly and justly includes, so far as practicable-
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense."

The tribunal must take into account the overriding objective in interpreting or exercising any power given to it by the rules of procedure.

8. The claimant has directed us to a number of failures on behalf of the respondent principally in being ready for hearings and being in compliance with orders made by the tribunal. The claimant reminded us that there was due to be an application for interim relief on 26 February but this was postponed as a result of an application by the respondent which was agreed and the hearing took place on 5 March 2021 before Employment Judge Laidler. Pursuant to a Judgment on the application for interim relief Judge Laidler then made a series of directions incorporated as orders under rule 56 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for certain things to be done by the parties to enable this matter to be properly prepared for the Full Merits Hearing listed for three days starting today.

9. The first was that there were orders for there to be disclosure by 5 May 2021 and more particularly there was an order, the onus of which was placed on the respondent for a bundle to be prepared by 5 July 2021.

10. We heard from the claimant that she has tried vainly since that time to persuade the respondent to comply with the order and produce a bundle and in fact it is not until we think Friday evening that a bundle was finally produced and one was emailed to the tribunal. In fact the claimant did not see a bundle until yesterday, although we later ascertained that it was in fact delivered to the Claimant on Friday but the Claimant was away for the weekend. She received a paper bundle and so it was only one day before that the claimant actually saw the bundle which included what appears to be most of the relevant documentation.

11. However, there is some issue as to whether two documents that were originally disclosed by the claimant have been removed by the respondent and the explanation by Mr Rubython on behalf of the respondent was not entirely clear but he seemed to be saying that he made a mistake, he did not understand the nature of Judge Laidler's order and what was required of him in the production of that bundle. He seemed to be arguing that he thought that he was missing certain information that he needed to produce that bundle and kept referring to witness statements when it seems to us that he already had all of the relevant documentation that he did need bearing in mind that witness statements had been produced very early in these proceedings.

12. So it was not entirely clear why a bundle could not be produced but we do understand that in a case such as this where the parties are not represented, it is difficult for the parties to understand some of the orders

that are made by the tribunal and whilst those orders are given dates for compliance and the parties are warned that non-compliance can lead to severe consequences it is sadly not unusual particularly where parties are unrepresented for compliance with those orders to fail and for there to be slippage in compliance.

13. In this case clearly there has been some significant slippage and significant failure on behalf of the respondent. We are also mindful of the fact that the claimant has pointed out to us that one of the witness statements she has only seen for the very first time today. That appears to be a document responding to the claimant's Schedule of Loss, something that Mr Rubython was not duty bound to do in any event. She raises some questions about whether that may have been backdated because he refers to events that post-date the date of that statement. It seems to us that that document is unlikely to be material to matters. Moreover there was no order or obligation to produce such a document so there is no breach in that respect.

14. We have come to the conclusion that the respondent clearly is in failure in compliance but that with the best will in the World and probably more by luck than judgment we do appear at the hearing today to have sufficient documents in front of us and sufficient witness statements for us to proceed with a hearing. We would admonish the respondent for their failures in complying with the orders and we do accept that this must have been a difficult process for the claimant to have to deal with. Having said that we are very mindful of the overriding objective and we do consider that on balance it would not be appropriate to strike out the response for these failures bearing in mind that it is possible for us to conduct a fair hearing. We have the parties here, we do have the relevant documents in front of us and we do have witness statements from seven witnesses who are proposing to give evidence before this tribunal. Therefore we believe that we are in a position to proceed and despite the fact that it is reprehensible that the respondent has failed to comply with the schedule and the orders made by Judge Laidler and have failed in other respects we do not consider that we should take what is an unusual and draconian step of striking out a party at the outset of the hearing. For that reason the application is refused.

