



EMPLOYMENT TRIBUNALS

Claimant: Miss S Codling

Respondent: Costello's (Malton) Ltd

Heard at Leeds by CVP on: 26, 27, 28 & 29 September 2022

Before: Employment Judge Tegerdine

Members: Mrs L Anderson-Coe
Mr J Rhodes

Representation

Claimant: In person

Respondent: Mr J Allsop (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The disclosures made by the claimant to the respondent on 9 July 2021 and 12 July 2021 qualify for protection pursuant to Part IVA of the Employment Rights Act 1996.
2. The claimant's complaint that she was unfairly dismissed on the grounds that she made the disclosures in paragraph 1 fails and stands dismissed.
3. The claimant's complaint that she was subjected to detriments for having made the disclosures in paragraph 1 pursuant to section 47B of the 1996 Act fail and stand dismissed.

REASONS

Introduction

1. The claimant brought the following complaints:
 - (1) Unfair dismissal for having made protected disclosures pursuant to section 103A of the Employment Rights Act 1996.
 - (2) Detriment for having made protected disclosures pursuant to section 47B of the Employment Rights Act 1996.

1. A joint bundle of documents (the “Bundle”) was provided to the Tribunal for the hearing.
2. There was a case management hearing on 8 February 2022. The issues in this case were agreed at that hearing, and are set out in the case management summary which is at page 17 of the Bundle.
3. The full merits hearing took place on 26, 27, 28 and 29 September 2022. The Tribunal heard evidence from the claimant and the claimant’s friend, Jason Skelton. The Tribunal also heard evidence from Louise Costello, the owner of the respondent, Sharon Horsfall, who was an Area Manager for the respondent at the relevant time, Frances Neill, who was a supervisor at the respondent’s café when the claimant worked there, and Ayesha Tomlinson, who worked in the café at weekends during the time the claimant worked for respondent.
4. The Tribunal delivered its oral judgment at the end of the hearing. The claimant asked for written reasons at the hearing.

Findings of fact

Background

5. The respondent owns a number of cafés. The respondent also owns a bakery where it makes products which are sold in its cafés. The claimant was employed by the respondent as a Barista/Shop Assistant at one of the respondent’s cafes from 18 May 2021 to 6 August 2021. The claimant had known and been on friendly terms with Frances Neill, who worked in the café between 12 April 2021 and January 2022, since they were both children.

Missing label issue

6. On 9 July 2021 the claimant noticed that a consignment of 12 individually wrapped Bakewell tarts (the “Tarts”), which had been produced in the respondent’s bakery, did not have ingredients labels on them. The Tarts were part of a delivery of 528 cakes, which included 60 Bakewell tarts. The Tarts were the only individually wrapped cakes which did not have labels on them.

The first disclosure (9 July 2021)

7. On 9 July 2021 the claimant sent a Facebook Messenger message to Miss Neill in which she said *“We have an entire box of bakewells, missing ingredients label... I’ve put them to one side for now, until clarification of what to do with them is given.”* (page 251 of the Bundle). Miss Neill’s response was that it was OK to sell the cakes. The claimant replied, *“I thought it was mandatory for pre-packed food. I don’t want to be responsible for breaking food standard regulations.”* The claimant also said, *“the risk of getting this wrong could have dire consequences... it’s not just possible dire consequences for the consumer, businesses can be heavily fined for breaking food standard regulations, and I know pre-packed food has to be labelled... Natasha’s law”.*
8. Miss Neill informed the claimant that she would check with Ms Horsfall, the Area Manager. Miss Neill subsequently advised the claimant that Ms Horsfall had said it was OK to sell the Tarts. The claimant was not satisfied with this response, and sent a number of messages to Miss Neill asking her to send the claimant a copy of the message Ms Horsfall had sent to Miss Neill confirming that the cakes could be sold. A copy of the claimant’s messages are at page 253 - 254 of the Bundle.

