EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Kumi	**v**	**Nando's Chickenland Ltd**

Heard at: London Central (by video)

On: 13 and 14 September 2022

Before: Employment Judge P Klimov
Tribunal Member Ms S Aslett
Tribunal Member Ms J Holgate

Representation:

For the Claimant: in person

For the Respondent: Mr S Proffitt (of Counsel)

JUDGMENT having sent to the parties on 14 September 2021 and written reasons having been requested by the Respondent at the end of the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form dated 29 November 2021 the Claimant brought complaints of sex discrimination and "whistleblowing" detriments. He did not include any particulars of his complaints in the ET1. The Claimant's complaints were clarified at the case management hearing on 24 March 2022. At the same hearing a list of issues has been prepared and agreed (pp 31 – 34 of the hearing bundle).

2. On 11 April 2022, the Claimant sought to add to the list of issues a complaint of automatically unfair dismissal under s.103A of the Employment Rights Act 1996 ("**the ERA**"), which was resisted by the Respondent. However, at the start of the final hearing the Claimant confirmed that his "whistleblowing" complaint was only with respect to the alleged detriments (s.47B ERA), and he was not seeking to amend his claim to include a complaint for automatically unfair dismissal under s.103A ERA.

3. In the course of the hearing the Claimant said that he was withdrawing his complaint about the alleged detriment 2.1.2 on the List of Issues – that is with respect to the alleged masturbating hand gesture by Gianfranco and Francesco on 30 August 2021.

4. The Respondent denies all the claims.

5. At the hearing, the Claimant represented himself and Mr Proffitt appeared for the Respondent. The Tribunal was referred to various documents in the 177-page bundle of documents the parties introduced in evidence. During the hearing the Claimant introduced an additional document of 3 pages – a handwritten note of his meeting with Ms Luvandu and Mr Chow on 31 August 2021, which was accepted by the Tribunal in evidence.

6. There were three witnesses: the Claimant, and Mr J Chow (the General Manager of the Respondent's Soho restaurant) and Ms V Luvandu (the then Assistant Manager in the Respondent's Soho restaurant) for the Respondent.

7. The Respondent also presented a witness statement of Mr G Dagnino. Unfortunately, due to a family bereavement Mr Dagnino was unable to attend the hearing. The Respondent requested that his witness statement was accepted by the Tribunal as evidence in chief, however recognising that because Mr Dagnino was not present to be cross-examined, the Tribunal should give such weight to his evidence as it finds appropriate. The Tribunal accepted Mr Dagnino's witness statement on that basis.

Findings of Fact

8. The Claimant worked as a night cleaner at the Respondent's Soho restaurant. He started his work on 18 August 2021. He went off sick on 31 August 2021 and resigned on 28 September 2021 without returning to work. The Claimant worked for the Respondent for approximately 9 shifts.

9. During his shifts the Claimant was covertly recording on his telephone conversations with his work colleagues for the purposes of gathering evidence which he could then use to make a claim against the Respondent and to negotiate a financial settlement.

10. The Claimant's work standards and work ethics were poor. His managers started to receive complaints about the Claimant, which caused Ms Luvandu, on or around 25 August 2021, to have an informal conversation with the Claimant about his performance. During that conversation the Claimant said that he did not know how to complete certain tasks, and Ms Luvandu agreed to arrange additional training for the Claimant, in addition to the standard 5 days of training.

11. On 25 August 2021, after the end of his shift, the Claimant stayed longer and behaved towards Ms Luvandu in a way that made her feel very uncomfortable and vulnerable. On the same day she raised the issue with Mr Chow, and on 14 September 2021 made a formal complaint of sexual harassment against the Claimant.

12. On 29 August 2021, the Claimant witnessed an incident at the kitchen where a member of staff accidently dropped a burger on the floor, picked it up, cooked and served to a customer ("**the burger incident**").

13. On 30 August 2021, the Claimant sent a WhatsApp message to the Respondent's Soho restaurant staff's WhatsApp group describing the burger incident and stating that he was not happy with this and because of such behaviour he did not want his food to be prepared for him before he arrived at the restaurant.

14. The Respondent investigated the burger incident and issued the responsible member of staff with a final written warning.

15. On 31 August 2021, the Claimant approached Mr Dagnino and told him about the burger incident. He then asked Mr Dagnino whether earlier when Mr Dagnino was going home Mr Dagnino said to the Claimant "*see you later, love*", to which Mr Dagnino replied that he did. The Claimant then asked Mr Dagnino whether he was joking, to which Mr Dagnino replied "*Yeah, of course*" and "*I say love to everyone*". The Claimant said "*Ok*". The Claimant covertly audio recorded that conversation.

