EMPLOYMENT TRIBUNALS

Claimant: Mr M Karpeta

Respondent: Mamuska Restaurants Limited

Heard at: London South, by video **On:** 17 May 2023

Before: Employment Judge Cawthray

Representation
Claimant: In person, not legally qualified
Respondent: Mr Coll, Owner and Managing Director, not legally qualified

RESERVED JUDGMENT

1. The Claimant was not dismissed by reason that he made a protected disclosure. This complaint is dismissed.

2. The Claimant was not subjected to a detriment on the ground that he has made a protected disclosure. The complaint under sections 47B and 48 of the Employment Rights Act 1996 are dismissed.

3. The Respondent did not breach the Claimant's contract of employment in relation to notice pay. The complaint is dismissed.

4. The Respondent has not made an unlawful deductions from wages claim in relation to accrued holiday. The complaint is dismissed.

5. The Respondent has not made an unlawful deductions from wages claim in relation to non-payment of tips. The complaint is dismissed.

REASONS

Introduction

1. The Claimant contacted ACAS on 7 April 2021, and Early Conciliation ended on 19 May 2021. The Claimant submitted his ET1 on 18 June 2021.

2. Despite the claim form being properly served, no response was received.

3. On 20 January 2022, the Tribunal wrote to the parties explaining that due to the none submission of a response, the Respondent would only be entitled to take part in the hearing to the extent permitted by the Employment Judge hearing the case. The letter also set out case management directions.

4. In a letter dated 11 July 2022, the parties were notified that a hearing would be listed, and a Notice of Hearing for a 3 hour final hearing scheduled to take place on 14 November 2022 was sent to the parties on 9 August 2022.

5. On 18 October 2022 Mr. Coll, for the Respondent, emailed the Tribunal.

6. On 11 November 2022, the Tribunal informed the Respondent, via email that the claim had not been dismissed and that the final hearing listed for 14 November 2022 would be converted to a case management preliminary hearing.

7. A case management preliminary hearing took place on 14 November 2022. The Respondent did not attend that hearing, although it was properly notified of the hearing.

8. The Case Management Summary & Order sets out the issues for determination at this final hearing.

9. The Respondent has at no time submitted a response and has not engaged in the Tribunal process. Mr. Coll, Owner and Managing Director for the Respondent, attended the final hearing today which took place via video. Mr. Coll had not prepared any witness statement for use at the hearing today.

10. I discussed with Mr. Coll the reasons for the Respondent's lack of engagement. He stated that the pandemic had been a very difficult time for him and the business, that he was extremely busy, post was unreliable at the restaurant and that he did not have any administrative support at the restaurant. Mr. Coll stated that after contacting the Tribunal on 18 October 2022 he considered the claim was not continuing from information provided by the Tribunal. Mr. Coll had still not prepared or submitted a response.

11. I considered the extent to which the Respondent should be permitted to participate in the hearing today in view of the case history including the comments made by Mr. Coll and the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (in particular the Overriding Objective) and practical implications and principles derived from case law.

12. I noted that although the Respondent had turned up to the hearing today, it had not properly engaged in the Tribunal process. Although the pandemic was a very difficult time, the claim was not submitted until 18 June 2021, when the peak of the pandemic had passed. There was no adequate explanation for the total lack of non-participation. There was

nothing in the Tribunal file to indicate that the claim was not continuing, and indeed the Tribunal specifically informed the parties the claim was continuing.

13. I decided that in all of the circumstances it was not appropriate to permit the Respondent to seek to engage in providing evidence at this late stage. In the circumstances I did not consider it to be within the Overriding Objective to adjourn the hearing. I explained that the Respondent would not be permitted to give oral evidence and would not be able to cross exam the Claimant.

14. The Respondent sent several chains of emails with the Claimant throughout the course of the hearing, and I explained I would consider the emails as far was necessary for me to make factual findings.

15. I allowed the Respondent to make brief oral submissions. I also determined that it was appropriate for me to consider liability only, and that if the Claimant was successful in any part of this claim, a separate remedy hearing would be listed, at which the Respondent could participate if it wished.

16. No adjustments to the hearing were required by either party.

Issues

17. I discussed with the parties the issues that would be determined, by reference to the List of Issues set out in the Case Management Order & Summary from the preliminary hearing on 14 November 2022. I reminded the Claimant about the issues at several times throughout the hearing. Both parties were able to access the Case Management Order & Summary.

Protected disclosures

18. At the start of the hearing I discussed the alleged protected disclosures with the Claimant by reference to paragraph 38 of the Case Management Order & Case Summary from the case management preliminary hearing that took place on 14 November 2022 and the subsequent information provided by the Claimant. The Claimant said he made a mistake regarding the date at paragraph 38.2, and said the call took place in December 2020. Paragraph 38.2 of the Case Management Order & Case Summary contains the details of the alleged disclosures, which I have labelled and put in chronological order below.

19. The issues for determination are set out below.

20. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide

    The claimant alleges he made the disclosures set out below:

    a. **"First Disclosure"** – 1 June 2020 verbally to Mr. Coll and Ms. Magda Santos.

The Claimant says he was informed by another employee, a cleaner named Beatta, that she had been asked to work whilst she was on furlough, and was then not paid by the respondent for those days which had been worked. The Claimant was included in the group chat in which Beatta asked for payment, but no longer has access to those messages. The Claimant says in his capacity as manager (responsible for hiring, but not payments), he verbally raised Beatta's non-payment separately with Ms. Santos and Mr. Coll.

The Claimant says this was information tending to show a failure to comply with a legal obligation.

b. **"Second Disclosure" -** 11 September 2020 verbally to Mr. Coll and Ms. Santos.

The Claimant says that he reported to Mr. Coll and Ms. Santos that the smoke alarms at the respondent's business were not working. The context was that a neighbouring building was on fire, the restaurant filled with smoke, but the alarms did not sound. The premises were evacuated and the fire brigade attended.

The Claimant says this was information tending to show the health and safety of any individual had been, was being or was likely to be endangered.

c. **"Third Disclosure"** - or around October 2020 - verbally to Ms. Santos.

The Claimant asked Ms. Santos if the smoke alarms had been fixed, and was told they had not.

The Claimant says this was information tending to show the health and safety of any individual had been, was being or was likely to be endangered.

d. **"Fourth Disclosure"** – in December 2020 - HMRC – verbally, via telephone, to HMRC.

The Claimant says that he contacted HMRC by telephone to report what he understood to be a furlough fraud in relation to Beatta being asked to work whilst on furlough. The Claimant says HMRC said it would investigate the issue with Mr. Coll.

The Claimant says this was information tending to show that a criminal offence had been, was being or was likely to be committed.

e. **"Fifth Disclosure"** - 22 December 2020 – in writing to Mr. Coll

The Claimant says he wrote a letter to the respondent repeating his concerns about health & safety (the fire alarms) and alleged fraud (furlough-related).

The Claimant says this was information tending to show that a criminal offence had been, was being or was likely to be committed and the health or safety of any individual had been, was being or was likely to be endangered;

21. Did he disclose information?
22. Did he believe the disclosure of information was made in the public interest?

23. Was that belief reasonable?

24. Did he believe it tended to show that:
    a. a criminal offence had been, was being or was likely to be committed;
    b. a person had failed, was failing or was likely to fail to comply with any legal obligation;
    c. the health or safety of any individual had been, was being or was likely to be endangered.

25. Was that belief reasonable?

26. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer or to HMRC, a prescribed person within the meaning of S.43F ERA 1996.

Automatically unfair dismissal

27. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure or disclosures?

28. If so, the Claimant will be regarded as unfairly dismissed.

29. What was the effective date of termination?

Detriment (Employment Rights Act 1996 section 48)

30. Did the Respondent do any of the things set out below, the Claimant says:

    a. He was ignored by Mr Coll;
    b. There was an aggressive tone to emails;
    c. There was a reduction in responsibilities;
    d. He was removed from work email/chat groups;
    e. He was asked to return the restaurant keys when he was sick, which was not asked of other absent employee key-holders;
    f. Mr. Coll attending the claimant's home address to ask for the keys;
    g. Mr. Coll reporting the claimant to the police in relation to the restaurant keys.

31. By doing so, did it subject the claimant to detriment?

32. If so, was it done on the ground that he made a protected disclosure?

Wrongful dismissal / Notice pay

33. What was the Claimant's notice period? The Claimant says he was entitled to two weeks' notice.

34. Was the Claimant paid for that notice period?

35. If not, was the Claimant guilty of gross misconduct? Did the Claimant do something so serious that the respondent was entitled to dismiss without notice?

Holiday Pay (Working Time Regulations 1998)

36. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when his employment ended?

37. How many days remain unpaid?

38. What is the relevant daily rate of pay?

Unauthorised deductions

39. Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

40. The Claimant alleges he is owed:

    a. Service charge – this was shared between all staff based on a formula. The Claimant says has not been paid service charge for any period after June 2020 (which was paid in arrears in September 2020);

    b. Statutory sick pay – the Claimant was off sick from around November 2020 until termination of his employment. He was paid some SSP, he believes for November, but no further SSP.

Evidence

41. I explained the process of giving evidence and submissions to the parties.

42. The Claimant had produced a Bundle amounting to 99 pages. Mr. Coll had been provided with a copy of the Bundle.

43. However, during the course of the hearing Mr. Coll provided several emails. It is noted that the complete email chains from 9:13 pm 13 December 2020 onwards were provided by Mr. Coll during the hearing, the emails in the Bundle prepared by the Claimant start at 17:40 on 22 December 2020. The complete email chains are helpful in understanding the factual events.

44. Within the Bundle the Claimant had included witness statements for Marcin Zawiatowski, Adrian Szymon Porębski, Alexendra Mizera. These persons were not in attendance at the final hearing, and therefore I attached limited weight to the statements as they were not present to swear or affirm and were not able to be questioned. I note that the witness statements were by former employees of the Respondent and are similar in content and language used.

45. The Claimant had not provided a witness statement. I discussed the process of giving evidence with him, and reminded him of the basis of his complaints as set out in the issues above. The Claimant adopted the detail in his claim form as his witness statement, affirmed and confirmed the information was true to the best of his knowledge and belief. Whilst under affirmation, I also gave the Claimant the opportunity to tell me anything else he considered was relevant to the issues and I asked him a number of questions.

46. As set out above, no response and no witness statements had been provided by the Respondent.

47. Both parties gave oral submissions.

Facts

48. The Claimant started employment at the Respondent, a restaurant, as a Manager, on 17 September 2019.

49. The Claimant spoke with his manager about the fact he did not wish to continue in a management role and stopped being a manager, in June 2020, as he had found the role to be too much pressure.

50. The Claimant, at the Case Management Preliminary Hearing on 14 November 2022 discussed the basis of his alleged protected disclosures. The Record of Hearing records the “First Disclosure” as allegedly taking place verbally in June 2020.

51. There was no mention of this alleged protected disclosure in the claim form, which was used as the basis of the Claimant’s written witness evidence. There were no related documents in the Bundle. There was no additional oral evidence provided by the Claimant in this respect other than in response to me asking the Claimant what he said he told Ms. Santos, the General Manager. The Claimant says he told her that Beatta had sent several emails but that she hadn’t been topped up or paid.

52. The Claimant spoke with Ms. Santos about the fact he had not been provided with a written contract of employment and was provided with one in July 2020, which the Claimant signed on 15 July 2020.

53. I asked the Claimant when he considered that Mr. Coll ignored him from. He stated that he was ignored when he asked for a copy of his contract employment prior to July 2020, which resulted in the Claimant speaking to Ms. Santos as above. He also stated Mr. Coll ignored him when he asked for information about his holiday balance, see below.

54. The Claimant was paid the National Minimum Wage, which was £8.21 at the time.

55. The most relevant clauses of the contract are copied below:

4.2 We shall be entitled to deduct from your wages or other payments due to you any money which you may owe to the company at the time.

6.1 The minimum hours of work is 0 per week. You will be asked to work shifts based on the needs of the business. You may be required to work such additional hours as are necessary to fulfill your role and as the business may require. You are required at all times to comply with our rules, policies and procedures in force from time to time.

7.1 The company will use a calculation to establish the amount of holiday pay you earn each week. This calculation is (your gross basic wages) x 5.6/46.4. If the company chooses to use the multiplier as described here, you may request a report on your accrued holiday pay, but not more frequently than 3 reports per annum. Under this system your accrued holiday pay will be paid to you when your holidays are taken (as approved under the rules of this section 7).

7.7 On termination of employment you will be entitled to payment of your holiday accrual fund balance, less any money you owe to the company. Where we have dismissed you under clause 9.2 or you have resigned without giving the required notice, such accrued holiday shall be limited to your statutory entitlement under the Working Time Regulations 1998 and any paid holidays shall be deemed first to have been taken in satisfaction of that statutory entitlement.

8.1 If you are absent from work for any reason, you must notify your line manager of the reason for your absence as soon as possible but no later than 7.00am on the first day of absence.

8.4 If you are absent from work, we:

a) shall pay you Statutory Sick Pay (provided that you satisfy the relevant requirements)…

9.2 We shall be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, or cease to be cease to be entitled to work in the United Kingdom or for gross misconduct.

56. The Claimant was employed on zero hours basis but in most weeks, he worked between 40 and 50 hours per week. The precise number of hours he worked depended on how busy the Respondent was. During quieter months in the pandemic the Claimant worked in the region of 30 hours per week. The Claimant was always given hours, and there were no weeks when he did not work, unless he was on leave or sick.

57. In relation to the Second Disclosure, there was no mention of this in the claim form, which was used as the basis for witness evidence. The Claimant provided no oral evidence and no documentary evidence in this

respect. In response to a question asked by me, asking what was said on 11 September 2020, the Claimant stated that he, and another employee, spoke with Mr. Coll via messenger and told him that the restaurant was full of smoke, that no customers were inside and that no fire alarm had gone off. The Claimant stated that Mr. Coll tried to be helpful told them to lock restaurant and make sure they were both safe.

58. The Claimant took two weeks holiday in October 2020.

59. In relation to the Third Disclosure, the Claimant provided no evidence, either within the claim form or orally in this respect.

60. In November 2020 the Claimant travelled to Poland to visit his father. The respondent gave the Claimant two weeks compassionate leave. The Claimant stated that he returned to the UK around 7/8 December 2020 but had to quarantine upon his return. There is no evidence to corroborate that the Claimant returned to the country on this date, and I am unable to conclude whether or not the Claimant did return to England, but consider it likely that he did not, based on my further findings as below.

61. The Claimant was on sick leave from 14 December 2020. He informed his manager, Ms. Santos, by email at 9.13pm on 13 December 2020 in which he stated he was feeling anxious and attached a GP booking request indicating an appointment for 10.50am on 16 December 2020. The Claimant requested that he be communicated with by email.

62. The Respondents, Managing Director, Ian Coll, emailed the Claimant at 12:04 pm on 14 December 2020. Mr. Coll informed the Claimant that he had removed the Claimant from the Line messaging groups so that he did not communicate on work issues and could focus on his health. The email also referred to the impact of the Claimant's compassionate leave, quarantine and sick leave on other staff and the business. The tone of the email was professional.

63. The Claimant attended a telephone GP appointment on 16 December 2020, and he was signed off for two weeks.

64. The Claimant sent his fit note to Mr. Coll by email at 18:38pm on 17 December 2020. This email and fit note were not in the Bundle but the email was provided during the course of the hearing by Mr. Coll. In his email the Claimant raised concerns about Ms. Santos speaking with people about his illness and made reference to discrimination and unfair treatment on his return to work.

65. In response, Mr. Coll emailed the Claimant at 13:59pm on 22 December 2020 and confirmed receipt of the fit note and refers to the fit note citing *"stress due to family illness".* Mr. Coll requested the Claimant provide confirmation of his father's illness. The email also makes other comments about the Claimant's absence and requested clarification on whether someone was writing the Claimant's emails for him. The email also refers to the Claimant's boyfriend's experience in HR matters and asked for evidence that Ms. Santos had discussed the Claimant's illness with others and sought confirmation on whether he was lodging a grievance against Ms. Santos. Mr. Coll also asked the Claimant what him and Craig (the

Claimant's boyfriend) were looking for from the company. The tone and comments in the email indicate that Mr. Coll was unhappy with the Claimant's absence and questioning/challenging his actions.

66. English is not the Claimant's first language.

67. On 22 December 2020, at 15:29 the Claimant sent Mr. Coll an email attaching a document setting out concerns. The email was not provided but both parties confirmed this was the date and time of sending.

68. The document is typed two page word document.

69. The document opens by stating the Claimant had *"become aware of certain types of wrongdoing in the past and present, however, I feel compelled to bring to your attention that I consider to possibly amount to criminal offences (fraud), and other concerns in relation to health and safety, which could possibly endanger lives".*

70. No evidence was given as to why the Claimant submitted this letter at this time, when he was on sick leave, although the letter states that Claimant felt he had a moral obligation to bring matters to Mr. Coll's attention.

71. The first part of the letter deals with furlough, and the second in relation to fire alarms. The complete letter has been reviewed, with key extracts copied below.

72. The Claimant stated that he believed the furlough regulations had been purposely broken to financially benefit the Respondent. He goes on to state:

"I have reason to believe that some employees which I have all names and details and evidence of were asked to come to work to perform their usual duties for periods of time whilst on furlough…".

"I am not prepared to share these details with you as you have this information yourself. I am also not prepared to breach the confidentiality entrusted in me by these individuals".

"These employees were removed from the rota so that the truth about their working hours and time could be hidden, as I have a reasonable belief you were aware it was against the law. I also have reasonable belief that this practice has recently reoccurred with at least a number of employees who I believe have been receiving full or part time furlough money when in fact they have been working more than full time hours and received the furlough money instead of company pay for the hours worked, again, clearly against the furlough job retention rules. Evidence to support this is the fact that employees you are aware of have previously always been visible on the rota for all shifts and hours worked (with no/minimal exceptions to this). However, since the week of the beginning of the second national lockdown in November 2020 they completely disappeared from the rota even though they were working many hours in the restaurant. You will notice from the rotas that the restaurant would not have been able to open the hours it was with the rota showing in the

system, which leads me to reasonably believe that manipulation of the hours to fraudulently benefit the restaurant took place through the misuse of the furlough job retention scheme. I believe you will also be aware of this, but in the event you are not, the CCTV cameras will highlight all of this to you."

"During the first national lockdown some employees (which I have full evidence and information of did receive their furlough money, even though they were in Poland, which you knew and were unavailable to immediately work due to being in Poland, yet other employees did not receive furlough money.)"

73. In relation to fire alarms, the letter states:

"There was an incident in the restaurant on the 11th September 2020 where smoke came into the restaurant from a fire, however, the fire alarms of the restaurant did not sound. Me and my colleague had to evacuate the restaurant for our own safety."

"I later found out that no fire checks are taking place and no fire alarm testing is being done."

"I also raised this to Magda and no one has looked into this or actioned this either."

"Should these matters not be dealt with appropriately I will have no choice but to notify HMRC and the HSE to investigate further."

74. The language used within the letter indicates an awareness of the law in regard to protected disclosures.

75. Mr. Coll emailed the Claimant at 17:40 on 22 December 2020 stating: *"Under the present circumstances it is best if you would arrange for the return of the keys to the restaurant within the next 24 hours, for your protection as well as the Companies".*

76. The Claimant had held keys for most of his employment and had never been asked or required to return keys previously during any holiday, leave period or sick leave.

77. The Claimant replied to Mr. Coll at 18:03 on 22 December 2020, in short stating he hoped to return to work in the New Year and that he would not be able to return the keys by the end of the following day and that he felt the request was made because the Claimant had sent a letter raising concerns.

78. At 19:20 on 22 December 2020 Mr. Coll sent an email requesting location of the keys and said he would collect them and that the security of the restaurant over the holiday was his paramount concern and he was entitled to ask for the keys back at any time.

79. The tone of the emails at 17:40 and 19:20 from Mr. Coll were direct, but not aggressive.

80. At 23:33 on 22 December 2020 the Claimant replied. The Claimant indicated the emails received were impacting his wellbeing and that he understood no other employees had been asked to hand back keys for the Christmas break and that he felt he was being singled out for raising concerns. The Claimant explained he felt Mr. Coll was harassing, bullying and intimidating him, and that the keys were safe.
81. Mr. Coll emailed the Claimant at 12:10pm on 23 December 2020, stating he was not responding to the Claimant's points and that he had driven to the Claimants address to collect the keys and asked the Claimant for his location. The tone of this email was direct, but not aggressive.

82. The Claimant was not home and Mr. Coll spoke with the Claimant's house mate. The Claimant was embarrassed by Mr. Coll attending his house. It is not possible to make precise findings of fact on what the discussions were between Mr. Coll and the Claimant's flat mate.

83. Mr. Coll emailed the Claimant at 13:00pm stating the matter had been escalated to the police, *"This has now been escalated to the Police due to your unreasonable refusal to hand over the keys to my restaurant*". The letter set out three options for the return of the keys.

84. Mr. Coll then sent a further email at 13:36pm on 23 December 2020 regarding options for handover of keys, giving a number of options but stating that posting was not an option.

85. These emails were direct, but not aggressive.

86. Mr. Coll then sent a further email at 13:51 on 23 December 2020, the key points, in short, being Mr. Coll said he had been told by the police that the Claimant was out of the country on holiday and asked the Claimant to confirm several points, including his address, when he would return to the country and confirmation of his father's illness. Mr. Coll suggested the Claimant could withdraw his application for SSP and that if he did not he would conclude that the Claimant had broken his contract and resigned. The email's penultimate and last sentences state:

    "Let's end this drama and walk away now Maciej. I have done nothing to deserve this horrible treatment and it pains me to think that you could be treating me so unfairly after everything I've done for you, including opening my home to you over the Christmas holidays a year ago today.

    Whatever else you decide, I need proof of your return date so that I can agree a date with you to hand over those keys."

87. This email was direct, but not aggressive.

88. The Claimant replied to Mr. Coll at 14:24pm on 23 December 2020. He emphasised he was sick, that he had a follow up appointment booked. The Claimant states that he informed the police he was abroad, but not on holiday. The Claimant has not explained where he was, or the nature of him being abroad.

89. There is no corroborative evidence to support the Claimant's position that he returned to the UK from Poland on or around 7/8 December 2020 and

then subsequently left the country again. I do find that, based on the contents of this email, the Claimant was out of the country on 23 December 2020. On balance, I find that it was likely that the Claimant had not returned to the UK.

90. The Claimant expressed his concern about Mr. Coll making false accusations and that he considered him to be deflecting from the concerns he raised. The Claimant ended the email stating the he wished to raise a formal grievance against Mr. Coll and asked for details on how to do this.

91. Mr. Coll replied at 15:39 on 23 December 2020. Mr. Coll made a number of requests and comments, including asking the Claimant to not contact other staff members. He also stated that he was considering whether the Claimant had constructed the situation to bring a claim against the company.

92. This email was direct, but not aggressive.

93. The Claimant replied at 18:11 on 23 December 2020. The email sought to respond to some points, but not all, and also explained that the Claimant had not yet booked a ticket to return to the UK. The email also contains the following paragraph:

"Regarding your accusation about me hacking company systems-I imagine you are referring to me accessing Bizimply with my username and password, which you gave me access to. Might I suggest spending less time on Xmas decorations and more time running a restaurant which would eliminate your anxiety for such matters. For clarity I have not accessed anything I didn't have your permission to view. Please don't kick yourself knowing that I now have the evidence to support some of the points raised in my letter of potential concerns. Let's be frank, if you haven't done anything wrong, you have nothing to worry about which is what I sincerely hope."

94. The email ended by the Claimant stating he was exhausted and for Mr. Coll to not expect an immediate response.

95. In regard to the Fourth Disclosure, there was no mention of this alleged protected disclosure in the claim form, which was used as the basis for written witness evidence. There were no related documents in the Bundle. There was no additional oral evidence provided by the Claimant in this respect

96. I note that the chronological detail in the claim form starts at 14 December 2020. On balance, on the evidence presented, I am unable to make a finding of fact that the Claimant contacted HMRC.

97. Mr. Coll emailed the Claimant at 13:35pm on 20 January 2020.

98. He stated the Claimant had not answered the questions asked:

"I note that you have not answered any of the very pertinent questions I raised in my email of 23 December, which were designed to give me some

reassurance that you are in fact acting in good faith, despite evidence to the contrary.

In particular, you have not told me or provided evidence to substantiate:

Where you were on the 23rd while claiming sick leave;
When you booked your tickets for that trip;
The dates that you flew out of the UK and any return leg information;
That your father does in fact have an illness that would warrant you signing yourself off on stress leave as per your medical certificate;
That the keys are in your possession and confirmation of an address where I can arrange collection; and
Your true residential address in the UK."

99. The email invited the Claimant to attend an investigation meeting the following day, at 10:45AM via Zoom. Mr. Coll stated that:

"Please note that should you fail to attend, I will be forced to resolve that the absence from work was premeditated and that the sick leave is fraudulent, and you will be summarily dismissed for gross misconduct as per your contract.

If you fail to attend the meeting, this will also leave me with no other choice but to escalate my complaint to the police in terms of your refusal to return the keys to the restaurant.

If you will attend the meeting, I leave open all range of possible outcomes."

100. The email was not aggressive.

101. The Claimant replied. The email in the bundle states the time as being 13:13, but the email is in response to that from Mr. Coll timed 13.35. The Claimant stated he was still unwell and not able to attend the investigation meeting. He also raised that he considered his concerns were not being investigated and that his dismissal was predetermined.

102. The Claimant requested a breakdown of and payment for his holiday balance. The Claimant offered to post the keys. The Claimant did comment against some of Mr. Coll's queries and stated he was out of the country on 23 December 2020, didn't readily have information available about when he booked trips and the dates of flights.

103. Mr. Coll held a meeting on 21 January 2021, the Claimant did not attend.

104. The Claimant emailed Mr. Coll at 16:41pm on 26 January 2021 stating that he had posted the restaurant keys to the police. The Claimant emailed Mr. Coll again on 5 February 2021 attaching a Royal Mail tracking receipt showing a parcel as being delivered on 5 February 2021.

105. The Bundle contains fit notes as below:

2 January 2021 – stress and anxiety due to family illness – unfit to work 30 Dec to 12 January 2021
29 January 2021 – stress related problem – unfit to work 29 January to 27 February 2021
8 March 2021 – work related stress and anxiety – 8 March to 4 April 2021
5 April 2021 - depressive disorder – 5 April 2021 – 4 May 2021.

106. However, the Bundle does not contain any cover emails. The Claimant, as stated within the claim form, sent the respondent the fit notes.

107. The Claimant discovered that he had been dismissed on 6 April 2021. At 09:45am on 6 April 2021 Mr. Coll emailed the Claimant an email attaching a six-page document. The email had no text and the subject line states "Findings". The document is headed: "Meeting to investigate Multiple Accusation of Contract Breaches by Maciej Karpeta".

108. It is not clear why this letter was not sent earlier.

109. The document set out 7 accusations against the Claimant in Section 1. Section 2 sets out the evidence considered by Mr. Coll. Section 4 of the letter sets out in detail Mr. Coll's findings, which is not repeated here.

110. These reasons do not set out the full detail of the letter, but notes key points as below:

a. Information about the Claimant's location when on compassionate leave and quarantine leave was unclear;
b. Information about the Claimant's fathers' illness was considered unclear;
c. The Claimant had waited until late on 13 December 2020 to notify the respondent that he was too unwell to work the following day, that this was intentional disruption;
d. The Claimant did not make the restaurant keys available when requested and had taken the keys out of the country;
e. That it was considered the Claimant was out of the county and a false application for sick pay was made;
f. The Claimant did not live at the address he provided and lied in relation to where he lived;
g. The Claimant refused to participate in the process and provide information requested.

111. The outcome is set out in section 5, and the document concludes that the Claimant was dismissed for gross misconduct.

112. It goes on to say the SSP paid to the Claimant was being repaid and that costs related to the retrieval of key were being charged to the Claimant's holiday accrual. The letter states there to be £666 accrued holiday and £98 SSP.

113. In response to a question asked by me the Claimant stated the Respondent usually shared service charges (tips) between staff. The Claimant says he was last paid tips in September 2020. He says he is

owed tips from January to April 2020 and October and part of November 2020. The Claimant states that tips are divided between staff that work and that Mr. Coll told him the tips from before covid would be paid. There is no information in the Bundle or the Claimant's ET1 about the amount of service charge he says is due.

114. In response to a question asked by me the Claimant states that he is owed sick pay of around £350 for January, February, March and April 2020.

115. At the Case Management Preliminary Hearing the Claimant was directed to provide a Schedule of Loss by 5 December 2022, no Schedule of Loss was provided.

116. The Claimant made a data subject access request on 6 April 2021. The respondent has not responded.

The Law

Protected Disclosures

117. Employment Rights Act 1996 ("ERA"):

"43A Meaning of "protected disclosure"

"43A Meaning of "protected disclosure" 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."

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, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

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

43C Disclosure to employer or other responsible person.

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure **F2** ...—*

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

43F Disclosure to prescribed person.

(1) A qualifying disclosure is made in accordance with this section if the worker—

(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

118. The Claimant must prove that they have made a protected disclosure.

119. The necessary components of a qualifying disclosure to an employer were summarised helpfully by HHJ Auerbach in *Williams v Michelle Brown AM (UKEAT/0044/19/00):*

"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

120. There must be a disclosure of information. The disclosure must contain facts, not simply make an allegation. A disclosure can be made orally and in writing. It makes no difference if the recipient is already aware of the information provided.

121. The case of *Cavendish Munro Professional Risks Management Limited - v- Geduld [2010] ICR 325* makes clear, there is a need to convey facts, and not just make an allegation. An opinion does not equate to information *(Goode -v- Marks and Spencers PLC EAT 0442/09).*

122. The Employment Appeal Tribunal in the case of *Kilraine -v London Borough of Wandsworth UK EAT/0260/15* warned that tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations are often intertwined and the fact that information is also an allegation is not relevant.

123. The information disclosed must tend to show the alleged wrongdoing in section 43B, and therefore requires sufficient factual content.

124. A communication asking for information or making inquiry is unlikely to be conveying information.

125. The Claimant must have a reasonable belief that the disclosure is made in the public interest.

126. There is no definition of public interest in the legislation. A matter that is of "public interest" is not necessarily the same as one that interests the public.

127. The focus is on whether the worker/employee reasonably believed that the disclosure was in the public interest.

128. In *Chesterton Global Limited and others -v- Nurmohamed [2017] EWCA 979* the Court of Appeal made a number of useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person's interest was served by a public disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what "is in the public interest" when dealing with a personal interest issue because "*the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, where more than one worker is involved. But I am not prepared to say never."*

129. The four factors that the Tribunal should consider when looking at public interest are:

The numbers in the group whose interests are affected;

The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.

130. There can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not

substitute its view for that of the Claimant; it must consider whether the Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable. *Chesterton* established that the necessary belief is that the disclosure is made in the public interest; the particular reasons why the worker believes that to so be is not of the essence. Also, while the worker must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – the Court of Appeal doubted whether it need be any part of the worker's motivation.

131. The Employment Appeal Tribunal in *Dobbie v. Felton (t/a Feltons Solicitors) [2021] IRLR 679* provided further guidance on the meaning of "in the public interest", particularly at paragraphs 27-30. Disclosures about certain subjects are, by their nature, likely to be "made in the public interest" (see paragraphs 30-31). 30. The question of the reasonable beliefs of the Claimant needs to be determined.

132. The Claimant must show that they have a reasonable belief that the "information disclosed tends to show". The case of *Soh v Imperial College of Science Technology and Medicine EAT 0350/14* it was confirmed that there is a distinction between a worker saying "I believe X is true" and "I believe that this information tends to show that X is true".

133. The test of reasonable belief is objective and subjective. The case of *Phoenix House Ltd v Stockman [2017] ICR 84* explains that a judgment must firstly be made as to whether the Claimant's belief was reasonable and secondly whether objectively, on the perceived facts, there was a reasonable belief in the truth of the complaints.

134. The test for assessing whether the worked has a reasonable belief is a low threshold, but the Claimant's belief must be based on some evidence – rumours and unfounded suspicions are not enough to establish reasonable belief.

135. There can be a qualifying disclosure even if the facts relied upon turn out to be wrong.

136. In cases dealing with a number of alleged disclosures it is necessary to look at them individually.

<u>Automatic unfair dismissal</u>

137. Section 103A of the Employment Rights Act 1996 states:

"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."

138. The burden is on the Claimant to show that the principal reasons for dismissal was the protected disclosure.

139. S.103 indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

140. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Justice Elias confirmed in *Feccitt and ors v NHS Manchester (Public Concerns at Work intervening) 2021 ICR 372 CA* that the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B of the Employment Rights Act 1996. The latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas section103A requires the disclosure to be the primary motivation for a dismissal.

141. If the protected disclosure was merely a subsidiary reason, the claim will fail.

142. A Tribunal needs to consider two questions: firstly, what is the reason for dismissal, and secondly whether a disclosure was protected. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact for the Tribunal to make. In cases of multiple disclosures, the approach is to ask whether the disclosures, taken as a whole, were the principal reason for dismissal.

143. Where an employee has less than two years' service the employee has the burden of showing, on the balance of probabilities, that the reason for dismissal was for an automatically unfair reason.

144. A tribunal may draw inferences from facts established by evidence, but is not obliged to do so.

Detriment

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

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

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

(b) by an agent of W's employer with the employer's authority,on the ground that W has made a protected disclosure.

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

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

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

48 Complaints to employment tribunals.

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.

(1XA)A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).

(1YA)A shop worker may present a complaint to an employment tribunal that he or she has been subjected to a detriment in contravention of section 45ZA.

(1ZA)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.

(1A)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(1AA)An agency worker may present a complaint to an employment tribunal that the agency worker has been subjected to a detriment in contravention of section 47C(5) by the temporary work agency or the hirer.

(1B)A person may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47D.

(2)On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(2A) On a complaint under subsection (1AA) it is for the temporary work agency or (as the case may be) the hirer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

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

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

(4) For the purposes of subsection (3)—

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

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

*and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer**]** shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

(4A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

(5)In this section and section 49 any reference to the employer includes—

(a)where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3)).

(b)in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

(6)In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—

- *"agency worker";*
- *"hirer";*
- *"temporary work agency".*

145. Workers who have been found to have made a qualifying disclosure are protected from detriment on the ground that the worker made a protected disclosure.

146. The burden of proof for the protected disclosure detriment claim is that the Claimant must prove that they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities.

147. 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.

148. Detriment has the same meaning as in discrimination law – being put to a disadvantage.

149. In the case of *Blackbay Ventures Ltd v Gahir [2014] ICR 747* the Employment Appeal Tribunal gave guidance about the definition of the word "detriment". In paragraph 84 of the judgment, reference was made to the speech of Lord Hoffmann in Chief Constable of the *West Yorkshire Police v Khan [2001] ICR* **1065** quoting in turn Brightman LJ in *Ministry of Defence v Jeremiah [1980] ICR 13*, 31 "a detriment exists if a reasonable worker would or might take the view that the [treatment] is was in all the circumstances to his detriment."

150. In paragraph 85 of *Blackbay,* the opinion of Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* was quoted which also referred to Brightman LJ's formulation, Lord Hope adding, *"An unjustified sense of grievance cannot amount to 'detriment'".* Mr Kemp relied upon the case of *Jesudason v Alder Hey Children's NHS Foundation Trust [2020] ICR 1226,* but it makes the same point as the cases cited above that the threshold for a detriment is not high, adding in paragraph 28:

"28 Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

151. In paragraph 98 of *Blackbay*, tribunals were reminded that: *"Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant to the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act."*

152. There must be a causal link between the fact of making the disclosure and the decision of the employer to subject the worker to detriment. In the case of *Aspinall v MSI Mech Forge Ltd EAT 891/01* it 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'.*

153. It must be proved that the wrongdoer knew about the disclosure, and the mental process of the decision maker must be considered.

154. If a Claimant proves they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities. The Respondent then has the burden of proving the reason for the detrimental treatment if the Claimant meets the threshold. The Tribunal does not have to find in favour of the Claimant by default.

155. A Tribunal may, where there is an absence of direct evidence, need to draw inferences as to the real reason the employer acted as they did. Inferences drawn must be justified by the facts found.

Wrongful dismissal/Breach of Contract

156. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provided, by a payment in lieu of notice.

157. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Holiday Pay

158. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum, although a contract of employment can provide more. The leave year begins on the start date of the Claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the Claimant's employment, unless a written relevant agreement between the employee and the employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the Claimant on termination of employment in lieu of any accrued but untaken leave.

159. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 of ERA, with some modifications.

Unlawful deduction of wages

160. Section 13(1) of the Employment Rights Act 1996 (ERA) provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

13 Right not to suffer unauthorised deductions.

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

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

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

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

23 Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

(5) No complaint shall be presented under this section in respect of any deduction made in contravention of section 86 of the Trade Union and

Labour Relations (Consolidation) Act 1992 (deduction of political fund contribution where certificate of exemption or objection has been given).

27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992,

(c) statutory maternity pay under Part XII of that Act, statutory paternity pay under Part 12ZA of that Act,

(cb) statutory adoption pay under Part 12ZB of that Act,

(cc)statutory shared parental pay under Part 12ZC of that Act,

(cd)statutory parental bereavement pay under Part 12ZD of that Act,

(d) a guarantee payment (under section 28 of this Act),

(e) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc.),

(f) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act,

(fa)remuneration on ending the supply of an agency worker on maternity grounds under section 68C of this Act.

(g) any sum payable in pursuance of an order for reinstatement or re-engagement under section 113 of this Act,

(h) any sum payable in pursuance of an order for the continuation of a contract of employment under section 130 of this Act or section 164 of the Trade Union and Labour Relations (Consolidation) Act 1992, and

(j) remuneration under a protective award under section 189 of that Act,

but excluding any payments within subsection (2).

(2)Those payments are—

(a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (but without prejudice to the application of

section 13 to any deduction made from the worker's wages in respect of any such advance),

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

(c) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office,

(d) any payment referable to the worker's redundancy, and

(e) any payment to the worker otherwise than in his capacity as a worker.

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part—

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

(4) In this Part "gross amount", in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is—

(a) of a fixed value expressed in monetary terms, and

(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).

A claim about an unauthorised deduction from wages must be presented to an Employment Tribunal within three months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

Conclusions

Protected Disclosures

161. The first question for determination is whether any of the disclosures happened as alleged. If so, the I must ascertain if it is a qualifying disclosure. If it is, and has been made to either the employer or a prescribed person (if the necessary belief is established), then it is protected.

162. The Claimant alleges that he made 5 protected disclosures.

163. I have set out below my conclusions, based on the evidence before me, in relation to each alleged protected disclosure.

The First Disclosure

164. There was no mention of this alleged protected disclosure in the claim form, which was used as the basis for written witness evidence. There were no related documents in the Bundle. There was no additional oral evidence provided by the Claimant in this respect other than in response to me asking the Claimant what he said he told Ms. Santos. The Claimant says he told her that she had several emails but that she (Beatta) hadn't been topped up or paid.

165. It is for the Claimant to prove that he has made a protected disclosure.

166. At the outset of the hearing the Claimant confirmed that he understood the issues for determination, was directed to the List of Issues several times and was given several opportunities to say anything he wished as evidence whilst under affirmation.

167. On the evidence provided, I am not able to conclude that the Claimant disclosed any information in which he reasonably believed was in the public interest that tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation. The Claimant has not discharged the burden on him in this respect.

168. I conclude that the First Disclosure did not constitute a protected disclosure.

Second Disclosure

169. In relation to the Second Disclosure, there was no mention of this in the claim form, which was used as the basis for witness evidence. The Xlaimant provided no oral evidence and no documentary evidence in this respect. In response to a question asked by me, asking what was said on 11 September 2020, the Claimant stated that he, and another employee, spoke with Mr. Coll via messenger and told him that the restaurant was full of smoke, that no customers were inside and that no fire alarm had gone off. The Claimant stated that Mr. Coll tried to be helpful and told them to lock restaurant and make sure they were both safe.

170. The letter sent by the Claimant on 22 December 2022 does make reference to the fire incident on 11 September 2020, but does not refer to any specific conversation with Mr. Coll on 11 September 2020, but it does reference the Claimant allegedly speaking with Ms. Santos, the General Manager and providing her with a video.

171. I am satisfied, based on the oral evidence that the Claimant gave, was that there was a conversation that took place between the Claimant and Mr. Coll on 11 September 2022 in which the Claimant informed Mr. Coll that there was a fire next door and that the building was full of smoke and had been evacuated. There were facts conveyed to him.

172. On the evidence provided, I am unable to conclude that there was a provision of information to Ms. Santos on 11 September 2020.

173. Having concluded there was a disclosure of information to Mr. Coll I next need to consider if the Claimant reasonably believed the disclosure was made in the public interest.

174. It is necessary to consider what the Claimant reasonably believed, and with consideration of the *Chesterton* factors.

175. The number of persons involved are not clear, but the Respondent is a restaurant, and has both customers and staff present in its premises. The health and safety of persons and premises, and prevention and management of fire is an important issue. There is no evidence of any deliberate wrongdoing.

176. On balance, I have concluded that the Claimant had a reasonable belief that the disclosure was made in the public interest.

177. It must then be determined whether or not the Claimant reasonably believed the information disclosed tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. I conclude that the Claimant did believe that the information conveyed, specifically that no fire alarm sounded, tended to show that the health and safety of customers and staff had been, was being or was likely to be endangered. I consider that objectively, based on the presence of the Claimant at the event and the report he made at the time to Mr. Coll, that there was reasonable belief in the truth of the complaints.

178. The Claimant made the disclosure to Mr. Coll, Managing Director and Owner of the Respondent, the Second Disclosure was a protected disclosure.

<u>Third Disclosure</u>

179. In relation to the Third Disclosure, the Claimant provided no evidence, either within the claim form or orally in this respect.

180. The letter sent by the Claimant to Mr. Coll on 22 December 2022 does make reference to the fire incident on 11 September 2020 and does reference the Claimant allegedly speaking with Ms. Santos, the General

Manager and providing her with a video. However, this is some two months after the date of the alleged in the Third Disclosure.

181. On the evidence provided I was unable to make any definitive findings of fact about the Third Disclosure. I have not found any discussions took place.

182. In any event, it appears that the Claimant's case, as described in the Case Summary following the case management preliminary hearing on 14 November 2022, is "the claimant asked Magda Santos if the smoke alarms had been fixed, and was told they had not".

183. This is the Claimant asking a question, and there is no indication that that there was a conveyance of information. A communication asking for information or making inquiry in this case does not amount to conveying information.

184. Accordingly, I conclude the Third Disclosure did not amount to a protected disclosure.

Fourth Disclosure

185. In regard to the Fourth Disclosure, there was no mention of this alleged protected disclosure in the claim form, which was used as the basis for written witness evidence. There were no related documents in the Bundle. There was no additional oral evidence provided by the Claimant in this respect.

186. There is a reference to HMRC in the last paragraph of the Claimant's letter to Mr. Coll on 22 December 2020, as set out above but repeated here for ease.

187. "Should these matters not be dealt with appropriately I will have no choice but to notify HMRC and the HSE to investigate further."

188. There was no evidence presented by the Claimant to enable a finding of fact that he contacted HMRC.

189. On the evidence provided, I am not able to conclude that the Claimant disclosed any information in which he reasonably believed was in the public interest that tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation. The Claimant has not discharged the burden on him in this respect.

190. I conclude that the Fourth Disclosure did not constitute a protected disclosure.

Fifth Disclosure

191. Although labelled as the Fifth Disclosure, this is a disclosure involving two allegations about two separate matters, furlough fraud and non-working fire alarms.

192. Dealing firstly with the content within the Claimant's letter dated 22 December 2020 in respect of furlough fraud, and the question as to whether or not there was a disclosure of information.

193. There six paragraphs dealing with furlough arrangements. Some of the early paragraphs contain vague statements and a lack of specific in relation to the persons involved.

194. The key paragraphs are again copied below for ease of reference, and contain what I consider to be a mixture of both allegations and information. The letter disclosed information about the removal of staff from rotas and that staff were working when furloughed. The Claimant specified the staff rota not showing staff that were present working in the restaurant, although he has not specified names. I have concluded there was a disclosure of information.

"These employees were removed from the rota so that the truth about their working hours and time could be hidden, as I have a reasonable belief you were aware it was against the law. I also have reasonable belief that this practice has recently reoccurred with at least a number of employees who I believe have been receiving full or part time furlough money when in fact they have been working more than full time hours and received the furlough money instead of company pay for the hours worked, again, clearly against the furlough job retention rules. Evidence to support this is the fact that employees you are aware of have previously always been visible on the rota for all shifts and hours worked (with no/minimal exceptions to this). However, since the week of the beginning of the second national lockdown in November 2020 they completely disappeared from the rota even though they were working many hours in the restaurant. You will notice from the rotas that the restaurant would not have been able to open the hours it was with the rota showing in the system, which leads me to reasonably believe that manipulation of the hours to fraudulently benefit the restaurant took place through the misuse of the furlough job retention scheme. I believe you will also be aware of this, but in the event you are not, the CCTV cameras will highlight all of this to you."

"During the first national lockdown some employees (which I have full evidence and information of did receive their furlough money, even though they were in Poland, which you knew and were unavailable to immediately work due to being in Poland, yet other employees did not receive furlough money.)"

195. Having concluded there was a disclosure of information regarding furlough fraud I must go on to consider if the Claimant reasonably believed the disclosure was made in the public interest.

196. It is necessary to consider what the Claimant reasonably believed, and with consideration of the *Chesterton* factors.

197. The number of persons involved in the allegation are not clear, but there is reference to a number of staff being furloughed, although there is no information to determine how many persons were affected.

198. The misuse of public funds is an important issue.

199. The Claimant asserts there has been deliberate wrongdoing, but there is no evidence on which I am able to make findings of fact in this respect. The size of the Respondent is not clear, but it is understood to be a single restaurant that serves food to members of the public.

200. I have considered the relevance of the Claimant's motive, based on the findings of fact above, noting in particular that the Claimant only set his concerns in writing following commencement of his sickness absence and challenge in this respect by Mr. Coll. I also considered the fact although the Claimant must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it. I consider the email correspondence with Mr. Coll shortly before Mr. Coll sent his letter dated 22 December 2020 was an influencing factor in the Claimant sending the letter.

201. On balance, noting that furlough payments were paid for by the government, and was public money, and that the Claimant was physically present in the workplace, I conclude that the Claimant had a reasonable belief that the disclosure was in the public interest.

202. It must then be determined whether or not the Claimant reasonably believed the information disclosed tended to show that a criminal offence had been, was being or was likely to be committed.

203. The Claimant references the staff rotas and CCTV, and directs Mr. Coll to those sources. Although this evidence was not available to me.

204. I conclude that the Claimant did believe that the information conveyed, specifically that there had been inappropriate use of furlough monies to pay staff that were still working, tended to show that a criminal offence had been, was being or was likely to be committed.

205. I consider that objectively, based on the presence of the Claimant at the restaurant and the detail within the letter in view of the general information to the public about the operation of furlough at the time, that there was reasonable belief in the truth of the complaints.

206. To be clear, I have not made any finding of facts on whether or not there has been misuse of furlough funds, only that I consider the Claimant to have had a reasonable belief.

207. The information regarding furlough misuse given to Mr. Coll in the letter dated 22 December 2020 was a protected disclosure.

208. Dealing next with the information about fire alarms. As set out above, the letter states:

"There was an incident in the restaurant on the 11th September 2020 where smoke came into the restaurant from a fire, however, the fire alarms of the restaurant did not sound. Me and my colleague had to evacuate the restaurant for our own safety."

"I later found out that no fire checks are taking place and no fire alarm testing is being done."

"I also raised this to Magda and no one has looked into this or actioned this either."

209. In view of the content in the paragraph starting with "There was an incident" I conclude that facts were conveyed to Mr. Coll about smoke coming into the restaurant, the fire alarms not sounding and the Claimant and a colleague evacuating the building.

210. It does not matter that this information was known to Mr. Coll.

211. Having concluded there was a disclosure of information, the next consideration is whether the Claimant reasonably believed the disclosure was made in the public interest, in view of the *Chesterton* factors.

212. As with my conclusions regarding the Second Disclosure, the number of persons involved are not clear, but the Respondent is a restaurant, and has both customers and staff present in its premises. The health and safety of persons and premises, and prevention and management of fire is an important issue. There is no evidence of any deliberate wrongdoing.

213. On balance, I conclude that the Claimant had a reasonable belief that the disclosure was made in the public interest.

214. It must then be determined whether or not the Claimant reasonably believed the information disclosed tended to show that the health or safety of any individual had been, was being, or was likely to be endangered. I conclude that the Claimant did believe that the information conveyed, specifically that no fire alarm sounded, tended to show that the health and safety of customers and staff had been, was being or was likely to be endangered. I consider that objectively, based on the presence of the Claimant at the event and the report he made at the time to Mr. Coll and that the letter aligns with earlier verbal reporting on 11 September 2020, that there was reasonable belief in the truth of the complaints.

215. The Claimant made the disclosure to Mr. Coll, Managing Director and Owner of the Respondent, the information about fire alarms not sounding as part of the Fifth Disclosure was a protected disclosure.

Automatically unfair dismissal

216. As I have concluded that the Claimant has made protected disclosure, namely that on 11 September 2020 – the Second Disclosure – and on 23 December 2020 – the Fifth Disclosure – I must next determine

whether the principal reason for dismissal was either or both of the protected disclosures.

217. Mr. Coll made the decision to dismiss the Claimant on 21 January 2021, although the Claimant was not notified of the decision until 6 April 2021.

218. The Second Disclosure was on 11 September 2020. There is nothing to base any finding or inference that the report of a fire and fire alarms sounding had any bearing on the decision to dismiss the Claimant. Indeed, there appeared to be no difficulties in the employment relationship until the Claimant reported as unfit to return to work on 13 December 2020, following a period of compassionate leave and quarantine leave in November and December 2020.

219. Although there were emails immediately following the Fifth Protected Disclosure, there was no contact between the parties from 24 December 2020 until 20 January 2021.

220. On 20 January 2021, Mr. Coll emailed the Claimant stating that he had not received a response to his earlier questions (regarding illness, absence, location and key) and invited the Claimant to attend a meeting on 21 January 2021. The email explains the consequences of the Claimant not attending, namely dismissal.

221. I do consider it would have been a very short and simple task to look at the dates of bookings and flights, and indeed reply with a clear response to the questions asked and note that even though the Claimant was on sick leave he had earlier been able to correspond with Mr. Coll by email, and could have sought support from his partner to provide a substantive response to Mr. Coll's email dated 20 January 2021.

222. The findings of fact above summarise the key points of the dismissal letter, but I have given the letter full and detailed consideration in reaching my findings of fact and conclusions.

223. Mr. Coll dismissed the Claimant for gross misconduct, and some of the reasons set out in letter align with early concerns and queries flagged by Mr. Coll pre the Fifth Disclosure being made, namely concerns about the information provided by the Claimant regarding compassionate and quarantine leave, his fathers illness, his late notification of sick leave.

224. Based on the available evidence, namely the timeline of events, the email content and the dismissal letter, I conclude that the principal reason for the Claimant's dismissal was that Mr. Coll had lost trust in the Claimant and considered his refusal to provide clear responses the various questions posed amounted to a refusal to obey a reasonable instruction and considered this was gross misconduct.

225. I note that some of the questions related to return of the keys, and the request for the key return and actions that followed the Fifth Protected Disclosure, but do not consider this to be evidence that the principal reason for dismissal was the Fifth Disclosure.

226. The Claimant has not discharged the burden of showing that the principal reason for his dismissal was either or both of the protected disclosures. His claim for automatically unfair dismissal under section 103A of the Employment Right Act 1996 fails.

Detriment

227. As set out above, I have concluded that Claimant made three protected disclosures, the Second Disclosure on 11 September 2020 and the two elements described within the heading of the Fifth Disclosure on 22 December 2020.

228. I must therefore go on to consider whether the alleged detriment happened. As explained above, the burden of proof is on the Claimant to show that there has been detrimental treatment. I must then consider if any detriment was on the ground that the Claimant made a protected disclosure/s based in evidence, or justifiable inferences.

229. Dealing with each allegation of detriment in turn.

Being ignored by Mr Coll

230. As set out in the findings of fact above, the Claimant's case was that he was ignored by Mr. Coll in two respects: in relation to asking for a copy of his contract employment, which was provided at some point prior to July 2020 and when he asked for information about his holiday balance in an email on 20 January 2021, the day before Mr. Coll conducted a meeting at which he concluded the Claimant should be dismissed.

231. The first element of alleged detriment, being ignored in relation to requests for a copy of his contract took place before the protected disclosures on 11 September and 22 December 2020. I have been unable to make any precise finding of fact on whether or not Mr. Coll did ignore such requests, but in any event, the alleged detriment predates the disclosures and therefore could not be on the ground that the Claimant made a protected disclosure.

232. In relation to the alleged detriment of being ignored regarding holiday balance, the Claimant did ask for information once, in an email dated 20 January 2020. Mr. Coll set out information about holiday in the Findings document that was sent to the Claimant on 6 April 2021. There was some delay in the Claimant receiving this information, but the Claimant has not satisfied the burden of showing this constituted a detriment. Further, there is no evidence to conclude, on the balance of probabilities, that there was any link between the delay in providing information about holiday balance and the protected disclosures.

233. I do not consider the Claimant to have been subjected to any detriment in this respect.

An aggressive tone to emails

234. In the findings of fact above, I have set out my findings on whether or not there was an aggressive tone to Mr. Coll's emails. The Claimant has failed to clearly specify what parts of which emails he considered to have an aggressive tone. I also note that the Claimant had not provided complete email chains, and these were provided by Mr. Coll and were used to reach findings of fact.

235. There were a number of emails sent by Mr. Coll to the Claimant in the relevant period, as listed by date and time below:

14 December 2022 12:04
22 December 2020 13:59
22 December 2020 17:40
22 December 2020 19:20
23 December 2020 12:10
23 December 2020 13:10
23 December 2020 13:36
23 December 2020 13:51
23 December 2020 15:39
20 January 2021.

236. I do not consider the email dated 14 December 2020 to have an aggressive tone.

237. In the email dated 22 December 13:59 as per the findings of fact above, Mr. Coll was clearly annoyed and suspicious about the Claimant's absence and actions and I can appreciate why the Claimant may have reasonably interpreted that email as aggressive. However, at this stage, the Claimant had not submitted the document purporting to be his Fifth Disclosure. Accordingly, even though the email could be considered aggressive, and therefore capable of amounting to a detriment, it was not linked to the Claimant's Fifth Disclosure. There is no evidence to suggest that the aggressive tone in the email was in any way influenced by the Second Disclosure, given the passage of time and the seemingly normal working relationship in the interim.

238. In relation to the emails immediately following the Fifth Disclosure, namely the emails at 17:40 and 19:20 on 22 December 2020 I found that the emails were direct, but not written in an aggressive tone. The Claimant was not subjected to any detriment.

239. In relation to all the emails sent on 23 December 2020, I found them to be direct, but not written in an aggressive tone. The Claimant was not subjected to any detriment.

240. With regard to the email sent on 20 January 2021, I did not find this to be aggressive.

241. Accordingly, I conclude that in the emails sent by Mr. Coll to the Claimant, he was not subjected to any detriment on the ground that he made any protected disclosure.

A reduction in responsibilities

242. The Claimant spoke with his manager about the fact he did not wish to continue in a management role and stopped being a manager, in June 2020, as he had found the role to be too much pressure.

243. The Claimant wished to step away from a managerial position, therefore I do not consider this to be a detriment, and was not related in any way to the alleged protected disclosures, indeed the change in the Claimant's role predates both the protected disclosures.

Being removed from work email/chat groups

244. Mr. Coll, emailed the Claimant at 12:04pm on 14 December 2020. Mr. Coll informed him that he had removed the Claimant from the Line messaging groups so that he did not communicate on work issues and could focus on his health. The email also referred to the impact of the Claimant's compassionate leave, quarantine and sick leave on other staff and the business.

245. The Claimant provided no other evidence of any other group removal.

246. I consider being removed from the Line messaging groups was a detriment, the Claimant felt excluded and I find that it was reasonable for the Claimant to feel that way.

247. In considering the reason for the removal from Lines, as set out above, the Claimant was removed immediately upon informing the Respondent he was absent. This is after the Second Disclosure but before the Fifth Disclosure. The Fifth Disclosure had not taken place, and plainly cannot be a causal factor motivating Mr. Coll to remove the Claimant from Lines.

248. Considering all the evidence, I do not consider there to be any link between the removal from the Line system and the Second Disclosure, which took place on 11 September 2020. I have concluded, based on the contents of the email evidence, that at that stage – 14 December 2020, Mr. Coll was frustrated by the Claimant's absence and concerned about when the Claimant would return and that was the reason for removal. There is nothing to suggest that the reason for the removal from Lines was in anyway motivated by the Claimant having made the Second Disclosure.

249. I conclude there was no detriment on the ground of any protected disclosure.

Being asked to return the restaurant keys when he was sick, which was not asked of other absent employee key-holders

250. The first email in which Mr. Coll requests the return to of the keys is at 17:40 on 22 December 2020, a short while after the Claimant emailed his letter of concern (the Fifth Disclosure).

251. At 19:20 on 22 December 2020 Mr. Coll sent an email requesting location of the keys and said he would collect them and that the security of the restaurant over the holiday was his paramount concern and he was entitled to ask for the keys back at any time.

252. There was no evidence from Mr. Coll as to what was meant by "in the present circumstances", and the conclusions reached are based on the evidence provided from the Claimant and the documents.

253. I can understand that the Claimant may have been upset by the request to return the keys. However, considering the request on both a subjective and objective basis, on the evidence, I do not consider this to be a detriment. The Claimant was absent on sick leave following a period of compassionate leave and quarantine leave and had been absent for a month already, indeed I have found it was likely that he was out of the country and had not returned. Although the Claimant may have kept keys during other periods of absence, Mr. Coll was clearly losing trust in the Claimant and suspicious of his actions prior to the Fifth Disclosure. I do not consider an employer requesting return of keys, whilst an employee is absent on sick leave, even in the context of the Fifth P Disclosure having recently occurred, to be detriment.

254. Further, even though I have concluded it did not amount to detriment, I consider there is nothing to suggest that Mr. Coll requesting the return of the keys was in anyway motivated by the Claimant having made the Second Disclosure, noting the passage of time between the two events and a seemingly unproblematic working relationship in the interim.

255. Although, I have concluded the request for returning the keys was not a detriment, I do consider that part of the reason why Mr. Coll asked for the Claimant to return the keys was a further loss of trust in the Claimant following receipt of the Fifth Disclosure, however Mr. Coll clearly had concerns and some loss of trust in the Claimant before the letter as indicated in the email 13:59pm on 22 December 2020

<u>Mr. Coll attending the Claimant's home address to ask for the keys</u>

256. It is clear Mr. Coll did attend the Claimant's home address on 23 December 2020 to obtain the restaurant keys, the day after the Fifth Disclosure, although on the evidence provided it was not possible to make precise findings of fact other than the Claimant was embarrassed.

257. Based on the limited evidence provided, when considering how a reasonable worker would view the matter, I do not consider Mr. Coll attending the Claimant's house to collect the restaurant keys constituted a detriment.

258. Further, even though I have concluded there was no detriment, I consider there is nothing to suggest that Mr. Coll attending the Claimant's house was in anyway motivated by the Claimant having made the Second Disclosure, noting the passage of time between the two events and a seemingly unproblematic working relationship in the interim.

259. Similarly, although I have concluded the attendance did not amount to detriment, I note the attendance was the day following the Fifth Disclosure and have considered whether the Fifth Disclosure was a material influence in Mr. Coll's actions. Mr. Coll was clearly frustrated by the Claimant's actions and was questioning the validity of the Claimant's illness before the Fifth Disclosure, as evidenced in the email Mr. Coll sent the Claimant at 13:59 on 22 December 2020. Mr. Coll did indeed request return of the keys shortly after the Fifth Disclosure, but, based on the emails, I consider the decision to attend the Claimant's house in an attempt to recover the keys was motivated by the Claimant's email responses – in short that he would not be able to return the keys in the time requested – and that Mr. Coll was dubious about the Claimant's sickness and whether or not he would be returning to work.

<u>Mr. Coll reporting the Claimant to the police in relation to the restaurant keys</u>

260. As set out in the findings of fact above, Mr. Coll contacted the police at 13:00pm on 23 December 2020 following his unsuccessful attempts to retrieve the keys from the Claimant's home address.

261. I consider that Mr. Coll contacting the police does amount to a detriment. It is plain that a reasonable worker would be upset by their employer contacting the police about them.

262. I do not consider the decision to contact the police was in anyway influenced by the Second Disclosure.

263. However, the reporting to the police was in close proximity to the Fifth Disclosure, and this has required careful consideration of the motivation for contacting the police – again based on the evidence available. In regard to the above alleged detriment, I concluded that the reason for attending the Claimant's house was to seek return of the keys following the Claimant saying he could not return them and his doubts about the Claimant's sickness. In regard to this allegation I have had to consider what motivated Mr. Coll to take the step of contacting the police. I did not have direct evidence from Mr. Coll. I note that Mr. Coll contacted the police very shortly after ascertaining the Claimant was not at home, and very quickly notified the Claimant in an email that he had reported the matter to the police. The wording of Mr. Coll's email at 13.00 on 23 December 2020 is central to my conclusion on motivation: "This has now been escalated to the Police due to your unreasonable refusal to hand over the keys to my restaurant."

264. I conclude that the main motivation for Mr. Coll contacting the police at the precise time when he did, 13:00 on 23 December 2020, was to try and obtain return of the keys, having failed to retrieve them from what he

believed to be the Claimant's home address. Mr. Coll was clearly dubious about the Claimant's absence, questioned the validity of this sickness and was concerned about Claimant's actions – but this concern arose before the Fifth Disclosure – as demonstrated by earlier emails. I do not consider there is any evidence before met to conclude that the Fifth Disclosure materially influenced the decision to contact the police – and based on the specific timeline of events regarding Mr. Coll attending the Claimant's home and ascertaining the Claimant was not at home, I consider Mr. Coll contacted the police because he had been unsuccessful in obtaining the keys directly from the Claimant.

265. Accordingly, I conclude that the Claimant has not been subjected to a detriment on the ground that he has made a protected disclosure. The complaint under sections 47B and 48 of the Employment Rights Act 1996 are dismissed.

Breach of Contract - notice pay

266. As set out in regard to the complaint of automatically unfair dismissal, I determined that the Claimant was dismissed for gross misconduct.

267. It is accepted the Claimant had fit notes certifying that he was not fit for work, and it is not a requirement for an employee to be in the country whilst on sick leave. However, the Claimant failed to comply with reasonable management requests, which I consider amounts to a fundamental breach of contract by the Claimant. Accordingly, the Respondent was entitled to dismiss the Claimant without notice.

Holiday Pay (unlawful deduction from wages)

268. There was very little evidence presented in regard to this complaint. In the findings letter it states that the Claimant was owed a sum of £666 in relation to accrued but unused holiday, but that the costs of retrieving the key were being charged against it. The Claimant made no submissions on whether such deduction was authorised or not. The Respondent, in submissions, stated that a sum of £667.46 was calculated as being owed but said the contract of employment allowed him to claim back funds owed.

269. There was a contract of employment in the Bundle, but neither party directed me to it. Clause 4.2 states: *"We shall be entitled to deduct from your wages or other payments due to you any money which you may owe to the Company at the time."*

270. The Claimant has not evidenced the unlawful nature of any deduction. On the evidence provided I am unable to conclude when any deduction took place (noting the Claimant was on a zero hours contract and on sick leave) and whether any deduction was authorised. Accordingly, the complaint of unlawful deduction from wages regarding non-payment of accrued holiday fails.

Unlawful deduction from wages - tips

271. There was very little evidence presented in relation to this complaint.

272. The Claimant has not evidenced the unlawful nature of any deduction. On the evidence provided I am unable to make any factual findings on what tips were collated in what period, what amounts should have been paid as wages, whether any deduction took place and whether any deduction was authorised.

273. Accordingly, the complaint the complaint of unlawful deduction from wages regarding of non-payment of tips fails.

Employment Judge G Cawthray

Date 26 June 2023