EMPLOYMENT TRIBUNALS

Claimant: MR BENETAR

Respondents: CHARLOTTE GUEST HOUSE LTD

Heard at: Watford (by Hybrid CVP) **On: 13-15 June 2022**

Before: Employment Judge Skehan
Ms Jaffe
Mr Dykes

Appearances
For the claimant: In Person
For the respondent: Mrs Peckham, solicitor

JUDGMENT

1. The claimant's claim for unauthorised deduction from wages is withdrawn and dismissed.
2. The claimant's claim for detriment contrary to section 47B Employment Rights Act 1996 is unsuccessful and dismissed.
3. The claimant's claim for automatically unfair dismissal on the grounds of protected disclosure contrary to section 103A of the Employment Rights Act 1996 is not well-founded and is dismissed

REASONS

1. This judgment and oral reasons were provided to the claimant at the conclusion of the hearing on 15 June 2022. These written reasons are provided at the request of the claimant.
2. The claimant issued proceeding on 9 April 2020 following a period of early conciliation between 1 April 2020 and 8 April 2020. The claimant's ET1 is very short, he ticks the box for unfair dismissal, holiday pay, arrears of pay and other payments. Within box 8.2 of the ET1 form, the claimant sets out the following background and details of his claim: 'I was suspended from work on 13 February 2020 after whistleblowing eight days earlier on 5 February 2020'.

3. At the outset of the hearing, we revisited the list of issues. These were agreed with EJ Alliott on 10 February 2021 and further clarified as indicated in *italics* below. They were:

   3.1. Public interest disclosure

   3.2. The alleged disclosures the claimant relies on are as follows:

      3.2.1. an online report of 5 February 2022 *Camden* Council;

      3.2.2. an online report to the health and safety executive on 6 February 2020;

      3.2.3. *it was agreed that the reports made by the claimant on 13 May 2020 and 14 May 2021 not relevant to this litigation as they postdatde the claimant's dismissal*:

      3.2.4. A grievance submitted to Mr Hoffart on 5 February 2020. *Prior to the respondent's submissions, the claimant clarified that the protected disclosure relied upon within his grievance related only to the extraction system and the health and safety aspects including fire consequences arising therefrom;*

      3.2.5. a discussion the claimant had with Mr Hoffart on *11 November 2019* ;

   3.3. did the claimant make one or more protected disclosures (employment rights act section 43B) as above? The claimant relies upon subsection 7 (a),(b) and (d) of section 43B(1).

   3.4. What was the principal reason the claimant was dismissed and was it that he had made a protected disclosure.

   3.5. Did the respondent subject the claimant to any detriment? The detriment to the claimant relies upon is not treating his grievance fairly.

   3.6. The claimant confirmed that any unauthorised deduction from wages claims have been withdrawn.

The Facts

4. We heard evidence from the claimant on his own behalf. We heard evidence from Mr Hoffart, Mr Diac and Mr BIglan on behalf of the respondent. Mr Ciobanu attended under witness order. All witnesses gave evidence under oath or affirmation. All witnesses apart from Mr Ciobanu who gave oral evidence in chief, had prepared witness statements and their witness statements were accepted as evidence in chief. All witnesses were cross-examined. We were provided with a short witness statement from Mr Ghaly but he did not make himself available for cross examination and we can place little weight upon it.

5. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in addressing the list of issues. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents. This is a unanimous decision of the employment tribunal.