The second disclosure (12 July 2021)

9. On 12 July 2021 the claimant sent an email to Louise Costello, the owner of the café, in which she asked Mrs Costello to confirm whether the respondent's products were classed as pre-packed food or pre-packed for direct sale foods. The claimant said she understood that there were different labelling rules for each type of product, and she wanted to understand the laws and procedures that must be followed. The claimant's email said, "*I am not a food standards expert, nor do I understand the full scope of law surrounding businesses, the loopholes and grey areas are a minefield at times, and therefore would appreciate it if you could clear up the confusion I have as to whether your cakes/tarts etc, that are in packaging, can be legally sold without an ingredient label attached...*" (page 102 of the Bundle).
10. Mrs Costello replied to the claimant, asking which products she was referring to, and which products did not have an ingredients label.
11. The claimant replied, "*It was regarding the Bakewell tarts, which do normally have an ingredient label, hence me questioning it when one box was missing the usual label*" (page 101 of the Bundle).
12. Mrs Costello sent a lengthy reply to the claimant, in which she said that she wasn't aware that a box of Bakewell tarts had slipped through without labels. Mrs Costello thanked the claimant for bringing it to her attention. Mrs Costello said that she had spoken to Ms Horsfall, and the products had been taken off sale and returned to the bakery so labels could be put on them.
13. The claimant replied to Mrs Costello saying, "*My concern was that when I noticed the error and raised my concern, I was told to break laws... I felt I needed to raise it with you, because the consequences could have been very serious*" (page 99 of the Bundle). The claimant confirmed in her oral evidence that she was satisfied with how Mrs Costello had dealt with the labelling issue when the claimant raised it with her.

Detriments

14. The alleged detriments are set out at paragraph 17 of the case management summary. The claimant claimed that because of the disclosures she made on 9 July 2021 and 12 July 2021:
 - (i) She was ignored by Miss Neill on 15, 16, 17, 22, 23 and 31 July 2021.
 - (ii) Miss Neill scrutinised and criticised the claimant's work excessively and unfairly on 17, 22, 23, 29, 30 and 31 July 2021.
 - (iii) Miss Neill dismissed what the claimant said about a colleague needing help because of her dyslexia on 24 July 2021.
 - (iv) Miss Neill prevented the claimant from taking unused stock for the claimant's own use on 22 July 2021.
 - (v) Ms Horsfall inaccurately recorded the content of the claimant's 3 month probationary review meeting on 29 July 2021.
 - (vi) Miss Neill said to the claimant on 31 July 2021 that if she was unhappy in her job she should leave, that she felt the claimant had betrayed her, and that the claimant was not complying and she had told her to leave.
- (i) Miss Neill ignoring the claimant on 15, 16, 17, 22, 23 and 31 July 2021

15. The Employee Schedule which is at page 293 of the Bundle shows that the claimant and Miss Neill were not on shift together on 15, 16, 17, 22, 23 or 31 July 2021, although their shifts did crossover on those dates, in that one of them took over when the other one finished their shift. On this basis the Tribunal found that the claimant and Miss Neill weren't on shift together on the relevant dates, and there were therefore limited opportunities for Miss Neill and the claimant to speak to each other at work. However, the Tribunal found that the claimant and Miss Neill were in regular contact with each other via Facebook Messenger during this period, which can be seen from the Facebook messages what are at page 254 – 273 of the Bundle.
16. There were numerous Facebook messenger messages between claimant and Miss Neill on 15, 16, 23 and 31 July 2021 which can be found in the Bundle at pages 254 – 273. The Tribunal found that many of the messages Miss Neill sent on those dates were friendly in tone, for example on 15 July 2021 Miss Neill sent a message to the claimant which said, *"thank you :-) great work today then xx"* (page 256 of the Bundle).
17. The claimant said in her ET1 that Miss Neill subjected her to "silent treatment", and at paragraph 74 of the claimant's witness statement she said (in relation to 15 July 2021), *"Fran blanked me when I first walked in, there wasn't the usual happy greeting, she was cold and uncommunicative"*. The claimant also said at paragraph 79 of her witness statement (in relation to 16 July 2021), *"I arrived for my afternoon shift, and got the same frosty reception from Fran"*.
18. The Tribunal found that the claimant's evidence about this issue was unsatisfactory, as it was at odds with the contemporaneous documents, which show that Miss Neill had not been ignoring the claimant, and was being friendly and helpful towards her during this period. Furthermore, the Tribunal found that the claimant is the kind of person who will say something if she is concerned or unhappy, as that is what she did when she noticed that the Tarts were not labelled. The Tribunal found that if Miss Neill had been cold, uncommunicative and frosty towards the claimant, it is likely that the claimant would have challenged Miss Neill about it at the time.
19. For these reasons set out at paragraphs 15 - 18 the Tribunal found that Miss Neill did not ignore the claimant on 15, 16, 17, 22, 23 and 31 July 2021.
(ii) Miss Neill scrutinising and criticising the claimant excessively and unfairly on 17, 22, 23, 29, 30 and 31 July 2021
20. On the basis of the Employee Schedule, the Tribunal found that there were limited opportunities for Miss Neill to criticise the claimant at work because Miss Neill and the claimant worked different shifts.
21. At paragraph 85 of the claimant's witness statement the claimant said that on 17 July 2021, *"Fran was hovering over me and then said 'Make sure you put all the plates on the bottom.' (this is exactly what I was doing) so I said 'I know, I am'. Fran then responded with 'Yeah you just need to make sure you're doing things right'."* The claimant said in her oral evidence that, *"Fran was hovering over me and telling me to do things while I was doing them"*.
22. At paragraph 93 of the claimant's witness statement she said that on 22 July 2021, Miss Neill said, *"Make sure you don't miss anything cleaning later"* on her way out.

23. The claimant said at paragraphs 101 and 102 of her witness statement that on 23 July 2021, *“Fran started again with the constant jabs, make sure you do this, make sure you do that, without any reason to be at me, because I was doing all these things, it felt as though she just had to be at me”*, and that after a customer spilt some coffee, Miss Neill told her, sternly, not to fill the cup so close to the top next time.
24. At paragraph 129 of the claimant’s witness statement the claimant said that Miss Neill had written in the black book that she should throw sticky notes away immediately, and not leave them on the side of the pad. The claimant said that this felt like a personal attack.
25. At paragraph 132 of the claimant’s witness statement the claimant said that an entry that had been made in the black book which said that they couldn’t use anything other than the washing up brush to wash up because they could only use one dishcloth per day, had suddenly become a rule. The claimant said that this made her feel as though Miss Neill was deliberately trying to make things difficult for her.
26. On 29 July 2021 the claimant sent a message to Miss Neill in which she said that she felt that a lot of what was written the black book was a personal attack and/or a detriment to her (page 268 of the Bundle).
27. As the claimant’s evidence about the matters referred to at paragraphs 21 – 26 was not challenged by the respondent, The Tribunal found that those comments were made. However, there was no evidence that those comments were unfair or excessive, and no evidence of any unfair comments being made. The Tribunal found that Miss Neill’s comments were merely instructions about how to carry out certain tasks, and that they were reasonable comments for a supervisor to make to a member of staff. On that basis the Tribunal found that there was no criticism or scrutiny of the claimant’s work on 17, 22, 23, or 29 July 2021.
28. The claimant said at paragraph 138 of her witness statement that on 30 July 2021 she, *“did the cakes part of the order first, and gave them their cakes (this is standard) and sent them out of the way of other customers while they waited for me to complete their milkshakes (again standard). This is when Fran snapped at me, and told me I had done something wrong. I hadn’t.”* It was not clear from the claimant’s witness statement exactly what Miss Neill had allegedly said. As the claimant did not elaborate on what Miss Neill had said in her oral evidence, and there was no other evidence of the claimant being criticised or scrutinised by Miss Neill on that date, the Tribunal found that there was no criticism or scrutiny of the claimant’s work on 30 July 2021.
29. At paragraph 141 of claimant’s witness statement she said that after she made some milkshakes Miss Neill said to her, *“You took way too long making them and you didn’t do what I told you”*. At paragraph 144 of her witness statement the claimant said that Miss Neill told her that she needed to go a lot quicker in future, and if Miss Neill told her to do something she needed to do it straightaway. As the claimant’s evidence about these comments was not challenged by the respondent, the Tribunal found that Miss Neill did make those comments to the claimant and that they did amount to criticism of the claimant’s work.
30. The claimant said in her witness statement that she was not *“overly quick”* at making milkshakes, and in a message she sent to Miss Neill on 30 July 2021 (page

272 of the Bundle) the claimant said, *“I do the orders as quick as I can I’m just not that quick with milkshakes”*.

