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EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr M Ali	**AND**	**Indian Cuisine Limited**

HELD AT: **London Central** **ON:** 29 & 30 May 2019

BEFORE: Employment Judge Isaacson

Representation:

For Claimant: Mr I Hurst, Solicitor
For Respondent: Ms D Keyms, Consultant

RESERVED JUDGMENT

1. The Claimant was automatically unfairly dismissed for making a protected interest disclosure.

2. The Claimant's claims for notice pay, holiday pay and arrears of pay succeed.

3. A remedy hearing has been listed for 23 September 2019.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a joint bundle of documents and further documents were presented during the Tribunal hearing. The Tribunal was assisted with a chronology and a cast list as well as an agreed list of issues. On behalf of the Claimant the Tribunal heard evidence from the Claimant and from Mr S Malik ("SM") a former restaurant manager of the Respondent. On behalf of the Respondent the Tribunal heard evidence from Mr F Dhaliwal ("FD") the Director of the Respondent. FD produced two written statements, providing a supplementary witness statement on the second day of the hearing. The Tribunal also heard evidence from Mr K Khanna ("KK") the Executive Chef of the Respondent, Mr A Roy ("AR") the Financial Accountant

for the Respondent and Mr N Mishra ("NM") the Financial Controller for the Respondent. All the witnesses produced written witness statements and had an opportunity to be questioned before the Tribunal. Both parties' representatives gave oral submissions at the end of the hearing. The Respondent's representative referred to the case of Annabel's (Berkeley Square) Limited and others v The Commissioners for Her Majesty's Revenue and Customs [2009] EWCA Civ 361 ("Annabel's")

Claims and Issues

2. The Claimant originally brought claims of automatic unfair dismissal on the grounds of making a protected interest disclosure, discrimination on the grounds of religion or belief and an unlawful deduction from wages claim. Later the Claimant withdrew his claim for discrimination on the grounds of religion or belief and amended his claim to add a claim for ordinary unfair dismissal.

3. An agreed list of issues was provided to the Tribunal at the beginning of the hearing since the issues had not been clarified at a previous preliminary hearing. At the end of the hearing, after submissions from both parties, the Claimant's representative asked to amend the Claimant's claim form to include a claim of detriment and confirmed that the claim of detriment was limited to the dismissal itself; that the Claimant was feeling depressed and confused by the whole incident. The Claimant's representative accepted that detriment had not been previously pleaded, although argued that the Respondent was always on notice of a detriment claim as they had included it in their list of claims in their agenda for the preliminary hearing.

4. The Tribunal has refused the Claimant's very late application to amend on the basis that the prejudice to the Respondent out weights the disadvantage to the Claimant. The Claimant had many opportunities in which to apply for an amendment to add a claim of detriment at the previous preliminary hearing and at the beginning of the full hearing. The Claimant was represented at both hearings. The Respondent's witness statements and pleadings did not deal with detriment and the Claimant was not cross examined on it. The fact that the Respondent's solicitors had identified as a potential claim detriment in their agenda does not indicate that they were preparing to respond to such a claim and in fact the list of issues clearly set out that the Respondent was arguing that detriment had not been pleaded. The application was too late in the day.

5. Therefore, the remaining issues before the Tribunal are:

Dismissal

i) What was the effective of date of termination?

ii) Did the Respondent dismiss the Claimant for a potentially fair reason on the grounds of redundancy pursuant to s.98 of the Employment Rights Act 1996 ("ERA")?

iii) If so, pursuant to s.98(4) ERA, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee?

iv) In particular, was the decision to dismiss the Claimant within the band of reasonable responses and did the Respondent follow a fair procedure?

Automatic Unfair Dismissal – s.103A Protected Disclosure

v) Was the Claimant automatically unfairly dismissed – was the principal reason for the dismissal making a protected disclosure by the Claimant?

PIDA

vi) Were the disclosures listed below qualifying disclosures? Three elements:

(a) Did the Claimant make a disclosure of information?
(b) Did the information relate to one of the six types of relevant "failure"?
(c) Did the Claimant have a reasonable belief that the disclosure was in the public interest?

Relevant Failures - The Claimant alleges a breach of a legal obligation.

vii) Did the Claimant make a qualifying disclosure pursuant to s.43A with regard to disclosures 1-3 below?

viii) Were the disclosures more than merely a communication and was the information more than merely an allegation or statement of position?

Disclosure One

In May/June 2018, upon the appointment of the Executive Chef when the Claimant brought to the attention of the Sous Chef Mr Sharma, the issue regarding the use of chicken Knorr stock powder for vegetarian/vegan dishes and the menu not matching the actual description;

Disclosure Two

On 11 June 2018 when he sent an email to all the Senior Chefs including the new Executive Chef and others including Mr Malik, raising concerns about the accuracy of the dietary requirements and the description of the meat free products;

Disclosure Three

On 13 and 18 June 2018 when the Claimant raised concerns with Mr Malik the Restaurant Manager, concerning the urgency of the allergen information for the launch of the new menus.

ix) Did the Claimant fulfil the requirements, in providing information that the Respondent was already aware of, for a qualifying disclosure, pursuant to s.43B ERA?

x) Did the information relate to a relevant failure by the Respondent-

1. The Respondent being in breach of its legal obligation (s.43B(1)(b) ERA) concerning food standards under the Trade Descriptions Act 1968;
2. Danger to the health and safety of any individual by not providing sufficient information on the menu and potentially exposing the customers to health risks;
3. The deliberate concealing of information about any of the above. S.43B(1)(f) ERA?

Reasonable Belief

xi) Did the Claimant have a reasonable belief that the information tended to show one of the relevant failures?