The Full Merits Hearing of this matter

15. We then commenced a three day hearing that was before us.

16. The matter had been subject to a degree of case management in that there was a preliminary hearing before EJ Laidler on 5 March 2021. At that preliminary hearing Judge Laidler requested the claimant to provide further details pursuant to her ET1 which were at that time lacking in detail. In particular EJ Laidler requested details of the claimant's claims arising out of alleged protected disclosures under s.43 of the Employment Rights Act 1996. EJ Laidler gave various orders and subsequently this matter was listed for a final Full Merits Hearing before this tribunal. There was a further preliminary hearing which took place before EJ Postle on 24 November but it appeared that there was a lack of documentation before EJ Postle and

upon ascertaining that EJ Laidler had previously case managed the matter and it had been listed for a Full Merits Hearing EJ Postle concluded no further case management was necessary.

17. So we were today confronted with whistleblowing claims based essentially on the claimant's homemade attempts to comply with the further particulars requested by EJ Laidler. Those disclosures were essentially set out in ten paragraphs submitted by the claimant pursuant to Judge Laidler's order. These were contained within the bundle. It was necessary to clarify with the parties what their understanding was of the nature of the claimant's claims. We were able to do this.

Issues

18. Essentially the claimant claims that she was dismissed as a result of making protected disclosures. The disclosures she relies upon are those set out in the further particulars produced by her. She agrees that this is a summary of her claim.

19. She is unrepresented as is the respondent. We were able to ascertain therefore that her claim is a claim arising out of an alleged unfair dismissal under s.103A of the Employment Rights Act 1996 which reads as follows:

> **"103A Protected disclosure.**
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

20. The claimant was only employed for a short period of time and therefore cannot claim "ordinary" unfair dismissal and relies upon the above section.

21. The claimant is also claiming unpaid arears of wages and holiday pay.

22. Both parties were able to agree that this was what was before us and it was on the basis of that agreement that we proceeded. The disclosures the claimant relies upon as being protected disclosures are those set out in pages 47-56 of the bundle before us. There are essentially ten disclosures which the claimant relies upon as being protected. I do not propose to repeat them here as they sit in the bundle as a pleading produced on a homemade basis by the claimant pursuant to EJ Laidler's order.

23. We had a bundle running to some 135 pages before us and we heard evidence from seven witnesses. We heard evidence from the claimant, also on her behalf from Emma Herd and Natalie Rees both former employees of the respondent. For the respondent we heard evidence from Tom Rubython who was representing the respondent and who is the respondent's managing director. We heard from Alex Sargeant an employee of the respondent, Graham Fudger chief photographer at the respondent and Susan Walsh a part time cleaner at the respondent. All had produced witness statements which were before us and which we had read.

Findings of Fact

24. Over the course of the three day hearing we naturally heard a great deal of evidence. It is not proportionate for all that evidence to be repeated in this Judgment. We shall confine ourselves to making findings of fact and repeating evidence only insofar as it is relevant to the issues before us.

25. The claimant was only employed for a short period of time by the respondent. She was employed from 14 December 2020 until 31 January 2021 when she was dismissed. The letter of dismissal was sent to her by Mr Rubython dated 29 January 2021. The reason cited was a clause under her contract of employment entitled, "Special Notice Regarding Covid 19". This referred to a clause appearing in her contract of employment purportedly giving the respondent the right to terminate the claimant's contract without notice should financial circumstances brought on by the Covid 19 pandemic prove that it would be impossible to continue to employee her. In fact in his evidence Mr Rubython made it clear that the reason why he had dismissed the claimant was because he felt she no longer wanted to work at the respondent. There are a number of email exchanges which included emails from Mr Rubython which were confused and it could be argued that there was more than one occasion when an email from Mr Rubython could have been construed as an attempt at dismissal. However, dismissal did not take place until the letter of 29 January. When questioned about the reason for the dismissal he was clear in his evidence that it was because the claimant failed to turn up for work the week commencing 25 January. He accepted that his letter of 29 January did not reflect this.

