



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss M Day

AND

Respondent
P Friedli & P Friedli
T/A R Friedli & Sons

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD By Video (VHS)

ON

14 and 15 March 2022

EMPLOYMENT JUDGE GRAY

Representation

For the Claimant: In person
For the Respondent: Mr M Withers (Counsel)

JUDGMENT

The judgment of the tribunal is that the Claimant's complaint of automatic unfair dismissal for making a protected disclosure fails and is dismissed.

JUDGMENT having been delivered orally on the 15 March 2022, and written reasons having been requested by email from the Claimant dated 16 March 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the Claimant Miss Day claims that she has been automatically unfairly dismissed, and that the principal reason for this was because she had made a protected disclosure.
2. The Respondent contends that the reason for the dismissal was conduct/performance and that this was confirmed in writing on the 18 January 2021.

The Complaints

3. By a claim form presented on 10 February 2021 the Claimant has brought a complaint of automatically unfair dismissal on the grounds of having made a protected public interest disclosure pursuant to section 103A of the Employment Rights Act 1996.

The Background and Issues

4. By way of general background, the Claimant was employed by the Respondent as a Bakery Shop Assistant from 28 May 2019 until her dismissal which took effect on 18 January 2021. The Claimant asserts she was dismissed for the principal reason of having made a protected public interest disclosure. The Respondent denies the claim, and the Respondent asserts that the Claimant was dismissed for reasons related to both performance and conduct.
5. The issues were confirmed as follows (having been agreed at the case management preliminary hearing before Employment Judge Roper on the 9 September 2021 (a copy of the Case Management Order is at pages 42 to 50 of the agreed bundle));

1. Protected Public Interest Disclosures ('Whistle Blowing')

1.1. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1. What did the Claimant say or write? When? To whom? The Claimant relies on one disclosure, namely that she informed Mr Peter Friedli by telephone on 7 January 2021 that a colleague Emily Newman was failing to self-isolate having been instructed to do the same by the NHS Test and Trace App. (The Respondent denies this telephone call took place as alleged).

1.1.2. Was this a disclosure of 'information'?

1.1.3. Did the Claimant believe the disclosure of information was made in the public interest?

1.1.4. Was that belief reasonable?

1.1.5. Did the Claimant believe it tended to show that:

1.1.5.1. a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.1.5.2. the health or safety of any individual had been, was being or was likely to be endangered;

1.1.6. Was that belief reasonable?

1.2. If the Claimant made a qualifying disclosure, then this was a protected disclosure by virtue of s43C(1)(a) of the Act because it was made to the Claimant's employer.

2. Whistle Blowing Unfair Dismissal (s103A of the Act)

2.1. Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

2.2. The Claimant did not have at least two years' continuous employment and the burden is therefore on the Claimant to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure(s)

3. Remedy (unfair dismissal)

3.1. The Claimant does not wish to be reinstated and/or re-engaged.

3.2. What basic award is payable to the claimant, if any?

3.3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3.4. If there is a compensatory award, how much should it be? The Tribunal will decide:

3.4.1. What financial losses has the dismissal caused the Claimant?

- 3.4.2. Has the Claimant taken reasonable steps to replace any lost earnings, for example by looking for another job?
- 3.4.3. If not, for what period of loss should the Claimant be compensated?
- 3.4.4. Is there a chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed, or for some other reason?
- 3.4.5. If so, should the Claimant's compensation be reduced, and if so, by how much?
- 3.4.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
- 3.4.7. If the Claimant was unfairly dismissed, did the Claimant cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the compensatory award? If so, by what proportion?
- 3.4.8. Does the statutory cap of fifty-two weeks' pay apply? (This is £86,444 until April 2020, and £88,519 thereafter).

This Hearing

6. For this hearing I was provided with:
 - a. An agreed electronic bundle consisting of 132 pages including the index pages.
 - b. The Claimant's witness statement together with some job advert documents relevant to remedy.
 - c. Three witness statements on behalf of the Respondent, Mr Peter and Mr Phillip Friedli and Ms Emily Newman.
 - d. A written skeleton argument by Counsel for the Respondent.
7. It was agreed with the parties that liability would be decided first and then remedy if appropriate.

8. A hearing timetable was agreed with the parties that anticipated evidence and submissions concluding at around 3:30pm on day one, then deliberation and judgment, with remedy if appropriate, on day two. However, it was not until around 4:10pm evidence was concluded, and it was agreed submissions would be from 10am to 11am on day two. A delay in evidence was primarily caused by Ms Newman having connection issues and eventually, with the parties' agreement, joining by audio only.
9. I heard from the Claimant, and I heard from Mr Peter Friedli (Peter), Mr Phillip Friedli (Phillip) and Emily Newman (EN) on behalf of the Respondent.
10. I was presented with helpful oral closing submissions by both sides.
11. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

THE FACTS

12. Initially from the issues and the witness statements presented there appeared to be a number of factual disputes between the parties (in particular whether there was a call between the Claimant and Peter on the 7 January 2021). However, by the conclusion of oral evidence this had narrowed.
13. The Respondent's business is a small family owned bakery consisting of two shops, one where the Claimant worked, Church Street and another, the Highstreet shop.
14. It is not in dispute that the Claimant was employed from 28 May 2019 until her dismissal which took effect on 18 January 2021 as a Bakery Shop Assistant (see also pages 4 and 18 of the bundle).
15. The Claimant initially worked with the Respondent's mother (for around 10 months) before then running the shop on her own during the COVID pandemic period, save for assistance from a member of Saturday staff.
16. It is not in dispute that the Claimant thought it was strange the way the Respondent treated her in September 2020 with a potential favouring of EN as can be seen by the text the Claimant sent to her mother dated 7 September 2020 (page 59) ... "... I hope Peter isn't thinking about getting rid of me and putting Emily in here."
17. This is consistent with the reason the Claimant asserts as what she believes to be her reason for dismissal in the letter she sends the Respondent via

their solicitor on the 19 January 2021 (pages 102 to 107), the day after her dismissal (see page 101).

18. The Claimant says in her letter (see page 105) ...

“Until March 2020 The Church Street shop always had two employees working there from 7.30am-1pm and a single employee from 1pm-4pm .Since March 2020 I have been working alone in the Church Street shop and have proved beyond any doubt that a second employee is not essential. So, the Friedli's decided that because Emily preferred to work in the Church Street shop and had been employed by the Model Bakery for approximately seven years, I was the better bet to dismiss if the Friedlis wished to save money on salaries.

It is therefore my belief that I was dismissed for the reason outlined above and not for the cock and bull story in your letter.”

19. It is not in dispute that the letter the Claimant sends does not say she believes the reason for her dismissal is her alleged protected disclosure. Initially in oral evidence the Claimant was reluctant to acknowledge that her letter did not say this. The Claimant confirmed that she knew it at the time (that she was dismissed for the disclosure), but that she can't see any direct reference to it in the letter. This acceptance by the Claimant is not a surprise as the letter very specifically identifies another reason (as detailed above). What is surprising is if the Claimant did know it at the time, as she has said she did in her oral evidence, that it is not stated in her letter challenging the fairness of the dismissal. The Claimant refers in detail to constructive and unfair dismissal, asserted procedural failings by the Respondent, as well as her previous experience of Employment Tribunals (see page 106).

20. It is not in dispute that the Claimant is told in December 2020 that EN has tested positive for COVID and is self-isolating (see page 62). As the Claimant states in paragraph 2 of her witness statement ... “... Emily Newman also tested positive for Covid-19 on 20 December 2020 and again was instructed to self isolate and Peter Friedii sent me a copy of her test results, I thought this was odd as I didn't think you could disclose another employee's personal information via a written document.”. Peter confirmed in cross examination that he had EN's consent to do this, and EN in her witness evidence makes no complaint about it.

21. The Claimant and EN are in friendly contact by text on the 24 December 2020 (see page 66). The Claimant says ... “Hi Emily. I wanted to wish you and your daughter a Merry Christmas I hope you're feeling ok.”. There are also texts of them exchanging happy new year messages (see page 68).

22. It is then communicated by Peter to the Claimant that EN will need to isolate to the 12 January 2021 (see page 69).
23. It is not in dispute that the Claimant is told by a customer on the 7 January 2021 that they have seen EN out walking her dog.
24. The Claimant does not seek to verify this information about EN with EN, before calling Peter.
25. This then leads to the alleged disclosure on the 7 January 2021.
26. The Claimant asserts she informed Peter by telephone on 7 January 2021 that a colleague EN was failing to self-isolate having been instructed to do the same by the NHS Test and Trace App.
27. The alleged disclosure is described in paragraph 2 of the Claimant's witness statement ...

