EMPLOYMENT TRIBUNALS

Claimant: Mr I Vaintraub

Respondent: Jusu Brothers Ltd

Heard at: London Central (by CVP) **On:** 5 & 6 November 2024

Before: Employment Judge Emery

REPRESENTATION:

Claimant: In person
Respondent: Mr P Roberts (Solicitor)

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The Judgment of the Employment Tribunal is:

Protected disclosures

1. On the respondent's concession, the claimant made disclosures which tended to show and which he reasonably believed were breaches of Food Standards Agency (FSA) Guidance, the Hazard Analysis and Critical Control Points (HACCP) guidance and/or The Food Safety (Temperature Control) Regulations 1995.

2. The Tribunal concludes that the claimant made further disclosures which tended to show and which he reasonably believed were breaches of Food Standards Agency (FSA) Guidance and the Hazard Analysis and Critical Control Points (HACCP).

3. The question which remains to be addressed at the full merits hearing is: did the claimant reasonably believe these disclosures were made in the public interest?

Health and safety disclosures

4. The claimant was an employee where there was no health and safety representative or safety committee and he brought to his employers attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety - s100(1)(c) ERA.

Disability

5. At the relevant times the claimant was a disabled person as defined by section 6 Equality Act 2010 because of symptoms of depression, Affective Bipolar disorder and Extremely Unstable Personality Disorder.

Applications for strike-out and/or a Deposit Order

6. The respondent's applications that some or all of the claims be struck out, or that a deposit be ordered, fail.

REASONS

The Issues

1. Reasons were provided at the hearing, written reasons were requested.

2. The respondent seeks the claim of automatic unfair dismissal to be struck-out as having no reasonable prosects of success; alternatively a deposit should be ordered to be paid by the claimant on the basis that this claim stands little reasonable prosects of success.

3. The basis of this application is that the respondent argues that the claimant did not make any protected public interest disclosures or health and safety complaints, alternatively if he did there is no link between his disclosures and his dismissal for gross misconduct. Given it was a strike-out application, I did not hear evidence from the parties.

4. During the course of the hearing, the respondent accepted that the claimant had made some disclosures which it accepts he genuinely believed were issues of concern and which he reasonably raised – those set out in paragraph 16 below. However, it does not accept that the claimant reasonably believed these were in the public interest.

5. Because I heard no evidence on this point, I was unable to make a determination on whether the claimant did have reasonable belief his disclosures were in the

public interest. This is therefore an issue which will require addressing at the full merits hearing.

6. The respondent does not accept the claimant was a disabled person and seeks a strike-out of the claim of a failure to make reasonable adjustment, alternatively a deposit to be ordered. The claimant provided a disability impact statement and I heard evidence from the claimant on it.

Evidence and Submissions

7. Both parties were prepared with written and verbal submissions. Both parties provided a bundle of documents.

Protected disclosures

8. The claimant worked for the respondent as a Sous Chef; the respondent also employed a Head Chef but during many of the events in question the claimant was the senior chef in the kitchen.

9. Over the course of his career, the claimant has received extensive training on food safety, food hygiene and health and safety in the kitchen. His qualification certificates are contained in the bundle from page 96 and include a Food Safety Level 2 certificate.

10. The respondent does not have a health and safety committee or representative.

11. Much of the claimant's evidence that he whistleblew consisted of photos and comments which he posted on the respondent's internal WhatsApp group "kitchen soldiers", this group included the respondent's managers. He says that kitchen employees of the respondent have all had health and safety training.

12. The claimant says that it is self-evident from the photos and comments that they were showing breaches of:

    a. food safety and hygiene regulations, as set out in the Food Standards Agency (FSA) Guidance and HACCP Regulations; and/or

    b. The Food Safety (Temperature Control) Regulations 1995; and/or

    c. The Health and Safety at Work Act 1974

13. The claimant says he made other disclosures in emails and WhatsApp, of breaches of other legal obligations including the Working Time Regulations – the right to paid breaks and time off between shifts.

14. The respondent's initial contention was that none of this could amount to public interest disclosures.

15. On further consideration of FSA Guidance, the Temperature Control Regulations and HACCP Regulations, the respondent **conceded** that the following photos/comments tend to show breaches of regulations relating to food handling and storage of food to avoid cross-contamination, fridge temperature control, and the safety of the kitchen floor.

16. The respondent also accepts that the claimant had a genuine and reasonable belief that these were issues of concern – as Mr Roberts said in his closing, the respondent "has no criticisms of the claimant for raising these issues, it was right he raised them". As mentioned above, the issue of whether the claimant reasonably believed they were in the public interest is an issue which needs to be considered at the full merits hearing.

Issues of 'Poor food handling'

a. 18 October 2023: photo of a shelf with partially uncovered dates with the comment "dates left like this in the dry store"

b. 1 November 2023: photo of an uncovered bowl of quinoa on top of a tray of raw salmon with the comment "lazy closing yesterday"

c. 1 November 2023: photo of uncovered lemons and peppers, "no cling film"

d. 1 November 2023: WhatsApp comment - "soaked [French toast] is in the gravadlax fridge".

Proper temperature control

e. 18 January 2024: WhatsApp comment - "inside the kitchen 2 fridge doors need sealant replacing urgent now".

Use of temperature monitoring and recording

f. 14 September 2023: photo of fridge temperature register; "Dear Guys can we please record temperatures!!!!!! AM PM"

g. 18 October 2023: photo of fridge temperature register; "Temperatures not recorded"

h. 20 October 2023: photo of fridge temperature register; "Please record temperatures"

i. 25 October 2023: photo of fridge temperature register; “Update temperatures IT’S A legal requirement like putting labels on food containers.”

j. 1 November 2023: photo of fridge temperature register; “Dell you don’t record temperatures”

k. 1 November 2023: photo of fridge temperature register; Nazi darling, I’m very disappointed no temperatures take today.”

l. 2 November 2023: photo of fridge temperature register; “Please record temperatures”.

