EMPLOYMENT TRIBUNALS

Claimant: **Mr R J Vale**

Respondent: **Jimmy Garcia Catering Ltd**

Held at: London South Employment Tribunals

On: 3, 4 and 5 October 2022

Before: **Employment Judge L Burge**
Ms G Mitchell
Mrs R Bailey

Representation
Claimant: In Person
Respondent: Mr A Leonhardt, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. the Claimant's claims of automatic unfair dismissal, being subjected to detriment because he made a protected disclosure, and unlawful deductions from wages fail and are dismissed.

REASONS

Introduction

1. The Claimant was employed as a head chef at the Respondent for just over 3 weeks from 9 June 2021 until 1 July 2021. The Claimant says he was automatically unfairly dismissed for health and safety reasons and/or for having made a protected disclosure, suffered a detriment for having made protected disclosures and had unauthorised deductions from his pay. The Respondent says that the Claimant resigned and denies the other claims.

The Hearing

2. At the start of the hearing the Claimant said that he had not received the Respondent's bundle of documents of 132 pages. The Respondent said that they had provided them via email (to an incorrect email address) and by post, although the Claimant did not receive it. The Claimant was given time to read the bundle, he had already seen most of the documents and said that he wanted to carry on with the hearing. The Claimant asked for the Tribunal to obtain a recording of a telephone conversation from the mobile phone company that he said had taken place in July 2021. The Tribunal refused the application because it was unlikely that the recording existed and it was not in the interests of justice for this case to be delayed further while enquiries were made as to whether a recording existed.

3. On the second morning of the hearing, part way through the Claimant's cross examination, both the Claimant and the Respondent provided further disclosure to the Tribunal. Neither party had fully complied with the Case Management Orders that were explained in person and drafted by EJ Abbott at a Preliminary Hearing on 21 April 2022. Two hours and twenty minutes of the hearing time was lost by the provision of further disclosure and both parties taking time to read them. Both parties wanted to continue with the hearing.

4. The Claimant gave evidence on his own behalf. Timothy Ivil, Ranulph Lees and Barry Wibling gave evidence on behalf of the Respondent. Sainzaya Bayasgalan had provided a statement but was not willing to come to the Tribunal. The Tribunal disregarded his witness statement as he was not present to be cross examined on it.

5. The Claimant had not understood that he had to provide a witness statement, he had provided a paragraph which purported to be his statement but the contents did not detail his version of events. He is a litigant in person and so no criticism is made of him. The Tribunal asked simple questions at the start of his evidence so that he could provide evidence in chief and then Mr Leonhardt cross examined him on that evidence. The Claimant cross examined all three of the Respondent's witnesses.

6. Mr Leonhardt provided the Tribunal with a skeleton argument. Both the Claimant and Mr Leonhardt gave oral closing submissions to the Tribunal.

The Issues

7. At the start of the hearing the Tribunal spent a long time with the parties agreeing the issues to be decided in this case:

1. Unfair dismissal

1.1 The Claimant did not have two years' service and so was pursuing a claim of automatic unfair dismissal.

1.2 The Claimant said he was dismissed by the Respondent and definitely did not resign. The question for the Tribunal was whether the Claimant was dismissed by the Respondent or did he resign?

1.2 If the Claimant resigned:

1.2.1 Did the Respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

1.2.1.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.2.1.2 whether it had reasonable and proper cause for doing so.

1.2.2 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.2.3 Did the Claimant affirm the contract before resigning?