31. In the claimant’s oral evidence she accepted that on 30 July 2021 Miss Neill took 8 orders in quick succession while the claimant was making milkshakes for one order. The claimant also accepted that she didn’t help Miss Neill when there was a spillage and Miss Neill asked her to help. The claimant said that the reason she didn’t help was because she was in the middle of preparing an order. The claimant also accepted in her oral evidence that she took photos of the milkshakes before she served them.
32. On the basis of the claimant’s own evidence and the contemporaneous documents in which the claimant admits she was slow making milkshakes, the claimant found that although Miss Neill did criticise the claimant about the length of time it took to make milkshakes on 30 July 2021, that criticism was not unfair or excessive.
33. The Tribunal found that although there was a disagreement between the claimant and Miss Neill on 31 July 2021, there was no evidence that the claimant was criticised by Miss Neill on that day.
34. For the reasons set out at paragraphs 20 – 27 and paragraph 33 the Tribunal found that the claimant’s work was not criticised or scrutinised on 17, 22, 23, 29 or 31 July 2021. For the reasons set out at paragraphs 28 – 32, the Tribunal found that although the claimant was criticised by Miss Neil on 30 July 2021, that criticism was not excessive or unfair.

(iii) Miss Neill dismissing what the claimant said about a colleague needing help because of her dyslexia on 24 July 2021

35. It was not disputed that on 24 July 2021 an issue arose around Ayesha Tomlinson not knowing how to make some new milkshakes, and having some difficulty reading the instructions owing to her dyslexia.
36. The claimant said in her witness statement that when Miss Neill arrived to start her shift on 24 July, the claimant said to her, *“Just so you are aware, I have told Ayesha about the new milkshakes, but she can’t read the instructions, so if she makes one just give her help needed, because she might still be unclear”*. The claimant said Miss Neill *“shut me down”* saying, *“She knows what she’s doing, she’s not stupid.”* The claimant said she walked away because she did not want to discuss how she felt about Miss Neill’s remark in front of customers.
37. In Miss Neill’s oral evidence she accepted that the claimant had made that comment, and that Miss Neill had said something similar to what the claimant said she had said, although according to Miss Neill she said that Miss Tomlinson *“isn’t daft”*, rather than saying she wasn’t stupid. Miss Neill said in her witness statement that the claimant almost made a fool out of Miss Tomlinson when the claimant said in front of customers that Miss Tomlinson couldn’t read the instructions.
38. Miss Tomlinson said in her witness statement that Miss Neill said *“Aisha isn’t daft”*. The Tribunal found Miss Tomlinson to be a credible witness. Her evidence was clear and straightforward, and as Miss Tomlinson no longer works for the respondent, she didn’t have any reason to be untruthful. As Miss Tomlinson’s evidence corroborated Miss Neill’s evidence about what was said, the Tribunal found that Miss Neill said to the claimant that Miss Tomlinson wasn’t daft, rather than saying she wasn’t stupid.

39. The Tribunal found that when Miss Neill responded, "Aisha isn't daft" Miss Neill did dismiss what the claimant had said about Miss Tomlinson.

(iv) Preventing the claimant from taking unused stock on 22 July 2021

40. It was not disputed that people who worked in the café were sometimes allowed to take home unsold cakes which would otherwise have been thrown away. However, this was not a contractual right, and the cakes were not distributed amongst staff in any particular way.

41. It was not disputed that on or around 22 July 2021 Miss Neill gave a large number of unsold cakes to Miss Tomlinson. The claimant suggested in her witness statement that Miss Neill had deliberately given the unsold cakes to Miss Tomlinson, in order to prevent the claimant from having them.

42. Miss Neill said in her oral evidence that she gave the unsold cakes to Miss Tomlinson because Miss Tomlinson had helped her to sort out the play area in the café a few days previously, and in the exchange of messages between Miss Neill and the claimant which is at paragraph 263 of the Bundle, Miss Neill said that Miss Tomlinson had helped her a lot when she re-did the shop and has a huge family, so it would be nice for them all to have the cakes.