Health and safety at work issues

m. 29 December 2023: email stating “please sort the kitchen floor out – it’s a hazard number 1.”

n. 30 December 2023: email stating “anyway deal with it and please repair the floor. People are getting injured because of this partly.”

o. 18 January 2024: email stating “Plus the kitchen floor very dangerous.”

17. The respondent does not accept that the following tended to show breaches of regulations, or that the claimant had a genuine or reasonable belief that they did show breaches:

Issues of “poor food handling”

a. 1 November 2023: photo of boxes on top of each other on floor; “4kg of stuff on top of eggs”

The respondent says this is an allegation of poor storage, it cannot amount to a public interest disclosure.

The claimant argues that this is an issue of contamination. The boxes containing eggs are stored on the floor, and heavy boxes are stored on top of the egg boxes. He says this will invariably crack some of the eggs, attracting rodents “it contributes to the mice population”.

b. 1 November 2023: photo of bowl in fridge with spoon in; “Spoon was left on small salmon now the whole thing is crispy”.

The respondent says that this is an allegation of food waste, that this cannot amount to a public interest disclosure.

The claimant argues that the photo shows an uncovered plate of salmon in the fridge; he argues that all of the kitchen staff will be aware that having uncovered food in the fridge is a breach of food handling regulations

c. 11 November 2023: "4kg of stuff on top of eggs"; see (a) above.

Food sold past its use by date

d. 26 October 2023: photo of tofu showing use-by date: "new delivery of 25 tofu until 3rd November"

The respondent says that this photo shows that a use by date is approaching, in itself this is not a health and safety issue.

The claimant says that the respondent had 25kg of tofu with less than a week to its expiry; much would be unused by this date and "I know it will be used, the respondent will not throw this away". He argues that it would be used after expiration; in fact it should have been returned to the supplier.

e. 26 October 2023: photo of packets of tofu; 15kg tofu expires Friday.

See (d) above.

Poor hygiene practices

f. 1 November 2023: WhatsApp message; "I will summarise for you last night[s] closing was not done properly professional or with care. That's all."

The respondent says that this is evidence that closing was not done properly, it is not a health and safety issue.

The claimant says that nothing had been washed and there was improper storage in the fridge. He says that this message relates to many of the other disclosures he made on the same day, including the photo of quinoa on top of salmon sent at 7.29 am on the same day (see 17b above)

g. 1 November 2023: photo of a sink full of unwashed pans; "from yesterday"

The respondent says this is a photo "of a messy sink" there can be no health and safety disclosure.

The claimant says that the respondent's employees will be aware that this photo is of the kitchen's 'food sink' – i.e. a sink to be used exclusively for washing and prepping food as required under FSA Guidance and regulations. Another photo shows the same sink being used to wash salad leaves. In addition, food hygiene regulations require these dishes to be washed in a machine at 70degreesC, not in a sink.

h. 1 November 2023 photo of uncovered salmon in bowl with spoon in; "disgusting close down".

The respondent says this is an example of food waste not a disclosure.

The claimant says this is the same issue as 17b above – that the food was left uncovered in breach of regulations, it could cross-contaminate other food, as well as now being unusable.

Use of temperature monitoring and recording

i. 18 January 2024: WhatsApp message :"Now guys lets keep track of ridge temperatures and waste list"

The respondent says that this is "keeping track" – asking kitchen staff to do something rather than an allegation of something not being done.

The claimant says that this must be read in light of the other fridge temperature issues he has raised, that it shows continuing breach of the Fridge Temperature Control regulations which require fridge temperatures to be monitored and recorded.

Health and safety workplace issues

j. 20 November 2023 email to manager, Mirek: C refers to an abusive customer shouting at him, he suspects the customer is "using illegal substances" in the toilets "is [R] tolerating abusive behaviour towards staff?"

The respondent says that this is a private grievance, not an act of whistleblowing.

The claimant says that there is a staff book on customer behaviour which says the respondent must protect its employees; they knew he has a disability "and I wanted them to protect me – so it's a grievance and a disclosure". He says that he had a concern that the customer was using illegal substances and abusing him – a clear violation of health and safety law.

k. 29 November 2023: Email from C to Mirek: requesting information on the workplace adjustments contained in the Dr's letter sent to the respondent; that his hours had been cancelled, that "no one is a slave and every minute must be paid"; that 3 days holiday over Christmas had been received "which you want to use as a subsidy to my Christmas salary, don't do that as its illegal …".

The respondent says this is a private grievance allegation, not a public interest disclosure.

The claimant says that this is a disclosure of information which tends to show that there has been a breach of the Working Time Regulations.

Health and safety at work issues

l. 30 December 2023: Email stating "Health and safety in the kitchen is a huge topic I want to cover with you in the new year."

The respondent says that this is a general allegation rather than conveying information.

The claimant says this email must be seen in the context of all the health and safety issues he had been raising until this date, it was sent because health and safety was "… compromised. I am saying we have issues with food standards and safety standards" which must be addressed".

m. 18 January 2024: Email saying "Glass jars on top of shelf must come down tomorrow".

The respondent says that this is saying a task needs to be done – it's not a disclosure of any breach.

The claimant says that he is pointing out a breach of the FSA Regulations which states glass jars must not be placed on a high shelf - because of the risk of breakage and contamination of food.

Allegations of 'miscarriages of justice'

n. 20 November 2023: grievance email about abusive customer using illegal substances - see 17(j) above.

o. 25 September 2023: email wanting meeting to discuss employment conditions – including contract, holiday entitlement, pension, service charge "I am not receiving any"; troncs scheme; working hours "and what are those" and due diligence issues.

The respondent says that the claimant raises "all sorts of issues" about his contract, this is not a public interest disclosure it is "all about him" and issues of "private law".

The claimant says that the respondent never responded to any of the issues he raised "they stay silent", hence his email which he says tends to show the respondent is in breach of WTR on issues including rest breaks and other legal obligations and not receiving his correct wages in breach of s.13 Employment Rights Act.

p. 20 October 2023 and dates following – in summary:
   i. complaints about lack of service charge (page 449);
   ii. complaints about salary, and tips share – "you are paying below average and pocket the service charge";
   iii. "your contract is actually illegal now" (1297);
   iv. 22 January 2024 - allegation of an invalid and unlawful contract in relation to base rate of wage and tronc distribution;
   v. 23 January 2024 – emails stating that salary reduction is illegal.

   See 17(o) above.

<u>Allegations of breach of WTR – right to 11 hours rest; and right to an in-work rest breaks</u>

q. 11 September 2023 to 1 December 2023: 23 texts or emails stating that the claimant had "no break" on shifts worked.

   The respondent says that these are allegations of private law breaches, and cannot be in the public interest, "it's all about me".

   The claimant says that he is highlighting breaches of the WTR and consequently health and safety breaches because of the risks of working without breaks.

Disability

18. The claimant says his disabilities are (i) bipolar disorder (ii) emotionally unstable personality disorder and (iii) depression. He says that he is receiving disability benefits, he has been given a blue badge.

19. The medical records disclosed by the claimant record that in October 2018 the claimant reported as "very stressed, anxious, unable to sleep" because of harassment he was experiencing in a business dispute (medical records page 17). On 31 October 2018 he was prescribed Sertraline; on 13 December 2018 he was prescribed Diazepam and Citalopram 10 mg. On 21 December 2018 his Citalopram was increased to 20mg with repeat prescriptions of Citalopram until

June 2019. A GP record on 18 March 2019 says that his mood has worsened, but medication is helping. It was agreed he would remain on Citalopram "for at least several months".

20. The respondent's case is that the medical records in 2018 record these symptoms as being caused by a business dispute, akin to work related stress and therefore not amounting to a disability.

21. The claimant says these symptoms are part of an ongoing mental health issue, that at this time he was prescribed medication which has continued to be prescribed off and on until, until his condition worsened from October 2023.

22. The claimant was next prescribed anti-depressant and anti-anxiety medication on 18 June 2021 – Setraline50 mg and diazepam. Sertraline was continued until end March 2022 (his last prescription on 7 January 2022 for 84 days' supply).

23. The claimant says his mental health deteriorated significantly from October 2023. The GP records show that on 2 October 2023 he stated he "cannot manage his mental health ***** … he cannot manage anger … Constantly crying, not sleeping very well"; he reported suicidal thoughts.

24. On 27 November 2023 the claimant saw his GP with symptoms of agitation, saying he paces up and down, "he gets angry at any situation … he is says he is not functioning as well as before". The record describes the claimant "struggling to call the bank etc" describing him feeling "fearful"; it was agreed that he would increase his dose of Sertraline from 50mg to 100mg, this prescription was repeated on 20 December 2023, it was reduced to 50mg at end February 2024 and increased to 150mg after his dismissal. He was prescribed diazepam and Lorazepam in March 2024.

25. The claimant says that from October 2018 to his admission to hospital in April 2024 all of his treatment was by his primary care GP and throughout this period his symptoms were classed as depression.

26. The claimant's impact statement records that when he started experiencing poor treatment at work "I found myself deteriorating, feeling stressed and experiencing regular low moods. I was persistently worried." He says he found demanding workloads demoralising, which triggered episodes of depression and increased his anxiety symptoms. He says the mood changes "were extremely debilitating". He says he had a higher number of mood swings, and difficulty in concentrating including dizziness light-headedness and unusual drowsiness. He says he was increasingly physically and mentally exhausted.

27. After dismissal he says he had a mental health crisis and was admitted to hospital. At this time he received specialist treatment and Affective Bipolar Disorder and Emotionally Unstable Personality Disorder were diagnosed on 8 April 2024. This

was after the Case Management Discussion in this case – hence why these conditions were not mentioned then.

28. A medical report provided by Dr Mbamali Consultant Psychiatrist dated 25 June 2024 provides the above diagnoses, and describes the claimant suffering from "fluctuating symptoms affecting daily function which are made worse during periods of depression and are often exacerbated by external stressors".

29. The report says the claimant can be "overwhelmed" by background noise and can find conversations difficult to understand. It says stressors lead to increased agitation and he needs to use noise cancelling headphones to reduce the stress. It says he suffers palpitations, stiffness and loss of concentration. He has been prescribed anti-psychotics, anti-depressants and sedatives, which can cause sedation, affecting his ability to interact.

30. The claimant's case in answer to questions was that his bipolar symptoms developed "when I was mistreated by the respondent", including the failure to give adequate breaks and being overworked and the failure to deal with the abusive customer. He accepts that it is "a difficult question" when he developed bipolar, that he developed some of the symptoms when working for the respondent but it was diagnosed after he was dismissed. He said his GP referred to depression, anxiety, sleeplessness, ruminations and suicidal thoughts, but it was only when he was referred to a specialist that he received a formal diagnosis.

31. The respondent did not accept the credibility of the claimant's evidence – there was a significant debate on how many times the claimant visited or spoke to his GP for mental health issues from October 2023; he says 7 times, the respondent says the records show 3 consultations for mental health issues. I find that the records are ambiguous, but that he visited or had consultations with his GP on at least 5 occasions, he also visited his GP for other reasons. I find that there are no issues of credibility on this discrepancy.

32. The respondent attacked his credibility for saying his "father" had died in January 2024, when in fact it was his partner's father. The claimant's explanation was that he is Druse, he has been with his partner for 25 years, and that culturally "my father died that day". Again I accepted this explanation, it is not an issue of credibility.

33. The respondent accepts that the claimant has experienced mental health issues – its position is that there is "no underlying medical condition, it's the claimant experiencing unpleasant times" at the relevant period during his employment.

34. The respondent's position is that there is "not much there" in the medical records, and there is little evidence on the effect on the claimant's day to day activities. The respondent's position is that the claimant may at times feel suicidal but this does not mean there is a substantial effect on his day to day activities. Also, it

can only be speculation to consider what the condition would be like without medication, there is “no evidence” of this at all.

35. While the claimant may experience mood swings leading to ‘outbursts’ this is “not sufficiently substantial” to amount to a disability. Also, the respondent says, the claimant is “exaggerating it’s impact”, his records mention stress and overwork; also there is the issue of the claimant exaggerating the times he saw his GP.

36. The claimant says that the respondent was aware of his ill health, that he asked on several occasions for longer breaks or split shifts instead of a single long shift. He says his messages were ignored.

Application to strike out some or all of the claims and/or order a deposit to be paid in relation to some or all of the claims

Automatic unfair dismissal

37. The respondent accepts that the claimant made some disclosures which he reasonably and genuinely believed shows issues relating to health and safety and food hygiene issues, which tended to show the relevant regulations were being breached, and which he reasonably believed to be true. The respondent “has no criticisms of the claimant for raising these issues; “it was right he raised them”.

38. The respondent also accepts that s.100(1)(c) may apply – that the claimant reasonably raised issues of kitchen health and safety in circumstances where there was no health and safety representative or committee.

39. However the respondent says it is “inherently unlikely” that he was dismissed because of his disclosures. Firstly, the messages were just the claimant doing his job, and his manager thanked him for raising issues.

40. Secondly most of his disclosures were in the period 17 October – 1 November a 2½ month period occurring several months before dismissal.

41. Thirdly it is “far more likely” he was dismissed because of inappropriate behaviour. The claimant “accepts and admits” to inappropriate behaviour, that he was spoken to. His medical records refer to his anger at work. He makes derogatory comments about the owner and his manager; the messages show that the business tried to help him - “we’re here to help you” - when he had outbursts. The last straw was the claimant’s belligerent approach to the issue of troncs; he abused the business in front of a customer; he was aggressive and threatening in messages. His letter of dismissal refers to repeated demonstrations of disrespectful behaviour, and the reason for his dismissal was serious insubordination.

42. Even if the claimant made some disclosures there is “no realistic prospect” of him showing these were the reason for his dismissal.

43. The claimant says that when he started making disclosures he became a problem for his employer. Before this, for 10 years it was trading, the respondent’s chefs had let standards slip, that “it was all okay” in the kitchen. He says that when he raised issues “I got the silent treatment” evidenced by the lack of responses to his messages; or he was told that things would be fixed and they were not; “I believe the true reason I was dismissed is because I was following the rules”.

44. He argues that any delay between the majority of his disclosures and his dismissl was because the Head Chef was on extended leave, due back in January 2024, that it did not make sense for the respondent to dismiss him before the Head Chef returned. He also says that he was making disclosures into 2024, for example his comments about the floor, shelves. He had also said he would raise further issues in the new year. The end of January was a quiet period, this was the convenient time to sack him.

45. He says that he complained about the customer in November 2023, his grievance was ignored and he was treated poorly – staff being told that he was “defective, ignore him”, that he was told there would be changes, but none were made.

46. He does not accept that his tone in messages led to a breakdown in relationships, he argues that at any time his managers could have sorted these issues out – the abusive customer, the wage and Tronc issues, the health and safety issues – but they did not do so. He says he was sacked at a convenient time for the respondent, when the Head Chef was returning to work. He says “I was dismissed for following the rules.”

47. He accepts that his behaviour was not always good – he says that his medical condition was deteriorating, that he was being lied to and ignored, and was often unable to take breaks or only short breaks. He says his medical records show the effect of his work environment on his health. He says that the real reason he was sacked was because “they wanted to get rid of me” because of all the complaints he was making, not the manner of his complaints.

<u>Reasonable adjustments claim</u>

48. The claimant says there was the failure to make the adjustment of “extended breaks”. It is accepted that the GP’s Med 3 Fit Note dated 27 November 2023 states that this is an adjustment sought by the claimant on his return to work (C’s bundle page 18).

49. The respondent says that this adjustment was agreed and implemented – breaks were given (136).

50. The claimant points to the messages he sent – 27 messages saying he had worked shifts with no break that shift. In practice he was often lucky if he was able to take a few minutes at a time for a cigarette break. He was never given extended breaks as suggested by his GP as a reasonable adjustment. This was in part why he believes he was underpaid, as often his hours showed he had taken unpaid breaks when in fact he had worked over his breaks.

51. The claimant points to a voicemail transcript in which he tries to negotiate 2 minutes out of the kitchen every hour, to which the response is "Hahaha don't make me laugh"; in the end it was agreed by his manager that he "… will get his cigarette break every 1.15 for 2 mins, all timed" (C220-221).