"... I passed on information given to me by a customer about another employee Emily Newman who had been instructed by NHS Test & Trace to self-isolate as she had come into "contact with someone who had symptoms" but Emily Newman was not self-isolating and had been seen out walking her dog by this customer. I was given the information by a customer called Hayley on Thursday 7th January 2021 sometime in the morning. I passed on the information to Peter Friedii, one of the owners of The Model Bakery, via a telephone call on Thursday 7th January. He told me during that call that two other customers had told him the same thing i.e. Emily Newman was seen out and not self-isolating as she had been told to do by the NHS, which is the law regarding Covid-19."

28. The Claimant confirmed in oral evidence that about what she says this information tends to show is that:
 - a. a person had failed, was failing or was likely to fail to comply with any legal obligation; by this the Claimant confirmed she means EN is not self-isolating, which she was required to do, although the Claimant accepted that this was just her belief and she could not evidence that EN was not actually self-isolating. EN denies that she was not self-isolating.
 - b. the health or safety of any individual had been, was being or was likely to be endangered; by this the Claimant confirmed she means that if EN had been out and about she could have caught COVID and brought it back into the business infecting staff and customers. I would observe here that there is a lack of logic to this explanation, because were EN not required to self-isolate, she could be out and

about more and potentially increase her risk of catching COVID, before unknowingly bringing it into the business.

29. Peter says about this telephone call in paragraph 8 of his witness statement (having corrected his evidence orally in examination in chief) ... "Maria Day called me on [~~Friday 8th~~] the afternoon of 7th January 2021 saying she had heard from a customer that Emily had broken her self isolation, and that she was seen out walking her dog. No proof or further details were given to me at the time. I asked Maria Day who this person was and who told her this, and if it was the same person. She told me she did not know the customers name? I said I will look into this in the morning and ask Emily if this was true."
30. The Claimant confirmed in cross examination that Peter did say to her that she should leave it with him. As the Claimant is recorded as saying in her WHATSAPP message to Peter on the 8 January 2021 ... "I care about the fact that as a responsible person that I felt that I should tell you and you could do with that information with whatever you wanted to do with it". The Claimant acknowledged in her oral submissions that Peter could deal with it and she left it up to him.
31. Peter did not agree in cross examination that during that call on the 7th January 2021 he told the Claimant that two other customers had told him the same thing. He confirmed that this was said in his call with the Claimant on the 8th January 2021.
32. At paragraph 3 of the Claimant's witness statement she describes her recollection of events of the 8 January 2021 ...

"On Friday 8th January at approximately 7.55am, Phil Friedii arrived at the shop where I worked alone. This is the conversation that took place:-

Maria: "Did Peter tell you that yesterday I called him to tell him that a customer had told me that Emily was seen out walking her dog when she should have been self isolating".

Phil: (went berserk) "it's none of your business you shouldn't be saying it you will get in big trouble for this you can't say things like that we have spoken to Carol in the accounts team and the legal team you cannot get involved and neither can we". (All the time jabbing his finger at me in close proximity).

Maria: "I cannot understand why you are reacting like this, all I did was pass on information to Peter that a customer had told me".

Phill: You've got no proof, you've got no name of the customer, no number of the customer, you've made it up I'm the boss why are they telling you and not me?" (All the time jabbing his finger at me in close proximity)

Maria: "I did not make this up. I spoke to Peter yesterday and Peter told me that he had received two separate phone calls from other customers who told him that Emily had been seen out when she should have been self isolating"."

33. Then at paragraph 4:

"4. After Phil Friedli left the shop on that day at 8.10am I called Peter Friedli and told him what Phil Friedli had done to me and what he had said. Peter Friedli said "I'm sorry that happened. I will get Phil to come back and apologise to you". After this Phil Friedli called me on the Church Street work phone. He said he wanted to discuss what had happened and he said "do you want to do this on the telephone" I said "no I'd rather speak face to face as I currently have three customers waiting outside" and could he wait until a bit later. Phil Friedli said "no I'm coming in 10 minutes". He then ended the call. Phil Friedli then arrived about 10 minutes later at approximately 10.55am, at which point he was outside speaking to a customer called Robert. After which he came into the shop with a clipboard. There were four things written on the clipboard which I could not read. Phil Friedli then accused me of making up a story about Emily Newman not following isolation rules. I said "ok I will call Emily whilst you're here". I called Emily on her mobile at home. Neither of us could hear each other speak because Phil Friedli was still shouting. Emily asked me to ask Phil to be quiet. I described the customer to Emily who had advised me she had seen Emily walking with her dog. Emily couldn't immediately place the customer I had described. Two hours later when I was at home Emily Newman sent me a Whats app message with a screen shot of her conversation with the customer that I now know is called Hayley. Hayley confirmed in the message that she did tell me she had seen Emily walking with her dog. I have the messages between Emily and the customer Hayley which I can provide. When I finished the call with Emily Newman I told Phil Friedli that Emily could not recall who the customer was. Phil Friedli continued to say I had made up the customer. I told him that all I did was to tell Peter Friedli the information I had been given as any responsible person would and because I was one of their employees."

34. What the Claimant describes about EN's interactions with her on the 8 January 2021 is broadly consistent with what EN describes in her witness statement at paragraphs 9 and 10:

"9. I was at home on my last day of isolation, when Phil phoned me to see how I was, and he told me that Maria had customers questioning me coming

back to work. I texted Maria and asked her what the worries were. She then phoned me. She told me that someone had told her I was out and about, walking my dog whilst isolating, and that another customer had told her I had the ambulance out to me recently. Neither of these were true.

10. While I was on the phone Maria and Phil were arguing about it. Phil was trying to explain what he had said at the same time I was speaking down the phone. Maria was getting wound up by it. I asked her to get Phil to be quiet, while we figured out who she had heard these rumours from. I then came off the phone and tried to work it out. I did eventually and sent messages to Maria and Phil, explaining where the mix-up had happened.”.

35. The Claimant describes at paragraph 5 of her witness statement:

“5. Phil Friedli shouted at me again and said "this is your first verbal warning and you're going to get it in writing". I asked therefore if it would be a verbal or written warning and he said "don't start that with me". During Phil Friedli's second visit to the shop two customers were outside and were witness to Phil Friedli shouting at me. One lady customer came back into the shop to check that I was ok because she could see that I was in a state of shock and she told Phil Friedli to his face that he is unprofessional. I was left in such a state of shock and fear that I told Phil Friedli that I was leaving the shop to go home. The time was approximately 11.30am. Phil Friedli then said "I will see you tomorrow". I told him I would not be in the following day until I had seen the warning and what it consisted of. I then emailed Peter Friedli on Friday 8th January 2021 at 2.37pm advising him of Phil Friedli's behaviour.”.

36. Phillip says (at paragraph 6 of his witness statement) ... “On 8th January 2021, Maria informed me she was clear Emily was not self isolating. I said this was incorrect as far as I knew, and that she was self isolating. She said in an aggressive manner I should look into this, shouting at me, and said we were a tin pot business, and ridiculed me. Her attitude and aggression towards me were not acceptable. I gave her a verbal warning.”.

37. It was during the cross examination and the oral evidence of Phillip that matters on the 8 January were clarified further by him:

- a. He said that he went to the shop in the AM on the 8th of January to make the usual deliveries. It was then that the Claimant raised the EN matter with him. He agreed the conversation was heated, he explained that he was telling the Claimant that Peter was dealing with it, so he is not talking about it, but the Claimant did not accept that. He did not accept the words the Claimant has attributed to him in her statement.

- b. There is then the phone call between the Claimant and him.
 - c. He then returns to the shop and he had a clip board with a piece of A4 paper on it but nothing written on it. He explained that this second meeting was also heated and a customer came in wanting to be served for her lunch order and he says he said to her that she would have to wait and she said he was unprofessional and he said that she did not know what was going on here.
 - d. The Claimant was told that she had a verbal warning which Phillip says he issued after the Claimant said to him you don't know who you are messing with, which he said he had never had an employee say something like that to him.
38. From this it is not in dispute that the Claimant initiates the conversation with Phillip about EN, this is despite her accepting she had left it with Peter after she told him. It is not in dispute that Phillip does not want to engage about it. It is not in dispute that it was a heated discussion and it was apparent from the cross examination of Phillip by the Claimant that they still felt strongly about the matter.
39. From this and the Claimant's responses in cross examination it is not in dispute that the Claimant is told she has been given a verbal warning.
40. It is not in dispute that Phillip sends a WHATSAPP message to the Claimant timed at 18:50 on the 8th January 2021 (see page 95) where Phillip apologises to the Claimant. It says ... "Hi Maria, it has shocked me in what has happened today and upset me too. There has been a massive misunderstanding on both sides, but I never wanted it to come this. I apologise for upsetting you but I can assure you that it wasn't intentional. We have always appreciated all your hard work and loyalty. I hope we can put this behind us and come to a mutual understanding. Best wishes for next week". He conveys he is upset and that there has been a massive misunderstanding on both sides.
41. When asked about this message Phillip said that Peter asked him to do so as Peter was being contacted by the Claimant about the matter.
42. In evidence I was referred to a number of WHATSAPP messages between the Claimant and Peter that appear to have been sent on the 8th January 2021 (see pages 73 to 87). The first message at page 73 refers to the Claimant being unable to work the next day (Saturday 9th January) because she says ... "This is due to being bullied and verbally abused in the workplace today on two separate occasions on Friday 8 January 2021 by Philip Friedli.". The messages from the Claimant to Peter circulate the message from the customer saying she was mistaken about EN breaching

self-isolation. The Claimant asserts though that this proves she did not make the customer up and that she wants an apology from Philip. It is clear that Peter has not accused the Claimant of this acknowledging ... "I haven't blamed you I took your information in good faith But there was nothing I could do", see page 85.

43. Phillip then sends the Claimant his WHATSAPP as referred to above (which is at page 95 of the bundle).
44. In evidence I was also referred to a number of WHATSAPP messages between the Claimant and Peter that appear to have been sent on Saturday the 9th January 2021 (see for example page 88, where the Claimant refers to being told yesterday that she was going to receive a verbal warning).
45. These messages run to page 94 of the bundle and can be described as the Claimant wanting clarity and a conclusion about the warning, asserting that the information she had passed on about EN was genuinely from a customer. The messages from Peter are him telling the Claimant he would look into it as he needs to speak to Phillip and for her to wait. He says he wants to ... "speak face to face" with the Claimant (see page 92). The Claimant expresses that she does not want to wait (see page 94) saying ... "But in my mind Peter this is something that cannot wait, you should be speaking to Phil tonight not waiting until Monday."
46. It is not in dispute that the Claimant does not return to work after the 8th January 2021, this is due to her having holiday booked and an operation.
47. By emails dated 12 January 2021 the Claimant makes further enquires of Peter for details of the warning.
48. The Respondent is taking advice at this time and it is then by email sent via their solicitors dated 18 January 2021 that the Claimant's employment is terminated.
49. This email states:

"This letter is to now confirm that we have decided to terminate your employment with immediate effect for the following reasons:

1. Your work performance has not been of a standard that we would expect;
2. Your attitude towards me and Phil, as owners, and our other members of staff has not been acceptable, in particular:

- a. Philip had an initial discussion with you on 8th January 2021 about your attitude to a fellow member of staff, Emily, and the inappropriate way in which you were talking about her,
- b. This then led to him speaking to you, about the attitude that you were displaying and issued a verbal warning;
- c. Rather than accept that warning, you continued to, as I stated to you at the time, be spiteful towards others at the bakery;
- d. This manifested itself by you sending various text messages to me, the content of which demonstrated to me that you had no regret about the way you had acted, and no acceptance that you had been criticised and given a verbal warning, the aim of which was to change that attitude.

I have now considered matters further, and given the above, I do not consider that your employment with the Model Bakery is sustainable. Your employment will terminate as of today's date (18th January 2021) and you will be paid up to today. You are entitled to one week's notice pay, which we will make a payment in lieu of. Also any holiday that is still due will be added to your final pay plus any extra hours you worked up to Monday 18th January 2021 which we have worked out to be 9 hours and 30 minutes extra."