In the Public Interest

xii) Did the Claimant have a reasonable belief that the disclosure was in the public interest, and have a legal obligations to the customer with regard to food safety standards?

xiii) Did the Claimant raise a grievance and if so, did the Respondent fail to conduct a fair and unbiased investigation into the Claimant's grievance?

Unlawful Deduction

xiv) Did the Respondent fail in its obligation to give the Claimant statutory notice pay?
xv) Did the Respondent underpay the Claimant by one day's pay (the Respondent admits it did).

xvi) Should notice pay and wages include tronc payments?

Remedy

xvii) If the Claimant's claims are upheld:
(a) What financial compensation is appropriate in all the circumstances?

(b) In respect of compensation: what loss has the Claimant suffered and for what period should the Claimant be compensated If the Claimant would have been dismissed in any event?
(c) Has the Claimant taken reasonable steps to mitigate his loss?
(d) Should the Claimant's remedy be reduced by up to 25% on the grounds of bad faith or not?

The Law

6. The definition of redundancy is set out in s.139 of the ERA:
"*(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

(a) the fact that his employer had ceased or intends to cease –
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) The fact that the requirement of that business –
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish."

7. Section 98 of the ERA sets out the law relating to unfair dismissal:
"***98 General***
(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 for 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 …
(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".

8. In deciding whether the dismissal was fair or unfair, the Tribunal looks at whether the dismissal was procedurally fair and then goes on to decide whether it was substantively fair. The test for the Tribunal to apply is whether

in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

9. The Tribunal must not put itself in the shoes of the employer and decide what it would have done in the circumstances but should decide whether the employer acted reasonably.

10. In a redundancy dismissal the Tribunal follows the guidelines set out in Williams and Others v Compare Maxam Limited (1982) ICR 156 EAT:

1. As much notice as possible of the impending redundancy so that employees can look for alternative solutions or alternative jobs.
2. Consult with the union regarding selection criterion and how it is applied.
3. Establish selection criteria which as far as possible does not depend solely on the opinion of the decision maker but can be objectively checked.
4. Establish whether the selection criteria was objectively chosen and fairly applied, also considering the pool for selection.
5. See if there is alternative work available before deciding to dismiss.

11. It is not necessary to have a selection process if all employees within a certain pool, for example with the same job title, are being made redundant. The ACAS code of conduct does not apply to genuine redundancy dismissals.

12. If the Tribunal finds that the dismissal was procedurally unfair, then, when considering remedy, the Tribunal needs to take in to account whether an award should be reduced by a percentage to take account of the likelihood that the employee would have been dismissed anyway if a fair procedure had been followed.

13. A protected disclosure is a qualifying disclosure as defined by s.43B of the ERA which is made by a worker in accordance with s.43C-H. A qualifying disclosure made to an employer is a protected disclosure.

14. Section 43B provides:

"*(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 - …*

(b) that that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,".

Findings of Fact

15. The Claimant commenced employment with the Respondent on 30 May 2016 as an Assistant Manager. On that day the Claimant received two letters; an offer letter and a letter from a troncmaster. The offer letter (page 168) confirmed his start date and stated a salary of £16,000 basic plus tronc pay. It referred to a tronc system and confirmed that the Claimant would receive a separate letter from the troncmaster. The Claimant received from SM, the restaurant manager and who was the troncmaster, a letter (page 174) stating:

"*I have allocated a default value to you which is based upon your position in the business. I will then assess your performance each month using a number of criteria and will also receive feed back from your managers.*

Depending on you meeting, not meeting, or exceeding the criteria will determine how much you will receive in a particular month. The more you meet your criteria the greater amount of tronc you may receive.

You should note that the tronc does not form part of your terms and conditions of employment with Indian Cuisine Limited and is operated completely independently of the company. Payments from the tronc are discretionary and are an addition to your basic pay from the company".

16. The Respondent tided up their paperwork and the Claimant received updated terms and conditions of employment in December 2017 (page 159), which confirmed the Claimant's salary of £16,000 gross per annum.

17. It was explained to the Tribunal, by both the Claimant and Respondent witnesses that when an employee applied for a job they were given an annual income figure and that figure was then divided into two parts; salary and tronc payments. Basic salary covered the national minimum wage and was usually around £16,000. The rest of the income was made up of tronc payments. In the Claimant's case when he was employed he was promised a gross income of £28,000 and his payslips confirm he was paid basic pay per month of £1,358.33 and his tronc payment was £983.33. It was the same throughout his two years of employment.

18. When an employee went on holiday their monthly payment remained exactly the same as no pay was accounted as holiday pay on their payslips, which would just show the normal monthly basic pay and tronc payments.

19. The advantage to both the employee and employer for the tronc system is a reduction in national insurance contributions. The basic pay and tronc system is known in the catering industry and there is a recognised tronc scheme by the HMRC. In the case of Annabel's, the Court of Appeal found that the Appellants could not rely on tronc payments to cover their obligations to pay the national minimum wage. When service charges were first collected by the employer, such payments were the employer's money. However, if there was a legitimate and genuine arrangement under which the administration and distribution of service charge money was handled exclusively and independently by the troncmaster, the sum paid by the

troncmaster was not the employer's money because, at the point of payment, what was paid to the employee was money forming part of a fund constituting in equity the employees' commonly owned property.

20. At the Respondent the tronc payments were collected from customer service charge and gratuities paid via credit and debit cards to staff. The restaurant automatically applied a discretionary gratuity on each bill. AR, the Financial Accountant for the Respondent confirmed that all the tronc payments were collected by the Respondent and were deposited in to the Respondent's bank account and not a separate account but the payments were accounted for separately on their accounting system.

21. The tronc payments to the employees were the same each month and any change was the exception to the normal rule. Occasionally the tronc master could reduce any tronc payment if an employee was late or had done something wrong or a tronc payment could be increased as a reward for doing something good. But overall an employee received the same amount each month which was the figure that had been agreed on employment. The troncmaster did not exercise his discretion each month to decide the figure for tronc pay. Not all the tronc monies collected by the Respondent went to the employees. There was no separate bank account set up for the tronc payments and they remained in the employer's bank account.

22. The Tribunal was shown a budget chart (page 307) which set the gross salaries for management, supervisors, head waiters etc. AR explained to the Tribunal that a manager, for example Mr V, may have an agreed package of £39,000 and that £16,000 of that would be classified as basic pay to cover the national minimum wage and that the rest would be paid as tronc. This type of division would be the same for all the staff listed in the budget.

23. The Tribunal finds that an agreement had been reached between the Claimant and the Respondent on his engagement that he would receive a gross package of £28,000 made up of basic pay and tronc pay. Although the tronc payment is referred to as discretionary it is clear from the evidence provided by the Claimant and the Respondent witnesses that in practice all employees received the amount they had agreed on appointment on a monthly basis and that it was only the exception to the rule when the tronc payment was at any time adjusted down or up.

24. The Tribunal finds that the tronc payments were a contractual entitlement and were part of the Claimant's remuneration package. Although both the Claimant and the Respondent benefited from the separation of the two payments for NIC purposes, the Claimant was entitled to be paid a daily rate which included both the basic and the tronc payment. This is demonstrated by the way holiday pay was paid to the employees by the Respondent.

25. The Claimant's job description is at page 182 of the bundle and the Respondent's grievance and disciplinary procedure commences at page 222. Copies of the Claimant's payslips commence at page 300. The Respondent had a protected interest disclosure policy (page 224).

Restructure

26. There are three restaurants that comprise the Tamarind collection group: Tamarind of Mayfair, Tamarind Kitchen and Zaika. The three restaurants specialise in Indian cuisine.

27. The Tamarind collection are not specialist halal restaurants, but all three restaurants use halal meat. In addition, there are vegetarian/vegan options that do not contain meat products. The restaurants note common allergens on control copies of their menus so that staff can answer queries from customers.

28. Food Alert is the food safety agency that Tamarind collection use for monitoring food hygiene and health and safety. The Tribunal accepts the evidence of the Respondent witnesses that the Tamarind collection do not set out to be halal restaurants and do not advertise themselves as halal restaurants. It is clear to customers that they are not fully halal as they do not display certificates from halal food authorities or the halal monitoring committee and because they serve alcohol. However, they use halal meat as their base meat because it means that less strictly observant Muslim customers are able to eat in their restaurants. If a customer asks if the restaurant is halal the staff reply that the meat is halal. If the customer asks further, then they tell them that they are not fully certified halal but that the base meat only is halal.

29. Tamarind of Mayfair was the first Indian restaurant in London to receive a Michelin star. It was decided in January 2018 to close the restaurant for refurbishment at the end of April. The Tribunal accepts the evidence of FD that the new Tamarind of Mayfair is a much larger restaurant, expanding from 75 covers up to 150 over two floors. A decision was made in January to 2018 to restructure the management of the restaurant and to make all assistant managers redundant and instead to hire restaurant managers who could operate independently on each floor. The Tribunal accepts the evidence of FD that a restaurant manager's role is different to an assistant manager's role. An assistant manager would not be involved in the day to day decision making, would not communicate directly with the head chef, whereas a restaurant manager would. It is a more senior role with more responsibilities.

30. FD could not produce any structural chart to support his evidence that he made the decision to restructure in January 2018 but the Tribunal does accept his evidence that the decision was made in January. A later organisational chart, dated 12 October 2018, confirms that the intention in October 2018 was to have a general manager and a restaurant manager but no assistant managers in the Tamarind of Mayfair. The restaurant reopened in December 2018 and now has three restaurant managers covering the two floors. There are no assistant managers.

31. A number of employees were made redundant when the Tamarind of Mayfair restaurant was closed for refurbishment at the end of April, including one of the assistant managers Mr Sharma. The Claimant and the other assistant manager, known as Tazul, were transferred during the refurbishment

to work in Tamarind Kitchen in Soho to cover holidays and other absences and in particular because SM was going on a long holiday.

32. The Tribunal accepts the evidence of the Claimant and SM that the Claimant was led to believe that his position was safe. Before the closure of Tamarind in Mayfair he had gone to his manager SM to say that he had been offered a job at another restaurant for more pay but was persuaded to stay on the basis that he would get a promotion and that at the restaurant in Soho he would be acting restaurant manager.

33. However, the Tribunal accepts the evidence of the Respondent witnesses that SM was never in fact authorised to promote the Claimant to acting restaurant manager and he never received a pay rise. FD was unaware that SM had told the Claimant that he was acting restaurant manager. Although the Claimant may have covered some of SM's roles while he was on holiday, the Tribunal finds that the Claimant was never in fact a restaurant manager but continued in his role as assistant manager and was not involved in the day to day decision making or required to communicate directly with the chefs.

New Michelin Star Chef and PID

34. KK was employed by the Tamarind Collection on 8 March 2018 to oversee the refit and reopening of the Tamarind of Mayfair. Whilst Tamarind of Mayfair was undergoing the refurbishment KK was based at Tamarind Kitchen where he oversaw menu development for the Tamarind Collection and operationally managed at Tamarind Kitchen. During that time, he started to prepare and taste new dishes which included the use of chicken Knorr stock.

35. The Claimant and SM gave evidence that chicken Knorr stock was being added to halal, vegan and vegetarian meals. KK denied using chicken stock in vegan and vegetarian meals. What is clear to the Tribunal is that the Claimant and SM genuinely believed that Knorr chicken stock was being used both with halal meat and in vegetarian and vegan meals. The Claimant was very concerned that customers maybe mislead by the addition of the chicken stock and was particularly concerned about the allergen charts being updated.