Comments concerning the evidence we heard and the credibility of the witnesses

26. The tribunal considers it important to set out how we have sifted and judged the considerable evidence we have heard which has led us to the conclusions which we have ultimately drawn. Tribunals are often faced in cases such as this with significant conflict between the parties on the evidence. It is necessary for the tribunal to resolve that conflict by preferring often one witness's evidence over another. It does not mean that by preferring one witness's evidence they consider that the other witness was telling blatant lies. All it means is that on the balance of probabilities they regard one witnesses evidence as being more credible and reliable than perhaps another. It is important for tribunals to assess the giving of evidence in this way to help them draw conclusions.

27. We heard much evidence from the two principal protagonists in this case being the claimant and Mr Rubython.

28. We have not been impressed with the evidence we have heard from the claimant in a number of respects. The claimant argued that she had not received the bundle in these proceedings until the day before the hearing,

that is Sunday 23 January 2022. In fact she relied on that as part of her submissions in her application to strike out the respondent's response. It emerged during the course of the giving of her evidence that in fact the bundle had been delivered to her home on Friday 21 January but that the reason she had not seen it until Sunday 23rd was that she was not at home during the course of that weekend until the Sunday. We consider that the claimant was disingenuous in not revealing this to us and this did not impress us. Secondly, during the giving of her live evidence the claimant argued that she had received a telephone call from Mr Rubython between Christmas and New Year telling her that she had to come into the office after New Year. This does not appear in her witness statement and is strenuously denied by Mr Rubython. We consider that it is highly likely that this would have appeared in her statement had it actually occurred.

29. Thirdly, the claimant makes much play of the effect on her mental health in her witness statement yet when questioned about this she confirmed that at no point had she sought any medical help, been diagnosed with any mental illness or been prescribed or had taken any medication. We would usually expect to see evidence of these things in support of such an assertion.

30. We are also unimpressed by the claimant's evidence in a number of other respects. Much of her claim is based on what she says are disclosures made to the respondent concerning its failure to properly manage and protect the employees working in the office as a result of the Covid 19 pandemic. Her claim is essentially based on what she says are protected disclosures relating to the respondent's failure in this regard. However, the claimant admitted in evidence that she had herself broken Covid Guidelines in place at the time by travelling from her home in Northampton to her parents property in the Lake District and spending the whole of Christmas with her parents and some of her extended family in breach of those guidelines. She also attended a Christmas lunch at the respondent which was technically permitted under the guidelines as it was classed as a business meeting but we would have thought that if she was genuinely so concerned about Covid safety measures being in place at the respondent she would have either raised issues about this Christmas party or perhaps not attended it. We found it a little too convenient that the claimant sought to rely on alleged breaches of Covid Guidelines when it suited her but not when it did not.

31. We also felt that the claimant's evidence relating to her former employment was a little confused. Where there is a conflict on the evidence as to the reason that she started at the respondent somewhat earlier than originally slated, we prefer Mr Rubython's evidence. The claimant says she started because she was asked to start because Mr Rubython said he needed her to assist in press week prior to the launch of the next edition of the magazine. We prefer Mr Rubython's evidence that the reason she started early was because she asked to because she was short of money. In fact it emerged during the course of her evidence that she continued to be paid during a notice period by her former employers whilst she was working at

the respondent. This was a fact that she only revealed under some pressure.

32. We are also bound to say that when the claimant attended the respondent's premises on 22 January and she then subsequently argued that it became clear to her at that point that the premises were not Covid compliant or safe, we find it odd that she did not complain during the course of the 22nd but wrote to the respondent on 23rd. We do not accept that it is plausible that she would have worked happily throughout the day on 22nd if she genuinely believed and felt that it was not safe to do so. We do not therefore believe her evidence in this respect. We were also impressed by the evidence of Mr Fudger and his interaction with her during the course of that day which suggested she was in no way concerned about Covid safety.

