EMPLOYMENT TRIBUNALS

Claimant: Mr M Thrift

Respondent: Belleville Brewing Limited

Heard at: London South by CVP **On:** 26 and 27 January 2023

Before: Employment Judge Truscott KC (sitting with panel members) Mr S Khan and Mr J Hutchings

Representation:

For the claimant: In person

For the respondent: Mr A Thomas director

JUDGMENT

Unanimous Decision

1. The claim of unfair dismissal for the making of a protected disclosure contrary to section103A of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The claim for unpaid expenses was not established and is dismissed.

REASONS

Claims, appearances and documents

(1) This was a claim for 'automatic' unfair dismissal under section 103A ERA and a breach of contract claim relating to £151.15 of unpaid expenses.
(2) The claimant represented himself and the respondent was represented by Mr Thomas, a director.
(3) The Tribunal had a bundle running to 91 pages. The bundle contained agreed transcripts of covertly recorded telephone conversations and the Covid 19 Regulations. Added to the bundle during the hearing was a without prejudice letter dated 9 December 2020 which was admitted with the consent of the parties.

(4) The Tribunal heard evidence from the claimant and Mr Thomas. Notwithstanding the clear terms of the Order of the Tribunal at the case management hearing on 22 June 2022, neither party had prepared a witness statement. The Tribunal provided additional time for these to be prepared and allowed a latitude to augment them with oral evidence.
(5) Both parties provided closing written submissions, supplemented orally.

Relevant findings of fact

1. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

2. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant to an issue in the case.

3. The claimant was employed as the manager of the Taproom which is a public house in south London. He commenced employment on 12 August 2020. He had a good record at work up until 27 November. The ET3 states "This he did effectively and without issue…". During this period, he had to adapt the taproom business to changes in Covid 19 guidelines including the introduction and enforcement of the 'rule of six', the provision of PPE for Taproom staff, conceiving and implementing an 'order from your phone' system to limit traffic at the taproom internal bar to one customer at a time.

4. The claimant and Mr Thomas had a telephone conversation on 24 November which was not recorded by the claimant. During that conversation, Mr Thomas expressed the view that he was opening the bar come what may on 2 December when new regulations were expected to apply.

5. The claimant spoke to Mr Thomas on 27 November and recorded the calls as he was concerned that Mr Thomas would not adhere to the new guidelines. The transcripts of the calls [34-40] were accepted as accurate. The claimant said that they would not be able to open in a new Tier 3 scenario, and might find it challenging to open in a new tier 2 scenario. He said that under the current operational paradigm, they would be in breach of Covid regulations were they to open from 2 December. The discussion moved to what would be required to comply with the guidelines. The claimant's position was that in order to open, the Taproom could only serve alcohol to a customer if it was accompanying a substantial meal. He considered that the Taproom was not set up to offer this at the time. Mr Thomas stated that he did not think that alcohol could only be served if accompanied by a meal, but that food just needs to be available. The claimant did not agree and said that the bar would have to pivot to full table service, that they had, for all intents and purposes, to function as something of a restaurant that also served beer. Mr Thomas thought otherwise and the discussion turned to whether the claimant wanted to work with the respondent. Mr Thomas took it that he did not.

6. The claimant was placed on furlough on 27 November 2020 when it was said that a decision would be made about his employment on 7 December [70].

7. On November 28, the respondent advertised to hire new taproom staff on Facebook [74].

8. The Taproom opened on 2 December and operated in compliance with the regulations in force at the time by ordering take away meals from a premises nearby.

9. In his letter dated 9 December the claimant said: **"**Your proposal to open without the proper service of a required substantial meal to all customers, without table service, was in breach of the law and posed a risk not only to the health and safety of myself, but also potentially to staff and customers."

10. He was dismissed on 15 December 2020 [73]. The respondent said that he was dismissed because he showed a "worrying lack of leadership and management" and refused to come in to work.

11. The claimant seeks reimbursement for the purchase of third-party alcohol, as well as the costs of transporting the boxes of alcohol by Uber to the Taproom. These expenses total £151.15. This occurred, on both occasions, just before 10am on Saturday 24 October and 31 October [75-76].

Law

Protected Disclosure claims

12. Under S.103A ERA, an employee shall be regarded 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.

13. A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure).

14. S.43B ERA says:

Disclosures qualifying for protection:

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.

15. Section 43B ERA requires consideration of whether the claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed above. The test is twofold: the subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed. The objective element is that that belief must be reasonable. **Chestertons Global Ltd v. Nurmohammed** [2018] ICR 731 CA and **Babula v. Waltham Forest College** [2007] ICR 1026 CA.

16. In relation to section 103A ERA, the burden of proof in relation to dismissal was addressed in **Kuzel v. Roche Products Ltd** [2008] ICR 799 CA:

> "57…when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
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> 58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
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> 59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
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> 60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

17. The Act provides a very broad definition of what amounts to a disclosure and 'any disclosure of information' will qualify (ERA 1996 section 43B(1)). A disclosure takes place even where an individual is provided with information that is not actually new to them.

18. There must still be the disclosure of information as such. As was pointed out in **Cavendish Munro Professional Risks Management Ltd v. Geduld** [2010] ICR 325 EAT it is not sufficient that the claimant has simply made allegations about the

wrongdoer (especially where the claimed whistleblowing occurs within the claimant's own employment, as part of a dispute with his or her employer). As Slade J put it in that case:

> "… the ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating “information” would be “The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.” Contrasted with that would be a statement that “You are not complying with Health and Safety requirements”. In our view this would be an allegation not information."