36. Around 4 June 2018 the Claimant made a verbal request to the senior sous chef Manish Sharma ("MS") that the correct information be provided to the waiters to ensure that the dishes were accurately described. The Claimant was told that the head chef's KK response to his request was that the information for the new menu was accurate, that they should carry on in the same manner as they had previously. The Claimant felt this was wrong and misleading and that he was being ignored. As the Tamarind Kitchen was getting closer to its new menu launch he did not feel he had an accurate description for his team.

37. The Claimant spoke again to MS, the senior sous chef, who said that he would speak to the executive chef but also encouraged the Claimant to speak directly to KK. The Tribunal finds that when the Claimant raised his concerns

with the sous chef he was making his first protected interest disclosure; he disclosed to a manager of his employer about his belief that the Respondent was potentially breaching their legal obligations to both their customers and staff by serving halal meat dishes, vegetarian and vegan dishes containing chicken Knorr stock. He explained how it was in the public interest to ensure the correct information about the ingredients for all the dishes were accurate and not misleading.

38. After a week the Claimant still did not feel he had accurate and relevant information and on 11 June sent an email to MS, copied to all the senior chefs, including the executive chef and his line manager. The Claimant in his email explained that he had faced a situation with a Muslim guest on the Saturday night as the guest had asked if the food was halal and he had told him yes but later realised that most of the dishes contained stock powder which contained animal products. He explained that they needed to be clear about the ingredients, that the last thing they wanted was to be calling an ambulance to the restaurant for either guests or members of staff. He asked for clarification of which meat dishes could be described as halal, whether they were using chicken stock powder for any fish or vegetable dishes and what dishes were suitable for the different dietary requirements such as vegan and lactose vegetarians and asked that the allergen menu be updated as the new menu was rolling in a week's time.

39. The Respondent's representative argued that as this email had only been sent to the sous chef and merely copied to the other senior members of staff, it was not directly addressed to them and could not be a disclosure to the employer. The Tribunal does not accept this argument. The Claimant by sending it around to all the senior managers was clearly intending that they knew about his concerns and was raising it with all of them.

40. The Respondent's representative also argued that the email did not disclose information relating to a breach of a legal obligation as it was merely asking questions rather than disclosing information. The Tribunal rejects that argument. The email is clearly stating his concern about what ingredients is contained in the various meals and how dangerous it could be not to disclose all the ingredients to customers and staff and to update the allergen menu. The Tribunal finds that this email was a protected interest disclosure; the Claimant did make a disclosure of information to the Respondent regarding a breach of a legal obligation and that the Claimant did have reasonable belief that the disclosure was in the public interest. He was clearly concerned about the ingredients for both staff and for customers.

41. The Claimant did not receive a response to his email. The Claimant also communicated with his general manager SM, while he was away on holiday, relating to his concerns about hidden ingredients, more specifically the Knorr chicken powder being used in dishes without disclosing to customers. SM did not respond to the Claimant while he was away. Neither the claimant nor SM could find messages between each other at this time but both recalled the Claimant communicating with SM.

42. On 18 June 2018, when SM returned to work, he was approached by six members of staff (including the Claimant) regarding the hidden ingredients being misleading and against their beliefs and that they felt that their integrity was being compromised. The staff included non- Muslim members of the team. SM made enquiries with the chefs on duty on the day and they confirmed that the Knorr chicken stock was being used under the instructions of KK.

43. SM approached the executive chef KK directly, asking for further clarification on the matter. The Tribunal accepts the evidence of SM in relation to the conversation he had with KK, which was later recalled to the Claimant. KK confirmed that Knorr chicken powder was being used and that he did not want it to be disclosed to guests "*guests don't need to know what ingredients*" and that if he had any further questions, he should address them to the director.

44. On the same evening SM called the director FD and during the conversation he brought up the issue of the Knorr chicken stock. He pointed out that this brought dishes described as vegatrian/vegan/halal into question and that the staff's integrity was being compromised. The Tribunal accepts the evidence of SM during his conversation with FD he was told to keep selling dishes as if they were suitable for all dietary requirements and when told that the team members would not be happy FD replied, "*those members of staff need to be phased out*". SM was very unhappy with FD's response and expressed his dissatisfaction to him. He felt it was unethical and it was agreed that they would discuss it further the following morning. That same evening SM spoke to the Claimant and reported what FD had said. Although both witnesses recall of the words used by FD are not exactly the same the tone and general message corroborate each other's evidence.

45. The Claimant was horrified by the attitude of not considering the impact of such policies on customers and exposing them to food that was potentially unsafe or against their religious and philosophical beliefs. SM told his team that he would have a further meeting with the director and KK but in the meantime if guests raised any questions about the ingredients, they should be forwarded to him. He had to answer a number of queries from customers that evening.

46. The following day SM had a meeting with KK who made it clear that he was not going to disclose the use of Knorr chicken powder to guests. SM felt this was very wrong and against the religious beliefs of the staff and customers and therefore felt he had no option but to resign and handed in his notice. It was evident to the Tribunal after he gave his evidence that FD wasn't going to do anything to interfere with KK's decisions and cooking. Having a Michelin star chef for the refurbished restaurant was very important to the Respondent.

47. FD did not want to accept SM's notice and instructed SM to take further leave and he would sort out the issues before his return from leave. FD said that for the moment he would let KK do as he pleased and that he would make sure that the issue of the hidden ingredients would be gone by his

return and would not be carried forward to the Mayfair restaurant when it reopened.

48. During this same meeting SM was told to dismiss the Claimant for redundancy. SM said that he was unhappy about this and then it was agreed he would go on paid leave. SM was on paid leave between 1 July and 7 August 2018.

49. FD then instructed Tamarinds external HR consultant Miss A Hunter ("AH") to make redundant the Claimant and the other assistant manager Tazul. Tazul was made redundant on 30 June 2018.

50. The Tribunal finds that the principal reason why FD decided to make the Claimant and Tazul redundant at this time was because they had both raised concerns about KK cooking with Knorr chicken stock and not disclosing this ingredient to customers. Although the Tribunal accepts that FD had already made the decision to make the Claimant and the other assistant manager redundant because of the restructuring, the Tribunal finds that the Claimant's dismissal was accelerated by his protected interest disclosures. FD didn't want anyone or anything interfering with KK's cooking as it was so important to FD to have the Michelin star chef for the refurbished restaurant.

51. The Respondent's representative argued that since only the Claimant and the other assistant manager was made redundant out of the 6 members of staff who complained to SM on his return from leave, this demonstrated that the principal reason for the Claimant's dismissal was redundancy and not whistleblowing. However, the Tribunal finds that there is a difference between junior members of staff complaining and more senior members of staff raising issues on behalf of others. By sending an email on the 11 June 2018 the Claimant was going a step further and demonstrating how concerned he was about the situation and that he wanted it remedied. FD's comments to SM that those members of staff who weren't happy about what the chef was doing should be phased out also influences the Tribunal's decision. The Tribunal finds that while SM was on holiday the Claimant would have remained employed to cover his absence if it wasn't for his whistleblowing, especially as FD told the Tribunal members of staff were kept on during the refurbishment to cover absences.

52. Around this time a restaurant manager Arbind Chouhan ("AC") was appointed. It is accepted by the Tribunal that AC had previously been a restaurant manager and was appointed as a restaurant manager for the Respondent. In July a further restaurant manager Vipen Magoon ("VM") was appointed. The appointment of the restaurant managers is in line with FD's decision to restructure; replacing assistant managers with restaurant managers.

Dismissal

53. On 2 July the Claimant was informed by AC that there was going to be a manager's meeting the following day. Despite this being a rostered day off for the Claimant he was told that he would have to be there. He assumed it was

a meeting for operational matters. On the day he was introduced to VM and told to go and attend a meeting with AH. He was given no further information and was not sent any notice of the meeting or a warning that he might be made redundant. AH invited the Claimant to go for a coffee outside the premises and on the way told him that "*it was not good*" and then told the Claimant that his position was redundant. The Claimant asked AH why he was being made redundant and other people were being hired for the same roles as him and he was told that they were for different positions. He said that he felt that the real reason was because he had raised concerns about inappropriate ingredients in the dishes.

54. There are no notes of the meeting between the Claimant and AH. AH did not attend the Tribunal to give evidence or be questioned. AH sent an email to the Claimant on 6th July (page 153) stating that at the discussions on 2 July the Claimant was told he was at risk of redundancy. However, the Tribunal accepts the evidence of the Claimant that he was told on 2 July 2018 that he was being made redundant. FD confirmed to the Tribunal that he had already made the decision that the Claimant would be made redundant and his evidence supports the Claimant's recall of the meeting that he was told he was redundant rather than being told that he was at risk of being made redundant.

55. The Tribunal finds that there was no attempt to consult with the Claimant or suggest alternative employment for him. The decision had been made that assistant managers were no longer required and that he was to be redundant. There was no suggestion that the Claimant could be trained up for the alternative role of restaurant manager as the two new restaurant managers had already been appointed.

56. In the email dated 6 July 2018 AH recorded that the Claimant had raised several issues regarding his employment and that it was agreed that they would meet again on 6 July to discuss those issues and the Claimant was then informed that he had a right to be accompanied to that meeting. The Claimant had not been notified of a right to be accompanied to the original meeting on 2 July.

57. Although the Claimant does not state in his witness statement that at the meeting on 2 July 2018 he made various threats, the Tribunal accepts the evidence of FD that he was informed by AH that the Claimant did raise various allegations about the company and threats if the company did not make him a financial settlement. Further documentation in the bundle demonstrates that the Claimant on numerous occasions made threats against the Respondent and asked for a considerable amount of compensation by way of settlement.

58. The Tribunal accepts the Claimant's evidence that he was offered to either leave then or to work out his notice and that he decided that because of the issues that he had raised it was difficult for him to return to work and serve out his notice period. The Claimant informed AH that he would take the matter forward to both the Tribunal and the media.

59. On 6 July the Claimant met again with AH and although there are no notes of that meeting an email was sent to the Claimant by AH on 16 July (page 148) which summarises what happened at the meeting. The email confirmed that the reason for the Claimant's dismissal was redundancy due to the new structure within the business. AH asserted that the Claimant did not give her the opportunity to explore other options with the company or to assist in finding alternative employment but that the matters that he had raised on 2 July were being investigated and confirmed the payments that he would receive and that he had a right to appeal.

60. On 9 July the Claimant sent an email to SM (page 150) confirming the conversations they had had about the ingredients issue and the fact that he had been dismissed and that he would require SM to be a witness at a Tribunal on his behalf.

Appeal

61. On 17 July the Claimant confirmed that he would be appealing against his redundancy as the reason stated was false and that he knew that the reason was related to the non- halal ingredients used which was raised by him. (Page 148). AH wrote to the Claimant on 27 July confirming that she had received his appeal letter and that an appeal hearing would take place on 1 August and would be chaired by the financial controller Mr N Mishra ("NM").

62. The Claimant's appeal meeting took place on 1 August 2018. There are no notes of the meeting even though AH was there as a note taker. At the start of the appeal meeting AH notified the Claimant that an investigation had been made into the issue he had raised regarding the chicken Knorr powder and that it had been found that his allegations were unfounded. AH told the Claimant that the reason for his dismissal was redundancy and not the fact that he had raised the issue of non- halal ingredients. The Claimant felt that as this was said right at the beginning of the meeting there was no point in the appeal meeting. He started to raise other allegations about the company. He said that he was not prepared to discuss his dismissal further.

63. What was apparent to the Tribunal was that NM had no training and had never previously held an appeal and was completely reliant on the support from AH from HR and in a sense, was just acting as a puppet in the meeting. The Claimant felt from the opening comments from AH that there was no point in proceeding as it had clearly been predetermined. The meeting lasted for no more than about five minutes.

64. The Tribunal finds that by AH indicating at the very start of the appeal hearing that the Respondent had already concluded that the Claimant's concerns were unfounded, it was not a reasonable and fair appeal hearing and that the Respondent was merely going through the process. The Claimant was not given a true opportunity to set out his concerns and grounds for appeal before a decision was reached by the Respondent.

65. Following the Claimant's appeal hearing NM asked AH to send him a copy of the notes which she had taken during the hearing and any other

letters sent or received by the Claimant that he was not aware of. AH responded on 8 August saying that all was done and stating, "*Don't forget I was told by Fateh that there were no other positions within the company and assistant managers positions are no longer in the business*". This email confirms to the Tribunal that AH had been told at the time by FD that the reason she was to carry out the Claimant's dismissal was for redundancy. The Tribunal would not have expected FD to tell an external HR consultant that the true reason for the dismissal was for whistleblowing.

66. On 7 August FD sent an email regarding SM's return to work and confirmed the management positions of SM as acting senior restaurant manager, Vipen as the restaurant manager and Arvin as the restaurant manager. On 8 August SM returned from his leave. The issues of the hidden ingredients remained the same as he believed that the Knorr chicken powder was still being used in vegetarian dishes. He found this approach towards dietary requirements immoral and unethical and felt that he could not return to work for the Respondent and therefore persisted with his resignation.

67. SM continued to work for the Respondent until September 2018. SM explained the reasons for his resignation in an email (page 117b) addressed to AH. The email confirms there were a number of reasons for him leaving, including the issues with the chef KK, stating that he felt that he was dishonest and deceiving staff and guests. SM confirmed that he had brought his concerns about KK on numerous occasions that he added chicken powder to many of the dishes on the menu and then claimed the food to be vegetarian/vegan/halal when it was not and this was unacceptable and unethical to one's faith and beliefs.

68. On 28 August the Claimant emailed SM (page 138) expressing his concern about the ingredients and misleading customers and that he felt that SM was partly to blame and that his solicitors would be in touch. The Tribunal finds that this email again demonstrates that the Claimant genuinely believed that the reason he was dismissed was for raising the issues regarding the hidden ingredient and how he believed it was in the public interest to raise his concerns.

69. AH sent to the Claimant a letter dated 7 September 2018 (page 125) setting out a summary of the various meetings that had taken place. The Claimant's written response to AH's letter is at page 119. The Tribunal accepts the version of the various meetings set out by the Claimant in his responses set out in the email of 17 September. The Claimant's position has been consistent throughout his evidence and AH was not present at the Tribunal to challenge the Claimant's evidence or to provide an alternative.

70. In AH's email she does not explain how the Claimant's allegations that he was dismissed because he had claimed that non- halal ingredients were being used at Tamarind Kitchen was fully investigated. It is clear from the email exchange that at the various meetings the Claimant did raise many allegations and did threaten to take the company to the Tribunal and sought large sums of money from the Respondent to avoid the need of going to the Tribunal. AH also made some offers to the Claimant that were not accepted.

Termination payments

71. In correspondence from AH she set out the amounts the Claimant would receive in redundancy pay, notice pay and for accrued holiday entitlement. An email confirmed that the Claimant was paid his full pay for June and that he was owed one day's pay for July. However, his notice pay and redundancy pay were to be calculated based only on his basic pay and not to include tronc payments. The email seems to suggest that the Claimant's holiday pay would include tronc payments. However, it was admitted in evidence by AR, the Respondent's financial accountant, that tronc payments were deducted from his accrued holiday payment on termination because he had been "*very naughty*".

72. The Tribunal finds that the Claimant's notice pay, holiday pay and redundancy pay should have been calculated on the basis of a normal week's pay which should have included basic pay and tronc pay as this was his contractual entitlement.

73. On 29 August 2018 (page 130) the Claimant emailed the Respondent's financial team querying the payments he had received, seeking a copy of his P45. AR responded in blue stating that the tronc payments were not payable because they were not contractual. The P45 issued showed a leave date of 30 June 2018 but it is accepted that the Claimant did in fact work a day in July and his effective date of termination was the 6 July 2018.

74. FD the director of the Respondent asked AR the financial accountant to have an informal meeting with the Claimant because the Claimant was unhappy about his redundancy. AR met with the Claimant on 3 September 2018 and a handwritten note of that meeting is at page 128. At the meeting the Claimant ran through his complaints about chef KK using non- halal ingredients. He also told AR that he had spoken to Tamarind Collections major competitors, who were in litigation with the Respondent at the time, and that they had promised to fund him £50,000 and their PR team to help him campaign against the Tamarind Collection. He said he would not leave the campaign unless the Respondent settled for £150,000. AR told him that the Tamarind Collection would not settle for this amount and that it was a vastly overstated sum.