33. For the reasons that we have stated above we therefore doubt the claimant's credibility as a witness.

34. We also doubt the credibility of Emma Herd and Natalie Rees who gave evidence in support of the claimant. They both said they mirrored the claimant's concern as to the working conditions with relation to Covid Safety at the respondent's premises but we did not find their evidence particularly compelling They had happily taken a business trip abroad paid for by the respondent. We are unconvinced that Ms Herd resigned as a result of health and safety concerns. The evidence of Natalie Rees was also broadly supportive of the claimant but we once again are not convinced that the reason she resigned was as a result of genuine concerns about health and safety. We think it is much more likely based on the evidence she gave us that she resigned as a result of having been put on furlough.

35. With reference to Mr Rubython, we are bound to say that we considered that some of his evidence was a little chaotic, that he did contradict himself and became confused, however we regarded that he gave his evidence honestly often confirming and admitting issues which were unhelpful to him. It is clear that he has no HR support and little or no knowledge of Human Resources/Employment Law. His managing of the process concerning furloughing employees was chaotic as was his management of the dismissal of the claimant.

36. During the course of his evidence and in respect of documents in front of us, he argued that he had placed the claimant on furlough for a period of time and that that is why he had not paid her her full salary at the end of January when she was dismissed. He was of the view that furlough could be unilaterally imposed on employees without their agreement. This is of course untrue. When confronted with this Mr Rubython said that the period through which he had deducted monies from the claimant's final payslip was therefore not because she was placed on furlough but because she was laid off. Yet there is no lay clause in the contract of employment. Ultimately he appeared to accept that he had been wrong in deducting monies from the claimant's final salary slip and that the respondent did indeed owe the

claimant arears of pay and holiday pay at termination. That is dealt with below.

37. We were impressed with the evidence of Alex Sargeant. We see no reason to doubt his evidence and accept his evidence that sufficient measures were put in place at the respondent to comply with Government Guidelines and to keep people safe. It is clear that there was a stand with hand sanitiser and that the respondent had gone to trouble to make the premises safe and that they were sufficiently safe upon the claimant's return to the office on 22 January. In this respect we accept the evidence of Mr Sargeant. He also is a vulnerable person and we should have thought that if anyone should have had concerns if the working environment was not safe it would have been Mr Sargeant. We regard his evidence as reliable. We were also impressed with the evidence of Susan Walsh the cleaner who gave evidence as to the extra measures the respondent had insisted she take to keep the business running and deal with safety in the workplace. Mr Fudger also gave evidence which we accept as to necessary precautions which the respondent had taken and we were impressed by his evidence too.

38. It is in the context of the comments above concerning those from whom we heard evidence that we draw our conclusions.

39. The claimant bases her claims on alleged disclosures. She started work on 14 December and alleges that she raised concerns as early as 22 December. This constitutes the first disclosure she relies upon. She says that she raised issues together with Emma Herd to Tom Rubython on 22 December 2020. The disclosure she alleges is the mixing of five households together on a daily basis in the workplace with no social distancing in place and no mask wearing enforcement. She also says there were no masks available to staff. Quite apart from the fact that the household mixing guidelines/regulations did not apply in the workplace we do not in any event accept that she raised these issues with the respondent on 22 December. The alleged disclosure is vague and does not detail the precise nature of what was said to Mr Rubython by whom. Even if we had no doubts about the claimant's credibility as a witness, and we do have doubts, we do not think that she has given sufficient detail as to this alleged disclosure. Putting the claimant's argument with respect to this disclosure at its highest I can imagine that there was some general discussion in the office about Covid but we imagine it was little more than that.

40. As the second disclosure, this was also allegedly verbal and related to disclosures voiced by Natalie Rees to Tom Rubython on 4 January in the office. Once again we do not accept that there was any sufficient detail in the way in which this disclosure has been expressed or certainty to convince us that such an approach was made to Mr Rubython. Putting it at its highest we can imagine that a general statement devoid of specific factual content might have been made but we put it no higher than that.