19. In **Western Union Payment Services UK Ltd v. Anastasiou** UKEAT/0135/13 (21 February 2014, unreported) Judge Eady, as she then was, following and applying the **Cavendish** distinction between information on the one hand and the making of an allegation or statement of position on the other, commented that 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.' This comment was made in the context of one of two possible qualifications or at least explanations of the basic **Cavendish** principle, namely that although the most obvious form of disclosure will concern primary facts, there can also be cases of mixed primary facts and opinion which on balance still qualify. In **Anasasiou**, the communications relied on by the claimant concerned both the factual state of existing sales figures and an opinion that future targets would not be met; this was held to qualify as a protected disclosure.

20. In **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 CA, one of four alleged protected disclosures was ruled out by the Tribunal under the **Cavendish** approach, as falling into the category of 'allegation'. In the Employment Appeal Tribunal ([2016] IRLR 422) Langstaff J said at [30]:

> "I would caution some care in the application of the principle arising out of *Cavendish Munro*. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between “information” and “allegation” is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point'.'

19. On further appeal to the Court of Appeal, the unsuccessful claimant argued that **Cavendish** did in fact favour a bright line distinction between allegation and information and was wrongly decided, but the court (in a judgment given by Sales LJ) held that such a reading of the case was wrong – what it decided was that whatever is claimed to be a protected disclosure must contain sufficient information to qualify under the ERA 1996 section 43B(1). Agreeing with Langstaff J, the position is that in

effect there is a spectrum to be applied and that, although pure allegation is insufficient (the actual result in **Cavendish**), a disclosure may contain sufficient information even if it also includes allegations. Moreover, the very term 'information' must grammatically be construed within the overall phraseology which continues 'which tends to show …'.

Conclusions and analysis

21. The first consideration is whether or not there has been a disclosure for the purposes of the Act. This is a question of fact for the Tribunal which must take into account the context and background. The question is whether there is sufficient by way of information to satisfy section 43BI. The more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide.

22. It may have been that, after the telephone conversation on 24 November, the claimant had concluded that it was likely that Mr Thomas was planning to ignore the Covid 19 regulations. The Tribunal is satisfied that he would have expressed his position in an angry and unpleasant way. This is corroborated by the narrative in the 9 December letter from the claimant:

> "On November 24th Adrian had called me specifically to say 'I don't care what Boris says next week, we're opening', and when I flagged that we might not be able to open if we were in tier 2 in the way we had operated during the previous iteration of the tier 2 restrictions, Adrian (frankly extremely aggressively) told me he didn't care, it wasn't up to me, and we'd be opening whatever."

23. The anger and unpleasantness from Mr Thomas continued into the calls of the 27 November and may have caused the claimant not to listen to what was being said by Mr Thomas. Having read the transcript of the calls, the Tribunal concluded that no information was provided by the claimant. He held and expressed an opinion about what was initially proposed by Mr Thomas and adhered to it. Whereas, Mr Thomas took on board what he was told by the claimant and modified his proposal to the point that he could operate within the then applicable Covid 19 regulations. The contents of the calls are not set out here but a movement can be seen from Mr Thomas opening regardless to a discussion of what was a substantial meal then whether they should be made available or offered. The claimant made clear at the end of the second call that he was not prepared to break the law but he did not know at that time if the law would be broken by Mr Thomas or even if it was likely.

24. In his letter of 9 December, an extract of which is set out at paragraph 9 hereof, the claimant acknowledges that Mr Thomas was making a proposal. It was his job as manager to ensure adherence to the law as he had done previously. The claimant formed a view as to what would be required to be in compliance with the regulations before they came into effect and adhered to it when he should have tried to manage the situation going forward. The respondent points to a successful opening on 2 December providing takeaway which the claimant could have been part of. This is confirmed by the claimant in his ET1 where he says:

> "… in the week following my disagreement with Adrian Thomas, the change I was fired for suggesting were made…"

25. After the calls, the claimant was placed on furlough and thereafter dismissed. The claimant asserts that he was dismissed principally for making a protected disclosure on 27 November 2020. In his ET1, the claimant says:

> "I was raising both a health and safety and legal violation, and my own health, other staff members' and customers' health was at risk."

26. The Tribunal found that he was dismissed because of a lack of co-operation with management in getting the premises open and operating legally on 2 December. It is likely that the deeply unpleasant and angry manner with which the discussions were conducted by Mr Thomas deflected the claimant from absorbing what was being said by him latterly as a change of position.

27. This case did not turn on the burden of proof provisions, the point here was whether there had been a disclosure of any sort, The Tribunal concluded that there was not. At the highest there was a proposal from which the respondent was moved by discussion with the claimant. There being no disclosure, the other elements did not require to be addressed. Accordingly, the Tribunal dismissed the PID claim although this should not be taken as an endorsement of the behaviour of Mr Thomas.

28. In relation to the expenses claim, the claimant provided receipts for the sums claimed to the Tribunal. He said that Belleville did not have a delivery driver at the time. "Adrian (Thomas) did much of the delivery work, but was always unavailable to do so on a Saturday morning because he had a karate class." This is why he wasn't able to transport the boxes from Majestic, and why the claimant was not able to get the company bankcard from him to make the purchase. The witnesses disputed whether extraordinary non-beer alcohol purchases were done without Mr Thomas' prior knowledge. Purchases from Majestic were always registered under Belleville's account/customer code. It is noted that the ET3 states "no issue in principle" arises with respect to payment. The evidence of Mr Thomas was quite different and he said that the claimant ought to have asked for permission before the purchases were made and did not do so. Whilst the Tribunal was not convinced of the respondent's evidence, it was concerned that the receipts had not been provided during the period of his employment or indeed shortly thereafter. For this latter reason alone, the Tribunal decided that the claim was not established on a balance of probabilities.

EMPLOYMENT JUDGE TRUSCOTT KC
Date: 27 February 2023