EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MR. M. HOUGH	**V**	**ZEN-NOH RESTAURANT LONDON LIMITED**

Heard at: London Central **On: 27 June 2019**

Before: Employment Judge Mason

Representation
For the Claimant: In person.
For the Respondent: Mr. Davidson, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

The Claimant's claim for automatic unfair dismissal fails and is dismissed.

REASONS

Background, issues and procedure at the Hearing

1. On 1 April 2018, Mr. Matthew Hough ("the Claimant") started employment with Zen-Noh Restaurant London Limited ("the Respondent") as General Manager. The Claimant's employment was terminated on 6 December 2018.

2. The Claimant claims he was unfairly dismissed. He accepts that he is unable to bring a claim of "ordinary" unfair dismissal reason (s98(2) Employment Rights Act ("ERA") as he has less than two years' service but says he was "automatically" unfairly dismissed because he was dismissed for having raised health and safety concerns. The Respondent denies his claim and says he was dismissed because of his conduct and performance.

3. The issues in this case as discussed with the parties at the outset are as follows.

3.1 Protected Disclosure(s) (S43B ERA)

(i) Did the Claimant raise with the Respondent concerns regarding the position of a freezer and removal of a Sukiyaki dish?

(ii) If so, were either of these disclosures a "qualifying disclosure" i.e. made in the public interest and relating to one of the specified categories of subject matter in s43B(1) ERA ("relevant failures")?
(iii) Was disclosure made in the correct manner (s43C ERA)?
(iv) Did the Respondent subject the Claimant to a detriment by dismissing him?
(v) If so, was his dismissal on the ground that the Claimant had made a Protected Disclosure?
(vi) If so, what sum should be awarded to the Claimant under s49 ERA?

3.2 Heath and Safety (s100 ERA)

(i) Was the reason, or principal reason, for the Claimant's dismissal because he:
a. carried out, or proposed to carry out, activities in connection with preventing or reducing risks to health and safety at work, having been designated by the Respondent to do so (s100(1)(a))?
b. brought to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety (s100(1)(c))?
(ii) If so, what sum should be awarded to the Claimant?

4. The Respondent provided a bundle of agreed documents. Certain documents were added at the Hearing at the request of both sides and without objection. The final bundle consisted of 77 pages.

5. Having established the issues, I retired to read the bundle and the witness statements. I then heard from the Claimant and from the Respondent's witness, Mr. Kenji Sakai (Director), Mr. Tamas Nasza (Senior Sous Chef) and Mr. Jean-Yves Teo (Business Development Manager). I explained that I placed no weight on the additional witness statement provided by the Respondent from Ms. Grundy as she did not attend the hearing to verify her statement and be cross-examined and Mr. Davidson told me that the only reason Ms. Grundy was not present was because she did not want to attend the hearing. I then listened to the parties submissions. I reserved judgment which I now give with reasons.

Findings of fact

6. Having considered all the evidence in the round and having reminded myself that the standard of proof is the balance or probabilities, I make the following findings of fact.

7. I will refer to the Respondent's witness by their initials as follows
- Mr. Kenji Sakai (Director): "KS"
- Mr. Tamas Naszai (Senior Sous Chef): "TN"
- Mr. Jean-Yves Teo (Business Development Manager): "JYT".

I will refer to other people mentioned in these proceedings solely by their initials
- Assistant Manager: " K I"
- Marketing/PR Manager (resigned January 2019): "CO"
- Executive Chef: "DH"
- Kitchen Porter: "KP"
- Commis Chef/waitress: "YG"
- Safety Consultant, DDS: "SB"

- Waitress (left 5 November 2018): "WZ"
- Finance Manager: "RJ"

8. The Respondent operates a high-end Japanese restaurant called Tokimeite at 23 Conduit Street, London. The parent company is Zen-Noh International Europe.

