EMPLOYMENT TRIBUNALS

Claimant: Mr W Blake

Respondent: Hamsterley and District Social Club Limited

Heard at: Newcastle Hearing Centre **On:** 16 and 17 November 2022

Before: Employment Judge Morris
Members: Miss BG Kirby
Mr D Morgan

Representation:
Claimant: In person
Respondent: Mr D Walton, former Vice-President of the respondent

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence. The respondent was represented by Mr D Walton, former Vice-President of the respondent, who gave evidence himself and called Mrs E Walton, his wife and a former member of the committee of the respondent, to give evidence on its behalf. The Tribunal also had before it a witness statement from Ms A Owens, the respondent's treasurer, on behalf of the respondent but as was explained at the Tribunal hearing, because she had not attended the hearing to give evidence, the Tribunal was only able to give limited weight to the content of that statement.

3. The principal evidence in chief of or on behalf of the parties was given orally as despite Orders of this Tribunal made at a Preliminary Hearing on 23 March 2022 ("the March Hearing") neither the claimant nor Mr Walton had produced a written witness statement and, although a witness statement had been produced by Mrs Walton it did not actually address the issues in the case.

4. The Tribunal also had before it a bundle of documents but despite best efforts of the Tribunal at the March Hearing and since it was extremely disorganised. Additionally, certain key documents had been omitted including letters from the respondent's HR consultants dated 8 and 24 September 2021. The numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle. It will appear that incorrect numbers have been quoted but that is because, for some inexplicable reason, when the respondent had compiled the bundle the same number had been given to different documents in the bundle, which was a source of much confusion during the hearing. On certain of the pages the claimant had also written numbering using the prefix "EV", which had then been crossed out; presumably by the respondent. In the hope that it might provide at least some clarity in identifying documents, where possible, that format "EV" has also been used below.

The Name of the respondent

5. By consent, the name of the respondent is amended to become Hamsterley and District Social Club Limited ("the Club") as shown above.

The claimant's complaints

6. As had been identified at the March Hearing, the claimant's complaints were as follows:

    6.1 'Automatic' unfair dismissal under section 103A of the Employment Rights Act 1996 ("the 1996 Act") as the reason or principal reason for his dismissal was that he had made a protected disclosure.

    6.2 A complaint under section 48 of that Act that he was subjected to detriment in contravention of section 47B of that Act on the ground that he made a protected disclosure.

The issues

7. The issues in this case that the Tribunal would decide are set out in the Case Summary arising from the March Hearing, which being a matter of record need not be set out in detail in these Reasons. Those issues will be returned to in the Tribunal's determination below.

Consideration and findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

    8.1 The respondent is a social club registered under the Industrial and Provident Societies Act 1965. It is run by a committee of members.

Mr and Mrs Watson were members of the Club at the times material to the events in this case; Mr Walton being Vice-President, which the claimant described as the top job on the committee.

8.2 The claimant was experienced in the bar and leisure industries and had a good reputation. On the recommendation of Mr and Mrs Walton, he was invited to become the respondent's bar manager. His employment as such commenced on 17 June 2021.

8.3 The parties are agreed that that employment was subject to a 12-week trial period but that that trial was not so much to assess the claimant's performance as to consider whether the respondent could again become viable after the Covid lockdown, which had just come to an end. There is no evidence before the Tribunal that the claimant's contract of employment was to be for a fixed term of 12 weeks and the Tribunal is satisfied that, to the contrary, his employment was to be for an indefinite period subject only to termination on notice from either side. The Tribunal accepts that such notice could have been given if the respondent considered that the trial period had not been completed satisfactorily.

8.4 There is no dispute that in the early weeks of the claimant's employment everything went extremely well. Indeed Mr Walton's evidence was that the claimant achieved the best figures in a stock take of any previous steward.

8.5 On the afternoon of Saturday, 31 July 2021, the Club held its first bingo event since reopening and, therefore, since the beginning of the claimant's employment. At its conclusion, the bingo caller handed the claimant the net takings of £60, which the claimant placed in the bar till. Later that day Mr Walton asked the claimant to give him the £60, which he said he would keep separate from the club cash in a "slush fund" that would be used at the discretion of him and the Club committee for, for example, payment of entertainments and wages.

