EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Bryan	**v**	Took Us A Long Time Limited

Heard at: Cambridge

On: 23, 24 and 25 August 2021
Chambers First Discussion: 28 October 2021
Chambers Second Discussion: 5 November 2021

Before: Employment Judge Tynan

Members: Ms H Gunnell and Mr M Brewis

Appearances
For the Claimant: Mr Samuel Martins, Law Consultant
For the Respondent: Ms Catherine Meenan, Counsel

RESERVED JUDGMENT

1. The Claimant's complaints that he was subjected to detriments contrary to section 47B of the Employment Rights Act 1996 are well founded in so far as comments were made and pressure brought to bear upon him on 22 November 2018 and he was subsequently issued with Formal Job Chats on 8 February 2019. However, the Claimant failed to present his complaints in relation to these matters within the statutory time period for presenting them to an Employment Tribunal, in circumstances where the Tribunal considers that it was reasonably practicable for them to be presented in time. Accordingly, the Employment Tribunal has no further jurisdiction in relation to the complaints and they are therefore dismissed.

2. The Claimant's remaining complaints that he was subjected to detriments contrary to section 47B of the Employment Rights Act 1996 together with his complaints that he was dismissed in breach of contract, constructively unfairly dismissed pursuant to Section 98 of the Employment Rights Act 1996, and that his dismissal was automatically unfair pursuant to Section 103A of the Employment Rights Act 1996, are not well founded and are dismissed.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 9 March 2020, following Acas Early Conciliation between 26 December 2019 and 9 February 2020, the Claimant raised various complaints against the Respondent in respect of alleged events in the period 19 November 2018 to 22 October 2019. At the heart of the Claimant's complaints are alleged disclosures by him which he claims qualify for protection under Part IVA of the Employment Rights Act 1996 ("ERA").

2. The Respondent is a casual dining restaurant business operating under the 'Wildwood' brand. The Claimant commenced employment with the Respondent as a Supervisor on 18 October 2016, originally working at restaurants in the south of England. As we set out below, in March 2019 the Claimant transferred to the Respondent's Cambridgeshire / Midlands Area as an Assistant Manager and was working in the role of Acting General Manager when he resigned his employment on 22 October 2019. The Claimant asserts that he resigned in response to the Respondent's repudiatory breaches of his contract of employment and / or relies upon the 'last straw' doctrine, the alleged last straw being the Respondent's actions on 22 October 2019 in inviting him to attend a disciplinary meeting in relation to a workplace accident that had occurred on 12 October 2019.

3. There was a single agreed List of Issues. We shall refer to the List of Issues in the course of this Judgment.

4. The Claimant gave evidence in support of his claim. We also heard evidence from the Claimant's mother, Maria Insegno.

5. For the Respondent, we heard evidence from:

    - Mr Joshua Field, the Respondent's former Head of People;
    - Hugo Sousa, General Manager of the Respondent's Chichester restaurant;
    - Mr Peré Capdevila, Area Manager of the South Area at the relevant time; and
    - Ms Tianey Grace-Mae, Area Manager of the Cambridgeshire / Midlands Area.

6. On 22 November 2018, Ms Insegno observed from a distance a meeting or interaction at the Chichester restaurant between the Claimant and, as we find, Mr Sousa and Mr Capdevila. She observed them from a café on the opposite side of the road to the restaurant and accordingly was not privy to what was said or discussed. She later attended a Grievance Meeting with the Claimant and Mr Field at the Respondent's Head Office in London on 4 March 2019. We return to these matters.

Preliminary Issue – Protected Disclosure

7. As the Claimant pursues complaints that he was subjected to detriments and dismissed on the grounds that he made protected disclosures, we must first determine whether or not he made one or more protected disclosures. The Respondent denies that he did.

8. The alleged disclosures upon which the Claimant relies are set out at paragraph B.10. of the List of Issues. Although detailed under four paragraphs, there are three alleged disclosures as follows:

    1. A text message from the Claimant to Mr Sousa sent at 12:31 on 20 November 2018;

    2. A conversation with Mr Capdevila on 21 November 2018; and

    3. A meeting with Mr Capdevila and Mr Sousa on 22 November 2018, during which the Claimant gave them a written statement setting out details of an alleged incident on 19/20 November 2018.

9. In his text to Mr Sousa of 20 November 2018, the Claimant stated that two named members of staff, Konrad and Florin, had told the Claimant they would be sleeping in the Chichester restaurant that night and, further, that it was not the first time they had done so. Konrad worked as a Chef at the restaurant and Florin was a Supervisor.

10. The Claimant included the same details in a handwritten statement that he prepared during the evening of 21 November 2018. He included within that statement additional information that Konrad had informed him on 19/20 November 2018 that Mr Sousa was aware he was sleeping at the restaurant that evening.

11. What was discussed between the Claimant and Mr Capdevila earlier in the day on 21 November 2018 is in dispute. There was also significant dispute as to what happened on 22 November 2018, including whether Mr Sousa was present during any discussion or meeting between the Claimant and Mr Capdevila, and to what extent other members of staff were privy to what was discussed.

    <u>Section 43B of ERA</u>

12. Once a Tribunal is satisfied that a worker has disclosed information, in determining whether the worker has made a protected disclosure for the purposes of section 43B of ERA, the Tribunal has to ask two questions:

    (a) firstly, whether the worker believed, at the time he was making it, that the disclosure was both in the public interest and tended to show one or more wrongdoings, of the type described in subsections (1)(a) to (g) of section 43B; and

(b) secondly whether, assessed objectively, the Claimant's belief (in relation to both elements) was reasonable.

13. Those principles derive from, amongst others, the Judgments of the Court of Appeal in Babula v Waltham Forest College [2007] EWCA Civ 174, Chesterton Global Ltd & Another v Nurmohamed [2017] EWCA Civ 979 and Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436.

14. The principle issue with which the Court of Appeal was concerned in Kilraine was the circumstances in which allegations made by an employee may consititute a disclosure of information by the worker for the purposes of section 43B. The Court of Appeal cited with approval Langstaff J's comments when the case had been decided by the EAT.

15. Tribunals should avoid an artificial division between "information" on the one hand and "allegations" on the other. According to the Court of Appeal, in order for a statement to be a qualifying disclosure it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters in subsection (1). Whether it meets that standard is something that tribunals should evaluate in the light of all the facts of the case (including the particular context in which it was made). The Court of Appeal noted that the meaning of a statement, which is to be derived from its context, should be explained in the Claim Form and in the Claimant's evidence, so as to allow the Respondent a fair opportunity to dispute the context relied upon and/or that the statement could really be said to incorporate any part of the factual background.

