EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104322/2023 Hearing Held at Edinburgh on 6, 7 and 8 February 2024

Employment Judge: M A Macleod
Tribunal Member: M Watt
Tribunal Member: R Henderson

X	**Claimant** **In Person**
GB Festivals Limited t/a Gilded Balloon	**Respondent** **Represented by** **Mr R Katz** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claim fails, and is dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 17 August 2023 in which she complained that she had been automatically unfairly dismissed under section 103A of the Employment Rights Act 1996 (ERA), on the grounds that she had made a protected disclosure or protected disclosures to the respondent.

2. The respondent submitted an ET3 in which they resisted the claimant's claim.

3. A Hearing was listed to take place on 6 to 9 February 2024 in the Employment Tribunal, Edinburgh. As it turned out, the Hearing was concluded on the 3rd day, 8 February 2024.

4. The claimant appeared on her own behalf. The respondent was represented by Mr R Katz, an Employment Consultant.

5. The claimant gave evidence on her own account.

6. The respondent called 3 witnesses:

   - Katy Koren, Artistic Director;
   - Katherine Duncan, General Manager; and
   - Felicity Gourley, Operations Manager.

7. A joint bundle of productions was presented by the parties and relied upon during the course of the Hearing.

The Issues

8. Following a Preliminary Hearing on 18 December 2023, Employment Judge Neilson issued a Note (4ff) in which he set out the Issues for determination by the Tribunal, which we adopted, as follows:

   1. **Was the claimant dismissed by the respondent in accordance with either section 95(1)(a) or section 95(1)(c) of ERA?**

   2. **Was the disclosure made by the claimant to the respondent on or about Tuesday 15 August 2023 regarding concerns relating to sexual harassment, sexual misconduct and abuse of power a qualifying disclosure under section 43B of ERA, and, in particular,**

      a. **Was it a disclosure of information**

      b. **Which, in the reasonable belief of the claimant, was in the public interest**

c. And which in the reasonable belief of the claimant showed or tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject, and/or that the health or safety of any individual had been, was being or was likely to be endangered?

3. Was the claimant subjected to the treatment set out by her at paragraph 8.2 of her ET1 and if so, did this treatment, or any part of it, amount to a detriment, and if so, was it done on the ground that the claimant had made the qualifying disclosure set out in Issue no 2 above (if established)?

4. If the claimant was dismissed, was the reason (or, if more than one, the principal reason) for the dismissal that the claimant made the qualifying disclosure set out at Issue no 2 above (if established)?

5. If the claimant succeeds with either or both of her detriment or unfair dismissal claims, what award should be made to her by the Tribunal in compensation?

9. It was noted that the respondent did not dispute that a disclosure was made to them by the claimant on or about 15 August 2023, but denied that it amounted to a qualifying disclosure within the meaning of section 43B of ERA.

Claimant's Application for Rule 50 Order

10. On the final day of the Hearing, before submissions were presented by the parties, the claimant made an oral application for a Rule 50 Order, and in particular, for an anonymity Order under Rule 50(3)(b) of the Employment Tribunals Rules of Procedure 2013.

11. The claimant's explanation was that she had not realised until the Hearing had commenced that she could make an application for an Order to maintain privacy, which she regarded as very important. She made

reference to her rights under the “Sexual Offences Act”, and to her right to a family life.

12. She expressed concerns that there would be stigma attached to her name, if it were to become known to prospective employers that she was a whistleblower. She said that she had spoken openly about her own personal history during the course of the Hearing which could affect her reputation as a counsellor and therapist. She stressed that she requires to be very careful what she puts online, in compliance with the guidelines of the British Association of Counsellors and Psychotherapists.

13. The circumstances of this case are not known to her friends and family, as she is very mindful of what she puts online. She has experienced online stalking as a result of her personal history, and she is very concerned that having information about her online could be used by this particular individual.

14. Mr Katz, for the respondent, submitted that the Tribunal must have regard to the important principle of open justice, and that it is necessary for the individual to show that their rights might be breached. In principle, the respondent did oppose the application.

15. He went on to submit that if the Tribunal were to grant a Restricted Reporting Order, it should be for 2 years rather than 1. He also asked that an anonymity order be granted for all parties involved in this process.

16. Having heard from both parties, it is our conclusion that this case should attract an Order anonymising the claimant, and providing a Restricted Reporting Order for a period of 2 years.