8.6 The claimant expressed his concern at this suggestion and urged Mr Walton that the money should be incorporated with the other Club cash and declared as income on the weekly cash sheet. He explained that this was a club of the members and this was the members' money; furthermore, to do as Mr Walton had suggested would amount to defrauding the taxman.

8.7 Nevertheless, Mr Walton insisted and the claimant handed him the £60 albeit requiring Mr Walton to provide him with a receipt as the claimant was responsible for the money.

8.8 In this connection, the Tribunal accepts the above account and, therefore, rejects Mr Walton's alternative evidence that he took the £60 home for reasons of safekeeping, which does not stand up to scrutiny when considering the more significant amount of money from bar takings that Mr Walton was apparently content would be

secure in the Club safe. The Tribunal also rejects Mr Walton's alternative evidence that this £60 was to become, in effect, petty cash: that is quite different to a "slush fund", which term Mr Walton accepts he used in this discussion with the claimant. The Tribunal considered that the fact that Mr Walton offered two different explanations for his request that the claimant should give him the £60 had a negative impact upon his credibility in this regard.

8.9 The next day was 1 August. The claimant was at work when Mrs Walton came into the Club. There is no dispute that they argued. There is, however, a slight difference in their evidence in that the claimant says that Mrs Walton accused him of calling her husband a thief, which he denied, whereas Mrs Walton says that the claimant said that he had not realised that her husband was a dishonest man. Despite the different terminology, there is no real difference in effect.

8.10 On balance of probabilities, the Tribunal also accepts that Mrs Walton said words to the effect that all the work that had been done to the manager's flat above the Club in preparation for the claimant moving into it had been for nothing. The claimant implied from that that he was to be sacked.

8.11 The claimant's evidence was that this altercation between him and Mrs Walton was the turning point of the souring of the relationship between them and, therefore, his relationship with the respondent. While it may have been the start of that deterioration, the text message exchange between the claimant and Mrs Walton on Tuesday, 3 August 2021 (16) in which she stated with reference to the claimant, "Thank you, you are a star", would at least suggest that the relationship between them was not too bad and, perhaps, could have been recovered.

8.12 On Monday, 2 August the claimant had organised the staff he required to work at the Club on the following Saturday, 7 August, when a surprise party was being held at the Club. On Wednesday 4 August EW told the claimant that he could not engage extra staff as he had intended. This and other matters occurring at the time caused the claimant to be concerned about how the Club was being run. He therefore sent an email to the Club Secretary, RW, at 11.32 on Friday 6 August (16/EV 51) and sent a copy of his email to other committee members. In that email, he set out his concerns including as follows:

8.12.1 Issues relating to staffing and EW having told him that he could not engage extra staff.
8.12.2 Getting mixed messages from the committee having been told on appointment that only two committee members would be his points of contact.
8.12.3 Being bullied and harassed by committee members, which he described as a "dictator style management system".
8.12.4 Stating that he could not work under these conditions.

8.12.5 Referring to children being allowed on the premises after 21.00.

8.12.6 Importantly (given the claims that the claimant now raises in these proceedings) requesting a meeting with the committee to explain this and more.

8.13 At the time of writing the above email the claimant had not seen an email that Mr Walton had sent to him on 5 August (16/EV 51) in which, amongst other things, he stated that in respect of the party on the Saturday, 7 August, the claimant would need staff to help it, which was contrary to what EW had told the claimant on Wednesday for August, the day before Mr Walton's email.

8.14 The claimant therefore wrote again to RW and others at 15.10 on 6 August stating that he could not staff the bar on one day's notice and again, "I would like to formally request a chance to discuss my employment with you or at your next committee meeting as I cannot work with all the mixed messaging and harassment" (16).

8.15 Also on 6 August, Mr Walton wrote to the committee having sought advice from PF in relation to the £60 (16). Mr Walton told the committee that, as the claimant had told him, the money needed to go on to the claimant's sheet and remain in the Club safe until it was needed. On the basis of that advice from PF Mr Walton returned the £60 to the claimant during that week.

