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EMPLOYMENT TRIBUNALS

Claimant: **Mr I Szaip**

Respondent: **Whitbread Group Limited**

Heard at: **East London Hearing Centre**

On: **17, 18 & 19 July 2019**

Before: **Employment Judge Ross**

Members: **Mrs Boot**
Ms Owen

Representation

Claimant: In person

Respondent: Mr Foster (Solicitor)

JUDGMENT having been sent to the parties on 29 July 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant was continuously employed by the Respondent as a night receptionist from 1 July 2011 until 27 November 2018, latterly at the Premier Inn Thurrock East ("the hotel"). By a claim presented on 8 August 2018, after a period of early conciliation between 25 June 2018 and 25 July 2018, the Claimant presented complaints of race discrimination by harassment under section 26 Equality Act 2010 and of public interest disclosure detriment under section 47B Employment Rights Act 1996.

2. Further particulars of his complaints were provided by a letter on 31 October 2018 and at a Preliminary Hearing before Employment Judge Prichard on 12 November 2018.

The issues

3. In the absence of a list of issues proposed by the parties, on the first morning of the hearing the Employment Tribunal drafted a list of issues for the liability part of the hearing for the parties to consider. Amendments were proposed and a final agreed list of issues was provided in typed form to the parties on the afternoon of 17 July 2019. The agreed list of issues on liability is incorporated into this judgment and reasons. As the Claimant made clear at the Preliminary Hearing, he did not complain of unfair dismissal.

The evidence

4. We read witness statements for and heard oral evidence from the following witnesses:

4.1 The Claimant;

4.2 Allison Copping (a former colleague of the Claimant as a receptionist and now Assistant Manager);

4.3 Viktorija Bartkeviciute (Operations Manager at Thurrock East Premier Inn from March 2016 to September 2018);

4.4 Gillian Klarin (Regional Operations Manager, but at the relevant time Area Manager).

5. There was an agreed bundle of documents from pages 1 to 228. Page references in this set of reasons refer to pages in that bundle.

6. The Tribunal took time for pre-reading the witness statements and the documents referred to in them before live evidence commenced.

Facts

7. The Claimant, who is Hungarian, used to work full-time at the hotel in January 2016. He worked five shifts per week, originally four-nightshifts from 11pm to 7am and one-day shift. Later, he worked five-nightshifts per week.

8. The Claimant was appointed by the former Operations Manager, Mr Sikka. At about the same time as the Claimant's appointment, Mr Sikka appointed Aleksas Jocys (whom I will refer to as "AJ" in this set of reasons). AJ is Lithuanian and he was recruited as a receptionist. His recruitment had nothing to do with Ms Bartkeviciute. We found it

was more likely to be the result of AJ's mother being a former head housekeeper at the hotel.

9. Ms Bartkeviciute became Operations Manager for the hotel in March 2016. She is Lithuanian.

10. Ms Bartkeviciute recruited Justas Stikelis (who we will refer to as "JS" in this set of reasons) a friend of AJ, as a receptionist, in July 2017. He is Lithuanian.

11. There were two-night receptionists on duty at the hotel each night. Generally, the Claimant worked his nightshifts either with AJ or Ms Copping and occasionally he worked with JS. On other days, Ms Copping would work with AJ.

12. The workload on the nightshift was in reality for one person, but for health and safety reasons, because there were two buildings, the Respondent had two-night receptionists. This meant that there was a considerable down time on the nightshift.

<u>The Respondent's business</u>

13. It was not unusual for the majority of the housekeeping teams in the Respondent's Premier Inn Hotels to be from the same nationality. They could be all UK nationals or all from either Poland, Romania or Lithuania. The Respondent relied on "word of mouth" recruiting from family and friends due to the relative difficulty in recruiting staff.

14. Although the Claimant alleged Ms Bartkeviciute only appointed Lithuanian workers, we found the appointments made by her were as set out in her witness statement at paragraph 27. Lithuanian workers were appointed both before and after she became operations manager and that other nationalities were also employed by the Respondent at the hotel.

