EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000298/2023

Held in Edinburgh on 24-28 June 2024

Employment Judge Sangster
Tribunal Member Watt
Tribunal Member Lithgow

Ms N Seal	**Claimant** **In Person**
Scotsman Group plc	**Respondent** **Represented by** **Ms J Barnett** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The claimant's complaints of unlawful detriment and automatically unfair dismissal, as a result of making protected disclosures, do not succeed and are dismissed.

- The claimant's complaint of breach of contract does not succeed and is dismissed.

- The respondent made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of £24.00, in respect of the amount unlawfully deducted. The respondent shall be at liberty to deduct from that sum, prior to making payment to the claimant, such amounts of Income Tax and Employee National Insurance Contributions (if any) as it may be required by law to deduct from a payment of earnings of that amount made

to the claimant, and if it does so, duly remits such sums so deducted to HM Revenue and Customs, and provides to the claimant written evidence of the fact and amount of such deductions and of the sums deducted having been remitted to HMRC, payment of the balance to the claimant shall satisfy the requirements of this judgment.

REASONS

Introduction

1. The claimant worked for the respondent as Cinema Manager for just over 6 weeks at the end of 2022/start of 2023. She presented complaints of unlawful detriment and automatically unfair dismissal as a result of making protected disclosures. Complaints of unauthorised deductions from wages and breach of contract were added by amendment.

2. The respondent resists the complaints.

3. The claimant had applied, on 11 December 2023, for strike out of the response and summary judgment and expenses in her favour. That application was refused by the Tribunal on 21 December 2023, for the reasons stated in correspondence from the Tribunal of that date. The claimant requested that the Tribunal vary that order, in correspondence dated 28 December 2023. That request was refused by the Tribunal on 3 January 2024. The claimant renewed her request at a hearing on 16 January 2024. That request was, for the reasons given orally at the time, also refused.

4. A joint bundle of documents, extending to 188 pages, was lodged in advance of the hearing.

5. On the morning of the final hearing, the claimant brought a further bundle of documents, extending to 234 pages. Additional documents were also brought by the claimant on the second and third days of the final hearing (38 further pages). The respondent did not object to the claimant doing so and the claimant was permitted by the Tribunal to refer to the documents during the final hearing.

6. The claimant gave evidence on her own behalf. Witness orders had been issued, at her request, for Nick Kourie and Paul Byrne, but it was agreed at the hearing that these individuals would be called by the respondent.

7. The respondent accordingly led evidence from the following individuals, who are all current employees of the respondent:

   a. Martin Taylor (**MT**), Cinema Operations Manager for the respondent; and
   b. Nick Kourie (**NK**), currently General Operations Manager for the respondent (Scotsman Hotel Manager at the time of the claimant's employment); and
   c. Paul Byrne (**PB**), Cinema Manager, Perth Playhouse.

Issues to be determined

8. Parties lodged an agreed list of issues. Some amendments were discussed and agreed at the commencement of the hearing. The issues to be determined were accordingly as follows:

*Qualifying disclosure - section 43B Employment Rights Act 1996 (**ERA**)*

9. Did the claimant make one or more qualifying disclosures, as defined in section 43B ERA? The claimant says she made disclosures to the respondent as follows:

   a. On 29 December 2022, in response to MT stating that the cinema was to close early on New Years Eve, and on Mondays and Tuesdays throughout January, the claimant expressed concern about this and its impact on the respondent's ability in its contractual obligations in respect of staff hours;

   b. On 4 January 2023, the claimant expressed concern to MT about shifts that she had scheduled being changed and cut while she was absent due to illness, without informing her, and about senior management's expectations in respect of appropriate workloads and staffing levels – as well as the lack of clear instructions and expectations about roles and responsibilities. In particular the claimant noted that the only procedural

manuals available were highly inaccurate and significantly out of date, and did not cover all of the relevant and necessary procedures;

c. On 9 January 2023, she stated orally to her Line Manager, MT, that requests from management for staff to reduce their hours meant inadequate staffing, unreasonable and unrealistic work expectations and inadequate breaks;

d. In writing, in an end of day report, submitted by the claimant on 11 January 2023; and

e. On 12 January 2023, when she reiterated her concerns in a discussion with MT.

10. In relation to each asserted disclosure, the Tribunal will decide:

a. Did the claimant disclose information?

b. Did the claimant believe the disclosure of information was made in the public interest?

c. Was that belief reasonable?

d. Did the claimant believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered, that a person had failed, was failing or was likely to fail to comply with any legal obligation or that information tending to show a relevant failure has been, or is likely to be, deliberately concealed?

e. Was that belief reasonable?

11. If the claimant made a qualifying disclosure, was it also a protected disclosure (s43C ERA)?

Detriment – s47B ERA

12. Did the claimant suffer a detriment on the ground that she has made a protected disclosure pursuant to section 47B ERA? The detriments relied upon by the claimant are as follows:

a. Her treatment by MT & the G1 / Scotsman Group in reaction to her protected disclosures on 9 & 11 January 2023. The claimant clarified at the hearing that this related to her exclusion from the rota system and MT failing to respond to her texts in relation to this;

b. Her exclusion from a key system required to do her job. The claimant clarified at the hearing that this related solely to the respondent's rotas;

c. The decision that she did not pass her probation period on 12 January 2023 with no given reason;

d. The letter confirming the dismissal on the 17 January 2023 the on the basis of unfounded criticisms of her work performance;

e. The dismissal (pled as a detriment);

f. The manner (as opposed to the fact of) her dismissal on the 12 January 2023 and in particular:

   i. The absence of any recognised procedure; and
   ii. That she was summoned to the dismissal meeting under false pretences/without being informed of the purpose of the meeting;

g. The misleading content in the dismissal letter, including the false allegations that there was a concern over lack of focus and energy on fundamental tasks, and failing to adhere to minimum staffing levels; and

h. The failure to follow an appeal procedure in line with the Acas Code of Practice on Disciplinary and Grievance Procedure.

Unfair dismissal – s103A ERA

13. Was the sole or principal reason for the claimant's dismissal the fact the claimant made a protected disclosure(s)?

Remedy

14. If the claim succeeds, what compensation should be awarded to the claimant?

Unauthorised Deduction of Wages

15. Did the respondent fail to pay the wages she was contractually entitled to in respect of the hours which she worked for the respondent? The claimant alleges that she is contractually owed the sum of £24, which she was underpaid (£12 for two hours worked).

Breach of Contract

16. Did the respondent breach the claimant's contract in respect of her pension entitlement?

Findings in Fact

17. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.

18. The respondent is a retail, hospitality and leisure business with around 100 sites and 2,000 employees.

19. The claimant was employed by the respondent as Cinema Manager for the Scotsman Picturehouse, a single screen cinema with 48 seats and a small bar area adjacent to it (the **Cinema**). The Cinema is situated within the Scotsman Hotel, in Edinburgh (the **Hotel**). The claimant's employment with the respondent commenced on 28 November 2022. At the time of the claimant's employment there were 3 other employees who worked in the Cinema. MT

was the claimant's line manager. The respondent has two other cinemas – in Perth and Glasgow.

20. The claimant signed a statement of terms and conditions of employment, provided to her by the respondent, on 30 November 2022 (the **Statement of Terms**). This confirmed that she was engaged to work 30 hours per week and would be paid £12 per hour. The claimant was disappointed at the number of hours stated in the Statement of Terms: she wanted to work 45 hours per week. She had requested this, during negotiations with the respondent, but the most they would agree to include in the Statement of Terms was 30 hours per week. It was however noted, in discussion, that she may be able to rota herself on for shifts in excess of that, where required.

21. The Statement of Terms stated that the first 6 months of the claimant's employment was a probationary period, during which her performance and conduct would be monitored and reviewed. It also stated that the claimant would be auto-enrolled in the respondent's workplace pension scheme, following assessment and if she met the criteria set by Government, and that further information would be sent to her separately in relation to that.

22. The claimant's first shift was on 2 December 2022. This mainly consisted of an induction to the role. Her first operational shift was on 5 December 2022. Throughout December 2022, all staff working at the Cinema, including the claimant, worked well in excess of their contracted hours.

23. MT held a 1-2-1 meeting with the claimant on 14 December 2022. In that meeting he noted the following:

a. That the Cinema would be closed on Mondays and Tuesdays throughout January 2023;
b. That programming for January 2023 required to be done ASAP, so it could be submitted to marketing and tickets could be placed on sale;
c. That rotas should be completed 2 weeks in advance;

d. 3 people on shift was too many, unless there is a cross over or event being hosted;

e. Help could be sought from the Hotel's manager, if required, in advance; and

f. That the claimant required to complete her online induction modules as soon as possible, particularly the licensing module.

24. MT sent the claimant the minutes of their meeting immediately following the meeting.

25. On 21 December 2022, the Cinema was privately hired by an individual looking to propose to his partner. It had been arranged that a film would be shown from 11:00. The claimant was scheduled to work from 10:00 that day, so she could open the Cinema and attend to the customers when they arrived. She did not however do so. The customers arrived before 11:00 and the Cinema was locked. They made enquiries in the Hotel, explaining that they had a private booking. NK opened the Cinema for them, and he contacted MT who was able to remotely play the film from Perth, where he was located that day. The claimant arrived at 11.45, stating that she had slept in.

26. A further 1-2-1 meeting was held between the claimant and MT on 29 December 2022. At this meeting MT reiterated each of the points he had made on 14 December 2022, as (where applicable) no progress had been made by the claimant on the actions noted. He noted that he was *'not happy about delay with Jan Whats On POS. This is not to happen again, ensure draft programming for February is complete by 15 Jan. This includes Valentines Day films'.* The claimant had known, since 14 December 2022, that the respondent intended to close the Cinema on Mondays and Tuesdays in January 2023. She did not raise concerns about this, or the impact of that planned closure on the respondent's ability to meet its contractual obligations in respect of staff hours, at the meeting.

27. The claimant had not completed any of the online training modules at the time of her meeting with MT that day. She completed 5 of these, including licensing, later that day.

28. The claimant was feeling unwell, with flu symptoms, on 29 December 2023. She arranged for a colleague to cover her shift the following day, as a result.

29. MT completed the programming for January 2023, as this had not been completed by the claimant. MT also completed the staff rota for the Cinema for week commencing 2 January 2023, and sent this to staff, as the claimant was not working.

30. The claimant next attended work on 4 January 2023. The rota showed her as starting at 11am that day. MT arrived at the Cinema, unannounced, just before 1pm, but the claimant was not there. The claimant arrived shortly after him, stating that she was still not feeling well, so had decided to come in later. MT raised concerns with her that she had not informed him of this. The claimant asked MT what was happening about rotas, stating that a member of staff had texted her to ask about shifts being changed and the claimant was unable to answer as she had not been informed of this. MT stated that he had looked at the rota and removed some shifts, before sending this to staff. He stated that January was a quiet month, so they did not need to rota as many people. During the course of their discussion, the claimant stated that she had worked from home on the Monday of that week. MT stated that she should not work from home: that was not permitted. The claimant stated in response that she felt there was lack of clarity regarding her role and the requirements on her. She highlighted that she felt some of the respondent's manuals were out of date and that she felt the respondent had unrealistic expectations regarding what could be achieved while operating and managing the Cinema, particularly if she was working on her own. MT reiterated to the claimant that things would be much quieter in January, stating that everything would be manageable as a result.

31. Later that day, at around 16:30, MT checked the rota and noticed that the claimant had not changed her start time, to reflect that she actually started at 13:00, rather than 11:00. He then did so.

32. On the morning of 9 January 2023, prior to the weekly cinema managers' meeting, it was brought to MT's attention by senior management that the Cinema appeared to have been overstaffed the previous week. When this issue was raised with him, MT checked the rota and realised that the claimant had added further shifts to the rota, after he had completed it and following her return to work on 4 January 2023, when they had discussed this matter. He was annoyed that the claimant had done so given the terms of their discussion, and that this had been highlighted to him by senior management. He explained what had happened to his managers and stated that he would speak to the claimant about this and have her ability to alter the rotas removed.

33. The weekly cinema managers' meeting was held, by Teams, on Monday 9 January 2023 at 11:00. At this meeting, MT informed all cinema managers that they needed to cut back on staff hours in January, when it was quieter. The managers grumbled initially about this, stating it was unreasonable and unrealistic, but did not raise any particular concerns and generally understood the requirement to do so.

34. While he was involved in the cinema managers' meeting, MT received an email from senior management stating that the expectation was that he raise the claimant's 'unacceptable behaviour' (in altering the rota) with her formally, in writing.

35. After the meeting, MT reflected on the direction he had been given by senior management to give the claimant a formal warning in relation to her actions in altering the rota. He noted that he required to complete a 6-week probation review with the claimant that week. He felt that her performance had been unsatisfactory in numerous other respects and, rather than proceed with a formal warning in relation to the claimant altering the rota, it would be more appropriate, given the range of concerns he had in relation to her performance,

and the significant concern about her changing the rota, to terminate her employment at that meeting. He sent an email to the respondent's HR department at 12:13 that day, stating that this was his intention at the 6 week review meeting (he stated in his email *'the outcome from this is to be dismissal with one week notice'*) and asking for their approval and guidance on the steps he should take to effect this. They had discussions by email and then by phone that day, regarding the steps to be taken. In an email sent at 13:18 that day, MT detailed the concerns he had, which related to time attendance, unauthorised changing of the rota, missing the deadline for providing the film schedule and not actioning the points raised during the 14 December 2022 1-2-1 meeting. It was agreed, in the discussions between MT and the HR department, that the claimant's employment would indeed be terminated, and that MT would meet with the claimant on 12 January 2023 to inform her of this. The procedure to be adopted in doing so was also discussed and agreed.

36. Later that day, the claimant's ability to alter the rotas was removed. She noticed this and queried this with MT, by text. He did not respond as he knew he would be meeting her a few days later to terminate her employment.

37. The claimant next worked on 11 January 2023. She was scheduled to work from 12:30 to 22:00 that day. When she arrived at work, she realised that she was working alone that day (the rota having been set by MT and her access to this having been removed). She was, at this point, generally unhappy that hours were being cut in January, that she was unlikely to get more than 30 hours work that week, that she was rostered to work alone that day, that she felt the requirements of the role were unreasonable/unrealistic, that her ability to set and see rotas for the Cinema had been removed and that MT was not responding to her texts. There were 3 screenings that day, at 13:30, 16:45 and 20:00. The number of attendees for each screening were 8, 9 and 20 respectively. The claimant required to check/issue tickets, serve individuals when they arrived (they had the ability to purchase drinks and snacks) and clean/tidy between screenings. The movies were scheduled to start automatically, so no action was required in relation to that. The claimant could take breaks either between screenings, or while the movie was running. The

claimant could contact the Hotel Manager to arrange for cover from the Hotel to enable her to take a break, if she felt cover was required to enable her to do so. The claimant did not however contact the Hotel Manager that day. She believed that, as Hotel staff had not been trained in every eventuality which could occur in the context of the Cinema's operation, the cover provided was, or would be, inadequate. She was scheduled to work to 22:00 that day, but in fact worked to 23:45. At the end of her shift, in accordance with the respondent's practice, she submitted an end of night report, which was then sent to MT and senior management. Her report stated as follows:

'Customers are still arriving at the cinema extremely early, with a couple that walked in 5 minutes after I had unlocked the door, I have suggested and I would like to have a sign made as this is becoming an issue, especially when there is only one staff member rostered. The issue of understaffing keeps coming up and I take umbrage with the way staffing is currently being managed, as it has been taken out of my hands and/or control, and yet myself and the staff suffer the fall out. The closure and forced reduction of hours and staff levels results in unhappy staff, unhappy customers, a risk to safety & security, and the risk of losing all of the above. It was noticed and commented on by customers today that I "could have used another pair of hands" or that I "needed to clone" myself, as they commented on my clearly being the only staff member on. The early customer arrivals also meant at that I came out of cleaning the first session with people looking for a staff member & already waiting to be served. Being rostered on for a 10-hour shift with no ability to break or leave is inappropriate at best, and what I am also expected to be able to complete with regards to Cinema Management & operations whilst also performing FOH operations is very unreasonable. Without notice or explanation I have now had shifts cancelled and my access to change the rota removed since Monday, and this also means I currently cannot even view my staff's rota regarding when and who is meant to be working?! Can someone please explain or setup a meeting to discuss, as I know I am not the only Cinema Manager with this opinion?'

38. The claimant worked on 12 January 2023. MT attended the Cinema that day also, to conduct the claimant's 6-week performance review meeting. He advised NK that he was going to do so, and that the outcome was to be the termination of the claimant's employment. It was agreed that NK would arrange for a meeting room in the Hotel for the meeting to take place, and that he would attend to take notes of the meeting.

39. The meeting took place early evening. Whilst the claimant may not have been aware that this was a formal meeting previously, the fact the meeting was taking place in a meeting room in the Hotel, and that NK was present to take notes, made it clear that was. At the start of the meeting, MT expressly stated that it was a probationary review meeting. At the meeting, MT explained the concerns he had in relation to the claimant's performance – particularly related to her attendance (lateness without notification, as well as informing him, after the event, that shifts had been extended), changing the rota (adding shifts back when he had removed them, as identified on the morning of 9 January 2023), missing the deadline for providing the film schedule for January 2023, which was in place to enable marketing to be conducted, and not actioning the points raised during the 14 December 2022 1-2-1 meeting (in particular she had still not completed her Induction and Declaration training modules, both of which were mandatory).

40. The claimant defended her position, challenging what MT was saying and stating that the expectations on her, as Cinema Manager, were unreasonable. She stated that staffing levels were inadequate, and manuals were not up to date. MT stated that, whilst the claimant had the skills and knowledge to undertake the role, he was frustrated with her lack of focus and urgency to undertake fundamental tasks. He stated that he did not believe she would rectify issues, even if she were given a further opportunity to do so. He was therefore terminating her employment.

41. Following the meeting, NK gave the handwritten notes he took during the meeting to MT. In accordance with advice given to him by the respondent's HR department, MT typed up the notes and uploaded these to the

respondent's system. He sent an email to the respondent's HR department at 20:20 that night, confirming that he had done so. The notes cannot however now be found on the system. It appears therefore that they were not uploaded correctly.

42. The claimant's employment terminated on 12 January 2023. She was paid one week's pay in lieu of her contractual notice period, as well as a payment in respect of her outstanding holiday entitlement. During her employment the claimant worked 224 hours in total, but was only paid for 222 hours.

43. By letter dated 17 January 2023, the respondent confirmed that the claimant's employment had been terminated, due to the unsuccessful completion of her probationary period, for the reasons discussed at the meeting with her, namely *'general performance issues that did not meet the company standards. This included concerns over lateness and attendance at work, lack of focus and energy on fundamental tasks and failing to adhere to minimum staffing levels.'* No appeal was offered or requested.

Observations on Evidence

44. There was a conflict in the evidence of PB and the claimant regarding what occurred at the cinema managers' meeting on 9 January 2023. The claimant stated that the meeting on 9 January 2023 was hostile and that PB had berated and lectured MT at the meeting, stating that he could not cut staff hours further, that the demands on management to do so were outrageous and that he felt it was imperative that they have a round table discussion with senior management, if this staffing cuts were insisted upon. PB however flatly denied this. He stated that he had been manager/depute manager of Perth Playhouse for 7.5 years and that he has required to make staffing cuts on a number of occasions in that period. He stated that he made the requested staffing cuts in January 2023 and was able to do so without any particular difficulty, accepting the business necessity to do so. He stated that if he had any particular issues, he would raise these on a one-to-one basis with MT, as he has a good relationship with him. Not in a cinema managers' meeting. He stated that he

has never requested a round table discussion with senior management, nor would he wish to have this.

45. The Tribunal unanimously preferred PB's evidence in relation to this point. The Tribunal felt that PB, who attended under a witness order issued at the claimant's request, gave very credible evidence regarding what was said at that meeting. The Tribunal accepted his evidence, concluding that he had no axe to grind, he would have confidence to raise issues he experienced in the workplace and would have no qualms about telling us he had done so. Having reached this conclusion, the Tribunal found that this generally undermined the claimant's evidence in relation to the other points she relied upon as occurring at that meeting: namely that she referenced being unable to adhere to minimum contract hours and staff safety, if hours were cut, and that there were illegal practices regarding breaks. PB denied that these points were discussed, stating that safety, minimum contract hours and illegality of breaks had not been raised by the claimant in the meeting. For the reasons set out above, the Tribunal preferred his evidence in respect of these points.

46. There was also a conflict in evidence in relation to what occurred at the meeting on 12 January 2023, when the claimant was dismissed. The claimant asserted that she informed MT during this meeting that:

a. Staffing levels were unsafe;
b. She could not take a break during a screening, as there could be a medical emergency;
c. There were rules and regulations which stated that for any shift over 6 hours a 20-minute break was required; and
d. That there was a health and safety risk in serving hot drinks to customers in the dark, while they were seated in the Cinema.

47. While MT had limited recall of what was discussed at the meeting, the Tribunal found NK to be a particularly credible witness. He made numerous, appropriate, concessions in relation to points put to him in cross examination and had very good recall of what occurred at the meeting. He was clear that

breaks were not raised or discussed at the meeting and the claimant did not raise any safety concerns, whether in relation to medical emergencies or taking hot drinks to customers in the Cinema (a practice in respect of which MT's evidence, which the Tribunal accepted, was that had this been mentioned, he would have clearly stated that this should not be done in any circumstances). The Tribunal accepted NK's evidence as being credible. He was a more senior and more experienced manager than MT and was there to assist MT. The Tribunal concluded that, had the claimant raised the points she stated she did, NK would have recalled these points and would have, at the time, advised MT to at least pause to take further advice, before proceeding to confirm the claimant's dismissal.

Submissions

48. Ms Barnett, for the respondent, had lodged a written skeleton argument, extending to 5 pages, in advance of the final hearing. She then lodged a supplementary submission, extending to 9 pages.

49. The claimant also lodged a written submission, extending to 7 pages.

50. The Tribunal took time to read both submissions. Parties were then given the opportunity to supplement these orally, which both did – principally to address credibility.

51. The parties' written and oral submissions were carefully considered by the Tribunal when deliberating. Given however that they were predominately made in writing, they are not replicated or summarised here.

Application for Strike out/Summary Judgment/Expenses

52. At the time of lodging her submission, the claimant also applied again for the Tribunal to vary the case management order made on 21 December 2023 (to refuse the claimant's application for strike out of the response, and for

summary judgment and expenses in her favour). The Tribunal accordingly also heard submissions from both parties in relation to that application.

53. The claimant's application was made on the basis that it was clear from the respondent's evidence that there had been notes of the meeting which took place on 12 January 2023, but these had been destroyed – either deliberately or inadvertently. The respondent had previously stated that there were no notes when ordered to produce these. They did not state that there had been notes but they had, either deliberately or inadvertently, destroyed.

54. The respondent objected to the claimant's application, stating that the Tribunal had already determined the application and there was no material change in circumstances.

Relevant Law

Protected Disclosure

55. Section 43A of the Employment Rights Act 1996 (**ERA**) provides:

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

56. A qualifying disclosure is defined in section 43B ERA 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 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, or is likely to be deliberately concealed."

57. In ***Kilraine v London Borough of Wandsworth*** [2018] EWCA Civ 1436, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f).' Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

58. In ***Simpson v Cantor Fitzgerald Europe*** [2020] ICR 236, the EAT confirmed these principles, stating:

'43...As the Court of Appeal in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation.

69. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach.'

Detriment Claim – Protected Disclosures

59. Section 47B ERA states that

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

60. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 confirms that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An 'unjustified sense of grievance' is not enough.

61. Whether a detriment is 'on the ground' that a worker has made a protected disclosure involves consideration of the mental processes (conscious or unconscious) of the employer acting as it did. It is not sufficient for the Tribunal to simply find that 'but for' the disclosure, the employer's act or omission would not have taken place, or that the detriment is related to the disclosure. Rather,

the protected disclosure must materially influence (in the sense of it being more than a trivial influence) the employer's treatment of the whistleblower (***Fecitt and others v NHS Manchester*** [2012] IRLR 64).

62. Helpful guidance on the approach to be taken by a Tribunal when considering claims of this nature is provided in the decision of ***Blackbay Ventures Ltd (t/a Chemistree) v Gahir*** [2014] IRLR 416 at paragraph 98.

Automatically Unfair Dismissal – Protected Disclosures

63. Section 103A ERA states that:

'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.'

64. In ***Fecitt and others v NHS Manchester***, the Court of Appeal held that the causation test for unfair dismissal is stricter than that for unlawful detriment under s47B ERA: s103A ERA requires the disclosure to be the primary motivation for a dismissal.

Unauthorised Deductions from Wages

65. Section 13 ERA provides that an employer shall not make a deduction from a worker's wages unless:

a. The deduction is required or authorised by statute or a provision in the worker's contract; or
b. The worker has given their prior written consent to the deduction.

66. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church*** [2000] IRLR 27).

Discussion & Decision

Disclosures

67. The Tribunal firstly considered each of the matters relied upon by the claimant as protected disclosures, to determine whether they were qualifying disclosures and, if so, whether they were also protected disclosures. The Tribunal was mindful that five elements require to be considered in determining whether each asserted disclosure amounted to a qualifying disclosure. The Tribunal noted that, unless all five conditions are satisfied, there will not be a qualifying disclosure.

68. The Tribunal's conclusions in relation to each asserted disclosure are set out below.

a. **On 29 December 2022, in response to, MT stating that the Cinema was to close early on New Years Eve, and on Mondays and Tuesdays throughout January, the claimant expressed concern about this and its impact on the respondent's ability in its contractual obligations in respect of staff hours.** The Tribunal's findings regarding what the claimant stated in this meeting are set out in paragraph 26 above. The Tribunal did not accept that the claimant expressed concern about the respondent's ability to meet its contractual obligations in respect of staff hours at this meeting. There was no reason for her to do so: she had known that the respondent intended to close on Mondays and Tuesdays in January since 14 December 2022; and staff had, throughout December 2022, worked well in excess of their contractual hours such that there could be no concern that the closure on two days each week would place their minimum working hours in jeopardy. The Tribunal accordingly concluded that no protected disclosure was made on 29 December 2022.

b. **On 4 January 2023, the claimant expressed concern to MT about shifts that she had scheduled being changed and cut while she was absent due to illness, without informing her, and about senior management's expectations in respect of appropriate workloads**

and staffing levels – as well as the lack of clear instructions and expectations about roles and responsibilities. In particular the claimant noted that the only procedural manuals available were highly inaccurate and significantly out of date, and did not cover all of the relevant and necessary procedures. The Tribunal's findings in relation to what the claimant stated in this meeting are set out in paragraph 30 above. While the Tribunal concluded that the claimant did disclose information: for example regarding shifts being changed without her knowledge and manuals being out of date, the information disclosed by the claimant did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that a person had failed, was failing or was likely to fail to comply with a legal obligation. There was no indication that there was any risk to health and safety or that legal obligations were being breached. In these circumstances, the Tribunal concluded that the claimant did not believe that the information disclosed tended to show a relevant failure (as set out in s43B ERA). If she did, that belief was not reasonable. Further, the Tribunal did not accept that the claimant believed that the limited information disclosed was made in the public interest, or that any such belief which she did have was reasonably held. The Tribunal accordingly concluded that the claimant did not make a qualifying disclosure on 4 January 2023.

c. **On 9 January 2023, she stated orally to MT that requests from management for staff to reduce their hours meant inadequate staffing, unreasonable and unrealistic work expectations and inadequate breaks.** The Tribunal's findings in relation to what was stated at the cinema managers' meeting on 9 January 2023, and the reasons for reaching those conclusions, are set out in paragraphs 33 and 44-45 above. The Tribunal did not accept that the claimant raised issues regarding staff safety, minimum contract hours or illegality in relation to breaks at that meeting, as she stated in evidence. Whilst the Tribunal accepted that the claimant grumbled about the requirement to cut hours, referencing that it was unreasonable and unrealistic to do so, that

complaint did not contain sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that a person had failed, was failing or was likely to fail to comply with a legal obligation. There was no indication that there was any risk to health and safety or that legal obligations were being breached. In these circumstances, the Tribunal concluded that the claimant did not believe that the information disclosed tended to show a relevant failure (as set out in s43B ERA). If she did, that belief was not reasonable. Further, the Tribunal did not accept that the claimant believed that the limited information disclosed was made in the public interest, or that any such belief which she did have was reasonably held. The Tribunal accordingly concluded that the claimant did not make a qualifying disclosure on 9 January 2023.

d. **In writing, in an end of day report, submitted by the claimant on 11 January 2023.** The content of the end of night report is set out in paragraph 37 above. The Tribunal accepted that this was a disclosure of information. The Tribunal concluded that the only parts of the end of night report potentially capable of tending to show one of the relevant failures (as stated in s43B ERA) are the statements that *'the closure and forced reduction of hours and staff levels results in…a risk to safety and security'* and *'being rostered on for a 10 hour shift with no ability to break or leave is inappropriate at best'.* The remaining sections are allegations of unreasonableness. They do not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that a person had failed, was failing or was likely to fail to comply with a legal obligation. They therefore could not, and did not, amount to a qualifying disclosure.

In relation to the statement that *'the closure and forced reduction of hours and staff levels results in…a risk to safety and security'*, the Tribunal concluded that this did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered. It is an allegation

without specifics. Facts are not conveyed. It is not clear how or why the claimant believes there is a risk to safety and security or what that risk is. The Tribunal accordingly concluded this was not a qualifying disclosure.

In relation to the statement that *'being rostered on for a 10 hour shift with no ability to break or leave is inappropriate at best'*, the Tribunal concluded that this was a disclosure of information and that the claimant believed that the information disclosed tended to show that the respondent was failing to comply with their legal obligation to provide breaks, as set out in the Working Time Regulations 1998. The Tribunal then considered whether that belief was reasonable. The Tribunal concluded that the claimant did not genuinely believe that there was no ability to take breaks. She was the Cinema Manager. It was her responsibility to arrange these breaks. Hotel staff could provide cover, if required, when Cinema staff were working on their own and there was insufficient time to take a break between screenings. The claimant had not made a request for cover on 11 January 2023, to enable her to take a break. The Tribunal concluded that the claimant did not do so as she believed the cover was inadequate, as Hotel staff were not trained on every eventuality which could possibly occur in the context of the Cinema's operations. Whilst the claimant believed that the cover provided was inadequate, that is a different matter: the claimant was able to take a break, if she wished. Hotel staff would be able to provide cover for the majority of issues which could potentially arise during a screening, such as an emergency or evacuation, to enable the claimant to take a break. Whilst it may not be ideal that customers may require to wait, if a particular issue arose while the claimant was on a break which the Hotel staff could not address, it was unlikely these events would occur and that did not impact whether there was the ability to take a break and leave the premises during a shift, where the member of staff is rostered to work on their own.

e. **On 12 January 2023, when she reiterated her concerns in a discussion with Martin Taylor.** The Tribunal's findings in relation to what the claimant stated in this meeting, and the reasons for reaching

those conclusions, are set out in paragraphs 39-40 and 46-47 above. The Tribunal did not accept that the claimant raised issues regarding staff/customer safety or breaks at that meeting, as she stated in evidence. While the Tribunal concluded that the claimant did disclose information: for example regarding shifts being changed without her knowledge and manuals being out of date, the information disclosed by the claimant did not have sufficient factual content and specificity capable of tending to show that the health and safety of any individual had been, was being, or was likely to be, endangered, or that a person had failed, was failing or was likely to fail to comply with a legal obligation. There was no indication that there was any risk to health and safety or that legal obligations were being breached. In these circumstances, the Tribunal concluded that the claimant did not believe that the information disclosed tended to show a relevant failure (as set out in s43B ERA). If she did, that belief was not reasonable. Further, the Tribunal did not accept that the claimant believed that the limited information disclosed was made in the public interest, or that any such belief which she did have was reasonably held. The Tribunal accordingly concluded that the claimant did not make any qualifying disclosures on 12 January 2023.

69. Having determined that the claimant did not make any qualifying disclosures (and therefore no protected disclosures), the complaints under s47B and 103A ERA cannot succeed. Those complaints are accordingly dismissed.

70. Whilst there is no requirement to do so, the Tribunal also wish to record the following conclusions:

a. The Tribunal was satisfied that the respondent had genuine concerns about the claimant's performance during her probationary period, as set out in paragraph 35 above.

b. The claimant's alteration of the rota prepared by MT, and his discovery of this on the morning of 9 January 2023 when this was brought to his attention by senior management, caused the removal of the claimant's

ability to set/alter the rotas. Concerns which the claimant raised during her employment did not influence that decision in any way.

c. The claimant's alteration of the rota prepared by MT, and the other significant concerns regarding her performance, were the sole reason for the claimant's dismissal.

d. The decision to dismiss the claimant was made on 9 January 2023, but it could not be communicated to the claimant until 12 January 2023. The fact that that decision had been made is what caused MT to ignore the claimant's texts about the rota, and led to him not engaging with the claimant, until he could communicate his decision. The fact that the claimant raised concerns during her employment did not influence this.

e. As stated in paragraph 39 above, reasons were given for the claimant's dismissal during the meeting on 12 January 2023. The reasons stated were an accurate statement of why the claimant was dismissed. They were genuine concerns, not unfounded criticisms. Those reasons were then accurately reflected in the letter confirming the claimant's dismissal. The content of that letter was not misleading or false.

f. The respondent did not follow any defined procedure, or offer an appeal as they understood that the claimant was in her probationary period, and they believed they did not require to do so. The fact that the claimant raised concerns during her employment did not influence their actions. They would have adopted the same process with any employee with the same length of service as the claimant.

Unauthorised Deductions from Wages – s13 ERA

71. The Tribunal then considered the claimant's complaint that the respondent had made unauthorised deductions from her wages, by failing to pay her in respect of all hours worked. The claimant gave evidence, with reference to a spreadsheet she had prepared, that she had worked a total of 224 hours with

the respondent, but had only been paid for 222 of those, so had been underpaid by 2 hours. The rotas produced to the Tribunal (subject to the addition of one hour on 2 December 2022, which was not challenged by the respondent) demonstrated that the claimant had worked 224 hours. Her payslips demonstrated that she had been paid for 222 hours, as well as receiving holiday pay and pay in lieu of notice. She was accordingly underpaid by 2 hours. Given her hourly rate of £12, this equates to the sum of £24. She is entitled to a further payment in relation to this, which had not been paid to her as at the date of the final hearing.

Breach of contract

72. The claimant also asserted that the respondent was in breach of the obligations stated in the Statement of Terms in relation to pension, stating that she was not provided with any information about the pension scheme, and she was not auto-enrolled into this. The respondent stated that they had not automatically enrolled the claimant into the pension scheme as they were entitled to operate a waiting/postponement period of up to 3 months before making an assessment of whether the claimant was eligible for auto-enrolment (in accordance with section 4 of the Pensions Act 2008).

73. The Statement of Terms merely provided that the claimant would be automatically enrolled *'Following assessment and if you meet the criteria set by the Government…Further information will be sent to you separately'*. It did not say when that assessment would be conducted, or when the further information would be sent. It cannot be said, therefore, that the respondent had breached the provisions of the Statement. More fundamentally however, the Tribunal accepted the respondent's submission that it has no jurisdiction to consider breach of any obligations in relation to automatic enrolment: this is the role of the Pensions Regulator. The claimant's complaint of breach of contract is accordingly dismissed.

74. The claimant's application, renewed at the point of submissions, to vary the case management order made on 21 December 2023 (to refuse the claimant's application for strike out of the response, and for summary judgment and expenses in her favour) is refused. The Tribunal did not consider there to have been a material change in circumstances: the claimant had always known there were minutes of the meeting, as she had seen and signed them at the time. The respondent's statement, in response to the order for production of those documents, that they did not have any such notes could only have meant that they had, either inadvertently or deliberately, destroyed them. For the avoidance of doubt however, the Tribunal concluded that the destruction of the notes was inadvertent. It also concluded that the absence of the notes did not impact the ability to have a fair hearing in respect of the claim. Even if the notes had been produced, and even if they had demonstrated that the claimant had made protected disclosures during the meeting on 12 January 2023 (as the claimant asserted they would have done), that would not have altered the outcome of the claim: all of the decisions relevant to the asserted detriments (namely that the claimant's ability to access the rotas would be removed and that her employment would then be terminated, as well as the reasons for this and the procedure to be followed when doing so) were made on 9 January 2023 – well before the meeting on 12 January 2023. Given those findings, anything said after those decisions were made on 9 January 2023, whether protected disclosures or not, is irrelevant to the complaints that the claimant was subjected to a detriment or dismissed as a result of making protected disclosures.

Employment Judge Sangster

Employment Judge

12 July 2024

Date of Judgment

Date sent to parties 12/07/2024