EMPLOYMENT TRIBUNALS

Claimant: Mr J Khan

Respondent: P2m Coffee Ltd (1)
Mr R Pandya (2)

Heard at: Croydon by Cloud Video Platform

On: 28 and 29 September 2020 (Part-heard)
30 November and 1 December 2020

Before: Employment Judge Nash
Mr N Aziz
Mr A Peart

Appearances
For the claimant: Ms S Forsythe, caseworker
For the respondent: Ms B Omotosho, solicitor

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant obtained an ACAS early conciliation certificates in respect of the first Respondent from 12 July 2019 to 12 August 2019. He obtained a certificate in respect of the second Respondent from 27 September to 1 October 2019.

2. He brought a claim against the first Respondent on 27.9.19. He brought a claim against the second Respondent on 28 October 2019. The complaints contained in the second claim were identical, save for the addition of a Section 13 claim for £1,428.36 for October 2019. The two claims were heard together.

3. In respect of witnesses, the Tribunal heard from the Claimant only on his own behalf. For the Respondents, it heard from the second Respondent - the owner

and director of the first Respondent – Mr Pandya, from Mr S Notturno – the operations manager - and from Mr M Chaudhary.

4. The Tribunal had sight of a bundle. There were very considerable delays and difficulties with documents which added materially to the length of the hearing. The index was incorrect. A good number of the documents were added to the bundle during the hearing.

5. Delays caused by the bundle were to some extent remedied by the time of the part-heard hearing, but not completely. After the hearing went part heard, the Tribunal ordered parties to disclose any additional documents by 16 November 2020 and the Tribunal disregarded any additional documents which were not disclosed in line with this order.

6. On the first day the Tribunal hearing did not start until 2.00pm, due to listings issues and judicial resources. The Respondent requested a postponement. The Tribunal refused this application and written reasons were provided. Briefly, the application to postpone was made within seven days of the hearing and none of the exceptions applied.

7. In these reasons, the Tribunal will refer to the first Respondent as 'the Respondent' and to the second Respondent as 'Mr Pandya'.

The Claims

8. The parties agreed that there were three claims live before the Tribunal –

   i. Section 13 of the Employment Rights Act against the first Respondent;

   ii. Section 8 of the Employment Rights Act against the first Respondent; and

   iii. Section 47(B) of the Employment Rights Act against the first and second Respondents.

The Issues

9. The issues were agreed at a case management hearing before Employment Judge Siddall on 23.3.20. The relevant issues for this hearing were:-

   <u>Protected Disclosure</u>

   a. What did the claimant say or write? He asserts that on 29 May 2619 he stated that the withholding of wages would be illegal.
   b. Was information disclosed which in the claimant's reasonable belief tended to show that a person had failed to comply with a legal obligation to which he was subject?
   c. If so, did the claimant reasonably believe that the disclosure was made in the public interest?
   d. If so. was that disclosure made to the employer?

e. If protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the first and/or second Respondents in that:
   i. asked to make good a shortfall of £115 on 27 June 2019;
   ii. invited to a disciplinary hearing to address accusations of financial irregularities and of being late;
   iii. accusing the Claimant of abusing his position on 5 July 2019;
   iv. accusing the Claimant of falsifying his timesheets;
   v. failing to pay his wages in full and on time;
   vi. falsely telling HMRC that the Claimant had been paid; and
   vii. failing to progress the disciplinary process in a timely fashion

Unlawful deduction from wages

f. Was the total amount of wages paid to the Claimant between July 2019 and January 2020 less than the total amount of wages properly payable?

Failure to provide itemised payslips

g. Between July 2019 and January 2020 did the Respondent provide the Claimant with a written itemised payslip at or before the time at which any of the wages were made to the Claimant?

The Facts

Background

10. The Respondent operates a number of Costa Coffee franchises. It employs about ninety-four staff including about ten at the Claimant's place of work. The Claimant started work in the Thornton Heath branch as a café manager on either 1 or 6 November 2014; nothing turns on this difference. His written employment contract was for forty hours, five days a week. He reported to Mr Notturno, the operations manager. He also had regular contact with Mr Chaudhary who was responsible for payroll and maintenance. The Claimant was paid his salary monthly.

11. The Claimant's evidence was that, in addition to his rostered hours, he worked a considerable amount of time covering shifts - either gaps in the rota at his own store or at other nearby stores. The Tribunal accepted this evidence as credible in the setting of a network of small coffee stores, particularly when he lived nearby to his own store. In addition, Mr Notturno gave evidence that he viewed the Claimant as the most senior employee after himself, so it was credible and understandable that the Claimant would be called upon to provide cover.

12. The Claimant said that because of this, and staffing issues generally, it was sometimes difficult for him to take his full holiday entitlement. Accordingly, he and the Respondent agreed that he could, when it was quiet, go home during his

shifts, as long as he returned quickly if needed and that he might be required to work when he was not rostered. Mr Notturno denied that this was the arrangement.

13. The Tribunal preferred the Claimant's evidence for the following reasons. The Tribunal had sight of WhatsApp messages between the Claimant and Mr Notturno, including one on the 18 June 2019. Mr Notturno asked the Claimant where he was, and the Claimant replied that he had been in yesterday so was not in today; it was agreed that he would come in within ten minutes. Mr Notturno replied, "thanks". There was no indication in the WhatsApp messages that this was problematic. The Tribunal found these messages more consistent with the Claimant's account than Mr Notturno's. In addition, Mr Notturno had said that he viewed the Claimant as the most senior employee after himself. So, the Tribunal found it credible that the Claimant would be given a degree of flexibility - as long as the job got done and the store was operated to the Respondent's satisfaction.