75. Following the meeting AR asked AH to deal with the queries that the Claimant had regarding his final pay.

76. On 8 October 2018 the Claimant emailed SM (page 116) referring to the news about Pret and how important it was not to put people's lives at risk by hidden ingredients. He referred to being phased out and stated: "*I will not let this go at any cost, this company needs to be exposed for what it is. I am whistleblowing on everything"*. He referred to delaying proceedings until the Tamarind launch and said that he has been in contact with various Muslim organisations and TV stations and the HMRC stating "*this will be huge and will have implications across the food industry*". It is evident from this email how passionate the Claimant was about the issue of hidden ingredients in halal and vegetarian/vegan food and to what lengths he had gone to whistle blow

and that he wanted SM to be on board with him. The Claimant did not send this email or threaten the Respondent directly, but SM forwarded the email on to the Respondent.

77. On 10 October 2018 an audit report was done by Food Alert, a standard quarterly or biannual audit report. (Page 83-108).

78. On 12 October the Claimant emailed SM again telling him the steps he had taken communicating with various organisations about the Respondent's restaurants including getting in touch with Max Clifford's office. He talked about destroying the Respondent but also stated *"you know that this is important for the public to know*". In the very last line of his email he stated, "*I guess this has become my jihad"*. The Claimant's email shows how stressed and upset he was. SM knew the Claimant and felt the irrational decisions and rash statements were out of character. He did not reply to the messages as he knew the Claimant would calm down once he was over the shock of his dismissal. However, SM forwarded this email on to AH who forwarded it on to FD who then referred the matter to the company's solicitor TR.

79. On 17 October (page 107-108) the chef KK emailed the auditors at Food Alert stating that the restaurant used certified halal meat products and that they let the customers know that some of the meat products were halal and could be consumed if you followed a particular religion. He stated that a few employees from a particular religion objected that the food could not be called halal because of the chicken powder which was not certified halal and stated that despite their best efforts to resolve it through conversation staff threatened the Respondent and started mentioning to customers on the floor about the issue. He went on to state "*The company was left with no option but to let them go through a legal procedure. As the company had followed the procedure of redundancy we could not be challenged in the court of law. On advice of our solicitors we have presently stopped using the Knorr chicken powder and at the same time we are seeking legal advice to stop them threatening us before the opening of our new restaurant".* KK asked Food Alert to visit the kitchen to confirm that the kitchen was no longer using chicken powder in cooking. The final Food Alert audit confirmed that Food Alert visited the premises on 24 October to ensure that the kitchen was not using Knorr chicken powder which was not a halal certified product (page 86).

80. The Claimant's representative argued that this email was clear evidence that the Respondent had dismissed the Claimant under the pretext of redundancy, for whistleblowing. KK told the Tribunal he had been told off by the director for writing the email. The email confirms that KK believed at the time that the Claimant and other staff members had been dismissed for redundancy after complaining about the chicken stock.

81. On 20 October 2018 TR, the Respondent's solicitor, sent a letter to the Claimant (page 111) and a letter to Holborn Police Station (page 109). In the letter to the Claimant TR stated that the Claimant's actions amounted to harassment which, if he continued, would lead to police prosecution, a criminal record and a restraining order and possibly a custodial sentence.

The letter also contained a threat of civil proceedings including damages and costs.

82. In the letter to the police TR accuses the Claimant of beginning a campaign of spreading false information and harassment, refers to the Claimant's email and his mention of jihad and accuses the Claimant of a robbery at the Tamarind Kitchen on the night of 1 October. The accusation is made without any evidence other than a belief that it was an inside job.

83. The Claimant responded to TR on 31 October (page 81) referring to the clear threat, repeating his accusation that the Knorr chicken powder was included not just in halal dishes but also vegetarian and vegan dishes and that he was not the only person with concerns but four other people were going to the media in the public interest.

84. TR responded on 1 November (page 80) confirming that the Respondent had a right to freedom of speech about a legitimate complaint, but he must refrain from pursuing matters unlawfully and once again referred to the Claimant's use of "*jihad*" and "*burying*" the company. There was a further email exchange between the Claimant and TR on 2 November (pages 76-78) in which the Claimant referred to KK's email to the Food Safety Auditors.

85. On 2 November 2018 KK's email exchange, including the audit report by Food Alert was forwarded from KK's work email address to the Claimant's Hotmail email address. (Page 83). The Respondent alleges that this is evidence that the Claimant hacked into KK's email account to forward the correspondence to himself. It was explained to the Tribunal that KK was using a generic password for his email account, which was the same password given to all new staff with an email account at the Respondent. KK had not changed the password.

86. There is insufficient evidence before the Tribunal to conclude that the Claimant had hacked into KK's email account. Any member of staff still employed by the Respondent would be aware of the generic password used by KK and could have gone into KK's email account and forwarded the email to the Claimant. It was clear that a number of staff were upset about the use of chicken Knorr stock in the ingredients of halal dishes and vegan/vegetarian dishes and may well have forwarded the email correspondence to the Claimant as they were aware of his campaign and litigation with the Respondent.

87. However, what is admitted by the Claimant is that on 31 October 2018 he telephoned Food Alert leaving a message for the auditor pretending to be a journalist with the surname Mohammad but leaving the Claimant's own personal mobile number (page 82). The Claimant admitted to the Tribunal that he had done this on the basis of undercover journalism and the Respondent argued that this demonstrates that the Claimant is not a credible witness.

88. Although the Tribunal is critical of the Claimant for lying to the person who took the message at Food Alert the Tribunal did find the Claimant to be a

credible witness. He clearly was extremely upset by chef KK introducing Knorr chicken stock into the Respondent's restaurant and genuinely believed that he saw chicken stock being used not just on halal meat dishes but also in vegan and vegetarian dishes. This passion led him to make a protected disclosure to the Respondent by email on 11 June. The Claimant genuinely believed that he was being dismissed because of whistleblowing and did not believe that his position of assistant manager was genuinely redundant.

89. The Claimant was clearly passionate about his campaign and wanted to get SM involved. He did not send threatening emails directly to the Respondent but was trying to encourage SM to join his campaign. His use of the word jihad was misplaced, and it is understandable that the Respondent would have felt threatened by that word. However, the Tribunal does note that the Claimant did not send the email in which he used that word directly to the Respondent but had included it in a passionate email to SM.

Applying the Law to the Facts

90. The Tribunal finds that at some stage in January 2018 the Respondent director FD did make an executive decision to restructure the Respondent in light of the new refurbished larger restaurant Tamarind of Mayfair. The decision was to have more independent working restaurant managers who had previous restaurant management experience and that those restaurant managers would be appointed and work alongside the current restaurant manager SM.

91. However, when chef KK introduced Knorr chicken stock into the kitchen the Claimant along with six other members of staff, including SM, raised concerns regarding misleading staff and customers regarding the ingredients of halal, vegetarian and vegan dishes and the concern for people with allergies. The Claimant made a protected interest disclosure when he raised concerns with the sous chef and by email to his manager and copied to all senior members on 11 June 2018. This email is clearly an email disclosing information regarding the use of chicken Knorr stock, made to the appropriate person in the Respondent as it was copied to all managers. It falls within the relevant failure of a breach of a legal obligation and it is clear that the Claimant had a reasonable belief that the disclosure was in the public interest; he was not only trying to protect himself but other members of staff and the customers of the Respondent's restaurants.

92. The director FD was clearly annoyed by the Claimant raising his concerns because FD wanted to do anything to ensure the restaurant would retain the Michelin star chef KK.

93. The Tribunal accepts the evidence of SM, who came across as credible, that when he first raised the concern with FD, he was told that any members of staff with an issue needed to be phased out. Although only the assistant managers who raised concerns about the stock were dismissed, and not all the other members who raised concerns, the Tribunals finds that the Claimant's dismissal was accelerated by his protected interest disclosure. Although the Claimant's position of assistant manager was to be made

redundant the Tribunal finds that the reason the Claimant was dismissed on 6 July 2018 was because he had made a protected interest disclosure. Had the Claimant not sent his email on 11 June then it is likely that the Claimant would have remained employed to cover SM's leave at least until 8 August 2018.

94. The Tribunal's finding that the Claimant would have been dismissed for a genuine reason of redundancy in any event is supported by the fact that two restaurant managers were appointed in June and July and that to date the restaurant Tamarind of Mayfair still only has three restaurant managers and no assistant managers. Although the Claimant had a lot of experience as assistant manager and may well have covered some of SM roles while he was away, the Claimant did not have years of experience as a restaurant manager and the responsibility that goes with that role.

95. The Tribunal finds that the Claimant did make qualifying disclosures pursuant to s.43(a) of the ERA when he first raised concerns verbally with the sous chef and then when he sent his email of 11 June 2018. His whistleblowing was the principal reason why the Claimant was dismissed on the 6 July 2018. Therefore, the Claimant's dismissal was automatically unfair.

96. The Tribunal finds that the Respondent did not follow a fair procedure when dismissing the Claimant and therefore his dismissal was also procedurally unfair. However, the Tribunal finds that the Claimant would have been fairly dismissed for redundancy around 8 August 2018 due to the restructure.

97. The Tribunal notes that the ACAS code of practice does not apply to redundancy dismissals and that it is not necessary to go through a selection process with a pool if a certain category of employees is to be dismissed by reason of redundancy. If the Respondent was to fairly dismiss the Claimant for redundancy in August, the Respondent would not have had to go through a selection process as the pool for selection was all the remaining assistant managers. However, the Respondent should have given the Claimant the opportunity to have notice of his redundancy and the opportunity to consult about ways of avoiding his redundancy, in particular whether he could have applied for the role of senior manager and whether it was possible for the Respondent to train the Claimant for that role or offer him less senior roles within the Tamarind collection.

98. The Tribunal finds that it would have taken a month to remedy the procedural failings. To properly give the Claimant notice that he was at risk of redundancy, to give him an opportunity to discuss alternative roles within the Respondent's three restaurants and to properly consider his grievances.

99. In summary the Tribunal finds that the Claimant was automatically unfairly dismissed for making protected interest disclosures. However, the Claimant would have been dismissed for the fair reason of redundancy a month later. Therefore, any compensatory award will be limited to one month's pay.

100. The Tribunal finds that the Claimant's total package included basic pay and tronc payments and that the tronc payments, although described as discretionary in the written contract, were in fact contractual by agreement and custom and practice. All employees were offered and accepted an agreed package at the beginning of their employment, which guaranteed them a total gross amount which was then broken down into basic pay and tronc payments. The employee was guaranteed that amount and it was only in exceptional circumstances, when an employee had done something wrong, when there may have been a deduction, or had done something good and would have received an increased amount of tronc payment.

101. The Tribunal does not make any finding in relation to whether the tronc system at the Respondent falls within the HMRC rules but does note the evidence of the Respondent's financial accountant AR that not all the tronc payments collated from gratuities paid on credit and debit cards were paid to the employees, nor were they separated and kept in a separate bank account.

102. The Claimant's notice pay should have included basic pay and tronc payments. The Claimant should have received one day's pay for July which should have included basic pay and tronc payment and any accrued holiday pay should also have included basic pay and tronc payments. The Claimant is entitled to the net amount of those payments, with the Respondent paying the tax and any NIC payable on those payments to HMRC.

103. A remedy hearing has been listed for 23 September 2019. However, bearing in mind the indication that the Claimant's compensatory award will be limited to one month's salary, the Tribunal is hopeful that the parties will be able to reach terms of settlement.

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Employment Judge Isaacson

Dated: 12 June 2019

Judgment and Reasons sent to the parties on:

17 June 2019

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For the Tribunal Office