- 50. Peter confirmed that this was a joint decision by both him and Phillip.
- 51. The potential link between the Claimant's alleged disclosure on the 7th January 2021 and the reasons for dismissal as expressed in this correspondence is where it says ... "Philip had an initial discussion with you on 8th January 2021 about your attitude to a fellow member of staff, Emily, and the inappropriate way in which you were talking about her". This though is not the disclosure itself but the subsequent interaction between the Claimant and Phillip which is not alleged to be a disclosure, but is the Claimant initiating a discussion with Phillip wanting to find out what Phillip knew about it. Phillip did not want to engage in that, which is not surprising as the Claimant has herself confirmed it was left with Peter.
- 52. Phillip says about the dismissal (at paragraph 7 of his witness statement) ... "Maria's work in the bakery was simply not up to standard. She seemed to think she was running the place, but also was generally not up to the job. The place was not kept clean, and items sell by dates had expired. I spoke with Peter, and Maria's general performance and aggressive attitude meant we agreed her employment should end, and he made the arrangements to terminate her employment."
- 53. Peter says (at paragraphs 11 to 14 of his witness statement) ...

- “11. We felt Maria had gone to far in the way she spoke to Philip as her Boss and not believing all outcomes as well as being aggressive towards us. We decided we needed to terminate her employment. (see P98 TB for dismissal letter)
12. Philip and I both were clear we needed to deal with this in the best way, unaware that without 2 years qualifying service, Maria did not have unfair dismissal rights anyway and we could terminate her employment on notice.
13. Maris Days conduct towards Phillip, shouting at him, and not listening to a word anybody else said, including being aggressive was justification in our eyes.
14. The constant texts and emails, together with a refusal to accept our decisions in running the business led us to the termination. Maria Day’s mother texted and e-mailed me a number of times and even demanded me to phone her on a Saturday night at 8 pm well pass normal work hours?”
54. It is not in dispute that the Respondent did not raise any performance concerns with the Claimant prior to the 8th January 2021.
55. It was accepted by the Respondent that the performance issues became apparent to them after the 8th January 2021. As EN sets out in paragraph 14 of her witness statement ... “Once I had been sent to cover the Church Street shop in January, it was clear that Maria had been struggling. I had to do a deep clean and sort through all of the stock. There were cans in the fridge that were months out of date and cabinets that hadn't been cleaned in a long time.”. EN confirmed in cross examination that this was discovered when she went there on the 14th January 2021 to reopen the shop. In her oral submissions the Claimant confirmed that this was something EN could have discovered as the shop had been closed since the 8th January 2021 and the Claimant explained that it was difficult to maintain the temperature on the fridge. I therefore accept what EN says she discovered.

THE LAW

56. Under section 43A of the Employment Rights Act 1996 (ERA) a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
57. Section 43B(1) of the ERA provides that 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, or is likely to be deliberately concealed.
58. The Claimant relies upon (b) and (d) of section 43B(1) of the ERA.
59. Under Section 43C(1) of the ERA a qualifying disclosure becomes a protected disclosure if it 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.
60. It is not in dispute in this case that the alleged disclosure is made to the Claimant's employer.
61. A disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient (section 43L(3) of the ERA).
62. Although it is not possible to draw a clear dichotomy between information and a mere 'allegation' or expression of opinion, in order to amount to a 'disclosure of information' the statement relied on 'must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) (***Kilraine v Wandsworth LBC [2018] EWCA Civ 1436; [2018] ICR 1850***).
63. Disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which a claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence (***Kilraine***).
64. The focus is on whether in the reasonable belief of the worker (at the time) the information provided tended to show one or more of the matters relied on. It is not whether the worker genuinely / reasonably believed that there had been such a failure. The worker must also believe at the time that the disclosure is made in the public interest.
65. Both aspects involve a subjective and objective element; i.e., that the worker believes the information tended to show the matters relied on/was

in public interest *and* that they were reasonable in holding that belief (**Chesterton v Nurmohamed [2017] EWCA Civ 979; [2018] ICR 731**).

