



**THE EMPLOYMENT TRIBUNAL**

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**SITTING AT:**                      **LONDON SOUTH**

**BEFORE:**                      **EMPLOYMENT JUDGE TRUSCOTT QC**  
**Ms S Campbell**  
**Ms C Edwards**

**BETWEEN:**

**Mr X Liu**

**Claimant**

**AND**

**PPM International (London) Limited**

**Respondent**

**ON:**            **24 and 25 July 2018 and 3, 4 and 5 December 2018**

**Appearances:**

**For the Claimant:**            **In person**

**For the Respondent:**    **Mr David Rushmere, solicitor.**

**JUDGMENT**

The unanimous judgment of the Employment Tribunal is that:

1. The Claimant's claims of race discrimination contrary to section 13 of the Equality Act 2010 are not well founded and are dismissed.
2. The claimant was not dismissed as a result of having made protected disclosures contrary to section 103A of the Employment Rights Act 1996 and his claims under that section are dismissed.
3. The claim that there has been an unlawful deduction of wages in relation to non-payment of overtime is not established and is dismissed. The alternative claim for breach of contract for non-payment of overtime pay is also not well founded and is dismissed.

## REASONS

### PRELIMINARY

1. The Respondent was represented by Mr David Rushmere, solicitor who led the evidence of Mrs Yingwen Shen, the Respondent's Managing Director. The Claimant represented himself and gave evidence on his own behalf. Both witnesses had the assistance of an interpreter

2. There was a bundle of documents to which additional documents were added during the hearing and to which reference will be made where necessary. The Respondents showed to the Tribunal a CCTV clip on a mobile telephone showing what was said to have occurred on 12 April 2016 in the reception area of the Hotel. Parties were agreed that what the CCTV showed was:

- (i) The Claimant shaking Ms Dymstraz's hand.
- (ii) Ms Dymstraz reaching and shaking the Claimant's hand momentarily.
- (iii) The Claimant making contact on two occasions with Ms Dymstraz with one finger making contact with her jacket.

Parties were not agreed as to the conclusions to be drawn from the actions.

### ISSUES

3. The issues for this hearing were:

#### Protected disclosure claims

1. The Respondent does not admit that the Claimant made any protected disclosures as alleged in paragraphs 11, 12, 13, 14, 15 and 17 of the grounds of complaint. The following issues therefore arise:

#### Disclosure at paragraph 11

2. Did the Claimant convey any information to Mrs Shen on 22 February 2017? In particular did he draw attention to any failure to comply with any health and safety requirements?

3. Did the Claimant as a matter of fact believe that such information as he conveyed tended to show:

- a. that the Respondent was failing or was likely to fail to comply with any legal obligation to which it was subject or
- b. that the health and safety of any individual has been, is being or is likely to be endangered?

4. Did the Claimant as a matter of fact believe that such information as he conveyed was in the public interest?

5. Were the Claimant's beliefs reasonably held?

#### Disclosure at paragraph 12

6. Did the Claimant convey any information to Mrs Shen on 18 March 2017? In particular did he in the course of a bus journey draw attention to any failure to comply with any health and safety requirements either at the Respondent's hotel premises or office as set out at the numbered sub paragraphs of paragraph 12?
7. Did the Claimant as a matter of fact believe that such information as he conveyed tended to show:
  - a. that the Respondent was failing or was likely to fail to comply with any legal obligation to which it was subject or
  - b. that the health and safety of any individual has been, is being or is likely to be endangered?
8. Did the Claimant as a matter of fact believe that such information as he conveyed was in the public interest?
9. Were the Claimant's beliefs reasonably held?

Disclosure at paragraph 13

10. Did the Claimant convey any information to Mrs Shen on 18 March 2017? In particular did he in the course of a bus journey draw attention to any failure to comply with any health and safety requirements at the Respondent's office building as set out at the numbered sub paragraphs of paragraph 13?
11. Did the Claimant as a matter of fact believe that such information as he conveyed tended to show:
  - a. that the Respondent was failing or was likely to fail to comply with any legal obligation to which it was subject or
  - b. that the health and safety of any individual has been, is being or is likely to be endangered?
12. Did the Claimant as a matter of fact believe that such information as he conveyed was in the public interest?
13. Were the Claimant's beliefs reasonably held?

Disclosure at paragraph 14

14. Did the Claimant convey any information to Mrs Shen on any occasions in June 2016, winter 2016 or February 2016 with reference to "fake invoices"? In particular did he inform her that relying on such an invoice would be illegal?
15. Did the Claimant as a matter of fact believe that such information as he conveyed tended to show:
  - a. that a criminal offence has been committed, is being committed or is likely to be committed; or
  - b. that the Respondent was failing or was likely to fail to comply with any legal obligation to which it was subject?
16. Did the Claimant as a matter of fact believe that such information as he conveyed was in the public interest?
17. Were the Claimant's beliefs reasonably held?

