Case Number: 3205901/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Babb**

Respondent: **Orange Twist Limited**

Heard at: **East London Hearing Centre (in public, by video)**

On: **23 June 2022**

Before: **Employment Judge Moor**

Representation
Claimant: In person
Respondent: Mr Kllokoqi, manager

JUDGMENT having been sent to the parties on 28 June 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. This hearing was heard remotely by video with the consent of the parties. I thank them for attending remotely. After resolving the initial difficulty with the Claimant's sound, the hearing ran smoothly and I am satisfied both parties had a full opportunity to participate.

Issues

2. EJ Russell set out the issues at the preliminary hearing on 4 April 2022 as follows:

    1. Did the Claimant make a qualifying disclosure in his 9 August email to Laines disclosing information which tended to show:

        (i) A breach of legal obligation in relation to tips/breaks; and/or
        (ii) Endangerment of health and safety in relation to understaffing.

    2. If so, was the disclosure protected beause it was made to the employer or another responsible person (s43C Employment Rights Act1996).

    3. Was the Claimant dismissed on 13 August 2021?

    4. If so, was the sole or principal reason for dismissal the fact that the Claimant had made a protected disclosure?

5. Does a relevant ACAS Code of Practice apply to this dismissal, and, if so, did the Respondent breach it?

In discussion with the parties at this hearing, I added a further two issues:

a. Was the Claimant an employee or worker?
b. Did the Claimant make the disclosure in the reasonable belief that it was in the public interest?

Law

3. A worker is only protected for certain types of disclosures made in certain circumstances. Part VIA of the Employment Rights Act 1996 ('ERA') sets out the circumstances in which a worker makes a '*protected disclosure'*.

4. Section 43A provides that a protected disclosure is a '*qualifying disclosure',* which, under section 43B(1), so far as is relevant to this case, '*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—*

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject … or

(d) or that health and safety of any individual is being or is likely to be endangered.'

5. The requirement that the disclosure must have been made in the public interest, is a relatively recent amendment to the law aimed at preventing a private employment law complaint from being a protected disclosure. Later cases show there is no bright line between these two categories. Some disclosures, for example about breaches of a worker's contract, might well engage a wider public interest. This is a fact-sensitive question that I must determine on the evidence I have heard.

6. What is the public interest? There is no definition. One useful guide is to look for an issue where a section of the public would be affected rather than simply the individual concerned.

7. In Chesterton Global Ltd & Anor v Nurmohamed & Anor [2018] ICR 731 CA, the Claimant made a complaint about accounting practices affecting the earnings of 100 staff, including himself. The Employment Tribunal found that he believed he had made the disclosure in the interests of all those staff. It concluded they were a sufficient group of the public to engage the public interest. The EAT thought a relatively small group might be sufficient to satisfy this test. The Court of Appeal rejected the argument that it had to concern a group outside the workplace. It suggested that relevant factors to assist in determining the question may be: the numbers in the group whose interests the disclosure served; the nature of interests affected; the nature of the wrongdoing; the identity of the wrongdoer.

8. In Dobbie v Felton [2021] IRLR 679 EAT, the principles were summarised again: the essential distinction is between disclosures which serve the private or personal interest and those that serve a wider interest.

9. The wording of the act is clear that the Claimant had to have in mind the public interest at the time he made the disclosure. In Chesterton Underhill LJ said at paragraph 27 '*First … the Tribunal … has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether if so, that belief was reasonable…'.* At paragraph 29 '*Third, the next belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that the disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event…. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all*.'

10. The worker's belief must be reasonable. The test is not that it must be correct: though of course a worker with a very inaccurate information may struggle to establish that he has a reasonable belief.

11. Section 43C of the ERA establishes that a qualifying disclosure is protected if it is made to the employer. For reasons I explain below, I do not need to consider the rest of section 43C.

12. Only an employee can bring an unfair dismissal claim. A person is employee if he has a contract of employment. This requires a minimum obligation on either side to offer and to do work, see Nethermere v Gardiner [1984] IRLR 240. Other factors should be consistent with employment, especially control, Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 1 QB 497 p515 McKenna J. The tax treatment of remuneration may be relevant but is not determinative. The label the parties apply to their agreement is not relevant – parties cannot contract out of what would otherwise be statutory rights, Uber BV v Aslam [2021] UKSC 5.

13. I should consider the facts for how the parties carried out their relationship and ask what the agreement in reality was between them.