16. In Kilraine, the Court of Appeal also considered whether the Claim should have been struck out on the basis that Ms Kilraine had no real prospect of establishing that she had the requisite belief under the first limb of the two-stage test I have referred to. The Court of Appeal concluded that the Tribunal was "plainly entitled" to conclude that she had no real prospect of success in circumstances where there was nothing in the Claimant's case or witness statement for the purposes of section 43B(1)(b) to suggest that she had a relevant legal obligation in mind at the material time.

17. Chesterton was concerned with the public interest element of s43B. We refer in particular to Lord Justice Underhill's comments at paragraphs 27 to 31 of the Court's Judgment. He said that "*the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.*" A disclosure did not cease to be in the public interest because it served the private interests of a workers' colleagues. The question can only be answered by the Tribunal on a consideration of all the circumstances of the particular case.

18. As to whether or not the worker's belief about the nature of their disclosure is reasonably held, Lord Justice Underhill recognised that there can be more than one reasonable view as to whether a disclosure is in the public interest. Tribunals should be careful not to substitute their own view for

that of the worker. The reasons why a worker considers their disclosure to be in the public interest is not particularly material. Lord Justice Underhill recognised that workers will often seek to justify their disclosure after the event by reference to things that were not in their head at the time of their disclosure. This isn't to call into question the decision in Kilraine; the employee will still be expected to offer credible reasons as to why they believed at the time that the disclosure was in the public interest (something we particularly bear in mind in this case). Finally, motivation is not to be confused with belief.

19. In Ibrahim v HCA International Ltd [2019] EWCA Civ 2007 the Court of Appeal again considered the public interest aspect of section 43B. The case was a little unusual because the Court of Appeal gave its Judgment in the Chesterton case after the Tribunal in Ibrahim had heard all the evidence but before it had decided the matter and given Judgment. There was some suggestion that Mr Ibrahim had been questioned at Tribunal as to whether contemporaneous emails and his witness statement made any mention of a public interest. However, the Court of Appeal said that in the light of Chesterton he should have been asked 'directly' whether at the time he made the disclosures he believed he was acting in the public interest. As appropriate the Respondent could have put to Mr Ibrahim that this was nothing more than an afterthought on his part.

20. In Ibrahim, the Court of Appeal reiterated a point made in Chesterton, namely that motives are not to be confused with belief. A worker's motivation in making a disclosure will not determine the question whether he believed the disclosure to be in the public interest.

21. Babula concerned the second limb of the two-stage test. Once a worker establishes that they reasonably believe their disclosure to be in the public interest and to tend to show relevant wrongdoing, the fact their belief turns out to be wrong or, in this particular case (which was brought with reference to subsection (1)(a)) that it did not in law amount to a criminal offence, does not of itself render the belief unreasonable. A whistle-blower need not be right. As Lord Justice Wall observed:

> "*To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute.*"

<u>The Tribunal's findings and judgment on the preliminary issue</u>

22. As a Supervisor and a key holder for the restaurant, it was the Claimant's responsibility on the evening of 19/20 November 2018 to ensure that the restaurant was made ready for the following day before it closed, that all staff left the premises and that the premises were locked and secure. We conclude that whilst the Claimant, not unsurprisingly, recognised that staff

should not sleep in the restaurant overnight (including in the upstairs function room), he was essentially concerned that night for his own position. We find that in sending a text to Mr Sousa he was concerned whether he had managed the situation effectively and wanted to be certain that he would not get into trouble if it transpired that Konrad and Florin had slept on the premises that night. Whilst he understood that Konrad and Florin may have slept at the premises previously and that it was possible Mr Sousa was aware this was the case, we conclude that the Claimant did not give active thought to this aspect when he sent his text. In our judgment, his concerns went no further than that this was a local issue for Mr Sousa to be aware of and, as appropriate, deal with. In our judgement, his text message was no more than an *"FYI"*. We conclude that the Claimant did not believe at this point in time that he was disclosing information to Mr Sousa in the public interest and did not have in mind, even in the most general terms, any of the matters in sub-paragraphs (a) – (f) of s.43B(1) of ERA.

23. However, we have come to the conclusion that the Claimant's thinking in relation to what he had been told on 19/20 November 2018 evolved over the following 36 hours or so.

24. On 21 November 2018, the Claimant spoke with Mr Capdevila at the Whitely restaurant, when it was agreed that the Claimant would discuss the matter further with Mr Sousa in the coming days. It is not possible for the Tribunal to make any further specific findings as to what was discussed between them on 21 November 2018 since the matter is barely addressed in the Claimant's witness statement and he did not elaborate further on the matter in his evidence at Tribunal. His limited evidence certainly does not support paragraphs B.10(b) and (c) of the List of Issues, namely that the Claimant expressed his concerns to Mr Capdevila on 21 November 2018 in terms that there was a danger to health or safety, the restaurant could face closure, what was happening was a breach of the terms of the business lease and staff faced a loss of income (presumably because they might lose their jobs if the restaurant closed). If there had been such a discussion on 21 November 2018 we would have expected the Claimant to have referred to this in the statement he wrote out by hand a few hours later. That statement makes no mention of such specific concerns.

25. The Claimant was confused at Tribunal as to when discussions and meetings had taken place. He was not the only witness who was confused in this regard. Ms Insegno incorrectly identified the meeting at the Chichester restaurant as having taken place on 21 November 2018. Mr Capdevila was likewise confused in his evidence. Given the significant passage of time, we find that both the Claimant and Mr Capdevila have conflated their discussions on 21 and 22 November 2018, so that they can no longer accurately recall the specific discussions on each occasion; in Mr Capdevila's case it has led him to become confused as to whether Mr Sousa was present at all and how he (Mr Capdevila) came to be in possession of the Claimant's handwritten statement. For his part, Mr

Sousa did not address any meeting with the Claimant in his witness statement. In spite of his denials in this regard, we find that he was with Mr Capdevila in the Chichester restaurant on 22 November 2018 when the Claimant came into the restaurant to hand deliver his statement.

26. Having spoken with Mr Capdevila on 21 November 2018, the Claimant sent a follow up email at 16:23 confirming that he would be returning the keys to the restaurant. He wrote,

> *"I don't wish to be responsible for the opening and the closing of the premises because of the improper use of the Wildwood premises out of hours, for my own accountability and the broken trust with the manager as once given keys I was not aware while he was."*

27. We find that the reference to "he" being "aware" refers to Mr Sousa being aware that staff were sleeping at the Chichester restaurant premises. Whilst the Claimant did not elaborate as to what he meant when he referred to *"the improper use"* of the premises, his email evidences to the Tribunal that his thinking on the matter was evolving.