43. The claimant did not have any right to take any unsold cakes, it was not disputed that Miss Tomlinson has a big family and had helped sort out the play area a few days previously, and there was no evidence to substantiate the claimant's allegation that Miss Neill had deliberately disposed of the cakes by giving them to someone else in order to prevent the claimant from taking them. For these reasons the Tribunal found that although Miss Neill did give the unsold cakes to Miss Tomlinson, this was to thank Miss Tomlinson for her hard work, and was not done to prevent the claimant from having them.

(v) Ms Horsfall inaccurately recording the content of the probationary review meeting on 29 July 2021

44. Ms Horsfall had a probationary review meeting with the claimant on 29 July 2021. There are 2 different versions of the meeting minutes in the Bundle. Ms Horsfall's notes of the meeting are at page 117 of the Bundle. The claimant's version is at page 316. The claimant alleged that Ms Horsfall's version was inaccurate.

45. In Ms Horsfall's oral evidence she said that her notes of the probationary review meeting were made on or around the date of the meeting. In the claimant's oral evidence the claimant accepted that she wrote her version of the meeting notes in response to documents she received from the respondent after she submitted a subject access request, which included a copy of Ms Horsfall's notes. This was a number of weeks after the meeting had taken place.

46. The Tribunal reviewed the 2 sets of notes and noticed that the claimant's version contains a surprising amount of detail considering that these notes were not made until many weeks after the meeting had taken place. The claimant's notes even include numerous quotations about exactly what people allegedly said in the meeting.

47. In the claimant's oral evidence she said that she had made notes of the meeting in a notebook, however the claimant had not disclosed any notebook to the respondent, and it was not in the Bundle.

48. On the basis of the evidence that was available to the Tribunal, the Tribunal found it implausible that the claimant would have been able to remember what happened

during the probationary review meeting in such a detailed way, several weeks after the meeting had taken place.

49. There was no other evidence to substantiate the claimant's allegation that Ms Horsfall's notes were inaccurate, and the Tribunal preferred Ms Horsfall's notes to the claimant's notes, because Ms Horsfall's notes were much more realistic than the claimant's notes. On this basis the Tribunal accepted that Miss Horsfall's notes were written on or around the date of the review meeting, and found that Ms Horsfall did not inaccurately record the meeting.

(vi) Miss Neill said to the claimant on 31 July 2021 that if she was unhappy in her job she should leave, that she felt the claimant had betrayed her, and that the claimant was not complying and she had told her to leave.

50. On 31 July 2021 there was a disagreement between Miss Neill and the claimant in the café. The claimant had been working that morning, and Miss Neill arrived about half an hour early for her shift, which was due to start at 12:30pm. Miss Tomlinson was at work on that day.

51. The claimant said at paragraph 156 of her witness statement that Miss Neill said to her, *"Are you happy working here... because if you're not you can leave if you want to"*. The claimant said at paragraph 157 of her witness statement that Miss Neill later said, *"I told you to leave, you are not complying"*.

52. In Miss Neill's oral evidence she said that she said to the claimant, *"Do you want to work as part of a team... if you don't work to want to work as part of a team, you can always leave"*. Miss Neill said in her witness statement that she asked the claimant if they could have a chat about things, however the claimant refused.

53. Miss Tomlinson said in her witness statement that she could hear Miss Neill and the claimant arguing, and that Miss Neill asked the claimant if they could move their conversation to the back away from the customers. However, the claimant ignored Miss Neill and carried on washing pots.

54. Miss Tomlinson said that Miss Neill later asked the claimant to leave as instructed by the Area Manager, however the claimant said she was not leaving because it was not the end of her shift.

55. The Tribunal found Miss Neill to be a credible witness. Miss Neill no longer works for the respondent, was not a respondent herself, and she had no reason to be untruthful about what happened. Miss Neill's version of events was also corroborated by Miss Tomlinson.

56. The Tribunal found Mr Skelton's evidence to be of minimal value, as Mr Skelton is the claimant's friend, and his evidence was very limited in any event.