14. The Respondent had a policy whereby staff who took counterfeit money or invalid currency had to make good such losses out of their own pocket. The Thornton Heath branch had a particular problem with counterfeit money due to its location. Mr Notturno said that staff were required to make good these shortfalls immediately. However, there was evidence that in practice the Respondent might wait until the employee in question was paid and then the Respondent deducted the losses from the wages. For instance, in early 2019 new staff took fake notes and were required to make up the money from their wages; Mr Notturno agreed that they could wait for their pay packets before doing so. There was no indication that the Respondent operated any limit for the amount it clawed back out of wages.

15. The Respondent had raised two concerns about the Claimant prior to the putative protected act. Both were some time before. Both were accepted as errors, for instance a customer complaint being mis-attributed to him.

<u>The Alleged Protected Act</u>

16. One of the Claimant's responsibilities was to send a monthly summary of hours worked by all staff at his store to the Respondent, so that this might be entered into the payroll system to generate the wages. This was done according to a fixed schedule of dates.

17. The Claimant was due to provide the hours summary on 24 May for the period ending on 23 May 2019. However, because the store computer was broken, he and Mr Notturno agreed that he would take a photo on his phone and send it to the Respondent by Whatsapp. Mr Notturno was away, and Mr Pandya became involved with these matters.

18. There was a telephone conversation between Mr Pandya and the Claimant on 29 May. The Claimant gave the following account. Mr Pandya said that he would not pay anyone in the Thornton Heath store because the Claimant had not sent in the monthly hours summary. The Claimant said that this was illegal. Wages were due to be paid the next day on 30 May. Mr Pandya then backed down and

said he would pay but one day late - on 31 May. The Claimant again said that this was illegal.

19. Mr Pandya denied this account. He said that he had raised the fact that the Claimant had not provided the monthly hours on time and had explained that this made it difficult - if not impossible - to pay staff. The Claimant shouted and screamed. He swore and used the "F-word".

20. The Tribunal considered the two accounts of the conversation and preferred the Claimant's version of events for the following reasons.

21. Firstly, it did not accept Mr Pandya's evidence before the Tribunal that during this conversation the Claimant had sworn and used the F- word, or shouted or screamed. This allegation was not in the ET3 or in Mr Pandya's statement, and there was no reference to it in any contemporary document. The document created nearest in time to 29 May was an email of 5 July in which Mr Pandya robustly criticised the Claimant for what he described as a highly improper attitude, and referred to the Claimant as aggressive and rude. However, there was no reference to swearing, the F- word, or to shouting and screaming.

22. Mr Pandya said that, once he told the Claimant to stop behaving like this, i.e., shouting and swearing, he dismissed the matter from his mind and did not expect any further action to be taken. Mr Notturno agreed with this account. However, the Tribunal did not find this plausible. The Respondent shortly afterwards disciplined the Claimant on a number of grounds. In the view of the Tribunal, if the Claimant had shouted, screamed and used foul language at the owner / director, it is highly likely that the Respondent would have added this to their list of disciplinary matters. Such conduct would be misconduct, if not gross misconduct. This would be all the more likely when the Claimant was, on the Respondent's case, in the wrong for failing to provide the figures in time.

23. Mr Notturno, further, did not recall Mr Pandya mentioning the swearing and the F- word, although Mr Pandya did complain to him about the Claimant's conduct. Finally, the allegation was not put to the Claimant.

24. The Tribunal turned to the question of whether Mr Pandya said that he would not pay the wages of the staff. The accounts varied in that Mr Pandya said he had explained that without the rota, he was unable to pay, whereas the Claimant said that he simply refused. Nevertheless, both agreed that Mr Pandya said that wages would be late or might not be paid.

25. The question for the Tribunal was whether the Claimant had told Mr Pandya that failing to pay wages or paying wages late was illegal.

26. The Tribunal considered the accounts and preferred the Claimant's version of events for the following reasons. Firstly, Mr Pandya's credibility had been adversely affected by the swearing and screaming allegation. Secondly, the Claimant's account, the Tribunal found, was plausible. He said used the word "illegal" and although that was not technically correct, it was credibly how a lay person might frame a concern that an employer was breaking the law.

27. Thirdly, the Claimant was concerned not just for himself but also for his staff team, so it was more credible that he would mention legal consequences. Fourthly, the Claimant's account was consistent with what he stated in the 5 July email exchange, that he had told Mr Pandya that such behaviour was illegal. Mr Pandya replied (on 5 July) that on 29 May the Claimant had brought up charges without foundation. This was consistent with the Claimant having said that late or non-payment of wages was illegal.

28. Finally, the Tribunal found that, whilst the Claimant did give very lengthy answers and was prolix, his evidence remained very broadly consistent.

The Shortfall of £115

29. Mr Notturno visited the store on 12 June. The Claimant's account was that he told Mr Notturno that there was a new shortfall in takings of £115, due to a member of staff, Elvira, having taken counterfeit / foreign notes as payment. This was an unusually high sum. According to the Claimant, it was agreed that Elvira would cover the losses out of her next wages due on 4 July. Mr Notturno's statement did not dispute this account, which was contained in the ET1.

30. The Claimant then said he was summoned to the shop on 18 June. His account was as follows. Mr Notturno told him that Mr Pandya was very unhappy. Essentially, he had said, 'how dare he (the Claimant) speak to me like that. I am the director. I put money on the table, and I want him out'.

31. Mr Pandya's evidence was that he had not said this to Mr Notturno, but he was upset about the Claimant's attitude and wanted Mr Notturno to speak to the Claimant. Mr Notturno denied telling the Claimant that Mr Pandya wanted him out.

