EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111372/2021

Held at Inverness on 13 & 14 February and 18 & 19 April 2023 and 5 June 2023

Employment Judge J M Hendry
Members A Sillars
J McCaig

Ms V Smith	**Claimant** **In Person**
Cocoa Mountain Ltd	**Respondent** **Represented by** **Mr J Findlay,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim for unfair dismissal was not well founded and is dismissed; the claims for accrued but unpaid wages and a failure to provide wage statements are also dismissed.

REASONS

E.T. Z4 (WR)

1. On 14 September 2021 the claimant lodged an Employment Tribunal application. She made claims of unfair dismissal and also for "other payments". The claimant did not have two years qualifying service.

2. The respondents opposed the claims. They indicated that the claimant had started work on 3 July 2019 and that her employment had been terminated on 28 April 2021 because of a breakdown in the relationship between her and the two Directors of the company.

3. The case proceeded to a case management hearing. At that point the respondent company was represented by solicitors. A hearing took place on 3 December 2022 before Judge Hosie who pointed out that the claimant did not have sufficient service to bring a "standard" or ''ordinary'' unfair dismissal claim. The claimant had made reference to health and safety issues in her ET1 being raised by her. It was noted that her complaint related to a claim for ''automatic'' unfair dismissal for a "health and safety reason" in terms of section 100(1)(c) of the Employment Right Act ("the Act''), a claim for unlawful deduction of wages and a failure to provide a written pay statements. The claimant was asked to provide better and further particulars setting out the protected interest disclosures (''PIDs'') on which she relied as this was not apparent from the ET1. In response to the request for better and further particulars the claimant provided the Tribunal with a copy of her grievance letter dated 15 April 2021 and the formal stage 1 grievance form which she had submitted to the respondents. The latter document being in very similar terms to the first. Her position was that these documents constituted the ''PIDs'' on which she relied.

4. The respondents also responded. Their position was that whilst the claimant had provided some additional information she had not provided sufficient information to fully engage with the Tribunal's Order. They suggested she had not adequately set out the protected interest disclosures on which she intend to rely.

5. In March 2022 the agents acting for the respondent resigned. A further telephone preliminary hearing took place before Judge Hosie on 26 April 2023 at which the claimant confirmed that the disclosures were contained in her letter of 15 April 2021 and in her contemporaneous formal grievance. The Judge took the view that there was sufficient material to provide the respondents with fair notice of her claims. He indicated that the case should proceed to a full hearing.

6. In retrospect this gave the Employment Tribunal hearing the case some difficulties as both parties were unrepresented and the PIDs had not been clearly identified. The consequence was that both parties ended up giving evidence about wide ranging matters around the history and background to the grievance and the employment relationship more generally. Throughout the hearing parties tried to expand the evidence to cover almost every twist and turn in their relationship. Indeed, on the final day of the hearing the claimant, not having given evidence about this particular matter or cross-examined Mr Findlay about it, sought to raise issues about health and safety matters involving the respondent's chocolate making factory in Perth. The Tribunal did not allow this line to be pursued. It did not appear relevant to the alleged PIDs that were said to have been made in the grievance and which were founded upon. In addition, the respondents had not been given fair notice of the matter and the case was in it's final states. To allow the matter would have meant delay and the recall of witnesses.

Evidence

7. The Tribunal heard evidence from the claimant on her own behalf. Unfortunately, both parties lodged bundles of documents. There were difficulties particularly with the numbering of the respondent's documents. The numbering of the respondent's productions was particularly problematical and accordingly we will as far as possible refer to the numbered productions in the claimant's bundle. The claimant was allowed to lodge further documents including photographs in the course of the hearing.

8. The Tribunal heard evidence from the claimant and from Jamie Findlay and Paul Madden both Directors of Cocoa Mountain.

Facts

Background

9. The respondents are a relatively small business having two outlets for their chocolate products. The original location for the business was in Balnakeil in the northern Highlands of Scotland and the second a café/shop in Dornoch in eastern Sutherland. The third, a later addition was a manufacturing facility in Perth.

10. The geography and locations causes the respondents difficulties. The business at Balnakeil is seasonal. Prior to the Covid pandemic the respondent relied on foreign seasonal workers to staff the business there. In Dornoch they had a more stable local workforce of two or three people.

11. The respondents have no HR Manager. Staff matters are dealt with by the two Directors who did not always see eye to eye. They were both particularly busy during the period of the claimant's employment during which they opened up a factory in Perth. The whole business was badly hit by the Covid Pandemic.

12. The claimant lives in Dornoch. She has had a varied career. She regards herself as an entrepreneur and somebody experienced in the world of business. She applied for and began working as a part-time waitress in the Dornoch shop in 2019. She met Mr Madden some short time later in 2019. He was impressed with her and thought that her talents and experience were wasted as a waitress and that she could be used to assist the business grow particularly as she appeared to have a flair for marketing.

13. The claimant was given a contract of employment. In terms of the contract of employment she did not have any set daily or weekly hours and was required

to work an average of 40 hours per week on an annualised basis starting from December 30, 2020.

14. The claimant was asked to be Manager at the Balnakeil location. It was expected that this would close at the end of October for the winter. When the claimant stayed in Balnakeil she was given the use of a house belonging to Mr Madden to stay in. The other seasonal staff were given another property there.

15. Financial aspects of the business including payment of staff are dealt with by Mr Findlay.

16. The premises in Balnakeil opened for the season early in 2020 just prior to lockdown being announced. It then had to close.

17. The claimant was furloughed.

18. The claimant was often sent payslips late and found the payments recorded difficult to understand. Payslips were eventually sent to her covering the period of employment. The claimant remained unsure as to how the furlough payments were being calculated. She wrote to Mr Findlay on 24 September 2020 (C1):

> "*Please could you provide me with all my backdated payslips please, which includes the period of furlough. I have asked many times without success. I have been promised that these would be sent. However I confirm with you now that I've not received any.*
>
> *The last payslip I have was dated 31/01/2020. This payslip had the word DRAFT printed in large letters……Just so you know…..last month I had bank charges due to returned direct debits on late mortgage payment penalties due to late payment of wages.*"

19. At the end of the season in about October 2020 issues arose in relation to the accommodation provided to seasonal workers in Balnakeil by the company.

The respondent's Directors expected that the claimant, as the Manager there, would ensure that the accommodation was left clean and tidy. Although the claimant had taken steps to clean and tidy her own accommodation she had not thoroughly checked the accommodation vacated by the seasonal workers in the lead up to them leaving. It was found that this accommodation had not been properly cleaned for some time. The respondents blamed the claimant. The claimant did not accept that this was part of her duties nor that she had been instructed to ensure that the accommodation had been cleaned. She e-mailed Mr Madden on 22 October:

> "*As you asked me to look over the property after the girls left I last saw the girls in the flat after work when the flat was in poor light and could not be inspected. They left around 6:am the early next day. The flat at that time appeared to be clean and tidy.*
> *However in the daylight it appears that the property has not been cleaned (on a regular basis).*"

20. The claimant had also not fully shut down the business premises in Balnakeil. At this point it was unclear as to whether or not the premises would shut at the end of October as normal. Mr Findlay wanted to keep the option of keeping the premises open for a period in the hope that there would be additional visitors to the area into the winter to justify that. In the event the premises were not re-opened until the following year.

21. On 29 October (C3) the claimant wrote to Mr Madden about the closing of the premises for the winter re-iterating that she wanted to see all her wage slips. She also wrote; ''What's up?''

22. Mr Madden wrote in response:

> "*We have empty shelves that need not be empty. It was not agreed that this would be adequate it was agreed that we would keep in touch to monitor the last week and as of yesterday I was conscious that we had not heard from you. Calling today leaves little room to resolve the situation. That's what's up.*"

23. There was some lingering resentment on the part of Mr Madden and Mr Findlay because of the way in which this matter had been handled by the claimant.