Disclosure at paragraph 15

18. Did the Claimant convey any information to Mrs Shen on an occasions in November 2016 with reference to “Visa salary”? In particular did he inform her that relying on such an arrangement would be illegal?
19. Did the Claimant as a matter of fact believe that such information as he conveyed tended to show:
- a. that a criminal offence has been committed, is being committed or is likely to be committed; or
  - b. that the Respondent was failing or was likely to fail to comply with any legal obligation to which it was subject?
20. Did the Claimant as a matter of fact believe that such information as he conveyed was in the public interest?
21. Were the Claimant’s beliefs reasonably held?

Disclosure at paragraph 17

22. Did the Claimant convey any information to the HSE in mid April 2017 in relation to health and safety breaches by the Respondent at their hotel premises?
23. Did the Claimant as a matter of fact believe that such information as he conveyed fell within the description of matters in which the HSE is prescribed?
24. Did the Claimant as a matter of fact believe that the allegations he made were substantially true?
25. Were the Claimant’s beliefs reasonably held?

Unfair Dismissal – Sections 94/103A of the Employment Rights Act 1996

26. Was the reason, or if more than one the principal reason for the Claimant’s dismissal the fact that he had made one or more of the protected disclosures above?

Direct discrimination contrary to Sections 13 and 39 of the Equality Act 2010

27. The Claimant is British born Chinese. He compares his treatment to Chinese born Chinese persons. He says that the reason for any treatment is his nationality or national origins for the purposes of Section 9 of the Equality Act 2010.
28. The Claimant complains of the following treatment:
- a. Not being given an annual salary review by Mrs Shen; and
  - b. Not being allowed to work from home; and
  - c. Being publicly berated/embarrassed for taking holidays; and
  - d. Being dismissed without any procedural safeguards.
29. In respect of (a) the Claimant compares his treatment to that of Miss Wu. In respect of (c) he compares his treatment to both Miss Wu and Ziaya Liu. In respect of (b) and (d) he compares himself to Mrs Zhang. In the event that those comparators do not share the Claimant’s circumstances the Claimant relies upon hypothetical comparators.
30. Does the Claimant show that, in the absence of any explanation from the Respondent, that a tribunal could conclude that the reason for any less favourable treatment shown to have occurred was discriminatory; if so
31. Can the Respondent show that the acts were not discriminatory?

Claims under Part II of the ERA 1996 and/or Employment Tribunals (Extension of Jurisdiction) Order 1994

Overtime

32. Was the Claimant contractually entitled to overtime at an hourly rate of £17.95 for additional driving duties?
33. If so did the Claimant carry out those duties for 207.5 hours as claimed?
34. When were the payments due?

4. Issue 16 should read February 2017. It should be noted that the issue in paragraph 29 is not correct, the claimant is Chinese born British and he seeks to compare behaviour towards him with Chinese born Chinese.

5. A previously agreed chronology was available to the Tribunal. The chronology was not always consistent with the evidence, hence the Tribunal has relied on the evidence.

6. There had been a motion before the Tribunal for the costs of an adjournment of an earlier hearing but this was withdrawn at this hearing by the Respondent.

**FINDINGS OF FACT**

7. The Claimant was employed by the Respondent as Director of Public Relations from 1st February 2016 until his dismissal on 28th April 2017. His place of employment was House of Phoenix, 25 Wharf Street, London. He lives in Manchester.

8. The negotiations about the Claimant's terms and conditions were conducted in January 2016 either by telephone or by WeChat and QQ which are internet-based chat services. Ms Jing Wu, HR, conducted the negotiations on behalf of the Respondent. The original messages are not now available.

9. The annual salary agreed for the Claimant was £35,000. He was also offered free accommodation in the hotel owned by the Respondent, the Phoenix Epping Hotel at North Weald, Epping, Essex. Generally, he lived at the hotel from Monday to Friday, then returned home to Manchester for the weekend.

10. The Claimant was entitled to 28 days paid holiday per year inclusive of all public holidays under his contract. The process for requesting annual leave was for the Claimant to submit a form to HR stating the dates on which he wished to take leave. That request would then be considered and approved if it was appropriate to do so. The leave requests submitted by the Claimant are recorded in the holiday records [228 to 229]. None of the Claimant's leave requests were denied and during the 2016 leave year, he took his full leave entitlement.

11. The Respondent provided the Claimant with a contract for him to sign but he did not sign it [54 to 77]. There are also two other copies of the contract with Chinese translations [78 to 104 and 105 to 129]. The draft contract contained a clause stating that the Claimant's pay would be reviewed from time-to-time. Mrs Shen said that the Respondent operated a policy of reviewing pay on an annual basis. At the end of each

year, an employee would submit a self-assessment report and have a performance review. That process may result in them being awarded a pay rise. She said that all pay rises are completely discretionary and are based on all the circumstances relevant to each employee. She said that the Claimant did not submit a self-assessment report in 2017 and at the time he was dismissed a pay review had not been completed. She said that in the assessment of 2016, he was the second to last [243]. The Claimant said that the result of the 2016 assessment had not been discussed with him. The Tribunal was doubtful that assessments were carried out in the manner described by Mrs Shen and, in any event, find that there was no discussion with the Claimant about his performance either in relation to the 2016 assessment or otherwise. There was no contractual commitment to carry out an assessment or increase the pay of the Claimant.