<u>Management structure</u>

15. Ms Klarin was Area Manager for the hotel at the material times (she is now Regional Manager after a restructure). At the time she had 26 hotels in her area and so 26 Operation Managers to supervise. She made one or two visits to each site per month.

16. Ms Klarin visited the hotel night reception on 26 February 2018. She met the Claimant and spent about one hour discussing his work, experience and the recent fire evacuation training, as can be seen by the document at page 69a. At that meeting the Claimant made no complaint about AJ, JS or Ms Bartkeviciute.

17. AJ and JS were students in their early 20s. When AJ began work as a night receptionist he did bring in a computer and headset and played games.

18. In early 2016 the Claimant made oral complaint to Mr Sikka about AJ ignoring his duties, this included reference to him sleeping and gaming on the computer and phone with headphones, including during a fire alarm.

19. When the Claimant made that disclosure, he did not have a reasonable belief that he was making it in the public interest. We found the Claimant's evidence to us was overlaid by his legal researches since that disclosure over three years ago. The Claimant made the disclosure because he reasonably believed it tended to show that AJ was not doing his job and that it would be hard for him to work with him. The Claimant did not believe it tended to show either a health and safety risk or that a breach of legal obligation was likely. He made the disclosure believing it to be in his personal interest because he did not want an unfair burden of work. Mr Sikka warned AJ and prohibited him from using his laptop at work.

20. Subsequently, Ms Bartkeviciute started as Operations Manager. AJ asked if he could use his laptop to do studying. She agreed.

21. We find it likely that AJ gradually took advantage of this by playing computer games during the nightshift, not just in his downtime or breaks. Also, we find he started to sleep for large parts of the shift and did poor or no work performance. We find that this developed over time.

22. AJ informed JS of a vacancy. When JS worked nightshifts with the Claimant, the same pattern of gaming and sleeping developed. AJ did not play computer games to the same extent with Ms Copping on reception; this was because of her direct personality and her ability to direct AJ on the allocation of work. Ms Copping did not work with JS.

23. In contrast, having seen the Claimant give evidence, we find it unlikely that he was assertive in this way and that the Claimant would go off and do jobs himself. We found he was a quiet and conscientious worker whose resentment built up over time.

<u>The Claimant's complaints to Ms Bartkeviciute</u>

24. About once every two months the Claimant would complain about AJ and JS. This would be usually after a nightshift at 7am or before he started a shift if Ms Bartkeviciute was working late.

25. Having seen them give evidence, we preferred Ms Bartkeviciute's account of what the Claimant told her. Her evidence was clear and precise. Moreover, we found if the Claimant told her that (1) AJ and JS was sleeping on duty and (2) that they were playing computer games for long periods and (3) that they did not hear a fire alarm and were therefore putting guests at risk, she would have taken action to stop it and investigate. Further, the Claimant never put to Ms Bartkeviciute in cross examination that he had shown her any photo or video evidence on his phone. Moreover, the Claimant never mentioned this during his meeting with Ms Klarin on 26 February 2018, so we found it unlikely that he had provided details to Ms Bartkeviciute.

26. In his complaints at the time, the Claimant was vague. He complained that the two men were lazy about their duties because he did 90 to 95% of the tasks each night. He complained to Ms Bartkeviciute because he considered that it was putting pressure on him physically and mentally. At that time, the Claimant's complaints did not refer to

health and safety matters or building regulations nor any statutory provision. The matters raised by the Claimant included not doing linen duties, not loading the washing machine, not doing day-to-day duties on the checklist and not addressing the allocation of rooms.

