EMPLOYMENT TRIBUNALS

Claimant: Mr S. T. Hudur
Respondent:11 Berkeley Street Ltd, trading as Jeru Restaurant

London Central

Employment Judge Goodman
Mr D. Kendall
Mr T. Harrington-Roberts **20-22 June 2023**
Panel discussion 23 June.

Representation:
Claimant: in person
Respondent: Jacob Tidy, Croner Consulting Ltd

RESERVED JUDGMENT

1. The claimant was not subjected to detriment because he complained about health and safety or because he made protected public interest disclosures.

2. The claimant was not unfairly dismissed for making complaints about health and safety or for making protected public interest disclosures.

3. The respondent made unlawful deductions from wages and is ordered to pay the claimant £1,667.

4. The respondent is ordered to pay £1,534.44 for holiday not taken at dismissal.

REASONS

1. The claimant was the respondent's restaurant manager. He claims unfair dismissal and detriment for making protected disclosures, or for bringing health and safety matters to the employer's attention. The claimant lacked two years' service, so there is no other unfair dismissal claim.

2. There is also a claim for unauthorised deductions from wages, which concerns tronc payments of customer service charges, and unpaid holiday.

3. A list of issues appears at the end of this decision. The issues were not identified at the case management hearing. After amendment of the response, a list was drafted by the respondent's representative and agreed by the claimant. After discussion at the start of the hearing, some clarifying changes were made, and some more at closing.

Evidence

4. We heard live evidence from the claimant, **Teyfun Hudur,** and from the respondent's general manager, **Adnan Ozkara,** and their HR manager**, Vanessa Charles.**

5. There was a bundle of documents for the hearing of 271 pages, and a remedy bundle of 60 pages. We read those to which we were directed.

6. The hearing was listed for four days. There was a short case management hearing on the first day where the respondent's representative appeared remotely due to family illness, he having the previous afternoon sought a postponement. It was established that the crisis had passed and that he would be able to attend on the remaining days. We spent the rest of the first day reading in to the case. We heard live evidence on the second and third days. After reading a written submission from the respondent and hearing an oral submission from the claimant, judgment was reserved.

Findings of Fact

7. In 2021 the respondent started up a restaurant called Jeru. The claimant was hired as restaurant manager. He started work on 15 November 2021. The restaurant opened on 2 December 2021.

8. The restaurant closed down because of Covid from 18 December 2021 to 7 January 2022. The claimant was told to take more days away if he wished, and he returned to work on 12 January 2022.

9. The claimant found relations with the chefs difficult. On 30 January he reported an incident "two weeks ago" involving one of them, when he was discussing portion items with him, and "without noticing tip of my toes in the kitchen tile, and he look at in the my eyes and he kick my toe". On 28 January he reported a complaint from customers the previous evening that the food was "awful". He suggested they offer the customers a return visit.

10. On 29 January he reported verbally to Adnan Ozkara, repeated in the early hours the next morning by email to Vanessa Charles, in HR, that the head chef (Richard) had been very rude to him when he was chasing up delay in customer main courses, pointing the finger and using the F word, in the restaurant. The claimant said he did not expect this treatment from anyone. He had not slept. He was told, sympathetically, that the matter would be addressed. He replied that this had not been the first incident, reporting the

earlier toe episode.

11. This report on 29 January about the chef's conduct is the first protected disclosure.

12. On 3 February the claimant wrote to Adnan Ozkara confirming a conversation the previous day. The day before that, there had been confrontation with chef Roy about the cleaning of the restaurant floor. The chef was ignoring him. The chef should stay in the kitchen, but was instead interfering, adjusting the lights, complaining about the music, and mixing cocktails. The restaurant was "like a police state!" He thought the chef was upset because the claimant had complained about him. He then said he had seen mouse droppings in the bakery section, and salami had been gnawed by mice. Chef Roy did not want them thrown away and kept them in the bakery display. He attached some photos. He added that four team members had left in the last 10 days, others are planning to leave. There was no staff handbook. No proper marketing had been done when they opened.

13. This is the second protected disclosure.

14. On 4 February the claimant took a day off because he was unwell with depression.

15. On 13 February he sent a video of mouse droppings and Adnan Ozkara was asked to call pest control.

16. On 15 February 2022, Vanessa Charles from HR, who had recently been able to return to the UK from South Africa, held a meeting with the claimant. She said it was about performance matters. The claimant complained about the chef, excessive overtime, and that the service charge was not being distributed to staff.

17. He sent her an email next day, 16 February, and this is the third disclosure.

18. He said that on 8 February two customers had complained that the food was tasteless and dry, and when reported to the chef he had said that there was nothing wrong with the food and something wrong with the customers. Another customer gave the restaurant a bad review the following day, and there had also been a poor review on Trip Advisor. The floor manager, Birgita, who had just left, had been sworn by chef Roy with the F word. The violinist had left complaining the chef thought he was Gordon Ramsay (a celebrity chef with a reputation for bad temper). There were delays in delivering food orders. The chef was talking behind his back to build a case against him because of his emails. He could not sleep because of stress. He then listed his other concerns: delay paying tronc, overtime payments, there was no allergen chart or food bible, a cleaner for the toilets had only just been appointed, until then the two managers had had to do it. Adnan Ozkara was keeping quiet for fear of losing his job, and the chef was a "control freak".