The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.3 If the Claimant was dismissed (actually or constructively), was the reason or principal reason for dismissal that the Claimant:

1.3.1 brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, specifically that:

1.3.1.1 in a face-to-face meeting with Barry Wibling on 14 June 2021 the Claimant raised issues concerning alleged forgery of kitchen records, the sale of products beyond their shelf-life, inappropriate re-use of cooking oil, and failures to comply with cleaning requirements and hygiene standards; and/or

1.3.1.2 on or shortly after 14 June 2021 the Claimant raised the same issues with the executive chef Mr Lees; and/or

1.3.1.3 on and around 24 June 2021 the Claimant raised orally and in writing (including photographs) with Barry Wibling issues relating to poor food hygiene standards and generally cleanliness and a drinking

culture amongst staff, specifically referring to two colleagues including Mr Bayasgalan; and/or

1.3.1.4 on 1 July 2021 the Claimant sent a text message to Barry Wibling and an email to Bea Neville and Tom Howe making further allegations regarding the conduct of staff, in particular 'Mr Bayasgalan'; or

1.3.2 in circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger, specifically:

1.3.2.1 making any or all of the disclosures listed under 1.3.1 above; and/or

1.3.2.2 upon being verbally abused and threatened by 'Mr Bayasgalan' on 1 July 2021, the Claimant left the kitchen; or

1.3.3 had made a protected disclosure (see 3. below) (Employment Rights Act 1996 section 103A) - Was the protected disclosure the reason or principal reason for dismissal?

2. Remedy for unfair dismissal

To be decided if the Claimant is successful in the liability stage.

3. Protected disclosure

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Claimant said that he made disclosures on the occasions listed under 1.3.1 above.

3.1.2 Did he disclose information?

3.1.3 Did he believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that:

3.1.5.1 a criminal offence had been, was being or was likely to be committed;

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

3.1.5.3 the health or safety of any individual had been, was being or was likely to be endangered; and/or

3.1.5.4 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.1.6 Was that belief reasonable?

3.2 If the Claimant made a qualifying disclosure, was it made to the Claimant's employer?

4. Detriment (Employment Rights Act 1996 section 48)

4.1 Did the Respondent do the following things:

4.1.1 The Respondent's employee, Mr Bayasgalan, verbally abused and threatened the Claimant on 1 July 2021, leading to the Claimant leaving the kiosk.

4.2 By doing so, did it subject the Claimant to detriment?

4.3 If so, was it done on the ground that he had made a protected disclosure?

5. Remedy for Protected Disclosure Detriment

To be decided if the Claimant is successful in the liability stage.

6. Unauthorised deductions

6.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

The Claimant says that he was paid £17 per hour and was supposed to be given 10% of takings. The Respondent says £17 was agreed disputes that 10% of takings was discussed.

Finding of Facts

8. A recruitment agency known as Jubillee arranged a meeting for the Claimant and Mr Lees of the Respondent to discuss the position of head Chef. It was to be on a three month contract at a food kiosk at the "The Scoop" in London Bridge. The Claimant met Mr Lees from the Respondent and their initial negotiation is set out in a Whatsapp exchange between them. The exchange shows that Mr Lees initially offered £16 per hour. Mr Lees and the Claimant agreed on £17 per hour. The Claimant claims that he was also offered 10% of the takings, however, this is rejected by the Tribunal, the amount of pay he actually received did not represent 10% of takings, the Claimant did not complain at the time that he was not receiving 10% of takings and there was no evidence of an agreement that he would receive 10%. The Tribunal finds, on balance, that the oral contract was for

the Claimant to receive £17 per hour for an initial period of three months. The Tribunal accepts the evidence of Mr Lees that had the Claimant performed well, they would have tried to offer him a further contract in one of the other eateries.

9. The Respondent operated "pop-up" eateries and employed 66 employees. At the kiosk where the Claimant worked, in London Bridge, they employed 3. The Claimant as head chef and two chef de partie ("cdp") who worked under him, one of whom was Mr Bayasgalan.

10. Three days after the Claimant started at the kiosk, on 12 June 2021 the Claimant had an argument with a colleague, Ben. The Claimant walked out of the shift. Mr Wibling gave evidence that he was not sure who was the aggressor but Ben was angry to him down the phone and so he sent Ben home. Ben then resigned. When Mr Wibling later spoke to another vendor, Janice, who had witnessed the argument she told him that it had been the Claimant who had been doing most of the shouting.