41. As to the third disclosure, once again this is set out as a verbal disclosure and relates to the mistaken belief that the mixing of households was a

guideline which applied in the workplace. In any event we do not accept that such a disclosure was made verbally to Mr Rubython, we prefer Mr Rubython's evidence with respect to all alleged verbal disclosures. He said nothing had been disclosed to him by the claimant or Emma Herd and Natalie Rees verbally and he had not had Covid safety measures brought to his attention by anyone until he received an email from Natalie Rees on 10 January. It was then that he purported to put Emma Herd, Natalie Rees and the claimant on furlough although of course the claimant did not qualify for furlough as she had not been employed long enough.

42. As to allegation number four, we cannot see how this could on any analysis amount to a disclosure. It appears to be a statement of a discussion the claimant said she had with Mr Rubython on 11 January. It cannot amount to a disclosure.

43. Disclosure number five relates to the claimant's attendance at work in the office on 22 January when she came back. We categorically do not accept that the claimant made any disclosure to Mr Rubython on that date. She accepted in evidence that she had not done so and it was after that on 23 January that she sent a lengthy email raising complaints to the respondent we believe somewhat disingenuously. We believe at that point the claimant had decided she no longer wished to continue working at the respondent and was unhappy at the way she had purportedly been put on furlough. We do not accept that she made a disclosure in terms she suggests on 22 January.

44. Disclosure number six. We accept that the claimant emailed Mr Rubython on 23 January and raised purported concerns about Covid 19 Safety Measures. We accept that the claimant purports to raise issues concerning safety issues in support of her argument that she be allowed to continue to work from home but we think it more likely that the reason that she sent the letter was that she was generally unhappy with firstly purportedly being put on furlough, secondly being told that it was necessary for the production of the magazine for individuals to attend the office and thirdly she was unhappy about an article that appeared in the magazine with respect to a formula one driver Nikita Mazepin. We do not believe that she had any genuine concerns about her safety with respect to Covid 19 whilst in the office.

45. One of the key reasons for our findings is an email which the claimant sent to the respondent on 11 January which flies in the face of everything she is now telling this tribunal. In that email which she sent prior to purportedly being furloughed she volunteers that there is a safe environment in the office where social distancing is evidently possible. She goes on to say that she believes there is a safe working environment in the office. This email sent some 12 days before the first email the claimant sent to the respondent raising any purported concerns is very damning to the claimant's case. It is one of the principal planks why we find the claimant's evidence before us to lack credibility. This email was sent during a period when she purportedly alleges she had made a number of verbal disclosures expressing concerns. Surely this would have been the perfect opportunity to highlight those

concerns and refer to them and the respondent's lack of dealing with those concerns. Yet we have the complete opposite appearing in this email.

46. Disclosure number seven relied upon by the claimant appears to be a restatement of the preceding alleged disclosures and concerns a response she had from Mr Rubython. It is difficult to imagine how this can stand as a disclosure on its own.

47. Disclosure number eight is a follow up email to the email of 23rd with we have already discussed above.

48. Disclosure number nine is more narrative relating to when she was asked to come to the office and have a meeting on 25 January but refused and instead says she would rather have a telephone call. It is difficult to imagine how this can amount to a disclosure. At best it is repetition of what she has previously said.

49. Much the same applies to alleged disclosure number ten which is a restating of what she says were earlier disclosures which have not been dealt with.

The Law

50. The Law with respect to protected disclosure is set out in s.43 of the Employment Rights Act 1996.

> "**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) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (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) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(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, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

51. Essentially a disclosure must be a qualifying disclosure under s.43B and then that disclosure must be made to an appropriate person under one of the other sub-sections to bring it under the umbrella of s.43A and make it a protected disclosure.

52. The key test in the qualifying disclosure section at 43B is that it must be "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".

53. In this case the claimant is relying upon s.43B(1)(a) that a criminal offence has been committed, is being committed or is likely to be committed, s.43B(1)(b) the a person has failed, is failing or likely to fail to comply with any legal obligation to which he is subject, s.43B(1)(d) that the health and safety of any individual has been, is being or is likely to be endangered and possibly 43B(1)(e) that the environment has been, is being or is likely to be damaged.