27. At the time of those complaints, we found the Claimant did not hold the belief that those complaints were being made in the public interest. We found the Claimant was a good and conscientious worker who complained because he felt he was doing far more than his share of the work. He did not have the belief, reasonable or otherwise, that he was making the complaints in the public interest. We find that there was no mention of the risk of harm to guests or other workers nor any reference to fire or other health and safety regulations by the Claimant which would have been likely had he held such a belief. Moreover, the Claimant would have raised these matters with Ms Klarin when she came to check on the impact of the fire evacuation training.

28. The Claimant asked Ms Bartkeviciute to tell the two young men that the hotel reception was a workplace and that they came to work there. He did not ask her to take formal action. As a result of his complaint, Ms Bartkeviciute would speak to AJ and JS. Their performance would then improve for a period of a couple of months and then the Claimant would complain again.

29. Ms Bartkeviciute, in her grievance interview, described that she had a type of mother and son relationship with AJ and JS, because she was a close friend of AJ's mother. Ms Bartkeviciute had begun employment with the Respondent as a receptionist and spent most of her seven years in that role. She had very limited managerial training and her learning was e-learning or about basic management skills. She had no training on how to manage performance issues evidenced by the lack of formal one-to-one meetings, the lack of any notes of informal warnings with AJ and JS and the lack of a system for reviewing how the nightshift were performing. There was no proactive management in respect of the nightshift at least at this hotel.

30. The first written complaint by the Claimant was not made until 23 May 2018. In this grievance letter, the Claimant complained of discrimination and risk of harm, including at page 75:

> "*I feel I have needlessly been subjected to a systematic campaign of discrimination, due to Premier Inn omissions to take reasonable and practicable steps and or implement any preventative or protective measures to ensure a working environment free from harassment. Furthermore, this omission has created an oppressive and intimidating working environment for my person. I can no longer ignore the palpable risk of harm Mrs Viktoraja Bartkeviciute Mr Aleksas Jocys and Mr Justas Stikelis unwanted conduct has had upon my mental and physical health. I personally find Mrs Viktoraja Bartkeviciute Mr Aleksas Jocys and Mr Justas Stikelis unwanted conduct embarrassing undignified and degrading…*
>
> *My co-workers Mr Aleksas Jocys and Mr Justas Stikelis refusal to carry out their duties whilst at work despite the number of informal complaints by myself and others to Mrs Viktoraja Bartkeviciute and former ops manager Mr Rishi Sikka has*

reached a level where the combination of excessive workload and workplace harassment had a detrimental impact upon my health. The cumulative effect of the aforementioned have adversely affected my abilities and capabilities to undertake my day to day activities".

31. The Claimant met Ms Klarin to discuss his grievance on 31 May 2018. By this time, the Claimant was absent sick due to a leg condition. He did not return to work prior to resigning.

32. For the first time at this meeting, the Claimant informed the Respondent that AJ and JS were sleeping on shift, leaving site and continually playing on their laptops. The Claimant believed this was a formal grievance because it was in writing and serious allegations were made. We found that it should have been dealt with formally. In any event, Ms Klarin should have noted the meeting, but nothing turns on this.

33. At no time (whether to Ms Bartkeviciute or in the grievance or in the meetings with Ms Klarin), did the Claimant complain about AJ or JS bullying or abusing him. We find it was most likely that the Claimant did hear foul language from the two men whilst they were playing games but that this was not directed at him. This explains why Mr Hay, another receptionist, closed the door to the office on one occasion, because the language used during the playing of the games might upset residents.

34. Although the grievance documents referred to Ms Bartkeviciute as a perpetrator, we accepted Ms Klarin's evidence as to why no investigation into her conduct took place after that first meeting with the Claimant on 31 May 2018. Ms Klarin probed how Ms Bartkeviciute would have known what these two men had done. The Claimant said: "*she knows*" but admitted he had had no direct conversation with Ms Bartkeviciute about the matters complained of to Ms Klarin. The Claimant did not tell Ms Klarin how she would have known. The most the Claimant said was that he had told
Ms Bartkeviciute that JA and JS would need to pull their socks up.