14. Section 103A ERA provides that, if the the sole or principal reason for an employee's dismissal was that he had made a protected disclosure, then it is automatically unfair. I must consider the set of facts known to the decision maker that caused him to dismiss.

Facts

15. Having heard evidence of the Claimant and Mr Kllokoqi and having read the documents provided to me in evidence, I make the following findings of fact. In doing so I have applied the 'balance of probabilities' test by asking where there was a dispute on the facts: 'What is more likely than not to have occurred?'

16. The Claimant engaged by the Respondent in May 2021 as a waiter at the People's Park Tavern, Victoria Park (the pub).

17. He was engaged under a contract that asserted he was not an employee. The contract stated he was a 'zero-hours' member of staff.

18. The rota was set weekly on a Friday by Mr Kllokoqi. The Claimant had to tell the pub the days he was not available beforehand.

19. The Respondent asserts the Claimant had no expectation of work, but I reject that as a fact. Mr Kllokoqi complained about one incident the Claimant did not give notice that he could not come; the Claimant complained about short-notice cancelling of his shifts. On this evidence, I find that, once on the rota, both parties considered there was an obligation to work and be offered the work rostered.

20. In addition I find there was in fact an expectation between them for the Claimant to be provided by the Respondent with minimum shifts per week unless he was on leave. I find this for several reasons:

    20.1. Mr Kllokoqi said he decided to send a termination letter (see below) when no shifts could be offered in the next week. This suggests he realised he otherwise had an obligation to provide shifts in the week.

    20.2. They agreed that he would work 4/5 shifts initially and, although this reduced over time, as a matter of fact it never reduced to zero shifts until that prospect arose in the week after 13 August when Mr Kllokoqi felt obliged to send the letter.

21. The Claimant was provided with a visor for social distancing by the Respondent. He was paid PAYE with tax deducted at source. Wages were set by the Respondent. He was referred to in the documents I have seen as an 'employee'.

22. While Mr Kllokoqi ran the pub. It was owned, by Laine, a company that leased around 70 pubs in the UK. The Claimant had seen their branding on training material and thought that they managed Mr Kllokoqi.

23. The Claimant had complaints about the way he and other members of staff were treated. He wrote to Laine on 9 August 2021 about them, in summary that: shifts were cancelled at short notice causing problems with travel plans and childcare arrangements; several waiters' shifts were cancelled 2 hours before duty was to begin meaning that, for other staff, they were so busy they could not take their breaks; understaffing; being called back from breaks, with colleagues, before they had finished. He said, '*it makes working in what should be quite an enjoyable environment anxiety based*'. He said staff were treated like numbers. He complained about the service charge being cut.

24. Laine replied to him that they were not the employer and he should make his complaints to Mr Kllokoqi.

25. Mr Kllokoqi left for a holiday abroad and to deal with his father's illness in the afternoon of 9 August 2021. He worked in the morning and left for Luton airport in the afternoon. He was away until 20 August 2021.

26. Laine forwarded the email to Mr Kllokoqi on 9 August at 18.45 as follows '*Hi gaz good to see you earlier we received this from recruitment. Amy [Operations Director] asked me to forward it to you but do not respond until Amy speaks to you tomorrow*.'

27. Mr Kllokoqi denied he talked to Laine's operations director about the Claimant's, email which I accept.

28. Mr Kllokoqi suggested in his evidence that, while he was away, he did not deal with emails but only the rota via an app. He said he only dealt with matters that were absolutely necessary when he was away on holiday and to deal with his father's ill heath, a family emergency. I am afraid I do not accept this evidence for reasons I will come to shortly.

29. On 13 August Mr Kllokoqi sent the Claimant an email terminating his employment. Entitled '*termination of employment*.' It stated: *Hi Alex I am writing to let you know that we have not got any work for you in the foreseeable future therefore will terminate your employment at this point. Your accrued holidays will be paid today and attached is your P45. …'*

30. Mr Kllokoqi said he had to write this email on 13 August 2021 because, when he was doing the rota, he realised he did not have any work for the Claimant the next week and because he was planning to reduce staff at the end of the summer. But he also argued there was no obligation to give work. If he is right about the latter, the email was not urgent or absolutely necessary: if this truly was a zero-hours contract he wouldn't have written the email at all. In any event the email was not just about work the next week but indefinitely (as Mr Kllokoqi agreed *foreseeable future* meant). On the logic of his evidence, the termination email could have been left until he got back and he just would not have put the Claimant on the rota in the meantime.

31. In my view the timing of this email shows two things:

    31.1. First that the Respondent appreciated it needed to tell the Claimant that there was no work in the immediate next week – in other words, this shows it knew it had an obligation to offer a minimum amount of work per week.

    31.2. Second, for Mr Kllokoqi, the email must have been absolutely necessary, because this was the only kind of business he was dealing with while he was away.

32. Even if Mr Kllokoqi needed to tell the Claimant that there was no work the following week, it does not follow that there was an urgent need to inform the Claimant that there was no work for him indefinitely.

33. I do not accept Mr Kllokoqi's evidence that he was reducing numbers of staff in preparation for winter. The 13 August 2021 was still the middle of summer and equally that matter was not so urgent that it could not have been left until after 20 August 2021.

34. Bearing these two points in mind, I have concluded that something else urgent triggered the 13 August email to the Claimant. He was on holiday and only dealing with urgent matters. The timing, the urgency and the finality of his email show something had happened urgently to change Mr Kllokoqi's mind about employing the Claimant. In my judgment this was very likely because he had read the email

from Laine forwarding the Claimant's complaints. Mr Kllokoqi has denied he saw this email but, for these reasons, I do not find his denials credible.

35. I am reinforced in my view because Mr Kllokoqi did not accept what the Claimant had said in his complaints. I conclude he took the opportunity to rid himself of what he saw to be a member of staff complaining on behalf of others.

    35.1. Finally the Respondent's explanations for the reasons for termination have varied. This too reduces Mr Kllokoqi's credibility. In the response form they were said to be about the Claimant's lack of commitment, but in evidence to me he denied that lack of commitment was the reason for termination and it was just about staff numbers. I do not find his evidence for the reason for termination credible. This again leads me to infer it was because of the complaint email.

36. The Claimant was clear in his evidence to me that he thought at the time his complaint was about his working conditions and those of the staff in the pub. He reasoned, later on, that the problems he had complained about rippled out to the wider public by risking poor service to customers; and risking accidents through tiredness, but he did not have those wider aspects in his mind at the time.

37. The Claimant did not however make a complaint just for himself but for his colleagues. From his descriptions, at any one time in the pub there were at least 4 waiters on shift and usually more.

38. The Claimant earned on average £207 net per week at the Respondent.

39. The Claimant had another 'day' job moving cars in transport logistics.

40. The Claimant looked for work in bars after the termination by going in and asking about vacancies. He used the internet to apply for work in casinos and betting shops. He is still out of work.

41. I accept Mr Kllokoqi's evidence that at the time there was a growing demand for bar staff in London after the pandemic restrictions had lifted and because of the reductions in EU applicants caused by Brexit. He suggests the Claimant has not made reasonable efforts to look for work because, in the 10 months since termination, he should have obtained bar work locally. I take judicial notice of the fact that the hospitality sector in London has been seeing high vacancies since the Covid restrictions were lifted in July 2021.

Application of facts and law and issues

Employment Status?

42. In my judgment here there was a contract of employment here for the following reasons.

43. Despite the label of 'zero hours' there was, on the facts, an agreement between the parties that the Respondent would provide minimum amount of work each week

and that, once work was rostered, the Claimant would do it. This is sufficient to provide the minimum obligations necessary for an overarching contract.

44. Beyond that there was flexibility in the agreement: employees identified times when they were not available and were able to swap shifts around once rostered between themselves, so meeting their work obligation.

45. The label in the contract that the Claimant was not employed is not relevant. This was not actually a zero-hours contract.

46. Other factors are less weighty but also point to there being an employment contract. The Claimant was provided with equipment by the Respondent: visors. He was paid via PAYE. The wage rates were set by employer.

Protected Disclosure?

47. In complaining about staff getting no breaks and breaks being cut short the Claimant made a disclosure that tended to show the breach of a legal obligation – to provide breaks under the Working Time Regulations 1998. In complaining about understaffing the Claimant made a disclosure that tended to show health and safety was likely to be endangered – by tiredness and risk of accident.

48. The Claimant's disclosures were not mere allegation, they included information: the lack of breaks, breaks cut short, understaffing.

49. I have not judged whether there were actual breaches of the Working Time Regulations or Health and Safety legislation: I have judged whether what the Claimant wrote tended to show such breaches and that is sufficient to establish a qualifying disclosure.