9. The Claimant was employed as General Manager at Tokimeite from 1 April 2018 until 6 December 2018. He reported to KS. He received a Contract of Employment [38-44] which refers to a Disciplinary Procedure set out in the Employee Handbook; I have not been provided with a copy of the Handbook.

10. The Respondent engaged an independent health and safety consultancy, DDS. It is accepted by both parties that the Claimant was designated by the Respondent to have responsibility for health and safety as part of his duties as General Manager and this including liaising and working alongside DDS; he was their main point of contact at Tokimeite.

11. The Claimant says that when he commenced employment with the Respondent the restaurant had a one star rating in food hygiene. The Respondent has not challenge this and I therefore accept this.

12. **30 June 2018:**

12.1 The Respondent received a written complaint by a customer [24-28] that the Claimant had been "*extremely rude*"; she said:
"You can let [the Claimant] know that in 8 years of eating in very fine restaurants I have NEVER been treated so badly and rudely" .
The Respondent apologised to the customer and concluded:
"Our director [KS] will take care of [the Claimant] as soon as possible and will make sure this never ever repeated again".
In verbal evidence, KS said he spoke to the customer for about 30 minutes. He was unsure if he met with the Claimant to discuss this.

12.2 The Claimant's only recollection is that a customer was not happy with the size of the dish she had ordered so he gave her a complimentary drink.

12.3 I accept that the customer made the complaint and that KS replied in the manner he describes. In view of KS' inability to recall taking this up with the Claimant, I accept the Claimant's evidence that in fact KS did not do so.

13. Subsequently (on an unspecified date) the Respondent says a customer complained that when she had telephoned the restaurant and asked to speak to someone who spoke Japanese, the Claimant rudely refused. The Claimant has no recollection of this. Despite the lack of a date, I find on the balance of probabilities that this did happen given that this is a Japanese restaurant and a likely occurrence. However, I also find that this was again not taken up with the Claimant.

14. **July 2018:**

14.1 There was a fire in the kitchen and an employee (Fabio) badly burned his hand and the fire brigade attended.

14.2 The Respondent says the Claimant did nothing to assist and KS says [w/s] that the Claimant "*played on his mobile phone"*. In verbal evidence, KS said the

Claimant did not return the next day to help clean up the kitchen and the restaurant. JYT says [w/s] that the Claimant "*did not do much during the incident and was mostly on his phone during the event, outside*". KS says that following this incident, the Claimant was reminded of his responsibilities.

14.3 The Claimant denies that he did not assist and says that when the fire alarm went off, he made sure customers were quickly escorted off the premises. He says Fabio had been taken to a hotel (TN and JYT confirmed this in evidence) and once customers were evacuated, he used his phone to locate Fabio as paramedics were on their way. When Fabio returned, the Claimant took him to hospital. The Claimant denies that KS reminded him of his responsibilities.

14.4 On balance, I prefer the Claimant's version of events. I accept his explanation that he was using his phone to locate Fabio and I accept that he made efforts to assist with the evacuation.

15. **23 July 2018:**

Having liaised with SB of DDS regarding a "Hot oil and Risk Assessment" [1-2], the Claimant sent an email [1] to various people at the restaurant including KS headed "Hot Oil and Risk Assessment" :

"*Dear All,*

After discussion with DDS it is imperative that we carry out a risk assessment on the tempura oil next to an open flame, until an assessment has been completed I would suggest we find an alternative to this for the safety of staff and guests, until this has been carried out.

We are also due a gas safety check. Recently a chef was air lifted to hospital after faulty kitchen equipment".

16. **30 July 2018:**

The Claimant sent an email [3] to KS headed "Health and safety". In that email, the Claimant asked KS a number of questions about the identity of personnel responsible for health and safety, fire safety and food safety policies and concluded "*Need to discuss*".

17. **31 July 2018**:

17.1 The Claimant forwarded to JYT and KS an email he had received from DDS [4] which stated:

"Ensure all staff are up to date with their annual health and safety and fire safety refresher training. All staff including the office upstairs must be trained as you all come under one building"

17.2 The Claimant sent an email to KI, DH, KS, TN and SB headed "Health and safety committee meeting" [6]. He refers to an "*intensive course with DDS*" the day before at which "*many issues were raised*" and states:

"We need to have regular committee meeting together to address any issues to improve the health and safety at Tokimeite ...

My priority at this stage is to address any serious issues ro reduce the risk of injury or harm to staff and customers.

We have removed the Nabe dish until risk assessment has been completed.

We need to address the freezer on the first floor. Not only is it blocking a fire escape but there are trailing wires from a plug socket. This is unacceptable. If anyone were to fall and injure themselves, the company would face a heavy fine and prosecution. [KI] and I discussed briefly where this could be placed and can only come up with the first floor in the wood room. [TN], please complete a risk assessment before this is moved (moving large objects). This needs to be done with immediate effect.

May I remind all personnel within the building that fire escapes cannot be left with obstacles (using the side fire escape as a storage area). All deliveries need to go to their respected [sic]

places immediately. [TN] as I have no access to Pyramid yet please could you print off a training record sheet so we can sign accordingly".

18. **3 August 2018:**
The Claimant completed a St. John Ambulance course, Emergency first aid at work [11].

19. **7 August 2018**:

19.1 The Claimant sent an email [7-10] to various people including DH, TN, KI, JYT, and CO in which he cut and paste the Fire Safety Risk Assessment for the previous year (2017) and said:
"*Dear all,*
This is last year's fire risk assessment of 23 Conduit Street.
[KS], [TN] and I are in progress of improving the suggested findings, please can you ensure where possible this is improved in your respected [sic] workplace area.
The review is up for renewal by October. Cabling across floor is the biggest findings on both 3rd and 4th floors as is the freezer outside the gents changing room. We need to discuss where this goes."

19.2 The Fire Safety Risk Assessment overview 2017 notes a number of "*significant issues... which require addressing*" which includes the "*large freezer... located on the 2nd floor directly outside the staff changing rooms*" which seriously restricted the only exit from the staff changing rooms; the report recommended removal of the freezer from this area. TN accepted in evidence that this freezer is large and heavy.

20. **5 November 2018**:

20.1 WZ, a waitress, left on the first day of her employment. On **16 November 2018**, she sent an email to email to CO [29-30] in which she said that she left because of the Claimant's attitude and that the Claimant had been "*easy to get mad, rude, discourteous and mean*"; she refers to his *"shocking rudeness*" and "*terrible attitude*" and describes him as "*rude"* several times.

20.2 The Claimant recalls that WZ was a Chinese student; he says after 2.5 hours into her first shift, WZ asked the Claimant if she would receive a pay increase if she did not eat in the restaurant; the Claimant told her that she would not receive a pay increase and suggested that they discuss this further after the lunch service; WZ then said she was going to leave and, as it was towards the end of the lunch service, he told her to go straight away; she changed and he escorted her off the premises at around 4.00 p.m.

20.3 It has not been suggested that this matter was taken up with the Claimant and therefore I accept that the Respondent did not have the benefit of the Claimant's version of events and its only understanding of what had happended was as set out in WZ's email.

21. **20 November 2018**:

21.1 KS and TN say that the Claimant had an argument with a kitchen porter (KP) who then left in the middle of his shift. When KP complained to the Claimant about the way that the Claimant spoke to him, the Claimant told him he should just go home.

21.2 The Claimant says KP had only been there a couple of weeks; he had asked KP to pass him something and that is all; KP then said he was leaving and the Claimant told him to go straight away as the restaurant was not busy.

21.3 It has not been suggested that this matter was taken up with the Claimant and therefore I accept that the Respondent did not have the benefit of the Claimant's version of events and its only understanding of what had happened was KP's account.

22. The Respondent says it received further complaints (on unspecified dates) from other members of staff about the Claimant's conduct on the basis he was rude and aggressive. It relies on YG's statement; YG says he was rude to staff and belittled people; YG left in about September 2017. For the reasons set out above (para. 5), I place no weight on YG's statement. Although the Respondent has failed to identify the members of staff, the dates and what was said, on the balance of probabilities I accept that further complaints were received as RS in his email on 22 November (para. 23 below) refers to "... *a spat of arguments and rows with one or more of our employees and unfortunately one has walked out".*

23. **22 November 2018**:
RS (Finance) emailed the Respondent's solicitors [32]; the subject was "Restaurant Manager" and RS stated as follows:
"As you are already aware that our restaurant Manager has had a run in with one of our employees and unfortunately he continues to do so.
In the last couple of days he has had a spat of arguments and rows with one or more of our employees and unfortunately one has walked out.
Saka San [KS] now wants to give [the Claimant] the manager a written warning that if this happens again he will be dismissed.
Can you please draft us such a warning letter for us?"

24. **26 November 2018**:
24.1 The Claimant was given an oral warning by DH. This was not confirmed in writing.
24.2 I accept KS' verbal evidence that it was his decision to give this warning.
24.3 The Claimant accepted in evidence that DH gave him this warning but was unable to recall what was said to him. He said he was shown a piece of paper but cannot recall what was written on it and a copy was not placed on his personnel file.
24.4 On the balance of probabilities, I find that the warning was given to the Claimant because of his conduct in light of staff and customer complaints.

25. **30 November 2018**:
25.1 Following another health and safety audit/inspection by DDS in November, the Claimant emailed the "team" [12].
25.2 He noted that the score had improved from 55 in 2015 to 77 in July and then to nearly 90 but that there were still safety issues which needed immediate action specifically:
(i) removal of the Sukiyaki dish which involved the customer cooking a boiling liquid in an unstable cooking pot; and
(ii) moving the freezer on the 2nd floor which posed a trip hazard and blocked the staff changing room door.
He noted:
"*A risk assessment has been created and failed each time. Again this is unsafe practice for Tokimeite to have this here. It needs to be relocated immediately". Such as into the office or onto the 3rd floor*.

(iii) He concluded:
"We are all responsible to make Tokimeite a safe environment to work. Please make the necessary steps".

26. **3 December 2018:**
KS sent an email to the Respondent's solicitors [31]; the subject was "*Re: Restaurant Manager*" and KS stated as follows:
"I would like you to make a legal notice letter to get rid of him. The effective date is 6th December 2018.
[DH] warned [the Claimant] on 26th November by verbal then [the Claimant] lost his interest in working at our restaurant and started a bad atmosphere to others. [DH] doesn't want to keep him any longer due to less performance."

27. **6 December 2018:**
The Claimant was given notice of dismissal and his employment came to an end with immediate effect and he was paid in lieu of notice. Both the Claimant and KS agree that the Claimant was given written notice of dismissal but a copy of the letter is not in the bundle and neither side could provide me with a copy. I accept the Claimant's assertion that the letter did not specify the reasons for his dismissal as this was not challenged by the Respondent.

28. KS says he made the decision to dismiss because [w/s] of his poor performance and unprofessional conduct. He says the reason was not because the Claimant had raised health and safety concerns and in fact the Claimant was not proactive in his role as GM with responsibility for health and safety, the Claimant simply transmitted DDS's recommendations and made no effort to implement those recommendations.

29. **13 December 2018:**
The Claimant emailed KS [75] stating that he believed his dismissal was because he had raised health and safety issues following the audit by DDS and that the Respondent had decided to dismiss him rather than address these issues. He specifically mentioned his concerns regarding the freezer and the Sukiyake. He concluded:
"I believe that it was too much for you to manage to make the work place safe after both my and DSS [sic] health and safety consultants advice earlier this month".