19. Vanessa Charles's evidence was that her meeting with the claimant was not intended as performance management. It was one of nine meetings she held over three days with the line managers to find out how things were going. She had then written a composite report collecting themes arising from discussions. This was not in the hearing bundle. She had concluded that the departments were working in silos – front of house, back of house, and bar – and that the management team needed to be united.

20. On 23 February the restaurant got a very poor review in the Evening Standard. The review was unflattering about food, but according to the claimant the chef said that the claimant was to blame. The claimant also reports an incident where a VIP customer had booked and the claimant had made a notable reservation system only managers were to deal with the booking. The claimant says the chef laughed, saying it needed someone better than him to do that. This indicates their relationship was poor.

21. Then on 3 March there was an inspection by the Environmental Health Officer for the local authority, and we can see from the report of 8 March 2022 that it was rated 2, out a possible 5. If not promptly rectified this would appear on the food hygiene rating sticker that restaurants are obliged to display to customers. The criticisms included cross contamination in the fridge of raw food and food that was ready to serve, the vac-pack machine was being used for both raw and ready to eat foods, some food beyond its use by date, and a "level of mice activity noted on the site was quite high and was borderline for me serving a hygiene improvement notice (this was explained at the end of the inspection to Mr Ozkara)". A notice would be served if there was still evidence on revisit. There was also inadequate cleaning in the kitchen and pot wash, inadequate record-keeping for cooked food, and they were using genetically modified cooking oil. Additional staff training was recommended.

22. When they opened, the respondent had taken out a standard contract for pest control, with monthly inspections by a company called Enviro Tech. On 7 March 2022, following the inspection, Enviro Tech quoted for "extensive works" to stop up the holes and cracks where mice were getting in. The work was completed on 17 March, although on 28 March the chef reported mice gnawing under the door and asked for a metal plate to be fitted. It was too rotten and had to be replaced.

23. In the first week of April kitchen staff all received updated food training. By the date of the next certificate, 1 September 2022, the restaurant achieved a five rating.

24. Meanwhile, on 25 March 2022, the claimant was invited to attend a disciplinary hearing on 29 March. The alleged offence was "poor work performance – failure to fulfil restaurant manager role and lead the front of house waiting team".

25. At this meeting the claimant discussed with Vanessa Charles the fact that he did not seem to be cashing up at the end of the shift, but was leaving it to other staff, the state of service, and the need to lead the team - her perception was that no one was leading the front of house team. The claimant replied that it should be the general manager (Adnan Ozkara), and he was not getting his support, but she said the general manager should be doing finance and analytics, and it was the claimant's job to lead front of house, as he was the senior person on the floor, and he should be doing the opening and closing. He was asked to be more proactive. There was no written follow up to this discussion.

26. That day the claimant went to ACAS to start the early conciliation. process. On 31 March 2022 he presented an ET1 claim to the employment tribunal that he was being bullied and harassed and "in the process of being" unfairly dismissed. The tribunal posted this to the respondent on 21 April 2022.

27. Meanwhile, on 13 April the claimant had sent another video of mice on the kitchen floor, reporting they were around two tables, the disabled toilet and the bar.

28. There was an incident on 15 April which illustrates the relationship between the claimant and chef: the claimant saw the chef and Mr Ozkara talking about him. Mr Ozkara told him later they were joking about whether the claimant wore make up.

29. We can also see that the food bible was on hand. On 14 April the marketing manager sent a draft of the food bible (a description of each dish on the menu), saying she would get the floor manager to produce a shortened version, so that was in hand.

30. On 27 April 2022 when the claimant was on duty, three senior managers, the CEO, the managing director, and general manager (Adnan Ozkara) were sitting round a table to one side of the restaurant eating lunch and discussing papers. They were being served by the kitchen staff, not by the front of house staff. No one was clearing the tables. The claimant was spoken to and told he was suspended for not providing adequate service.

31. Next day Mr Ozkara emailed the claimant asking for some information: when was his start date, when did he raise any health and safety matters, to whom, and what were they, much tronc money did he think he was entitled to, could they have a copy of his contract. We assume from this that the prompt for the questions was either the claimant's discussion with ACAS, or that they had seen a copy of the ET1 and were considering a response. The claimant replied that he was "a bit confused". They already had the documents, and his emails to HR. He wanted to know if you had been suspended or dismissed, and what the reason was? He assumed it was because he complained to ACAS. He identified his disclosures as the 28 and 30 January and 3 February. As for the tronc money, a troncmaster had been involved three

weeks earlier and money was being withheld.

32. He got a reply that he was suspended until told otherwise, amplified on 30 April as: “you will be paid when you are suspended. You are suspended for me to investigate your unsubstantial claims and to investigate your performance at work”.

33. On 2 May the claimant was asked to attend a meeting on 2 May. At this meeting he was dismissed for poor performance. We have the notes of that meeting, taken by a note taker. The stated purpose of the meeting was to review the claimant’s performance, and friction between him and chef Roy and Richard. They could not have a senior manager constantly arguing with the head chef and other kitchen team. He was also accused of working short hours, and taking more holiday than he was entitled to. Adnan Ozkara asserted that they did not understand what the claimant meant by disclosures. If these were about pest problems, these were well known to all, nothing was hidden or needed disclosing, and they working to eliminate the problem. His employment was being ended for “untenable relations with kitchen management, low performance (working only for shifts which is around 34 hours per week when we are short of staff) and failing to lead his team. He was given one month’s notice, “and it will be the only payment we will make to you”. They would not take back money for overused holiday. The claimant said that he did not punch or swear, and that the chef had served mouse bitten salami to the public. He was not working short hours, and both he and Vanessa Charles had prepared the rota. He added that they had already decided to dismiss him when he was suspended. The claimant was sent the meeting notes, and they, it seems, stand as the letter of dismissal.

34. On 30 April 2022 the claimant wrote separately about the proposals made to all staff to pay tronc and in turn cut pay (see unlawful deductions below).

35. On 10 May the claimant wrote appealing the dismissal. As far as he was concerned, he had been dismissed for complaining about bullying and mouse droppings. Their response to his complaints was to threaten disciplinary action. They had not investigated by looking at the documents. Adnan Ozkara replied on 11 May asking him to look at the minutes of the meeting carefully to see the reasons. He had not supplied the evidence requested. That was the end of it.

36. On 18 May 2022 the claimant presented his second claim to the employment tribunal for unfair and wrongful dismissal for making protected disclosures and for tronc payments.

Relevant Law – protected disclosure and health and safety

37. The statutory protection of whistleblowers is set out in the Employment Rights Act 1996. The purpose of the legislation is:

"to protect employees…for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have an early knowledge of them, and protecting the respective interests of employers and employees" –

L. J. Mummery in **ALM Medical Services Ltd v Bladon (2002) IRLR 807.**

38. The "whistleblowing " that is protected is:

"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) ..
(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 the health or safety of any individual has been, is being or is likely to be endangered,
(d)…
(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.
- section 43B Employment Rights Act.

A disclosure qualifies for protection if made to the employer (among others) - section 43C.

39. Tribunals must approach the question of whether there was a protected disclosure in structured way. They must consider whether there has been a disclosure of information, not a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information. **Kilraine v L.B. Wandsworth(2018) EWCA Civ 1436** makes clear that the disclosure must have "sufficient factual content" to make it a disclosure of information and not just an allegation.

40. They must then consider whether the worker held a belief that the information tended to show a class of wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element) – which is not to say that belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA.** Then the tribunal must assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be explicit. As was said by the EAT in **Bolton School v Evans**, "it would have been obvious to all but the concern was the private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability".

41. **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837** confirms that a claimant's genuine belief in wrongdoing, the reasonableness of that belief, and his belief in public interest, is to be assessed as at the time he was making it. Public interest need not be the predominant reason for making it. Public interest can be something that is in the "wider interest" than that of the whistleblower- **Ibrahim v HCA International**. The whistleblower may have a different motive for making the disclosure, but the test is whether at the time he believed there was a wider interest in what he was saying was wrong.

42. Each of these five questions must be answered for each disclosure in order to decide whether it was made and whether it qualified for protection.

43. Workers (a term which includes employees) are protected from detriment for making protected disclosures. Employees are protected from being dismissed for making a protected disclosure.

44. By section 47B(1)A of the Employment Rights Act 1996:

> " 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.

This includes acts done

> "by another worker of W's employer in the course of that other worker's employment" - section 47B (1A

Detriment means being put at a disadvantage. The test of whether someone has been disadvantaged is set out in **Shamoon v Chief Constable of RUC (2003) UKHL 11,** and the test is whether a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment - **Jesudason v Alder Hay Children's NHS Foundation Trust (2020) EWCA Civ 73,** but **"**An unjustified sense of grievance cannot amount to detriment" **Barclays Bank v Kapur no2 1995 IRLR 87.**The test of whether any detriment was "on the ground that" she had made protected disclosures is whether they were materially influenced by disclosures– **NHS Manchester v Fecitt (2012) ICR 372**. This is less stringent than the sole or principal reason required for claims about dismissal.

45. The Tribunal is required to make a careful evaluation of the respondent's reason or reasons for dismissing her - or subjecting her to other detriment. This is in essence a finding of fact, and inferences to be drawn from facts, as a reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA,** and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.**

46. In assessing reasons, tribunals must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425 (**a victimisation claim), and **Ahmed v Amnesty International [2009] IRLR 884** . However, it is not necessary to show that the

employer acted through conscious motivation – just that a protected disclosure was a ground for detriment– what caused the employer to act as he did - **Nagarajan v London Regional Transport (1999) ITLR 574**. These cases concern the Equality Act, but the same considerations apply to analysis of why the employer acted as it did in the context of a protected disclosure: "the reasoning which has informed the European Union analysis is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. In my judgment, that principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in insuring that they are not discouraged from coming forward to highlight potential wrongdoing." – **Fecitt.**

47. For dismissal, rather than detriment, both sections 100 and section 103A provides that the health and safety complaint, or protected disclosure, must be the sole, or if more than one, the principal reason, for dismissal. This is more stringent than the material influence requirement for claims of detriment.

Health and Safety

48. Section 44(1)(c) of the Employment Rights Act protects a worker from detriment where

> being an employee at a place where—
>
> (i) there was no such representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

49. By section 100 of the Employment Rights Act, where an employee is dismissed he must be regarded as unfairly dismissed if the reason – or if more than one, the principal reason, was that he:

> being an employee at a place where—
>
> (i)there was no such representative or safety committee, or
>
> (ii)…
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety

Discussion and Conclusion – the Protected Disclosure and Health and Safety Claims

50. Taking the disclosures in turn, the first one gives information that the claimant has been confronted in an unpleasant way by the chef, and that he is losing sleep because of it. This tends to suggest his health is affected by the behaviour, and, as far as we know, that his belief was reasonable, that is based on evidence, not fanciful. However we did not conclude that it was made in the public interest. There is no mention of the effect on anyone

else.

51. We also considered whether this met the conditions for section 44 health and safety detriment. We concluded that it does, subject to the question whether there was any detriment on that ground. There was no safety committee. He raised it by reasonable means, namely speaking first to his line manger and then confirming in writing to HR.

52. Moving to the second disclosure, this discloses more information about the chef's behaviour to staff, and then about mice and food hygiene. There were grounds for the belief that there was injury to (mental) health, and that there was a threat to the health of the public and breach of legal obligations for food hygiene in a restaurant open to the public. In the latter the claimant considered this at the time to be in the public interest. As for the chef's behaviour, it is debatable that the claimant had public interest on mind. There is reference to four team members leaving, but as part of a list of disparate matters, and it could just be there to suggest the business was not being very well run. We concluded that this part of the complaint was not made by the claimant in the belief that it was in the public interest. It does however meet the requirements for a section 44 report on a health and safety concern.

53. Turning to the third disclosure, this discloses information about the chef, and is mainly about the chef, including his effect on other staff. We considered whether this met the test of public interest, as it raised a wider concern than the effect on the claimant's own health, but concluded it was not a wide enough section of the public, though it did meet the section 44 test, which is about workplace health and safety. As for the other complaints in his email, they concerned the success of the business, his own duties, a complaint about unpaid hours, and a delay in distributing tips from a tronc, which do not suggest breach of legal obligation (the tronc – see below – was always to follow after the initial period) or a matter of public interest. They do mention an allergen chart and food bible, which might tell customers if there were contents they should know about it, which are conceivably about health and safety and a matter of public interest.

54. The pleaded claim is that the claimant was subjected to disciplinary action and then dismissed because he made protected disclosures or health and safety at work. The tribunal has first to consider whether the disciplinary action was a detriment, and whether it was materially influenced by any disclosure.

55. We considered that it was detrimental that there were no notes of this meeting or any letter telling him an outcome or what was expected. It will have been worrying to any staff member to be told they were being disciplined and then left unclear on the outcome.

56. We discount the effect of reporting the mouse droppings and gnawed salami.

The respondent already had measures in place to control mice, though evidently not very effective ones. After the local authority inspection on 3 March (and no one has suggested they were tipped off by the claimant) the fact that the *claimant* had raised it will have paled into insignificance. The problem had been independently reported and they took immediate action to try to fix it. We also discount complaints about an allergen chart or food bible. The respondent took steps to deal with these. They were obviously needed. Nothing suggests the claimant was resented for mentioning these items in his much longer list of personal matters.

57. What was the effect of complaining about the chef? On the initial complaint at the end of January, we understand the chef was spoken to, and that this act of itself made relations worse. The head chef (Roy) had a share in the business and had won awards in Australia. In our finding, there were already poor relations between the claimant and the kitchen. Such tensions do arise from time to time in restaurants. They continued to be poor. They may have got worse because the chef resented being spoken to by managers and told the claimant complaining about him. The so-called disciplinary meeting at the end of March was called because of the problems in leadership Ms Charles had identified in her review. The relationship with the chef does not seem to have been part of her discussion with the claimant at the end of March. It is of course possible that the claimant's poor relations with the kitchen were part of the problem. However her concern was not that he had raised it in his emails, but that the claimant was not in fact an adequate leader of the front of house team, relying too much on his own line manager, Adnan Ozkara. We note that the claimant has said nothing in evidence about cashing up or whether he opened and closed, and that elsewhere Mr Ozkara said the claimant lacked computer skills, which is likely to be about not cashing up. These criticisms may have had some merit. We do not find that his complaints about the chef's behaviour affecting health of staff were a material influence on the decision to call him to a meeting, and the meeting did not lead to any disciplinary action, nor even a warning of penalty if he failed to improve, just a request to improve his own contribution to smooth running. Ms Charles said that as a result of her review of staff, both the bar manager and the marketing manager had left. This of itself suggests that disclosures or health complaints had little to do with the decision to call him to a disciplinary meeting, which was more about the "silos" she had identified. As for the lack of information about the outcome, Ms Charles said that was because the conclusion was that Mr Ozkara should continue to monitor the claimant's performance, and she was no longer involved. That is an inefficiency which is hard to understand as being caused by complaints about the chef.

58. Moving on to the dismissal, the test here is whether protected disclosures (section 103A) or a complaint about health and safety (section 100) were the sole, or if more than one, the principal cause of the dismissal.

59. Having considered the reasons given by the respondent, and the context, we conclude that one of the reasons given, namely continued friction between the claimant and the chef, was entirely plausible as a real reason. There was friction between the claimant and the chefs, and it will have made running the restaurant, which already faced poor reviews and mouse infestation, more difficult. Both sides may have been to blame, and the chefs may have been regarded as less expendable, especially when one had a holding, but the fact that the claimant had complained about the chefs was only one feature in the pattern. As the claimant's evidence made clear, the friction was clear to Mr Ozkara and to several other staff. They knew about it first hand, not just from the claimant. His disclosures were not a principal cause.

60. The other feature we considered in assessing the reason for dismissal was its context and timing of the dismissal. The contemporary emails indicate the respondent may have had in mind either a tribunal claim or an approach to ACAS. This may have been on the senior managers' minds on 29 April when they were unimpressed by the front of house service and the claimant's lack of attention to serving them. If so, it may have been the fact of claim to the tribunal, not the earlier protected disclosures (which they had not been able to identify), that made them consider dismissal. We must also take into account that Mr Ozkara was charged with following up the claimant's performance after 29 March, and it was now month later. Exasperation that the claimant and his staff were not serving their table will have been fed by their knowledge that the claimant had already been told he was not leading as he should. Of course it would be unfair to dismiss him without a warning or investigation, but as he had less than two years' service, we have only to consider the reason, not whether it was unfair to dismiss for that reason.

61. We concluded that neither protected disclosures, nor complaints about health and safety, were the sole or principal reason for the dismissal.

Unauthorised Deductions from Wages – The Tronc

62. Section 13 of the Employment Rights Act protects workers from unauthorised deductions from wages. The claimant asserts that the failure to pay him his share of tronc is an unauthorised deduction.

63. Section 27 defines wages:

> "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,

64. The respondent argued that tronc payment would not count as wages as it was not contractual. The definition "whether payable under his contract or otherwise" shows this is not relevant. What the respondent might however mean is that it was not payable by the employer.

65. In **Cofone v Spaghetti House Ltd** (**1980) ICR 155, EAT,** it was held that tips paid to the waiter were not counted as wages, so when the waiter was required to pay £8.50 per month to the employer from his tips, that was not a deduction from his pay. However, in **Saavedra v Aceground Limited 1995 IRL 198**, where a waiter's contract provided he was to receive £7.80 plus service per shift, and the service charge was compulsory, it was held that the service charge was allocated to the employer by the customer, and it counted therefore as wages.

66. That case preceded the introduction of the national minimum wage (NMW). The NMW Regulations define wages as "all money payments paid by the employer to the worker in the pay reference period". In **HMRC v Annabels (2009) ICR 1123,** the question was whether distributions by a troncmaster (a person appointed to manage distribution of tips) counted as wages for the National Minimum Wage Regulations. Tips and service charge paid into a tronc and distributed by a troncmaster, who deducts tax before paying it to the employee, but not national insurance (as by HMRC rules a troncmaster is independent of the employer) were held not be not to have been paid by the employer, so should not be counted towards the national minimum wage. Regulations have since made it explicit that tips and service charge payments should not count against wages for the national minimum wage.

67. There was no evidence before the tribunal from the respondent on whether the Jeru service charge on customers' bills was compulsory or discretionary. The troncmaster referred to it as discretionary.

68. There is conflicting evidence on what was agreed about tronc (the distribution of service charge and tips). There are two versions of the claimant's contract in the bundle, both with a typed signature for Ms Charles, dated 28 October 2021, and both headed with the claimant's name and address. The version relied on by the respondent states at paragraph six that salary will be £50,000 per annum, annually reviewed, and that there will be a discretionary bonus scheme for managers if the restaurant made unspecified targets. It concludes with a declaration section in the claimant's name.

69. The version relied on by the claimant inserts an extra paragraph after salary and before bonus. This says: "you may be entitled to join the tronc arrangement which is operated independently of the company by the troncmaster and distributes discretionary service charge and card gratuities received from customers to employees. You will receive further details in respect of this letter from the troncmaster as soon as you commence employment. Tronc payments are entirely discretionary. They are paid through the company payroll. The tronc arrangement is non contractual and as such can be changed or withdrawn without notice". The last paragraph of this version has a declaration and acceptance for a member of staff called Megan Brown, who left the business in mid-March.

70. Miss Charles said that she is not sure what was attached when she emailed the contract to the claimant as her computer had since been corrupted. She agreed that they had been working quickly in the autumn of 2021, altering standard templates without necessarily keeping copies as each was printed and dispatched. It is possible that the respondent's version is correct. It is also possible that the claimant's version is correct, and only mentions Megan Brown because his contract had not been properly edited. We suspect that one version or the other has been doctored, without knowing which. We did consider the wording of the tronc clause unusual, as we know that a tronc master was not appointed until March 2022, and Megan Brown's contract must have been issued before that date, as she left in March. It could have reflected the intention to appoint one.

71. The other piece of evidence the respondent relies on is a letter they sent to another employee, T. Cisty, on 23rd October 2021, congratulating him on the successful interview and saying "your salary will be £45,000 per annum. In due course your salary will be split between basic and tronc". The respondent argues that they will have sent a similar letter to the claimant, but have not retained the edited copy. The claimant denies receiving such a letter.

72. Given the conflicting documentary evidence, but having heard the oral evidence, and having read various texts and emails from the claimant and other staff that allude to tronc, we concluded that there was an understanding that once the restaurant was up and running there would be payments from a tronc, but without detail of how the scheme would operate. We do not find, as the respondent's general manager asserted, that the claimant had been told from the outset that tronc payments would be set against his basic salary, or that he was paid more than the going rate because there was (for now) no tronc.

73. In March 2022 the respondent appointed Peter Davies of WMT Troncmaster Services Ltd the troncmaster. He held a general meeting with staff on 7th April. Next day he emailed Vanessa Charles, saying there was:

> "a clear sentiment from the team that they should be paid monies which have been generated in the period since opening, and I am persuaded that this is the right thing to do".

He mentioned the scheme being launched in May. He would calculate the expected level of tronc commitment for one month, making sure they kept enough in reserve to match that, and any difference "from opening to this month" will be paid out to the team. He would pro-rate awards by the date employment started, but the amount would not be linked to job role or position. "Staff who have left will not receive an award". He said the figures would be reviewed and calculated "next week". This e-mail was shared with the staff.

74. Mr Davies prepared two letters for the staff. Both are dated "April 2022". There is a letter addressed to the claimant saying that tronc is not part of his

terms and conditions of employment, but was operated independently of the company and was an addition to his basic pay. Based on the level of service charges and gratuities already received he should receive a minimum of £14,000 per annum from the tronc before deduction of tax. The second letter refers to the business making "proposed changes to their pay and salary structure". There follow comparative figures for current and proposed arrangements. Instead of £4,166.67 per month before tax, the claimant would receive £3,000 basic pay, and a minimum of £1,166.67 from the tronc. His gross receipts and tax liability would remain the same, but (because national insurance is not payable on the tronc element) his National Insurance liability would reduce. This meant that each month his net payment would go up from £3,099.84 to £3,254.43.

75. There is a dispute about when the claimant received the second letter. The claimant said in evidence he did not see it until disclosure of documents in these proceedings. Vanessa Charles said all staff had received both letters in envelopes handed out at a meeting, although we do not know when that meeting was. It was suggested it was on 7th April, which is possible, but unlikely in view of Peter Davies's 8th April e-mail to her. He may however have *indicated* to staff that the company proposed to trade tronc for basic pay, because a message from another employee on the 8th April comments: "and the troncmaster said for (sic) me: good luck to them it's nothing to do with us now. Amazing. So I was supposed to say for every guest who asked me if I received the service charge - no sorry it's a reserve for the restaurant", adding that she had asked a lawyer friend to check the contract. It is interesting that despite the e-mail traffic between the claimant and Adnan Ozkara at the end of April about payments does not mention the company's proposal to cut pay in exchange for tronc. Nor do we know precisely when, or even if, the respondent, rather than the troncmaster, told staff that pay would be cut in exchange for tronc.

76. We do know that on the 30th April the claimant signed and returned to Mr Davies the form inviting participation in the tronc, and on the same day wrote to Vanessa Charles saying he had reviewed "the letter proposing changes to my terms and conditions of employment, effective 1st May, specifically the level of basic salary reduction and thank you for the outlined potential financial benefits", saying he rejected the pay cut. There is no other letter in the bundle about proposed changes, and we conclude that the letter he meant was the second letter from Peter Davies. So by the 30th April he must have received both letters. His evidence that he did not see the second letter until disclosure in these proceedings is not accepted because he does not explain how else he knew about the proposal on 30 April.

77. From this we conclude that at the date the claimant stopped work, 3rd May 2022, there was about to be a tronc scheme, but it was not yet operational. Payment also appears to have been conditional on accepting a cut in basic pay. There is no explicit statement of what would happen if an employee joined the tronc, but refused to accept a basic pay cut, but it seemed unlikely

to us that the employer would do other than impose a pay cut, lawfully or not. This linkage of tronc to basic pay implies, in our finding, that tronc money was treated by the employer as allocated to them, and then to the troncmaster, so it was wages within the meaning of section 27, being "other emolument referable to his employment", though not paid under contract. The contract with Megan Brown's name, whether or not sent to the claimant, said tronc would be paid through company payroll, not the troncmaster's payroll. Both employer and employee did not expect to pay national insurance on the tronc allocation, a saving of 12% for the employee and 13.8% for the employer (April 2022 rates).

78. The contract of employment states notice periods on termination at paragraph 24, and includes that "at their discretion Jeru may specify that you will receive payment in lieu of your basic salary for all or part of your notice period.

79. There is no letter specifying the date employment terminated or was to terminate. When the claimant was dismissed on 3 May he was told, according the meeting minutes he was sent later that day, "we will pay you one month's notice and it will be the only payment we will make to you. I will not charge back your overused holiday for now, but I will keep my options open". Jeru did not specify payment in lieu, and he was kept on the payroll. Tronc was not discussed at this meeting or in the days leading up to it, so we assume "the only payment we will make to you" is not a reference to tronc.

80. The leaving date on P45 is 31st May 2022, and the 31st May pay statement shows the normal gross payment based on £50,000 per annum. We considered whether he should also have received a tronc payment for May, given the acceptance sent to Mr Davies on 30th April. There is no evidence from Mr Davies or the respondent about not paying the claimant tronc for May. We assume, in the absence of other evidence, that tronc payment to other staff went ahead from 1st May, as proposed by Mr Davies, if they had asked to be included in the scheme. The claimant was still in employment although not required to work. We conclude he is entitled to tronc payment for the month of May, a sum of £1,667. This is a gross sum on which the claimant is liable to tax. We considered that the reservation in the 8th May email about leavers not being paid, when read in context, refers to the discussion of back pay - whether those who had already left would receive a pro rata payment from their start dates to leaving- not to those serving notice.

81. It was implied in Peter Davies's email to Vanessa Charles that there would be an addition for back pay. In the absence of information we concluded that any tronc money for months before May 2022 was allocated to the fund for making the ongoing monthly payment shown in the second letter calculations. We reject the claimant's claim to be paid tronc for the months he was employed before May 2022.

Holiday Pay

82. The contract of employment (in both versions) allowed 30 days of holiday a year. This is 2 days more than the statutory allowance of 5.6 weeks provided in the Working Time Regulations.

83. Can the employer decide when the employee is to take holiday? A term of the claimant's contract of employment states: "Jeru reserves the right to require the employee to take holidays through a period of low business levels, e.g. recession".

84. Regulation 15 of the Working Time Regulations requires an employer to give notice of a requirement to take holiday, the notice being twice the number of days for which holiday is to be taken.

85. The respondent informed staff of a shutdown –which was because of government direction at a time of a renewed outbreak of Covid - from 18 December 2021 to 6 January 2022. Their email told staff that salaries would be covered by accrued overtime and by leave – and that many staff would go into "negative holiday" as a result; it was implicit that absence during the shutdown would be treated as holiday if there was no accrued overtime to cover it. In January 2021 the claimant enquired about the reopening date. He was told when it would be, but also that he could return a few days later if he liked. He chose to do this, and returned to work on 11 January, an extra 3 days after the end of the shutdown. He later took a day off to move house. The respondent remonstrated with him, at the end of April, that he had in effect also taken holiday when rostered for 4 days of the week, rather than 5, as he was once or twice, but they stated explicitly that they were not asking him to repay this when dismissed. Their calculation of holiday at the time also states they did not pursue this. Having heard evidence, we concluded that there had been no request by the claimant for holiday in those 4 day roster weeks. The respondent had not asked the claimant (and other managers similarly rostered) to take holiday. The claimant often worked well past midnight, which was unpaid overtime, and it is reasonable to hold that managers would view a shorter working week on some later dates as recompense by way of time off in lieu. He was not asked to come to work – perhaps to catch up on paperwork, as Mr Ozkara suggested in evidence - on the fifth day when rostered for four. Neither side suggested these days represented bank holidays (which would count against leave entitlement). We concluded that these days should not be counted against the claimant's annual leave entitlement.

86. We find that the extra 2 days contractual holiday were taken during the closure, the respondent having the right to require holiday in these circumstances, a lockdown being akin to recession.

87. That leaves the 28 days statutory entitlement. We find that the respondent could not set the claimant's statutory holiday against his absence to 6 January 2022, because the claimant had only a few hours' notice and could not therefore be required to take that as holiday.

88. At the date of termination, the claimant had worked 24 weeks in 2022. That means his statutory leave entitlement for the time worked was 24/52 x 5.6 = 2.6 weeks. Out of that he had taken 4 days (0.8 weeks). He is entitled to 1.8 weeks at £959 per week. The award is £1,534.44. This is taxable.

Employment Judge Goodman
18 September 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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. .18/09/2023

FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

The Complaints

1. Automatic Unfair dismissal

1.1 for a health and safety reason (s100 of the ERA) and/or
1.2 for making a protected disclosure/whistleblowing (s103A of the ERA)

2. Unlawful deductions from wages

– failure to pay contractual holiday pay and
- tronc payments

3.Detriment for making a protected disclosure or for bringing health and safety to the employer's attention

Issues

1. Protected Disclosures

The Claimant relies on the alleged following disclosures:

1.1 The Claimant states that on 29th of January 2022, the Claimant mentioned to Adnan Ozkara that he was being bullied and harassed by a colleague Richard Tewnion. This was also sent in an email to Adnan Ozkara and Vanessa Charles on 30 January 2022.

1.2 The Claimant states that on 3 February, the Claimant sent an email to Adnan Ozkara which said there had been more bullying and shouting by Chef Roy, along with allegedly mentioning that there were mice droppings in the bakery side of the kitchen.

1.3 The Claimant states that on 16th February 2022, the Claimant emailed Vanessa Charles, saying that they were not receiving tronc payments or any alternative service pay, contrary to our contractual entitlement; also that the restaurant had no allergy chart or food bible, so we could not warn customers about allergens which is health and safety matter. The Claimant also alleges that this email disclosed that the Chef was soliciting complaints against him from other staff (because of his earlier complaints) and swearing in a sexual manner at a female employee.

1.4 In each, did the Claimant disclose information?

1.5 If so, did the Claimant disclose information that in his belief showed or tended to show the following:

1.5.1 Breach of any legal obligation (section 43B(1)(b), ERA 1996;) or

1.5.2 Danger to the health and safety of any individual (section 43B(1)(d), ERA 1996) or

1.5.3 Damage to the kitchen environment – claimant asserts this falls under (section 43B(1)(e), ERA 1996).

1.6 if so, was that belief reasonably held?

1.7 in each case, did the Claimant have a reasonable belief that each disclosure of information was made in the public interest?

2.Health and Safety

2.1 was the claimant at a workplace where there was no safety representative or safety committee, and

2.2 did he bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety

Detriment

3. Did the Respondent submit the Claimant to the instigation of disciplinary proceedings against him because of one or more protected disclosures?

4. Did the Respondent submit the Claimant to the instigation of disciplinary proceedings against him because he had brought to his attention matters harmful to heath and safety?

Dismissal – section 103A

5.Was the respondent's principal reason for dismissing the claimant that he had made protected disclosures? The Respondent states that the principal reason for dismissal was capability.

Dismissal – section 100

6.Was the principal reason for dismissal the fact that being an employee at a place where there was safety representative or safety committee he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety

Unfair dismissal and whistleblowing detriment remedy

7. What financial losses has the detrimental treatment caused the claimant?

7.1 Does the respondent show that the claimant has not taken reasonable steps to replace lost earnings, for example by looking for another job?

7.2 If not, for what period of loss should the claimant be compensated?

8. What award should be made for any injury to feelings caused to the claimant by the detrimental treatment?

9. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

10. Is it just and equitable to award the claimant other compensation?

11.Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

12. Did the respondent or the claimant unreasonably fail to comply with it?

13. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

14. Did the claimant cause or contribute to the detrimental treatment by his own actions and if so would it be just and equitable to reduce his compensation? By what proportion?

15. Was the protected disclosure made in good faith?

16. If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

Unlawful Deduction from Wages

Tronc Payments

17. Are tronc payment wages, which are, "any sums payable to the worker in connection with his employment". Were payments of tronc an "emolument referable to his employment, whether payable under his contract or otherwise" – section 27(1) (a) Employment Rights Act 1996.

18. If yes, when were they payable?

19. Were the wages paid to the claimant on that date less than the wages properly payable?

20.Was any deduction required or authorised by a written term of the contract?

21. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

22. Did the claimant agree or authorise the deduction in writing before it was made?

23.How much is the claimant owed? The claimant suggests he is owed £7,000 in Tronc payments.

Holiday Pay

24.What was the claimant's holiday entitlement at the date of termination?

25. What holiday had he taken?

26. Is there untaken for holiday for which he should be paid?