8.16 The only response the claimant received to his two requests to meet the committee was Mr Walton's email of 9 August (16) in which he told the claimant he would be at the Club on 10 August "to meet the plumber" and he and RW could meet the claimant then or another time.

8.17 On Saturday 7 August Ms Owens approached someone working in the bar at the Club requiring her to complete a form P46. In this connection also, Mrs Walton overheard the claimant referring to paying that person "cash in hand". These events led to the claimant, Ms Owens and Mr and Mrs Walton going into another room at the Club where a heated argument ensued on both sides; the claimant being angry that committee members had interfered with his management. The claimant insisted that paying such workers "cash in hand" was legal whereas the others did not accept that.

8.18 Mrs Walton's evidence was that it was at this meeting that the claimant said that her husband was dishonest. The claimant denies that and it is not supported by the evidence of Mr Walton or Ms Owens both of whom attended the meeting. In this respect the Tribunal considers that Mrs Walton has simply mistaken the dates and the occasion on which the claimant referred to Mr Walton's honesty actually took place on 1 August as described above.

8.19 The Tribunal is satisfied that by this point, after the events on 1 and 3 August and the email exchanges on 6 August, the relationship

between the claimant and Mrs Walton had truly soured. As she confirmed in oral evidence, their relationship was "destroyed"; it had previously been positive but then stopped. In her evidence she explained, "I have no intention of helping people screaming at me".

8.20 The claimant had anticipated a positive response to his two requests to attend a committee meeting to explore the above issues with the members. Their next meeting was on 16 August. Mr Walton's evidence was that he had not put the claimant's request on the committee agenda as the claimant had not replied to his suggestion to meet him and RW on 10 August when he had told the claimant that he would be at the club to meet the plumber. There was, however, an item on the committee agenda regarding what he described as the claimant's "heated moment"; that referring to the discussion regarding the form P46 and "cash in hand" referred to above.

8.21 In this regard the Tribunal accepts the claimant's evidence, however, that before the start of the meeting Mr Walton was standing near the bar and asked the claimant whether he wanted to come into the meeting to which he had replied, "Yes please". Despite that and his emails requesting a meeting, copies of which he had sent to committee members, the committee meeting concluded without the claimant having been invited to attend.

8.22 The claimant had built himself up in preparation for his attendance at the meeting with the committee and, when he realised that was not going to happen, he broke down. He went outside and was violently sick. The claimant later went home. The following morning, Tuesday 17 August, he went to his doctor. That afternoon he came to the Club to collect his personal possessions and posted the keys to the premises through the letterbox of a committee member who lived next door to the Club.

8.23 The claimant's evidence of expecting to attend the committee meeting is borne out by his contemporaneous email to CH that he sent at 12.35 on 17 August (16/EV 58).

8.24 Having initially self-certificated in respect of his absence from work the claimant was given a medical certificate from his GP on 23 August confirming advice that he was not fit for work for two weeks because of "low mood" (17/EV 62). That certification was later extended. The certificate dated 2 September 2021 stated that the claimant's condition was "Depressive disorder NEC" and declared him not fit for work for three months (18/EV 63). The claimant did not return to work.

8.25 On 19 August, Mr Walton wrote to the claimant to inform him that he would be putting out an advertisement for a manager and staff at the Club (17/EV 43).

8.26 On 20 August the claimant wrote to Ms Owens thanking her for sorting out his payslips and informing her of his sickness absence and how he had been bullied and harassed by committee members. He also raised that he had been informed by Mr Walton that the respondent was advertising his job and that he had been advised "that there is a case now for a claim of constructive dismissal" (17/EV 60).

8.27 On 26 August, PB, an HR consultant with a business called Professional People Management wrote to the claimant informing him that she was supporting the respondent in respect of his absence (17/EV 40). She referred to the claimant having stated that he had been subjected to bullying and harassment and asked him to provide details in line with the respondent's grievance procedure.

8.28 The claimant wrote a holding reply on 6 September (18/EV 65) and a detailed reply on 8 September (18/EV 66), which he concluded by thanking PB for offering to help. In that second email the claimant set out in some detail his concerns and the events that had occurred recently at the Club, which reflect, in effect, is evidence to this Tribunal. As that is a contemporaneous account in that email it gives credence to the claimant's evidence before the Tribunal. Particular matters that the claimant raised in that email, which are relevant in these proceedings included as follows:

8.28.1 He had been told at interview that only Mr Walton and Ms Owens would be his point of contact/instruction from the committee, which had not been adhered to.

8.28.2 Initially, things were great at the Club, including the committee starting improvement works to the flat for him to live "above the shop", until he discovered that the committee were taking members' money off the premises and not recording it as income on the weekly cash sheet.

8.28.3 He had expressed his concern and explained to Mr Walton that such practice must stop as it was illegal and against the guidelines for running a members' club that all money raised on site is members' money and must be declared.

8.28.4 Mr Walton had said that he and the committee had a "slush fund" made up of income streams from bingo/raffles/bonus ball etc, which they used to pay things off the books and which the claimant had said was bad practice and must stop as it was deceiving the Inland Revenue but more importantly the club members.

8.28.5 Mrs Walton had accused him of calling her husband a thief.

8.28.6 Harassment had then started including Mrs Walton telling him that work on the flat would stop and making decisions about staffing levels, which he regarded as her punishing him for being a whistleblower regarding the misappropriation of members' money.

8.28.7 He had emailed the committee and requested a meeting with them all to try to sort the awful situation out. A meeting had been scheduled and he had prepared himself for it (including

making a list of such matters as all the times Mrs Walton had interfered with his management, the breaking of club rules and licensing breaches) but then he had not been invited into the meeting to address these issues despite Mr Walton telling him before the meeting started that he would get the chance to discuss these matters in the meeting.

8.28.8 This had caused his anxiety to rise and he had become very unwell with mental health problems for which he was then getting treatment and medication.

8.29 Also on 8 September PB wrote to the claimant. Amongst other things, she stated as follows:

> "As you are aware your current position was a temporary role due to end on 25 September 2021. The plan was always to advertise the role; which has now been done and I understand you have been offered the opportunity to apply for the Bar Manager role.
>
> If you do not want to apply for the position, we will continue to pay you Statutory Sick Pay up to the 25 September 2021."

8.30 The Tribunal is satisfied that that was a clear indication that the claimant's employment would terminate on 25 September 2021, albeit he could apply for the permanent post. PB replied to the claimant's email of 8 September by letter of 24 September in which she challenged many of the points the claimant had raised in his email. Importantly, she concluded,

> "As previously confirmed your Statutory Sick Pay ended on 25 September, 2021 which is the end date of your temporary role."

8.31 Thus, the Tribunal is satisfied that the respondent terminated the claimant's contract of employment. The Tribunal notes Mr Walton's evidence that he never saw or approved the letter of 24 September but the Tribunal finds it not credible that PB would have written it without authority. If she did, that is a very serious matter which the respondent should consider pursuing with her. Be that as it may, PB had ostensible authority to act on behalf of the respondent and the claimant was entitled rely on her letter as notification of the termination of his employment on behalf of the respondent.

Submissions

9. After the evidence had been concluded Mr Walton and the claimant made brief submissions, which the Tribunal fully considered.

10. The key points made by Mr Walton on behalf of the respondent included as follows:

10.1 I do not agree that the claimant was dismissed. We were happy with his work and invited him to apply for the permanent role. Then

he submitted sick notes. I did not expect PB to write as she did without the chance to see the letter first.

10.2 I do not think that there was any detriment. I removed the £60 then paid it back and the committee was happy. Everything was paid in.

10.3 We never said anything about the heated argument.

10.4 The claimant had the best support from the committee who wanted him to stay. The committee had to put the job out and he never applied.

10.5 The claimant had thought, "that's it" and took his belongings.

11. The key points made by the claimant included as follows:

11.1 I am concerned about the detriment. If Mr Walton had known how I felt and the way I felt when I was not invited into the committee meeting; I have still not recovered.

11.2 Mr Walton had said that we did not have the correspondence and words but I know that we did.

The law

12. The principal statutory provisions, so far as is relevant to the issues in this case, are as follows:

The 1996 Act

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

43A. Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*.*

43B.— Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C.— Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer,
…….

47B.— Protected disclosures.

(1) 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.

103A Protected disclosure

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

Employment Act 2002

38 — Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) .....

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and
(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 ……, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and
(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

Trade Union and Labour Relations (Consolidation) Act 1992

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employee has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

Application of the facts and the law to determine the issues

13. The above are the salient facts and the submissions of or on behalf of the parties relevant to and upon which the Tribunal based its judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law some of which are referred to elsewhere in these Reasons.

14. The Tribunal adopts as its structure for this determination the complaints and the issues therefrom as set out in the Case Summary arising from the March Hearing, albeit in a different order.

Public interest disclosure detriment

15. The Tribunal first considered the claimant's complaint under section 48 of the 1996 Act that he was subjected to detriment in contravention of section 47B of that Act on the ground that he made a protected disclosure.

16. Some preliminary points should first be made in relation to this complaint. The Tribunal brought into account the guidance of the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 as to what constitutes a protected disclosure. Additionally, that in Babula v Waltham Forest College [2007] IRLR 346 the Court of Appeal clarified that in establishing that the person making the disclosure has a reasonable belief that the disclosure is made in the public interest if is sufficient if he or she has a subjective belief, which is objectively reasonable. As to the existence of detriment, the Tribunal relied upon the guidance given by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL and reminded itself that in NHS Manchester v Fecitt [2012] IRLR 64 the Court of Appeal held that the question in detriment cases is whether "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"; the focus of the Tribunal being upon the mind or mental processes of the individual or individuals occasioning the alleged detriment: see Royal Mail Group Ltd v Jhuti [2019] UKSC 55.

17. Against this general background, the Tribunal considered the several statutory elements that are contained in sections 43B, 43C and 47B of the 1996 Act.

A qualifying disclosure

18. The first issue in this respect is whether the claimant made one or more qualifying disclosures as defined in that section 43B of the 1996 Act.

19. The Tribunal has found above that on 31 July 2021, in response to Mr Walton asking the claimant to give him the £60 bingo money for the slush fund, the claimant expressed his concern and told Mr Walton that the money should be incorporated with other cash of the Club and declared as income on the weekly cash sheet, explaining that it was the Club members' money and to do as Mr Walton had suggested would amount to defrauding the Revenue. The Tribunal therefore considered whether what

the claimant said to Mr Walton amounted to a qualifying disclosure in relation to which it applied section 43B of the 1996 Act. By reference to that section, the Tribunal is satisfied that the claimant,

19.1 disclosed information,

19.2 that he reasonably believed was made in the public interest (in which respect the Tribunal considered the factors that the Court of Appeal stated in the decision in Chesterton GlobalLtd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979 would normally be relevant in relation to this issue),

19.3 and he reasonably believed that it tended to show that,

19.3.1 a criminal offence had been, was being or was likely to be committed, and
19.3.2 the respondent had failed, was failing or was likely to fail to comply with a legal obligation.

20. As what the claimant said to Mr Walton satisfies all of the above elements of that section 43B, what he said amounted to a qualifying disclosure.

A protected disclosure

21. The second issue in connection with this complaint is whether, in accordance with section 43C of the Act, that qualifying disclosure was a protected disclosure. It was because it was made to Mr Walton who was an appropriate representative of the respondent.

22. In summary thus far, therefore, and considering each of the above matters in the round, the Tribunal is satisfied that the claimant made a protected disclosure under section 43A of the 1996 Act.

Detriment

23. The Tribunal therefore moved on to consider the third issue in connection with this complaint with reference to section 47B of the 1996 Act, namely:

23.1 whether the claimant was subjected to any detriment by the respondent and, if so,

23.2 whether that detriment was done on the ground that the claimant had made a protected disclosure.

24. The Tribunal has found above that it is satisfied as follows:

24.1 There was an altercation between Mrs Walton and the claimant on 1 August 2021 at which she remonstrated with the claimant either for calling her husband a thief or saying that her husband was dishonest.

24.2 From that point and certainly following events on 3 August 2021 and 7 August the working practices etc of the claimant were interfered with and his authority was undermined.

24.3 The claimant was denied the opportunity to attend a committee meeting that he had requested in his two emails on 6 August and confirmed to Mr Walton immediately before the start of the meeting on 16 August. Furthermore, all members of the committee had received a copy of the claimant's email requests and none had intervened to grant him the audience with the committee that he had requested

25. Thus, in respect of each of the above the Tribunal is satisfied that the claimant was subjected to detriment by or on behalf of the respondent.

The reason for the detriment

26. The final issue in connection with this complaint is whether any of those detriments were done on the ground that the claimant had made a protected disclosure. That is the statutory wording, but as set out above, in its decision in Fecitt, the Court of Appeal explained that the correct approach to the words "on the ground that" was to consider whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower.

27. Based on its findings on the evidence before it as set out above, the Tribunal is satisfied that that fairly low thresholds has been met in this case. The claimant's disclosure did more than trivially influence the respondent in respect of the above detriments. As such, the Tribunal is satisfied that the detriments were done on the ground that the claimant had made a protected disclosure.

Conclusion in respect of this complaint

28. Thus, the claimant's complaint under section 48 of 1996 Act that he was subjected to detriment in contravention of section 47B of that Act on the ground that he made a protected disclosure is well-founded.

Unfair dismissal

29. The Tribunal now turns to consider the claimant's complaint 'automatic' unfair dismissal under section 103A of the 1996 Act as to whether the reason or principal reason for his dismissal was that he had made a protected disclosure.

Was the claimant dismissed?

30. The first issue in respect of this complaint is whether the claimant was dismissed.

31. Section 95(1)(a) of the 1996 Act defines dismissal as being where the contract under which an employee is employed "is terminated by the employer". As found above, the Tribunal is satisfied that, first, the contract of employment between the respondent and the claimant was not a fixed-term contract but was for an indefinite term and, secondly, the respondent did terminate that contract of employment. In accordance with that section 95(1)(a), therefore, that termination did amount to a dismissal. Thus, in answering this first question, the Tribunal is satisfied that the claimant was dismissed.

Was the reason or principal reason for the claimant's dismissal that he made a protected disclosure?

32. The second issue in respect of this complaint was whether the reason or principal reason for the claimant's dismissal that he made a protected disclosure. The Tribunal is satisfied that the principal reason for the claimant's dismissal was him challenging Mr Walton on 31 July 2021 and making the disclosures as recorded above.

33. The Tribunal accepts that there were then other events, primarily during the following week and the claimant requesting a meeting with the committee, and he then being absent on account of sickness. Although acknowledging all those reasons as possibly having something of a bearing on the claimant's dismissal, the Tribunal is satisfied that the principal reason for that dismissal was nevertheless the claimant's disclosures to Mr Walton when he challenged him on 31 July 2021 about not only him requesting the £60 but, more than that, about what appeared to have been the respondent's practice in this regard.

Conclusion in respect of this complaint

34. Thus, the Tribunal is satisfied that the reason (or, if more than one, the principal reason) for the dismissal of the claimant was that he made a protected disclosure and, therefore, in accordance with section 103A of the 1996 Act, he is to be regarded as having been unfairly dismissed. That being so, his complaint that he was unfairly dismissed is well-founded.

Remedy

Compensation

35. Having announced its decision that the Tribunal had found both of the claimant's complaints to be well-founded, it proceeded to consider the question of remedy in respect of which it heard evidence and submissions from the claimant and Mr Walton. In this respect the claimant sought only an award of compensation.

36. Furthermore, although it is highly likely that he would have been entitled to a greater award of compensation, he sought only an award equal to the sick pay at the then current rate of £96.35 that he would have received from the respondent during what would have been a period of 13 weeks'

sickness absence had he not been dismissed: i.e £96.35 x 13 = £1,252.55.

37. The Tribunal was satisfied that, in respect of his complaint that he was subjected to detriment in contravention of section 47B of the 1996 Act on the ground that he made a protected disclosure, pursuant to section 49 of that Act the claimant should be awarded compensation of £1,252.55.