6. The respondent operates a small group of guesthouses in West Hampstead consisting of approximately 50 rooms. Mr Hoffartt runs the business from Germany, visiting London regularly and the claimant was employed by the respondent on 4 November 2019 as the general manager. The claimant relocated to take this job and with the agreement of the respondent resided within the respondent's accommodation for an initial temporary period while he found alternative accommodation.
7. The respondent's main guesthouse had at the relevant time a relatively small kitchen where it provided breakfasts only for its guests. As it catered for neither lunch nor dinner, it was subject to different standards within the kitchen from normal commercial restaurants and its kitchen was fitted with a extractor canopy/system that was more suited to a residential setting than a commercial kitchen.
8. The claimant alleges that inadequate extraction was a source of multiple complaints to the respondent. The respondent acknowledges that there had been comments in respect of cooking smells within the guesthouse when breakfast was being prepared but denies that there were any complaints that constitute concerns relating to health and safety. We have no evidence in respect of any previous complaint made and made no findings in this regard.
9. It is common ground that on approximately 11 November 2019 the claimant and Mr Hoffartt had a discussion about the adequacy of the extractor fan within the respondent's kitchen, alongside other topics. There is a dispute about what was said. Mr Hoffart recalls a discussion but not raised as a complaint nor a matter of safety. He recalled reference to a matter of legality.
10. The claimant says that he told Mr Hoffart that there was a lack of adequate extraction of fumes and chemicals in the kitchen which made it unsafe for guests and staff and was also a fire hazard. He describes Mr Hoffart is being agitated, angry to the point where he had gone white in colour was shaking and clearly losing control, very hostile and intimidating in his response. The claimant says he was told to not focus on it and Mr Hoffart refused to discuss the matter further. We conclude that the claimant had genuine concerns in respect of the extraction system.
11. Mr Hoffart says that as the claimant was a very new employee, he had set out priorities for him. These included completing the claimant's initial training and dealing with matters that Mr Hoffart considered to be a priority including following up on previous health and safety fire reports and ensuring all noted outstanding tasks were completed. Mr Hoffart said that he took a positive and proactive approach to health and safety matters. He did not consider that the claimant's concerns in respect of the extraction system were serious or warranted priority status. Mr Hoffart told the tribunal that he explained to the claimant that the respondent had previously been awarded a five-star food rating by the council and the extractor was adequate and approved in the latest food safety inspection and the respondent was not legally required to change it. However he could see that this appeared important to the claimant, the extraction system could be improved, and authorised the claimant to 'make this a project', meaning taking the initial steps to get the issue resolved. We conclude that there was a genuine difference of opinion between the claimant and Mr Hoffart part in respect of the risk posed by the extraction system.

12. Mr Hoffart says that during a visit to the business in January 2020 he noted that the extractor system project had not been progressed. He acknowledged that the extraction system could be improved. The claimant was not present during this visit. Mr Hoffart spoke to Mr Diac, the main chef, and prompted him to take the initial steps to get the matter resolved.
13. The claimant accepts that Mr Diac discussed the practicalities of fixing the extractor system with him and they sourced a potential replacement. They contacted the manufacturer of the replacement product for further information. The work would require some structural change to the kitchen and their handyman was also consulted by Mr Diac. The claimant, as general manager, did not take any steps to progress this project. He told the tribunal that he had not been asked directly by Mr Hoffart to do so and believed that Mr Diac alone had been tasked with this project. The claimant told the tribunal that he did not believe the respondent was genuine in his attempt to address the extraction issue but gave no further elaboration.
14. On 5 February 2020 the claimant wrote a long grievance to Mr Hoffart. The relevant parts of the purposes of this claim include:
    14.1. the extractor system and the kitchen is ineffective and totally inadequate! This is an unhealthy and unsafe environment to work in and contravenes health and safety legislation.
    14.2. The fumes from the kitchen have been affecting my eyes….
    14.3. I suffer daily with my eyes because of this….
    14.4. … Although I have discussed this with you, you have refused to discuss the matter any further claiming that 'as you are just being regraded to 5 (from three) you were not obliged to do anything more.
    14.5. You were hostile and aggressive about this and this is one of the main reasons of now communicating this to you in writing.
    14.6. …… I am also really worried about the effect this has on our lungs and respiratory systems having to breathe in these fumes.
    14.7. In addition by no means least is the fire risk this poses…
    14.8. ….. I unfortunately now have no choice but to report this matter to the appropriate authorities, which as a manager I, or any employee is obliged to do.
15. We do not comment in any detail on the other parts of the grievance not said to be protected disclosures other than to note that the grievance also relates to issues around the terms and conditions of the claimant's employment, alleged illegal retention of deposit, issues relating to alleged excessive management control and scrutiny by Mr Hoffart of the claimant, excessive lengthy telephone discussions and other matters.
16. The claimant says that he made an online report on 5 February 2022 to Camden Council. The only available evidence is an automatically generated receipt, summarising the complaint received as 'there is no extraction system in the kitchen of the [respondent] and strong fumes affecting also a serious fire hazard and risk'.
17. The claimant says he made an online report to the HSE. The evidence provided is a receipt addressed to the claimant on 6 February 2020 stating, 'thank you for contacting the HSC with your enquiry regarding harmful fumes at work and danger of fire as there is no extraction system in the kitchen….. Your enquiry does not fall

within HSC's enforcement agreement so we are unable to comment on the matters you raise…….

18. It is common ground between the parties that the only information made available to Mr Hoffart in respect of the external complaints prior to 13 February was that as stated above [paragraph 14.8] within the claimant's grievance.

19. Ms Biglen was appointed to deal with the claimant's grievance.

20. Mr Hoffart says that on or around 13 February 2020 he was searching for documentation relating to refunds made within the respondent system, while working Germany. Mr Hoffart searched an email folder within the claimant's work email account for these documents. In conducting research Mr Hoffart found a letter dated 11 November 2019. This letter states:

> To whom it may concern: This should bear to confirm that [the claimant] is employed by [the respondent] as general manager.The claimant is also resident at 195 Sumatra Road being one of our guesthouses'.

The letter has a space for a signature, it appears to be signed and underneath the signature is printed, 'Stefan Hoffart, Director'

21. Mr Hoffart says that this letter is factually incorrect, the claimant was not resident at 195 Sumatra Road but was staying there on a temporary basis as a guest. Mr Hoffart did not draft the letter, nor did he sign it.

22. Mr Hoffart contacted the claimant on 13 February 2020 to discuss this letter. Mr Hoffart says that he received no adequate explanation from the claimant and the claimant was thereafter suspended pending an investigation.

23. Ms Biglen was also appointed to conduct the disciplinary hearing.

24. The claimant accepts that he drafted the letter in November 2019 and he says he 'PP'ed' it. He drafted it with the intention of using it for a parking permit application. The claimant says that he spoke to Mr Hoffart at the time who told him that he [Mr Hoffart] would provide a letter for the claimant as requested, therefore the claimant did not need the letter that he had PPed and he did not use it. The claimant accepts that he sent a copy of the signed letter to his personal email account in January 2020.

25. It is common ground between the parties that Mr Hoffart provided a letter to the claimant on 21 November 2019 headed 'proof of employment'. This letter addressed, 'to whom it may concern' and states, 'This is to confirm that the claimant is employed at the respondent as a full-time general manager since 4 November 2019.' The claimant says that he used this letter to obtain his parking permit and was granted a parking permit due to his employment (rather than residence) with the respondent. Mr Hoffart says that this letter of 21 November 2019 was provided to the claimant for the purpose of assisting him with obtaining alternative accommodation not a parking permit. He told the tribunal that he did not believe it was possible to get a parking permit from Camden Council without claiming residence in the area and believed that the claimant used the letter of 11 November 2019 to obtain this permit.

26. Ms Biglen's disciplinary report concludes with a recommendation that the claimant is issued with a first and final written warning for misconduct. It also states 'however, I understand that due to his short amount of service you may wish to exercise this clause in his contract to dismiss the claimant, however I would recommend that this be for serious misconduct and he be dismissed with notice rather than for gross misconduct and dismissed without notice. My reason for this

is that I believe this is an error of judgement from the claimant to draft the letter and sign it on behalf of Mr Hoffart without his permission when Mr Hoffart made clear he would write & one for the claimant, however I don't believe this was done with an intent to deceive the company.