16. In the morning of 31 August 2021, after the Claimant's night shift, the Claimant had a meeting with Ms Luvandu and Mr Chow. The meeting was arranged to discuss the Claimant's performance, which had not improved following the informal conversation on or around 25 August 2021. The Claimant covertly audio recoded the meeting on his phone.

17. The Claimant blamed his poor performance on the lack of training given to him. The Claimant also raised the burger incident. Mr Chow assured the Claimant that the burger incident would be investigated, and appropriate actions would be taken.

18. The Claimant then raised issues of Mr Dagnino saying "*we know what you did*" and Gionmarco and Francesco making a masturbating gesture to the Claimant.

19. When questioned by Mr Dagnino about the masturbating gesture incident on 30 August 2021, the Claimant gave contradictory and conflicting account and accused Mr Dagnino of not getting his facts right. The masturbating gesture allegations were investigated by Ms Luvandu, including by speaking with Gionmarco, Francesco and Mr Dagnino and reviewing the CCTV footage. She found that it did not happen.

20. At the end of the meeting, Ms Luvandu asked the Claimant to review and sign the handwritten notes of the meeting, which he refused to do. She allowed him to take pictures of the notes and come back with any comments and corrections, which he did later that day via a WhatsApp message.

21. At the end of the meeting, the Claimant said that during the last shift he had been given too much work on purpose and was not able to have a break. Ms Luvandu acknowledged his concern. She later investigated the matter and found that the Claimant had been given the opportunity to have a break, which he had declined, and that the Claimant had finished his shift earlier without completing all the tasks.

22. During the meeting, which lasted approximately 40 minutes, there were following exchanges with Mr Chow in which he referred to the Claimant as "my dear" and "darling":

> *"Claimant: It is who does them that is the problem. The time isn't really a concern. It is the allocation of those task but George changed it and that is what messed it up today. Today, we didn't have a break.*
> *Yesterday the one that I suggested that he said that he does downstairs and I do all the machines and everything that worked and we had an hour break.*
>
> *Jamie: But he is extra my dear"*
>
> […]
>
> "*Claimant: So once you match him up with the right person, job is done. With him and Christian, the job was getting done.*
>
> *Claimant: So we will see how it goes. I mean if you are not happy with me yeah then by all means you can ask me to leave.*
>
> *Jamie: Darling. I am telling you, I have raised my concern and you have raised your concern so let's complete your training and see what you can do and if this is the job for you great and if it doesn't it doesn't.*"

23. In the evening of the same day, when the Claimant arrived for his night shift, Ms Luvandu had a meeting with all the cleaners on that shift. The meeting was about the quality of cleaning. When other cleaners left the meeting, the Claimant sat on the sofa next to Ms Luvandu. Mr Luvandu felt uncomfortable being alone with the Claimant. The Claimant kept questioning Ms Luvandu about various aspects of

the tasks he was meant to do, which she had explained to him several times. Ms Luvandu felt that the Claimant was being difficult on purpose, deviating from the subject and trying to avoid taking accountability for the task he was required to do. She said that she thought that the Claimant was very "slithery". The Claimant covertly audio recorded that conversation.

24. At 20:04, Ms Luvandu sent a WhatsApp message to all night shift cleaners, including the Claimant, reminding them of the conversation and what they were expected to do during their shift.

25. At 21:03, the Claimant sent a WhatsApp message stating that the handwritten notes from the morning meeting were inaccurate, that he felt that he was being ostracised for raising the health and safety concerns, and that he was taking the next 3 days off to control his diabetes, which he claimed was affected by "detriments".

26. On 5 September 2021, the Claimant sent to Ms Luvandu a lengthy complaint in which he listed his grievances and stated that he had raised "*a protective(sic) disclosure*", suffered "*a detriment*", which was unlawful. He concluded his complaint with the following demand: "*[a]s an outcome for this serious issue, I am seeking £20,000 in compensation from Nandos as at now to draw a line in the sand under this issue*".

27. On 15 September 2021, the Respondent acknowledged the Claimant's grievance and told him that a meeting would be arranged to discuss it. The Claimant responded on the same day saying that there was no need to hear his grievance because it was in writing and that he was not willing to meet another manager and was seeking legal advice.

28. Ms Luvandu investigated the complaints raised by the Claimant in his grievance and found them unsubstantiated.

29. On 24 September 2021, the Respondent invited the Claimant to a grievance meeting on 1 October 2021 to be chaired by Mr N Savage, the Respondent's Regional Managing Director.

30. The Claimant replied on 29 September 2021 stating that he was unwilling to attend the meeting because it was going to stress him out and push his blood pressure up, which would adversely affect his diabetic condition. Instead, he asked for an email communication and repeated his demand for "*£20,000 (negotiable) in settlement to draw a line in the sand under the grievance raised*".

31. On 30 September 2021, Mr Savage replied to the Claimant acknowledging the Claimant's health concerns but reiterating the importance of having his grievance fully investigated and discussed. He reminded the Claimant that he was entitled

to be accompanied at the meeting and suggested reasonable adjustments should the Claimant felt uncomfortable during the meeting.

32. On 28 September 2021, the Claimant resigned by email to Mr Chow and Mr Savage. Mr Savage acknowledged the Claimant's resignation by an email of 1 October 2021. In that email Mr Savage noted that the Claimant had not attended the grievance meeting scheduled for that day and asked the Claimant to confirm by 5 October 2021 whether he wished to have the meeting re-arranged, failing which the Respondent would assume that the Claimant had decided to withdraw his grievance. The Claimant did not reply.

33. The Claimant's commenced ACAS early conciliation on 16 September 2021 and received the EC certificate on 18 October 2021. He issued these proceedings on 29 November 2021.

The Law

Harassment related to sex/sexual harassment

34. Unlawful harassment is provided for under section 26 the Equality Act 2010 ("**the EqA**"), the relevant parts of which are:

> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) A also harasses B if—*
>
> *(a) A engages in unwanted conduct of a sexual nature, and*
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b).*
>
> […]
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect*."

35. The Equality and Human Rights Commission's Code of Practice on Employment ("**the EHRC Employment Code"**) at paragraph 7.9 states that '*related to*' should be given a broad meaning '*a connection with the protected characteristic*'.

36. When considering unlawful harassment, the context must be considered. Mere mention of a protected characteristic may not be enough, because it must still be shown that that characteristic was the ground or reason for the treatment to which objection is taken. In the EAT case of *Warby v Wunda Group PLC* UKEAT/0434/11 Langstaff J stated that paragraph 23:

> "*we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context; the context here was that the dispute and discussion was about lying. The conduct complained of, as the Tribunal saw it, was a complaint emphatically made about lying; it was not made to the Claimant because of her sex, it was not made to the Claimant because she was pregnant, and it was not made to the Claimant because she had had a miscarriage. In the words of* ***Ahmed*** *at paragraph 37, as earlier quoted:*
>
> *"The fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of a sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.*"

37. The word '*unwanted*' is essentially the same as '*unwelcome*' or '*uninvited*' (see *Reed and anor v Stedman* 1999 IRLR 299, EAT and para 7.8 of the EHRC Employment Code).

38. The EHRC Employment Code notes that unwanted conduct can include '*a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour*' (at para 7.7).

39. In *Reed* the EAT noted that certain conduct, if not expressly invited, can properly be described as unwelcome. Normally, conduct that is by any standards offensive or obviously violates a claimant's dignity will automatically be regarded as unwanted. In that case the EAT said, as an example of "inherently" unwanted conduct, that a woman does not have to make it clear in advance that she does not want to be touched in a sexual manner.

40. However, if the claimant made it clear that he or she personally has no objection to the conduct in question, the conduct will not be unwanted (see *Thomas Sanderson Blinds Ltd v English* EAT 0316/10).

41. In *Richmond Pharmacology v Dhaliwal* 2009 ICR 724, EAT, Mr Justice Underhill, then President of the EAT, said: '*Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended*'.

42. In *Weeks v Newham College of Further Education* EAT 0630/11, Mr Justice Langstaff, then President of the EAT, pointed out that the relevant word here is 'environment', which means a state of affairs. "Environment" is not the same as an "incident", and while a one-off incident might be sufficient to create *an intimidating, hostile, degrading, humiliating or offensive environment* for the claimant, the incident will need to be of a sufficiently serious nature to have such effect.

43. In *Grant v HM Land Registry* [2011] EWCA Civ 769, overturning the Tribunal's decision that a comment made by the claimant's line manager to another colleague that the claimant was gay was an act of harassment, said at para 47 (***emphasis added***)

> *47. In my judgment, therefore, it would simply not be open to a tribunal to find with respect to the first incident that there is either direct discrimination or harassment. As to the former, in my view there can be no detriment because having made his sexual orientation generally public, any grievance the claimant has about the information being disseminated to others is unreasonable and unjustified.* ***Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment****. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment.* ***In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute***.

"Whistleblowing" detriment

44. Section 43A of the ERA states,

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

45. Section 43B of the ERA states,

> *(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—*
>
> *[…]*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*

46. In *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837, the Court of Appeal

provided guidance on the public interest test at [27]-[31] (***emphasis added***),

> *"27 First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula's case [2007] ICR 1026 (see para 8 above).* ***The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable****.*
>
> *28 Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful.* ***All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative****.*
>
> *29* ***Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it****. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable****.*
>
> *30 Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role.* ***I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their***

motivation in making it.

31 Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, ***I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression.*** *Although Mr Reade in his skeleton argument referred to authority on the Reynolds defence (Reynolds v Times Newspapers Ltd [2001] 2 AC 127) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10—13 above.* ***That clearly establishes 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. This seems to have been essentially the approach taken by the tribunal at para 147 of its reasons****."*

47. The case of *London Borough of Harrow v Knight* 2003 IRLR 140 EAT set out the correct approach to apply under section 47B(1) and section 47B(1A) which is:
    - the Claimant must have made a protected disclosure and
    - they must have suffered a detriment
    - the employer/worker/agent must have subjected the Claimant to that detriment by some act/deliberate failure to act and
    - the act or deliberate failure to act must be done on the ground that the Claimant made a protected disclosure.

48. "*Detriment*" has the same meaning as in discrimination law, meaning to put at a disadvantage (see the case of *Ministry of Defence v Jermiah* 1980 ICR 13 CA). The assessment of whether a reasonable worker would take the view that the action taken was in all the circumstances to his detriment must be viewed from the perspective of the worker (*Shamoon v Chief Constable of the RUC* 2003 ICR 337 HL).

49. Section 47B states that the worker must be subjected to a detriment '*on the ground that*' they made a protected disclosure. In the case of *Aspinall v MSI Mech Forge Ltd* EAT 891/01 the EAT held that the words '*on the ground*' required a causal nexus between the fact of making the disclosure and the decision of the employer to subject the Claimant to a detriment. The *Aspinall* case used the wording adopted in the discrimination case of *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065 HL where it stated that it had to be causative in the sense of being '*the real reason, the core reason….the motive for the treatment complained of*'.

50. Elias J in the case of *Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372 CA held that section 47B will be infringed if the

protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

Analysis and Conclusions

51. The Tribunal has come to the decision unanimously.

Has Claimant's claim been engineered?

52. The Respondent submitted that it considered that the Claimant had engineered his claim from the start by covertly recording his colleagues over a very short period of his employment.

53. In support of this argument the Respondent pointed out that:
    a. the Claimant had started recording conversation with his colleagues before any issues arose,
    b. his allegations of sexual harassment related to the period prior to the alleged detriments were entirely spurious, and him saying that he was offended by being called "darling" and "dear" suggest that he was looking for things to complain about,
    c. after only 9 days of working and one working day after making the alleged protected disclosures, the Claimant had submitted a detailed complaint asking for £20,000 in compensation. In cross-examination the Claimant confirmed that the purpose of his demand was to make the Respondent to pay him off, rather than spending money on lawyers,
    d. the Claimant had brought other tribunal claims against his former employers, where he was also engaged only for a brief period of time.

54. The Claimant said that his claim was genuine. He said that he had not engineered the burger incident, and he had made people to call him "dear", "darling" or "love". He said that it would have been "*wrong and malicious*" for him to engineer his claim. He said that he had no intention of initiating tribunal proceedings and was simply calling off the wrongs he had suffered at the hands of the Respondent.

55. We reject the Claimant's submission. We find that he indeed engineered his claim from the start. We find that the whole purpose of him joining the Respondent was to gather evidence that he could then use to make a claim and negotiate a favourable financial settlement. We have come to this conclusion for the following reasons.

56. The Claimant accepts that he was covertly recording his colleagues (he did not like the word "covertly", but that what he was doing) because he wanted to have "records of things" that happened to him or around him that he could then show to his employer, because otherwise, he said, he would not be believed. Therefore, on his own case, he was looking for, or at any rate expecting, "things" to happen

to or around him that he could then use to make a complaint. There is no other reasonable explanations for making such extensive audio recordings when the Claimant just started a new job, which the Claimant said in his evidence he loved, and before anything "bad" happened to or around him.

57. In his closing submissions the Claimant said that he had recorded the whole of his last night shift, which would be approximately 9 hours. Considering that the Claimant was largely working by himself, it would appear a completely unnecessary thing to do, unless he was gathering evidence for a future complaint. This also explains the Claimant trying to be awkward and argumentative in his conversations during that shift with his supervisor (George) about what cleaning tasks the Claimant will do and what tasks he will not do.

58. Not only the Claimant was recording his colleagues unbeknown to them, he was also setting them up to say things that he could record and then use to make a complaint against them. He admitted in cross-examination that he went back to ask Mr Dagnino whether he called him "love" on purpose to create a record of that. Again, other than gathering evidence for a future complaint there is no other credible explanation for that action.

59. The Claimant said in his evidence that he wanted to have audio recordings of all conversations because otherwise people would deny saying things to him. The logical conclusion from that is that the Claimant was planning to use his recordings to make a complaint against his colleagues about things he was expecting them to deny.

60. It is also telling that at no point during the interactions with his colleagues did the Claimant raise any objections about being called "love" or "darling" or "dear", but now he rests his entire sexual harassment claim on being addressed in that way.

61. Furthermore, after just 9 days of employment the Claimant leaves the job, complaining essentially that at one shift he was asked to do his job properly. Even if the Claimant thought that he had not had enough training (which we find he had), that is not a behaviour of a person who, as the Claimant claimed, loves his job. We find that it was not a coincidence that he stopped working the day after he had made what he believed was a protected disclosure.

62. Just one working day after that and before he resigned the Claimant presented a detailed complaint with his financial demands. He called it a grievance, however the only outcome he was seeking from it was a pay-off of £20,000. He was not asking for any extra training, or less work, or for staff stop addressing him as "dear" or "darling" or "love". He did not even want his grievance to be heard. All he wanted was to negotiate a financial settlement.

63. The Claimant was clearly preparing to bring a tribunal claim, having started ACAS early conciliation on 16 September 2021, that is a day after his grievance had been

acknowledged and before it being investigated, and before the Claimant resigning from his job. All actions following the Claimant submitting his grievance on 5 September 2021 show that he had no interest in resolving the matters he complained about and staying in the job. He was after money.

64. The Claimant was candid in his evidence that money was indeed all that he wanted. He said he was "entitled" to ask for a negotiated settlement, even if he had been employed only an hour or even 5 minutes. This, in our view, gives away his motives and his plan which he had all along, that is: *go there – make yourself a nuisance – record as many conversations as possible - something will be said or done to you – use that to negotiate a payoff*.

65. It appears he has done that on more than one occasion. The Claimant admitted that he did not last long in his other jobs. He said that after being dismissed he took his former employers to the tribunal and was currently engaged in other tribunal proceedings. While it is not for this Tribunal to examine his other cases, (and we did not do that, and we do not rest our conclusions in this case on the fact that the Claimant appears to be running multiple tribunal proceedings), it is still the relevant background to consider.

66. Unfortunately for the Claimant, on this occasion, his "canny plan" resulted in a rather poor catch. After 8 days at work, he only had a handful of innocuous greetings such as "ladies and gentlemen" and "love" in his arsenal. It would have been very hard to "squeeze" any kind of claim out of that. But then the breakthrough in the form of a dropped burger came his way and he ceased the moment. Now all he needed to do was make a complaint and look for "detriments" to follow.

67. However, even then he was scrapping the bottom of the barrel in terms of finding "detriments". He was called "darling" and "dear", plus the alleged comment by Mr Dagnino "*we all know what you did*". He was asked to do his job properly, which he clearly had no intention to do. Finally, he was called by Ms Luvandu "slithery".

68. He thought it was good enough to move to the "pay me off" stage of his plan, rather than bothering with coming back to work in the hope of gathering further "detriments", especially now that he was told to get on and do his job properly.

69. To sum up, we find that it was all planned by the Claimant from the outset. However, on this occasion his plan did not work out because it appears the Respondent was not prepared to pay him off. The Claimant admitted in his evidence that perhaps he asked for "too much".

70. These findings lead us to the conclusion that the Claimant has acted vexatiously and unreasonably in the bringing these proceedings. It was a blatant abuse of the Tribunal process.

71. This, however, does not dispense with the matter, as there is no strike out application in front of us. We have decided that having heard the evidence and submissions, we must deal with the Claimant's claim on its merits rather than to strike it out on the Tribunal's own initiative. We, therefore, proceed to examine each element of the Claimant's claim in turn.

Harassment related to sex/sexual harassment

72. First, we shall deal with the sexual harassment complaint. We accept the Respondent's submissions that the complaint does not get off the ground whichever way you look at it.

73. The Claimant claims the following was unwanted conduct related to sex or alternatively sexual conduct:
    a. *Assistant manager (Justyna) saying to the claimant "goodnight ladies and gentlemen";*
    b. *Supervisor (Giovani) saying to the claimant "see you later love";*
    c. *Manager (Jamie) calling the claimant ''darling" during one to one meeting with Vanessa on 31st August 2021*.

74. In his witness statement the Claimant also complained about Ms Luvandu calling him "darling" at the meeting on 31 August 2021.

75. None of the remarks the Claimant complains about could be sensibly considered of "sexual nature". The Claimant said that calling someone "my darling" is conduct of sexual nature. We reject that.

76. Firstly, he was not addressed as "my darling", but "darling". There is nothing in the word "darling" that is inherently sexual.

77. Furthermore, looking at the context in which the word was used, it was clearly not an intimate or flirtatious conversation. That was said in the context of a business discussion in which Ms Luvandu criticised the Claimant for lying to her. We accept her evidence that she used that phrase as a general comment without any sexual connotation. We also accept her evidence that she felt being sexually harassed by the Claimant and made a complaint about that. Therefore, in the circumstances, it would be incongruous to suggest that her calling the Claimant "darling" had any sexual undertone to it.

78. We also accept Mr Chow evidence that he used the word "darling" to reassure the Claimant that the Respondent wanted the Claimant to complete the training and stay in the job. There was no sexual connotation there either.

79. We also find that none of the comments were related to sex. All of them are gender neutral and can be said to men and women.

80. The Claimant was trying to suggest that the greeting "*goodnight, ladies and gentlemen*" was "sexual" because it was allegedly said by Justina to the Claimant and another male cleaner, with no female staff being present. In explaining that at the hearing, the Claimant suggested that the comment was an innuendo about sexual orientation of one of the Respondent's managers, because when the Claimant asked Justine why she said "ladies", she replied along the lines "*you will find out in a couple of weeks*".

81. Taking the Claimant's case at its face value (which for the reasons explained above we have grave reservations about), this could not have been an unwanted conduct related to sex. Even if at a stretch it could be argued to be unwanted conduct related to sexual orientation, it is not a claim the Claimant brings in these proceedings.

82. The Claimant never objected to being addressed in that way. In fact, when Mr Dagnino said that he called everyone "love", the Claimant replied with "Ok". Therefore, there is no credible evidence from which we could concluded that the conduct he now complains about was indeed perceived by the Claimant at the time as "unwanted".

83. Finally, we find that the Respondent's staff saying the words the Claimant complains about did not have the purpose of effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

84. We reject the Claimant's evidence that he was offended by those words. He did not raise any complaints at that time. He accepted that such pronouns were widely used in parts of the UK and that there was nothing wrong with people using them.

85. He also accepted that they were not used with bad intent. His complaint is essentially that they were not appropriate in the work environment, and that he would have preferred to be called by his first name. That falls far short of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

86. Therefore, the Claimant complaints of harassment related to sex and sexual harassment fail and are dismissed.

87. Before moving on to deal with the whistleblowing complaint, we observe that we find it telling that the Claimant dropped his complaint about Gianfranco and Francesco making masturbating gesture to him.

88. If the Claimant had anything to complain about with respect to sexual harassment, that would appear to be the most obvious conduct to complain about. Yet, having made that allegation, which was investigated by the Respondent and found that the alleged episode did not happen, and having nonetheless continued to pursue

it throughout these proceedings, the Claimant dropped it at the first day of the hearing and without giving any sensible explanations as to his sudden change of heart. This goes to the overall credibility of the Claimant's complaints and his evidence.

Whistleblowing detriments

89. I now turn to deal with the whistleblowing claim.

90. The Respondent accepts that the Claimant disclosed information. It also accepts that that the Claimant had reasonable belief that the disclosed information tended to show that the health or safety of any individual had been, was being or was likely to be endangered. We agree with that.

91. This issue, however, is whether the Claimant believed the disclosure of information was made in the public interest.

92. If he did genuinely believe that, given the nature of the wrongdoing disclosed, a potentially large group of individuals whose health or safety might have been endangered, the obvious interest of the general public to know that they can safely eat food in public restaurants, and the fact that the Respondent is a well-known and widely present restaurant chain in the UK, such belief would have clearly been reasonable.

93. The Respondent, however, contends that the Claimant did not have a genuine belief that he was disclosing information in the public interest because it was self-serving premeditated plan, and the sole reason for the disclosure was to engineer a claim for himself. The Claimant disputes that and says that he genuinely believed that he was disclosing information in the public interest.

94. Given our findings and conclusions that the Claimant indeed engineered his claim we reject the Claimant's evidence that he believed that his disclosure was in the public interest.

95. We are cognisant of the fact that the law draws a distinction between "belief" and "motivation", and it does not matter whether the Claimant was motivated by self-interest in making the disclosure. As long as he genuinely believed that the disclosure was in the public interest it will be a protected disclosure.

96. However, in this case we find that the Claimant's belief as to why he was making the disclosure and his motivation for making the disclosure merged. We find that the only reason he made that disclosure was to move to the next stage of his plan with the ultimate goal of exerting a financial settlement from the Respondent.

97. Essentially, for the Claimant it was a “gotcha you” moment, and that was the only thing that operated on his mind when he made the disclosure, and not that his disclosure would serve any wider interest.

98. Therefore, we find that he did not genuinely believe that his disclosure served any public interest. What he genuinely believed was that the disclosure would be good enough to later argue that it was a protected disclosure, thus advancing his plan to engineer a complaint and eventually get a pay-off.

99. A belief that a disclosure is in the public interest and a belief that a disclosure is sufficient to argue it was made in the public interest are two different beliefs. We find that the Claimant held the latter, but not the former.

100. Therefore, we find that the Claimant’s disclosures were not protected disclosures under s. 43A of ERA, and the Claimant complaint for whistleblowing detriments fails at this hurdle.

101. However, in case we are wrong on that issue, we shall proceed to examine and deal with the alleged detriments and causation.

2.1.1 Giovani said to the claimant in front of other members of staff “we all know what you did" (ie whistleblowing);

102. We find as a fact that Mr Dagnino did not say “*we all know what you did*”. Although Mr Dagnino was not giving evidence to the Tribunal, given our serious reservations about the credibility of the Claimant’s evidence for the reasons explained above, we prefer Mr Dagnino’s written statement to the Claimant evidence. In his witness statement Mr Dagnino denied saying those words and we accept that.

103. For the sake of completeness, we also find the Claimant has failed to prove that the alleged statement was made in response to the Claimant’s sending a WhatsApp message about the burger incident. There is no recording or transcript of that conversation with Mr Dagnino. The Claimant did not provide any no context in which the alleged phrase was said.

104. The fact that Mr Chow said at the meeting on 31 August 2021: “*any you are thinking why people are talking about you*”, does not prove that the alleged statement by Mr Dagnino was referring to the Claimant’s alleged protected disclosures, as Mr Chow’s statement itself is taken out of context.

105. Furthermore, we do not find that even if Mr Dagnino had said those words (which we find he did not), him saying them could be properly considered as “a detriment”. It was simply stating the obvious given that the Claimant had posted his alleged protected disclosures on the Respondent’s staff WhatsApp group chat.

The Claimant did not adduce any evidence to show how Mr Dagnino saying those words put him at any disadvantage.

106. Next, we shall deal together with the alleged detriments 2.1.3, 2.1.5, 2.1.6 and 2.1.7, as these all relate to the Claimant's last shift and the meeting with Mr Luvandu and Mr Chow that followed it.

2.1.3 the claimant being given tasks by management that did not allow him to have a break on the 9 hour shift whilst colleagues stood by at a point in time doing nothing;

2.1.5 Vanessa talking to the claimant about quality checks and training (alleged detriment set out more fully in the claimant's further and better particulars)

2.1.6 Jamie the manager told the claimant that if I can't do the job within the time set then the job is not for me (alleged detriment set out more fully in the claimant's further and better particulars);

2.1.7 Vanessa continued with the one to one session with assistant manager Vanessa and myself (alleged detriment set out more fully in the claimant's further and better particulars);

107. We accept Mr Luvandu's and Mr Chow's evidence as to why the Claimant was told to undertake additional cleaning tasks on his last shift. These were within his job description. That was also accepted by the Claimant in cross-examination.

108. We also accept the Respondent's evidence that the Claimant was told to do only the tasks he was trained on, and that he had been given more than sufficient training to undertake them.

109. We reject the Claimant's evidence that he was "overwhelmed" or "overloaded" with work and did have the opportunity to take a break during the shift. We accept the Respondent's evidence that in fact the Claimant was offered to take a break, which he declined, and then the Claimant left the shift without finishing all the required tasks.

110. Therefore, we reject that by telling the Claimant to do those tasks the Respondent caused the Claimant a detriment. The Claimant was simply told to do what he was paid to do.

111. In any event, we find that the Respondent telling the Claimant to do those tasks had nothing to do with the alleged protected disclosures. We accept the Respondent's evidence that the only reason the Claimant was told to do that work was because that was his job, and he was trained to do those tasks. In fact, the Claimant himself complained to the Respondent before that he was mainly washing dishes and wanted to be given other types of cleaning work to do.

112. We reject the Claimant submission that he had not been given sufficient training on those additional tasks. We find that the Respondent went above and beyond what was required to give the Claimant sufficient training on those tasks. The Claimant's skill gaps were recorded (p. 63 of the bundle) and he was not required to undertake the tasks he had not been trained on.

113. We also find that Ms Luvandu and Mr Chow's at the meeting on 31 August 2021 expressing their dissatisfaction with the quality of the Claimant's work and his attitude to work had nothing to do with the alleged protected disclosures. The only reason they criticised the Claimant's performance was because in their reasonably held view the quality of the Claimant's work and his attitude were unsatisfactory.

114. With respect to the alleged detriment 2.1.6, what Mr Chow said was: "*let's complete your training and see what you can do, and if this job is for you – great, and if it isn't – it isn't*". This shows that Mr Chow was quite happy with the Claimant's staying in his job, provided that after he has completed the training, he could meet the required performance standards. That, in our view, cannot be reasonably considered a detriment.

115. In any event, we find that the reason why Mr Chow said that had nothing to do with the Claimant's alleged protected disclosures. Mr Chow said that in response to the Claimant's saying that he would need to consider if the role was for him. That was said as an acknowledgement that after the training the Claimant might still find the role too demanding and not to his liking.

116. Finally, with respect to Ms Luvandu and Mr Chow having a one-to-one meeting with the Claimant after his night shift. At the hearing the Claimant said that his complaint was that he was too tired to have that meeting and therefore it was a detriment.

117. Firstly, that is not how the Claimant pleaded that detriment. His original complaint was that he had been asked to sign the meeting notes when he said he was too tired to read them. However, he did not complain about the holding of the meeting after the night shift. That is not in his further and better particulars or in his witness statement.

118. Furthermore, the Claimant did not complain during the meeting that he was too tired to carry on. He took several breaks to go to the toilet, which break it appears he used to do whatever was technically necessary for him to continue to record the meeting in its entirety.

119. We find that in the circumstances where the Respondent had genuine and well-founded concerns about the Claimant's performance it was appropriate to have a meeting to discuss them. Given that the Claimant worked night shifts and both Ms Luvandu and Mr Chow worked day times, having the meeting after the Claimant finished the shift was an obvious and reasonable choice. The meeting was not too

long (about 40 minutes). It appears it could have been far shorter but for the Claimant continuing to deviate from the subject of the discussion. Therefore, we find that holding that meeting after the end of the Claimant's shift cannot reasonably be considered as a detriment to the Claimant.

120. In any event, we find that the reason the Respondent held the meeting had nothing to do with the Claimant's alleged disclosure. The reason the Respondent held the meeting with the Claimant was the Respondent's genuine and well-founded concerns about the Claimant's performance.

2.1.4 the assistant manager Vanessa calling the claimant slithery and criticising him (alleged detriment set out more fully in the claimant's further and better particulars);

121. We accept it would be a detriment for the purposes of s.47B ETA.

122. However, we accept Mr Luvandu's evidence as to why she said that. We find that it had nothing to do with the alleged protected disclosures. She was simply frustrated with the Claimant not engaging on the points she was putting to him, trying to take derail the discussion and not accepting any accountability for his poor performance. She also felt uncomfortable being in his company because of her previous experience with the Claimant's making inappropriate advances.

123. In his closing submissions the Claimant tried to make a big deal out what he called "discrepancy" between Ms Luvandu's evidence at paragraph 38 of her witness statement and what she said in cross-examination. We reject that. We find no such discrepancy.

124. Ms Luvandu clearly explains in her witness statement why she felt frustrated with the Claimant and why she felt uncomfortable being alone with him. The feeling of being frustrated with the Claimant's conduct at the meeting and feeling generally uncomfortable being in his presence, that what made her to call the Claimant "slithery". We find it had nothing to do with the Claimant alleged protected disclosures.

2.1.8 Vanessa tried to get the claimant to sign a false statement on 31st August 2021 after the manager (Jamie), Vanessa and the supervisor (George) overloaded the claimant with work, (alleged detriment set out more fully in the claimant's further and better particulars).

125. The alleged about the Claimant being "overloaded" with work has been dealt with above (see paragraphs 107-120).

126. We find that it was not a detriment to ask the Claimant to sign the meeting note. The meeting note was not "false". The Claimant had the opportunity to comment and make corrections. The Claimant refused to do so because he said he was too tired to read the notes, even though they were only 3 pages long. In any event,

Ms Luvandu accepted that and let the Claimant to take photos of the notes and comment on them later, which he did. This did not put him at any disadvantage.

127. In any event, it had nothing to do with his alleged protected disclosures. It was to ensure that both parties to the meeting were in agreement what was discussed at the meeting. That is good management practice.

128. For these reasons we find that even if we were wrong on our primary conclusion that the Claimant did not have genuine belief that the disclosures were in the public interest, his "whistleblowing" detriments case nonetheless fails on the points of detriment and causation.

129. It follows that all the Claimant complaints fail and are dismissed.

Respondent's potential costs order application

130. After the judgment was delivered orally, the Respondent stated that, given the Tribunal's findings and conclusions, it was considering applying for a costs order against the Claimant. However, if the Claimant did not have sufficient means to satisfy a potential costs order, to avoid incurring further legal costs in making the application, the Respondent asked the Tribunal to order that the Claimant provided evidence as to his ability to pay.

131. While in the absence of a costs order application, it appears that there were no grounds for the Tribunal to order the Claimant to disclose his financial standing, the Claimant agreed to do so, indicating that his means were very limited.

132. The Tribunal found that in the circumstances the Claimant providing evidence about his means before the Respondent decides whether to make a costs application would be a sensible approach in line with the overriding objective.

133. Therefore, it was ordered by consent that the Claimant must within 14 days of the date of the order send to the Respondent and the Tribunal a written statement about his means, which must include details of his income, outgoings, capital, debts, savings, anticipated income. The statement must be supported by relevant documentary evidence, such as bank statements, payslips, benefit statements, mortgage statements, etc.

Employment Judge Klimov

24 September 2022

Sent to the parties on:

26/09/2022

.....

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.