24. At the respondent's suggestion the claimant took some leave in early November. By this pont the two Directors were not happy at the way in which the claimant had managed the Balnakeil premises. In particular, Mr Madden had been asked by the claimant to dismiss an employee. When he later discussed this with other staff and having received a letter from the employee in question he felt aggrieved that he had not known the full background before dismissing the girl. She alleged that the claimant had taken against her because she had corrected the claimant in front of a customer in relation to a product which contained dairy product.

25. The respondent's Directors decided that they would keep the claimant busy after the closure of the premises developing the business. The claimant agreed that she would start contacting current and past customers and also look for new customers. It was agreed that she would set up a database with customers details to allow speedy ordering. The reason for behind this was that the business had now opened a manufacturing facility in Perth and the respondent was confident that it could meet any expected demand for their products. A difficulty in supplying sufficient quantity of chocolate products to customers had previously been an issue.

26. At the beginning of December Mr Madden had a telephone call from a graphic designer that the company had used in the past. The claimant in setting up the database had been asked to prepare a form with details of customers/potential customers including their contact details from information to allow this to be uploaded to a new area of the company's website which would allow the customers to order or reorder through that platform. The designer told Mr Madden that he had been asked by the claimant to design this form. He was concerned at the cost. Mr Madden confirmed that he did not want the designer to design this form. He was angry with the claimant as

she had not asked his permission to instruct this work and he believed that it was an unnecessary expense. He wrote to the claimant on 3 December (C8):

> "*This is a formal warning about your conduct at work which could not be closer to gross misconduct and dismissal.*
> *You are not authorised to commission expense (expenses of designers) to help with a form. You do not have any permission to spend any company money without express permission. You certainly do not have permission to do this…..*
> *I also want to make you aware that there are other issues I feel you must address, if you do not wish your ex-colleagues in Dornoch to be proved right about your abilities or lack of them:*
> *You need to listen and follow our direction. You need to get the basics in place before thinking that you are some kind of super person. If you cannot master the detail then you will not get results.*
> *Your attitude troubles me. I heard glee in your voice when relaying negative comments from Michael Baddon about previous activity with Lindsays. This is not teamwork.*
> *If I hear you say something along the lines of "I am here to help you…." Again, you will no longer have any future with us. You are employed by us, are a member of our organisation, and you need to adjust your perspective PDQ. You are not Mother Teresa, we do not need your generous help, thanks. You work for us and need to change your language drastically, from "I" to "us" and consider yourself as part of a team rather than somewhere floating above.*
> *I took a chance on hiring you, do not let me down again……"*

27. In response the claimant e-mailed Mr Madden on 12 December (C9). She asked for a copy of the company's handbook. She appealed the disciplinary penalty. She wrote:

> "*I feel that given there was a variant to my contract from shop manager to new business development. Allowances could have been made. Nothing was set out in writing and no remit of the new role other than I had a mix of work and furlough up until I returned to Balnakeil. A job description would have provided direction and limitations. You indicated this would come later. Depending on how things went, I was content with that.*
> *My allowances have been made by myself in the way of your support, which I have no issue with, however I expect the same in return…..I feel that the formal warning about my conduct at work is too harsh and unfair. I've not spent any company money, nor would I, without your expressed permission, and I want to know that I am clear about this. I have sought your permission and cc'd you into emails……I strongly disagree when you comment that you heard "glee in my voice" when providing you with negative feedback. Having unhappy customers is <u>not</u> something that fills me with joy and I had absolutely <u>no</u> delight in telling you. I'm sorry that you felt this.*"

28. Mr Findlay and Mr Madden reviewed the situation after receiving the email of 3 December. They took the view that the claimant had "gone into a huff". They had had no contact with her for a period in excess of a week following these events. Mr Findlay was suspicious as to what the claimant was actually doing and believed she was not working the hours she claimed. Mr Madden also insisted that the claimant should be asked about what she had been doing in the first two weeks of December. The claimant responded on 22 December (C10) with a spreadsheet showing that she was working a minimum of eight hours a day. There was no detail in the spreadsheet of work done. The claimant was pressed for further details. Mr Findlay e-mailed the claimant on 24 December (C12): "*Your original submission was wholly inadequate and we need a detailed breakdown of the work you have done for the time you have submitted on your timesheet.*"