11. Mr Wibling gave evidence that the first time the Claimant raised health and safety issues was over Whatsapp on 24 June 2021. The Claimant did not give evidence that there was a meeting 14 June 2021, instead he said he told Barry "every day". This is rejected as implausible as it is not supported by the contemporaneous Whatsapp messages between them. The Tribunal finds as a fact that the Claimant did not raise issues with Mr Wibling nor Mr Lees on 14 June 2021.

12. The Claimant went to check on the kiosk, even on days when he was not working. On 17 June 2021 he reported to Mr Wibling that the day before he had seen that Mr Bayasgalan and the other cdp were "too relaxed when they could do way more".

13. On 21 June 2021 the Claimant messaged Mr Wibling to ask him to tell the cdps to throw away the old burgers at the end of the shift. Mr Wibling responded "oui chef" and gave evidence to the Tribunal, that is accepted, that he passed the message on. On 24 June 2021 the Claimant messaged Mr Wibling:

> *"fridges all greasy, literally kitchen paperwork for the last two days, bins not changed, fried onion in the fridge, fryers dirty and oil black, no prep on the service and backup fridge, floor not swept, containers not decanted, I left a prep to execute (aolli) before I left not done, items that were on fridge for longer shelf life were put back on dry storage, and more"*

14. Attached to the message were 7 photographs showing some of the criticisms including burgers at least one of which was discoloured, condiment bottles that were not in the fridge, a rubbish bin with blue roll in it. The Claimant then messaged "I don't want [the two cdps] working together unsupervised", "they get too friendly and do [f***] all". Mr Wibling replied "Sorry Ricardo. Not acceptable. I'm in Henley until Sunday but I'll send Tom over to see you". The Tribunal accepts Mr Wibling's evidence

that he thought the Claimant was complaining about the staff and did not interpret it as complaints about health and safety.

15. Mr Wibling asked Tom to go to the kiosk. Tom did visit the Claimant at the kiosk as can be seen in the Whatsapp messages between the Claimant and Mr Wibling but the Tribunal accepts the Claimant's evidence that Tom did not address the issue that had been raised. The Tribunal finds that both Mr Wibling and Mr Lees saw these as minor health and safety issues that he expected the Claimant, as head chef, to sort out but thought that what was being complained about was a staffing issue. Mr Lees thought that the burgers were oxidized and would expect any chef not to cook it and serve it. The Claimant gave evidence that one of the cdps had put the old burgers, that he had requested to be thrown away, into the tray to be used and labelled them to be used by 26 June. There was no corroborating evidence of this and the Tribunal makes no findings on this. The Claimant also gave evidence that his signatures had been forged on the daily sheets. He said that temperatures had been incorrectly inputted. The Tribunal finds that this level of detail was not provided to the Respondent at the time and makes no findings in relation to whether or not the daily sheets were appropriately completed.

16. On 29 June 2021 the Claimant reported to Mr Wibling that only Mr Bayasgalan was working at the kiosk when both he and the other cdp were supposed to be working. The Claimant thought that Mr Bayasgalan was more to blame as he would have "incentivized" the other cdp to go. Mr Wibling responded "ok. We're looking into it". Again, the Tribunal finds that Mr Wibling interpreted this as a complaint about staffing.

17. On 30 June 2021 the Claimant was off work and messaged Mr Wibling to ask him to check on the site if he was passing as the cdps "can't be alone".

18. On 1 July 2021 the Claimant attended the kiosk and Mr Bayasgalan was "angry with him as usual". The Claimant gave evidence that Mr Bayasgalan was constantly angry because the Claimant received £17 per hour when he himself only received £13 per hour and also he thought that the Claimant had been "snitching" on him. The Claimant and Mr Bayasgalan had a heated argument. Mr Wibling then arrived at the kiosk and attempted to mediate between the two. He gave evidence to the Tribunal, that is accepted, that the Claimant was shouting aggressively in Mr Bayasgalan's face, pointing at him and calling him stupid. Mr Bayasgalan responded to call him "stupid" back. Mr Wibling told them to grow up and told the Claimant to go outside to calm down. When Mr Wibling left the Claimant was outside putting on his jacket. The Tribunal finds that the Claimant was the aggressor in the argument with Mr Bayasgalan, although Mr Bayasgalan responded to the Claimant's aggression and was also upset because he was paid less than the Claimant and because the Claimant had been "snitching" on him – telling Mr Wibling that he was not working hard enough and he was cutting corners.

19. The Claimant said to the Tribunal that Mr Bayasgalan had been waving a knife around and that he said words such as "I am going to stab you through and through". The Claimant accepted that the final hearing was the first time he had mentioned it. The Tribunal rejects this as a fabrication because Mr

Wibling did not see it, the Claimant did not raise it at the time despite complaining about other things, he also did not raise it at the Preliminary hearing when he had described the incident as "being verbally abused and threatened by Mr Bayasgalan on 1 July 2021". It is not credible that he did not mention being threatened with a knife had it occurred.

20. There is a dispute about when the Claimant left. The Claimant told the Tribunal that he was outside of the kiosk but still nearby. Yet the text message that was sent by him at 11.09 started with "Barry I'm going home".

21. The Claimant sent a text message to Mr Wibling at 11.09 which read:

> *"Barry I'm going home and it seems this is my last day, i can't tolerate insubordination, be gratuitously contested, being shout at, be called an idiot, [Mr Bayasgalan] is threating me and looking as if i personally own him something, if I stay today i probably do something i regret,*"

22. The second text message sent by the Claimant at 13.34 read:

> "*Barry i want [Mr Bayasgalan*] *fired, I have spoken with ran, he will call you..not only we cant have bullys at work, even less people drinking during working hours, he has to go, I got witnesses how [Mr Bayasgalan*] *embarrassed the business in several occasions while working."*

23. The Claimant's evidence to the Tribunal was contradictory. On the first day, in cross examination, he answered questions about the meaning of the words in his first text message. On the second day when cross examination recommenced the Claimant said that he had not sent the text messages and that they had been fabricated. He said that he had been in a dispute with vodaphone and so it was not possible for him to have sent text messages. He accepted that he had wifi at the kiosk. The Claimant said he did not use this language but it was consistent with language used in his whatsapp messages and emails. Mr Wibling showed the Tribunal his phone with the messages on and the Claimant confirmed that the number they came from was his number. Given this, and that the Claimant had not contested that he sent the text messages on the first day of the hearing, and given that they were sent as a screen shot from Mr Lees to Mr Wibling on the same day that they were received, the Tribunal finds that the Claimant did send the text messages. The Tribunal finds that the first text message sent by the Claimant described when and why he left the kiosk on 1 July 2021 – he left the kiosk at 11.09 and he left because he thought Mr Bayasgalan was insubordinate and because of the heated clash between them.

24. At 12.35 the Claimant emailed the Respondent's bookkeeper with a message titled "professionalism kitchen issue" and asked her to forward his email to the owner or Directors. The email said that he had to leave the kitchen because for the last two weeks since Mr Bayasgalan had done many things including cutting corners, refusing to follow direction, been insubordinate, no prep in the service fridges, not washing his hands, always giving attitude, the Claimant had been the one to change the oils and deep

clean. The Claimant's view was that Mr Bayasgalan "acted as if he owned the place". The Claimant said "if I don't receive a reply in utile time I will assume that the business wont act upon this and being the case i want to settled all payments upto date, getting paid Everything tomorrow." The email was copied in to Tom and forwarded to Mr Ivil. The email was consistent with the second text message that the Claimant had sent Mr Wibling demanding that Mr Bayasgalan be sacked.

25. A Whatsapp message exchange occurred between Mr Lees and Mr Wibling at 17.04 where Mr Lees asked Mr Wibling "shall I call [the Claimant] and tell him not to come in tomorrow" to which Mr Wibling replied "Tell him he's done" and "Can't be dealing with him any more" to which Mr Lees replied with the emoji sign 👌. A phone call took place between the Claimant and Mr Lees wherein Mr Lees told the Claimant not to return to the kiosk tomorrow. In evidence to the Tribunal Mr Lees says "You had been physically abusive and walked out and we acted accordingly" and "I was concerned you would turn up and be aggressive".

26. At 17.15 Mr Lees said "all done" and "he won't be bothering you again". Mr Lees said that the Claimant brought it on himself and Mr Wibling replied "yup. Don't walk out 45 minutes before service and ask me to fire everyone that isn't called [the Claimant]". The Tribunal therefore finds that Mr Lees had not interpreted the Claimant's words and actions as a resignation, he dismissed the Claimant for shouting at Mr Bayasgalan, walking out of his shift 45 minutes before service began and for making demands that Mr Bayasgalan be sacked. He had only worked for the Respondent for 3 weeks and 2 days.

27. The Claimant wrote again to Mr Wibling at 17:45 saying "it was a pleasure to have met you and apologise for today, I shouldn't have left today and you you [in a] pickle but I could not work today with saya like that mocking me even after you left, completely disrespectful". He went on to criticise Mr Bayasgalan saying he was being bullyed and undermined by him and that instead of Mr Bayasgalan being fired the Respondent had decided to fire the Claimant.

28. On 2 July 2021 Mr Ivil sent an email to the Claimant saying that they take complaints very seriously and if he had any evidence or a written statement of complaint he would follow them up. Mr Ivil continued that they had taken the text saying "it seems this is my last day" as a resignation and they expect people to come to them with concerns about staff rather than just walking out. The Claimant did not respond to this email with evidence or a complaint.

29. The Respondent hired a different head chef shortly after the Claimant's departure.

Relevant law

Automatic unfair dismissal for a health and safety reason

30. S.100(1) ERA:

> *"100Health and safety cases.*
> *(1)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—*
>
> > *…*
> > *(c) being an employee at a place where—*
> >
> > > *(i)there was no such representative or safety committee, or*
> > >
> > > *(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
> > >
> > > *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
> >
> > *(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work…"*

31. In the case of *Oudahar v Esporta Group Ltd* [2011] ICR 1406. Mr Oudahar was a chef who had refused his manager's instruction to mop an area of the kitchen as he claimed that wires protruding from the wall made mopping there dangerous. He was dismissed for failing to comply with a reasonable request after the employer accepted the maintenance manager's evidence that the area was safe. The Employment Appeal Tribunal allowed Mr Oudahar's appeal against the Tribunal's finding that he had not been dismissed for a reason falling within s.100 but for failing to follow a reasonable instruction. The EAT set out a two stage approach for applying s.100(1)(e):

> *"In our judgment employment tribunals should apply section 100(1)(e) in two stages.*
>
> *Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of Balfour Kilpatrick are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.*
>
> *Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.*

In our judgment the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e).

We reach this conclusion for the following reasons.

> *Firstly, it seems to us to be the natural way to read section 100(1)(c)-(e). Each subsection is directed to some activity on the part of the employee: the bringing of matters to the attention of the employer (section 100(1)(c)), leaving or proposing to leave or refusing to return (section 100(1)(d)), or taking or proposing to take steps (section 100(1)(e)). In each case the statutory provision directs the Tribunal to consider the employee's state of mind when he engaged in the activity in question. In no case does it direct the Tribunal to consider whether the employer agreed with the employee.*

Secondly, it seems to us that this reading gives effect to the protection which Parliament must have intended to afford to an employee, having regard to the provisions of the Framework Directive which we have quoted. Section 100(1)(c)-(e) do not protect an employee unless he behaves honestly and reasonably in respect of matters concerned with health and safety. It serves the interests of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection.

Thirdly, we think this conclusion derives some support from the judgment of the Appeal Tribunal in Balfour Kilpatrick Ltd v Acheson [2003] IRLR 683. In that case a group of employees took industrial action and refused to return to work, believing their working conditions to be hazardous to health and safety. The principal ground of the decision was that taking industrial action did not amount to "reasonable means" of raising a health and safety concern."