12. The Claimant reported to Mrs Shen and worked with her in a variety of ways not strictly within the job description of public relations. According to the Claimant from autumn 2016, he was told to drive the company Mercedes minibus if the dedicated driver was on holidays or swapped weekends. The Tribunal accepted that the Claimant carried out driving duties but he agreed to do so in addition to his usual duties. The issue of payment for the driving duties is addressed later.

13. The Tribunal accepts the Claimant's evidence that Mrs Shen sought to reduce costs. The Tribunal finds that the Claimant assisted her in achieving her aim.

14. The Claimant sought to portray Mrs Shen as a tyrant, who would instantly dismiss anyone who crossed her. He gave the example of two chefs who worked in the Hotel restaurants who were fired by Mrs Shen in March and around May 2016 because Mrs Shen did not like the taste of the food they had prepared. The Tribunal is unwilling to characterise Mrs Shen in the way the Claimant described. He worked with her for a reasonably long period and, according to him, felt that he was able to raise matters with her. Whether he actually did so is another matter.

15. On 12 April 2016, the Respondent held a reception banquet for delegates from China at the Hotel. Ms Paige Dmytrasz, the receptionist at the hotel made a complaint of harassment against the Claimant [190 – 191]. She reported an incident in the hotel reception where the Claimant had touched her. This incident is the one recorded in a CCTV clip referred to in paragraph 2. After the incident, there had been a further issue when Ms Dmytrasz's boyfriend had come to the Hotel threatening to attack Mr Liu. The hotel manager, Ms Yuyang Zhang had intervened and prevented the issue from escalating. The Respondent says that after an investigation into the matter, the Respondent had given the Claimant a verbal warning and that he was to formally apologise to Ms Dmytrasz.

16. The Claimant has a different version of events. He says that as Mrs Shen wanted to save cost, Ms Dmytrasz was asked to serve at the banquet. The Claimant also served at the banquet as well as washing plates while she served drinks. While talking with Ms Dmytrasz, the Claimant found that her boyfriend was living at the Hotel without paying. The Claimant reported this to Mrs Shen and she told the Claimant to ask the boyfriend to move out. The Claimant says that the boyfriend caused Ms Dmytrasz to make the complaint against him.

17. The Tribunal considers that the Claimant's version of events is more likely to be true. On the basis of the CCTV clip, it does not consider what took place could reasonably be viewed as giving rise to a complaint of any sort far less sexual harassment. In any event, it should not have constituted a basis for dismissal nearly a year later.

18. In and around July and August 2016, the Respondent alleges that the Claimant had harassed two female employees on WeChat who made a complaint about this to the Respondent in August 2016 and the Respondent subsequently warned the Claimant about his conduct. The Claimant said he had never heard of this complaint. He says that Ms Shen decided to offer him a £600 bonus for his good performance in August. This bonus was for him and not all employees. This is shown on his August payslip. The Tribunal concluded that the Claimant's version of events was more likely. Even if the Respondent was correct, it should not have constituted a basis for dismissal some months later.

19. In September 2016, there was a party to mark the opening of Phoenix House. The Claimant had an important role to play. It was hoped that he would invite as many VIP guests as possible. There was a dispute as to whether he had been successful. For example, the Claimant invited the council leader from Royal Greenwich Council but she was unable to attend [134]. The Respondent claims that the Claimant failed to do his job properly. The Tribunal does not accept that the Respondent was dissatisfied with the Claimant's work at this time.

20. Mrs Shen gave evidence about a customer complaint [192] contained in a WeChat conversation between the customer and Mr Jimmy Ping. They say "At that time, Mr Ping was working as a consultant for PPMI. The complaint says that Mr Liu was acting creepy towards the customer. Mr Liu told the customer to go to bed early and that he wanted to listen to her voice, which made her very scared." They also say "Intern - In December 2016, we had an intern working with us for a short time. She told Ms Wu that in December 2016, Mr Liu had approached her and said he wanted to come home with her. She said that this made her feel very afraid of Mr Liu. She did not provide a written complaint she only told HR about it. In addition to the above, I (Mrs Shen) had also received a number of complaints and concerns about Mr Liu, including one from his former employer. Those complaints were not documented but I (Mrs Shen) recall that they were generally about Mr Liu's aggressive attitude towards colleagues." The Claimant said he was unaware of the complaints. The Tribunal does not accept that these instances were of any significance at all to the Respondent and should not have constituted a basis for dismissal many months later.

21. In October 2016, the Claimant alleged that Mrs Shen shouted at him when he applied for leave. Mrs Shen denies mocking the Claimant for taking holidays or subjecting him to any negative treatment whatsoever because he requested annual leave. She also denies saying that "only you British people apply for holidays" or anything like that. The Tribunal accepted the evidence of Mrs Shen on this matter.