30. **22 December 2018:**
The Claimant emailed KS [13] asking for the reason for his dismissal. The Respondent did not reply.

31. **January 2019:**
KS says CO resigned and one of the reasons she gave (verbally) for resigning was that she could not get on with the Claimant; although the Claimant had left in December, she said that she had had enough and wanted to start afresh somewhere. KS said in evidence that it was too late to persuade her to stay. I place little weight on this as CO has not provided first-hand evidence.

32. Shortly after the Claimant left, the freezer was moved and the Sukiyaki served in a safer way [72].

33. The Claimant contacted ACAS on **24 December 2018** and an Early Conciliation Certificate was issued on **27 December 2018**. On 2 February **019** the Claimant presented this claim to the Employment Tribunal. On **18 April 2019**, the Respondent submitted a response.

34. The Claimant started new employment on comparable salary after 10 weeks and is not seeking loss of earnings after that date. He says he made all reasonable efforts to find new employment prior to this date and relies on various job applications 12 January 2019 to 11 February 2019 [19-22]. He seeks £10,000 compensation.

SUBMISSIONS

Respondent's submissions:

35. Mr. Davidson submits that the Claimant's claim must fail for the following reasons.

36. The sole issue is whether the sole or principal reason for the Claimant's dismissal was a health and safety matter (s100 ERA) and/or the fact that the Claimant had made a protected disclosure (s103A ERA). The burden falls to the Claimant to show that it was. This case is won or lost on this point.

37. As this is not an "ordinary" unfair dismissal claim, it is not necessary for the Respondent's belief in the Claimant's conduct/performance to be reasonable, nor for the Respondent to have carried out a reasonable investigation and dismissal does not have to have been within the band of reasonable responses.

38. To whatever extent the Claimant did anything of a health and safety nature or made any qualifying disclosure, that had nothing to do with his dismissal. Rather, the Claimant was dismissed for poor performance and unprofessional conduct.

39. It is agreed that the Claimant was designated to carry out activities in connection with preventing or reducing risks to health and safety at work, for the purposes of s100(1)(a) ERA.

39.1 However, he was inactive in this role. If anything, the Claimant's lack of health and safety activities contributed to his dismissal. The Claimant refers to recommendations he made not being acted upon: it was his responsibility to enact necessary changes. That was part of his role, and reflected in his salary.

39.2 The fact that the Respondent moved the freezer and the Sukiyaki shortly after the Claimant left supports TN's evidence that management were keen to comply with health and safety requirements and are not cavalier about such things.

40. To the limited extent that the Claimant did carry out any health and safety activities, those formed no part of the reasons for his dismissal. The Claimant repeatedly demonstrated that he was unfit for his position:

40.1 In his customer-facing function as General Manager, he was required to be courteous and helpful but was discourteous and unhelpful.
40.2 In dealing with staff, he was required to be professional and competent but was unprofessional and incompetent. His management led to low morale, including staff departures explicitly attributed to him.
40.3 Internal emails show that senior managers were concerned about the Claimant's loss of interest in his role, bad atmosphere and poor performance. This followed a warning, prompted by a spate of arguments and rows.

41. The internal emails to the Respondent's lawyers show that the reason for the warning and the Claimant's dismissal was his conduct

42. Even if the Claimant did make a Qualifying Disclosure this had nothing to do with his dismissal; he cannot show that the principal reason was the fact that he had made a Qualifying Disclosure.

43. In conclusion, the Claimant was not dismissed for health and safety activities. The evidence is overwhelming that he was dismissed for performance and conduct issues. As such, this claim must fail.

Claimant's submissions:

44. Mr. Hough made verbal submissions as follows.

45. He maintains that he was dismissed because he raised health and safety concerns.

46. As a result of the fire, one person was burnt severely and he took that person to hospital. The rating was 55 when he started employment and was up to 88 when he left; he worked hard to achieve this. The freezer is over 100 kilos and tall; it could not be moved just by him.