27. Ms Biglen addresses the claimant's grievance in detail. The elements relating to the extractor fan are not upheld. Ms Biglen notes the background as outlined above and that the company are taking reasonable steps to replace the current extractor system (which they are not required to do). Ms Biglen upholds part of the claimant's grievance that related to unauthorised deduction from wages in that she finds that the respondent has incorrectly withheld deposits from staff at the start of their employment outside of the contractual deposit scheme and recommends that the claimant's deposit is repaid. This sum was repaid by the respondent.
28. Mr Hoffart said that he considered the claimant's actions in relation to the letter to be a breach of trust. He needed to have trust in his general manager particularly as he worked remotely from Germany. Mr Hoffartt decided to terminate the claimant's employment with notice on the basis of misconduct.
29. Mr Hoffart told the tribunal that the Covid pandemic lockdown that commenced in March 2020 had a significant effect on the respondent's business, immediately suspending their breakfast offering. The breakfast service has not been reinstated and it is envisaged that this has been disbanded permanently.

The Law

Detriment on the grounds of a protected disclosure

30. The provisions in respect of protected disclosures can be found within the Employment Rights Act 1996 (ERA). To be a protected disclosure:
    30.1. it must be a 'disclosure of information'
    30.2. it must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' has occurred or is likely to occur, in this case (a) that a criminal offence has been committed…. (b) that a person has failed…to comply with a legal obligation and (d) that the health and safety of any individual is endangered.
    30.3. In this case, it is accepted that any protected disclosure was made was made to the employer.
31. Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment by his employer, done on the ground that the worker made a protected disclosure.
32. S43F ERA provides that a qualifying disclosure may be made to any "prescribed persons" named in any relevant order. A qualifying disclosure to a prescribed person will only be protected if the worker reasonably believes that both:
    - The default falls within the remit of the prescribed person in question.
    - The information disclosed and any allegation contained in it are substantially true**.**
33. S43G ERA deals with wider disclosure. However, there are rigorous conditions for such wider qualifying disclosures to be protected:
    - Belief. The worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true.

- Not for gain. The worker must not make the disclosure for the purposes of personal gain.
- Reasonableness. In all the circumstances of the case, it must be reasonable for them to make the disclosure.

Dismissal – S103A ERA

34. Section 103A of the Employment Rights Act 1996 provides that an employee who was dismissed be regarded as unfairly dismissed is the reason (or if there was more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Deliberations

35. We find that the claimant's discussion with Mr Hoffart on 11 November 2019 amounted to a protected disclosure: this is a disclosure in respect of specific information relating to the extraction system that in the reasonable belief of the claimant constitutes a risk to health and safety both in respect of fumes and fire. There can be no sensible argument that this was not in the public interest. The disclosure was made to his employer. Similarly, we find that the claimant's grievance of 5 February 2020, to the extent claimed with reference to the extraction issues, was a protected disclosure.

36. Where a disclosure is made outside of the employer the claimant's must identify on what basis the disclosure is made. We heard no submission in respect of ERA 43F, referring to a prescribed person or section 43G, being disclosure in other cases. We do not consider that either of these disclosures could be protected under S43G. The claimant had raised issues in respect of the extractor system. While the respondent does not share the claimant's view as to the severity of the issues, it is common ground that they respondent had provided authorisation for the issues to be remedied. The claimant, who was the general manager took no action to remedy these issues. The claimant's suspicion of the respondent's genuineness in offering to address the extraction system is inconsistent with Mr Hoffart following up the matter directly with Mr Diac. There was a genuine will on the respondent's part to improve the extraction system within the respondent's premises. The claimant did not action these issues with which he was concerned for reasons relating to his deteriorating relationship (not related to matters concerning the extractor fan) with Mr Hoffart. In the circumstances we do not consider that it was reasonable for the claimant to make the external disclosures as he chose to do and for that reason those external disclosures are not protected by S43G.

37. Even if it is the case (although we heard no submissions) that the external disclosures are considered 'protected disclosures' under 43F ERA, these were not copied to Mr Hoffart. Mr Hoffart had no visibility or knowledge as to what was said or written to any external party other than that mentioned in the greivance. We refer to our findings of fact in respect of the respondent's dealing with the claimant's grievance and the reason we have found for the claimant's dismissal and conclude that these disclosures (whether protected or not) played no part whatsoever within these matters.

38. We note in general terms that we considered Mr Hoffart to be a straightforward credible witness who gave consistent and comprehensible answers within both his oral and written evidence. We prefer Mr Hoffart's evidence in respect of the respondent's attitude to the extraction system. The claimant does not allege that he

made further representations to Mr Hoffart following their initial discussion in November in respect of the extraction system. We consider that had Mr Hoffart behaved as alleged by the claimant in November 2019, he would have been unlikely to independently contact Mr Diac and seek to progress improvements to the extraction system. It is common ground between the parties that Mr Hoffart had at least from January 2020, prior to the claimant's grievance, agreed to address the extractor issue. It was Mr Hoffart's genuine intention at the time for the extraction system to be improved although he did not consider the respondent was legally obliged to do so. We consider that there is likely to be misunderstanding on the claimant 's side that is further complicated by a generally deteriorating working relationship as evidenced by the content of the grievance letter that is unrelated to the extraction system and outside of the scope of this litigation.

39. Turning to the detriment claim. This is expressed as the respondent not treating his grievance fairly. We can see from the evidence and documentation that the respondent addressed the claimant's grievance. Ms Bigley produced a detailed report, and it was noted that the claimant's grievance was partially successful with the respondent subsequently repaying a sum of money to the claimant as a result of the grievance outcome. The claimant's allegations of detriment appear to be based on the fact that the remaining aspects of the grievance were not upheld. Taking all of the evidence into account we conclude that the claimant's grievance was dealt with fairly by the respondent. Therefore the claimant was not subject to any detriment relating to the handling of his grievance.

40. We have examined the respondent's decision to dismiss the claimant. We note the timing of this decision, in that the disciplinary concern arises shortly after the claimant's grievance of 5 February 2020, and this leads us to consider the matter further. When looking at the subject matter of the disciplinary it is clear from both the evidence of the respondent and the documentation provided to the tribunal that a genuine conduct issue arises. Ms Bigly's conclusion within her report that 'it seems clear that the claimant has created this letter and signed it on behalf of Mr Hoffart in some capacity without permission when Mr Hoffart stated he would create his own letter with the required information', is in our view a reasonable one. Ms Bigly forms the view that the claimant's actions were not done with the intention to deceive the company. While she provides a recommendation as to a final warning, she notes the claimant's short service and suggests an alternative of dismissal with notice rather than without.

41. Neither party sought to provide evidence in relation to the requirements of Camden Council in respect of parking permits. We conclude on the balance of probability that it was Mr Hoffart's genuine suspicion that parking permits were provided by the council to those who could evidence residence rather than just employment within the borough, and that the claimant had used the ' PPed letter' for this purpose. Mr Hoffart considered the claimant's actions in relation to this letter to constitute a breach of trust. We conclude that the claimant conduct, and in particular what Mr Hoffart considered a breach of trust, was the reason for the claimant's dismissal.

42. The respondent has demonstrated that the reason for the claimant's dismissal was related to his conduct.

43. In light of our findings above the claimant's claims for automatically unfair dismissal and detriment on the grounds of protected disclosures fail and are dismissed.
44. I apologise to the parties for the delay in providing these written reasons.

Employment Judge Skehan

17 July 2022

SENT TO THE PARTIES ON

01 August 2022

FOR THE TRIBUNAL OFFICE