54. It must be remembered that there is considerable case law on the various tests under s.43B as to what constitutes sufficient to amount to a disclosure of information, what constitutes sufficient to amount to a reasonable belief and what amounts to such a belief being in the public interest.

55. Cavendish Munroe Professional Risk Management Ltd v Geduld [2010] ICR 325 is relevant in that the Employment Appeal Tribunal made it clear in that case that the ordinary meaning of giving information is the conveying of facts and that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant fact. In the case of Kilraine v London Borough of Wandsworth [2018] ICR 1850 the Court of Appeal held that information in this context is capable of covering statements which might also be characterised as allegations but it must be of sufficient factual content to be capable of tending to show one of the matters listed in s.43B. Whether an identified statement or disclosure in any particular case meets that standard will be a matter for evaluative judgment by a tribunal in light of all the facts and evidence of the case before it. It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures.

Reasonable belief

56. S.43B(1) requires that in order for any disclosure to qualify for protection the disclosure must in the reasonable belief of the worker:

- Be made in the public interest; and
- Tend to show one of the six relevant failures has occurred, is occurring or is likely to occur.

57. Therefore an individual must have a genuine belief that the information tends to show a state of affairs as identified in s.43B(1) and that genuine belief must be reasonable. If the reasonable belief only has to be that the information disclosed tends to show that an allegation is true. Thus the tribunal first must decide whether such a statement was made but naturally it must consider if such a statement was made and the motivation behind making it.

Conclusions

58. In respect of alleged disclosure number one, we do not accept that any such disclosure was made to Mr Rubython at all. Even if we accept the claimant's case as pleaded, which we do not, we do not consider that the case as pleaded would satisfy the test that it was disclosure of information. Even on the claimant's own case it is too vague to amount to such. Nevertheless we do not accept the claimant's evidence that such a verbal disclosure was ever indeed made. At best there may have been some general discussion about the pandemic.

59. With respect to disclosure number two the same applies as to disclosure number one. We prefer the evidence of Mr Rubython and do not accept that any verbal disclosure was even attempted by the claimant, Emma Herd and Natalie Rees. At best there may have been some general discussion within the office but no more. Even taking the claimant's case at its highest and accepting her pleaded case, which we do not, we do not believe that it would come close to a qualifying disclosure under s.43B as it would not constitute a disclosure of information. Moreover nor would it pass the test of reasonable belief. The five households mixing together guideline did not apply to the workplace in any event.

60. With respect to disclosure number three, this relates to the email from Natalie Rees to Tom Rubython dated 10 January 2021. This was an alleged disclosure not made by the claimant. It is difficult to see how the claimant could rely upon this and in any event we do not believe that the claimant reasonably believed that this was a disclosure in the public interest as she wrote the very opposite in her email of 11 January.

61. With respect to disclosure number four, we do not find that this is a disclosure capable of protection. It appears to relate to a telephone conversation with Mr Rubython on 11 January. We cannot see how this can be a disclosure, it is at best a narrative of general events on 11 January and is wholly unspecific. It could not on any analysis amount to a disclosure. We do not accept however that during the course of that telephone conversation the other disclosures were discussed. This call comes immediately after the claimant's email of 11 January which we have already described as flying entirely in the face of her claims before this tribunal.

62. With respect to disclosure number five, in our findings of fact we make it very clear that we do not accept that there was any attempt by the claimant during the course of 22 December to make any disclosure concerning her concerns with respect to Covid safety procedures within the office. In fact in her evidence she made it plain that she made no such complaint during the course of that day and even explained why she had not. We do not accept that there was any such disclosure.

63. As to disclosure number six, we have of course a copy of that letter before us. We do not consider that this satisfies the test of reasonably held belief. We do not consider that the claimant genuinely felt she was making a

disclosure which was in the public interest which tended to show one or more of the breaches in s.43B. Our findings of fact explain that we consider that she had determined not to continue at the respondent for other reasons. We do not consider this a genuine letter which was purporting to raise disclosures or a disclosure for the reasons the claimant now seeks to rely upon.