22. In November 2016, the Claimant allegedly raised concerns about salary irregularities at a meeting with Mrs Shen, he describes a "visa salary" where the visa holder and employee is said to be paid a certain amount in sterling but in truth is paid much less and returned the difference to the employer. He says that Ms Wu, a young

HR manager without any background and experience in HR is given a salary of £43,000 and she returns around £25,000 to company. He says that the Respondent has operated this scheme since 2013 for all staff sent by HQ in China. He says that he told Mrs Shen that it would be illegal. It did not apply to him. The Claimant produced no evidence to support his allegation. The Tribunal did not accept his evidence that he raised any concerns about the issue.

23. After the Hotel shut down, the only residents were the Claimant and Mr Gao who left the UK in April because his visa expired. Ms Wu used to live in the Hotel, but she moved out in January 2017. The Claimant did not want to stay in the Hotel by himself so when he told Mrs Shen, she suggested that he could rent an apartment near the House of Phoenix but he did not want to incur that expense. It was then that he says he applied to work from home. The Claimant stated that he had made requests to work from home on a number of occasions, the last of which was on 18th March 2017 during the shuttle bus journey. The sole reference to a request is at paragraph 6 of the ET1 in which he states that he requested to work from rather than at the Hotel. Ms Shen's evidence in respect of the homeworking requests of the Claimant is that she does not recall any specific requests by the Claimant to work from home but she is sure he did make some at various times. She considered that it was not realistic for him to work from home and perform his duties because the Respondent had no plan to develop business in Manchester. The Tribunal accepted the evidence of Mrs Shen.

24. The Claimant has identified a former colleague of his, Mrs Yuyang Zhang, who was permitted to work from home. Ms Zhang was one of the first people employed by PPMI. She is of Chinese origin and married to a British man. Mrs Zhang worked in the print room which was in Unit B7, Forest Oaks, Gallery Hill, Waltham Abbey. For a short period during the winter months of 2015 the weather was very cold and the heating in the print room did not work. She worked for PPMI from 2012 until the Hotel was closed and she was made redundant on mutually agreeable terms.

25. Although the chronology gives June 2016 as the date when the Claimant raised the issue of a fake invoice with Mrs Shen, the only evidence before the Tribunal related to activity in January and February 2017 in connection with the delegation from Gulou District, Nanjing City which arrived in the UK on 15th January. There was an event held at the Respondent's office on 16th January 2017. The Claimant says that because he accompanied the delegation for the whole journey, he needed cash to meet expenses. Mrs Shen allowed him to withdraw cash on 13th January from the company bank account. He withdrew £2000 at Barclays Epping Branch which is the nearest bank to the hotel [155]. He gave £1900 cash to Mrs Shen and retained £100 for his use. He says that Mrs Shen gave the cash to the leader of the delegation at the airport on arrival. After the delegation left the UK, the Claimant said that he had to account for the money he gave to Mrs Shen. She asked him to find any company which could provide an invoice for the cash. The Claimant says that he advised her not to do this but that Mrs Shen found a friend who would issue a fake invoice. He relies on the email exchange "Ms Shen, Hello. Here is an invoice, how do you think? I can issue it as Translation fee, is it OK? Mr Xue Kai." [148]. The Respondent says this is not a fake invoice, it is a genuine invoice for a translation fee. When the Chinese delegation came, they needed to pay for a translator to assist. Mrs Shen forwarded this email to Ms Jing Wu. Ms Wu then forwarded it to the Claimant so that he could use the fake invoice to cover the cash he gave to Ms Shen. The Claimant said that the



Respondent never used Mr Xue's company to translate, he acted as the interpreter for delegation. The Tribunal concluded that the invoice was not for translation services but that the Claimant had not raised any issue about it with Mrs Shen.

26. Mrs Shen offered 1% commission to any member of staff who introduced a buyer for the Hotel. The Claimant was actively seeking a buyer for the Hotel and had been asked by Mrs Shen to find a tenant for floor 1 and floor 2 of Phoenix House and also for the gallery.

27. On 22 February 2017, the Claimant alleges that he told Mrs Shen about health and safety concerns with the office and hotel during a visit by Mr Robert Smith whose company manages hotels on behalf of owners. The Claimant says that Mr Smith was not satisfied with the maintenance condition of the Hotel, in particular, the boiler had broken down and fire doors were not closed properly. The Claimant says Mr Smith asked for a health and safety inspection report. The next day the Claimant asked Mrs Shen whether there was such a report as he thought there was but she said there was not. Mrs Shen said that it was not the Claimant's responsibility to consider health and safety. She was aware of the concerns and was addressing them. As part of the sale of the Hotel, the Respondent appointed Mr Yu Gao to ask an engineer to repair the boiler equipment of the Hotel and he told her about problems with health and safety. Mrs Shen said that she did not recall any occasion when the Claimant told her about any health and safety concerns. The Tribunal accepts Mrs Shen's evidence that the Claimant was not responsible for health and safety but he did have some involvement in the issues that arose. He was involved in discussions about what was needed and the cost but nothing more.