28. For his part, Mr Capdevila's response a few minutes later at 16:40 evidences that at this point in time he understood the matter to be an internal company issue. He referred to the Claimant having not broken any company rules and therefore not being responsible for any *"misdoing"*. He asked the Claimant to let him have a signed statement as soon as possible.

29. That evening, the Claimant wrote out a statement. It is a basic statement of facts rather than an expression of the Claimant's opinions or conclusions, except that at the end of the letter he wrote,

> *"For the time it took to give me an answer to such a serious matter, it led me to believe that Hugo was indeed aware."*

30. The Claimant's statement makes no reference to health and safety issues, or any breach of the restaurant lease, including that the restaurant might face closure or that staff might lose their jobs. However, the Claimant was expressing the view that the premises were being used improperly, that it was a serious matter and that he believed Mr Sousa was aware of the situation (and, by implication, condoning it).

31. We think it relevant that the Claimant was accompanied by his parents to Chichester on 22 November 2018. It reinforces that the issue had assumed increased significance in his mind. We consider that Ms Insegno was bringing her influence to bear on the Claimant's thinking and approach. We had the benefit of hearing her give evidence at Tribunal. She was vocal and, at times, trenchant in her views and we are in no doubt that she shared her views at the time with her son, so that by the time the Claimant entered the Chichester restaurant on 22 November 2018 to deliver his handwritten statement to Mr Capdevila, he firmly had in

mind that staff sleeping on the premises was a health and safety issue. We have come to that view notwithstanding the Claimant may have embellished his evidence at Tribunal by suggesting that he thought a fight could have broken out involving knives or glasses, or that a coffee machine might have exploded. We do not consider these risks were in his mind at all. Equally, we do not accept the Claimant's evidence that he informed Mr Capdevila on 22 November 2018 that the company would be breaking the terms of its lease by allowing staff to sleep on the premises. But this does not alter or detract from the fact that he raised, and believed he was raising, a health and safety concern.

32. We find that the conversation on 22 November 2021 became slightly heated and that comments were made by Mr Capdevila and / or Mr Sousa to the effect that they regarded the matter as closed and there would be no further discussion. This led the Claimant to tell them that he was prepared to escalate the matter to the Respondent's Head Office. We find this provoked Mr Capdevila, who told the Claimant that he had grounds to report him to Head Office regarding the discovery of potentially out of date steaks in the walk-in fridge.

33. We think that is relevant because it indicates to the Tribunal that Mr Capdevila understood from their discussion on 22 November 2018 that the Claimant was raising health and safety concerns, and he responded 'in kind' by confronting the Claimant with what he believed was a health and safety or food safety failing on his part. We are further reinforced in this view by the fact that Mr Capdevila took immediate steps to discuss the matter with the Respondent's CEO, Mr Plant. In response to questions from Ms Gunnell, Mr Capdevila explained that he had discussed the matter with Mr Plant in case the matter came to the attention of Chichester Council, whom he described as having a fairly strict approach to compliance. In his evidence he said,

"You could have Environmental Health officers on your door."

He went on to say that Mr Plant had told him to make sure that nothing like this happened again at any of the company's sites.

34. Whilst we are, of course, concerned with the Claimant's belief in this matter, rather than Mr Capdevila's, the fact that Mr Capdevila understood the situation to be of potential interest to Chichester Council and to carry a risk of enforcement action, that he felt it necessary to inform Mr Plant, and that he reacted to the disclosure by raising what he believed were public health failings on the part of the Claimant, all evidence to the Tribunal that the Claimant had disclosed information which, in the reasonable belief of the Claimant was in the public interest and showed the Respondent was failing or likely to fail to comply with its legal obligations regarding the restaurant and that the health or safety of individuals could be endangered. Whilst the Claimant may have sought to justify the disclosure at Tribunal by reference to a fight breaking out or the coffee machine exploding, we are satisfied that his belief was reasonably held at the time

even if he did not have in mind a precise health and safety statutory obligation. In our judgement it is sufficient that he believed, as we conclude he did, that staff sleeping at the restaurant would be inconsistent with health and safety laws and requirements. We find further support for our conclusions from the fact that Mr Capdevila evidently regarded the concerns as sufficiently grounded that he escalated the matter to Mr Plant who, in turn, apparently gave a clear instruction that sleeping on the premises must never happen again.

The Substantive Complaints

35. We turn then to the substantive complaints that the Claimant was wrongfully dismissed, unfairly dismissed contrary to s.98 ERA, automatically unfairly dismissed contrary to s.103A ERA and subjected to detriments contrary to 47B ERA.

36. The matters relied upon by the Claimant in support of his claim to have been unfairly dismissed (paragraph A.1 (a) – (f) of the List of Issues) are also relied upon by the Claimant in support of his claim to have been automatically unfairly dismissed.

37. The detriment claim proceeds by reference to the same matters, though the alleged detriments relied upon are elaborated upon at paragraphs C.21(b) – (i) of the List of Issues. Those further paragraphs in fact largely replicate the matters set out in paragraphs A.1 (a) – (f). We address them in turn in our findings below.

Findings of Fact

Events in the South Area

38. The Claimant was originally recruited by Ms Grace-Mae. She interviewed the Claimant in connection with an Assistant Manager role. Whilst she considered that the Claimant was not qualified for the role, she evidently recognised his potential and so created a role of Supervisor for him. She also put in place a Training and Development Plan in order that he might develop the skills required to become an Assistant Manager.

39. In November 2017, the Claimant was promoted to Assistant Manager. We accept Ms Grace-Mae's evidence that, in accordance with the Respondent's standard practice when staff are promoted, he completed a three month probationary period in the new role. Ms Grace-Mae agreed with the Claimant that he would move to be Assistant Manager at the Respondent's Plymouth Royal William Yard restaurant. However, before the Claimant's transfer to that restaurant took effect, Miss Grace-Mae herself moved Area and became the Area Manager for the Cambridgeshire / Midlands Area.

40. We find that Ms Grace-Mae was not only personally supportive of the Claimant and of his career development during his first 15 months or so at

the Respondent, but that she continued to be fully supportive of him throughout the remainder of his employment with the Respondent. When the Claimant resigned his employment late on 22 October 2019, Ms Grace-Mae's immediate response was to try to call him and, when he seemingly would not pick up her calls, she sent him an email (within less than half an hour of him resigning) *"imploring"* him that he was making a mistake and to reconsider his decision. Her words and actions speak for themselves. In a case where most of the witnesses were confused at times in their evidence and also made somewhat generalised assertions, her evidence stood out. She was articulate, specific in her recollections, insightful and reliable. We have attached significant weight to her evidence.