32. In Balfour Kilpatrick Elias J said at para. 67:

> *"The fact that the employer was dismissing because of the failure to return to work and was indifferent to the reason why the men were not at work is immaterial. He knew what the employees were asserting the reason to be. Had we found that to have been a protected reason then we would have concluded that the dismissals were for that reason. We consider that the tribunal were right on this aspect of the case. Moreover, we consider it likely that an employer would be equally liable if he had the opportunity to find out the reason*

for the absence and chose not to take it. This ought, in our view, to be the position in order to give effective implementation of the Directive."

33. The EAT in Oudahar commented on this at paragraph 36:

"Strictly speaking, in its reasons the Appeal Tribunal only addressed the employer who was indifferent to the reason for the employee's absence, or chose not to find out (although the submission seems to have been wider (see paragraph 50, which we have quoted). But we see no difference in principle between the employer who positively disagrees with the employee and the employer who is indifferent or does not bother to find out. In each case it seems to us that the statutory intention is that the employee should be protected if he falls within the scope of section 100(1)(c),(d) or (e).
…"

34. In *Masiak v City Restaurants (UK) Ltd* 1999 IRLR 780, EAT, the Employment Appeal Tribunal held that "other persons" can include members of the public and is not restricted to other employees or workers of the employer. In that case Mr Masiak said it was the potential health hazard to the public that lead him to walk out of his employment.

35. In *Harvest Press Ltd v McCaffrey* [1999] IRLR 778, the Employment Appeal Tribunal held that "the word danger is used without limitation in section 100(1)(d) and Parliament was likely to have intended those words to cover any danger however originating".

Protected Disclosures

36. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H Employment Rights Act 1996 ("ERA"). A qualifying disclosure is defined by s.43B:

"(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."

37. In *Williams v Michelle Brown* AM, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

38. *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA dealt with what might constitute a disclosure of information for the purposes of s.43B ERA:

> *"…35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)…"*
>
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case…"*
>
> *41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the Cavendish Munro case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner."*

39. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. There is lengthy discussion of that leading case in *Dobbie v Felton (t/a Feltons Solicitors*) - [2021] IRLR 679.

Detriment

40. S.47B(1) ERA provides:

> *"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."*

41. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. In *Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372, CA, Elias LJ described "on the ground that" as whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower.

42. S.48 ERA provides:

> *(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.*
>
> *[…]*
>
> *(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

43. It is unlawful for another worker of the employer to subject the Claimant to a detriment during the course of their employment, on the ground that they made a protected disclosure (s.47B(1A) ERA). This may include deciding to dismiss an employee as well as steps prior to dismissal (*Timis v Osipov* [2019] ICR 655 at [68 and 77]). The employer is vicariously liable for any such detriment (s.47B(1B) ERA).

Automatically unfair dismissal

44. S.103A ERA provides:

> *"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."*

45. Where, as here, the Claimant does not have two years of continuous employment, the burden of proving that the reason or principal reason for the dismissal in a claim for automatic unfair dismissal is upon the Claimant (see *Ross v Eddie Stobart* UKEAT/0068/13).

46. This case does not turn on the burden of proof. As set out below, the Tribunal has been able to make a positive finding of fact about the reason for the dismissal.

Unlawful deductions from Wages

47. Section 13(1) of the ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA.

Conclusions

48. The Claimant did not raise health and safety issues on 14 June 2021. However, he did raise a series of issues by Whatsapp on 24 June 2021. They were framed as a staffing issue of Mr Bayasgalan and the other cdp that could be rectified by management but they did contain health and safety concerns. Mr Wibling and Mr Lees did not recognise them as health and safety concerns but accepted that they showed that best practice was not being adhered to. The Tribunal concludes that it was the disclosure of information that tended to show that the health or safety of any individual was likely to be endangered and/or that a person was likely to fail to comply with any legal obligation to which he or she is subject. The Claimant had a reasonable belief in this - health and safety guidelines in public eateries are in place to protect the public from food poisoning and similar. The public has an interest in knowing that food kiosks are sanitary and free from health risks. The Claimant thus raised a qualifying disclosure and as he raised it to his managers it was a protected disclosure. It was also a safety concern.