47. An audit took place at the end of November. He put his concerns to the Respondent on 6 December and was then dismissed. He asked the Respondent the reasons for his dismissal but received no response.

48. The complaint from the customer was 5 months earlier, there was no follow-up.

RELEVANT LAW

49. Health and Safety

49.1 s100 ERA:

> "*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> *(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *…*
>
> *(c) being an employee at a place where—*

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety"

49.2 Causal link

The Tribunal must ask why the employer acted as it did; there must be a causal link between the Claimant raising health and safety concerns and the dismissal.

50. Protected Disclosures(s)

50.1 s103A ERA

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

50.2 43A ERA: Meaning of "protected disclosure"

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

50.3 43B ERA: Disclosures qualifying for protection

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
(a)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, is being or is likely to be deliberately concealed."

50.4 43C-43H ERA: manner of disclosure

A qualifying disclosure must be made in accordance with 43C-43H ERA. In this case, the Claimant relies on 43C: disclosure (internally) to employer or other responsible person.

50.5 47B(1) ERA: Detriment

"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".

50.6 Causation

(i) Even if there has been a protected disclosure and the employee or worker has been subjected to adverse treatment, the protected disclosure must be shown to have caused (or at least be the principal cause of) the detrimental treatment or dismissal.

(ii) An employment tribunal must look at what the person who took the decision to dismiss knew at the time they made the decision; this requires an analysis of the mental processes (conscious or unconscious) which caused him so to act (**Abernothy v Mott Hay & Anderson [1974**]).

(iii) The detriment must be more than "just related" to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment.

(iv) In **NHS Manchester v Fecitt [2012] IRLR 64** the Court of Appeal held that s.47B will be infringed if the protected disclosure materially influences (in the

sense of being more than a trivial influence) the employer's treatment of the whistleblower.

"*Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical- eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed to genuine explanation…if the reason for the adverse treatment is the fact that the employee has made the protected disclosure, that is unlawful.*"

Lord Justice Elias at paragraph 41 set out the following:

"Once an employer satisfies the tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles."

50.7 S48 ERA: Burden of proof

(i) The Claimant must prove (on the balance of probabilities) that he made a protected disclosure, that there has been detrimental treatment and the Respondent subjected the Claimant to that detriment.

(ii) The burden then shifts to the Respondent to prove that the Claimant was not subjected to the detriment on the ground that he made the protected disclosure and to prove the reason for the treatment.

Conclusions

51. Applying the relevant law to the findings of fact to determine the issues, I have concluded that the Claimant was not automatically unfairly dismissed.

52. Reason for the Claimant's dismissal

52.1 I agree with Mr. Davidson that the key issue is the reason for the Claimant's dismissal. In determining this, I have reminded myself that I must consider the set of facts known to the employer, or beliefs held by him, which caused him to dismiss the Claimant. It is the knowledge or state of mind of KS (who was the decision-maker) at the time he took the decision to dismiss which I must consider.

52.2 I do not accept the Respondent's assertion that the Claimant fell short in respect of his health and safety duties as General Manager or that this was a reasonably held belief on the part of KS:

(i) With regard to the fire in July 2018, I have accepted the Claimant's account of his conduct on that day.

(ii) He liaised with DDS.

(iii) There is clear evidence that he made efforts to initiate health and safety improvements in July, August and November 2018.

(iv) He completed a St John Ambulance course, Emergency first aid at work course on 3 August 2018.

(v) The Respondent's health and safety score improved from 55 in 2015 and 77 in July to close to 90 by the time he left.

52.3 However, I cannot conclude that the Claimant's actions in raising health and safety issues was the principal cause of his dismissal in the sense that the disclosures were the "real" or "core" reason for his dismissal, or even that KS was materially influenced by them, for the following reasons:

(i) KS was aware of the written complaint by a customer on 30 June 2018 [para. 12 above] having dealt with the complaint personally. That complaint was extremely critical of the Claimant. I have accepted that this was not taken up with the Claimant; therefore KS was not aware of the Claimant's explanation.