28. In early March, Morgan Lovell who decorated the office building during 2015/2016, said, according to the Claimant "You should hire a maintenance manager to manage the whole building; You also need do Health and Safety Inspection regularly, you will have big trouble if you do not have them, cause your ground floor gallery is opened to public." The Claimant says that he reported this to Mrs Shen but she did nothing. A quotation dated 9 March 2017 [140-145] for a fire inspection was received but Mrs Shen thought that it was too expensive and did not go ahead.

29. It is not clear whether this is the disclosure identified in the Issues but in any event the Tribunal find that there may have been a general discussion in which the Claimant was included about what was required for the office but nothing more.

30. On 18th March, the Claimant says that he was driving the shuttle bus with Mrs Shen to meet an important delegation from China. They had dinner together in Baker Street. Because the aim of the delegation was to find some venues to hold a series of events in London in the summer of 2017, the delegation visited House of Phoenix. The Claimant said that he again mentioned the health and safety issue both in relation to the office and the Hotel to Mrs Shen, but she did not follow up on it. In cross-examination, Ms Shen denied the allegations made by the Claimant. As narrated in paragraph 23, the Claimant also says that he raised the issue of working from home.

31. It would have been most inappropriate to raise either issue in the company of guests and the Tribunal finds that the Claimant did not do so.

32. The Tribunal finds that generally the working relationship was good. The Tribunal finds that Mrs Shen did not treat the Claimant inappropriately because he was British. They would discuss a number of matters relating to the business but nothing constituted a disclosure of information.

33. In March 2017, Mrs Shen says she received a complaint about the Claimant's behaviour from Ms Wu [189]. In the ET3, the Respondent says "on or around 17 February 2017, Ms Wu was verbally abused and threatened by the Claimant after Ms Wu had pointed out a mistake to him. This bullying behaviour had made Ms Wu feel frightened and extremely upset prompting her to go back to China for holiday for two weeks. The Claimant's behaviour was both inappropriate and unacceptable." The Claimant's account is that the date is not correct, the incident occurred in early February. He says that Ms Wu made a mistake and was shouted by Ms Shen, Ms Wu felt embarrassment in the office so she shouted at the Claimant, he replied 'please do not speak to me like that' but denies that this was bullying. He says that Ms Wu returned to China because she wanted to celebrate Chinese New Year with her family, not for a reason related to the Claimant. This complaint is not mentioned in the email providing reasons for dismissal. The Tribunal did not accept the Respondent's version of events. The Tribunal did not accept that Ms Wu had made a complaint. The written complaint refers to the Claimant discriminating against Chinese employees. The Tribunal considers that this demonstrates a contrivance by the Respondent after the Claimant has complained of discrimination against him.

34. The Claimant began a period of annual leave on 22 March 2017 and went to China. He returned on 5 April 2017 and Mrs Shen asked him to work from home.

35. On 7 April 2017, a potential buyer of the Hotel, Amit, emailed the Claimant in connection with a letter of Intent and Proof of Funds [253].

36. The Claimant says that, around 12 April, he completed an online form on the Health and Safety Executive website to report his concerns. He says that as the Respondent has each employee's email and password, the emails can be monitored, they saw the response from H&S and dismissed him. The Claimant did not cross-examine Ms Shen on whether she was aware that he made a referral to the HSE about the Respondent. The Claimant has not advanced any evidence that he did, in fact, make a referral to the HSE but more importantly, he has not established that Ms Shen was aware of any such referral. The Claimant alleges that the Respondent has interfered with his email account so that it does not show his email to the Health and Safety Executive but the Tribunal finds that no such email was sent prior to his dismissal. In evidence, the Claimant said he had previously sent an anonymous email to the HSE, the Tribunal did not accept this either.

37. Mrs Shen says that in addition to Ms Wu's complaint, there were also the other complaints to which she referred in evidence and also his performance. Her key concerns about his performance were that:

- He was inefficient in his work.
- Weak in colleague relations.
- Had low enthusiasm.

- Always said it was inconvenient for him to introduce customers to PPMI.
- Lacked team spirit.
- Belittled the position of his colleagues.
- Verbally bullied colleagues.
- He liked to pry into the privacy of the company and colleagues.
- The Phoenix event of joining the London book fair in 2016, which he organised, was rated by headquarters as the worst since 2012.

38. She says that whilst the Claimant was on holiday, she considered all the problems with his behaviour and performance and concluded that he should be dismissed. The Tribunal does not believe the evidence of Mrs Shen with regard to the reasons she put forward for the dismissal of the Claimant.

39. Mrs Shen arranged a meeting with the Claimant on 18 April 2018. She attended the meeting with Ms Wu. The meeting was a short one. Mrs Shen says that she told the Claimant that he was dismissed and she explained the problems with his performance and his behaviour. She says that he accepted everything they said to him and, at the end of the meeting, when she asked him if he had anything he wanted to say, he asked them to help him by not referring to the sexual harassment behaviour in the dismissal letter. The Claimant's account is very different. He said in his witness statement "In the 5 minutes meeting, firstly Ms Shen blamed buyer I introduced to hotel, she told me 'How stupid Indian people are, I said can you buy whole London, when buyer explain how rich he is'; then she told me: 'your home is too far, and you do not want to move to London. You think hotel is not safe and do not want to live, but we do not know when new member is coming'. In his evidence to the Tribunal, the Claimant expanded on what he claims was said at the meeting in order to advance his claims. The Tribunal accepts neither account of the meeting given by Mrs Shen and the Claimant. The Tribunal finds that the Claimant was dismissed and there was little discussion but there was some discussion about the buyer of the Hotel.

40. After the meeting, Ms Wu sent the Claimant an email on 18 April 2018 confirming his termination [149 to 152] attached to the email was a letter confirming his last day of employment as 28 April 2017 [156 to 157]. Ms Wu also wrote to the Claimant asking for repayment of a loan which had been made to him on 21 January 2017 [155].

41. On 19 April 2017, the Claimant asked for reasons for his dismissal. Ms Wu sent a further letter by email on 21 April with three reasons for dismissal [158]. The first two cover the performance concerns they say they had with the Claimant. The third one, interpersonal relationships, does not expressly state the allegations of bullying and harassment that were made against the Claimant. This is said to be because he asked to save his face so as to not to prevent him from finding a job in the future.

42. The Claimant replied to Ms Wu's email on 21 April challenging the reason that had been given in the letter [150]. He said that the reasons he had been given were wrong and that Ms Wu or the company were lying. He does not make any mention of health and safety concerns. Ms Wu replied later that same day to confirm that the reasons in the letter were the reasons Mr Liu had been dismissed.

43. On 24 April 2017, the Claimant sent an email to appeal the dismissal decision [162] to which there was no response.

44. There is no clause in the written contract or any other agreement which provides for the payment of overtime pay. The practice of the Respondent is not to pay employees for working overtime but it does offer time off in lieu where someone works additional hours. In order to claim time off in lieu, an employee would have to submit a request after they worked any additional hours. When the employee submits their request, it would be considered and, if it were genuine, then the employee would be allowed to take some extra time off. The Claimant submitted claims for overtime [233 to 234] which appear to be for complete days. The Claimant alleges that Mrs Shen agreed he would be paid overtime for driving the company shuttle vehicle. She disputes this and says that, in any event, there were only two circumstances when the Claimant drove the shuttle: Firstly, if the driver was on holiday, the Claimant thought driving was more comfortable and convenient, so he chose to drive from the Hotel to the office and the bills were then paid by the Respondent. Secondly, in March 2017, when the Chinese delegation visited the UK, the Claimant drove Mrs Shen to dinner. Mrs Shen disputes saying that he would be paid for driving her to the dinner. The Claimant pursues a claim in respect of an alleged agreement between himself and the Respondent providing for the payment of overtime. The evidence of the Claimant was not that he was contractually entitled to overtime payments, he said Mrs Shen said during the end of the next financial year, she would think about how to pay him for overtime properly. This is not a contractual commitment.

45. The Claimant produced a detailed schedule of the overtime he says he was due in his witness statement from February 2016 to March 2017. The Claimant may well have worked these hours but there is no legal basis for claiming payment for them in these proceedings.

## **SUBMISSIONS**

46. The Tribunal heard oral submissions from both parties and received more detailed written submissions from the respondent.

## **LAW**

47. Section 13 of the Equality Act 2010 ("EqA") deals with direct discrimination. It states as follows:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

48. Section 23 EqA deals with comparators. It states as follows:

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

49. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the Claimant to what would have been received by the

actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

50. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

51. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

52. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional Transport** [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

53. The crucial question is why the Claimant received the particular treatment of which he complains.

54. Paragraph 3.11 of the Code of Practice confirms:

The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

55. Paragraph 3.13 of the Code of Practice confirms:  
In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.
56. The burden of proof provisions in relation to discrimination claims are found in section 136.
57. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.
58. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e. looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.
59. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).
60. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.
61. The Claimant pursues a claim of automatically unfair dismissal pursuant to sections 94 and 103A Employment Rights Act 1996 ('ERA').
62. The Claimant must satisfy the Tribunal that a disclosure was made on the facts, if he is successful, he must go on to satisfy the Tribunal that such disclosure was protected within the meaning of section 43A ERA. The Claimant must satisfy two requirements:
- a. That the disclosure was a qualifying disclosure within the meaning of section 43B(1) ERA; and
  - b. That the disclosure was made in a manner that accords with the scheme set out in sections 43C to 43H ERA.
63. Section 43B (1) provides:  
"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) 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.”

64. It has been held that a qualifying disclosure must be a disclosure of information, which means the conveying of facts, as opposed to mere allegation: **Cavendish Munro Professional Risks Assessment Ltd v. Geduld** [2010] IRLR 38. In **Kilraine v. London Borough of Wandsworth** [2018] ICR 1860 CA, the Court of Appeal supported the EAT’s view that a rigid dichotomy between information and allegation should not be read into section 43B, but that a disclosure must contain sufficient detail and content to be capable of tending to show one of the prescribed categories of information in section 43B (1). Ultimately, this will be an evaluative judgment for the Tribunal to make, see paragraphs 30 – 36. Further, it was held that the context in which the disclosure is made is a relevant consideration, see paragraph 41.