35. On 31 May 2018, the Claimant provided Ms Klarin with a small number of specific dates for which he believed hotel CCTV would support his complaints. Ms Klarin immediately visited the hotel and asked Ms Bartkeviciute, who was on leave, to meet her there. Ms Klarin informed Ms Bartkeviciute of the Claimant's allegations about AJ and JS. Ms. Bartkeviciute was genuinely shocked because she had no idea of the particulars of them. Both women were very concerned by what they saw on the CCTV, involving sleeping on duty, eating pizza and gaming for six to seven hours at a time. Ms Klarin instigated the disciplinary process against AJ and JS, and both were dismissed after disciplinary hearing in June 2018.

36. There was no evidence that JA or JS had been treated more favourably by Ms Bartkeviciute than she treated the Claimant and others. The Claimant's real complaint was that he could not have got away with what they did, but he was a conscientious worker and never tried to do so.

37. We find that Ms Bartkeviciute's treatment of the Claimant's complaints was not related to his nationality at all. It resulted largely from her well-meaning but naive and

inexperienced management and in part from her personal relationship with AJ's family, the youth of AJ and JS, and their student status.

38. The Claimant's evidence as to why the alleged conduct occurred is emotive and incorrect. There was no systemic plan to push him and other nationalities out. This allegation was not put to Ms Bartkeviciute or Ms Klarin. Ms Klarin for example invited the Claimant to rescind his resignation.

39. The Claimant found it humiliating that his soft way of complaining about the two men had not led to any investigation of them by Ms Bartkeviciute and Ms Klarin did not consider whether Ms Bartkeviciute was negligent in her role. She relied on the Claimant not stating that Ms. Bartkeviciute was negligent in the meeting of 31 May 2018. She found that his emotion clouded his view of the effects on him of the perceived conduct of Ms Bartkeviciute.

40. We found it was not reasonable for the conduct of the Operations Manager to have that effect on the Claimant. His perception obscured the objective facts. He believed there was a breach of trust and confidence by the Respondent and was unable to view matters clearly.

<u>The grievance investigation</u>

41. Although Ms Klarin was acting on his complaints in respect of AJ and JS, on 11 June 2018 the Claimant complained about how the Respondent was handling his complaints. This was despite his lack of direct complaint to Ms Klarin on 31 May 2018 about Ms Bartkeviciute's conduct. After further correspondence, the Claimant pursued his complaint about her. Ms Klarin agreed to meet him to discuss this on 22 June 2018 (pgs.159-160). At this meeting, the Claimant expressly alleged Ms Bartkeviciute knew what AJ and JS were doing and that she did nothing about it because they were Lithuanians. Ms. Klarin asked why the Claimant had not raised his concerns with Ms Bartkeviciute. The Claimant shrugged his shoulders and said: "*she knows*" but gave no particulars about any specific conversation or information that he passed on.

42. As a result of this meeting, Mr Scott, another Area Manager, formally investigated the Claimant's complaints that Ms Bartkeviciute had known but done nothing and that this was discriminatory. Mr Scott did investigate the Claimant's grievance. As part of the investigation, Mr Scott interviewed the Claimant, Ms Bartkeviciute, and, by telephone, Ms Copping.

43. In the course of his interview with Ms Bartkeviciute, Mr Scott investigated her relationship with AJ and JS. She admitted that she was friends with the mother of AJ. She also explained that the Claimant did not make her aware of what AJ and JS were doing or not doing. She believed they were doing the bare minimum of work to be satisfactory but not that they were doing nothing at all.

44. In his grievance report (pgs.214-216), Mr Scott found the grievance was not upheld, finding that Ms Bartkeviciute did not know members of her team were sleeping on shift and playing computer games, and that the Claimant was not discriminated

against. He concluded that Ms Bartkeviciute was not negligent. He made recommendations for her to follow (see page 216).

45. The grievance report was sent to the Claimant on 24 July 2018. On 27 July 2018, the Claimant resigned by letter at page 219.