32. The Tribunal preferred the Claimant's account of the conversation on 18 June for the following reasons. The main reason for preferring the Claimant's account was that Mr Pandya's email of 5 July, in the view of the Tribunal, indicates that he was genuinely angry with the Claimant. In addition, the Tribunal found the Claimant a credible witness. In contrast, there were concerns with Mr Notturno's credibility. For instance, he said in his witness statement that the Claimant was suspended, but he denied the Claimant was suspended when questioned by the Tribunal.

33. Mr Notturno's evidence was that the Claimant walked out of the store on 26 June and the ET3 stated that the Claimant was suspended that day. The Tribunal rejected this account, which have been an error. The contemporaneous documents show that the Claimant was informed of an investigation on 27 June. There was nothing in writing to suggest there was a suspension on 26 June and for the avoidance of doubt, the Tribunal did not find that the Claimant walked out of the store on 26 June.

34. The Tribunal then turned to the events of 27 June. The parties gave two different accounts. According to Mr Notturno's statement, he came to the store and when

the Claimant arrived (late) he asked him about £115 missing from the safe, there was no mention of fake notes. The Respondent had become concerned about possible money problems in the store following a 20 June memo from the staff complaining about a number of matters including 'missing money from the till'. (The memo did not indicate why money was missing or that the Claimant was responsible for this.) According to Mr Notturno's statement, the Claimant repaid the missing money on 27 June.

35. The Claimant's account was different. Mr Notturno knew that takings were short by £115 because Elvira had mistakenly taken invalid notes, as previously discussed. Mr Notturno had insisted that the Claimant replaced the money there and then - which he did.

36. The Tribunal considered the dispute between the parties.

37. The Tribunal considered the plausibility of the Claimant's account. It asked itself whether it was plausible that, if the shortfall was caused by invalid notes taken by another member of his team, the Claimant would go home to replace the money himself. The Tribunal concluded that such behaviour would be consistent with the Claimant being worried about his job. He had been told that Mr Pandya wanted him "out", so it was easier to pay the money now and have Elvira repay him later. Mr Notturno told the Tribunal that the Respondent expected any shortfall due to counterfeit money to be repaid straight away, rather than waiting to claw it back out of the next pay packet. Further, the Respondent's attitude to staff making mistakes about invalid money did not suggest that it was particularly understanding in such situations and was focused on making up the shortfall, not the justice of the circumstances.

38. The Respondent relied on a handwritten note from another employee called Romona dated 20 August, who said that she had witnessed what had happened on 27 June between Mr Notturno and the Claimant. Mr Notturno had asked the Claimant to check monies in the safe and discovered it was £115 short, whereupon the Claimant went to get the money from home.

39. There were issues with the dates of Romona's statements. There was another handwritten statement from Romona also dated 20 August, saying that the Claimant was prone to taking money from the safe. The Respondent's evidence was that at least one if not both statements were mis-dated. There were two further statements from staff were dated 20 June - which on the Respondent's case was correct – which indicated that staff were capable of dating statements correctly. The Respondent had no explanation as to why Romona should have mis-dated any statements. There was also no explanation as to why Romona did not give evidence to the Tribunal; on the Respondent's case she was a witness to Mr Notturno discovering that the Claimant had taken money home, a crucial point in the case.

40. It was impossible for the Tribunal to know the truth of when either statement was written. However, either the statements were mis-dated which adversely affected their reliability or they were written nearly two months after the events - which had the same effect.

41. In addition, the Tribunal had concerns about the content of the Romona statements. According to the statement, Mr Notturno asked the Claimant 'where is the missing money, that's the shortfall from yesterday's takings?'. The Claimant replied that he had taken the money home and had told Romona that he had done so. This did not seem to the Tribunal to be a very plausible thing for the Claimant to say. Romona reported to the Claimant so, if the Claimant had taken money, there was no clear reason why he would have told her.

42. The Tribunal also noted a considerable difference in the standard of English in the two Romona statements. The statement which gave the account of the conversation between Mr Notturno and the Claimant used formal and sophisticated language, for instance, "I witnessed Mr Notturno and the Claimant, and Mr Notturno found a discrepancy of circa £115." In contrast the other statement starts, "This is my statement, did you ask me to do it."

43. In light of these external and internal issues with the Romona statement, the Tribunal was unable to attach much weight to the statement.

44. Further, Mr Notturno in his witness statement did not deny being told by the Claimant about the fake notes on the 12 June. In addition, the Tribunal took into account that the Claimant taking money out of the safe or till would be very high-risk behaviour. There was no indication that the Claimant had previously indulged in high-risk behaviour.

45. Further, the Respondent's credibility was damaged by the fact that the Respondent's account of how much money was in question changed, usually between £115 and £125 (for instance in the first disciplinary letter of 27 June).

46. Finally, there was some evidence that the counterfeit and foreign money did exist. The Claimant relied on a picture he said he took in the store of the notes on 5 July including a Bank of Ireland £50. The Tribunal accepted his evidence that the photo was taken in the store. It did not accept the Respondent's contention that there was a wine glass in the background - which would not have been present in the store. The Tribunal considered that this object was much more likely to be a fan.

47. Accordingly, and on the balance of probabilities, the Tribunal accepted the Claimant's account of the events of the 27 June. The Claimant told Mr Notturno that there was a shortfall due to invalid notes and the Respondent knew why the £115 was missing. There was no reason to consider disciplinary on the basis that the till or the safe was short because there was a good explanation as to why money was short. The Tribunal did not consider, if the Claimant was one hour late that day, that, in light of its findings about flexibility accorded to the Claimant, the Respondent would have commenced an investigation into the Claimant on this basis alone.