57. For the reasons set out at paragraphs 55, the Tribunal preferred Miss Neill's evidence and Miss Tomlinson's evidence to the claimant's evidence, and found that what Miss Neill said was, *"If you don't want to work as part of a team you can leave"* and that Miss Neill asked the claimant to leave, but she refused to leave until the end of her shift.

58. For the reasons set out at paragraph 51 - 57 the Tribunal found that some aspects of what the claimant alleges happened on 31 July 2021 did happen, in that:

- (i) There was a conversation during which Miss Neill said to the claimant that if she didn't want to work as part of the team she could leave; and
- (ii) Miss Neill asked the claimant to leave.

The Tribunal found that the rest of the things the claimant alleged Miss Neill said on 31 July 2021 were not said.

Did any of the things that happened amount to a detriment?

59. The Tribunal found that Miss Neill dismissed what the claimant said about Miss Tomlinson. The Tribunal found that this amounted a detriment, as Miss Neill's response was somewhat abrupt.
60. The Tribunal found that the claimant was told that if she didn't want to work as a part of a team she could leave. However, the Tribunal found that when Miss Neill said this, she was merely pointing out that this was an option if the claimant was unhappy. The Tribunal found that this did not amount to a detriment.
61. The Tribunal found that Miss Neill asked the claimant to leave before the end of her shift. The Tribunal found that this did amount to a detriment, because it suggested that the claimant had done something wrong, and that Miss Neill was unhappy with the claimant.

Were any detriments on the ground that the claimant had made protected disclosures?

62. On the basis of Miss Neill's evidence, the Tribunal found that the reason Miss Neill dismissed what the claimant said about Miss Tomlinson was to spare Miss Tomlinson's feelings, because the claimant had made comments about the claimant's dyslexia and suggested that Miss Tomlinson couldn't read in front of customers, which Miss Neill thought almost made a fool out of Miss Tomlinson. Although the claimant made those comments in good faith, it was insensitive of her to say those things in front of customers, and Miss Neill was trying to spare the claimant from embarrassment by quickly dismissing what the claimant had said and closing down the conversation. There was no evidence that Miss Neill's actions were influenced by the fact that the claimant had made a protected disclosure.
63. The Tribunal found that telling the claimant she could leave if she didn't want to work as part of a team did not amount to a detriment. Furthermore, the Tribunal found that even if it was wrong about this point and the claimant had been subjected to a detriment, a number of witnesses said that the claimant did not work well as part of a team, and there was no evidence that Miss Neill was influenced by the fact that the claimant had made a protected disclosure when she made this comment. On this basis the Tribunal found that Miss Neill made this comment because the claimant was not working effectively as part of the respondent's team, and not because she had made a protected disclosure.
64. On the basis of Miss Neill's evidence and Miss Tomlinson's evidence, which was consistent with each other, the Tribunal found that the claimant was arguing with Miss Neill in front of customers on 31 July 2021, and refused to go to the back of the shop to talk to Miss Neill when Miss Neill asked her to do so, and that she was not influenced by the fact that the claimant had made a protected disclosure.

Dismissal

65. Ms Horsfall dismissed the claimant by email on 31 July 2021. The email, which is at page 124 of the Bundle states, "*Your probation is due to end on 18th November 2021 however following reviews of your work and feedback from your supervisor, regrettably, the results did not meet business expectations and so we have decided to terminate your employment with Costello's Malton effective 6th August.*" The email states that the reason for the claimant's dismissal was the incident that day

which involved improper conduct with a supervising member of staff in front of customers, and the claimant's failure to improve her performance in respect of teamwork and taking instructions from her supervisor.