Wages claim

52. The respondent says that the claimant says he was entitled to £15.50 an hour. But during probation there was an agreement that he would receive £13.50 an hour; at the end of his probation on 23 October 2023 the respondent says he was given his contract of employment specifying £15.50 an hour. The respondent accepts there is nothing in writing saying his probation pay would be £13.50 an hour. This part of the claim is out of time as his probation ended in October 2023.

53. The claimant also argues his final pay was not correct. The claimant says that his pay was reduced incorrectly. He says that his pay shows his £15.50 an hour is broken down between hourly rate and service charge, and the £15.50 an hour includes service charge. He says that he has a contractual entitlement to receive £15.50 plus service charge.

54. The claimant signed a contract on his first day of employment, however he says he scanned and signed it and he was not given a copy. He says he received a copy on 27 February 2024 following his subject access request.

55. The contract makes no reference to his probation pay being lower than his pay after probation. There is a comment handwritten on his contract that his hourly pay "includes service charge" (C91).

56. The respondent also says that the claimant was paid for all hours he worked "there is no evidence otherwise." This claim is out of time and it was reasonably practicable to bring it earlier. Also, on its merits it stands no reasonable prospects, or little reasonable prospects, of success.

57. The claimant disputes he was aware that his hourly rate included tips when he signed the contract. Hence his several written complaints about this issue. He was unaware that his hourly rate would be lower during probation, he says he was never told this. He says that he was not paid for all the hours he worked throughout his employment, evidenced by the fact he was not paid for his breaks even when he worked through them.

The law

58. Strike-out – does the claim have “no reasonable prospects of success” - rule 37(1)(a) Employment Tribunals Rules of Procedure 2013?

    i. *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*: where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested. It upheld the EAT's decision that tribunals should not be overzealous in striking out a case as having no reasonable prospect of success, unless the facts as alleged by the claimant disclosed no arguable case in law.

    ii. *Anyanwu and another v South Bank Students' Union and South Bank University [2001] IRLR 305:* discrimination claims should not be struck out as having no reasonable prospects of success, except in the plainest and most obvious cases. It was a matter of public interest that tribunals should examine the merits and particular facts of discrimination claims.

    iii. *Balls v Downham Market High School & College UKEAT/0343/10*: strike out is a power that should be exercised only after a careful consideration of all the available material, including the evidence put forward by the parties. No reasonable prospects of success does not mean the claimant's claim is likely to fail, or it is possible the claim will fail, and it is not a test that can be determined by considering whether the other party's version of disputed events is more likely to be believed. It is a high test: there must be *no* reasonable prospects of success.

59. Deposit order – does the claim have "little reasonable prospect of success" -- rule 39(1), Employment Tribunals Rules of Procedure 2013?

    i. *Van Rensburg v Royal Borough of Kingston-Upon-Thames and others UKEAT/0096/07:* "a tribunal has a greater leeway when considering whether or not to order a deposit" than when deciding whether or not to strike out,

    ii. *H v Ishmail UKEAT/0021/16*: "The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis."

iii. *Amber v West Yorkshire Fire and Rescue Service [2024] EAT 146:* If the prospect of success turns on disputed factual issues, it is highly unlikely that a deposit order will be appropriate. The claimant's case must be taken at its highest, requiring the tribunal to test the factual account and examine it "through the prism of reality". This would include examining the case against basic logic, internal inconsistency or any contradiction by contemporaneous documentary evidence.

60. Disability

i. S.6(1) Equality Act 2010: a person has a disability if they (a) have a physical or mental impairment and (b) if the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

ii. EqA 2010 Schedule 1 paragraph 2(1): The effect of an impairment is long term if (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected

iii. EqA 2020 Sch 1 para 2(2): If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

iv. *Tesco Stores Ltd v Tennant UKEAT/0167/19/00*: a claimant must show that they met the definition of disability at the time of the alleged discriminatory acts.

v. *Cruickshank v VAW Motorcast Ltd [2002] ICR 7291:* The date of determination of disability status is at the date of the alleged act, not after. The tribunal must consider whether the impairment had a substantial adverse effect on day-to-day activities at that point, and whether that effect was likely to be long term at that point.

vi. *Patel v Metropolitan Borough Council [2010 IRLR 280*: whether the effect of an impairment is long term may be determined retrospectively (under (Sch 1 para 2(1)(a), or prospectively under 2(1)(b). Where there are two related conditions which developed consecutively, the Tribunal should consider whether there is a link between the two

> "… in my judgment fine distinctions between one medical condition and its development into another are to be avoided. I adopt the observation of Mummery LJ in *McNicol* at paragraph 19: "It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects." … Thus in my judgment the effect of an illness or condition likely to develop or which has developed from another illness or condition forms part of the assessment of whether the

effect of the original impairment is likely to last or has lasted at least 12 months."

vii. *SCA Packaging Ltd v Boyle [2009] UKHL37:* Whether an impairment producing a substantial adverse effect is 'likely' to last for 12 months – likely means that 'it could well happen' rather that it is more probable than not that it will happen.

viii. *Nissa v Waverly Education Foundation Ltd UKEAT/0135/18:* A medical diagnosis is relevant but not determinative. Where a diagnosis is made at or after the claimant's dismissal, it is still important to concentrate on the effects of the condition during the relevant period, and whether there is information which shows that, viewed at the date of dismissal, it could well happen that the effects of the impairments would last for more than 12 months.

61. Disclosures in the "public interest"

(i) Employment Rights Act 1996

43A Meaning of "protected disclosure"

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

43B Disclosures qualifying for protection

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

    a. …
    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. **…**
    d. that the health or safety of any individual has been, is being or is likely to be endangered

(ii) *Chesterton Global Ltd v Nurmohamed [2017] ICR 731:* In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation.

"The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be…. the broad intent behind the amendment of section 43B(1) is that workers

making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers …

"… In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case …

"… The four factors adopted are as follows: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

(iii) *Ibrahim v HCA International [2019] EWCA Civ 207*: The mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing? The fact that a motivation for making the disclosure may be different: "the necessary belief [of the employee] is simply that the disclosure was in the public interest".

(iv) *Parsons v Airplus International Ltd UKEAT/0111/17:* The necessary reasonable belief in that public interest may arise on later contemplation by the employee and need not have been present at the time of making the disclosure. Where an employee makes a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a dispute with the employer, the tribunal was held entitled to rule that they were made *only* in her own self-interest – the fact that an employee *could* have believed in a public interest element is not relevant.

(v) *Darnton v University of Surrey* [2003] IRLR 133 *EAT* - The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or

not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

(vi) *Babula v Waltham Forest College [2007] EWCA Civ 174* - "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

(vii) *Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT* – the EAT provided the following guidance to tribunals:

(a) Each disclosure should be separately identified by reference to date and content.

(b) Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered, should be separately identified.

(c) The basis upon which each disclosure is said to be protected and qualifying should be addressed.

(d) Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.

(e) The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, … whether it was made in the public interest.

(f) Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant…

(g) The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

Conclusions on the evidence and the law

The claimant made the following disclosures of information which he reasonably and genuinely believed showed breaches of FSA and other food-safety Regulations:

62. As above at paragraph 16, the respondent accepts that the claimant had a genuine and reasonable belief that he was disclosing information about breaches of food safety and hygiene under the regulations referenced above.

63. The following are, I find, very similar disclosures to those accepted by the respondent as being public interest disclosures. Given the respondent accepts many of his food hygiene disclosures were reasonably and genuinely raised in the public interest, I find it is more likely that these similar disclosures were also genuinely and reasonably believed by the claimant, and that he reasonably believed he was raising them in the public interest.

    a. 1 November 2023: 4kg boxes on top of eggs: I accept that the claimant was raising an issue which he reasonably believed was likely to lead to broken eggs stored on the floor attracting vermin. This was an unsafe method of storage. There had been recent vermin within the kitchen. This was a disclosure which tended to show there was a breach of FSA guidance and food safety regulations.

    b. 1 November 2023: photo of uncovered salmon with spoon "disgusting close down". I accept that the claimant had a genuine belief that this food was stored in breach of food safety regulations, requiring stored food to be properly sealed to ensure no cross-contamination. The respondent accepts that it is a breach to store unsealed food; the claimant had a reasonable belief that this was the case when he posted this picture.

    c. 1 November 2023: email stating :… last night closing was not done properly, professional or with care…": I agree with the claimant that this message should be seen in the context of other posts he made that evening on the same subject, for example the quinoa/raw salmon picture. This email is part of the same disclosure that there had been a failure to properly clean-up and properly store food, it is therefore part of the same information which tended to show, and that the claimant genuinely and reasonably believed, there was an ongoing breach of food storage health and safety requirements.

    d. 1 November 2023: photo of a sink full of unwashed pans; "from yesterday": I accept the claimant's argument that this photo was showing a breach of food hygiene regulations – a requirement that there are separate sinks for preparing food and for washing pans. It was conveying specific information – this sink was being used for the wrong purpose. In the context of several other messages and photos that day pointing out the poor closing, it was genuinely and reasonably held belief that the respondent was failing to comply with food safety regulations.

    e. 18 January 2024: Message "Now guys let's keep track of fridge temperatures…". The respondent accepts that it is a legal requirement to

maintain a record of fridge temperatures. The only way this email can be read is that a proper record was not being maintained, otherwise there would have been no point sending this message. The respondent accepts that the claimant reasonably raised the issue of a failure to record fridge temperature as a breach of the Food Safety (Temperature Control) Regulations 1995. This disclosure was no different.

f. 30 December 2023: WhatsApp message stating "Health and safety in the kitchen is a huge topic I want to cover with you in the new year". This message must be read in context of other messages that the claimant had sent that day and the day before about the kitchen floor. The respondent accepts these were disclosures which tended to show there was a safety hazard requiring repair.

   The claimant was raising health and safety issues as a "huge topic" which he required to be resolved. In context, this message was in part referring to the issue he had specifically raised that day about the floor. The respondent accepts the floor was disclosure genuinely raised and reasonably believed by the claimant, this message was in this context reiterating the same point.

   In addition, this message was, I concluded, a statement that the claimant would be continuing to raise similar health and safety issues into 2024. This part of the message – "… I want to cover with you in the New Year" is not in itself a public interest disclosure. But it is relevant to the issue of dismissal and the prospects of this claim – dealt with in more detail below.

g. 18 January 2024: Email saying "Glass jars on top of shelf must come down tomorrow". I accept that this is a reference to specific regulations which state that glass should not be stored up high – a breach of HSCCP.

<u>Whistleblowing issue to be determined at the full merits hearing</u>

64. I find that the following amounted to a disclosure of information. The claimant says that when he raised these issues, he genuinely and reasonably believed that he was raising breaches of statute, the Working Time Regulations.

65. As I did not hear evidence on the issue of public interest disclosures, it is for the Tribunal at the full merits hearing to determine whether the claimant had a genuine belief that particular regulations were being breached, and if so whether it was reasonable for him to believe that he was raising the following issues in the public interest.

66. <u>Health and safety workplace issues (see paragraphs 17 (j) & (k) above):</u>

a. 17(j) - 20 November 2023 email to manager, Mirek: C refers to an abusive customer shouting at him, he suspects the customer is "using illegal substances" in the toilets "is [R] tolerating abusive behaviour towards staff?"

   Much of the claimants grievance appears to be about being subject to abusive behaviour at work. Arguably this is an allegation of harm to the claimant, not to any issue in the public interest.

   But the claimant also refers to a customer using illegal substances – potentially an allegation of a criminal act, "… it's a concern that a customer was using illegal substances and abusing me because I have an impairment". The respondent accepted that this disclosure 'may just' meet the definition of an allegation of a criminal act.

   The question which still requires addressing: Did the claimant have a genuine belief that this was the case and was it reasonable for him to believe it was in the public interest to raise it?

b. 17(k): 29 November 2023: email from the claimant to Mirek requesting workplace adjustments and alleging he had not been paid for all hours worked.

   The claimant says that he had a genuine belief that the respondent by its actions was breaching or was going to breach the Equality Act (failing to make reasonable adjustments) and the Working Time Regulations – requiring him to work full shifts without breaks.

   Because he worked over his unpaid breaks, he says that this is an allegation which tended to show there was a failure to pay wages due (s.13 Employment Rights Act – an unlawful deduction from wages).

   He says that the issue of working over unpaid breaks was also a health and safety breach of the right to breaks, because he was disabled and had a requirement for extended breaks for health reasons.

   The question which still requires addressing: Were these genuine beliefs, and was it reasonable for him to believe that it was in the public interest for him to raise these issues?

67. <u>Allegations of 'miscarriages of justice' (see paragraphs 17 (n) to (p) above):</u>

a. 17(n): 20 November 2023: grievance email about abusive customer using illegal substances - see paragraphs 66 and 17(j).

Did the claimant have a genuine belief that the customer was using illegal substances, and did he reasonably believe it was in the public interest to raise it?

b. 17(o): 25 September 2023: email wanting meeting to discuss employment conditions – including contract, holiday entitlement, pension, service charge "I am not receiving any"; troncs scheme; working hours "and what are those" and due diligence issues.

The claimant argues that this is an allegation that the respondent is breaching the Working Time Directive by not allowing him to take unpaid breaks, that this is also an allegation of a health and safety breach as it will lead to an unsafe workplace for a person with disabilities who needs regular breaks.

He also argues that it is an allegation that he is not being paid his contractual hourly rate, including not being paid when he worked over his (unpaid) breaks, plus not receiving his entitlement to Tronc.

The questions which still require addressing: Did the claimant have a genuine belief that the respondent was breaching statutory requirements on pay and Tronc (s.13 Employment Rights Act); the right to breaks (Working Time Regulations and health and safety regulations)? Was it reasonable for him to believe that he was raising these issues in the public interest?

c. 17(p): 20 October 2023 to 23 January 2024: complaints about: not being paid Tronc and salary; illegal contract relating to salary and service charge; email saying salary reduction is illegal.

The claimant says that he had a genuine belief that the respondent by not paying him his contractual entitlement to salary and not paying him when he worked over his breaks was making unlawful deductions from his wages (s.13 ERA) and breaching the Working Time Regulations because he was not receiving his statutory break entitlement.

Did the claimant have a genuine belief that the respondent was breaching these requirements and was it reasonable for him to believe that he was raising these issues in the public interest?

68. <u>Allegations of breach of WTR – right to 11 hours rest; and right to an in-work rest breaks (see paragraph 17q above):</u>

a. 17(q): 11 September 2023 to 1 December 2023: 23 texts or emails stating that the claimant had "no break" on shifts worked.

The claimant says that he had a genuine belief that the respondent was breaching the Equality Act (failing to make reasonable adjustments) and the Working Time Regulations – not allowing him statutory breaks during his shift. He says that the issue of working over unpaid breaks was also a breach of health and safety requirements for regular breaks, because he was disabled and had a requirement for extended breaks for health reasons.

Was this a genuine belief, and was it reasonable for him to believe that it was in the public interest to raise this?

<u>The claimant has no reasonable prospects of showing he made the following public interest disclosures</u>

69. Pictures of tofu close to its sell-by date (see 17(d) & (e) above). I accept that the claimant is raising an issue of the overordering of food. I accept that the claimant may have had in mind that it should not be used past this date, and that he may have thought it would be used. But the message does not convey this information; it is simply a description of food close to its sell by date. At its highest, this was a statement with an implication that it should not be used when that date passed. There is no disclosure of information which tends to show that any legal obligation was, or was likely to be, breached.

<u>Health and safety disclosures</u>

70. The respondent accepts that the claimant raised valid issues about health and safety in relation to food storage and safety and fridge temperature control and about the kitchen floor. It says he did so reasonably. It accepts that there was no health and safety committee or nominated safety representative. It follows that the claimant brought to his employers attention by reasonable means matters which he reasonably believed were potentially harmful to health and safety of staff members and of customers.

<u>Disability</u>

71. The evidence shows that the claimant suffered intermittently from depression over several years. In October 2018 he had depression and was prescribed medication for over 6 months. The medical records at this time record poor mood and inability to sleep. I accept that this illness, which may have been precipitated by a business dispute, was more than transient work related stress. He was again diagnosed with depression in June 2021 and was on medication for approximately 10 months.

72. I also accept the claimant's contention that from October 2023 he began to develop more significant symptoms of poor mental which from October 2023 had a substantial effect on his day to day activities. His condition was poorly controlled

by medication such that his dose of anti-depressants was tripled over a period of 2 months. He was agitated, prone to outbursts, having severe mood swings, difficulty concentrating, drowsiness. I accept his evidence that his symptoms were "extremely debilitating".

73. During the period of his employment I accept that his symptoms had a substantial effect on his day to day activities of concentration, ability to communicate effectively and ability to sleep. The sleeplessness and dizziness affected his ability to work a full shift at work without having mental health problems. The fact that the dose of medication was increased strongly suggests that the effect on him would have been worse absent medication.

74. I accept that during this period of employment from October 2023 to his dismissal the claimant had symptoms which were shortly after diagnosed as Affective Bipolar Disorder and Emotionally Unstable Personality Disorder. The claimant describes from October 2023 having mood swings, poor temper, engaging in impulsive actions, using intemperate language. These are common symptoms of emotionally unstable personality disorder as well as depression.

75. All of these conditions taken together – depression, Affective Bipolar Disorder and Emotionally Unstable Personality Disorder – had a substantial impact on his mood and on his ability to control his temper; all affected his patterns of thought and his ability to concentrate. All substantially affected his sleep patterns.

76. The claimant says that his symptoms were in effect misdiagnosed by his GP as depression, that it was only when he was admitted to hospital and saw a specialist that he received definitive diagnoses of his conditions.

77. I accept the claimant's argument that his worsening symptoms from October 2023 were part of the range of symptoms he suffered related to these three conditions which continued after his dismissal until his diagnosis in April 2023

78. My principal conclusion that from October 2018 to June 2022 the claimant had intermittent mental health conditions which had a substantial impact over the claimant's day to day activities for periods of less than 12 months – i.e. on each occasion there was a substantial impact on day to day activities, but that the substantial impact was not long-term.

79. From October 2023 it is clear that the claimant's symptoms were of a different magnitude of seriousness. It is clear that his mental health rapidly deteriorated, such that the medication was having little effect despite increasing doses. By the date of his dismissal, the date that has to be considered for a consideration of whether the condition was likely to be long-term, it is clear that he was very ill indeed and there was a very substantial impact on the day to day activities described above. On the day of his dismissal and on being informed of his dismissal, his illness immediately and substantially worsened.

80. I conclude that a specialist examining the claimant just prior to or on the day of dismissal would highly likely have diagnosed the claimant as having symptoms consistent with emotionally unstable personality disorder and/or affective bipolar disorder, and depression. This is what he was diagnosed with shortly after, and his symptoms prior to dismissal were consistent with these diagnoses.

81. Affective Bipolar Disorder is a life-long condition. It is absolutely capable of being treated successfully, but such treatment may be required for significant periods of time, and may well be required for life. Emotionally Unstable Personality Disorder is often a long-term condition.

82. I also conclude that this specialist, examining the claimant just prior to or on the day of dismissal would conclude that the claimant had long-term health conditions which were likely to last longer than a year. They would also conclude that, discounting the effects of future treatment, 'it could well happen' that these conditions would have a substantial impact on his ability to undertake day to day activities for more than 12 months.

83. For these reasons I conclude that the claimant was a disabled person from October 2023 onwards with the conditions of depression, Affective Bipolar Disorder and Emotionally Unstable Personality Disorder.

Application to strike out or order a deposit

84. The respondent says that the claimant was dismissed for misconduct and loss of trust and confidence in him, the distance of time makes it unfeasible that whistleblowing was on the mind of those taking this decision.

85. The claimant says that he had sent strongly worded texts criticising management throughout his employment, but there was no comeback on him at all. He says there was also silence when he raised health and safety issues relating to the kitchen, instead of management supporting him. He was raising inconvenient issues for his employer, he says, but it was convenient to wait to dismiss him when the Head Chef had returned and during a quiet period, otherwise it would have been done earlier. He was also continuing to raise health and safety issues and issues regarding his wages and tronc, all connected with his prior disclosures, up until his dismissal.

86. I conclude that there will be significant contested evidence, and the respondent has not shown that the claims of automatic unfair dismissal on grounds of whistleblowing and/or raising health and safety complaints stand no reasonable prospect of success (strike-out), or little reasonable prospect of success (deposit).

87. The respondent will have to prove the reasons for dismissal. Until its closing submission, and until I intervened saying I had some prior knowledge of food

safety regulations, it denied the claimant had raised whistleblowing allegations, despite it operating a professional kitchen which has knowledge of the relevant regulations. The respondent says it welcomed the claimant raising health and safety issues, the claimant says there was usually silence from management, not support, when he raised them. These *may* be issues of credibility which in turn *may* affect the Tribunal's assessment of the evidence.

Claimant's application to amend his claim to include a breach of the Working Time Regulations

88. This application is declined. The legal test is: was it reasonably practicable to bring this claim within the appropriate time limit? Ignorance of the law is not sufficient to make it not reasonably practicable to bring this claim. Other claims were brought in time.

89. In reaching this conclusion, I accept that issues of breaches of Working Time records are implicit in the claimant's allegations. He is saying (i) he raised public interest disclosures in respect of them; (ii) he claims an unlawful deduction from his wages in respect of a failure to pay him when, he says, he worked his unpaid breaks. Whether he did or did not take breaks is therefore a significant factual issue within the claim.

90. But whether or not the claimant whistleblew about a failure to give breaks, and whether or not he can claim an unlawful deduction in respect of these breaks, is legally very different from alleging as a freestanding claim that there was an actual breach of the WTR. For the whistleblowing claim, he need not show there was an actual breach, just that he genuinely and reasonably believed there was a breach. For the unlawful deduction, he must show he was not paid for a period when he worked. These legal claims are very different from a Working Time Regulations claim.

91. I conclude that the claimant has not shown it was not reasonably practicable for him to bring the WTR claim within the applicable time limit. This claim is therefore not added to the claims in the List of Issues, notwithstanding that this may be a factual issue to be determined in respect of other claims.

Employment Judge Emery
18 December 2024

Judgment sent to the parties on:

31 December 2024
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