Discipline and Suspension

48. The parties agreed that on 27 June Mr Notturno gave the Claimant a disciplinary letter inviting him either to an investigation or disciplinary meeting the next day. It was unclear from the Respondent's evidence which it was. There were two charges – that he had arrived one hour late, and the previous day's takings were £125 short. It was agreed that this in fact referred to the £115. The Claimant refused to sign the letter. According to the Claimant, Mr Notturno then asked him if he wanted to resign. The Claimant refused and Mr Notturno sent him home.

49. The letter was then sent to the Claimant by WhatsApp. However, the Claimant failed to attend the meeting on 28 June. The Claimant asked the Respondent to send him letters by post from then on as he was having internet difficulties at home.

50. The Respondent duly sent another disciplinary letter on 5 July for the re-scheduled disciplinary meeting and to conduct further investigations. The Respondent no longer relied upon the time-keeping allegation, but simply that the Claimant had taken the money.

51. There was then the email exchange previously referred to on 5 July between the Claimant and Mr Pandya. In brief, the Claimant said that on 29 May he told Mr Pandya that failure to pay wages was illegal. In his reply Mr Pandya told the Claimant to no longer communicate with him, because he was being rude and aggressive. In this email, Mr Pandya stated that the Claimant had abused and taken advantage of his management role.

52. The disciplinary meeting was re-scheduled for 9 July. Mr Chaudhary, however, cancelled it on the basis that the Claimant had not confirmed his attendance in time. On 9 July, the Claimant chased Mr Chaudhary about being paid his last month's wages. On 10 July, the Claimant chased Mr Notturno asking to be paid. He said he had no money to feed himself and his child. He was a single parent.

53. Mr Notturno's evidence was that on 10 and 11 July, he and a colleague carried out a very extensive video analysis of the Claimant's attendance at the store compared to the hours he had claimed on the rotas. This was referred to briefly in the ET3 and in Mr Notturno's statement as a unparticularised reference to considering CCTV.

54. The Respondent relied on a document which was described as a comparison between the Claimant's rota and the hours he was actually shown working on the CCTV footage. This document was not disclosed to the Tribunal or to the Claimant until after the end of the first day of the hearing.

55. On the Respondent's case, this document had been in existence since about the 10 July. There was some evidence consistent with this - an email possibly referenced this document on 10 July. However, there was no justification why if it did exist earlier than the first day of the hearing, it was not disclosed until then. On the other hand, if it did not exist until the first day of the hearing, then the Respondent's account of its creation could not be true.

56. The document was manifestly relevant. The Respondent sought to rely on it to support a key plank of its case - that it was justified in paying the Claimant only for the hours actually worked and that the Claimant had been misleading it as to his hours.

57. This failure to disclose put the Claimant at a material disadvantage. Whilst Mr Chaudhary gave evidence that he had showed this document to the Claimant in the disciplinary meeting, it was a complex and data-heavy document which the Claimant would need considerable time to study, in order to put his case. This disadvantage was magnified by the fact that the CCTV footage was not disclosed; the Claimant would not have been able to challenge the Respondent's interpretation of the CCTV footage itself.

58. Further, the Respondent's account was that it had four cameras recording at the store. Respondent staff watched twenty-eight days, at least, of footage - mapping the Claimant's entrances and exits, to create the document. The Tribunal had some concerns about how reliable the resulting document would be in such circumstances.

59. There were also concerns about the internal reliability of the document. It purported to compare the Claimant's rostered hours with the hours shown by CCTV. The Respondent used it to justify deducting the Claimant's wages where the rota was not corroborated by the footage. However, the document discounted hours rostered on days when the Respondent had no CCTV at all. Further, there were days when the Claimant was not rostered, but he did come in due to the flexible arrangements. This was evidenced by contemporaneous WhatsApp messages on days when there were no hours recorded.

60. Because of internal and external difficulties with this document, the Tribunal could attach little weight it.

61. The Respondent made a third attempt to invite the Claimant to a disciplinary meeting on 11 July. By the time of this third letter the charge had been clarified to misappropriating company money on 26 June, i.e., taking £115, and falsification of the store rota and failure to work his contractual hours. The letter confirmed that the Claimant was on paid suspension.

62. The disciplinary meeting duly took place on 16 July. Mr Chaudhary was the disciplinary investigating officer and Mr Pandya was the note-taker. (Mr Pandya was to have been the note-taker in the 9 July disciplinary meeting).

63. Mr Chaudhary gave evidence to the Tribunal that he was not entirely in charge of the disciplinary or investigatory procedure. When Mr Chaudhary was asked why charges had not been taken any further following the 16 July, he said that it was a matter for Mr Notturno. When Mr Notturno was asked, he was unable to provide reliable evidence of the disciplinary procedure, for instance, he thought that the Claimant had not been suspended when he had.

64. Following the meeting on 16 July, there was, in effect, radio silence from the Respondent. There was no suggestion or evidence that there was any decision

or movement on the disciplinary process. Mr Chaudhary's evidence was that he was undertaking further investigations but there was no evidence of what this was, as Mr Chaudhary himself accepted.

65. In the meantime, the Claimant was not being paid in full or in time. He was due to be paid on 4 July for his June salary, and his pay was short by £181. Mr Chaudhary's explanation was that this deduction was because the Respondent only paid the Claimant for those hours corroborated by the CCTV analysis, that is he was paid for the work he actually did, rather than the work he claimed to have done.

66. The Claimant was due to be paid again on 1 August but was not paid. He chased the Respondent who said it would look into it. He chased again on 7 and 8 August explaining that he was under financial pressure. The Respondent paid him £1000 on 8 August, £424.16 short.

67. On 30 August, the Claimant contacted Mr Chaudhary saying that he had still heard nothing since the disciplinary meeting on 16 July and he again asked for his wages. His next wages were due on 29 August, but he only received £424.16 on 16 September.

68. The Claimant made his first application to the Tribunal on 29 September 2019.

69. The Claimant was again due to be paid on 3 October and he was not paid. He emailed the Respondent and asked, in effect, if he was still employed.

70. The Claimant's evidence was that the Respondent wrongly declared to HMRC that he was being paid in full at this time whereas he, in fact, was not. This resulted in his claim for Universal Credit being refused. The Tribunal accepted the Claimant's evidence on this point. The Respondent did not deny informing HMRC that they were paying the claimant. In those circumstances, a refusal of Universal Credit was a logical consequence.

71. The Claimant presented his second claim to the Tribunal on 28 October.

72. The Claimant was not paid his wages on 31 October or on 28 November. He resigned on 11 December by way of an email to Mr Chaudhary saying that he had not had any pay for two months; the Benefits Agency were withholding payment because the Respondent said that he had been paid for September, October and November. He had been to a food bank and had suffered severe hardship. The Respondent subsequently paid him £2,848 on 18 December.

73. In respect of payslips, the Claimant's evidence was that he did not receive payslips for June and July until 29 November by post. He did not receive his August and September payslips by email until December. According to the ET3, the Respondent said that it provided payslips timeously.

74. There was nothing in any of the Respondent's witness statements as to who had sent the payslips or indeed any statement that any witness knew that payslips had been sent. The Tribunal had sight of all these payslips in the bundle.

75. In respect of the June payslip, the Respondent's case was that it had been sent, and the Claimant's case was that it had not been received. There was no evidence that it had been received. There was a paucity of evidence to assist the Tribunal in deciding what had happened to the June payslip.

76. The Tribunal took into account the context and the Respondent's conduct in telling HMRC that it was paying the Claimant - when in reality it was failing to pay him timeously or at all. This failure fell far short of that which would be expected in good industrial relations. This was more consistent with a failure to provide a payslip in June. Accordingly, on the balance of probabilities, the Tribunal thought it likely that the Respondent had not provided the Claimant with his June payslip on time.

The Applicable Law

77. The applicable law is found in the Employment Rights Act at Section 8 as follows:-

8 Itemised pay statement

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable, . . .

78. The applicable law is found in the Employment Rights Act at Section 13 as follows:-

13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

79. The applicable law is found in the Employment Rights Act at Section 47B as follows

43B Disclosures qualifying for protection

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

…

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

…(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

47B Protected disclosures

(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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

Submissions

80. The Tribunal had received written submissions from the Claimant and had heard oral submissions from both parties.

Applying the Facts to the Law

Whistleblowing

81. The first issue was whether the Claimant had made a protected disclosure. The Tribunal found that the Claimant told Mr Pandya on 29 May that his failure, or his likely failure, to pay wages at all or on time was illegal. The question for the Tribunal was - did the Claimant disclose information which in his reasonable belief tended to show that the Respondent was failing or likely to fail to comply with a legal obligation to which it was subject?

82. The Respondent and Claimant in submissions concentrated on the issue of whether or not any disclosure by the Claimant was of "information". The case law tells us that the key point to take away from the case of **Cavendish Monroe Professional Risk Management v Geduld** [2010] I.C.R. 325, is that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436 agreed with Mr Justice Langstaff in the Employment Appeal Tribunal below as follows:-

'the *dichotomy between information and allegation is not one made by the statute itself and it would be a pity if Tribunals were too easily seduced into asking whether it was one or the other, when reality and experience suggests that very often information and allegation are intertwined.*

83. The Tribunal is also reminded that the question of whether a disclosure or a statement amounts to information is an evaluative judgement by a Tribunal in the light of all of the facts of a case and that the context of any putative disclosure is highly relevant.

84. The Tribunal also had the advantage of a recent decision in the Court of Appeal in **Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601** in which the Court again emphasised that Tribunals should not be too distracted by any distinction between allegations and information.

85. The Tribunal accordingly considered what was said by the Claimant. It found that the Claimant's statement was specific. In the context of the 29 May conversation. Mr Pandya can have been in no doubt that the Claimant was referring to a specific issue, the payment on time or at all of wages for staff in the Thornton Heath store the next day.

86. In the context of a discussion about the payment on time or at all – or otherwise – of the staff wages, the Claimant told Mr Pandya that failing or delaying payment would be illegal. Did the statement that a failure to pay wages would amount to an illegal (sic) act, disclose information tending to show that the employer is likely to fail to comply with a legal obligation? In the view of the Tribunal, it did so. The specific information was the fact that failure to pay would be against the law. It was the unlawfulness of the conduct which was the information the Claimant inserted into the conversation.

87. The Tribunal went to consider whether this information, in the Claimant's reasonable belief, tended to show that the Respondent was failing or likely to fail to comply with a legal obligation to which it was subject. The Tribunal found that it did for the following reasons. This test is both objective and subjective – would a reasonable person in the Claimant's personal circumstances believe that a failure to pay wages was against the law? The Tribunal found that a shop manager would reasonably believe that a failure to pay wages either on time or at all, would be against the law. Most people, in the experience of the Tribunal and in particular its lay members, believe that a failure to pay wages is against the law, even if they are unsure of the legal framework. This would be more so for an experienced shop manager who had an important role in ensuring that his staff were paid properly and on time. It is trite law that there is no requirement for a Claimant to be able to name the specific law. The fact that the Claimant confused "illegal" (a criminal act) with "unlawful" (a breach of civil law) was of no account.

88. It was accepted by the Respondent that any such disclosure would be in the public interest and that the disclosure was made to the employer.

89. Accordingly, the Tribunal found that the Claimant made a qualifying protective disclosure. It, therefore, went on to consider whether he was subjected to any of the detriments on the grounds that he had made the disclosure.

90. The leading case on causation is **NHS Manchester v Fecitt & Ors [2011] EWCA Civ 1190.** The question under Section 47B for the Tribunal is whether the disclosure materially - in the sense of more than trivially - influences the employer's treatment of the whistle-blower.

91. The Tribunal therefore applied this test to the specific detriments. It considered the first detriment - that the Claimant was asked to make good a shortfall of £115. The Tribunal had found that Mr Notturno did ask the Claimant to make good this shortfall. The question was why.

92. The Respondent's explanation for asking the claimant to make good the shortfall – that the Claimant was responsible for the missing money because he had taken it - was not accepted by the Tribunal. The Respondent knew why there was a shortfall - because £115 had been taken in invalid notes. Accordingly, there was no good or obvious reason why the Claimant would be asked to make this good.

93. The Tribunal had found that Mr Pandya was angry and upset about being challenged by the Claimant on 29 May. The question for the Tribunal was

whether the disclosure, the specific part of the conversation when the Claimant spoke of law breaking, was a material influence on the Respondent's actions. The Tribunal found that it was the disclosure – the reference to law breaking – that had a material influence on Mr Pandya. In the opinion of the Tribunal, there is a material difference between an employee who - however robustly - challenges their employer's when it makes decisions about how it goes about its business, and an employee who alleges that an employer is breaking the law. Implicit in the latter is the fact that the employer is opening itself up to legal action - potentially by that employee.

94. The Tribunal did not accept that the disclosure was the sole reason for the Respondent's behaviour. The 29 May conversation was difficult even without the disclosure. Mr Pandya was upset simply because the Claimant was challenging him. Further, there was a dispute of fact about whether the rota had been sent in. Nevertheless, the Tribunal found that the allegation of law-breaking was a material influence upon Mr Pandya and the Respondent's conduct. This was backed up by Mr Pandya's email of 5 July. He referred specifically to the Claimant making allegations against him on 296 May, which in the view of the Tribunal, most likely referred to the illegality allegation.

95. Mr Pandya was the controlling mind of the company. There was limited evidence that he was involved, except occasionally, in detail. However, the Tribunal found it notable that neither Mr Notturno nor Mr Chaudhary, the two most senior employees, were willing to take full responsibility for the disciplinary process. Further, in the view of the Tribunal Mr Pandya, in his email of 5 July, showed real anger against the Claimant as a result of the 29 May conversation.

96. The Tribunal considered if there was a link between the Respondent's reaction to the disclosure and the requirement to make good £115. The Tribunal was influenced by the timing. The disclosure happened on the 29 May. Less than a month later, the Claimant was falsely accused of taking money. There had been some investigation or criticism of the Claimant in the past, but this had been resolved. What happened here was different in kind and degree from, for instance, a customer complaint about service. The Claimant was falsely accused of taking money from the Respondent and only returning it when in effect forced to do so. There was no evidence that the Claimant had been previously disciplined or of any allegation that the Claimant was taking or, at least inappropriately borrowing, his employer's money. In addition, Mr Notturno had told the Claimant that Mr Pandya wanted the Claimant "out" a few days before the incident.

97. For these reasons, the Tribunal found that the disclosure had materially influenced the Respondent's order to the Claimant to make good the shortfall.

98. The Tribunal considered that the remaining detriments fell naturally into two categories. The first set were those that related to the disciplinary - the invitation to the disciplinary meeting, accusing the Claimant of abusing his position, accusing him of falsifying time sheets and failing to process the disciplinary. The Tribunal reminded itself that in respect of the first Respondent, it only had

jurisdiction up to the date of presentation of the first ET1, and in respect of the second respondent only up to the date of the second ET1.

99. The Tribunal viewed these four putative detriments as inter-linked. The Tribunal found that the disclosure did materially influence the Respondent in subjecting the Claimant to these detriments for, predominantly, the same reasons as to the findings in respect of the £115. The Tribunal did not accept that the fact that the Claimant was late to work was the reason for the disciplinary process, which left the allegation about the £115 as the reason for the process. The Tribunal had found that this allegation was made, knowingly, without foundation. The link between the allegation and the disciplinary was obvious but it was corroborated by Mr Notturno's offer to let the Claimant resign prior to the investigation.

100. For the avoidance of doubt, the Tribunal considered if the disclosure had materially influenced the allegations about the hours and timesheets. The Tribunal found that the disclosure was a material influence, for predominantly the same reasons as the £115. Further, the Tribunal was similarly unconvinced by the Respondent's case on the hours, CCTV and timesheets. It had found that it could place little weight on the schedule of CCTV and rotas. Even if the Tribunal were to accept the Respondent's case as to the preparation of the CCTV/ timesheets schedule, the schedule was not a neutral document. For instance, it recorded the Claimant as not having worked on days when there was no CCTV footage.

101. In respect of the hours, the Tribunal accepted the Claimant's case that he had a certain degree of flexibility as to his hours worked and the Tribunal was attaching little weight to the CCTV schedule. In the view of the Tribunal, once the Respondent had started along the disciplinary path, it essentially went on a "fishing expedition" to see what other allegations it could make. Mr Notturno, the Tribunal had found, agreed with the flexibility given to the Claimant as to his hours. He knew that the Claimant did not work exactly his rota'd hours.

102. Accordingly, the Tribunal saw that there was no good reason to invite the Claimant to a disciplinary meeting at this time. There was also no good reason to accuse him of abusing his position, as this was part of his working arrangements, and there was no good reason to accuse him of falsifying the time sheets.

103. For these reasons, the Tribunal found that the disclosure had a material influence on the Respondent's accusing the Claimant of abusing his position and of falsifying his time sheets.

104. The Tribunal considered the failure to progress the disciplinary procedure. This was, in the view of the Tribunal, a striking failure on the Respondent's part. The earlier delays and failures might be laid at the Claimant's door to some extent. However, after the 16 July meeting, there was no evidence that the Respondent had done anything further. The fact that there was no action was not down to the Claimant. He made numerous attempts to get the process moving.

105. There was no evidence of further investigation or any steps. The respondent had a number of opportunities to move forward because the Claimant was actively chasing. The Respondent could not argue this was a simple oversight. The only reason that the Respondent communicated with the Claimant after 16 July appeared to be that the Claimant had contacted it first.

106. The Tribunal considered if there might be other potential explanations for the Respondent's conduct. There was no suggestion from the Respondent that it had a practice or record of delaying disciplinary matters. In oral evidence all three Respondent witnesses were notably unable to explain the delay. As the Tribunal had found that the disclosure had a material influence on the instigation of the disciplinary procedure, the Tribunal found that the lengthy delays in progressing the matter was also materially influenced by the disclosure. The Tribunal viewed these detriments as interlinked.

107. Finally, the Tribunal considered the detriments of - failure to pay the wages in full and on time and informing HMRC incorrectly. The Tribunal considered these detriments not to be inter-linked with the other detriments.

108. In respect of failure to pay, there was, little explanation from the Respondent. There were two explanations which the Tribunal understood the Respondent to rely upon. Firstly, in respect of the £181 shortfall in June, Mr Chaudhary said that the Claimant was only paid the hours he had worked. The Tribunal was not been satisfied as to the Respondent's explanation as to this. More importantly, this did not explain why there was further failures.

109. Secondly, Mr Chaudhary suggested that the Respondent company was in some financial difficulties. However, there was no corroborating evidence as to this. It was accepted that other employees were paid in full and on time. Accordingly, the Tribunal did not accept this explanation.

110. The Tribunal found that the failure to pay wages in full and on time was materially influenced by the disclosure for the following reasons. There was an absence of a good explanation for such a basic failing – to pay an employee their wages. Further, the Tribunal relied on the same reasons as it relied upon in the disciplinary process because the failure to pay wages echoed the failures to take action in disciplinary process. Both occurred at the same time and both involved the Respondent in effect ignoring the Claimant as much as possible. This was a dramatic change in the way that the Respondent treated the Claimant. Even when the Respondent had in the past considered action against the Claimant (for instance the mis-attributed complaint), the Claimant kept working and kept being paid. The timing, in the view of the Tribunal, was striking - he was not paid in full or on time for any work done after the 29 May disclosure.

111. In respect of HMRC, there was no evidence or explanation from the Respondent as to why it had misinformed HMRC. The Respondent's submissions in respect of HMRC were that Mr Pandya, as an individual Respondent, was not liable. There was no submission about the failure itself.

112. Nevertheless, the Tribunal considered that this particular detriment was not materially influenced by the disclosure for the following reasons. In effect, the chain of causation was stretched too far. Whilst the failure to pay was materially influenced by the disclosure, there were too many other possibilities as to why HMRC might have been incorrectly informed. It might have been a simple error, or it might have been the Respondent's not being willing to record the fact that it was not paying the Claimant and attracting adverse attention. To find that this was materially influenced by the disclosure would be speculation and not based on evidence.

113. For the avoidance of doubt, the Tribunal found that all matters relied upon could be properly described as "detriments". There was no real challenge to this by the Respondents.

114. The Tribunal then turned to the question of Mr Pandya's individual liability under Section 47B(1)(a). In the view of the Tribunal, Mr Pandya could be liable under this Section for the following reasons. The Respondents' case was that he was not an employee and the Tribunal had no evidence in respect of this. However, this was otiose because the Tribunal was satisfied that he was an agent.

115. No party relied on any case law on the definition of agent in Section 47B(1)(a). The Tribunal turned to discrimination case law, with reference to the guidance from the Courts as to the analogous principles in discrimination and public interest disclosure law. The Tribunal had regard to the case of **Unite the Union v Nailard 2019 ICR 28, CA.** The Court of Appeal found that a Tribunal should consider whether the discriminator was exercising authority conferred by the principal. The question was not whether the agent was actually authorised the discriminator to discriminate. The Tribunal also considered the more general concept of agency to be found in discrimination law cases such as **Ministry of Defence v Kemeh 2014 ICR 625, CA*;*** for instance did the putative agent have the authority to bind the principal in law?

116. Mr Pandya was the owner and director of the first Respondent. He was the controlling mind, although not usually concerned with detail. The Tribunal found that he was authorised by the First Respondent to act on its behalf and, as director, to enter into legal relations. Accordingly, the Tribunal found that Mr Pandya was an agent of the First Respondent.

117. The Tribunal went on to consider whether Mr Pandya as an individual subjected the Claimant to the detriments. Mr Pandya was the controlling mind of the company and it was he who initiated the change in attitude to the Claimant because he was angry. This anger was materially caused by the disclosure. This was not a purely personal matter for him but one which he expected the company to take up. In making this finding, the Tribunal relied on the fact that Mr Pandya copied Mr Notturno and Mr Chaudhary into his email of 5 July.

118. Having found that the disclosure in effect turned Mr Pandya against the Claimant, the Tribunal did not find it plausible that in that circumstances Mr Notturno and Mr Chaudhary, and perhaps others, got together to take action against the Claimant, essentially on a frolic of their own.

119. Further, Mr Pandya was intimately involved with the disciplinary process. He was due to be the note-taker at the second scheduled disciplinary meeting and was, in fact, the note-taker at the third scheduled meeting. The Tribunal found this surprising because Mr Pandya was not an obvious person to act as note taker. He had exchanged emails with the Claimant on 5 July and so was self-evidently integrally involved in events. He was the head of the company and acting as note taker rendered him unavailable for any appeal.

120. Further, Mr Pandya's involvement as note taker did not fit well with the Respondent's case that he was essentially a hands-off manager. A hands-off manager is unlikely to be a note-taker in an investigatory meeting. This is a simple admin function. The Tribunal took into account that this was not a large company with a well-resourced HR department. Nevertheless, the respondent had 90 employees, it was not a corner shop where a few people had to do all the various jobs. Further, Mr Pandya was senior to Mr Chaudhary, who was stated to be chairing the meeting. The Tribunal found it unlikely that Mr Chaudhary would not feel himself at least somewhat constrained by the presence of the owner/director. This was corroborated by Mr Chaudhary (and Mr Notturno) saying that they did not have full responsibility for the process.

121. For these reasons on the balance of probabilities the Tribunal found that Mr Pandya had subjected the Claimant to the detriments as set out above. It was likely that he was aware of and supervising the detriments. Accordingly, he himself was liable under Section 47B(1)(a).

122. The Tribunal then went on to consider the deductions and found that the deductions and the disciplinary were inter-linked. Mr Pandya was actively involved in the payroll on the 29 May.

123. Accordingly, as the Respondent did not rely on any reasonable steps in respect of Mr Pandya nor did it contend that it relied on a statement in contravention of the Act, both Respondents are liable for all detriments, save the HMRC detriment.

<u>Unauthorised Deductions from Wages</u>

124. The Tribunal went on to consider the Section 13 claim. There was an error in the case management order. The Tribunal only has jurisdiction in respect of deductions made up to the date of the first ET1 because a s13 claim can only lie against the first Respondent.

125. The Tribunal found that there was an unauthorised deduction of £181 on 4 July. This was unauthorised because the Claimant had not authorised his agreement. The Tribunal had sight of the Claimant's contract which did not authorise the deduction. The Respondent provided no documents which it contended authorised it to make a deduction in these circumstances. Accordingly, the Tribunal found that this was an unauthorised deduction.

126. The Tribunal went on to consider the next potential deduction. In the view of the Tribunal, the Claimant was paid in full for the 1 August, although late. He was

paid £1000 and then £424 on the 16 September meaning that he was fully paid for August.

127. However, he was not paid for 29 August, 3 October, 31 October, 28 November, and for the final period ending with the effective date of termination. Accordingly, there were five deductions made on five occasions up to 18 December 2019.

128. The Respondent's payment on 18 December was a single sum, equal to two months wages. However, there was no explanation or evidence as to what this 18 December payment was. There was no evidence for the Tribunal to use to apply this payment to the various monies owed by the Respondent to the Claimant.

129. The Tribunal accordingly finds that the unauthorised deductions in respect of payments on 29 August and up to 27 September 2019. These are the periods over which the Tribunal has jurisdiction in respect of deduction from wages. The Tribunal has no jurisdiction under section 13 against the first Respondent after this date, the date the first ET1 was presented. It cannot have jurisdiction for the period up to the date of presentation of the second ET1 because the second claim was only presented against the second Respondent who was not the employer.

130. The Tribunal considered what liabilities the Respondent intended to settle when it made its payment on 18 December. The Tribunal concluded that the Respondent made part payment of all the monies owing to the Claimant. The most likely explanation, on the balance of probabilities was that the Respondent simply did not address its mind to what it was paying. The respondent made a payment intending to go towards its global liability to the Claimant and it was not paid with reference to any period.

131. The Tribunal therefore found that the 18 December payment was equally applicable to all the Respondent's liabilities to the Claimant for wages. The payment should be divided up proportionately across all of the deductions made up to 18 December. The Respondent made part payment of all the deductions from wages.

132. As stated above, the Tribunal only has jurisdiction over deductions in respect of the period from 29 August to 27 September. Accordingly, Tribunal found that the Respondent made unauthorised deductions from the Claimant's wages for this period. The amount of the deduction is the total of all deductions made up to 18 December, less the proportion of the 18 December payment attributable to the period from 29 August to 27 September 2019. To put it another way, the shortfall is the amount of the deduction.

<u>Payslips</u>

133. Under Section 8 an employee has the right to receive from his employer, at or before the time at which any wages or salary is made, a written itemised pay statement. From 1 August, the respondent did not provide accurate pay

statements because the statements itemised wages which were not paid. Accordingly, this amounted to a breach of Section 8(2).

134. The Tribunal went on to consider the 30 June payslip. This accurately reflected what was paid, in that it accurately reflected that £181 had been deducted. Accordingly, there was no breach of Section 8(2).

135. The Tribunal went on to consider whether there was a breach of Section 8(1) in respect of the 30 June payslip. The Tribunal found that the Respondent breached section 8(1) because the Tribunal had found that the June payslip was not sent at or before the time at which the payment of wages was made.

Employment Judge Nash
22 December 2020