65. The editors of Harvey at CIII(4)(C) [21] summarise the position as follows:  
“... in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (the actual result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations... The question therefore is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide.”

66. Once a disclosure has taken place it becomes necessary to consider whether or not that disclosure can be categorised as a qualifying disclosure. This largely depends upon the nature of the information revealed. As an initial starting point, it is necessary that the worker making the disclosure has a reasonable belief that the disclosure tends to show one of the statutory categories of ‘failure’ (ERA 1996 s 43B (1)). It needs to be stressed that what is required is only that the worker has a reasonable belief and it is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect. This was made clear by the Employment Appeal Tribunal in **Darnton v. University of Surrey** [2003] IRLR 133 EAT. In that case the employment tribunal had held that the claimant had not made a qualifying disclosure because the allegations relied upon were not factually correct. In allowing the employee's appeal, the Employment Appeal Tribunal confirmed that the proper test to be applied is whether or not the employee had a

reasonable belief at the time of making the relevant allegations. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

67. The determination of whether a belief is reasonable is dependent on his subjective belief, but that belief must be objectively reasonable: **Babula v Waltham Forest College** [2007] IRLR 346.

68. In **Chesterton Global Ltd. v. Nurmohamed** [2018] ICR 731 CA at paragraphs 35 - 37, on the issue of public interest, it was held:

"[35] ...It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"...

[36] The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be... The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

[37] Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

69. The 'Laddie factors' referred to are: (a) the number of workers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; (c) the nature of the wrongdoing disclosed; and (d) the identity of the wrongdoer.

70. **Soh v. Imperial College of Science, Technology and Medicine** UKEAT/0350/14 decided that if the Claimant relies on information he received from a third party as the basis for the disclosure, then the tribunal should consider whether he was reasonable to believe the truth of the information as it was passed to him.

71. **Boulding v. Land Securities Trillium (Media Services) Ltd** UKEAT/0023/06 held that it is for the Claimant to show:



- a. That there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the Respondent in each of the circumstances relied on; and
- b. That the information disclosed tends to show that the Respondent had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject.

72. The Respondent accepted in this case that it is not necessary for the Claimant to use 'strict legal language' when making a disclosure provided it is clear to all concerned that there was a failure by the Respondent.

73. As to the meaning of whether it is likely that the relevant failure occurred, will occur or is likely to occur, following **Kraus v. Penna plc** [2004] IRLR 260, the meaning of likely is probable or more probable than not.

74. In order for a qualifying disclosure to be a protected disclosure, the Claimant must show that the disclosure was made in the proper manner. In order to be made in the proper manner, it must have been made in accordance with one or more of sections 43C to 43H. Subject to the Respondent's denials as to the facts of the disclosures, the Respondent accepted that the Claimant would satisfy the requirement as to the manner of the disclosure.

### **The reason for dismissal**

75. Section 98(1) (a) of the Employment Rights Act 1996 ("ERA") provides that the employer must establish:

- "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."

76. The list of potentially fair reasons is set out in section 98(2) of the ERA, redundancy is given as a potential reason.

77. As there was a dispute about the reason for dismissal the Tribunal followed **Maud v. Penwith District Council** [1984] ICR 143 CA where the Court of Appeal held that the burden of proof was on the Claimant where the employee does not have sufficient qualifying period to claim unfair dismissal.

78. If the Claimant satisfies the Tribunal that any or all of the disclosures amount to a protected disclosure then he must go on to show that the reason or principal reason for his dismissal was that he made the disclosure, **Kuzel v. Roche Products Limited** [2008] EWCA Civ 380.

### **DISCUSSION and DECISION**

79. The acts of discrimination relied upon by the Claimant are as follows:

- (i) That he was not given an annual salary review as verbally agreed by Mrs Shen when employed in February 2016. His comparators are Ms Wu, and Ziaya

Liu as identified at paragraph 31 of the record of the Telephone Preliminary Hearing held on 23rd November 2017. In the alternative he relies on hypothetical comparators.

(ii) That he was not allowed to work from home, although Mrs Yuyang Zhang (a Chinese national) was allowed to do so from winter 2015 until Spring 2016. Mrs Zhang is his actual comparator but in the alternative, he relies on a hypothetical comparator;

(iii) In October 2016 he asked for permission to take holidays and whilst his request was ultimately allowed, Mrs Shen berated him in front of the whole office staff for making the request and accused him of only asking because he was British and that only British people apply for holidays;

(iv) The Claimant alleges that his dismissal without following any form of disciplinary procedure was direct discrimination on grounds of race. There is no dispute that he was dismissed without following a disciplinary process. His comparator is Mrs Zhang who he states was dismissed but was taken through a lengthy procedure prior to her dismissal. The particulars of this element of his claim are set out in slightly more detail at paragraphs 9 and 18 of the Grounds of Complaint.