17. Our reasons for doing so are that the claimant has expressed concern not only about her reputation with future employers (which would not, of itself, be sufficient for us to grant an anonymity order) but also, and more significantly, about the potential effect upon her personal life were her name to be disclosed on the Employment Tribunal Judgment register, given her history of personal sexual harassment and stalking, of which

she spoke in her submission. The claimant has a right to respect for her private and family life, under Article 8 of the Convention on Human Rights set out in Schedule 1 to the Human Rights Act 1998. We take this matter very seriously on the claimant's part.

18. The respondent's opposition to the application was not entirely clear in its terms, but their request that all individuals involved in this case should be anonymised is refused. We have already made clear that we would refer to the subject of certain allegations in the case as A, rather than providing their full name. We are not persuaded that the names of the other employees referred to, to whom we have only referred as first names, should be anonymised.

19. We accept that the principle of open justice is a very important one, but consider that in this case derogation from that principle is amply justified. A Judgment published on the public register remains in place, and open to searching, in perpetuity, and we entirely accept the claimant's concerns in this regard. The claimant shall be identified as X.

20. Further, we have determined that the Judgment should be the subject of a Restricted Reporting Order for 2 years, as requested by the respondent, in order to protect the claimant's identity and remove the risk that she might be identified by the public naming of the respondent, particularly given that she carried out a very specific role within the company.

21. Accordingly, we have issued the appropriate Orders at the same time as this Judgment.

Findings in Fact

22. Based on the evidence led, and the information presented, the Tribunal was able to find the following facts admitted or proved.

23. The claimant, whose date of birth is 13 June 1985, commenced employment with the respondent as Box Office Manager on 1 March 2023. The respondent is an events business primarily operating with the

Edinburgh Festival and Festival Fringe. The box office is based in George Square, Edinburgh.

24. The claimant's contract of employment was for a fixed term until 31 October 2023. The contract, which was produced (39ff) confirmed that the claimant was responsible to the respondent's Directors and General Manager. The claimant signed the contract on 2 March 2023. Attached to the contract was the respondent's Staff Handbook (46ff).

25. The respondent company was formed in 1986 by Karen Koren, who was, at the time of the claimant's employment, still a Director of the company. Her daughter, Katy Koren, was the Artistic Director. The General Manager was Katherine Duncan, and the Operations Manager was Felicity ("Flick") Gourley.

26. The claimant's duties encompassed all activities relating to the sale of tickets for the Festival, including inputting information into systems, ensuring that information about events was correct, ensuring that tickets were sold correctly, recruiting temporary staff and dealing with complaints. Her tasks grew as the Festival approached, and she would require to deal with many emails and phone calls, carry out training of staff and liaising with performers and management. Initially, the claimant was based in the respondent's main office in Commercial Street, Edinburgh, but in July 2023 she moved to the box office in George Square.

27. The Festival and Fringe took place over 3 weeks in the course of August 2023. Activity in the box office became particularly busy during that time.

28. In addition, the claimant was one of 3 nominated Safe Spaces Officers, the others being Flick Gourley and Lucy Green (Production Co-ordinator). This meant that if staff had any concerns about the working environment, or felt threatened in any way, they could come to speak to the claimant or the other two Safe Spaces Officers. The respondent set out the basis upon which they would operate in documents which formed part of the staff training (62ff).

29. On 27 July 2023, the claimant attended a party for the production staff, to which the claimant had been invited, though not herself one of the production team. She observed one of the technicians, joking to one of the female staff present about Tinder and topless photos. She also noted that he used a wrench to simulate masturbation, using a yellow Sharpie highlighter pen to denote ejaculation, close to a female manager. The claimant walked away from this situation. She spoke to the Technical Manager, Robin, but found her reaction to be dismissive.

30. On the following morning, the claimant spoke to Ms Gourley about this matter, in the garden outside the building in which the box office was located. This was relatively common when private matters were to be discussed, largely because the box office did not have any private spaces available for staff to use. The claimant expressed her unhappiness with this situation and how it had been dealt with. She said that she wanted the matter nipped in the bud, and for the technician to be spoken to. In addition, she wanted Ms Gourley to "check in on" the people involved. Ms Gourley apologised. It was agreed between them that it would be a good idea to share all policies with the senior management team, and that Ms Gourley would speak separately to the production staff about the kind of jokes which they would make

31. Ms Gourley spoke to the production manager, who was the person at whom the joke had been directed. She advised that she "did not mind", but agreed that it was not appropriate for such a joke to be made in the workplace and so she would speak to the technician about this. She subsequently reported that she had spoken to him and that he had been "mortified", and had apologised to her.

32. Ms Gourley did not like the joke as it had been related to her, but did not regard it as harassment.

33. The claimant sent a WhatsApp message to Katy Koren on 29 July 2023, and the exchange of which this formed part was produced (68ff). the claimant stated that she was keen for senior management to "get on the

same page" about the respondent's harassment policy and procedure. She said that *"Concerns were raised to me, which I passed on to that manager and it was all a bit sticky."* Following the initial incident, the claimant said that another member of staff had raised concerns with her about A's behaviour. She confirmed this in a later message on WhatsApp.

34. Ms Koren, who was at this time on maternity leave with a very young baby, continued to communicate about this matter. On 30 July 2023, Katherine Duncan sent an email to all senior management (71) in which she said:

"Hi everyone

Ahead of all of our teams starting fully this week and next week, I wanted to remind all of the senior management team of a few key policies that we all need to be aware of as part of our roles of managing staff. Just wanted to make sure we are all on the same page together so we can have a consistent approach to any staffing issues.

There are the key documents:

- *Disciplinary Procedure*
- *Grievance Procedure*
- *Safe Spaces Policy*

Please look through them and confirm to myself or Flick that you understand the processes. Hopefully this is not something that comes up too often but we need to be ready in case it does.

Please do talk to myself or Flick if you have any questions or need anything clarified.

All the best

Katherine"

35. The claimant was satisfied that her report had resulted in this action by management. She forwarded the email to the two assistant managers with whom she worked, A and another individual, Jasmine (known as "Jas").

36. On 14 August 2023, the claimant was approached by Jas, who advised her that she felt that A, the other assistant manager, was not "pulling his weight", and was also making mistakes in his work. There followed a team meeting, which was being filmed by a crew making a documentary about the Fringe, and during which the claimant laid out some of the difficulties under which she was operating. She became upset, and left the meeting for a time. When she returned, she sat next to Ms Gourley. After the meeting ended, she spoke to Ms Koren, and expressed the view that it would be necessary to demote A. Ms Koren agreed and was supportive of the claimant.

37. A was asked to attend a meeting with the claimant and Ms Duncan. The claimant's view was that A turned up "a bit dishevelled". They asked him if there was anything he wanted to tell them, to which he said there was not. They told him that his role as Assistant Manager was not working out, and advised him that he would require to move to become a supervisor as he had been before. He agreed to do so.

38. On 15 August 2023, the claimant arrived at the box office "about lunchtime", and spoke privately with Jas, to inform her that A had been demoted, and to ask her to take on some of his former duties. They discussed a work plan. Jas appeared to be satisfied that A had been demoted. Jas then informed the claimant that there had been a staff party on the Sunday evening previously (13 August), during which she had observed A behaving badly towards another colleague, Emma. After this, the claimant approached Emma to check that she was all right, and she assured her that A had been drunk and that she felt fine about it. She informed the claimant that A had "hooked up" with another member of staff (which the claimant interpreted as meaning that he had had sex with her).

39. It was a very busy day in the box office, during which the card readers had stopped working.

40. The claimant went to meet with Ms Gourley and Ms Duncan to tell them that there had been further reports of sexual harassment and complaints about A's behaviour. Ms Duncan was very concerned as she believed that the matters being raised “sounded very serious”. She advised the claimant to put her concerns in writing immediately, with names and laying out everything clearly. The claimant made clear to them that she would not deal with A in any way.

41. She then submitted a message on Slack, a private messaging service, at 1.47pm (74):

“Hello,

Popping in slack so not in my outbox.

Flick had mentioned yesterday that A has been spoken to for being inappropriate at Patter Party.

Jas mentioned today that he was acting inappropriately with Emma (A supervisor) and she was very drunk. I checked in with Emma and she feels fine about it, said he was drunk. I checked she was safe, let her know we take harassment seriously and she could talk to us anytime. She mentioned that he ‘hooked up’ with Alex (another supervisor).

Jas also mentioned that Eve (FOH) had an incident with him last year. and he has a reputation for being a ‘sex pest’.

I have heard from several members of staff that he was bragging about how many member of the team he had slept with last year – his ‘body count’.

This is the first that this has been brought to my attention. He has received the policies by email and was at safe spaces training.”

42. The “Patter Party” was the staff party which had taken place on the previous Sunday evening, to which Jas had referred in their discussion. Every Sunday evening, staff who have been working hard are given a party to allow them to relax together.

43. “FOH” means “front of house”, another area in which staff are employed to deal with public and performers.

44. When Ms Duncan and Ms Gourley read the message, they were surprised as they had expected the information to be more serious than it appeared to be. They did not consider that any of the incidents set out in the message clearly described sexual harassment. They regarded it as “second- or third-hand information” which the claimant had not herself witnessed. Nobody had come forward to complain, themselves, of sexual harassment.

45. Ms Gourley spoke to Eve in order to establish her position. Eve said that she recalled A, with whom she had worked before, flirting with her, but said that she did not feel that she was the victim of sexual harassment, and made clear that she did not wish to make a complaint about A.

46. A was due to come on shift at 4pm on 15 August 2023, and the respondent was concerned to ensure that they made a decision about what to do before he arrived.

47. They spoke to Katy Koren, who sent a message to the claimant at 3.38pm (76):

“But in terms of what we need to do for A – we have to follow procedure that Katherine is suggesting.

We can’t fire him without giving him proper notice and so can he come in now and you put him over at patter whilst Katherine gets a chance to speak to Pam our he (sic) consultant and compose the proper procedure between you her and flick.

I know you are frustrated and upset with the situation but we need to do more investigation into the incident than we have info for currently. If we don't he can has ground for improper dismissal and I do not want to get into that situation.

Please follow Katherine's proposed plan and if you need to take some time out please do. I don't want you or jas to feel uncomfortable but from what I've heard we do not have grounds to fire him as it currently stands. We need to manage this really carefully and not rush into anything. Sorry.

I can call you as soon as I can to discuss properly if needed – again apologies I can't call right now x"

48. In a short message at the side of this larger message, Ms Koren explained that *"I've got a screaming child here".*

49. Before the Tribunal, Ms Koren's evidence was that having seen the claimant's Slack message, there was no further need for investigation at that time, having spoken to HR about it. She and Ms Duncan were concerned that the claimant may not take in such a message, and may not feel that she had been heard, and accordingly wrote to her via Slack (76) as above.

50. The claimant said that she merely glanced at this message and understood, essentially, that Ms Koren was telling her that "there's nothing we can do". She was disappointed and upset that what she regarded as very serious concerns were not being taken seriously by the respondent, in her view.

51. Ms Duncan and Ms Gourley then arrived at the claimant's office, and asked her to come outside so that they could meet and speak privately. They walked out, with the claimant behind them. The claimant asked if she was being marched out, but Ms Duncan advised her that she was not. They went into George Square in order to find a quiet place to speak. At this point, the claimant's only understanding was that A was returning to work. She began to feel that she was having a panic attack –

"dissociating", as she described it – and was unclear as to what she was being told, other than that the respondent was unable to do much, and that A would be coming in to work, though in a different venue, Patter.

52. This meeting took place at approximately 4pm, shortly before A was due to arrive at work.

53. The claimant expressed concerns that the staff in Patter would not be safe if he went there. She described herself as being "not in my right mind", in her evidence to the Tribunal.

54. The claimant told Ms Duncan and Ms Gourley that she was not prepared to work in an environment where sexual harassment was not taken seriously, and that she had to leave. She also commented that it had been a pleasure working with them, and she walked away. She went back to her office, with the intention of resuming work, and opened her emails. A performer came in with a question, which she answered. The claimant then decided that she could not continue to work, and collected her bag and left. She knew that Ms Koren had said to her that she could take time out if she wanted. She felt that she was not in a fit state to speak to anyone, nor was she fit to work. The claimant went to the bus stop next to the McEwan Hall to await her bus, and attempted to calm down. She then went home. On her arrival she phoned the Samaritans, took medication and went to bed.

55. The following day (16 August 2023) was the claimant's day off. She had not arranged cover for her shift. She wished to speak to Ms Koren before attending work, to explain why she had left. She attempted to call her but was unable to speak to her.

56. The respondent did not attempt to make contact with the claimant on 16 August. They had been advised by their HR consultant to leave the claimant alone for 24 hours, and then make a formal decision about the matter.

57. At 4.05pm, Ms Koren emailed the claimant (81):

"Hi X,,

I'm writing to you to formally acknowledge in writing your verbal request to resign with immediate effect in your role as Box Office Manager that was given to Katherine and Flick yesterday at 4pm.

We'll arrange for monies due to you up to that point as part of our normal payroll.

I'd request that any contact between us going forward is in writing over email with myself or Katherine rather than over the phone.

All the best,

Katy K"

58. The claimant responded at 1714 that afternoon (80):

"Hi there,

I am really taken back by this email. I didn't resign yesterday. In an incredibly heated situation I was leaving what I seen to be a dangerous situation. I raised health and safety concerns for myself and my team and I didn't feel like the duty of care to protect the staff was being exercised. I was incredibly distraught and it wouldn't have been possible for me to stay on site. I had a slack message to say I could take some time out and that it what I needed to do. Today is my day off and I was ringing to discuss the situation and offer to come back in to work this evening.

I take sexual harassment in the workplace incredibly seriously and I believe I have followed protocol in both incidents I have reported. I have a duty of care to provide my team with a safe environment and in return I should feel safe also. It is not easy to be a whistleblower and in doing so I become a victim also.

Kind regards,

X"

59. In response, Ms Koren emailed (80) to say that this was not how the situation was understood, and that it was very clear to those present (an apparent reference to Ms Duncan and Ms Gourley). She continued:

"You had a meeting on 15th August with Katherine and Flick where you stated that you were unable to continue working in an environment where you felt claims of harassment were not taken seriously and you stated you were leaving, where you left mid shift without further communication. This is clearly understood as a resignation from your roles and responsibilities to the team.

You had raised a grievance with an employees performance which was handled and resolved through an informal discussion in line with our disciplinary procedure.

We take these kinds of claims incredibly seriously and find it disappointing that you have interpreted the situation in this way.

We wish you all the best."

60. The claimant replied (80):

"I hear what you are saying about how it could have been understood, but those were not the words I said. I said 'I'm leaving' as I needed to step away and calm down and be safe. I was completely overstimulated in the moment and my fight or flight kicked in. When we went outside I said I felt like I was being walked home and I meant that. I am sorry I left. If I could have stayed I would have.

Please don't make me leave my job and my team that I love so much. I have always said to the team how supported I am and how for the first time I am accepted and able to be me. Sexual harassment is a major trigger for me. I have made it my life work to provide people with the support and safety that has been largely missing from my own life. I'm not saying this to garner any kind of sympathy but to communicate honestly through text what happened yesterday."

61. Ms Koren wrote then to the claimant (79/80) to advise that she would revert to her in the morning (this was late in the evening of 16 August) once she had spoken to their HR consultant. The claimant interpreted this as a hopeful indicator, and repeated her desperation to get back to work, in an email she sent on 17 August 2023, at 11.29am (79).

62. However, Ms Koren then emailed the claimant (79) to advise that there was no misunderstanding on the part of Katherine Duncan and Flick Gourley, *"who heard and accepted your resignation on 15 August."* She went on to say that the decision to leave the team came from her, and that decision had been accepted. She had left abruptly, and the respondent had had, she said, to restructure quickly. They considered the matter closed and confirmed that the claimant's pay and P45 would be dealt with.

63. In reply, the claimant expressed considerable distress (79), and said she had not got any fight left in her. The claimant considered that she had been treated badly by people whom she had come to believe were close friends, but who had behaved as if they were strangers.

64. No further communication took place between the parties after that.

65. The claimant submitted her claim to the Employment Tribunal on 17 August 2023. For reasons which were not explained in evidence before us, the claimant does not appear to have contacted ACAS to engage the Early Conciliation Scheme, and received no Early Conciliation Certificate.

66. Following the termination of her employment with the respondent, the claimant did some mental health counselling work – she is a trained mental health counsellor, and provided counselling to clients before and after her employment with the respondent. She also provided a mentoring service for a student for one hour per week. Ranstad employed her to carry out 4 hours a week counselling, on a zero hours contract, and in addition, she did some self-employed counselling for a charity.

67. In her evidence, the claimant said it was "challenging" to provide a quantification of what earnings she received from the different work she did. She said that due to depression she was unable to work for a period of time, and had to be very gradual in her returning to work.

68. She stated that in October 2023, she earned "probably about £100"; in November, "about £800"; December 2023, £800; January 2024, £2,000. Over Christmas and New Year she provided telephone counselling for which she billed £1,500. She is, she said, building her private practice.

69. The claimant has not applied for any jobs other than carrying out the work identified above.

70. She accepted that there was no expectation on her part that her contract would continue with the respondent beyond 31 October 2023, though she did anticipate that she would be able to work all of the festivals in Edinburgh, including Christmas and New Year. Her position, under cross-examination, was that there was no indication that she would not get a contract from the respondent in 2024, and that she had "every plan to stay – they were my family."

71. She described the impact of the events leading to the ending of her employment with the respondent as causing her to feel devastated, particularly as she considered the respondent's managers as very close friends, "like family – such a close bond". She spent two hours at the Royal Edinburgh Hospital on 17 August 2023, where she was given medication and matched with Crisis Navigation, with whom she has spoken on a number of occasions, usually going out for a walk to discuss what happened with the respondent. The medication which she was prescribed was anxiety medication, but she only took two doses of it, as it "knocked me out" and meant she felt unsafe.

72. The respondent accepts that the claimant is due outstanding holiday pay of £317.94. The claimant was uncertain as to the precise amount due to her, as she had been unaware that she had been due any holiday pay at the time her employment ended.

Submissions

73. Mr Katz made an oral submission at the conclusion of the evidence. The claimant chose not to make any submission, having been assured by the Tribunal that she would not be disadvantaged if she did not do so.

74. Where appropriate, reference to the terms of the respondent's submission is included in the decision section below.

The Relevant Law

75. 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."

76. A qualifying disclosure is defined in section 43B 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."

77. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

78. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2.. The 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 or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. 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. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is

impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. 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. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

79. In addition, reference was made to the well-known decisions in **Kuzel v Roche Products Ltd [2008] EWCA Civ 380, Fecitt & Ors v NHS**

Manchester [2012] ICR 372 and **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT**.

80. 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). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.

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."

81. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
>
> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

82. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

83. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the "classic" definition:

> "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

84. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

> "…whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

85. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

86. The Tribunal also took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

87. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

Discussion and Decision

88. The List of Issues was set out as follows:

1. **Was the claimant dismissed by the respondent in accordance with either section 95(1)(a) or section 95(1)(c) of ERA?**

2. **Was the disclosure made by the claimant to the respondent on or about Tuesday 15 August 2023 regarding concerns relating to sexual harassment, sexual misconduct and abuse of power a qualifying disclosure under section 43B of ERA, and, in particular,**

    a. **Was it a disclosure of information**

    b. **Which, in the reasonable belief of the claimant, was in the public interest**

    c. **And which in the reasonable belief of the claimant showed or tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject, and/or that the health or safety of any individual had been, was being or was likely to be endangered?**

3. **Was the claimant subjected to the treatment set out by her at paragraph 8.2 of her ET1 and if so, did this treatment, or any part of it, amount to a detriment, and if so, was it done on the ground that the claimant had made the qualifying disclosure set out in Issue no 2 above (if established)?**

4. **If the claimant was dismissed, was the reason (or, if more than one, the principal reason) for the dismissal that the claimant made the qualifying disclosure set out at Issue no 2 above (if established)?**

5. **If the claimant succeeds with either or both of her detriment or unfair dismissal claims, what award should be made to her by the Tribunal in compensation?**

89. We addressed these issues in turn.

1. **Was the claimant dismissed by the respondent in accordance with either section 95(1)(a) or section 95(1)(c) of ERA?**

90. We required to weigh up the evidence carefully in determining this question. The claimant's evidence differed somewhat from that of Ms Duncan and Ms Gourley, in the precise details of the conversation which took place at about 4pm on 16 August 2023 in front of the McEwan Hall.

91. The claimant's position was that she was aware that the respondent was not going to take any action against A, and that he was to be moved, at least in the short term, to a different building to the claimant; that she said words to the effect that she could not work with him, and that this was unacceptable, so she was leaving; that she did so because she had been told she could take some time out if she wished; that she resumed her work station with the intention of carrying out work, and answered some questions from a performer who came into the box office; and then left to go home, where she phoned the Samaritans, such was her distress.

92. Her evidence also indicated that she did not hear or take in everything that was said to her as she was so anxious, and her recollection of the conversation was not detailed.

93. The evidence of Ms Duncan and Ms Gourley was that it was clear that the claimant was upset, and angry, about the decision not to take any formal action against A; that she said to them that she could not work in a place where sexual harassment was not taken seriously; that it had been a pleasure to work for them; and that she was leaving. She then walked away in the direction of the office. They understood that she was returning to the office to collect her bag from her desk.

94. We considered that it was possible to reconcile these different versions of events by acknowledging that the claimant's recall of the conversation was not detailed, due to the way she was feeling at the time. She was plainly distressed and angry, and in her own evidence made clear that she simply wanted to leave the place.

95. If the conversation on 15 August 2023 were to be taken as the only evidence of the claimant's intentions, it might be understandable that the respondent would insist that the claimant was intimating her intention to

resign at that time. However, it is clear that there are relevant facts following that conversation, and into the following day.

96. The respondent did not immediately write to the claimant to acknowledge that she had resigned; they sought advice from their HR consultant, who told them to wait for 24 hours before doing so. It is entirely unclear why they did so. If, as they have insisted before this Tribunal, and insisted to the claimant in the emails which were exchanged on 16 and 17 August, they were of the view that the claimant had clearly and unambiguously resigned on 15 August, there is no reason why they should have waited an arbitrary period of 24 hours before proceeding on the basis that she had resigned.

97. It is not clear to the Tribunal what they were waiting for in that 24 hour period, but one inference is that they wanted to check that the claimant actually meant to resign, and wait a period of time to give her the chance to clarify her intentions. If so, (and we consider that that can be the only explanation for waiting for that time) the claimant's statements on 15 August were not as unambiguous as the respondent insists now. Nobody from the respondent made any attempt to contact the claimant during the period between her departure on 15 August and the email sent on 16 August confirming her resignation at 4.05pm by the respondent.

98. Indeed, when the claimant emailed the respondent in reply to that email, she made it quite clear that she did not intend to resign, and that she had taken time out as had been suggested to her in Ms Koren's message of 15 August (76). No account was taken of that explanation by the respondent, and Ms Koren herself simply appears to have checked with Ms Duncan and Ms Gourley to confirm their version of events, and then written again to the claimant to reaffirm the respondent's view that her resignation was being accepted.

99. This was a fraught and confusing episode, which took place during an extremely busy period for the respondent, and particularly in the box

office, right in the middle of the Fringe Festival when activity there was at its height.

100. In our judgment, the words used by the claimant in that conversation on 15 August cannot be considered to be unambiguous evidence of resignation. On the one hand, the claimant's comment that she could not stay in a place where sexual harassment was not taken seriously, and that it had been a pleasure working with the respondent, may indicate that she did intend to leave permanently; on the other hand, the fact that she had been told, very shortly before this, by Ms Koren, that she could take time out if she wished, casts the matter in a different light. For the claimant to have said that she was leaving does not, of itself, resolve the matter: that is consistent with resignation but also with leaving for the day only, and taking time out.

101. The fact that the respondent waited for 24 hours indicates to us that they did not consider the claimant's position to be unambiguous at that time. If it had been, there would have been no reason to wait.

102. Further, when the claimant advised the respondent by email on 16 August that she did not intend to resign, and referred to Ms Koren's message inviting her to consider taking some time out, the respondent's reaction was simply to reinforce their earlier position. They did not take any account of the claimant's clarified position. It is not clear why they did not at least invite the claimant to a meeting to discuss and confirm her intentions.

103. It appeared to be the respondent's position that even if the language in the conversation of 15 August were not unambiguous, the claimant had made clear that she was not prepared to work for them if A remained in employment. Two concerns appear to us to arise from this. Firstly, the claimant clearly stated that she wished to continue in work, the following day, which indicated that there was a "heat of the moment" quality to the previous day's conversation; and secondly, the claimant's concern was at least in part that the respondent had decided without investigation (at

least as far as she was aware) that A should not be subject to any disciplinary action. Had the respondent taken the opportunity to discuss the matter further with the claimant, they may have been in a position better to understand her concerns, or to reassure her of the steps which had been taken.

104. One difficulty which arises here is that the respondent appeared to think that the only two alternatives were to dismiss A or allow him freely to return to work. No consideration appears to have been given to the possibility of suspension on full pay pending an investigation. There may have been serious concerns about removing a manager from the workplace during such a busy time, but such concerns do not alleviate an employer of the responsibility to proceed by way of fair process, and to investigate matters which may give rise to disciplinary action.

105. In our judgment, the claimant's actions here were not unambiguously those of an employee seeking to resign, and the respondent did not believe they were at the time, according to their own actions. What seems extraordinary is that between the claimant's departure and the email sent to her on 16 August at 4.05pm, nobody from the respondent attempted to contact her to establish or confirm her intentions. If they were waiting 24 hours for any purpose at all, it is unaccountable that they did nothing to contact the claimant in that time.

106. Accordingly, we have concluded that the claimant did not resign, nor that the respondent could reasonably consider that she had. They acted with great haste once their self-imposed deadline had passed, and refused to consider the claimant's explanation – which in our view was not unreasonable – that she had had to remove herself from a stressful situation and had simply needed to take time out, as she had been invited to do.

107. What conclusion do we then reach? It is our judgment that the respondent terminated the claimant's contract by purporting to accept a resignation

which the claimant specifically disavowed. Accordingly, the claimant did no resign, but was dismissed by the respondent.

2. **Was the disclosure made by the claimant to the respondent on or about Tuesday 15 August 2023 regarding concerns relating to sexual harassment, sexual misconduct and abuse of power a qualifying disclosure under section 43B of ERA, and, in particular,**

   a. **Was it a disclosure of information**

   b. **Which, in the reasonable belief of the claimant, was in the public interest**

   c. **And which in the reasonable belief of the claimant showed or tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject, and/or that the health or safety of any individual had been, was being or was likely to be endangered?**

108. The disclosure made was presented by the claimant via Slack on 15 August 2022 (74). It should be noted that the claimant appeared, during the course of the Hearing, to seek to expand this to a disclosure at the end of July 2022, to which the respondent objected on the basis that it did not appear in the claim form and did not form part of the List of Issues identified by Employment Judge Neilson. We accept this submission by the respondent. It is important only to deal with those claims which have been presented by the claimant to the Tribunal. It is not appropriate simply to address complaints which may arise during the course of the Hearing, without any notice being given to the respondent that they require to defend such a claim.

109. Accordingly, we restricted ourselves to consideration of the claimant's disclosure of 15 August.

110. Was it, firstly, a disclosure of information? The message contained a number of matters raised by the claimant:

- That she had been told by Flick that A had been spoken to for being inappropriate at the Patter party. This is a statement of fact, and of itself does nothing to indicate any conduct giving rise to one of the concerns in section 43B; it relates to Flick's action, not anything that A had done.

- That Jas had said that A had been acting inappropriately with Emma, who had been very drunk. Both Flick and the claimant then checked in with Emma to make sure she was all right, and she confirmed that she was. In our judgment, this is not the disclosure of information, but an allegation of inappropriate behaviour, which, when investigated, did not appear to be sustained, though for an employer may still give rise to misgiving.

- That Emma had said that A had "hooked up" with Alex, another supervisor. Here, the claimant is not disclosing any information, but passing on an allegation (or, perhaps more accurately, a rumour) that A had left the party with another colleague. Precisely what Emma knew is unclear; what the claimant knew even less so.

- That Eve had had an incident with A the previous year. In our judgment, there is no disclosure of information here, but merely a vague allegation by an employee (without in any way being critical of that employee).

- Stating that A has a reputation for being a "sex pest" is merely a broad and unspecified allegation. It is, in our judgment, very clearly not a disclosure of any information.

- The claimant makes clear that she "has heard" from team members that A was bragging about how many team members he had slept with the previous year, referred to as his "body

count". There is no information disclosed here, but the claimant passing on what amounts to a rumour about A.

111. It is our conclusion, therefore, that the claimant's message of 15 August 2022 did not rise to the level of a protected disclosure, as at no stage did it amount to the disclosure of information tending to show that one of the listed requirements in section 43B had taken place, was taking place or was likely to take place.

112. This is not to say that the Tribunal viewed the claimant's message as unimportant. Indeed, it raised a number of wider issues about the conduct of A, and possibly others, in relation to events taking place in the workplace, even if outside working hours, which could have merited further investigation by the respondent.

113. However, given that the claimant did not, in her message of 15 August 2022, disclose information to the respondent, nothing in that message amounted to a qualifying disclosure in terms of section 43B.

114. In light of that finding we do not address the terms of the other issues 2b and 2c.

3. Was the claimant subjected to the treatment set out by her at paragraph 8.2 of her ET1 and if so, did this treatment, or any part of it, amount to a detriment, and if so, was it done on the ground that the claimant had made the qualifying disclosure set out in Issue no 2 above (if established)?

4. If the claimant was dismissed, was the reason (or, if more than one, the principal reason) for the dismissal that the claimant made the qualifying disclosure set out at Issue no 2 above (if established)?

5. If the claimant succeeds with either or both of her detriment or unfair dismissal claims, what award should be made to her by the Tribunal in compensation?

115. On the basis that we have found that the claimant did not make a protected disclosure in her message of 15 August 2022, her claims under issues 3 and 4 must fail, and be dismissed.

116. Issue 5 therefore falls away, on the basis that the claimant's claim did not succeed.

117. We appreciate that the claimant will be disappointed by the decision we have reached. Her claim was made on the very specific basis that she was dismissed and subjected to detriments on the basis that she had made protected disclosures, and she has, in our judgment, been unable to prove that she made such disclosures.

118. It was clear to us that the claimant was very sincere in her view that the respondent failed to take her concerns seriously. That was not the central issue for us to determine, but it may be of consolation to the claimant that we found the respondent's approach to her concerns difficult to understand. Mr Katz, on behalf of the respondent, made a submission in which he asked the Tribunal to conclude that the respondent takes allegations of sexual harassment very seriously. It is not within our remit to make such a finding, as this case is about its own specific circumstances, and not a review of the management practices of the respondent. However, the claimant plainly felt very deeply that the respondent was not taking her concerns seriously, and took no action at all against A when she felt that she had brought them to her attention.

119. We commend the claimant for her resilience in taking this matter forward on her own to Tribunal, and for conducting herself in the manner in which she did before us, with courtesy and respect. Mr Katz also provided

assistance to the Tribunal and to the claimant, and we were grateful to him for that.

Employment Judge: **M Macleod**
Date of Judgment: **17 April 2024**
Entered in register: **18 April 2024**
and copied to parties

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