66. Ms Horsfall and Mrs Costello said in their oral evidence that they had already decided to terminate the claimant's employment after the review meeting on 29 July 2021 because the claimant wasn't good at taking instructions, wasn't doing things she had been asked to do or in the way she had been asked to do them, and wasn't a team player. Ms Horsfall and Mrs Costello said that although they had decided to terminate the claimant's employment, they hadn't decided when to terminate it until 31 July 2021, when the claimant and Miss Neill had the disagreement in the café.
67. Mrs Costello said that it was her decision to terminate the claimant's employment. It was not disputed that Mrs Costello owned the shop and was in regular contact with Ms Horsfall. As the claimant did not dispute that the decision to dismiss her was made by Mrs Costello, the Tribunal found that Mrs Costello was the person who decided to dismiss the claimant.
68. In Miss Tomlinson's oral evidence she said that Miss Neill was a good boss, that the atmosphere was usually calm, and that the staff who worked in the café worked as a team, but the claimant was more independent.
69. The Tribunal found that many of the claimant's Facebook messenger messages to Miss Neill which are at pages 250 - 273 the Bundle were antagonistic (for example, "*I don't understand why you seem so set against sending me it, it a pretty simple request to ask my team leader*" (page 254), "*Haha can't wait for that review.. She might as well write, TROUBLE.. and have done with it*" (page 265), "*Other customers could see I was making milkshakes, and not one of them was bothered, they could clearly see that we were both in the middle of doing the job in hand, they weren't unhappy, you were!*" (page 271)).
70. In contrast, Miss Neill's messages to the claimant tended to be much more friendly and conciliatory (for example, "*I do hope everything has ran smoothly today and gone okay for you xx*" (page 254) "*Hope all went well this afternoon.*" (page 262), "*I can see from both sides, it can be confusing when busy and she likes the writing to be done in black (if possible) Sorry for the crossed wires*" (page 268).
71. The evidence given by Ms Horsfield, Mrs Costello, Miss Neill and Miss Tomlinson about the claimant's conduct was consistent with each other, and on that basis of the evidence given by those witnesses and the Facebook Messenger messages between the claimant and Miss Neill, the Tribunal found that the claimant did not always follow instructions, was not good at working as part of a team, and was argumentative towards Miss Neill.
72. It was Mrs Costello's decision to terminate the claimant's employment, and there was no evidence that Mrs Costello terminated the claimant's employment because she had made a protected disclosure. For the reasons set out at paragraphs 65 - 71 the Tribunal found that the reason for the claimant's dismissal was the claimant's conduct, because she did not work effectively as part of a team, refused to follow instructions, and was involved in an argument with Miss Neill in front of customers on 31 July 2021.

The law

73. The claimant claimed that she was unfairly dismissed and subjected to detriments because she made protected disclosures.
74. Where, as here, an employee who alleges that they were dismissed for an automatically unfair reason does not have the necessary length of service to bring a claim for ordinary unfair dismissal, the burden is on the employee to show the reason for the dismissal (**Smith v Hayle Town Council [1978] IRLR 413**). The claimant must show that the making of the disclosure was the reason or principle reason for the dismissal.
75. It is also open, as the claimant did in this case, for an employee to make a complaint that they were subjected to detriment during employment for making a protected disclosure. A detriment means simply something which puts the employee or worker to a disadvantage and exists where a reasonable worker would or might take the view that the employer's actions were to their detriment or disadvantage.
76. It is for the claimant to show that they made a protected disclosure. Section 43B of the Employment Rights Act 1996 defines a protected disclosure as "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 6 relevant failures set out in section 43B(1)(a) to (f).
77. Firstly, the content of the disclosure must be considered to determine whether it includes information of sufficient factual content and specificity capable of showing any of the matters listed in section 43B(1)(a) to (f). Secondly, the Tribunal must consider why the claimant considered the matter to be in the public interest. Thirdly, the Tribunal must consider whether it was reasonable for the claimant to have that belief. Fourthly, the Tribunal must consider whether the claimant believed that the disclosure tended to show any of the 6 relevant failures in section 43B(1), and finally, the Tribunal must consider whether that belief was reasonable.
78. In a claim for detriment under section 47B, the employee must prove that they have made a protected disclosure, and that there was detrimental treatment. The employer then has the burden of proving the reason for the treatment (section 48(2) of the Employment Relations Act 1996).
79. The test in detriment cases is whether the protected disclosure materially influenced the employer's treatment of the whistleblower (**NHS Manchester v Fecitt [2012] IRLR 64**.) Therefore, where a worker has made a protected disclosure and their employer has subjected them to a detriment, to avoid liability the employer must show that the protected disclosure did not materially influence their detrimental treatment.

Conclusions

80. The Tribunal reached the following conclusions on the issues in the case which were identified in the case management discussion on 8 February 2022.

Protected disclosures

81. The claimant claimed that the following were disclosures which qualified for protection under section 43B of the Employment Rights Act 1996:
 - (i) 9 July 2021 – An exchange of messages between the claimant and Miss Neill on Facebook Messenger in which the claimant said, "*We have an entire box of bakewells, missing ingredients label... I've put them to one side for now, until clarification of what to do with them is*

given.... I thought it was mandatory for pre-packed food. I don't want to be responsible for breaking food standard regulations... the risk of getting this wrong could have dire consequences... it's not just possible dire consequences for the consumer, businesses can be heavily fined for breaking food standard regulations, and I know pre-packed food has to be labelled... Natasha's law".

- (ii) 12 July 2021 – An exchange of emails between the claimant and Mrs Costello in which the claimant said, *"I am not a food standards expert, nor do I understand the full scope of law surrounding businesses, the loopholes and grey areas are a minefield at times, and therefore would appreciate it if you could clear up the confusion I have as to whether your cakes/tarts etc, that are in packaging, can be legally sold without an ingredient label attached... It was regarding the Bakewell tarts, which do normally have an ingredient label, hence me questioning it when one box was missing the usual label... My concern was that when I noticed the error and raised my concern, I was told to break laws... I felt I needed to raise it with you, because the consequences could have been very serious."*

82. The Tribunal found that the claimant conveyed information of factual content in both of these exchanges, and that both exchanges included disclosures which qualified for protection.
83. The Tribunal found that both disclosures were made in the public interest, as it is clearly in the public interest for food items that are sold to members of the public to be correctly labelled, and that it was reasonable for the claimant to believe the disclosures were in the public interest.
84. The Tribunal was satisfied that the claimant had a reasonable belief that the respondent had failed to comply with a legal obligation, and/or that the health and safety of an individual was likely to be endangered. The respondent did not dispute that the Tarts were legally required to have ingredients labels on them, and the Tribunal found that it was reasonable for the claimant to believe that members of the public who have severe allergies might be exposed to a health and safety risk if the Tarts were not labelled.
85. For the reasons set out at paragraphs 82 - 84 the Tribunal found that the claimant made protected disclosures on 9 July 2021 and 12 July 2021.

Detriments

86. The Tribunal found that the things that the claimant alleged happened which are set out at paragraph 17 (i), (ii), (iv) and (v) of the case management order made on 8 February 2022 did not happen.
87. The Tribunal found that the thing that the claimant alleged happened which is set out at paragraph 17 (iii) of the case management order (Miss Neill dismissing what the claimant said about a colleague needing help because of her dyslexia) did happen.
88. The Tribunal found that certain elements of what the claimant alleged happened which are set out at paragraph 17 (vi) of the case management order (Miss Neill saying to the claimant that if she was unhappy in her job she should leave, that she felt the claimant had betrayed her and that the claimant was not complying she had told her to leave) did happen, insofar as Miss Neill said that if the claimant

didn't want to work as part of a team she could leave, and Miss Neill asked the claimant to leave. The Tribunal found that other things that are referred to at paragraph 17 (vi) of the case management order did not happen.

89. The Tribunal found that Miss Neill dismissing what the claimant said about Miss Tomlinson was a detriment, and that Miss Neill asking the claimant to leave was a detriment. The claimant was not subjected to any other detriments. However, the Tribunal found that those detriments did not happen because the claimant had made a protected disclosure, and that Miss Neill was not materially influenced by the fact that the claimant had made protected disclosures when she did the things that amounted to detriments.

90. For the reasons set out at paragraphs 86 - 89 the claimant's detriment claim failed.

Dismissal

91. For the reasons set out at paragraphs 65 - 72 the Tribunal found that the reason for the claimant's dismissal was the claimant's conduct, and not the fact that she had made protected disclosures. Accordingly, the claimant's automatic unfair dismissal claim failed.

Emma Tegerdine

Employment Judge Tegerdine

9 December 2022

JUDGMENT & REASONS SENT TO
THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

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