80. In pursuing the allegations of direct discrimination, the Claimant seeks to compare his treatment to specific individuals who are Chinese born Chinese but, in the alternative, he also relies on a hypothetical comparator if any of the specific individuals are not appropriate comparators. The comparison should be like for like and the Tribunal considered that none of the named comparators were in a similar position to that of the Claimant. The Tribunal also considered the issue of hypothetical comparators but concluded that as these were for events which had not been established in evidence, the comparison could not be made.

81. Dealing with each one in turn, the Tribunal has held that there was no contractual entitlement to a pay review from which the Tribunal has inferred that the Claimant means that he should receive a pay increase. There is a review of sorts but there is no specification as to when this must take place and what must happen. This allegation is unfounded and no comparison is necessary.

82. The Tribunal considers that the Respondent was reasonable in the way it dealt with the issue of the Claimant working from home in Manchester and was not acting in a discriminatory manner. The circumstances of the Claimant and Mrs Zhang are quite different as narrated in the factual findings. The Tribunal is satisfied that the Claimant did not request to work from the Hotel or from home in the shuttle bus on 18 March 2017.

83. The Tribunal does not believe that the incident of being berated described by the Claimant because he sought to take leave took place and no comparison is necessary.

84. In relation to the absence of a disciplinary procedure for the Claimant, the circumstances of the dismissal of Ms Zhang and the Claimant are very different. She

was the Hotel manager and was dismissed when the Hotel closed. She had sufficient length of service to claim unfair dismissal. It is important to note that the Claimant is not alleging that his dismissal in itself was an act of race discrimination, only his dismissal without following a disciplinary procedure. There was no discrimination.

85. In oral evidence the Claimant stated that he did not raise complaints as to the allegations of race discrimination during his employment because he had seen what had happened to other employees who disagreed with Mrs Shen. They were “gone” as he put it, meaning that they were summarily dismissed. He said that he knew he could not complain while he was still working for the Respondent. This had not stopped him complaining as he alleges about health and safety matters (i.e. those matters relied on as protected disclosures). His response was that health and safety issues are a moral issue and that he had to find the right time to raise issues of race discrimination. The Tribunal did not accept his evidence.

86. For the avoidance of doubt, the Tribunal did not accept any of the evidence of the Claimant where he alleged the Respondent treated him differently and in a discriminatory manner in any of the instances he put forward. The Tribunal has found that the Claimant and Mrs Shen had a reasonable working relationship. He took on additional tasks willingly and was treated reasonably well. This is evidenced in some way by the grant of a loan in January 2017.

87. The Claimant alleges that he was unfairly dismissed because the reason, or if more than one, the principal reason, was that he made one or more of the protected disclosures as alleged. The Tribunal concluded that the Claimant did not convey any information to the Respondent which might constitute protected disclosures. There may well have been general discussions between them about the state of the hotel and the office premises as part of the process of sale of the former and letting of the latter but there were no disclosures. He did not submit a report online to HSE which the Respondent became aware of which resulted in his dismissal. There was no evidence that the dismissal was a reaction to anything the Claimant had done in relation to health and safety.

88. For the avoidance of doubt, the Tribunal did not accept any of the evidence of the Claimant where he alleged that he made disclosures to the Respondent in any of the instances he put forward including the “fake” invoice and the visa salary.

89. The Tribunal does not accept the reasons proffered by the Respondent were the reason for his dismissal. Whilst it might be thought that this might give credence to the evidence put forward by the Claimant, the Tribunal did not consider that it did. As the Tribunal has found that the Respondent did not discriminate against the Claimant in any way and that the Respondent had no reason to complain about the performance or behaviour of the Claimant and that the complaint by Ms Wu was concocted after the event, the Tribunal considered what, if any, proximate event occurred near the time of the dismissal which might have caused it.

90. The Tribunal considered that the dismissal of the Claimant might have been related to the sale of the Hotel and his entitlement to commission. The Tribunal is not sufficiently confident about the evidence to make findings about what was said at the dismissal meeting but there was some discussion about the Indian prospective buyer.

Since his dismissal, the Hotel has been sold. The ET3 says the eventual buyer was not introduced by the Claimant, the Claimant says he must have been. The Tribunal has no information about who introduced the purchaser but has noted evidence of contact between a potential purchaser and the Claimant on 7 April 2017. The Claimant said "I have heard commission of hotel sales paid to my replacement. I believe that Mrs Shen has shared some of the commission with my replacement." The Tribunal is not in a position to find what the reason for dismissal was but since the Claimant has failed to establish a *prima facie* case as his claims of discrimination and whistleblowing have been found to be not based on fact, the claims of discrimination and dismissal for making protected disclosures must be dismissed.

91. Throughout the Claimant's employment he was paid £35,000 per year as had been agreed. He had no entitlement to overtime pay or a salary review. His claims are dismissed. He may still have recourse in the ordinary courts for commission on the sale of the hotel as the reference to commission in the contract he did not sign [61] may be a reference to commission on the sale of goods.

92. The Claimant gave evidence about the loss he has sustained in consequence of his dismissal as set out in his schedule of loss. In the light of the findings of the Tribunal, the detail of this evidence and the Respondent's dispute with it are not recorded.

**Employment Judge Truscott QC**

**Date 28 January 2019**