41. The Claimant complains that he was threatened with disciplinary action by Mr Sousa and Mr Capdevila on 22 November 2018 when he escalated his concerns. We refer to our findings at paragraph 32 above. Whilst we do not consider that the Claimant was explicitly threatened with disciplinary action, in the heat of the moment Mr Capdevila's response to the Claimant articulating concerns was to bring pressure to bear by highlighting the Claimant's own alleged failings. In that moment, Mr Capdevila lost sight of his own responsibilities in the matter, specifically the need to remain objective and impartial. Instead, we find he immediately felt the need to defend Mr Sousa, and perhaps ultimately his own position. Whether the Claimant perceived it at the time as a threat, or only later came to do so, does not matter. What is relevant is that he believed Mr Capdevila was not taking his concerns seriously in so far as he appeared to be standing by Mr Sousa and seeking instead to turn the spotlight on the Claimant. We can well understand why the Claimant regarded that as being to his detriment.

42. The Claimant alleges that he experienced a hostile working environment during the following weeks by being repeatedly moved to different restaurants throughout November and December (Issue A.1(b)). This complaint is not addressed at all in the Claimant's witness statement. In any event, the suggestion in the List of Issues that the Claimant moved between Chichester, Portsmouth, Whitely and Salisbury is not supported by his shift records at page 187G of the Hearing Bundle. They evidence that from 22 November 2018 (when he made his protected disclosure), the Claimant worked at just two restaurants, namely Whitely and Chichester for the remainder of that year and that from 6 December 2018 he was based entirely at Chichester. This must also be seen in the context that on the Claimant's own evidence he routinely moved between restaurants.

43. The Claimant has failed to establish the primary facts upon which the complaints at paragraph A.1(b) and C.21(c) of the List of Issues are based.

44. The Claimant alleges that,

> *"The Respondent did not adequately address or remedy the Grievance filed by him regarding the bullying behaviour to which he was subjected by Mr Sousa and Mr Capdevila"*

(paragraphs A.1(c) and C.21(e) – (f) in the List of Issues)

45. On 8 February 2019, the Claimant was issued with two *"Formal Job Chats"* by the Respondent (each Job Chat was signed by Mr Sousa and Mr Capdevila). We return to these below on the basis that this is the order in which they appear in the List of Issues.

46. On 18 February 2019, the Claimant raised a formal grievance complaining that he had been subjected to unfair treatment and harassment on several occasions. However, whilst he referred in his grievance to being made to feel inadequate by Mr Capdevila and / or Mr Sousa, the only two specific matters referred to in his Grievance were their response to his disclosures and the two Formal Job Chats.

47. The Grievance was handled by Mr Field, who met with the Claimant and Ms Insegno on 5 March 2019. Mr Field's evidence is that the Grievance was effectively resolved by agreement even if it the complaints underlying the Grievance were not upheld. In the aftermath of the Grievance the Claimant moved to the Cambridgeshire / Midlands Area where Ms Grace-Mae was based. The outcome is documented in an email from Mr Field to the Claimant dated 14 March 2019, in which he did not uphold the Claimant's Grievance but confirmed that the Claimant would transfer permanently to the Cambridgeshire / Midlands Area.

48. The available documents in the Hearing Bundle evidence that Mr Field responded appropriately to the Grievance in the first instance, including by arranging a meeting with the Claimant without undue delay and by speaking to the Claimant three times on 23 February 2021 to establish and satisfy himself that no immediate action was required to address the Claimant's situation pending the outcome of the Grievance process. Thereafter, Mr Field can be criticised for how various aspects of the Grievance were handled. However, we have been careful in our discussions to distinguish between those failings which, regardless of whether the Claimant was aware of them, might amount to detriments for the purposes of s.47 ERA, and those matters, if any, which were in the Claimant's mind when he resigned his employment on 22 October 2019 and may have informed his decision to resign, even if this was in response to a last straw event.

49. The Claimant was not provided with any notes of his meeting with Mr Field on 5 March 2019 nor was he asked to approve them. Whilst he would have been aware that he had not been asked to approve or invited to comment on the meeting notes, having not been provided with the notes he would have been unaware that Mr Field had kept inadequate notes of the meeting. For example, the events of 19/20 November 2018 were recorded as follows by Mr Field,

> *"G: outline details of the incident on 20 November. Gave him a written statement".*

That is a hopelessly inadequate record of their discussion of the issue on 5 March 2019. Notwithstanding the Grievance concerned the events of 19/20 November 2018 and the Formal Job Chats issued on 8 February 2019, we note that the Job Chats are not referred to in the meeting notes. That means either that this important aspect of the Grievance was not addressed at all by Mr Field during the meeting or that he failed altogether to document any discussion of it. It is also clear that other than viewing a very limited number of emails sent to him by the Claimant, Mr Field himself undertook only limited further enquiries in respect of the Grievance. He interviewed Mr Capdevila, but not Mr Sousa, and even then he failed to keep any notes of his interview with Mr Capdevila. When cross examined he had no recollection of any specific questions or lines of enquiry that he had pursued with Mr Capdevila.

50. In circumstances where Mr Field's notes of his meeting with the Claimant contain the barest of information regarding the events in November 2018 and no information whatever in relation to the Formal Job Chats, we do not understand on what basis Mr Field felt confident to write to the Claimant on 14 March 2019 that,

> *"I have carried out a full investigation into the evidence you presented at your grievance".*

On the evidence available to this Tribunal, it seems that Mr Field undertook only a cursory investigation. For this reason we have little confidence in his further assertion in his email to the Claimant that Mr Capdevila and Mr Sousa had acted to prevent staff sleeping in the restaurant *"again"* once they were made aware of the situation. That is borne out by Mr Sousa's evidence at Tribunal whose approach was driven by what he described as his trust in his staff, rather than founded in a detailed, objective investigation into the events of 19/20 November 2018. Be this as it may, it is equally clear to the Tribunal that the Claimant was entirely unaware that Mr Field had not in fact investigated the matter thoroughly as he claimed to have done (and equally unaware of Mr Sousa's unsatisfactory handling of the matter when Mr Capdevila originally asked him to look into the Claimant's concerns in November 2018). Instead, the Claimant would appear to have accepted Mr Field's assurances at face value. In an email, he thanked Mr Field for the outcome and did not pursue his right of appeal. His failure to appeal further evidences to the Tribunal that he agreed with the proposed resolution, namely his transfer to the Cambridge area.

51. In his email to Ms Grace-Mae dated 22 October 2019, resigning his employment, the Claimant made no reference to how his Grievance had been handled. Subsequently, on 13 November 2019, the Claimant sent a more detailed letter to the Respondent expanding upon the reasons for his

earlier resignation. That letter, which was written with the benefit of professional advice, makes no reference to Mr Field's handling of his Grievance. The first reference to the Grievance is at paragraph 16 of the Addendum to the Claimant's claim form, in which the Claimant refers to the lack of a formal minute taker at the meeting on 5 March 2019, before going on to state,

> *"My manager deliberately conducted a shambolic meeting knowing that there would be no official notes to rely upon".*

52. Notwithstanding those comments, we find that the Claimant did not resign in response to how his Grievance was handled by Mr Field. We return later in this Judgment to the issue of whether the failings identified above were on the grounds, in the sense of materially influenced by the fact, that the Claimant made a protected disclosure.

53. Mr Field's email confirming the outcome of the Grievance (pages 176 and 177 of the Hearing Bundle) does not address the issue of the Formal Job Chats, nor does it provide any explanation as to the reasons why Mr Field decided not to uphold the Grievance. However, any criticisms of Mr Field in this respect arose for the first time in the course of cross examination. The extent of the Claimant's evidence on the matter is at paragraph 44 of his witness statement in which he states,

> *"I received the final letter of resolution from Joshua on the 14th March 2019 where he saw no misconduct from Peré and Hugo and I was immediately transferred to Tia full name Tianey Grace-Mae area."*

54. At paragraphs C.21 (e) and (f) of the List of Issues, it is suggested that Mr Field responded with a smirk to the Claimant's suggestion that Mr Sousa and Mr Capdevila be moved and, by inference, that the Claimant's subsequent transfer to the Cambridgeshire / Midlands area was not by agreement. We do not uphold the Claimant's allegations in this regard. His friendly interactions with Mr Field on 15 March 2019 and 19 March 2019, do not support that he was treated in the way he suggests and, of course, as already noted he did not pursue any appeal. On the contrary, we find that he welcomed the opportunity to transfer to the Cambridgeshire / Midlands Area where he would be managed once more by Ms Grace-Mae. He enjoyed a good working relationship with her and he knew that she would continue to be supportive of him and of his career progression.

55. We return then to the issue of the Formal Job Chats, copies of which are at pages 164 and 165 of the Hearing Bundle. They are in similar, but not identical, form. One relates to the restaurant closing on 28 January 2019, the second relates to an incident on 5 February 2019 when the Claimant arrived late to work when the Respondent was hosting a client event in its function room. Mr Sousa and Mr Capdevila were each unclear at Tribunal as to the status of the Job Chats, namely whether they constituted formal or informal warnings in accordance with the Respondent's documented

disciplinary Policy and Procedure. The concept of a Job Chat (formal or otherwise) is not referred to in the Disciplinary Policy and Procedure at pages 64 – 67 of the Hearing Bundle. Each Job Chat is expressed to be *"Formal"* and in the case of the Job Chat relating to the restaurant closing on 28 January 2019, it stated that it would be kept on file and would last for six months. The Claimant was also asked to sign the Job Chats. They were evidently to the Claimant's detriment and the manner in which they were imposed was to his detriment also. We further note that both Mr Sousa and Mr Capdevila were present when the Job Chats were issued and are sceptical as to their suggestion that Mr Capdevila was only present because Mr Sousa had no prior experience of such matters; on Mr Sousa's account he had at the very least undertaken an investigation into the Claimant's November 2018 concerns.

56. As regards the restaurant closing on 28 January 2019, we find that the Respondent's approach to this issue was heavy-handed and disproportionate. Mr Sousa's evidence in this regard was particularly unsatisfactory. The Claimant received no prior notice of any concerns, there was little or no investigation into the matter, and the Job Chat was issued at a hearing at which the Claimant had not been afforded any right to be accompanied. Mr Sousa had reviewed CCTV footage from the restaurant to identify that the Claimant had been Face-Timing on his personal mobile telephone after midnight. It was said that the Claimant should have been focused instead on the restaurant closing. We regard Mr Sousa's actions in reviewing the CCTV footage as questionable and in stark contrast to the Respondent's failure to review CCTV footage in November 2018 when the Claimant had raised concerns that staff may have slept on the premises. On Mr Sousa and Mr Capdevila's own evidence the Formal Job Chats were prepared by them prior to their meeting with the Claimant. That indicates they went to the meeting with the Claimant with the intention of issuing the Job Chats regardless of any comments or explanations that the Claimant might seek to put forward. Certainly, the Job Chats did not reflect anything that the Claimant may have said.

57. As regards the Job Chat in relation to the incident on 5 February 2019, the Claimant was supposed to have opened the restaurant by 9:30am but only arrived on site, at 10:04am. This had resulted in text messages from the client. The Claimant accepted during cross examination that it was a significant and serious matter and an important client relationship; we do not accept the Claimant's attempts to compare his actions with the late arrival of a Chef or Supervisor on other occasions. Unlike the other Job Chat, the Job Chat in relation to the restaurant opening on 5 February 2019 was not expressed to last or to remain on file for a given length of time. However, that does not alter the fact that it was a Formal Job Chat and it would have been understood by him as something that might count against him in the future. All the same procedural shortcomings identified above equally apply.

Events in the Cambridgeshire / Midlands Area

58. Following the Claimant's transfer to the Cambridgeshire / Midlands Area in March 2019, he initially worked at the Respondent's Ely restaurant. Ms Grace-Mae was aware, in general terms, that there had been an issue between the Claimant and his Manager and was subsequently told that the Claimant had raised a Grievance. We accept her evidence that she did not involve herself in the matter. It was only after the Claimant transferred to her Area that the Claimant himself told her about the Grievance, including that staff may have slept in the restaurant premises. We find Ms Grace-Mae was supportive of the Claimant albeit she encouraged him to put the matter behind him. We find this was a supportive act on her part.

59. Ms Grace-Mae offered the Claimant the opportunity to cover for the General Manager of the Newmarket restaurant in May 2019. It is clear to us that she understood the Claimant was looking for opportunities for promotion to a General Manager. When a General Manager role became available at the Respondent's Cambridge restaurant, Ms Grace-Mae approached the Claimant about the role. She saw it as an ideal opportunity for the Claimant as the Area Chef was permanently based in the Cambridge restaurant meaning that the Claimant would be able to focus on the front of house. Furthermore, Ms Grace-Mae would herself be at the Cambridge restaurant at least twice a week as it was her base, meaning that she would be available to provide the Claimant with additional direct support. He was also part of an apprenticeship programme through which he enjoyed the additional support of an Apprenticeship Manager, Ms Emma Pearson. Against this background, we reject the Claimant's assertion that he was set up to fail.

60. The Claimant makes three specific complaints regarding the time he worked in the Cambridgeshire / Midlands Area:

    a. That he was intentionally not provided with adequate tableware and staff to enable him to effectively perform his duties as acting General Manager during his probation period at the Cambridge restaurant;
    b. That he was pressured by Ms Grace-Mae to withdraw his Grievance against Mr Capdevila and apologise for it, and informed that his probation period was due to the fact he had raised a Grievance; and
    c. That he was moved from Cambridge to Ely and then back to Cambridge again in September 2019 when he was informed that his three month probationary period would start again.

61. The Claimant alleges that when he moved to the Cambridge restaurant, he inherited a restaurant with almost no glasses or water jugs, untrained staff with communication difficulties and no chefs. We have no hesitation in rejecting his allegations which are expressed in very general terms. We prefer Ms Grace-Mae's evidence in this regard, which, as with the rest of her evidence, was detailed, specific and credible. The Cambridge

restaurant undoubtedly had its challenges. It is a seasonal restaurant and it relies heavily upon students to staff the restaurant, meaning that additional staff have to be found during the summer months. However, we reject the Claimant's suggestion that the Respondent, or more specifically Ms Grace-Mae, embarked upon a course of action that harmed its own commercial interests simply in order to undermine the Claimant during his probation period as acting General Manager at the Cambridge restaurant. We find the suggestion fanciful.

62. We accept Ms Grace-Mae's evidence that the Claimant inherited a fully operational restaurant and that during his time as acting General Manager he only placed one order for items for the restaurant, which was approved, and that this order did not contain any order for glasses. We accept Ms Grace-Mae's evidence that if the Claimant had submitted any other orders she would have approved them. As she had been during her time in the South Area, we find that Ms Grace-Mae continued to be supportive of the Claimant and, in any event, that she had an obvious vested interest as Area Manager in ensuring that the restaurant traded successfully. We find that she brought the Claimant into the Cambridge restaurant because she genuinely believed it offered a good training ground for the Claimant to succeed as a General Manager and because she wanted him to succeed.

63. In this regard, Ms Grace-Mae arranged for the Claimant to attend the Respondent's 2019 Summer Road Show, an event she viewed as a treat, an enjoyable paid for opportunity to get together with colleagues as well as to network with Senior Managers in the organisation so that the Claimant might build his profile. We accept Ms Grace-Mae's evidence that she did not tell the Claimant to keep a low profile and not to talk to the Operations Manager or other Head Office staff. On the contrary, we find that she would have been delighted if he had spoken to Senior Managers and begun to build a personal network. We further accept her evidence that the Claimant reported back after the Road Show that he had had a great time and expressed regret at having raised a Grievance. He asked her whether she might arrange a meeting between himself and Mr Capdevila. He evidently wished to build bridges within the business, we find, because he saw his future within the organisation. He wanted to put the events of November 2018 and February 2019 firmly behind him.

64. Ms Grace-Mae spoke with Mr Capdevila who referred to the matter as 'water under the bridge' and confirmed that he would be happy to speak with the Claimant. This was relayed back to the Claimant by Ms Grace-Mae who left it to the Claimant whether or not to contact Mr Capdevila. Since the Claimant did not say at Tribunal that he had called Mr Capdevila, we proceed on the basis that he and Mr Capdevila did not speak directly on the issue as the Claimant felt there was no need.

65. By the end of August 2019, it became apparent to Ms Grace-Mae that the Claimant was struggling in the role of acting General Manager at the Cambridge restaurant. He was struggling in particular to hire staff, and she suggested to him that he return to the Ely restaurant for a month whilst

a more experienced General Manager, Ms Karolina Ozimek, was parachuted into the restaurant to deal with some of the immediate challenges. We accept Ms Grace-Mae's evidence that the alternative would have been to fail the Claimant's probation period, something she did not wish to do. We find that the Claimant agreed with this proposal and that further supportive measures were put in place to ensure that the Claimant had the necessary support when he returned to the Cambridge restaurant at the end of September 2019.

66. Given our findings above, the Claimant has failed to establish the primary facts upon which the complaints at paragraphs A.1(e) and C.21(g)(i) and (g)(ii) in the List of Issues are founded. We are satisfied that Ms Grace-Mae acted reasonably and properly, and with the Claimant's understanding and agreement in extending his probation period to allow him an opportunity to demonstrate his ability to become a General Manager in circumstances where he had got off to an uncertain start in his initial weeks in the role. It was a supportive step on Ms Grace-Mae's behalf and was entirely consistent with trust and confidence rather than undermining of it.

The Claimant's resignation

67. On 12 October 2019, a Bartender in the Cambridge restaurant burned her hand whilst using the coffee machine. The Claimant applied cream to the burn and offered to take the Bartender to hospital. The offer was refused and the Bartender continued to work her shift, finishing at 9pm that evening. The Claimant did not inform Ms Grace-Mae of the incident and no accident report was completed.

68. In the course of the Tribunal Hearing, we were provided with photographic evidence of the Bartender's hand taken some days later by which time the her fingers had swollen and blistered. Even if it was not apparent on 12 October 2019, the photograph evidences a material scalding burn across the knuckles and surrounding skin of four of her fingers. We do not regard Ms Grace-Mae's description of the Bartender's hand as being *"badly burned"* to be unfair.

69. At paragraph 62 of his witness statement, the Claimant says there were multiple occasions when similar incidents were not reported albeit he provides no further details, consistent with his tendency towards assertion. He further relies upon the Bartender's refusal to attend hospital as a further reason why the incident did not need to be reported. We do not accept that as a proposition.

70. Ms Grace-Mae spoke to the Claimant on or around 22 October 2019, when she perceived the Claimant to be stumbling on his words as if he had been caught out. We find that his response was to minimise the seriousness of the matter. Ms Grace-Mae asked the Claimant why he had not told her about the injury and also asked him if he had logged it in the company's accident book in accordance with the Respondent's

documented Health and Safety Policy. She further asked him if he had contacted NSF, the company's Health and Safety advisers to which reports are supposed to be submitted. Ms Grace-Mae's evidence is that she found the Claimant to be somewhat *"blasé"* about the situation and that he confirmed he had not completed a report in the accident book or contacted NSF. Ms Grace-Mae immediately contacted Mr Robert Williams, the Respondent's Health and Safety Advisor, to ask for advice as to what she should do. She was advised by Mr Williams to complete the requisite Health and Safety forms, repair the coffee machine and provide support to the Bartender, including reimbursing her for any shifts that she might have missed due to the injury. She was further advised by Mr Williams that the failure to comply with the Respondent's Health and Safety Policy was a potential disciplinary issue. Ms Grace-Mae then contacted Mr Field to let him know what had happened and for guidance as to whether or not she should commence a disciplinary process. Mr Field endorsed Mr Williams advice.

71. In a follow up email to the Claimant timed at 13:28 on 22 October 2019, Ms Grace-Mae wrote,

> *"An accident report needs to be filled in and completed on NSF by the end of the day.*
>
> *This needs to be confirmed as completed to me and Rob Williams by the end of the day today.*
>
> *Following that, please make sure that statements are taken from the Manager on duty as well as the employee to determine what caused the accident.*
>
> *Please also confirm that risk assessments and staff paperwork have been completed."*

72. She went on to emphasise that it was urgent that these matters be attended to, due to the previous delay in notifying anyone of the accident. In our judgement these were entirely appropriate instructions for Ms Grace-Mae to issue to the Claimant in the circumstances, and it was equally understandable that she emphasised the urgency of the situation to him.

73. In his witness statement, the Claimant states that he was not aware there was a leak on the coffee machine that the Bar Tender had been using when she burned herself. It seems to us that the issue is not whether he was aware that the machine was defective, rather that in circumstances where he was aware a member of staff had been burned using the coffee machine and he considered the situation sufficiently serious that he offered to take the Bartender to hospital, he seems not to have taken any steps to ascertain the condition of the machine or to report the matter to anyone in the organisation so that the machine might be checked for any defects. In our judgement this was a serious dereliction of his

responsibilities. We regard Ms Grace-Mae's response to the situation to be entirely appropriate and proportionate.

74. Likewise, we can find no grounds to criticise the Respondent for inviting the Claimant to attend a disciplinary Hearing to discuss the incident. The invitation to the Disciplinary Meeting is at pages 178 and 179 of the Hearing Bundle. We cannot identify anything in the invitation of concern or with which the Claimant could reasonably take issue; he was given seven days' notice of the meeting and provided with a copy of the Handbook containing the Respondent's Disciplinary Rules and Procedure; the specific concerns under consideration were identified as his failure to report an accident in the restaurant to his Line Manager and his failure to report the accident on NSF; he was warned, as is prudent in such circumstances, that one outcome was that he could be issued with a Final Written Warning or even dismissed from his employment (not because that would have been the outcome, rather as an indication of the potential seriousness of the situation); and he was reminded in the letter of his right to be accompanied and informed that he would be provided with copies of any documents to be used at the meeting at least 48 hours before the meeting. In our judgement, the email was in accordance with the Acas Code of Conduct on Disciplinary Hearings.

75. Approximately four hours later, the Claimant resigned his employment with immediate effect, citing what he referred to as Ms Grace-Mae's *"uncorrectness and unfairness".*

76. This prompted Ms Grace-Mae's response, already referred to, in which she implored him to reconsider his decision. Given the opportunity, not only did the Claimant not clarify what he was referring to when he complained of Ms Grace-Mae's *"uncorrectness and unfairness"*, but instead he went on to write a further email to her at 23:04,

> *"I don't think you understood why I am resigning myself. It is not because of this incident"*

77. We have referred already to the Claimant's formal letter of resignation sent on 13 November 2019, with the benefit of professional advice. In that letter of resignation, the Claimant cites the events of November 2018 as the primary reason behind his resignation, as well lost opportunities for promotion, pay rise and stifled career development in the period to October 2019. These latter issues are not referred to in the List of Issues save in so far as the stifled career development referred to may allude to the extended probation period.

78. His letter concluded,

> *"The final breach arose in the way my shambolic disciplinary hearing was managed on 22 October 2019."*

The letter does not further identify what was allegedly shambolic about the events of 22 October 2019, nor does it explain what he meant when he said at 23:04 on 22 October 2019 that he was not resigning because of the incident. The Addendum to the Claimant's claim form provides no further clarity on the matter. Paragraph 44 of the Addendum refers to the fact that the Claimant was invited to attend a Disciplinary Meeting on 22 October 2019. He does not refer to this as incorrect, unfair, or having been managed in a shambolic manner. He addresses the issue in cursory terms in his witness statement, simply referring to having been invited to attend the Disciplinary Meeting with dismissal identified as a possible outcome.

79. In paragraph 65 of his witness statement, the Claimant states,

> *"At that point I responded with my immediate resignation, I was pushed and put at a disadvantage and set up to fail numerous times until 22 October 2019 I was forced to quit. Ref. statement Maria Teresa Insegno."*

Law and Conclusions

The wrongful dismissal and section 98 and 103A complaints

80. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996).

81. An employee who is dismissed by reason that they made a protected disclosure is to be regarded as unfairly dismissed (section 103A of ERA). In other words, their dismissal is automatically unfair. There is no qualifying period of service to bring such a claim.

82. 'Dismissal' includes "where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct" (section 95(1)(c) of the Employment Rights Act 1996).

83. The Claimant claims that he resigned by reason the Respondent's conduct. We have regard to the Respondent's conduct up to and including 22 October 2019. The Claimant must have relied upon the conduct in resigning his employment, and it is relevant in this regard therefore what he knew at the time of his resignation.

84. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach (or matters collectively complained of) must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then, the employee must actually resign in response to the breach and not delay unduly in relying upon the breach as bringing the employment relationship to an end.

85. It is an implied term of all contracts that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to damage or destroy the essential trust and confidence of the employment relationship.

86. Under the "last straw" doctrine, an employee can resign in response to a series of breaches or conduct that cumulatively amounts to a breach of trust and confidence – Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. The final incident relied upon by an employee, the so-called "last straw", need not be of the same character as the earlier matters complained of and, indeed, may be relatively insubstantial. The "last straw" may resurrect earlier breaches of contract that have otherwise been waived by the employee. The question is whether, viewed objectively, the employer has demonstrated that they no longer intend to be bound by their obligations as an employer. The final straw must contribute something to the cumulative breach, even if what it adds is relatively insignificant, though it must not be trivial or innocuous. A Tribunal will fall into error if it assumes that because an employer acted reasonably in the matter, its actions should therefore be regarded as innocuous – Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19.

87. In our judgement, Mr Capdevila's comments to the Claimant on 22 November 2018 in reaction to his protected disclosure, together with Mr Capdevila's and Mr Sousa's actions in issuing the Claimant with two Formal Job Chats on 8 February 2019 were in breach of the implied duty of trust and confidence. They acted without reasonable and proper cause. Mr Field's handling of the Grievance, had the facts been known to the Claimant at the time, might also have been relied upon by the Claimant as a further breach of trust and confidence. However, up to and beyond his resignation the Claimant only knew that Mr Field had not arranged for a note-keeper to attend the meeting and had not sent him a copy of his notes of the meeting. Such matters, of themselves, do not amount to a repudiatory breach of contract on the part of the Respondent, though we consider they could have amounted to a "last straw" event had the Claimant resigned his employment at that time (and we also consider them to amount to detriments for the purposes of section 47B of ERA). However, and putting aside whether the Claimant in fact resigned in response to how the Grievance was handled, including its outcome, we are satisfied that the Claimant waived any existing breaches of contract when he accepted a transfer to the Cambridgeshire / Midlands Area in March 2019 by way of the resolution to his Grievance. We are satisfied that he resolved to draw a line under these matters and move on. Even if it was a decision he later came to regret, as he indicated was the case when he wrote on 22 October 2019, *"I will be taking legal action like I should have from the beginning…",* his comments following the Summer Road Show evidence beyond doubt that he regarded these events as firmly behind him, had affirmed the employment relationship and was not seeking to reserve his rights.

88. Given our findings above, the only matters after March 2019 about which the Claimant might make complaint (and about which he was aware when he resigned his employment) are the extension to his probation period as Acting General Manager in September 2019 and the invitation on 22 October 2019 to attend a disciplinary hearing. Each would have been an unwelcome development, but as regards the extension to his probation period as Acting General Manager this was something the Claimant understood and agreed to (alternatively, he reaffirmed the relationship and waived any potential breach, including any "last straw" by working on without protest when he transferred back to the Cambridge restaurant at the beginning of September 2019), and in the case of the disciplinary invitation it was innocuous. In our judgment, the Respondent did not act without reasonable and proper cause in either situation and its actions were not destructive of or seriously damaging to the relationship of trust and confidence. Furthermore, in our judgment, these matters contributed nothing further to the breaches in late 2018 / early 2019 such that they could be relied upon as "last straw" events. In the circumstances, in our judgement, the Claimant was not dismissed by the Respondent and his claim to his notice pay and complaints under sections 98 and 103A of ERA therefore fail.

The section 47B complaint

89. A worker has the right not to be subjected to detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure (section 47B of ERA).

90. The parties are agreed that the Claimant can rely on the detriments listed in the List of Issues without falling foul of s47B(2) ERA, notwithstanding the detriments are also relied upon by him as entitling him to resign his employment and claim constructive dismissal. We are grateful to Mr Martins and Ms Meehan for their further written submissions on this issue.

91. As set out in our findings above, the Claimant was subjected to detriments on 22 November 2018 and 8 February 2019. Even if he was unaware of the various failings in relation to the Grievance, these too amount to detriments. The extension to the Claimant's probation period in August/September 2019 and the commencement of a disciplinary process in relation to him on 22 October 2019 were also detriments.

92. The question of whether or not a detriment was on the ground of a protected disclosure arose in NHS Manchester v Fecitt & Others [2011] EWCA Civ 1190. The Court of Appeal said that liability arises if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. It is a lower threshold test than in dismissal cases. The Court of Appeal observed that:

93. "The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because

of the protected characteristic and it cries out for an explanation from the employer"

94. Tribunals are concerned with the reasons why the Employer acted as it did. Under section 48(2) of the ERA 96 the burden of proof is upon the employer to show the ground on which any act, or deliberate failure to act, was done.

95. The Respondent has failed to discharge the burden upon it in relation to Mr Sousa's and Mr Capdevila's actions. Indeed, it is clear to this Tribunal that Mr Capdevila's comments to the Claimant on 22 November 2018 were a direct immediate reaction to the disclosure. In the case of the Job Chats, these cry out for an explanation. Whilst there is at least some explanation for the Respondent taking action in relation to the Claimant's failure to attend the restaurant on time for the client event, there is no explanation for the way in which the matter was handled, including why the Respondent dispensed with the essential safeguards in its own documented Policy and Procedure. In our judgment, Mr Sousa's and Mr Capdevila's heavy-handed approach, including issuing what amounted to formal warnings without first following any recognised process, was materially influenced by the Claimant's actions the previous year which, in our judgment, they believed had challenged their authority and undermined them in the eyes of the Respondent's senior leadership.

96. As regards the Grievance process, the various failings are identified in our detailed findings above. However, in our judgment, they reflect Mr Field's overly informal, even casual, approach to the task. His focus was on achieving a resolution, at the expense of following due process. It was not a robust process, indeed Mr Field could be accused of cutting corners and presiding over a poorly executed process even if the outcome was one the Claimant was happy with. Ultimately, however, we are satisfied that Mr Field's approach, the fact that corners were cut, was not influenced in any sense by the fact that the Claimant was a whistleblower. Mr Field possibly did not have the time or natural inclination for a detailed investigation, but in our judgment his outcomes-based approach was not influenced in any way by the fact the Claimant was a whistleblower.

97. In our judgement, in extending the Claimant's probation period in August/September 2019 and commencing a disciplinary process in relation to him on 22 October 2019, Ms Grace-Mae was not influenced in any way in her actions by the fact that the Claimant was a whistleblower, nor was Mr Field in his advice to her. The Claimant's probation period was extended solely because he had initially struggled in the role of Acting General Manager and got off to an uncertain start. Disciplinary proceedings were commenced on 22 October 2019 solely because there were important and pressing concerns for him to address in relation to his handling of the scalding incident.

Time Limitation

98. An Employment Tribunal shall not consider a complaint under section 48 of ERA unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them. However, where satisfied that it was not reasonably practicable for the complaint to be presented within such period, the Tribunal may permit the claim to be pursued within such further period as the tribunal considers reasonable (section 48(3) of ERA). In our judgment, Mr Capdevila's actions extended over a period, so that 8 February 2019 is to be regarded as the last day of that period and, accordingly, the date from which time runs.

99. The Claimant has the burden of establishing, on the balance of probabilities, that it was not reasonably practicable for the complaint to be presented in time, and he has failed to discharge that burden. He has not put forward any evidence on the issue, including why it was not reasonably practicable for him to notify his potential claims to Acas by 7 May 2019. He does not say when he first took advice or when and how he first came to understand that he might have legal redress in respect of his claimed disclosures, including whether, and if so when, he had discussed the matter with his parents. He told the Tribunal that his letter of 13 November 2019 was written with professional advice. Even if he had put forward a case that it was not reasonably practicable to present a claim until he was in receipt of professional advice, there is no explanation as to why he failed to notify his claims to Acas for a further period of six weeks and, even then, from at the latest 13 November 2019 delayed a further 10 weeks before presenting a claim to the Tribunals. Even if he was in complete ignorance of his legal rights until November 2019 (a case he has not advanced), once advised of his rights he might reasonably have presented a claim to the Tribunals that same month. In these circumstances, the Tribunal has no further jurisdiction to consider the complaint and it shall be dismissed on that basis.

_____

Employment Judge Tynan

Date: 19 November 2021

Sent to the parties on: 29/11/2021

For the Tribunal Office