66. A belief can be reasonable even if it is wrong (**Chesterton**).
67. There may be a range of reasonable views as to whether a disclosure is made in the public interest (**Chesterton**).
68. Section 108 of the ERA sets out that an employee requires two years qualifying service in order to bring an (ordinary) unfair dismissal claim.
69. By virtue of section 103A of the ERA an employee without the requisite length of qualifying service may bring a claim for unfair dismissal in circumstances where the sole or principle reason for dismissal is alleged to be a protected disclosure.
70. The burden on proving that the dismissal was for the sole and principle reason of her protective disclosure, and therefore that the tribunal has jurisdiction in this claim, falls squarely onto the Claimant, as per **Smith v Hyde Town Council [1978] IRLR413 (CA)**.
71. Under section 103A of the ERA, an employee is to be regarded 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.
72. In **Martin v Devonshire Solicitors [2011] ICR 352** the EAT set out guidance for determining whether dismissal was because of a protected act or because of the way in which it was communicated.
73. There is no requirement of exceptionality in cases where a Respondent contends that the fact of any protected disclosure is separable from the reasons for dismissal as per the EAT in **Panayiotou v Chief Constable Kernaghan [2014] IRLR 500** (at para 54-55).
74. In **Kuzel v Roche Products [2008] ICR 799** the Court of Appeal made some preliminary observations on the operation of section 103A and its interaction with unfair dismissal generally. The Court of Appeal held that, having rejected the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party.
75. The Claimant in her oral submissions referred to the Employment Tribunal decision of Employment Judge B Elgot in the case of **Ms Best -v- Embark on Raw Ltd**. It is noted that decisions of another Employment Tribunal are not binding on this Employment Tribunal.

76. Having considered that judgment, which relates to a claim that covers many more complaints than in this claim, I observe that the Respondent in the claim before me does not downplay the concerns the Claimant raises on the 7th January 2021 (which is factually different to the findings at paragraph 14 of the judgment of Employment Judge B Elgot). Further, the articulation and evidencing of the reasons for dismissal in that case are in my view very different to the one before me.

THE DECISION

77. Dealing first with the alleged disclosure.

78. Peter Friedli is informed by the Claimant on the 7 January 2021 by telephone that she had heard from a customer that Emily Newman had broken her self-isolation, and that she was seen out walking her dog. This is in the context of the Claimant and Respondent being aware that EN is required to self-isolate at this time.

79. Peter confirms he will look into it in the morning and will ask EN if it was true.

80. The Claimant left the matter with Peter to deal with. Peter confirms in a WHATSAPP message that he received the information in good faith (as can be seen at page 85 of the agreed bundle).

81. In my view this is information of sufficient factual content and specificity which is capable of tending to show one of the matters listed in subsection 43B (1), namely subsection (b) ... that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The obligation that applied at that time was for EN to self-isolate.

82. In my view this would be in the public interest (as the rule was there to limit the transmission of COVID in the public), and I accept that the Claimant has demonstrated this was in her reasonable belief at the time of the disclosure.

83. I do not accept though that the information disclosed tends to show that the health or safety of any individual had been, was being or was likely to be endangered, in the way the Claimant has asserted. That is if EN had been out and about she could have caught COVID and brought it back into the business infecting staff and customers. There is a lack of logic to this explanation to support it being reasonable both subjectively and objectively, because were EN not required to self-isolate, she could be out and about more and potentially increase her risk of catching COVID, before unknowingly bringing it into the business.

84. Having found the Claimant to have made a protected disclosure, I go on to consider if the Claimant has proven that it was the reason or principal reason for her dismissal or is the reason for her dismissal separable from the disclosure.
85. I accept the Respondent's evidence on the reason for dismissal (which is supported by contemporaneous documentation at the time as detailed in the fact find set out above), that it was the conduct of the Claimant between her and the Respondent's joint owner Phillip on the 8th January, that led to the Claimant being issued a verbal warning for her conduct towards him that day. Then it was the actions of the Claimant after that incident, and the state of the shop as subsequently discovered by the Respondent, that led the Respondent to form a view that they could no longer work with the Claimant due to her conduct. It was her conduct that was the principal reason which is separable from the disclosure she made on the 7 January 2021.
86. The Claimant did not have to engage with Phillip on the 8th January about EN. The Claimant accepts Peter had told her he would deal with it. The Claimant conducted herself in a way towards Phillip on the 8th January that he considered warranted a verbal warning. The Claimant then continued to push Peter for an urgent decision on the warning despite him communicating he wanted to look into it, discuss it with Phillip and meet with her face to face. This is the cumulative conduct that resulted in the Claimant's dismissal, not the disclosure of information she made on the 7th January 2021.
87. For all these reasons the Claimant's claim of automatic unfair dismissal for making a protected disclosure fails and is dismissed.
88. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 5; the findings of fact made in relation to those issues are at paragraphs 12 to 55; a concise identification of the relevant law is at paragraphs 56 to 76; how that law has been applied to those findings in order to decide the issues is at paragraphs 77 to 87.

Employment Judge Gray
Dated: 15 March 2022

Judgment sent to parties: 30 March 2022

FOR THE TRIBUNAL OFFICE