49. The allegation that “on 1 July 2021 the Claimant sent a text message to Barry Wibling and an email to Bea Neville and Tom Howe making further allegations regarding the conduct of staff, in particular Mr Bayasgalan” amounted to a health and safety concern and protected disclosure for the same reasons. Although it was treated as a management concern, it did contain information about health and safety concerns.

50. Turning to the Claimant’s claim that he was subjected to a detriment first, the question under S.47B is then whether the Claimant was subjected to a detriment *on the ground* that he had made a protected disclosure. The Claimant alleged that “the Respondent’s employee, Mr Bayasgalan, verbally abused and threatened the Claimant on 1 July 2021, leading to the Claimant leaving the kiosk” and that this was a detriment for having raised a protected disclosure. The Claimant and Mr Bayasgalan had a heated exchange where the Claimant was shouting aggressively in Mr Bayasgalan’s face, pointing at him and calling him stupid. The main reason that Mr Bayasgalan argued with the Claimant was because he was being shouted at, pointed at and being called stupid. However, there were also more minor reasons why Mr Bayasgalan was arguing with the Claimant. Firstly, because the Claimant had been paid more than him and secondly because the Claimant had been “snitching” on him for not working hard enough and for cutting corners. The “snitching” was a reference to the Claimant having reported Mr Bayasgalan for his alleged shortcomings, only some of which were alleged health and safety issues. The Tribunal

concludes that the protected disclosures did not materially, and only trivially, influenced Mr Bayasgalan's treatment of him and so the Claimant's claim for having suffered a detriment therefore fails and is dismissed.

51. The Claimant had worked for the Respondent after 3 weeks and 2 days. The Tribunal has found the Claimant left the kiosk on 1 July 2021 at 11.09 because he thought Mr Bayasgalan was insubordinate and because of the heated clash between them. He did not leave because there were "circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left". At the Preliminary Hearing and at the start of the final hearing the Claimant had described the circumstances of danger as "upon being verbally abused and threatened by 'Mr Bayasgalan' on 1 July 2021, the Claimant left the kitchen". The Tribunal concludes that a heated argument where Mr Bayasgalan was insubordinate and where the Claimant himself said "…*if I stay today i probably do something i regret,*", do not constitute circumstances of danger. The Claimant seemed to suggest later in the final hearing that the health and safety consequences of Mr Bayasgalan's alleged substandard work such as cutting corners, not sweeping the floor, leaving blue roll in the rubbish bin, not binning discoloured burgers and not cleaning/refrigerating condiment containers could lead to "circumstances of danger", however, the Tribunal rejects that they can be properly described as "circumstances of danger", at their highest they are health and safety issues that needed to be addressed by management (the Claimant as his line manager), but they cannot properly be described as and nor did the Claimant believe them to be serious and imminent. The Claimant's claims for automatic unfair dismissal pursuant to s.100(1)(d) ERA therefore fails.

52. Mr Leonhardt submitted that the Claimant had made a conditional resignation – he had walked out, said the words "*Barry I'm going home and it seems this is my last day".* This was followed up with an ultimatum by email and text – it's either Mr Bayasgalan or me. However, the Tribunal has found that the Claimant was dismissed by Mr Lees over the telephone who had not interpreted the Claimant's words/actions as a resignation. The email sent by Mr Ivil was therefore without consequence, the Claimant had already been summarily dismissed the day before. The reasons why the Claimant was dismissed on 1 July 2021 was for shouting at Mr Bayasgalan, walking out of his shift 45 minutes before service began and for making demands that Mr Bayasgalan be sacked. The health and safety concerns were not the reason, or principal reason for his dismissal as is required for s100(1)(c) ERA and 103A ERA. His claims for automatic unfair dismissal for making a protected disclosure and/or for bringing to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, fail and are dismissed.

53. The Tribunal has found that the oral contract was for the Claimant to receive £17 per hour only and he was paid this. His claim for unlawful deductions from wages therefore also fails and is dismissed.

Employment Judge **L Burge**

Date: 7 October 2022