64. With respect to disclosure number seven, it is unclear precisely what the claimant is saying but it seems to us that this cannot amount to a disclosure. She appears to be arguing that she raised a grievance and that this in itself amounts to further disclosure. For the avoidance of doubt however we do not consider that this is a qualifying disclosure. We accept that the email raised supposed concerns about Covid Health & Safety measures in the office but we do not accept for the reasons we have explained as to our doubts about the claimant's credibility that she was genuinely raising disclosures which in her reasonable belief tended to show one or more of the breaches at s.43B. Once again we think the contents of the email were a smoke screen for the fact that she was unhappy for other reasons.

65. Disclosure number eight [Judge Palmer – this was not mentioned in your dictation]

66. With respect to disclosure number nine, this cannot be a disclosure under s.43B. The claimant talks of attempting to speak to Tom Rubython and for whatever reason not being able to do so. She then refers to an email which she sent pursuant to an exchange she had with Mr Rubython as purportedly being a further disclosure. It is a continuation of previous emails and she raises nothing new. For the reason we have already set out we do not consider this constitutes a disclosure under s.43B.

67. As to disclosure number ten, for the same reasons we have raised above we do not consider this to be a valid disclosure under s.43B. The email is a re-statement of general unhappiness and a statement of an intention to attempt to pursue a grievance. For the reasons we have already outlined with respect to the claimant's evidence and its credibility we do not believe that the claimant was genuinely seeking to highlight failures at the respondent by way of a disclosure capable of protection.

The reason for the dismissal

68. None of the ten alleged disclosures relied upon by the claimant have been found by this tribunal to be capable of amounting to qualifying disclosures under s.43B. That therefore is essentially an end to the claimant's whistleblowing claims. However, for the avoidance of doubt we think it important to make clear that even if one or more of those alleged disclosures had qualified for protection we would not have concluded that the reason or the principal reason for the dismissal was the raising of those issues. In our findings of fact we conclude that some of the alleged disclosures were not raised at all. We of course have certain alleged disclosures in the form of emails before us so clearly they were raised. For the avoidance of doubt

we do not consider that the reason for the dismissal was anything to do with the contents of those emails. The reason for the dismissal we believe was as outlined by Mr Rubython in cross examination namely that the claimant failed to attend work during the week commencing 25 January 2020. Therefore even if we had concluded that one or more of the alleged disclosures amounted to a qualifying disclosure capable of protection and was protected the claimant would not have succeeded in her claim.

69. Her claims under the protected disclosure legislation and s.103A therefore fails and is dismissed.

Claimant's claim for unlawful deduction of wages/Holiday pay

70. The claimant pursues a claim for unlawful deduction of wages and unpaid accrued pay in lieu of holiday at termination. She quantifies this claim as being £931.97. She does not differentiate as to which part of that sum amounts to unpaid wages and which part amounts to unpaid monies in lieu of accrued untaken holiday or holiday pay.

71. However, in cross examination Mr Rubython openly admitted that the claimant's final salary slip dated 31 January 2021 showed a net pay due of £2,286.74 yet because he understood that he had properly furloughed or laid off the claimant for a period of time the amount due to her was only £1,059.15 which sum both parties accept she was paid. The respondent argued that he was entitled to deduct this sum albeit that under cross examination he accepted that he was not. It is clear therefore to us that the sum unpaid to the claimant is the difference between these two figures. Accordingly the claimant was entitled to full payment under the terms of that final payslip and she is now entitled an award in the sum of £1,227.59. We make a declaration to that effect and an award. The sum of £1,227.59 is to be paid by the respondent to the claimant immediately.

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Employment Judge KJ Palmer

Date: 09 March 2022

Sent to the parties on: ……...

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For the Tribunal Office