(ii) I have accepted that there was another complaint from a customer [para. 13 above] but also found that this was again not taken up with the Claimant. So again, KS was not aware of the Claimant's explanation.

(iii) KS was aware that WZ, a waitress, left on 5 November 2018 on the first day of her employment and was aware of her email to CO on 16 November in which she is highly critical of the Claimant [para. 20 above]. Again, this was not taken up with the Claimant and KS' only understanding of what had happened was as set out in WZ's email.

(iv) KS believed that the reason KP left in the middle of his shift on 20 November 2018 was because of the way the Claimant had spoken to him [para. 21 above]. Again, this was not taken up with the Claimant and KS' only understanding of what had happened was as alleged by KP.

(v) KS was aware that other members of staff had made further complaints about the Claimant [para. 22 above].

(vi) It is clear from the email of 22 November from RS to the Respondent's solicitors that the Respondent (specifically KS) had concerns because the Claimant "... *had a run in with one of our employees and unfortunately he continues to do so"* and *"... had a spat of arguments and rows with one or more of our employees and unfortunately one has walked out"* [para. 23 above] I place significant weight on this email as it is reasonable to assume it was never intended to be seen by the Claimant and therefore not a deliberate smokescreen to disguise another reason for the warning.

(vii) I have found that the oral warning on 26 November 2018 was given to the Claimant because of his conduct in light of staff and customer complaints [para. 24.4 above]

(viii) It is clear from the email of 3 December 2018 from KS to the Respondent's solicitors that the Respondent wished to terminate the Claimant's employment because "*[the Claimant] lost his interest in working at our restaurant and started a bad atmosphere to others. [DH] doesn't want to keep him any longer due to less performance."* [para. 26 above]. Again, I place significant weight on this email for the same reasons as set out above [para. (vi)] .

52.4 In conclusion, I accept that the principal reason for the Claimant's dismissal was complaints by customers and staff.

53. <u>Protected disclosures: s47 ERA</u>

53.1 I am satisfied the Claimant made protected disclosures on 31 July 2018 and in December 2018 when he raised with the Respondent concerns regarding the position of a freezer and removal of a Sukiyaki dish. These were "qualifying disclosures" as they were made in the public interest and related to one of the specified categories of subject matter in s43B(1) ERA ("relevant failures") specifically health and safety. Disclosure was made in the correct manner i.e. internally to his employer (KS) (s43C ERA).

53.2 However, I cannot conclude that his dismissal was on the ground that the Claimant had made these protected disclosures for reasons set out above [para. 52.3].

54. Heath and Safety (s100 ERA)

54.1 I am satisfied that:

(i) the Claimant was designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work (s100(1)(a));

(ii) the Claimant brought to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety (s100(1)(c)).

54.2 However, for the same reasons as set out above [para. 52.3], I cannot conclude that the sole or principal reason, for the Claimant's dismissal was because he:

(i) carried out, or proposed to carry out, activities in connection with preventing or reducing risks to health and safety at work; or

(ii) because he brought to the Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

55. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 3 all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 6 to 34; statement of the applicable law is at paragraphs 49 to 50; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 51-54.

56. Although the Claimant has lost his case, I would add that the Respondent's procedural failings undoubtedly contributed to the Claimant's sense of injustice and to these proceedings. Notably, the Respondent failed to (i) discuss with the Claimant the customer and staff complaints (ii) confirm in writing the verbal warning and (iii) to give written reasons for his dismissal. Had the Claimant been eligible to bring a claim of "ordinary" unfair dismissal, it is likely he would have succeeded. However, this is a claim of automatic unfair dismissal and the tests are very different.

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Employment Judge

3 July 2019

Judgment sent to Parties
9 July 2019