29. The claimant provided more detailed information on 24 December (C11). That spreadsheet recorded that on 8 December she had read some reports for some eight hours and carried out some research. On 9 December it recorded that the claimant had read reports, reviewed spreadsheets and dealt with a problem with telephone storage and on 10 December reviewed contact lists, wholesale lists and market reports. Mr Findlay was aware of the reports that she had been given to read and couldn't understand why so much time had been spent on this. When Mr Madden became aware of these matters he was annoyed as he believed that the reports should have been read in November prior to the claimant starting this exercise.

30. As a result of these issues the respondent did not pay the claimant for 82 hours claimed. Her full hours were latterly paid in her last pay.

31. The claimant's furlough pay was based on historic pay to 22 March 2020. The claimant queried this. She could not understand why it wasn't based on her agreed manager's pay (C14, 15 and 16). The respondent's reiterated their

position on several occasions to her explaining that they had followed Government guidance.

32. The respondents believed that the claimant did not enjoy a good relationship with the two other staff members who worked in Dornoch. Nevertheless, they instructed the claimant to help reopen the Dornoch shop/café. The reason for this was that the claimant was involved in putting in place Covid compliant practices at Balnakeil. The respondent needed to do the same at Dornoch and the claimant had the relevant experience. This resulted in two "managers", the claimant and another staff member Caroline being asked to work in Dornoch. Caroline had been an employee for some time. The respondent arranged that she would work part of the week and the claimant the rest of the week and there to be an overlap of one day.

33. The shop in Dornoch had been closed since lockdown although the claimant had periodically been in the premises for a number of purposes including to collect cleaning materials for use in Balnakeil.

34. On 14 April the claimant was expected to attend at the shop and help get it ready for re-opening. She had been asked by Mr Madden to arrange some minor repairs to the concrete ramp at the front of the shop. The claimant went to the shop but left shortly after to go home to make calls to tradespeople. The other staff complained to Mr Madden that the claimant had disappeared and was not helping with the cleaning. The claimant later re-appeared at 3.30pm that day.

35. At or about this time the respondents were advertising for a packing operative for the factory in Perth. They were surprised at the large number of applications. This was the subject of gossip within the company and the claimant was told there were 120 or so applicants for her position as Manager in Balnakeil. This was not the case. She was annoyed as she though she would be returning there in due course.

36. The claimant had a telephone call with Mr Madden on 14 April. She had earlier been in contact with a local builder and she suggested to Mr Madden that drawings should be prepared up to allow the replacement of the concrete ramp with a more suitable ramp including a railing. Mr Madden was annoyed at the increase in the scope of the proposed works. The builder the claimant had contacted was related to the landlord of the shop. Mr Madden believed that the suggested upgrading of the ramp was unnecessary and would firstly make the work profitable for the builder and secondly to improve the value of the property for his sister who owned it. Mr Madden was angry and he instructed the claimant to use a handyman that the company used to do the repairs. This was done and some minor restoration work to the step and ramp carried out.

37. The claimant was annoyed at the way in which she had been treated. She felt that she was doing her best to get the ramp repaired. She thought the proposed works were inadequate.

38. The claimant sent a letter to Mr Madden on 15 April (C19):

> "*Dear Paul,*
>
> *I am writing to seek your help in resolving a problem that I am experiencing at work. It is a problem that is causing me some concern and that I have been unable to solve without bringing to your attention in a letter. I hope in doing so we can deal with the issue quickly and amicably.*
>
> *I would like to receive outstanding wage slips for the period Christmas 2020-21 ie for December 2020, January 2021, February 2021, March 2021.*
>
> *Could you also provide with a to letter explaining how the furlough arrangements is, and how it is calculated.*
>
> *I wish also to raise the issue of non payment of wages for hours worked since leaving Balnakeil. This was a mix of working as instructed to do so, in the shop, working in the factory in Perth, driving to Perth, arranging van hire, loading the van and working from home.*

There was a short fall of wages for December. When I questioned this I was told that you did not believe that I was working at home and that I did not provide satisfactory evidence.

An incident happen on 13th April Dornoch

I was asked to find a local builder to repair the eroded ramp area outside the shop. So in order to carry out the task I had to make the calls from home. Given the previous issue of 'not being believed' I asked if you could just txt me but you you refused my request to seek your permission this way.

The plan was to call tradesmen until as instructed I had two quotations and report to you asap or at the end of the day.

Around lunch time you called and told me I should not calling local businesses or people that had no intention of turning up. As per your instructions I contacted local trademan.

You then said I should not have because you had issues with some of them. You then said that Wednesday was no good and Friday was too late. I did actually make arrangement with tradesman. You said that a tradesman came on Monday.

During the call you were angry and irritated and would not let me explain. I feel interrogated when quizzed about Monday and what was I doing all day. You said it doesn't take all day to call tradesmen.

This is not correct to say that I was working from all day. Yesterday after we spoke I contacted Steven and immediately returned to the shop around 2.30.

An incident happen on 13th April Dornoch

I needed to get in touch with you regarding setting up the shop. Because there is no phone at the shop I came home, a 2 minute walk, to call you and at the same time place the Brakes order that Caroline and I had put together earlier. I would have sought your permission to work from home I regarded it a quick call and necessary call.

Cleaning products were needed to clean the shop and comply HACCP and Covid Guidelines. It was not possible to place an order from the shop as explained, no internet or phone was available at the shop.

You were angry and told me that I should not be working form home. And that I to return to the shop because Caroline and Jaen had a phone and that they should place the order not me.
This is not correct, Caroline does not have a phone. Jaen is not working yesterday and has had issues with her mobile phone.

Caroline said has no recollection of the conversation you had with her regarding dispensers and sanitisers. On my return to the shop 2 more dispensers had just arrived. Dornoch shop already has surplus dispensers in the store.

With out ascertaining the facts you unfairly apportion blame in an angry and disrespectful manner. And I am made to feel untruthful or in some way unreliable. When I tray to talk these over you say that I am difficult.

I was embarrassed to hear from my colleagues that there had been 120 or so applicants for the position of manager at Balnakeil. You will recall on Monday you told us all that Balankeil was not going to open, so I am sure you can understand why I might feel humiliated.

I would welcome the chance to talk this over with you and a convenient time and place.

Yours sincerely

Valerie Smith"

39. Later after sending the letter the claimant completed a Stage One Grievance Form (C21/24) raising the same matters as she had raised in her letter. The headings used by the claimant in her formal grievance form were:

"

- *Outstanding wage slips (December to March 2021);*
- *Requests for letter explaining how furlough is calculated;*
- *Withheld or unpaid wages;*
- *Incoherent instruction/incident 13 April Dornoch;*
- *Manner in which I am dealt with and conflicting information and I am embarrassed in front of my work colleagues.*"

40. The claimant insisted that Mr Madden was not involved in the grievance. It was arranged that meeting would take place at the Dornoch shop on 28 April. Prior to the meeting Mr Madden and Mr Findlay discussed the situation they were in. They felt that the claimant's influence was disruptive. They found her difficult to manage. They were concerned that she was not accepting their authority in the company. They decided to terminate her contract of employment.

41. Mr Madden drafted a termination letter (C33). Mr Findlay hoped that matters might be smoothed over at the meeting, which was socially distanced. However, the claimant persisted with her grievance despite being told that they had already explained how the wages and furlough was calculated and that there were no wages due to her. The claimant adamant that she wanted to discuss the grievance issues and the events on the 28 April. Mr Madden became angry and gave the claimant the dismissal letter. The date was added in pencil by him.

42. The claimant received her outstanding wage slips. In her last payslip (C43) she was paid £1,006 for the 84 hours deducted by the company prior to Christmas.

Witnesses

43. The claimant was a forceful and robust witness. However, we had considerable difficulty accepting some of her crucial evidence and it became clear to us that she had a number of grievances against the two Directors and the way in which the company was run. There were some aspects of her evidence such as her denial that she commissioned the design of what was a straightforward administrative form difficult to accept. Importantly however, she indicated to the Tribunal that her grievance letter did not contain details other various health and safety concerns she actually had because she had been scared to articulate them. The plain fact is that even if we accepted this it shows that health and safety concerns were not put plainly to the respondents nor were health and safety concerns in their minds when they dismissed her. Overall, the claimant was mostly a reliable historian in respect to dates and the sequence of events but as noted above overall we had some considerable reservations about her credibility.

44. We found Mr Findlay at times a difficult witness to follow and one who often did not focus on the questions being asked of him. We understand that he was unrepresented and no doubt nervous. He was generally a credible

witness but not a particularly reliable one. Mr Madden gave his evidence more clearly and while we have concerns about the intemperate nature of some of his correspondence particularly the letter dated 3 December he was in the round generally a credible and reliable witness.

Submissions

45. Neither party was legally represented. We indicated that we were happy to hear any legal submissions parties wanted to make but that they could take some comfort from the fact that the Tribunal had to make it's decision in accordance with the law or at least the law as it understood it and would not expect detailed legal submissions. In the event parties were content to reiterate their respective positions on the facts alone.

Discussion and Decision

46. The starting point for the unfair dismissal claim is Section 103A of the Employment Rights Act 1996:

> ***''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''***

47. The idea of an employer being influenced by the protected disclosure was definitively developed in the Court of Appeal case ***Fecitt v NHS Manchester*** [2012] IRLR 64 *per* Lord Justice Elias:

> ''*In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle- blower.''* (Emphases added)

48. There is also helpful guidance in the case of ***Kuzel v Roche Products Ltd*** [2008] IRLR 530, CA *per* Lord Justice Mummery:

''56… *There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.*

57. *I agree that 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.*

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.*

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.. ''

Not a 'but for' test

49. In terms of causation, the correct causative test is not a 'but for' test or a test of whether the treatment was "related to'' the protected disclosure, but whether the fact that the protected disclosure has been made caused or influenced the employer to act in way complained of. That requires an analysis of the mental processes (conscious or subconscious) which caused the employer to act (***London Borough of Harrow v Knight*** [2003] IRLR 140, EAT. See in particular paragraph 16 of that judgment)

''It is thus necessary in a claim under s.47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough (see Khan). In our view, the phrase 'related to' imports a different and much looser test than that required by the statute: it merely connotes some connection (not even necessarily causative) between the act done and the disclosure. On any view, the failure of Mr Redmond to answer Mr Knight's letters was related to the protected disclosure: after all, the disclosure was the fundamental subject-matter of the letters and they would never have been written but for the fact that the disclosure had been made. Likewise any failure on the part of the council to look after Mr Knight related to the disclosure: the awkward situation created by the disclosure was the very reason why he needed help. But that does not answer the question whether that formed part of the motivation (conscious or unconscious) of Mr Redmond or Mr Esom. Mr Redmond, for example, might have failed to answer the letters because he was annoyed by the original report and regarded whistleblowers as disloyal and a nuisance: that would indeed be a deliberate omission 'on the ground that' he had made the

protected disclosure. But he might in principle equally have failed to do so for one of a number of other reasons.''

50. An employee wanting to rely on the whistleblowing protection before a tribunal bears the burden of proof on establishing the qualifying disclosure and that it was made to the employer (or other prescribed organisation. The case of ***Blackbay Ventures Ltd. t/as Chemitree v Gahir*** UKEAT/0449&50/12/JOJ provides guidance as to the approach that the Tribunal should take when considering protected interest disclosures. In particular each disclosure must be identified with reference to date and content and the alleged failure to comply with a legal obligation must be identified. Although the claimant said that she was relying on the letter and grievance (C19 and 20) we also considered if there was any surrounding circumstances that put the alleged ''disclosures'' in context or added to them.

51. The first related to the wage sips and was connected to the Furlough pay. Explanations had been given to the clamant in the past which she didn't not accept. She was unable to demonstrate what she should have been paid. We accepted Mr Findlay's evidence on these matters. That is not the end of the matter in that the three issues were possibly capable of fulfilling at least some of the elements required for PIDSs They were not presented as protected disclosures or with that intended effect. The claimant did not say that there was a legal requirement to provide accurate payslips or that the respondents were involved in some wrongdoing. Even if we left this to one side it seemed to us that this was a situation where the claimant had a longstanding grievance over these matters and that it could not be argued that there was the necessary public interest element. These matters had been canvassed in the past between parties. In essence there was a dispute over the calculation of furlough payments. The respondent's Directors were confident of their position and neither they nor the claimant believed these matters were particularly significant at the time as the position seemed to be accepted by the claimant.

52. We concluded that they did not form part of the reason for dismissal rather that was caused by a breakdown in the parties' relationship and the mistrust that had grown up between them. The claimant did not in her evidence seek to rely on the outstanding wage slips as being protected disclosures. They were in fact supplied at a later point. She also did not seek to rely on the withheld wages matter, relating to the period before Christmas, no doubt because the outstanding wages were paid in full on termination.

53. After considering the evidence as a whole we concluded that the significant issues turned on the ''incident'' of the 13 April that the claimant describes in her letter and grievance relating to the ramp and cleaning materials. Once more these issues are not framed as protected disclosures but we examined them closely. For example, the issue over the ramp is under a complaint headed 'Incoherent instruction'. We were conscious that the claimant might not have used the words protected disclosure but it was the substance of what was said that was important. The claimant did not go on, however, in that passage, or elsewhere, to state that the ramp/step was dangerous or that a railing would be required or that there was some breach of the law in not instructing more comprehensive repairs. The respondents' position was that the entrance was safe. As a matter of fact we accepted Mr Findlay's evidence that the step and ramp simply suffered from some minor erosion and that the 'set up' of the entrance which did not include a railing had been inspected by the local authority when the necessary approvals were granted when the shop opened a couple of years earlier. There was nothing to indicate some breach of health and safety laws even of the most general kind.

54. We considered that potentially the issues around the cleaning of the shop given the Covid Pandemic could also give rise to a possible basis for a protected disclosure. The claimant stated that ''no petty cash was available so an immediate order needed to be placed with Brakes to clean the shop and

comply with HACCP and Covid guidelines. She does not go on to suggest that there would be an immediate breach of the regulations at that point nor in fact could she. The context is crucial. The shop was not due to open for some weeks so there was no immediate risk to the public. The claimant had no reasonable basis to believe that there was a breach of any obligation or regulation at that point nor does she warn of any future breaches because she understands that the lack of cleaning materials would be rectified before the shop opened. We would observe that she notes that there was a surplus of sanitisers. The evidence that we accepted was that there was in fact some petty cash available to purchase materials although the claimant might not have realised this. The respondents Directors had assumed that there would be some cleaning materials already available in the shop. In short we struggled to accept that there had been any matters raised which amount to protected disclosures under the Employment Rights Act.

55. Even if we had so concluded that we could identify all the necessary elements for a protected disclosure or disclosures in relation to health and safety matters or for non-payment of wages, which we could not, we concluded that the respondent's Directors did not see the letter and grievance as raising any actual breach of obligation of their part. This may, to an extent, have been naivety on their part but their state of mind is crucial. It was apparent that the claimant's dismissal related to earlier matters such as dissatisfaction with the claimant's period as manager in Balnakeil, her actions in instructing a graphic designer, dissatisfaction with her work in the period when she was constructing the database, the events on the 13 April when she was reported by other staff to have gone ''AWOL'' and her repeated re-raising of matters the respondent's Directors had already given an explanation for such as the calculation of the furlough payments and which they thought had been resolved .These matters, we concluded, had eroded the trust between the parties and had led to the dismissal and not any putative protected interest disclosures as suggested by the claimant.

56. In laymen's terms it was clear that both sides had had enough of each other.

Employment Judge: J M Hendry
Date of Judgement: 8 June 2023
Date sent to Parties: 8 June 2023