46. Ms Klarin replied by asking the Claimant to reconsider his resignation and to consider mediation or a grievance appeal. The Claimant refused to reconsider.

Whistleblowing complaints

47. As we explained, the Claimant did make a series of disclosures to Ms Bartkeviciute about AJ and JS until they were dismissed on 21 and 25 June 2018. These disclosures were not particularised statements. The information they contained was that they were lazy and/or that they had not done certain tasks or not done them as they should be done. The disclosures did not allege bullying or the use of bad language towards the Claimant. In making those disclosures at the time they were made, the Claimant did not hold the belief that the health and safety of any individual was being or was likely to be endangered, nor that a person had failed or was likely to fail to comply with any legal obligation to which he was subject.

48. We found the Claimant made those disclosures because it tended to show AJ and JS were lazy and had a poor work ethic and that he was having to do an unfair burden of work. He made the disclosures to protect himself and his dignity at work. We found that Ms Bartkeviciute, Ms Klarin and Mr Scott's actions could not have been influenced by the Claimant's alleged disclosure to Mr Sikka. There was no evidence that they would know of this disclosure to Mr Sikka made over two years prior to the alleged detriments. It was never put to Ms Bartkeviciute or Ms Klarin in crossexamination that they did know about these disclosures.

49. Although the Claimant did make the disclosures of information to Ms Bartkeviciute that we have outlined, they had no influence either on Ms Klarin or Mr Scott. It was never suggested to Ms Klarin in cross-examination that they did affect their decisions.

50. From Ms Klarin's meeting with the Claimant on 31 May 2018, which she viewed as an informal meeting and believed that the Claimant agreed to it being informal, Ms Klarin did not understand that he was alleging race discrimination against Ms Bartkeviciute despite the contents of his written grievance. The Claimant did not explain how Ms Bartkeviciute would know about what AJ and JS were doing.

51. As soon as Ms Klarin realised the Claimant was complaining about Ms Bartkeviciute as well, and that her actions were discriminatory, she moved the grievance to a formal investigation and Mr Scott was appointed to investigate. As part of the grievance, Ms Bartkeviciute was interviewed and the allegation put to her that she ignored what AJ and JS were doing. Mr Scott accepted her explanation that she did not know what they were doing; he did not uphold the

grievance but Ms Bartkeviciute was held to account in the sense that recommendations were made relating to her practice as a manager.

The law

The Employment Rights Act 1996 Part IVA Protected Disclosure Statutory Definition

52. We directed ourselves to the statutory provisions of Part IVA of the Employment Rights Act and considered the statutory wording. We were conscious of the importance of not adding any form of gloss to the statutory wording. Section 43B(1) includes where relevant:

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

…

(d) that the health or safety of any individual has been, is being or is likely to be endangered".

53. The wrongdoing provisions of section 43B(1) were subject to some examination in *Babula v Waltham Forest College* [2007] ICR 1026. As the EAT explained in *Soh v Imperial College* UKEAT 0350/14, the following propositions are well established.

53.1. The Tribunal should follow the words of the statute, no gloss upon them is required.

53.2. The key question is whether the disclosure of information in the reasonable belief of the worker making the disclosure tends to show a state of affairs identified in section 43B.

53.3. Breaking this down further, the first question for the Tribunal to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question.

53.4. The second question for the Tribunal to consider is whether objectively that belief was reasonable. If these tests are satisfied it does not matter whether the worker was right in his belief, a mistaken belief can still be a reasonable belief.

54. More recently in *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837, the Court of Appeal held, applying section 43B, that:

    54.1. The Tribunal had to ask whether the worker believed at the time of making it that the disclosure was in the public interest and whether, if so, that belief was reasonable. The Tribunal had to recognise there could be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief was simply that the disclosure was in the public interest. The particular reasons why the worker believed it to be so were not of the essence.

    54.2. An approach to public interest which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions.

    54.3. Whether the disclosure was in the public interest depended on the character of the interest served by it rather than simply on the number people sharing that interest.

    54.4. The correct approach was that, in a whistle-blower case where the disclosure related to the breach of the worker's own contract of employment or some other matter under 43B where the interest was personal in character, there might nevertheless be features of the case that made it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

    54.5. The question was to be answered by the Tribunal considering all the circumstances of a particular case but it could be useful to consider the numbers whose interests the disclosure served, the nature of the interest affected and the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer (see paragraphs 34 and 37).

55. For a qualifying disclosure to be protected it must be made in accordance with any of the sections, sections 43C to 43H ERA. Each sub-section sets out various categories of persons to whom a disclosure may validly be made and the conditions attached to disclosures made to each of them.

56. Under section 47B ERA, a worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. The proper test is to whether a detriment has been suffered is set out in *Shamoon* at paragraphs 34 to 35. It was not necessary for the worker to show there was some physical or economic consequence flowing from the matters complained of. In short, per Lord Hope: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was a detriment? An unjustified sense of grievance cannot amount to a detriment.

57. Under section 48(2) ERA, where a claim under section 47B is made, it is for the employer to show the ground on which the act or deliberate failure to act was done. Section 47B would be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower (see *Fecitt v NHS Manchester* [2012] IRLR 614).

58. Section 48(3) ERA provides that an Employment Tribunal should not consider a complaint under section 48 unless it is presented:

"(a) Before the end of the period of three months beginning with the date of the act or failure to act to which the claimant's complaint relates or where that act or failure is part of a series of similar acts or failures, the last of them; or

(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

59. Section 48(4) provides that:

"For the purposes of subsection (3) –

(a) where an act extends over a period the date of the act means the last day of that period; and

(b) a deliberate failure to act shall be treated as done when it was decided on."

<u>Equality Act 2010</u>

60. Section 26 provides a prohibition on harassment. We do not repeat the section which we incorporate into these reasons.

61. Paragraph 7.9 of the EHRC Code of Practice states that:

"'*related to' in section 26(1)(a) should be given a broad meaning and that the conduct does not have to be because of the protected characteristic.*"

62. In respect of the proper application in section 26(1)(b) and (4) EA 2010 which deal with the prescribed consequences of the unwanted conduct, we considered *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions and issues raised at section 3A Race Relations Act 1976 were to those in section 26 Equality Act. It is helpful to set out the following extracts of the judgment of Underhill J:

"Thirdly, although the proviso in sub-section (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed

consequence; it should be reasonable that that consequence has occurred… The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."

63. We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that at least as a matter of practice rather than law more than in other areas of discrimination law context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

64. We reminded ourselves of the burden of proof provisions within section 136(2) of the Equality Act 2010 as explained in *Igen v Wong* and *Madarassy v Nomura* [2007] ICR 867. It is important not to make too much of the role of the burden of proof provisions at section 136, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination but they do not apply where the Tribunal, as in this case, is in a position to make positive findings on the evidence one way or the other: see *Hewage v Grampian Health Board* [2013] UKSC.

65. We considered section 123 Equality Act 2010. We incorporate its provisions into this set of reasons. Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rules, scheme or practice fits the facts of a particular case. The focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which workers were treated less favourably: see *Hendricks v Commissioner of Police for the Metropolis* [2003] ICR 530 at paragraph 54.

Submissions

66. The Respondent prepared short submissions in writing and made brief oral submissions. The Claimant made longer oral submissions. We took into account all the submissions.

Conclusions

67. Applying the law set out above to our findings of fact, we reached the following conclusions.

Issues 1, 2 and 7 – Jurisdiction

68. The thrust of the Claimant's case was that it had been Ms Bartkeviciute's purpose to drive out non-Lithuanian staff from the hotel over time. In the event, the Tribunal found that there was a continuing state of affairs in which the Claimant complained about the two men. Ms Bartkeviciute spoke to them, their conduct moderated and they returned to their lack of performance which was to his detriment. We concluded that there was a continuing act under section 123(2) Equality Act 2010. This continued until the suspension or dismissal of AJ and JS. Therefore, the complaints of harassment were brought in time.

69. We concluded that the detriment complaints under section 47B ERA were brought in time. There was either a continuing act from up to the point at which the grievance about Ms Bartkeviciute was addressed formally by Mr Scott from 22 June 2018 onwards or a continuing series of acts ending in the grievance decision of Mr Scott of 24 July 2018. To Mr Foster's credit, he did not dispute that the Tribunal had jurisdiction.

Issues 3 to 6 – The harassment allegations

70. From 2016, Ms Bartkeviciute did not ignore the alleged complaints about sleeping on duty, gaming or bullying. No such complaints were made to Ms Bartkeviciute.

71. From 2016 Ms Bartkeviciute did not favour AJ and JS because they shared her nationality. She did not know what they had done. Had she known the gravity of their actions, she would have informed her manager and an investigation would have been instigated, which happened when the Claimant told Ms Klarin what had happened. We repeat the relevant findings of fact.

72. The conduct of Ms Bartkeviciute was not related to the nationality of either the Claimant or the two men. If we are wrong and there was the unwanted conduct alleged, it was not done with the purpose of violating the Claimant's dignity or creating a hostile or humiliating environment. Insofar as the Claimant perceived the conduct had the effect of creating a humiliating or hostile environment, we found that this perception was not reasonable in the circumstances where he had not given Ms Bartkeviciute details of what AJ and JS were actually doing on shift. His complaints were generally about the lack of effort or work ethic. The Claimant's perception was that Ms Bartkeviciute must know, even though he never told her the details. His emotion clouded his perception.

Issues 8 to 10 – The alleged protected disclosures

73. We concluded the Claimant did make the disclosure alleged to Mr Sikka. Ms Bartkeviciute, Ms Klarin and Mr Scott did not know of this and it had no effect on their actions.

74. We concluded the Claimant did not make the disclosures alleged at issues 8.2. In any event, in respect of disclosures of information made by the Claimant at issue 8.1 and those we found he made to Ms Bartkeviciute, the Claimant made those disclosures in his private interest. The Claimant did not believe they were made even partly in the public interest; and it was not reasonable to believe those disclosures as being in both public interest and personal interest. Applying *Nurmohamed,* the Claimant's disclosures were directed to his workload on the nightshift, there was no public interest element to them. He never mentioned any aspect of fire risk, health or safety or other risk to workers or members of the public affected. He was complaining only about fellow receptionists, staff workers, not persons in authority. Members of the public were not affected, because he made up for the failings of AJ and JS.

Issue 11 – Alleged detriment

75. We concluded that the Claimant did not suffer the alleged detriment. The *Shamoon* test was not satisfied. The Claimant's complaints about Ms Bartkeviciute were considered in his grievance, as demonstrated in our findings of fact. Although disciplinary action was not taken against her, no reasonable worker would conclude that this was to his detriment.

76. Mr Scott concluded correctly that Ms Bartkeviciute had not known what AJ and JS were doing on shift until Ms Klarin had told her, and Mr Scott made recommendations about Ms Bartkeviciute's management practice.

Issue 12 - Causation

77. In any event, the Respondent has proved why it acted as it did. We found that the step taken by Ms Klarin and Mr Scott were not influenced in any way by the disclosures of the Claimant.

Summary

78. The claim is dismissed; but we find that there are no winners. The Respondent has lost a conscientious worker. The Claimant is currently without work.

79. The Employment Tribunal would ask the parties to consider if they could put aside their differences and renew the employment relationship. AJ, JS and Ms Bartkeviciute are no longer in the Respondent's business; after all, the Respondent had sought to

persuade the Claimant to withdraw his resignation and the Respondent is a large hotel business which finds recruitment at this level difficult.

Employment Judge Ross

Date: 25 September 2019