38. The Tribunal did not award any additional compensation in respect of the complaint of unfair dismissal because any such compensation had been addressed in the above award of £1,252.55.

39. There were, however, two further issues, which the Tribunal went on to address.

No written statement of initial employment particulars

40. As set out more fully above, section 38 of the Employment Act 2002 provides that if an employer had failed to comply with its duty to give an employee a contract of employment or at least a written statement of employment particulars, the Tribunal "must" make an additional award to the employee of either two or four weeks' pay unless there are exceptional circumstances that would make such an award unjust or inequitable.

41. In this case, the respondent accepted that the claimant had not been given a contract of employment or statement of employment particulars. Mr Walton explained that when the claimant had been appointed the respondent took HR advice, which he said was that as the previous Club steward had been made redundant, the claimant could not be given the same contract of employment as the previous contract of employment even though he would have the same duties as the previous steward. Instead, the advice was that the contract of employment should be changed so that all references to "steward" should be amended to read "manager".

42. Mr Walton further explained that the respondent had been in the process of making those amendments and, after the claimant's trial period, had intended to offer him a new contract of employment. He had now researched this, however, and understood that the claimant should have been given a contract of employment.

43. The Tribunal was satisfied on the evidence before it (not least in light of that concession by Mr Walton) that when these proceedings were begun, the respondent was in breach of its duty under section 1(1) of the Employment Rights Act 1996 to give the claimant a written statement of initial employment particulars. Furthermore, in this respect there were no exceptional circumstances that would make such an award unjust or inequitable. That being so, in accordance with section 38(2) of the Employment Act 2002, the Tribunal made an award of the minimum amount of two weeks' pay: i.e £850.

Failure to comply with a relevant Code of Practice

44. As also set out more fully above, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that if it appears to an employment tribunal that the claims in the particular proceedings concerned a matter to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with that Code, the tribunal may increase any award it makes to the employee by up to 25%.

45. In this case, the claimant's claim concerned matters to which the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) applied. The Tribunal therefore considered the above section 207A in light of the guidance given in the decision of the Employment Appeal Tribunal in Rentplus UK Limited v Coulson EA-2020-000809-LA, in which other relevant decided cases are considered) and applied the decisions in Sir Benjamin Slade v Biggs [2022] IRLR 216 and Lawless v Print Plus (Debarred) UKEAT/0333/09/JOJ.

46. Having undertaken that consideration, the Tribunal was satisfied that the respondent failed to comply with that Code of Practice and, further, that failure was unreasonable. Taking account of all the circumstances of the case together with the guidance in the above case law, the Tribunal was satisfied that it was appropriate to increase the above award of two weeks' pay (£850) by 10% (£85) making a total of £935.

Conclusion

47. The unanimous judgment of the Employment Tribunal is as follows:

    47.1 The claimant's complaint that, contrary to section 47B of the 1996 Act, the respondent subjected him to detriment on the ground that he made protected disclosures is well-founded.

    47.2 In respect of that contravention, pursuant to section 49 of that Act, the Tribunal awards compensation of £1,252.55 to be paid by the respondent to the claimant.

    47.3 The claimant's complaint that his dismissal by the respondent was unfair because the reason (or, if more than one, the principal reason) for his dismissal was that he made a protected disclosure, as provided in Section 103A of the 1996 Act, is well-founded.

    47.4 The Tribunal does not award any compensation in respect of that unfair dismissal because any such compensation is already addressed in the above award of £1,252.55.

    47.5 When these proceedings were begun, the respondent was in breach of its duty under section 1(1) of the 1996 Act, to give the claimant a written statement of initial employment particulars and, therefore, in accordance with section 38(2) of the Employment Act 2002, the Tribunal makes an award of the minimum amount of two

weeks' pay (i.e £850) which is then increased by 10% (£85) pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 producing a total of £935.

47.6 The total sum that the respondent is ordered to pay to the claimant is therefore £2,187.55.

EMPLOYMENT JUDGE MORRIS
23 December 2022