50. Were those disclosures made in the public interest?

51. The Claimant credibly and frankly acknowledged his complaints at the time were made for himself and for the group of staff in the pub. He only thought later about the impact on customers. In my judgment nevertheless, on the facts of this case, the circumstances that were in his mind at the time were sufficient to show that the disclosure was made at at the time in the public interest.

    51.1. His complaint was about more than his own working conditions. It is clear from his email at the time that his complaint about breaks was not just about himself but the other staff.

    51.2. There was a pool of employees like him to staff the pub with at least 4 of them at any one time. Thus the pool must have been more than 4, though not a large group.

    51.3. Further the information he complained about - lack of breaks and breaks cut short – was grounded in health and safety concerns, the reason for the Working Time Regulations. The nature of the wrong and the interest in the disclosure is a factor I should take into account. This was a complaint expressly about fellow staff that engaged the public interest because at root

it was about their health. The Claimant later explained lack of breaks caused fatigue and risks accident.

51.4. It seems to me, therefore, on the facts that this group, though relatively small, was large enough to amount to a section of the public given the problems facing them that the disclosure concerned.

51.5. The disclosure, therefore, was made in the public interest.

52. While the Claimant may not have appreciated that this group of staff were members of the public, his was a complaint made for than his personal interest but also the interest of the health and safety of the group of workers at the pub. To me this is plainly a public interest complaint. It would be odd if the Claimant were not to succeed simply because he did not have the phrase 'public interest' in his mind or even 'the public'. As a matter of fact he was making a complaint for a section of the public (his co-workers) beyond merely his own private interest. His complaint was about working conditions of a group, albeit a relatively small group of workers, and about a matter that engaged the health and safety of that group of the public.

53. The Claimant pointed to his later reflections in his evidence about customers, but I have not taken them into account because it was what he thought at the time that the act requires me to consider.

54. I find his belief that this was in the public interest reasonable for the same reasons – breaks are a health and safety measure for all workers. It is reasonable to regard that as a matter of public interest – that a section of the workforce can avoid fatigue and therefore reduce the risk of accidents.

55. I find the complaint was made to the employer when Laine forwarded it to Mr Kllokoqi. The disclosure was made to him by that process.

56. I therefore find that the statutory ingredients of a protected disclosure are met.

57. I do not find, in the alternative, that the other part of 43C was engaged because the Claimant was not complaining about Laine.

Unfair Dismissal?

58. I have found as a fact, despite his denials, that Mr Kllokoqi did see the disclosure before sending the termination email.

59. I have found as a fact that the complaint was the sole reason for his decision to end the Claimant's employment. In my judgment the protected disclosures were the principal part of that complaint.

60. Therefore the Claimant was automatically unfairly dismissed, contrary to s103A ERA.

Remedy

61. Anyone coming before the Tribunal has a duty to mitigate their losses – this means make reasonable efforts to find equivalent work (reduce their losses).

62. In my view the Claimant has not made reasonable efforts to mitigate. He has now had 10 months to find work. I agree with the Respondent that there is a high rate of vacancies for bar work in London and accept Mr Kllokoqi's account of that. Not all bars are seasonal. Some do better in the winter months. The Claimant went to some bars to seek work, but I did not hear from him about any other efforts he made to find bar work: writing letters looking on the internet for bar work. This is one of those cases where, given the amount of vacancies, I find that the Claimant's efforts were unreasonable because he would have been likely to find work if he had been making reasonable efforts over 10 months.

63. The Claimant did look for work in betting shops and casinos via the internet and that was reasonable, but it is the bar work that was available in higher vacancy numbers than before.

64. I find, had the Claimant made reasonable efforts to look for equivalent work, he is likely to have been able to obtain equivalent work within 12 weeks of his dismissal.

65. I therefore award him 12 weeks' net loss = 12 x 207 = £2,484.

66. I do not have the power to award injury to feelings in dismissal cases.

67. There was no loss of statutory rights here, the Claimant was not employed for 2 years.

<u>Dispute over Amount of Average Pay</u>

After I gave oral judgment in this case Mr Kllokoqi complained about the amount of average pay that I had decided. I had given both parties during the hearing an opportunity to work out this average. He had not come back to me with a figure, therefore I had used the figure provided by the Claimant. I explained to Mr Kllokoqi that he should look at the Employment Tribunal Rules of Procedure 2013 and consider whether to ask for a Reconsideration of the judgment on the question of the amount of the average wage.

Employment Judge Moor
Dated: 1 August 2022