EMPLOYMENT TRIBUNALS

Claimant: **Mr. N Charlette**

Respondent: **The Original Bowling Company Limited**

Heard at: **Reading (by CVP)**

On: 31 January and 1 and 2 February 2022

Before: **Employment Judge Price, Ms Betts and Ms Baggs**

Representation
Claimant: In person
Respondent: Ms G Churchhouse, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal contrary to s.94 Employment Rights Act 1996 is dismissed.

2. The Claimant's claim for dismissal by reason of a protected disclosure is dismissed.

3. The Claimant's claim for failure to pay holiday pay under regulation 14 of the Working Time Regulations 1998 is dismissed.

4. The Claimant's claim for a breach of section 10 of the Employment Relations Act 1999 is dismissed.

REASONS

Introduction and issues

1. By claim for presented on 29 October 2020 the Claimant brings a complaint of unfair dismissal, automatic unfair dismissal, a claim for outstanding holiday pay and a claim relating to the failure to allow him to be accompanied to a disciplinary

hearing. The Claimant commenced employment as a centre manager for the Respondent on 15 November 2017.

2. There is no dispute that the Claimant was dismissed and that this took effect on 17 September 2020. ACAS were notified under the early conciliation procedure on 6 October 2020 and a certificate was issued on 28 October 2020. The ET1 was presented on 29 October 2020. The ET3 was received by the tribunal on 17 December 2020.

3. The issues had been addressed at a case management hearing and were subsequently agreed by the parties to be as follows:

4. The claims before the Employment Tribunal are:

   4.1. Automatic unfair dismissal, as defined by section 103A Employment Rights Act 1996;
   4.2. Unfair dismissal, as defined by s98 ERA 1996;
   4.3. Failure to pay holiday pay under regulation 14 Working time Regulations 1998; and
   4.4. Breach of section 10 Employment Relations Act 1999.

5. <u>Protected Disclosures</u>

   5.1. What information did the Claimant disclose?

      5.1.1. On 18 December 2019 during the course of a telephone conversation the Claimant told Sian Oliver, that the Respondent needed to cease trading as it was against the health and safety at work act 1974, workplace heath and safety welfare regulations 1999 and management of health and safety at work regulations 1999. As we, a food and beverage retailer, we must have working facilities such as running water, gas and toilet restroom facilities to be able to safely and hygienically operate the operations in the centre (‘‘Disclosure 1’’).

      5.1.2. On 18 December 2019 during the course of a telephone conversation with Andy Goddard, the Claimant told him how could the centre still trade with no water, no gas, and toilet room facilities and that it was against the Health & Safety at Work Act 1974 (‘‘Disclosure 2’’).

      5.1.3. On 18 December 2019 during the course of a telephone conversation with Andy Goddard the Claimant told him that he was not happy with the current scenario as apart from not having water, we needed to have access to running water and to Hot Water, to safely continue on trading

and providing food and beverage products to their customers under the health and safety law act 1974 (‘‘Disclosure 3’’).

5.1.4. On 18 December 2019 during the course of a telephone conversation with Andy Goddard, the Claimant told him that the water bottles needed to be administered by staff and that we needed extra staff on site to be able to safely conduct this operation (‘‘Disclosure 4’’).

5.1.5. On 18 December 2019 during the course of a telephone conversation with Julia Oliver the Claimant voiced his concerns about trading with no water and gas. He reminded Julia that it was against the Health & Safety at Work Act 194, Workplace Health and Safety Welfare Regulations 1992 and Management of Health and Safety at Work Regulations 1999 as there was no current risk assessment completed for this type of scenario (‘‘Disclosure 5’’).

5.1.6. Between 18 December 2019 to 5 January 2020, the Claimant constantly protested and chased the business and the landlord for any potential fix issues along with threatening further action to the local authorities and EHO due to the Coronavirus pandemic issue of being able to wash hands as this was an ongoing public health concern and issue (‘‘Disclosure 6’’)

5.1.7. Having constantly fed back customer and team concerns daily to Andy Goddard and Julia Oliver daily by phone call (‘‘Disclosure 7’’)

5.2. Did the Claimant reasonably believe that the disclosure tended to show that?

5.2.1. 43B(1)(b) ERA 1996 that a person has failed, or is likely to fail to comply with any legal obligation to which he is subject.

5.2.2. 43B(1)(d) ERA 1996 that the health and safety of any individual has been, is being or is likely to be endangered.

5.3. Did the Claimant reasonably believe that his disclosure was made in the public interest?

6. <u>Automatic Unfair Dismissal s103A 1996</u>

6.1. Was the Claimant dismissed by reason (or principal reason) of making a protected disclosure? If so, the Claimant’s dismissal is automatically unfair.

7. <u>Unfair Dismissal s98 ERA 1996</u>

7.1. If not, was the Claimant dismissed for a potentially fair reason pursuant to s98(1) or (2) ERA 1996?

7.2. If so, did the Respondent act reasonably in all the circumstances in treating that reason as a sufficient reason for dismissing the Claimant pursuant to section 98(4) ERA 1996?

7.3. Did the Respondent follow a fair procedure when dismissing the Claimant?

8. Failure to pay holiday pay regulation 14 WTR 1998

8.1. Was the proportion of leave taken by the Claimant less that the proportion of the leave year which had expired?

8.2. Did the Respondent fail to pay the Claimant a sum equal to the amount that would be due to the Claimant under regulation 16 WTR?

9. Breach of section 10 ERA 1996

9.1. Did the Claimant reasonably request to be accompanied to a disciplinary or grievance hearing?

9.2. Did the Claimant propose an alternative time for the hearing which was reasonable and fell before the end of the period of 5 working days beginning with the first working day after the day proposed by the Respondent?

9.3. If so, did the Respondent fail to postpone the hearing in breach of section 10(4) ERelA 1999?

Procedure, documents, and evidence heard

10. This was a remote CVP hearing which had not been objected to by the parties. The form of remote hearing was video. A full face-to-face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

11. We were assisted by a chronology prepared by the Respondent, a cast list, an agreed bundle of documents of 911 pages and a bundle of witness statements.

12. The Claimant provided a witness statement and gave oral evidence. Ms Julia Oliver, Ms Sian Oliver (no relation), Mr Laurence Keen, Mr Andrew Goddard and Mr Stephen Burns all provided witness statements and gave oral evidence on behalf of the Respondent.

13. We heard oral submissions from Ms Churchhouse. Ms Churchhouse and the Claimant also submitted written submissions.

Preliminary matters

Admission of new evidence

14. The Respondent sought to admit an amended witness statement from Mr Burns on 19 January 2022 and a new statement from Ms Sian Oliver. The Claimant took issue with both of these statements and explained to the tribunal that he considered that this was unfair as he did not understand why it had taken so long for the Respondent to submit them, and that he had only had a week to consider them prior to the tribunal hearing.

15. The amendment to Mr Burns statement consisted of inserting one corrected reference to a page number in the file of documents provided to the Tribunal. The tribunal considered that this was a helpful amendment and did not cause any prejudice to either party and therefore allowed this evidence to be admitted.

16. The new statement from Ms Sian Oliver consisted of two paragraphs. It dealt with one discrete point of evidence which was relevant to the Claimant's claim. Although the Tribunal was of the view that it was clear this evidence was relevant and should have been prepared and exchanged in advance and there was no good reason for it not having been done, the Tribunal also considered it to be helpful to both the factual and legal issues it had to decide. It also considered that given the length of the statement the Claimant would not be prejudiced in terms of its admission as evidence as he had a week to prepare in light of it. Finally the tribunal considered that admission of this statement was proportionate as it would add little to the tribunal's time taken to hear the claim given the narrow issue it addressed.

Application to strike out part of the claim

17. The Respondent also took issue with whether protected disclosures 6 and 7 in the list of issues were in fact properly particularised and whether it should therefore be struck out. It was understood the application was made the grounds that there had been non-compliance with the Tribunal's earlier case management order requiring the Claimant to set out the particulars of the information he said had been disclosed.

18. The Claimant clarified when questioned by the tribunal that what he alleged he had said to Ms Julia Oliver and Mr Andrew Goddard by telephone every day between 18.122019 and 5.1.2020 that 'there was no gas or hot water in the centre and this was a breach of the Health, Safety and Workplace Act 1974'. The Respondent confirmed that they did not need more time to prepare their case if these matters

were allowed as part of the claim. On this basis the tribunal considered that there was no real identifiable prejudice in allowing these matters to continue as part of the Claimant's case. They were primarily repetitious of the earlier disclosures in terms of substance. They added very little to the evidence or issues the tribunal was going to have to decide. The tribunal also considered that the Claimant was a litigant in person and had made reasonable efforts to comply with the orders made, and believed that he had already provided sufficient information in order to meet the direction given. On that basis the tribunal dismissed the application for a strike out.

Findings of fact

19. The Claimant was employed by The Original Bowling Company Limited as a Centre Manager from 15 November 2017 until his employment was terminated by reason of gross misconduct on 17 September 2020.

20. Under clause 9 of his employment contract the Claimant was entitled to 28 days holiday a year. The Respondent's holiday years runs from 1 October to 30 September each year.

21. The centre the Claimant managed was located in Bracknell. The centre contained bowling lanes and also served some food and drinks to customers whilst they used the bowling facilities. As a Centre Manager the Claimant was responsible for the day to day running of the centre and compliance with company operating policies.

22. It was not disputed that part of the Claimant's duties were to have health and safety responsibility for the centre and to report maintenance issues to head office.

23. Sometime in 2019, a grievance was raised by one of the Claimant's colleagues, Ms Dianca Birt against the Claimant. It was not disputed that the subject of the complaint was that the Claimant had repeated comments made by a customer of a sexual nature about another colleague, A, and had commented on Ms Birt's appearance. This grievance was investigated and not upheld by Respondent.

24. A further grievance was raised by the Claimant on 23 September 2019 and then again on 28 October 2019 against his line manager Mr Andy Goddard. This concerned a range of issues including the Claimant feeling harassed by Mr Goddard and the fact that they disagreed over workplace decisions (such as when to discipline staff) and that the Claimant was accused of mismanagement. HR were involved with investigating this and it was resolved through work place management mediation. The Tribunal heard from Mr Goddard about this and accepted his evidence that as far as he was concerned it was a helpful mediation that created a better working relationship through understanding and he spoke highly of the Claimant's work ethic. The Claimant did not suggest in his evidence

before the Tribunal that there were any ongoing issues with Mr Goddard following the mediation. Therefore the Tribunal found that on balance it was likely that the issues that had existed had resolved as far the two individuals were concerned after the mediation.

25. On the 17 December 2019 the Claimant had the day off as it was his birthday. On the 18 December 2019 the Claimant was on shift all day. His shift began, according to the rota, at 7.30am and ended at 21.00.

26. It was not in dispute that from 18 December 2019 the Bracknell centre had no hot water or gas. The Centre accommodated two other businesses, Pizza Hut and Odeon, both of whom closed because of these issues. Nor was in disputed that the Claimant raised this with the management on the morning of the 18 December 2019 when he came into work. The Claimant reported this initially by email to the landlords, Savills, who was responsible for the utilities in the building. The Claimant copied Mr Andy Goddard from the Respondent into this chain of emails.

27. Sian Oliver, Deputy Manager, also came into work on 18 December 2018. There was some dispute as to whether she was aware of the issue about the hot water and gas late on the 17 December 2018 and whether she telephoned the Claimant about it at this stage. We accept Ms Oliver's evidence that she was not aware of the issue until the 18 December 2018 when she next came into work. However, we don't consider that anything turned on this issue.

28. The Claimant asserts that on 18 December 2019 he told Sian Oliver 'that the Respondent needed to cease trading as it was against the health and safety at work act 1974, workplace health and safety welfare regulations 1999 and management of health and safety at work regulations 1999. As we, a food and beverage retailer, we must have working facilities such as running water, gas and toilet restroom facilities to be able to safely and hygienically operate the operations in the centre'. Ms Sian Oliver told the tribunal in her evidence that she recalled the Claimant being frustrated at the lack of hot water and gas and that this was a difficult time for everyone. In her oral evidence she told the tribunal the event was highly unusual and something she would not forget as losing gas and hot water was not something that happened every day. As Ms Oliver was the deputy manager and the Claimant the centre manager we find it overwhelmingly likely that they did speak on the 18 December 2018 about the lack of gas and running water. Indeed it was not disputed that a number of conversations took place between them on that day. We find that it is very likely that the Claimant expressed his frustration and was concerned that the lack of running water and gas and that he expressed that these were necessary to safely and hygienically operate. It is also likely on balance that he expressed that he wondered if the Respondent needed to cease trading as a result of this and that in his view it was not safe to continue to function. However, we considered it was not likely that the Claimant would have

quoted specific legislation when he spoke to Ms Oliver and we accept her evidence on this point. We consider that she was a reliable witness who had no reason not to tell the tribunal her accurate recollection of what was said.

29. The Tribunal also considered that on the balance of probabilities it was very likely that the Claimant asked Mr Goddard as his line manger on 18 December 2019 'how could they continue to trade with no water, gas or toilet room facilities'. Mr Goddard accepted in his evidence he spoke with the Claimant that day and that during that discussion they both expressed concerns to each other about the situation, indeed his account was that they were both very concerned about the safety of the public and staff. In his own oral evidence to the Tribunal Mr Goddard supported the fact that a conversation based on this question did take place between him and the Claimant. His account was that they were both concerned and that in response to this he contacted Mr Carne who was the Health and Safety Manager for the Respondent and took his advice on what to do.

30. The Tribunal also found the Claimant expressed to Mr Goddard that he was 'unhappy with situation and concerned about safety'. This seems very likely to have been said given the situation, and again it was supported by Mr Goddard's account that they were both worried and shared concerns about the situation, that he then went and sought advice from Mr Carne in light of these health and safety concerns.

31. The Tribunal accepted Mr Goddard's evidence that he spoke to Mr Carne who advised him that the food safety manual had to be followed, including using bottled water for hand washing, but the centre could still function. It was not disputed that Mr Goddard then came to the centre that day, and that he brought bottled water with him and also hired portable toilets for the venue to use from 20 December 2019 onwards.

32. The Tribunal also found that the Claimant asked Mr Goddard for extra staff. Given the extra duties and complexities involved in managing the centre during the period of no gas and hot water, it seems very likely the Claimant would ask for more staff. This is also supported by Mr Goddard's email sent a few days later on 20 December 2019, setting out the steps taken and this includes an increase to 'team levels' as staff were needed to fill the cistern manually in the disabled loo. This appears likely to be a response to the Claimant's request for additional staff to assist.

33. It was accepted by Julia Oliver in her evidence that she did speak to the Claimant on 18 December 2019, and again it seems likely on balance that the Claimant's account that he expressed how difficult the situation was is correct. Indeed this did not appear to be in dispute as Ms Oliver told the Tribunal that she had rung him to offer her support. However, the Tribunal did not accept the Claimant's account that he expressed a view to Ms Oliver that the centre should close due to safety

concerns or quote health and safety legislation. Ms Oliver's remit was Human Resources and given this we consider unlikely on the balance of probabilities that the Claimant would have raised this issue with the her. Further, the Claimant's evidence has been inconsistent on this point. He did not mention this conversation at any point until he was directed by the Tribunal to provide further and better particulars of his case. Although, we find that the reason for this inconsistency was not as the Respondent suggested dishonesty, but rather that with the passage of time that has passed the Claimant's recollection of what exactly was said on 18 December 2019 has faded, although we believe he is doing his best to assist the Tribunal on these points, we did not consider that his recollection of his conversation with Ms Julia Oliver was accurate.

34. The Tribunal accepted Mr Goddard's evidence that he spoken to Mr Carne, who had health and safety responsibility within the Respondent's company and that Mr Carne told him that the centre could trade if they followed the Food Safety Manual. This advice is recorded in part in an email sent by Mr Goddard on 20 December 2019 [pg 358] which praises staff for their efforts to date and tells staff 'when doing food packages centre need to be conforming to the food manual as specified by Ben'.

35. It is clear from this email that Mr Goddard was instructing the Claimant, along with the wider team, to follow Mr Carne's advice. However, we did not accept the Claimant's evidence that Mr Goddard told him he would dismiss him if he did not do this. There is no contemporary evidence to support this claim and further the Claimant's account of this is inconsistent. He does not mention this detail in any contemporaneous documentation or in his claim form. It was suggested for the first time in his witness statement and built on in his oral evidence. We consider that it is possible that the Claimant feared that he might lose his job if he did not comply with management instruction, but we do not find this was something that was repeatedly expressly said to him by Mr Goddard or Ms Julia Oliver. We accepted Mr Goddard's evidence that this was very difficult period for the Claimant and that he thought he was doing well in circumstances that would be very challenging for any manager. This was supported by the email of the 20 December 2019 from Mr Goddard to the Claimant and all the team, in which he specifically says 'Nigel' 'you've done an amazing job so far coping with such challenging circumstances' and do not consider that it was likely on the balance of probabilities that in light of this Mr Goddard threatened the Claimant with dismissal. Further as the Claimant did not refuse to comply with Mr Carne's advice, it seems very unlikely that the Respondent would have any reason to dismiss him.

36. We did not accept the Claimant's account that he was not aware of a food and safety manual. The manual is mentioned by Mr Goddard in his email of 20 December 2019 sent to the team. Mr Goddard gave evidence that the Claimant was a competent manager and we accept this evidence. We find that any

competent manager such as the Claimant would have written back and asked what was being referred to, if they were not aware of a food safety manual.

37. It was agreed that the following day, on 19 December 2019, the Respondent was advised in an email by the landlord Savills that the engineers had attended site and that they could not fix the problem due to leaks and that the problem was bigger than they had initially thought. However, it was agreed that from the 23 December 2019 onwards, running water was re-established in the centre and the only remaining issue was the gas. It was agreed that the only impact this in terms of service provision was that the menu provided to customers was more limited, specifically they could not provide burgers. Given the minimal impact the lack of gas supply had on the business we do not consider that from this point onwards it was likely that the Claimant repeated on a daily basis that the centre was not safe to open or that this was a breach of any health and safety related legislation.

38. We accepted the evidence of Mr Burns, CEO that the weekend before Christmas was the company's busiest trading period, however the company had business interruption insurance that would have covered any financial loss from this and instead the company wanted to continue trading however this was in order to ensure customers were able to continue with their Christmas plans rather than in order to increase profit.

39. The Claimant continued to work for the Respondent as expected until the national lockdown brought about by the outbreak of Cvoid-19. As a consequence the Claimant was placed on the furlough scheme from 23 March 2020. However, he continued to be paid 100% of his wages. In a communication sent out to all staff on 24 March 2020, there was a series of Frequently Asked Questions and their answers, which included the following

    'If I have one, can I use my company email whilst I am in a furlough Scheme?
    We will need to contact you to update you whilst you are furloughed, we ask that you check your company email for messages. You may use your company email for keeping in touch with your fellow team members and manager, but you must divert all work queries to askdarryl@hollywoodbowl.co.uk;

    Can I contact my fellow team members / managers?
    If you have a query, please send it to askdarryl@hollywoodbowl.co.uk. You may contact your fellow team members / managers if you wish to keep in touch with them from a personal level, however this must not be for work related queries.'

40. On the 7 April 2020 a further communication was sent by the Respondent to all staff. It stated '*As you are all on temporary leave, you cannot work (even on a voluntary basis) as this would jeopardise our payments through the governments furlough scheme'.*

41. During the period of leave the Claimant sent a significant number of messages to A, who was a member of his team for whom he had management responsibility through the platform Whatsapp. It was not disputed by the Claimant that he sent these messages between May 2020 and August 2020, and that they included the following:

    41.1. pictures of naked men in bed together
    41.2. pictures entitled queer burger
    41.3. numerous messages seeking to meet up
    41.4. message calling him sad and lonely when he declined to meet up
    41.5. messages suggesting to him that there was ‘‘deep down there is someone who wants to break out of him’’,
    41.6. emoji’s of him kissing
    41.7. messages telling him he loved him
    41.8. messages telling him he liked him
    41.9. messages telling him he missed him
    41.10. threats in the form of a picture of a man holding another man hostage with a gun asking where’s my phone call after he did not pick up the phone
    41.11. repeated missed calls
    41.12. messages threatening to have a chat with his stepmum if he did not call him
    41.13. when Mr A referred to taking a shower sending him a wink emoji and stating it would not keep him cool for long
    41.14. sending Mr A a picture of someone with white foam around their lips with the phrase ‘‘What y’all looking at I aint had no cake’’ and a laughing emoji.

42. Mr A was 17 and 18 years old when these messages were sent to him. The Claimant accepts that the messages were sent by him. The Claimant explained to the Tribunal that he believed A to be suicidal when these messages were sent and that he was being a mental health first aider having attended a course about mental health first aid organised by the Respondent. He also however considered them to be personal correspondence although he recognised when the Tribunal asked him that they were not professionally acceptable. The Claimant gave evidence that he considered this was supportive communication but done in a personal capacity as A and he were friends.

43. However, the Claimant suggested that the messages provided to the Respondent were edited or cherry picked by A prior to submission to the Respondent. The Tribunal did not accept this was the case. Although we did not see any meta data for the chain, the message chain seemed to run sequentially and had no apparent edits on the face of the evidence provided. Although the Claimant may not recall

the exact nature of the chain of messages and may believe that the message chain was somehow different from that which was presented in evidence, there is no evidence to support this. This allegation was not supported by any evidence. The Claimant explained that the phone he had prior to the 5 July 2020 had broken and he got a new phone which meant he could not access the messages prior to that date. The Claimant told the Tribunal that he has since then changed phone again and so did not have any further evidence he could therefore disclose. He told the Tribunal that he had provided a copy of the messages from 5 July 2020 onwards from his phone to the Respondent and they had not taken them into account or disclosed them in the Tribunal proceedings. The Claimant had not suggested this at any point prior to giving oral evidence. Further, the Tribunal found the Claimant's evidence was evasive on this point and did not therefore accept his account.

44. The Claimant's leave year ran 1 October to 30 September. It was agreed he was entitled to 28 days holiday per year. During this period the Claimant, and all other employees were informed that they were being told to take annual leave for a week commencing on 8 June 2020. This was put in writing to the Claimant by way of an email. There was then a further request by the respondent for all staff to take the week's commencing the 3 and 10 August 2020 as holiday. This was also put in writing to the Claimant by way of an email. It was not disputed that the Claimant was paid at 100% for this period of time and was not asked to work. Indeed the Claimant himself in correspondence, copied into the tribunal, on 27 August 2021, that he did take holiday in August. In his oral evidence it was not disputed by the Claimant that he had taken 23 days annual leave in the holiday year prior to 22 August 2020. The issue appeared to whether the Claimant had taken 5 days off between the 24 August 2020 and the 28 August 2020 which was recorded on the Respondent's annual leave records. We accepted the Respondent's evidence that the app staff could use to look up their holiday entitlement was inaccurate up to the 7 September 2020 and that their computer records were an accurate reflection of the days the Claimant was paid for holiday during August 2020.

45. On 26 August 2020, A made a compliant to his direct line manager, Ashley Lawrence, one of the assistant managers of the Bracknell Centre about the Claimant's contact with him and the content of the messages. A told the Respondent they were unwanted messages and he felt fearful of the Claimant as a result of this contact.

46. The Respondent duly appointed Mark Johnson, Regional Support Manager to investigate the complaint. He interviewed Ashley Lawrence on two occasions, Nicole Smith, A on two occasions, Sian Oliver, and also interviewed the Claimant on 2 September 2020 and 8 September 2020. It was agreed that the Respondent did not interview the other employees who A mentioned in his interview. The explanation for this, was that due to the sensitive nature of the complaint and in

order to protect A's privacy they only discussed (and disclosed) details of the matter to the witnesses A agreed for them to contact.

47. On 3 September 2020, the Claimant was suspended from work on full pay. The letter notifying him of his suspension warned him that the allegations under investigation could be deemed to be gross misconduct.

48. A copy of the Investigation Report completed on 11 September 2020 and the Claimant was then invited to a disciplinary hearing on 17 September 2020. In this letter he was informed he had a right to bring a colleague or a TU representative as a witness to the meeting.

49. Following his suspension, on 8 September 2020, the Claimant raised a grievance about his treatment. The essence of the grievance was that the allegations raised were false and were damaging to his reputation. Scott Moyle was appointed to hear the Claimant's grievance and met with the Claimant on 11 September 2020, however did not uphold it.

50. Whilst the grievance was being investigated, the disciplinary process was suspended. The grievance outcome was provided to the Claimant in writing on 14 September 2020, and he was invited to a disciplinary hearing on 15 September 2020. This hearing took place on 17 September 2020 two days later.

51. It was agreed that at the point he received the invite to the disciplinary hearing he was provided with the notes of the first investigation meeting and some of the other documents relied upon including copies of the Whatsapp messages. It was also agreed that the Claimant did not have some of the documents provided to him prior to this date including screen shot copies of the Whatsapp chain or the notes of the first investigation meeting conducted with him.

52. The Claimant then had just short of two days to read the information provided and prepare for the disciplinary hearing. At the same time he was preparing for an appeal of his grievance. The disciplinary hearing was conducted by Mr Keen. Notes of the meeting were taken by an employee called Amy Dicastiglione-Gray, Head of Culture and Development and signed by the Claimant afterwards.

53. During the meeting the Claimant did not challenge the fact he had sent the messages. However, the Claimant explained that the reason he had done this was because he had been concerned for Mr A's mental welfare and was trying to support him. He also expressed his view that the messages were sent on a personal level.

54. The Claimant told the Tribunal that prior to the hearing, there was a pre-meeting discussion in which he asked for more time to prepare for the hearing and to find

a colleague to accompany him. The notes of the meeting do not record this. They do record that he was asked 'rep ?' and he replied 'ok'. The Claimant agreed he said this, but stated it was in protest as he had been told he could not have a representative or more time. Although the Claimant did raise this in his appeal, we don't find that the Claimant had raised an issue with either representation or the length of time he had to prepare in a pre-meeting. We formed this view for the following reasons:

a. There are no other parts of the notes of this meeting the Claimant disputes as being inaccurate.
b. The Claimant signed the notes of the meeting.
c. The outcome letter from this meeting stated 'you were allowed to bring a representative but you didn't chose to do this'. The Claimant did not write back to challenge that at the time [pg. 683].
d. Further, the Claimant in the meeting agreed that he replied ok when he was asked about a representative. We consider it likely on the balance of probabilities that had he had an issue with the lack of representation he would have stated this at this point.

55. At the end of the meeting the Claimant was told he was summarily dismissed. This was confirmed in writing to the Claimant on 17 September 2020. The Claimant appealed this decision on 18 September 2020. He also appealed the outcome of the grievance on 23 September 2020. Both appeals were heard together by Mr Burns, the Respondent's CEO on the 29 September 2020. The Claimant's appeals were both dismissed. Mr Burns recorded this in an outcome letter dated 6 October 2020 that the Claimant chose not to have a representative present at the meeting and stated '*I note that you admitted that you had made the communications, yet even with the benefit of hindsight you did not show remorse or regret*…'

56. At the time of his dismissal the Claimant had access to an HR portal used by the Respondent's called Forth App. This showed that the Claimant had 7 days of annual leave left in the holiday year. The Claimant accepts the Respondent's evidence that this information was inaccurate as it had not been updated fully. This was supported by the screenshots of the internal digital HR record for the Claimant that showed the number of days taken off by the Claimant was in fact taken 31 days in the annual leave year. Not only was this internal record largely agreed by the Claimant, but there was clear correspondence from the Respondent directing all staff to have two weeks off off as part of their annual leave entitlement which also tallied with their internal computer records.

The law

<u>Protected disclosure</u>

57. Insofar as is relevant Section 43B Employment Rights Act 1996 ('ERA') defines qualifying disclosures.

> *Section 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,*
> *(e)..., or*
> *(f).....*
>
> *(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory…'*

58. The starting point is that the disclosure must be a 'disclosure of information' made by the employee bringing the claim. That disclosure must have two features. Both are based on the belief of the employee, and in both cases the belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show relevant wrongdoing; or deliberate concealment of that wrongdoing. The second is that at the time of making the disclosure, the employee reasonably believed the disclosure was made in the public interest.

59. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have "sufficient factual content and specificity such as is capable of tending to show" one of the five wrongdoings or deliberate concealment of the same. It is a matter "for the evaluative judgment of the tribunal in the light of all the facts of the case" (paras 35-36).

60. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (Soh v Imperial College of Science, Technology and Medicine EAT 0350/14).

61. What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistle-blower must

exercise some judgment on his own part consistent with the evidence and the resources available to him (Darnton v University of Surrey [2003] IRLR 615, EAT. However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: Babula v Waltham Forest College [2007] ICR 1026.

62. In relation to the type of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase "is likely to" has been interpreted as meaning more than a mere possibility. In Kraus v Penna [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "probable or more probable than not".

63. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices. Unless the legal obligation is obvious, Tribunals must specify the particular obligation that the Claimant believes has been breached, the source of the obligation should be identified and capable of verification by reference to statute or regulation: Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] ICR 747 (EAT) at paragraph 98.

64. An employee's belief that a legal obligation has been breached need not be formed by reference to a detailed or precise legal duty, though it must amount to more than simply a belief that the impugned conduct is wrong Eiger Securities LLP v Korshunova [2017] ICR 561 (EAT), per Slade J at paragraph 46.

65. It is not necessary that the disclosure identify the specific legal obligation that is said to have been breached: Twist DX Limited v Armes (UKEAT/0030/20) at paragraph 84.

66. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the particulars of claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

67. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components, first a

subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one

68. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in Chesterton Global Limited v Nurmohamed [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. So long as workers genuinely believed that disclosures were in the public interest when making the disclosure, they could support the reasonableness of the public interest element by reference to factors that they did not have in mind at the time.

Qualifying protected disclosures

69. A qualifying disclosure is a protected disclosure if it is made to the claimant's employer (sections 43A and 43C Employment Rights Act 1996). In this case, all of the alleged disclosures were made to the Respondent. Therefore, if the alleged disclosures were qualifying disclosures, they were also protected disclosures.

Automatic unfair dismissal

70. Section 103A ERA 1996 provides:

'*Dismissal - 103A Protected disclosure.*

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure'.

71. Under a claim of unfair dismissal for making a protected disclosure requires the Tribunal to determine the principal reason for the dismissal. It is not sufficient if the Tribunal decides that the dismissal was materially influenced by protected disclosures, it is necessary for the principal reason for the dismissal to be the protected disclosures

Unfair dismissal

72. The burden of proof lies on the Respondent to show, on the balance of probabilities, what the reason or principal reason for dismissal was and that it was a potentially fair reason under S. 98 (2) ERA.

73. S.98 ERA provides:

> "*(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a)the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2)A reason falls within this subsection if it—*
> *... (c)is that the employee was redundant, or ..."*

74. The Respondent contends that the reason for dismissal was gross misconduct, which is a potentially fair reason within S. 98(2)(b) ERA. If the Respondent shows a potentially fair reason, such as misconduct, for dismissing the claimant then the question of fairness is determined in accordance with s.98 (4) ERA which states:

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case..."

75. We are also guided in our deliberations, because this is said to be a conduct dismissal, by the leading case of British Home Stores v Burchell [1978] ICR 303 which sets out the issues which we should consider including whether the Respondent had a genuine belief in the conduct complained of which was founded on a reasonable investigation and whether a fair process was followed. The investigation should be one which is fair and reasonable and the band of reasonable responses test applies to that part of the process as well as to the overall consideration of the fairness of the sanction (Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23).

76. If the Burchell test is answered in the affirmative, we must still determine whether the decision of the employer to dismiss the employee rather than impose a different disciplinary sanction (or no sanction at all) was within the range of reasonable responses that a reasonable employer could reach.

77. In considering the fairness of the dismissal, it is important that it looks at the process followed as a whole and the appeal should be treated as part and parcel of the dismissal process: Taylor v OCS Group Limited [2006] ICR 1602. We are also required to have regard to the ACAS code of practice on disciplinary and grievance procedures

78. It is important that the Tribunal does not substitute its own view for that of the respondent London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220 at paragraph 43 says: "*It is all too easy even for an experienced ET to slip into the substitution mindset. In conduct cases the claimant often comes to the Et with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may take it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

Conclusions

79. We consider that the comments we found to have been made to Mr Goddard and Ms Sian Oliver on the 18 December 2019 were protected acts.

80. The Respondent conceded that the disclosures tended to show information.

81. It is quite clear that the statements made to Mr Goddard and Ms Sian Oliver raised questions regarding concerns for the health and safety of others, in that members of staff and the public could suffer as a result of the lack of gas and water and the impact this had on standards of hygiene. And we considered that the Claimant held a belief in making those statements that the lack of running water and gas could endanger the health and safety of others. Further, in our view this was a plainly reasonable belief given the potential impact of a lack of running water on hygiene. Mr Goddard himself accepted as much in his evidence when he told us that both he and the Claimant shared real concerns about the health and safety of both staff and customers. There was no suggestion from him that these concerns were anything other than genuine and legitimate concerns that any manager might reasonably have when trying to serve food to the public and run a service with no running water or gas. This also accords with Ms Oliver's evidence that the Claimant was very frustrated with the situation on 1 December 2019. And is also supported by the Claimant's email of 18 December 2019 in which he states '*Greg can you please arrange for a contractor to come out and have a look at this problem as this*

is not the first time as you are all aware that it is happened and we can not legally operate our facilities without hot water'.

82. We also find that the Claimant believed at the time of his disclosure that it was in the public interest to raise the matter. We accepted the evidence that he was a competent manager and we accepted his evidence that he did not want to put customers or his team in danger and therefore raised the matter. Again we find this to be a reasonable belief given the impact we have already found the lack of amenities could have on the public.

83. However, we do not consider that this was an operative cause on the decision to dismiss. We find that the Respondent's reason for dismissing the Claimant was his conduct in sending messages to A and that this was therefore a dismissal for a potentially fair reason within the meaning of section 98 (2) ERA 1996, namely, misconduct. We do not consider that there was any connection between the Respondent's decision to dismiss and the Claimant's complaints or the concerns he brought to his manager's attention.

84. There is no evidence that anyone prompted A or sought out a complaint from him. There appeared to be no reason for A to complain if he did not genuinely feel fearful of the Claimant as he said at the time. Nor was there any evidence that the Claimant's management found him a difficult drain on company resources as he had suggested. We accepted Mr Burns evidence that the company had busines interruption insurance and therefore would not have stood to lose financially from needing to close in December 2019, had they had to do so. Indeed, the evidence we heard was that the Claimant's managers thought he was good at his job.

85. We applied the Burchell test and concluded that there was a genuine belief in the Claimant's misconduct. We accepted the evidence of Mr Keen and Mr Burn that it was the content of the messages that was the reason for the dismissal and that they considered this to be inappropriate both in content and the context of a vulnerable employee (by way of age and mental health) whom the Claimant had management responsibility for. Mr Burn summarised this in his appeal outcome letter saying you '*Admitted that you had made the communications, yet even with the benefit of hindsight you did not show remorse or regret'*.

86. Next we considered the scope of the Respondent's investigation. Although we considered it may have been better practise to interview all the employees in the team that were mentioned by the Claimant and A in the investigation, some interviews were undertaken. And in any event, the Respondent had sight of the chain of WhatsApp messages and the Claimant did not deny sending them. Given that the misconduct was the sending of the messages and their content, the scope of the investigations was sufficient to be within the reasonable range in the circumstances.

87. As the scope of the Respondent's actions to investigate the matter was within the range of a reasonable investigation we considered that the Respondent's belief in the misconduct was also reasonable. Indeed, given the Respondent had clear evidence in the form of copies of the messages of the misconduct and the Claimant admitted sending them, the belief in the misconduct seems entirely reasonable.

88. We then considered whether or not the decision to dismiss fell within the reasonable range. The messages were sent by the Claimant, who was A's manager at the time. The chain of correspondence was very one sided as A's response were always very minimal. In the chain of messages the Claimant suggested A defy his parents wishes to keep him in during lockdown, subjected A to emotional pressure by asking him why he had not called, and made frequent sexual references. A was only 17 and then 18 years of age when the messages were sent and was on Claimant's account very vulnerable from a mental health point of view. A had told his employer he was fearful of the Claimant.

89. We consider that the Respondent's view that this was gross misconduct that warranted summary dismissal was within the reasonable range. Dismissal on the basis that a manager should not be sending these types of messages to a junior member of staff, is not outside reasonable range of a view for an employer to take. Despite the messages being sent during the period of furlough and the fact that the Claimant considered them personal or supportive, does not change our findings. There was still an employment relationship which was fundamental context to the social relationship between A and the Claimant, put simply the Claimant was still his manager. We also considered whether the Claimant's length of service took the decision to dismiss outside of the reasonable range. The Claimant had not yet been employed for three years. This length of service and the seriousness of the conduct alleged to have occurred, we did not consider that this took the dismissal outside of the reasonable range.

90. We went on to consider whether the dismissal was procedurally unfair. The Claimant was given time to prepare for disciplinary meeting when he was on a period of paid suspension. He had to read approximately 100 pages, some of which were pages he had not seen before. According to the Respondent's policy employees must be given 24-hour notice of a disciplinary hearing. This would in our view seem very tight for a complex matter. However, in this case the Claimant was given two days to prepare for the hearing and was already aware of the allegations having been interviewed about them twice. Further, he had a right of appeal which he exercised and where he agreed in evidence that he was given an opportunity to make any further points he wanted to.

91. It follows from our above findings of fact that there was no breach of the right to be accompanied to a workplace meeting. The Claimant did not make a request for to

be accompanied to the disciplinary hearing in advance. The letter inviting him to the meeting stated he had this right and he did not take it up.

92. It follows from our findings of fact that the Claimant had taken all of this holiday allowance in the holiday year in which he was dismissed and therefore none was outstanding on his dismissal.

EJ Price

8 March 2022

Sent to the parties on:

14 March 2022

For the Tribunal Office: