EMPLOYMENT TRIBUNALS

Claimant: Fabio Serci

Respondent: Padstow Harbour Hotel Limited

Heard at: Bristol On: 21, 22, 23 and 24 March 2022 (by Cloud Video Platform):

Before: Employment Judge Halliday
Ms Hewitt-Gray,
Ms Clarke

Representation:
Claimant: In person
Respondent: Mr Wheaton, Counsel

JUDGMENT having been sent to the parties on 08 April 2022 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

Introduction

1. The claimant, Mr Serci, was employed by the respondent from 9 September 2019 until his dismissal on 4 August 2020. In this case he claims that he has been automatically unfairly dismissed under section 100 and section 103A of the Employment Rights Act 1996 (ERA) because he made protected disclosures pursuant to section 43B of the ERA and also section 100 disclosures concerning health and safety issues and that he was discriminated against because of a protected characteristic, namely his Italian national origin. The claim is for direct discrimination.

2. The respondent contends that the reason for the dismissal was gross misconduct, that the claimant does not have two years' service so is unable to bring an unfair dismissal claim and that there was no discrimination.

Claims, Issues and Proceedings to Date

3. In his claim form presented on 21 December 2020, the claimant brought claims for race discrimination, arrears of pay, other payments and automatic unfair dismissal.

4. A case management hearing was held on 16 September 2021 before Reginal Judge Pirani and the issues were agreed and set out in an Order made on 16 September 2021 and sent to the parties on 1 October 2021. The claimant's only outstanding money claim at that time was clarified as being for outstanding overtime payments.

5. At the start of this hearing the claimant confirmed that his claim for outstanding overtime payments had also been resolved so the claims before the Tribunal were for:

   5.1. race discrimination by reason of his Italian nationality arising out of two incidents:

      5.1.1. failure to appoint him to the position of Maintenance Assistant in September/October 2019;

      5.1.2. failure to appoint him to the position of Assistant Restaurant Manager in July/August 2020.

   5.2. automatic unfair dismissal following disclosures made by him at a meeting with the General and restaurant managers on 3 August 2020 in relation to:

      5.2.1. health and safety concerns that staff were missing 11 hours rest between shifts;

      5.2.2. health and safety concerns for mental health as the bar manager only had one day off;

      5.2.3. seeking an explanation why the bar manager had to work instead of the claimant covering her shift.

6. The remaining issues to be decided as set out in the case management Order were therefore:

   Time Limits

   6.1. Were any of the claimant's complaints presented outside the primary time limit?

   6.2. Do any of the matters about which the claimant complains constitute conduct extending over a period of time for the purpose of s 123 of the Equality Act 2010 ("EQA")?

   6.3. If any complaint was not submitted in time, was it submitted within such other period as the Tribunal thinks just and equitable?

   Direct race/nationality discrimination (EQA, section 13)

   6.4. The claimant describes himself as Italian.

   6.5. Did the respondent do the following things:

   6.6. fail to appoint him as maintenance assistant in October 2019;

   6.7. fail to offer him the job of supervisor in July 2020.

   6.8. Was that less favourable treatment? The claimant says he was treated less favourably than Sophie Fowler.

   6.9. If so, was it because of race/nationality?

   Protected disclosure ("whistle-blowing")

6.10. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant says he made disclosures on 3 August 2020 at a meeting with the hotel and restaurant managers:

6.10.1. health and safety concerns that staff were missing 11 hours rest between days;

6.10.2. health and safety concerns for mental health as the bar manager had only one day off;

6.10.3. seeking an explanation why the bar manager had to work instead of him covering her shift.

6.11. Were the disclosures of "information"?

6.12. Did he believe the disclosure of information was made in the public interest?

6.13. Was that belief reasonable?

6.14. Did he believe it tended to show that:

6.14.1. a person had failed or was likely to fail to comply with any legal obligation;

6.14.2. the health or safety of any individual had been, was being, or was likely to be endangered;

6.15. Was that belief reasonable?

6.16. If the claimant made a qualifying disclosure, was it a protected disclosure because it was made to the claimant's employer?

Automatic Dismissal (Employment Rights Act 1996 sections 100 and 103A)

6.17. Was the making of any proven protected disclosure(s) the principal reason for the claimant's dismissal?

6.18. Or, was the principal reason for dismissal the fact that in August 2020 he brought to the employer's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Preliminary matters

7. This has been a remote hearing which has been consented to by the parties. A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing. The hearing was originally by Video Hearing Service but following connectivity issues on the part of counsel for the respondent and two witnesses, the hearing was converted to a hearing on Cloud Video Platform

8. At the start of the hearing, it was agreed that additional disclosure provided by the claimant could be included in the bundle and the bundle size was increased to 290 pages. The documents referred to in the hearing are in the indexed bundle of 278 pages and the additional 11 pages of disclosure.

9. The Tribunal heard from the claimant, and from Ms Fowler on the claimant's behalf. For the respondent we have heard from Mr Tuffin, Maintenance Manager, Mr Reburn General Manager and Ms Roach, formerly Hotel Manager of the Guildford Harbour Hotel. To the extent that the witness statements exceeded the ordered wordcount, the wordcount was increased.

10. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have found the following relevant facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

11. The claimant is Italian and was employed by the respondent as a waiter at the Padstow Harbour Hotel from 9 September 2019 under the terms of a contract dated 8 September 2019.The Hotel has 58 guest rooms and employs 55-60 staff with up to 22 staff working in the food and beverage team. There are two associated hotels, St Ives Hotel and Fowey Harbour Hotel.

12. At the time he was employed, the claimant's manager was Mr Tocci and the assistant manager was Mr Chris Jordan.

Maintenance Assistant Role

13. On 17 September 2019, the claimant applied for the role of Maintenance Assistant. We heard evidence from both Mr Tuffin and the claimant that the claimant attended a "walk and talk" interview with Mr Tuffin but that subsequently another candidate was appointed to the position. We accept Mr Tuffin's evidence that the reason that the claimant's application was not proceeded with is that Mr Stanford, who is identified as a General Manager, wished to retain the claimant in the role of waiter and it was not related to the fact that the claimant was Italian.

14. The claimant identified in November 2019 that he believed he was more qualified than the appointed candidate and that his national origin had played an important role in the hiring process but took no further action.

Promotion to Restaurant Supervisor

15. The claimant applied for the role of Restaurant Supervisor on 13 January 2020 and was appointed to this position on 4 February 2020. We accept Mr Reburn's evidence that the general (although not invariable) process is for posts to be advertised internally and externally.

16. On 24 March 2020 the Hotel shut due to the pandemic and re-opened on the 4 July 2020. The claimant was furloughed during this time and remained in accommodation provided by the respondent. We note that there were various issues with the claimant's pay including payment of the increased hourly rate following his promotion and payment of overtime, but these pay issues have now been resolved between the parties.

July 2020 and Assistant Manager Role

17. When the hotel opened on 4 July 2020, the claimant and a colleague, Ms Fowler, were both still employed as restaurant supervisors. Mr Jordan who had previously left the respondent's employment had been re-employed as Restaurant Manager and Mr Reburn had been employed as the General Manager.

18. We were referred to a number of rotas which the claimant says demonstrates the long hours worked by Ms Fowler following the hotel re-opening and we accept that as is common in the hospitality sector, split shifts were worked, and hours were long. We are also mindful of the fact that these events occurred in the first month after lock-down was lifted when consumer demand was high and the respondent had to re-open in line with Government constraints.

19. We conclude that there were various discussions about how to organise the restaurant service and staff and accept Ms Fowler's evidence that there were discussions with her about a possible role change, and her career progression. We note that in relation to the Assistant Manager role, she referred in her evidence to the fact that this "role would be on the cards in

the future". We do not find that Ms Fowler was in fact offered this role or that it was advertised or existed before 29 July 2020.

20. The claimant met with Mr Reburn on 22 July 2020 and was offered the role of Restaurant Floor Manager. This role had not been advertised.

21. A meeting was held on 29 July 2020 between the claimant, Ms Fowler and Mr Jordan during which the claimant offered to cover Ms Fowler's following Tuesday shift as she had to work over 60 hours that week in order that she could have two days off in a row rather than one full day and one-half day. The claimant says and we accept that it was on the same day, at a separate meeting, that having expressed her preference for a Bar role, Ms Fowler was offered the role of Bar Supervisor and the claimant accepted the role of Restaurant Floor Manager, with an increase in the hourly rate of pay from £9.50 to £9.60.

22. We also accept Mr Reburn's evidence that a separate position of Breakfast Manager was advertised on or around that time and that a strong candidate, Paul Fox, applied for this position and undertook a trial shift. We further find that due to Mr Fox's perceived strengths, a decision was taken to advertise a position of Assistant Restaurant Manager with the express intention of appointing Mr Paul Fox to this role. This advert was placed on 29 July 2020. It was apparent from Mr Reburn's evidence that there was no expectation that anyone other than Mr Fox would be appointed to this role. Mr Fox subsequently started in the role of Assistant Restaurant Manager on 7 August 2020 as evidenced by his contract of employment.

23. Mr Reburn' stated in cross-examination and we accept that he genuinely found that the claimant was "difficult to manage", "unduly challenging" and that although "on better days he had the capability" this was "just not managed well" and that Mr Reburn believed that "to run a restaurant was beyond his capability".

24. We do not find that the reason that the claimant was not appointed to this role was in any way connected with his Italian nationality, rather it was because the respondent had identified a better candidate for the role.

August 2020

25. On 1 August 2020 the claimant was working in his new role as Restaurant Floor Manager. When he arrived for his evening shift, he found that the shift had already been organised without consulting with him. The claimant says and we accept, that he was unhappy with this and that he spoke to Mr Jordan about the situation on the 2 August 2020. He was told by Mr Jordan that Mr Reburn might want to talk to him. The claimant was also told by Mr Jordan on 2 August 2020 that he would not be allowed to cover Ms Fowler's shift on the following Tuesday as had previously been agreed and we accept Mr Reburn's explanation that this was due to concern about the claimant's behaviour on the previous day. The claimant was unhappy with this decision, and he then told Mr Jordan that he intended to speak to Mr Reburn.

26. We accept Mr Reburn's evidence that on 2 August 2020 Mr Jordan then informed him that the claimant wished to meet with him. but that Mr Reburn was not provided with an explanation of why.

27. On 3 August 2020 the claimant worked a split shift. When he left the hotel at 12.00 pm, the claimant asked Mr Reburn if he wished to speak to him. Mr Reburn confirmed he did not. The claimant did not raise any of his concerns with Mr Reburn at this point. That afternoon, the claimant texted Ms Fowler about the Restaurant Assistant Manager position seeking to establish if she had been offered it. We do not accept Mr Wheaton's submissions that these texts were sent in June 2020.

28. The claimant clocked in for his evening shift at 4.52 pm. He was briefed about the shift but then he asked to leave as he felt unwell and he knew there were enough staff on shift for the number of covers. The claimant explained to Mr Jordan that it was not COVID but that it might have been linked to a medical condition he had. Mr Jordan informed Mr Reburn that the claimant appeared "wasted". The claimant referred in his evidence to Mr Jordan saying that there was "an issue" and to the fact that the claimant then said, "that in [his] opinion we had more than

one issue and that [he] needed to talk to Mr Reburn" We find that the claimant intended to talk to Mr Reburn about both the Assistant Manager role and his concerns about the rota and in particular about Mr Jordan's refusal to allow him to cover Ms Fowler's shift.

29. The evidence about the exact sequence of the meeting attended by the claimant, Mr Jordan and Mr Reburn in the function room on 3 August 2020 was somewhat contradictory. Having reviewed the witness evidence of Mr Reburn and the claimant and the contemporaneous notes of the conversation prepared by Mr Reburn, we conclude that Mr Jordan and Mr Reburn initially arrived in the meeting room together. Mr Jordan then went to find the claimant and there was some conversation between Mr Jordan and the claimant that Mr Reburn was not a party to prior to all three being in the meeting room together.

30. We find that the claimant did intend to speak to Mr Reburn about both his concern with the rota and specifically about the hours worked by Ms Fowler and the fact that he had not been allowed to cover Ms Fowler's shift on the following Tuesday but that he was agitated from the commencement of the meeting, and note that he may have been unwell or alternatively was otherwise not fit to work, and we find that his concerns were not clearly articulated. We do not accept that he specifically raised the issue of an 11 hour break between shifts, referred to a duty of care, or referred to health and safety concerns in that conversation as he alleges.

31. We conclude that the meeting was short, lasting no more than a few minutes, and that during that time he was asked on a number of occasions by Mr Reburn to be quiet as Mr Reburn perceived that he was ranting at Mr Jordan and not in a state to have a rational conversation. Mr Reburn referred to the fact that he was "flabbergasted" and "horrified" by the claimant's behaviour and that the claimant was in "no position physically or mentally to have a conversation" and we accept that this was the case. The claimant then stood up and said he "was off" and Mr Reburn asked him if he meant he was resigning to which the claimant responded that he would when he found something else.

32. The claimant asked for the CEO's email address so he could raise a formal complaint. We find that it was as the claimant was pulling his phone out of his pocket, that a packet containing white powder fell out of his pocket and onto the floor as witnessed by Mr Reburn, and although we did not hear evidence from him, the respondent says also by Chris Jordan. The claimant picked the packet up, and the claimant then shook the packet in front of the CCTV camera and later walked out of the room with the packet. Notwithstanding his agitation, we do not find it credible that the claimant found a packet on the floor that did not belong to him and then walked out of the room with it suspecting that it may contain something untoward. We draw no conclusions about what was in the packet but accept that Mr Reburn genuinely and reasonably concluded that the packet likely contained a class A drug.

33. We find that it was following this incident that the claimant was suspended by Mr Reburn and that the claimant responded by referring to the fact that he should still be paid his wages. Mr Reburn then left the function room and returned to his office. The claimant followed him, and Mr Reburn provided him with a post-it with the requested email address for the CEO. We do not find that there was any physical contact between the claimant or Mr Reburn but we do conclude that the claimant did swear in front of guests. We accept that Mr Reburn believed he could smell alcohol on the claimant's breath. We also accept that the claimant asked Mr Reburn if he felt scared and that Mr Reburn perceived this question as threatening. The claimant then left the hotel with the packet of powder.

34. Mr Reburn made a note of the meeting and spoke to the respondent's HR advisors, Mentor who advised him to send a letter confirming the suspension. He then spoke to Ms Roach who was working in the hotel at the time but had left for the evening, to check her availability for the next day.

35. The claimant was sent a letter at 7.30 pm (UK time) on 3 August 2020 confirming that he had been suspended and detailing the allegations that he had behaved in an aggressive manner though body and verbal language, was in possession of a small clear bag containing white powder and demonstrated an act of physical aggression by waving the bag in front of the CCTV camera. The allegation of the claimant having alcohol on his breath was also noted. The letter

did not make it clear if the claimant was being invited to attend an investigatory or disciplinary meeting.

36. The claimant attended the meeting with Ms Roach on the 4 August 2020 at 11.30. Ms Kim Morgan, HR Administrator, was also in attendance. We accept that the notes are a materially accurate if not verbatim account of the meeting. The first part of the meeting was stated to be a fact-finding exercise, but it was not clear at what point the meeting moved to be a disciplinary hearing. During the hearing, the claimant made a number of challenges to the fairness of the process which, had he had two years' service, would have fallen to be considered as part of an unfair dismissal claim, however, these were not relevant to the claims before the Tribunal today. We do note however that the claimant was not provided with Mr Reburn's statement in advance of the meeting and accept that this would have made
it difficult for him to respond to the detail of the allegations raised against him although the claimant was aware of the substance of the complaints against him.

37. We find that Ms Roach was not aware of any specific concerns raised by the claimant in relation to health and safety, nor was she aware of the issues relied on by the claimant as protected disclosures. In her statement she recalls the claimant stating that he believed he was called to the meeting because he had previously notified management of some health and safety concerns but confirmed that she was not aware of this before the meeting and did not pursue this line of enquiry. The meeting notes refer only to the issue of the swapped shifts.

38. Ms Roach confirmed, and we accept, that the claimant's behaviour in the meeting with her was also in her view aggressive which gave credence in her mind to the allegations against the claimant. We find that Ms Roach dismissed the claimant for gross misconduct for the reasons set out in the dismissal letter, namely, that he had behaved in an aggressive manner through body and verbal language and that he became increasingly aggressive when he stood up to signal the end of the meeting (on 3 August 2020) and that he was in possession of a small clear bag of white powder which he waved in a physically aggressive way in front of the CCTV. The claimant drew our attention to the fact that the CCTV was not watched by Ms Roach, and Ms Roach, agreed that in retrospect she should have viewed it, but given the claimant's admission that he waved the bag in front of the camera, we do not find this to be a significant omission on this occasion.

39. We find that some inappropriate facebook messages and the allegation that the claimant had been drinking on shift were also factors taken into account by Ms Roach as set out in Ms Roach's witness statement. However, we do not find that the fact that the claimant had made (or had sought to make) a protected disclosure or had raised (or intended to raise) health and safety concerns was the principal reason for or in any way contributed to Ms Roach's decision to dismiss the claimant for gross misconduct.

40. The claimant sought to appeal against his dismissal on 9 August 2020 on a number of grounds linked to the lack of a fair procedure. He did not suggest that he had been dismissed for a reason related to the concerns he had raised in relation to Ms Fowler's working conditions, nor did he mention health and safety issues or that the reason for his dismissal was anything other than the misconduct relied on by the respondent.

41. The claimant was refused the right to appeal by Ms Roach by email dated 10 August 2020 on the basis that there was an express provision in the respondent's handbook which stated that an appeal would not apply where an employee had less than 24 months' service.

Law

42. Having established the above facts, we now apply the law. The Tribunal has considered the legislation and case law referred to below, together with any additional legal principles referred to in the parties' submissions.

Race Discrimination

43. The claimant is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent

has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination.

44. The protected characteristic relied upon is race, based on the claimant's national origin, as set out in sections 4 and of the EqA.

45. Under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

46. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

47. Counsel for the respondent has referred us to the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. We have also considered the cases of Igen Ltd and Ors v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; and Hewage v Grampian Health Board [2012] IRLR 870 SC; Ayodele v Citylink Ltd [2018] ICR 748; and Royal Mail Group Ltd v Efobi [2021] UKSC 22; We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

Time limits under the Equality Act 2010

48. The time limits for bringing a discrimination claim are set out in s123 EqA:

S123 Time Limits

(1) Subject to section 140B proceedings on a compliant within section 120 may not be brough after the end of –

a. The period of 3 month starting with the date of the act to which the complaint relates, or

b. Such other period as the employment tribunal thinks just and equitable

(2) …..

(3) For the purposes of this section

a. conduct extending over a period is to be treated as done at the end of that period

Automatic Unfair Dismissal

49. The right not to be automatically unfairly dismissed for raising health and safety concerns is set out at s100 of the ERA. The equivalent provisions for protected disclosures are set out at s103 of the ERA.

S100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities, …

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

…

103A Protected disclosure

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

Qualifying disclosure

S130. A protected disclosure is defined by s43A ERA as a 'qualifying disclosure' under s43B ERA:

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—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

Decision

Race Discrimination

50. With regard to the claim for direct race discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.

51. The claimant relies on two acts of direct race discrimination. The fact that he was not appointed to the role of Maintenance Assistant in September/October 2019 and the fact that he was not offered the role of Assistant Restaurant Manager in July/early August 2020.

52. We have found that the reason the claimant was not appointed to the role of Maintenance Assistant in 2019 was because the respondent wished to retain the claimant's services as a waiter. We have found that the reason that the claimant was not appointed to the role of Assistant Restaurant Manager was that the role was created expressly to enable Mr Paul Fox to be offered the role. We have further found that Ms Fowler was not as the claimant alleges offered the role of Assistant Restaurant Manager and we conclude that she is therefore not an appropriate comparator. We have also found that on two other occasions the claimant was promoted by the respondent firstly to Supervisor and secondly to Floor manager. In both instances where the claimant was not offered the role, the respondent's explanation has been accepted by the Tribunal and in neither case was the claimant's Italian origin a relevant factor.

53. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The decisions of Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc have been confirmed as binding authorities by the Court of Appeal in Ayodele v Citylink Ltd [2018] ICR 748 and by the Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 22.

54. In Hewage the Supreme Court said of the burden of proof provisions:

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings of fact on the evidence one way or the other"

55. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred, and the claimant's claim of direct discrimination therefore fails and is hereby dismissed.

56. Further in relation to the application for the role of Maintenance Assistant, the claimant's claim is out of time as it was not submitted within three months of the act complained of, but over a year later; was not part of a continuing act of discrimination; and the panel do not conclude that it would be just and equitable to extend the time for submitting a claim under section 123(b) EqA.

Automatic Unfair Dismissal

57. In relation to the claim for automatic unfair dismissal, we have found that the claimant was agitated and that his concerns were not clearly articulated during the meeting on 3 August 2020 with Mr Reburn. Specifically, we do not find that the claimant raised the issue of an 11 hour break between shifts, referred to a duty of care, or referred to health and safety concerns as he alleges in that meeting.

58. We therefore conclude that the claimant did not make a protected disclosure in accordance with section 43B ERA, nor did he raise a health and safety concern in accordance with section 100 ERA at the meeting on 3 August 2020.

59. Although not raised in the list of issues or expressly relied on by the claimant, for completeness we also conclude that that the claimant did not make a protected disclosure or raise health and safety concerns in accordance with section 100 ERA in the meeting with Ms Roach on 4 August 2020.

60. We have further concluded that Ms Roach dismissed the claimant for gross misconduct due to his behaviour in the meeting on 3 August 2020 in acting in an aggressive manner and being in possession of a bag of white powder which he waved in front of a camera in an aggressive manner.. Therefore, even if we are wrong and the claimant's comments did constitute a protected disclosure or raised health and safety concerns, we are satisfied that the principal reason for the claimant's dismissal was neither the fact that he had made such protected disclosure(s) nor that he brought to his employer's attention by reasonable means circumstances which he reasonably believed were harmful or potentially harmful to health or safety, but rather we conclude that the claimant was dismissed due to his conduct.

61. The claimant's claim for automatic unfair dismissal therefore fails and is dismissed.

62. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 6; the findings of fact made in relation to those issues are at paragraphs 11 to 41; a concise identification of the relevant law is at paragraphs 42 to 49; and how that law has been applied to those findings in order to decide the issues is at paragraphs 50 to 61.

Employment Judge Halliday
Date 9th July 2022

Case No: 1406618/2020

REASONS SENT TO THE PARTIES ON
18 July 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE