EMPLOYMENT TRIBUNALS

Claimant: **Mr K Fernando**

Respondent: **SBH Hospitality Limited**

Heard at: **East London Hearing Centre (by CBP)**

On: **4, 5, 6, 7, and 11 July 2023**

Before: **Employment Judge S Shore**
Members: **Ms T Jansen**
Ms A Berry

Appearances

For the claimant: In person
For the respondent: Ms E Afriyie, Consultant

JUDGMENT AND REASONS ON LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claims of direct discrimination because of the protected characteristic of race (contrary to section 13 of the Equality Act 2010) are determined as follows:

    1.1. The claim that Ms K Barnes, asked the Claimant to act as a cleaner between May 2020 and July 2020 fails.

    1.2. The claim that even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist fails.

    1.3. The claim that from 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26 fails.

    1.4. The claim that Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months, fails.

1.5. The claim that Ms Barnes did not recognise the Claimant's good performance during weekly meetings fails.

1.6. The claim that at a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the Claimant fails.

1.7. The claim that relying on the acts above, Ms Barnes was trying to push the Claimant out of the company fails.

1.8. The claim that in a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer and that the Claimant subsequently discovered from the owners much nearer the time that this was not the case (after he had made arrangements to relocate) fails.

1.9. The claim that in around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave (to help his family relocate) fails.

1.10. The claim that in around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave fails.

2. The Claimant's claims of harassment related to the protected characteristic of race (contrary to section 26 of the Equality Act 2010) are determined as follows:

2.1. The claim that Ms K Barnes, asked the Claimant to act as a cleaner between May 202 and July 2020 fails.

2.2. The claim that even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist fails.

2.3. The claim that from 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26, fails.

2.4. The claim that Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months, fails.

2.5. The claim that Ms Barnes did not recognise the Claimant's good performance during weekly meetings fails.

2.6. The claim that at a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the Claimant fails.

2.7. The claim that, relying on the acts above, Ms Barnes was trying to push the Claimant out of the company fails.

2.8. The claim that in a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer fails.

2.9. The claim that in around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave fails.

2.10. The claim that in around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave fails.

3. The claimant's claim that he was subjected to detriments because he made protected disclosures contrary to section 47B of the Employment Rights Act 1996 are determined as follows:

3.1. The claim that Ms K Barnes asked the Claimant to act as a cleaner between May and July 2020 fails.

3.2. The claim that even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist fails.

3.3. The claim that from 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26 fails.

3.4. The claim that Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months fails.

3.5. The claim that Ms Barnes did not recognise the Claimant's good performance during weekly meetings fails.

3.6. The claim that at a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the Claimant fails.

3.7. The claim that, relying on the acts above, Ms Barnes was trying to push the Claimant out of the company fails.

3.8. The claim that in a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer and that the Claimant subsequently discovered from the owners much nearer the time that this was not the case, (after he had made arrangements to relocate) fails.

3.9. The claim that in around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave fails.

3.10. The claim that in around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave fails.

4. The claimant's claim that he was unfairly dismissed for the principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996 fails.

5. The claimant's claim of breach of contract (failure to pay notice pay) (contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994) fails.

6. The claimant's claim of breach of contract (non-reimbursement of telephone expenses) (contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994) fails.

7. The claimant did not make a claim of sex discrimination that is marked on the Tribunal's file, so that claim is dismissed upon withdrawal.

8. The claim relating to non-reimbursement of telephone expenses had been wrongly coded as an unauthorised deduction or wages claim under section 13 of the Employment Rights Act 1996. It has been correctly identified as a claim of breach of contract (see paragraph 6 above), so the unauthorised deduction from wages claim is dismissed.

9. The Tribunal does not need to consider remedy because all the claimant's claims have been dismissed.

REASONS

Introduction and History of Proceedings

1. The claimant was employed as General Manager by the respondent, which is a hotel management company, from 21 March 2020 to 30 June 2021. The claimant worked at the Epping Forest Hotel ("EFH") for the entirety of his employment.

2. The claimant is of Sri Lankan heritage and self identifies as of Asian heritage and non-white.

3. The claim arises from the circumstances under which the Claimant's employment ended. The hotel at which the Claimant worked was up for sale for all his time as an employee. The Claimant's employment began as the first pandemic lockdown started. The Claimant's case (as clarified by his evidence at the hearing, which we will deal with below) was that he was told that there would be no job for him after the sale of the hotel. His final position on how his employment was ended was that the Respondent expressly dismissed him by telling him that there would be no job for him after the sale of the hotel was completed. The sale (and related TUPE transfers) happened on 30 June 2021. The Claimant says that he was told that there would be no job for him under the new owners on 20 April 2021 in a meeting with his line manager, Kerian Barnes and the respondent's Group People Manager, Beverley Flint. He alleges that this was an express dismissal.

4. Mr Fernando also raises instances of direct race discrimination, harassment related to race and detriment because he made protected disclosures that span a period from the very start of his employment.

5. The Claimant started early conciliation with ACAS on 23 July 2021 and obtained a conciliation certificate on 3 September 2021. The Claimant's ET1 was presented on 15 September 2021. The Claimant has been a litigant in person throughout these proceedings. We do not underestimate how difficult it must have been for the Claimant to navigate these proceedings. The law is dense and complicated. His initial ET1 was brief and lacked detail of the claims made and the legislation that they were brought under.

6. The Claimant's claims were better defined in a preliminary hearing before Employment Judge Moore on 23 March 2022 that produced a case management order dated 24 March 2022, which was sent to the parties on 28 March 2022 ("the CMO") [36-47]. The Claimant had produced a document setting out further information about his claims that enabled EJ Moore to clarify the issues in the case and put the claims in broad chronological order in the CMO. The following heads of claim were identified:

    6.1. Direct race discrimination contrary to section 13 of the Equality Act 2010 as set out in the Judgment above.

    6.2. Harassment related to race contrary to section 26 of the Equality Act 2010 as set out in the Judgment above.

    6.3. Claims that he was subjected to detriments because he made protected disclosures contrary to section 47B of the Employment Rights Act 1996.

    6.4. Automatic unfair dismissal for the principal reason that he made protected disclosures contrary to section 103A of the Employment Rights Act 1996.

    6.5. Breach of contract (failure to pay notice pay) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

    6.6. Breach of contract (non-reimbursement of telephone expenses) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

The Claimant's claims of direct race discrimination, harassment related to race and detriments because he made protected disclosures all arise out of the same ten alleged acts or omissions by the respondent. The claimant had indicated in his ET1 that he was bringing claims of discrimination because of marital status and for a statutory redundancy payment. Both these claims were dismissed upon withdrawal by the claimant by a Judgment dated 24 March 2022 [48]. On preparing this Judgment and reasons, we have noted that the Tribunal's file is marked as including a claim of sex discrimination. We checked with the Claimant, and he confirmed that no such claim was made, so we have dismissed that claim as part of this Judgment

to ensure that there are no loose ends left on the Tribunal file. We also noticed that the claim for non-reimbursement of telephone expenses had been labelled as claim for unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996. Expenses claims are excluded from such claims, so we amended the claim to one of breach of contract and dismissed the unauthorised deductions claim with the agreement of both parties.

7. EJ Moore drafted a List of Issues for the parties [41-47] and ordered the Claimant to provide information that was missing from the draft List of Issues by 22 April 2022 and for the Respondent to send the final List of Issues to the Tribunal by 27 April 2022. The Claimant appears to have provided the further information by an email dated 27 April 2022 [49-53]. On 27 April 2022, the Respondent's representative emailed the Claimant and attached a "current" List of Issues, which was not agreed, as "the claimant had not identified the legal obligation relied upon for the protected disclosure claim". That incomplete List of Issues appears to be the one produced in the bundle [55-61].

8. On reading the papers before the first day's hearing started, we noticed that the List of Issues was incomplete. We could not proceed with an incomplete List of Issues, as the document is the vital framework upon which the whole hearing is based. We therefore spent over 90 minutes on the first morning going through the List of Issues with the parties, filling in the missing information, and clarifying and refining the issues in the case. We then began our reading and amended the draft List of Issues. We sent it to the parties late on the afternoon of the first day and asked them to confirm their agreement.

9. Ms Afriyie confirmed her agreement. Mr Fernando responded with a list of highlighted points. Some were seeking clarification, but some were additions to the scope of his claims. We had explained to the claimant on the previous day that any new claims would require an application to amend his claim before the Tribunal. We advised Mr Fernando that his claim was that which was contained in:

    9.1. His ET1;

    9.2. The further information provided to EJ Moore; and

    9.3. The further information contained in his email to the respondent of 27 April 2022 [49-53].

10. Anything that was not set out in those documents could not just be added to the claim. We therefore advised the Claimant that he would have to apply to amend his claim to include the new matters he had tried to add to the List of Issues we had produced. He decided to leave the claim as it was.

11. Unfortunately, there was one error in the List of Issues that had been in EJ Moore's draft List at paragraph 5.10 [57] and had been replicated in our List in the same paragraph number. The error was that the claimant's Deputy Manager's skin colour was described as 'white.' No one appeared to have noticed the error until the Claimant picked it up when he went through the final List of Issues that had been sent to the parties. It only became a problem when there was a

discussion on the point during the evidence, and it was mentioned that the Deputy Manager was of Asian heritage and had brown skin. We pointed out that this was at odds with the List of Issues. The Claimant said that he had highlighted this in his amended List, but that we had glossed over it.

12. For the avoidance of doubt, none of the panel made a note that the Claimant specifically brought this error to our attention on the second morning or in the amended List of Issues he provided.

13. It was agreed that the Deputy Manager was of Asian heritage and has brown skin. The Claimant said that his point on the race discrimination claim was that the Deputy Manager was allowed to leave his post at EFH to start a new post within the company at a hotel in the North West of England. The Claimant alleges that the Deputy Manager was appointed to assist a white General Manager who needed help. This meant that the claimant could not be given the leave he had asked for.

Issues

14. Further to the history and discussion outlined above, the final List of Issues was agreed as follows:

Time limits

1. Given the date the claim form was presented (15 September 2021) and the dates of early conciliation (23 July 2021 – 3 September 2021), any complaint about something that happened before 24 April 2021 may not have been brought in time.

2. Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2. If not, was there conduct extending over a period?

2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.4.1 Why were the complaints not made to the Tribunal in time?

2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

3. Was the detriment for making protected disclosures claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

3.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act(s) complained of?

3.2. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

3.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

3.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Direct race discrimination (Equality Act 2010 section 13)

4. The Claimant identifies as Asian; he has Sri Lankan heritage and identifies as non-white.

5. Did the Respondent do the following things:

5.1. Ms K Barnes, asked the Claimant to act as a cleaner between May 2020
and July 2020.

5.2. Even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist.

5.3. From 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26. (The Claimant clarified that it is not his case that being made to manage staff redundancies was because of race.)

5.4. Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months.

5.5. Ms Barnes did not recognise the Claimant's good performance during weekly meetings. (The Claimant compares himself to white British managers whose performance was recognised)

5.6. At a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the Claimant.

5.7. Relying on the acts above, the Claimant contends that Ms Barnes was trying to push him out of the company.

5.8. In a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer. The Claimant discovered from the owners much nearer the time that this was not the case, but this was after he had made arrangements to relocate.

5.9. In around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave (to help his family relocate). (The Claimant compares himself to Chris, the Maintenance Manager, see below.)

5.10. In around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave. (The Claimant compares himself to his deputy who was white.)

6. Was that less favourable treatment?

6.1. The Tribunal will decide whether the Claimant was treated less favourably than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

6.2. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Tribunal may refer to 'evidential comparators' in reaching this decision.

6.3. In relation to issue 5.5, not recognising good performance, the Claimant compares himself to the other white British managers.

6.4. In relation to issue 5.9, unpaid leave, the Claimant compares himself to Chris, the Maintenance Manager, who was allowed unpaid leave and to leave the company without working his notice when he changed jobs. Chris is white British.

6.5. In relation to issue 5.10, paid leave, the Claimant compares himself to his deputy who was transferred to help another General Manager. (The deputy is an evidential comparator).

7. If so, was it because of race? The Claimant will rely on the comparators identified above and the following factors:

7.1. Ms Barnes also pushed out a previous General manager who was black,
Canadian.

7.2. The Claimant was the only non-white General Manager.

7.3. Ms Barnes stereotyped the Jewish owners of the hotel.

7.4. The Claimant was not recruited by Ms Barnes.

7.5. Ms Barnes wanted to bring back a white employee, Mary, from furlough in the kitchen who had poor disciplinary record instead of the Asian Chef (Sri) or Mohamed who ran the restaurant who did not have disciplinary problems.

7.6. The Respondent provided insufficient training on equal opportunities for the senior leadership team.

7.7. The Respondent gave insufficient explanation in the staff handbook about equal opportunities in particular what discrimination means or how it would occur.

7.8. Equal opportunities were not discussed in meetings or reported on.

Harassment related to race (Equality Act 2010 section 26)

8. Did the Respondent do the following things:

8.1. Ms K Barnes, asked the Claimant to act as a cleaner between May 2020 and July 2020.

8.2. Even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist.

8.3. From 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26.

8.4. Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months.

8.5. Ms Barnes did not recognise the Claimant's good performance during weekly meetings.

8.6. At a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the Claimant.

8.7. Relying on the acts above, the Claimant contends that Ms Barnes was trying to push him out of the company.

8.8. In a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer. The Claimant discovered from the owners much nearer the time that this was not the case, but this was after he had made arrangements to relocate.

8.9. In around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave (to help his family relocate). (The Claimant compares himself to Chris, the Maintenance Manager, see below.)

8.10. In around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave.

9. *If so, was that unwanted conduct?*

10. *If so, did it relate to race?*

11. *Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

12. *If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.*

Remedy for discrimination

13. *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*

14. *What financial losses has the discrimination caused the Claimant?*

15. *Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

16. *If not, for what period of loss should the Claimant be compensated?*

17. *What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*

18. *Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?*

19. *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*

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

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

22. *If so, is it just and equitable to increase or decrease any award payable to the claimant?*

23. By what proportion, up to 25%?

24. Should interest be awarded? How much?

Protected disclosures (Employment Rights Act 1996 section 43B)

25. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide: What did the Claimant say or write? When did he make the disclosure? To whom did he make the disclosure? The Claimant says he made the following disclosures:

25.1. On 25 August 2020, the Claimant raised in writing with the property manager that kitchen equipment was not being serviced and had not been maintained for many years and no service contracts were in place. The Claimant contends this tended to show that the health or safety of any individual had been, was being or was likely to be endangered.

25.2. In or around September 2020, the Claimant informed Ms Barnes and her team verbally and followed up in emails on 22 May 2020, 20 August 2020, and 8 June 2021, that there were electric cables with open ends dangerously lying around between the roof space, reception, and the back offices and multi socket plugs were being overloaded. The Claimant kept pushing verbally with the property manager to resolve this issue. The Claimant contends the information tended to show that the health or safety of any individual had been, was being or was likely to been endangered.

25.3. On 23 November 2020 and 20 April 2021, the Claimant verbally challenged what he saw as the abuse of the furlough system with the HR manager by the hotel reemploying and putting on furlough staff it had made redundant when it had no intention of keeping them after the furlough scheme came to an end. The Claimant contends this tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation. The Claimant alleges 16 people /staff were made redundant and rehired when the extension to scheme was announced only to collect furlough.

25.4. Around November/December 2020, the claimant informed the owners of the respondent and Ms Barnes verbally and, in May or June 2021, by email that:

25.4.1. There was no planning consent to allow the renting of the hotel bedrooms as flats or studios. This is alleged to be information that tensed to show that the respondent had failed to comply with a legal obligation – planning regulations. It is also alleged to be information that tended to show that the failure to comply with a legal obligation had been or was likely to be concealed.

25.4.2. The respondent had installed a laundry room, but no one was monitoring the room at night. The Claimant contends that this

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

25.4.3. The respondent had purchased new furniture for bedrooms that "did not seem to be fire rated". The Claimant contends that this tended to show the health or safety of any individual had been, was being or was likely to be endangered.

25.5. From around December 2020, the Claimant had informed the property manager verbally and, from 10 June 2021, had informed him and Ms Barnes by email that the ceiling of the staff room was unsafe, and the staff had nowhere to take their breaks. The Claimant contends that the health or safety of any individual had been, was being or was likely to be endangered.

25.6. On 9 June 2021 and 18 June 2021, the claimant informed the property manager by email that plumbers who had replaced installed two new gas boilers were qualified for domestic use. The Claimant contends that the health or safety of any individual had been, was being or was likely to be endangered and that a person had failed, was failing or was likely to fail to comply with a legal obligation, namely the requirement that gas installers have the correct certification.

25.7. On 23 June 2021, the Claimant informed Beverly Flint by email [532] of a failure to have someone responsible at the hotel in the Claimant's absence (he was Designated Property Supervisor for liquor licensing purposes for the hotel). On 7 July 2021 the Claimant expressed his concern about the death of an alcoholic resident during that period. The Claimant contends the information tended to show that the health or safety of any individual had been, was being or was likely to be endangered and that a person had failed, was failing or was likely to fail to comply with any legal obligation, namely the Licensing Act 2003.

25.8. On 23 December 2020, the Claimant sent an email [331] to Keith Griffiths regarding the issue of an application for business grants asking, "If everyone knew what was required for the grant application, why was this info not provided to us in the first place?" The Claimant sent another email after the Hotel Managers were asked to apply for grants asking why the grants not applied for by the "company as the company had all the financial information, instead of the hotel managers applying for grants." The Claimant contends that he disclosed information that tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation because "it was unlawful to ask for money when the company had money" and he thought that applying for a grant without understanding the company's finances was a breach of a legal obligation.

26. Did the Claimant disclose information?

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

28. Was that belief reasonable?

29. In respect of each disclosure, did he believe it tended to show one of the following:

(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) a miscarriage of justice had occurred, was occurring or was likely to occur;

(d) the health or safety of any individual had been, was being or was likely to be endangered;

(e) the environment had been, was being or was likely to be damaged; or

(f) information tending to show any of these things had been, was being or was likely to be deliberately concealed.

30. Was that belief reasonable?

Detriment (Employment Rights Act 1996 section 48)

31. Did the Respondent do the following things:

31.1. Ms K Barnes, asked the Claimant to act as a cleaner between May 2020
and July 2020.

31.2. Even after a housekeeping contract was confirmed, on occasions thereafter asking the Claimant to clean, cook, and work as a receptionist.

31.3. From 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26.

31.4. Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months.

31.5. Ms Barnes did not recognise the Claimant's good performance during weekly meetings.

31.6. At a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the Claimant.

31.7. Relying on the acts above, the Claimant contends that Ms Barnes was trying to push him out of the company.

31.8. In a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer. The Claimant discovered from the owners much nearer the time that this was not the case, but this was after he had made arrangements to relocate.

31.9. In around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave (to help his family relocate).

31.10. In around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave.

32. *By doing so, did it subject the Claimant to detriment?*

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

Remedy for Protected Disclosure Detriment

34. *What financial losses has the detrimental treatment caused the claimant?*

35. *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

36. *If not, for what period of loss should the claimant be compensated?*

37. *What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?*

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

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

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

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

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

43. *Did the claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?*

44. *Was the protected disclosure made in good faith?*

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

Automatic Unfair dismissal (Employment Rights Act 1996 section 103A)

46. Was the Claimant dismissed? The Claimant will say he was constructively dismissed.

47. Was it a breach of the implied term of trust and confidence that the Respondent informed the Claimant there was not going to be a job for him after the transfer when they knew this was not the case?

48. If so, did the Claimant resign partly because of the breach.

49. Did the Claimant affirm the contract prior to resigning? The Respondent contends that the Claimant affirmed the contract by virtue of a delayed resignation.

50. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure? The Claimant will say yes. The Respondent will say the refusal to TUPE transfer was the reason for the Claimant's resignation.

Remedy for unfair dismissal

51. Does the claimant wish to be reinstated to their previous employment?

52. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

53. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

54. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

55. What should the terms of the re-engagement order be?

56. If there is a compensatory award, how much should it be? The Tribunal will decide:

56.1. What financial losses has the dismissal caused the claimant?

56.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

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

56.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

56.5. If so, should the claimant's compensation be reduced? By how much?

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

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

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

56.9. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

56.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

56.11. Does the statutory cap of fifty-two weeks' pay apply?

57. What basic award is payable to the claimant, if any?

58. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal (Notice pay)

59. Was the Claimant dismissed or did he resign?

60. What was the Claimant's notice period?

61. Was the Claimant paid for that notice period?

62. If not, did the Claimant do something so serious that the respondent was entitled to dismiss without notice?

Breach of Contract

63. Was the Claimant promised a payment of £25 per month for using his own phone.

64. Was that payment made to him?

65. If not, what is his loss.

15. We removed the words in brackets in Issue 5.10 following the discussion about the ethnicity of the claimant's Deputy Manager.

16. As we did not find in favour of the claimant on any of his claims, we do not have consider any issues concerning remedy.

Law

17. The statutory law relating to the claimant's claims of discrimination is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 13 (direct discrimination), 26 (harassment); 123 (time limits) and 136 (burden of proof). The relevant provisions are set out here:

13. Direct discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

The relevant protected characteristics are—

(a) age;

(b) disability;

(c) gender reassignment;

(d) race

(e) religion or belief;

(f) sex;

(g) sexual orientation.

26. Prohibited conduct (Harassment)

A person (A) harasses another (B) if

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In deciding whether conduct has the effect referred to, each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

123. Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal…

18. The law relating to the unfair dismissal and detriment because the claimant made a protected disclosure is contained in sections 43B (definition of protected disclosure), 47B (prohibition on detriment because an employee has made a protected disclosure), 48 (Time Limits on detriment claims), 103A (prohibition on dismissal because an employee made a protected disclosure) and 111(2) time limited.

19. A 'protected disclosure" is defined by section 43B of the Employment Rights Act 1996:

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 while 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)."

20. The relevant parts of sections 47B and 48 state:

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)…

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…

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

(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)…

21. Section 103A 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."

22. Breach of contract claims in the Employment Tribunal are allowed by Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 which states:

Extension of jurisdiction

4. Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies;

(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and

(d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.

TUPE

23. The parts of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") that were relevant to this hearing were contained in Regulation4:

Effect of relevant transfer on contracts of employment

4.—*(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee…*

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person

whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

24. We were referred to the following precedent cases by Miss Afriyie, which we considered when making our decision:

    24.1. **Shamoon v Chief Constable of the RUC** [2003] UKHL 11
    24.2. **Pemberton v Inwood** [2018] EWCA Civ 564
    24.3. **Richmond Pharmacology v Dhaliwal** EAT/0458/08
    24.4. **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] ICR 325
    24.5. **Harrow LBC v Knight** 2002] UKEAT 0790/01/1811

Housekeeping

Preliminary comments

25. We were very disappointed by the standard of preparation undertaken by both sides in relation to this final hearing. In addition to the failure of both parties to produce an agreed List of Issues that accurately reflected the matters that this Tribunal had to find the answers to, we found the witness statements of all the witnesses to be inadequate in addressing the issues in the case. Whilst Mr Fernando has the excuse of being a litigant in person, he was given a lot of guidance by EJ Moore, who also referred him to a number of useful websites that would have enabled him to research the preparation that would be required. Mr Fernando's witness statement contained no detail of any date upon which he alleged events to have happened. This made it very difficult to match allegations with the bundle. Neither party's witness statements contained any page references to the bundle.

26. The Respondent had less of an excuse, as it is represented by a national provider of HR support and Tribunal litigation services. Ms Afriyie said she had come to the case relatively recently, so may not bear much personal responsibility for the way her client's case was prepared. However, the witness statements produced by the Respondent did not fully address the issues in the case.

27. Both parties produced documents during the hearing that they said were relevant to the issues. We allowed all to be admitted but were disappointed that neither party had disclosed them at the relevant time in the case management process.

28. We considered that, despite the lack of preparedness of the parties, a fair and just hearing was still possible if we were able to agree a List of Issues and ensure that cross-examination and/or questions from the Tribunal covered all the issues in the case. This meant that we asked more questions than we would normally do to make sure that everything was covered in evidence. We did not consider that it was in furtherance of the overriding objective to adjourn the hearing as this would be a waste of time and cost to the parties and to the public purse. We were also mindful of the many cases that are waiting to be heard and which would be further delayed if we vacated the five days allocated to this case. Neither party applied for a postponement.

29. The Claimant is unrepresented. On the first morning of the hearing, we reminded him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

30. We strived to ensure that Mr Fernando was given every opportunity to put his case and ask any questions he had about procedure and the law. There were times when we had to intervene to advise the Claimant that some questions were not assisting us to answer the questions raised in the list of issues, but we gave both parties more time than we had allotted to them for their respective cross-examinations.

31. The parties produced a joint bundle of 764 pages.

32. On the second morning of the hearing, the Respondent submitted a number of documents that were relevant to the issues we had to determine. These were added to the bundle and given the page numbers 765 to 770 with the agreement of the Claimant.

33. Also, on the second morning of the hearing, the Claimant submitted 5 additional documents. These were titled Final Scoring [771], KG confirms change of use [772], Offer letter to claimant dated 13 March 2020 [773-774], Letter dated 20

September 2020 to Mary from respondent [775-776], and Chris leaving without notice [777]. They were also admitted to the bundle with the consent of Ms Afriyie.

34. On the third morning, the Respondent submitted several documents concerning the Claimant's contract of employment. The bundle contained a pro forma copy that was unsigned and undated. Mr Fernando objected to the production of the new documents, which included a signed and dated copy of his contract of employment, but we found they were relevant to an issue we had to determine in the case and were better evidence than the pro forma. Mr Fernando accepted that the signatures on the document were his. The documents were given page numbers [778-783].

35. Mr Fernando submitted a document on the fourth morning but withdrew his application to add it to the bundle, as he accepted it was already included.

36. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]). If we refer to a particular paragraph in a document, we will use the silcrow symbol (§) with any paragraph number. If we refer to more than one paragraphs, we will use two silcrows (§§).

37. The claimant gave evidence in person and produced a witness statement which was undated that ran to 11 pages.

38. Evidence was given in person on behalf of the respondent by:

    38.1. Kerian Barnes, who was the Claimant's Line Manager and is Operations and Commercial Director for the Respondent. Her witness statement dated 9 July 2023 consisted of 40 paragraphs over 7 pages.

    38.2. Beverley Flint, who is the Group People Manager for the Respondent. Her witness statement dated 8 June 2023 consisted of 20 paragraphs over 4 pages.

    38.3. Andrew Burne, who is the Property Manager for the Respondent. His witness statement dated 8 June 2023 consisted of 4 paragraphs on one page.

39. All the witnesses gave evidence on affirmation. The claimant was cross-examined by Ms Afriyie in some detail. All the respondent's witnesses were cross-examined by the claimant in some detail. We advised the claimant that evidence that was unchallenged was likely to be accepted as credible by the Tribunal. The Tribunal asked questions of the witnesses either during cross-examination, or when cross-examination had finished.

40. At the end of his evidence, Mr Fernando was given the opportunity to clarify or expand upon any of the answers he had given to questions he had been asked. Miss Afriyie was offered the opportunity to ask re-examination questions of the respondent's witnesses after they had been cross-examined.

41. No timetable for the hearing had been set by EJ Moore or agreed by the parties.

42. When the hearing started, we discussed preliminary matters with Mr Fernando and Miss Afriyie, which included:

    42.1. the overriding objective;

    42.2. the list of issues;

    42.3. the timetable for the hearing;

    42.4. the claims, which the claimant confirmed were as set out in our Judgment above; and

    42.5. the documents.

43. The case had been listed for 5 days to include remedy. After discussing the above matters with the parties, we agreed that it was a priority to finalise the List of Issues. The process we adopted is set out above.

44. Ms Afriyie confirmed that there was no list of recommended reading, which was unfortunate in a 5-day case with over 750 pages of documents. It was even more unfortunate that none of the witness statements made any reference to any page number in the bundle.

45. Ms Afriyie estimated that she would take three hours to cross-examine the Claimant. Mr Fernando thought he would take the same amount of time to cross-examine the Respondent's three witnesses. Both parties far exceeded over their respective estimates, but we allowed both to take as much time as they needed.

46. We clarified the claimant's claims with him. The agreed list is set out in the Judgement above. We should note that in reading the papers and file during the hearing we noticed that the Tribunal had allocated a sex discrimination code (SXD) to the file. EJ Moore had dismissed the claims for discrimination because of marital status and a statutory redundancy payment. Mr Fernando agreed that he had not made a claim for sex discrimination, and that he had no objection to the claim noted on the file being dismissed upon withdrawal, which we have done above. We also dismissed the unauthorised deduction from wages claim because it had been mis-labelled.

47. We ended the hearing on the first day at 11:35am and advised the parties we would send them a final agreed List of Issues later in the day and would commence the evidence at 10:00am on the second morning. We would then give the respondent until lunchtime on the second day to cross-examine the claimant. We proposed that the claimant would then have the second afternoon to cross-examine the respondent's witnesses, so we could hear closing submissions on the morning of the third day. We would then make our decision on the third and fourth day and deliver a judgment and reasons on either the afternoon of the fourth day or morning of the fifth day.

48. On the second day, we dealt with the claimant's attempt to amend the List of Issues and the two applications to add documents to the bundle. Mr Fernando started to give his evidence at 10:45 am and continued (with regular breaks) until 13:15pm on the third day.

49. On the morning of the third day, we dealt with the Respondent's application to add the claimant's contract documents to the bundle, finished the claimant's evidence, and heard the evidence of Ms Barnes from 14:15pm until 10:45 on the fourth day. We started late on the fourth day because of connectivity issues. Several participants had such issues, and we are grateful to them for their patience and good humour in the circumstances.

50. Ms Flint gave evidence from 10:48am to 11:30am and Mr Burne gave evidence from 11:33am to 12:10pm on the fourth day.

51. At the end of the third day, we had advised the parties that we would be looking to hear closing submissions at the end of the evidence and that if that was on the fourth day, we would expect to hear those submissions then. We explained to Mr Fernando what closing submissions were, what they were meant to do and the form in which they could be made.

52. At the end of the evidence, at 12:10pm on the fourth day, we asked the parties if their closing submissions were ready. Ms Afriyie asked for 20 minutes additional preparation time. Mr Fernando said he had not yet started preparing his submissions. We gave him until 14:15pm to submit his written submissions to the Tribunal and to Ms Afriyie and said we would meet at 14:30pm to hear the parties' submissions.

53. Mr Fernando submissions were received by the Tribunal at 14:28pm, so we read them before we opened the hearing at 14:35pm.

54. After hearing the submissions, we indicated that we should be able to deliver a judgment and reasons at 13:00pm on the fifth day, Tuesday 11 July. If the claimant was successful in one or more of his claims, we would deal with remedy after delivering the judgement and reasons.

55. We notified the parties on the morning of the fifth day that we would deliver the judgment and reasons at 14:00pm on the fifth day, which is what we did. Mr Fernando asked for written reasons.

56. As we have not found for the claimant on any part of his claim, a remedy hearing will not be listed.

Findings of Fact

Preliminary Comments

57. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's evidence over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents or call additional evidence, so we have dealt with the case on the basis of the

documents produced to us, the witness evidence produced, and the claim as set out in the List of Issues.

58. The claimant was reminded on several occasions that if he did not challenge the evidence of the respondent's witnesses, we were likely to find that unchallenged evidence was credible.

59. As the discrimination claims and claim of detriment because the claimant made a protected disclosure relate to the same allegations of facts, we will make findings of facts on the ten allegations of fact that will apply to both discrimination claims and the claim of detriment because the Claimant made protected disclosures.

60. In our conclusions, we will deal with the time points first and then address the other claims in the order that they appear in paragraph 6 above.

Undisputed Facts

61. We should record as a preliminary finding that a number of relevant facts were not disputed, not challenged, or were actually agreed by the parties. These were:

    61.1. The Claimant was employed as General Manager ("GM") by the Respondent, which is a hotel management company, from 21 March 2020 to 30 June 2021. The Claimant worked at the Epping Forest Hotel ("EFH") for the entirety of his employment. It was agreed that the Respondent managed the EFH but did not own the premises or the business.

    61.2. The Claimant is of Sri Lankan heritage and self identifies as of Asian heritage and non-white.

    61.3. The Claimant joined the Respondent on 24 March 2020, the day after the first pandemic lockdown was announced and two days before it came into force on 26 March 2020. It was agreed that the Claimant was never furloughed. It was not disputed by the Claimant that he was one of only 3 GM's who were not furloughed when the first lockdown started. It was agreed that the other two GMs who were not furloughed were white. It was not disputed that EFH had no guests until the first lockdown was lifted.

    61.4. The Claimant entered into a contract of employment with the Respondent on 18 March 2023 [778-783] under which he was entitled to receive three months' notice of termination of employment. It was agreed that the Claimant was subject to the terms within the Respondent's Employee Handbook [73-114].

    61.5. It was agreed that the EFH was closed to customers from 26 March 2020 and that the Claimant was kept on, rather than furloughed. The Claimant was not eligible for furlough, but the Respondent kept him in employment so that he could deal with some issues of maintenance and cleaning, which we find he agreed to do, as he did not dispute the point.

    61.6. It was agreed that the Handbook [76] stated:

    "*E) JOB FLEXIBILITY*

It is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our business. During holiday periods, etc. it may be necessary for you to take over some duties normally performed by colleagues. This flexibility is essential for operational efficiency as the type and volume of work is always subject to change"

61.7. The Respondent's handbook included an Equality, Inclusion and Diversity Policy [111-112] that included a section on recruitment.

61.8. It was never disputed that the Claimant reported to Kerian Barnes, the Operations Director of the Respondent. It was never disputed that Keith Griffiths was the Managing Director of the respondent at the time that the Claimant was recruited, but that he had left the company by the time that the Claimant's employment ended.

61.9. It was agreed evidence that EFH had been for sale for some time and that it remained on sale at the time that the Claimant's employment began and throughout his employment. It was agreed that the sale to a company called Open View completed on 30 June 2021 and that the Respondent's remaining employees at EFH transferred to Open View on that date, with the sole exception of the Claimant.

61.10. It was agreed that once the TUPE transferee had indicated that it would not wish to keep the Claimant on after the transfer, there were negations between the Claimant and the Respondent as to the terms upon which his departure would be managed. The parties have waived privilege on the terms of the negotiations and all the relevant documents were in the bundle, including a draft settlement agreement [399-409] that indicated that the Claimant's employment would end on 30 June 2021 and that he would be paid a sum, including 2 months' notice pay.

61.11. It was also agreed that the Claimant declined the offer and was therefore placed on the list of transferring employees to transfer to Open View under TUPE. It is clear from the correspondence in the bundle and the claimant's evidence that he did not understand the legal implications of his being on the list of transferring employees or the effect that his refusing to transfer may have had on his rights.

Points of Dispute

General Points

62. Both parties made representations about the credibility of the other side's witnesses. We made it clear to both parties that it is rare that a Tribunal will find a witness to be entirely credible or, in the alternative, entirely not credible. In this case, we will address the issue of credibility on an issue-by-issue basis. We found no witness to be either entirely credible or entirely not credible.

63. We found many of the allegations made by the Claimant lacked precision and were based on his subjective interpretation of events with the benefit of hindsight. We will explain why in the following paragraphs.

Jurisdiction

64. We find that the Claimant's claims of discrimination and detriment because he made protected disclosures were made in time because they were part of a continuing series of events. We note that there was a gap of approximately 8 months between the 2020 allegations and the 2021 allegations, but the underlying situation that the Claimant complains about was the same throughout.

Factual allegations

65. We will deal with the 10 allegations of fact that are the alleged acts of direct discrimination because of race, harassment related to race and detriments because the Claimant made protected disclosures as follows.

Ms K Barnes, asked the Claimant to act as a cleaner between May 2020 and July 2020

66. We find that Ms Barnes did not ask the claimant "to act as a cleaner" between May 2020 and July 2020. We make that finding because:

    66.1. We find the wording used by the claimant in his allegation misrepresents his own evidence. His own evidence was not that he was asked to act as a cleaner, but that he was asked to undertake some cleaning duties. Ms Barnes accepted that this had been the case.

    66.2. We find that when the claimant began his employment, EFH was closed to guests and that, therefore, there was only maintenance and cleaning to be done at the premises. It was agreed that the company who were contracted to provide housekeeping services to EFH did not do so until the first lockdown was eased.

    66.3. We find that the respondent's Company Handbook gave the respondent the contractual right to require the claimant to undertake such duties as may be required within the business.

    66.4. We find that other managers undertook cleaning work as a matter of course because this was the evidence of Ms Barnes that was corroborated by the pictures on the respondent's GM Teams page [138]. We reject Mr Fernando's assertion that the picture was "posed", as we find it highly unlikely that such a picture would be posed at the date it was posted in preparation for this litigation or for some other purpose.

    66.5. We find that other GMs working for the respondent were required to undertake work that may have been undertaken by other staff or contractors in different times. We make that finding because we found Ms Barnes' evidence to be credible and that it was more likely than the Claimant's version of events.

    66.6. We find that the Claimant was not required to do any cleaning work once the third-party company recommenced its contract with the respondent

because we found Ms Barnes' evidence to be credible on the point and because the Claimant never challenged the evidence.

66.7. We find that the Claimant made no complaint at the time.

Even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist

67. We find that the ordinary meaning of this allegation refers to "occasions" after the company engaged to provide housekeeping services resumed its contract after lockdown in July 2020.

68. We find that after July 2020, the claimant undertook cleaning, cooking, and reception work, but that this was entirely normal and usual for GMs working for the respondent. We make that finding because:

68.1. We find that the respondent's Company Handbook gave the respondent the contractual right to require the claimant to undertake such duties as may be required within the business.

68.2. We found Ms Barnes' evidence on the point to be more credible than the Claimant's because it was more likely to be correct.

68.3. The Claimant never complained about having to do the work he now complains about.

68.4. We repeat our finding about other GMs doing varied work in their hotels.

68.5. We also note that a team of 3 GMs and 2 contractors visited EFH to spend a day cleaning and repairing the property. The Claimant confirmed that all 3 GMs who attended to help were white.

From 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels: he was being pushed to manage with around 10-15 members of staff instead of 26

69. We find that the Ms Barnes did not allow the claimant to increase staffing levels from 18 May 2020. We make that finding because Ms Barnes agreed with the claimant's assertion (§ 20 of her witness statement). However, we find that the "agreed levels" were agreed before the effect of the pandemic lockdown could have been known.

70. We find that Ms Barnes evidence about staffing levels was much more credible than that of the claimant. The claimant's evidence concentrated on one page of the bundle. His argument was that the levels of occupancy meant that more housekeepers should have been engaged with the company who provided them.

71. We found Ms Barnes's evidence to be more likely to be accurate on this point, namely:

71.1. That the occupancy statistics bore no relation to the requirement for housekeepers, as the government guidance did not allow rooms to be cleaned whilst guests remained in residence. Cleaning was only allowed on the departure of the guests.

71.2. The occupancy figures were low following the re-opening of EFH, as government guidelines only allowed key workers to stay in hotels. Her figure of 6% occupancy on the reopening of EFH in May 2020 was not disputed by the claimant. Nether was her figure showing that the occupancy target was 78.6%.

71.3. Ms Barnes' figures for occupancy in June (26% against a target of 82% - §20 of her witness statement) were not challenged either. The housekeeping company was not re-engaged until July 2020 and from that time, the company cleaned all bedrooms (Ms Barnes evidence on this point was unchallenged).

71.4. The contract between the respondent and the company that provided housekeeping required the company to provide an appropriate number of housekeepers to meet demand.

71.5. Ms Barnes did not dispute that the claimant was required to undertake cooking and reception work after July 2020, but we find that this was permissible under the claimant's contract and handbook. This happened after the period specified in the claimant's allegation in any event.

71.6. The claimant did not complain about the duties at the time.

72. We find that the claimant did not show on the balance of probabilities that there was anything untoward about the staffing levels at EFH from May 2020, even if he had been prevented from setting levels that had been set in a budget made when the effects of the pandemic were unknowable.

73. We find the claimant's emphasis on the small profitability of EFH to be neither relevant nor determinative of the point he was trying to show because it focussed on only one aspect of the performance of the business, whereas Ms Barnes' evidence properly took a holistic view of its performance.

Ms Barnes sent her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months

74. This allegation is, effectively, two allegations. The first relates to a visit by Tim O'Brien, the respondent's Compliance Manager, to EFH on 18 and 19 August 2020 that resulted in a report dated 18 August 2020 [254-296]. The second appears to be a reference to visits by the respondent's Property Manager, Andy Burne. We will deal with Mr O'Brien's visit and report first.

75. We find that it is legitimate for the operator of a hotel to monitor compliance with health and safety requirements at its premises. It was disappointing to note that

Ms Barnes' witness statement (21) on the issue of Mr O'Brien's visit was a generic denial of discrimination and contained no details as to how the visit came about.

76. We find the claimant's witness statement contained more information, but not much more. His written evidence was:

    76.1. Ms Barnes ("KB") advised him that Mr O'Brien was attending to support him (he did not give the date he was so informed).

    76.2. Mr O'Brien arrived when the claimant was not at the hotel.

    76.3. Mr O'Brien "went around the hotel taking pictures of area (sic) that have been neglected for many years under KB's watch and compiled an audit report."

    76.4. KB had wanted the claimant out, just as she had wanted the previous GM, who was Black, out.

    76.5. The claimant "immediately contacted Ms Barnes and Ms Flint and informed them that I was upset that they misled me about sending TO to support me when actually he was sent to spy on me. My grievance was ignored."

77. Neither the claimant nor Ms Barnes dealt with how the visit of Mr O'Brien was arranged in their respective witness statements. There were no emails in the bundle or any calendar entries showing when the visit was arranged. Ms Barnes suggested in answer to questions that Mr O'Brien "would have notified" the claimant of his visit.

78. We find that the lack of evidence and the fact that Mr Fernando was not at the hotel on the first day of Mr O'Brien's visit indicates that it is more likely that the claimant was not given any notice that the purpose of Mr O'Brien's visit was to conduct an audit.

79. We find that Mr O'Brien's audit visit was legitimate and was not ordered by Ms Barnes in order to find fault with the claimant's performance for the following reasons:

    79.1. We find that it was legitimate for Mr O'Brien to carry out compliance audits as part of his role. Ms Barnes gave this evidence orally and was not challenged on it by the claimant.

    79.2. We find that whilst the claimant's email to Mr O'Brien dated 19 August 2020 [297] stated that he had not been aware that the visit was to carry out an audit, he did not challenge the findings of the report.

    79.3. Further, we find that Mr Fernando sought to avoid personal responsibility for the condition that Mr O'Brien had found the premises in by:

79.3.1. Stating that “Rome wasn’t built in a day”, which we take to be a reference to the historically poor condition of the hotel;

79.3.2. Blaming some staff who “don’t seem to care, they don’t want to work, or don’t have the training.”

79.3.3. The neglect of the hotel for “far too long”;

79.3.4. The pandemic;

79.3.5. Furlough;

79.3.6. The company reorganisation; and

79.3.7. Concentrating on other priorities, such as dealing with guests and their needs.

80. We find that the claimant neither disputed the findings of the report nor suggested that it had been ordered by Ms Barnes in order to discredit him with a view to dismissing him in his response to Mr O’Brien [297]. Nor do we find that he disputed the findings of the report in his email to Ms Barnes of 25 August 2020 [299].

81. We find that the report contained a number of criticisms of the state of the premises that could have been historical, such as a defective fire extinguisher [288], biscuits left in lamp shades (which Mr O’Brien said had been an issue he had raised for the previous 2 years) [286], registration cards stored insecurely from 2013 [281], and blood on the carpet of the room Mr O’Brien had stayed in [295] etc.

82. However, we find that the vast majority of matters listed in the 43-page report were matters of day-to-day cleanliness and health and safety that we find could not be reasonably attributed to historical faults with the building. The most obvious of these were issues such as leaving doors unlocked and windows open [e.g., 291] and the egregious example of a fire exit being blocked [277].

83. We find that it was clearly under the control of the claimant to ensure that the hotel was clean – particularly in the kitchen and bar area - and the fact that it obviously was not [260, 261-263, 264, 266, 267, 268, 269, 270, 271, 272] was not due to the historical condition of the hotel.

84. We find that if Ms Barnes had intended to dismiss the claimant, then the report by Mr O’Brien could have led to a disciplinary investigation at least. The fact that no action was taken against the claimant is corroborative of the respondent’s position that there was no plan or intention to dismiss the claimant.

85. The respondent’s case is also supported by the claimant’s failure to corroborate his allegation that he had complained to Ms Barnes and Ms Flint.

86. We conclude that the claimant failed to meet the standard of proof required to show that Ms Barnes sent Mr O'Brien to EFH in August 2020 to find fault with the claimant's performance.

87. In respect of the visits of Mr Burne, we find that it is reasonable for the respondent to ask its Property Manager to undertake regular visits to the properties under their control to check on the state of the premises. The claimant did not dispute that this was a legitimate action for Mr Burne to undertake.

88. It was disappointing that Mr Burne's witness statement was so brief and did not address any factual matter before 10 June 2021. However, he was asked no questions by the claimant about his visits to EFH. Neither did the claimant put any questions to Mr Burne about how he monitored other hotels under the management of the respondent.

89. The only report from Mr Burne that we were shown was one dated 23 June 2020 [143-244] that had 99 remedial points listed within it. We find that the report was exclusively concerned with the state of the 99 bathrooms at EFH. We also find that the report contained no criticism of the claimant. The actions required were almost all about replacing or repairing the bathrooms – these matters were remedial works to address historical issues with the premises.

90. We heard no evidence that the claimant was subjected to any criticism following the report, or any other report by Mr Burne.

91. We conclude that the claimant failed to meet the standard of proof required to show that Ms Barnes sent Mr Burne to EFH to find fault with the claimant's performance.

Ms Barnes did not recognise the Claimant's good performance during weekly meetings

92. The weekly meetings to which the claimant referred were Teams meetings with GMs.

93. We find that the meetings were not held to evaluate the performance of GMs. Rather, they were to keep in touch with managers during the early days of the pandemic lockdown. We make that finding because we preferred Ms Barnes' evidence about the nature of the meetings, which contained sufficient detail, was internally consistent and seemed to be more likely than the claimant's evidence on the point, which was vague and lacked detail.

94. We find that the claimant did not meet the standard of proof required to show that Ms Barnes did not recognise the claimant's good performance during weekly Teams meetings. We accept Ms Barnes' evidence that there was a Teams chat group of GM managers on which GMs would post pictures of what they were doing. The pictures would elicit comment.

95. Ms Barnes gave unchallenged evidence that the purpose of the group was to raise morale amongst the GMs and not to appraise performance. The claimant accepted that he did not participate in the Teams chat group.

At a meeting at the hotel in September 2020, Ms Barnes focussed on negative feedback to the claimant

96. We find that that the meeting referred to was on 2 September 2020 and that it followed Mr O'Brien's report dated 18 August 2020. It followed the claimant's email to Mr O'Brien dated 19 August 2020 [297] and his email to Ms Barnes [299] that we have referenced above.

97. A further report by Mr O'Brien dated 2 September 2020 [300-309] was produced in the bundle, but not referred to in any witness statement. The report noted 19 points that still required attention. We find that these were partly historical issues with the property and partly matters of cleanliness and stock control.

98. The claimant's written evidence on the point lacked any detail. Ms Barnes' evidence contained more detail and was more credible that the claimant's. Ms Barnes' evidence is corroborated by her email of 3 September 2020 [311], which the claimant did not dispute, and which included the following:

> *"Following yesterdays action packed day I have asked Tim to consolidate the report he had completed a couple of weeks ago with what we came and did yesterday.*
>
> *We have done it this way as it's a good tool for you to go through and tick off what's done as this gives you a measure and I hope a sense of achievement. It also leaves a very clear action for you to divide with the team that you can then monitor.*
>
> *As we discussed yesterday it's a challenging property with lots to do and its going to be an ongoing action plan so*
>
> *We have the call with Bev this afternoon and then we will plan another visit where we can sign off and add to the list almost like a rolling diary.*
>
> *See if this helps you.*
>
> *Linda has raised the purchase order for the things we discussed you need. So progress is being made."*

99. The claimant did not dispute that his response to the mail from Ms Barnes was:

> *"Thanks. Spoke with Peninsula and we'll work on the next step now and I'll have a look at the attached. Thanks again for coming down to help. The areas that we tackled on the day looks much better I would not have been able to get all that done for a long time and it was very frustrating. You know I have been scrubbing the hotel from the day I started, but since we opened there was no chance to keep deep cleaning various areas, because we*

were so busy, but I am confident that we will get there in the end as a team, especially when we get the team in place. HIX Chingford failed their 3 previous H&S audits with three different GMs and since I started, first year we go 100% +won an award and then for the next 4 years we got 100% for H&S. So, I am optimistic that we can do it here, as a team."

100. We find that the claimant's assertion that Ms Barnes focussed on negative feedback did not meet the balance of probabilities in the light of the findings made above.

Relying on the above, the Claimant contends that Ms Barnes was trying to push him out of the company

101. For the reasons we have outlined in the preceding paragraphs, we find that the claimant has not met the standard of proof required to show that Ms Barnes tried to push him out of the respondent's employment.

In a telephone call on 20 April 2021, Ms Barnes told the Claimant that he would lose his job and that he would not have a job after the transfer. The Claimant discovered from the owners much nearer the time that this was not the case, but this was after he had made arrangements to relocate

102. We find that there was a telephone conversation between the claimant, Ms Barnes, and Ms Flint on 20 April 2021, as it was the evidence of all three participants that the conversation took place.

103. The Claimant produced a transcript of extracts of parts of the meeting [361-363]. Transcripts should be complete transcripts of the recordings from which they emanate. This is so that a Tribunal can be assured that it has the context of the conversation. By "cherry picking" snippets of a conversation, the claimant did not give us the full context of the words he included in his transcript. We were mindful, however, that the respondent did not produce its own transcript and did not object to the claimant's use of his transcript.

104. The claimant's evidence was that he relied on the following extract, that he says was spoken by Ms Barnes, as proof that he was given notice of the termination of his employment [361] (we have struck through a comment inserted into the transcript by the claimant):

"again, we cant do much until we hear from the Schreiber's ~~(alleged owners of the hotel)~~ in terms of numbers, in terms of yourself I think it's pretty straight forward it terms they don't need a General Manager at the property, and therefore your position wouldn't continue"

105. We find that the context of the conversation is set out in the meeting that Ms Barnes and Ms Flint had with some members of the EFH staff on 13 April 2021 [358-359] and the follow-up email sent to all staff at EFH by Ms Flint on 14 April 2021 [360]. The email set out the following bullet points:

- *The owner of Epping Forest hotel is taking over from Starboard hotel by end of June 2021.*

- *The hotel will operate as normal until June 2021*
- *Owners want to run the hotel as a Long-term stay, which is a different business model, therefore they might not need the current staffing level.*
- *Starboard Head office will communicate more information in the coming weeks as to how exactly owners want to take the business forward.*

106. Staff were asked to contact Ms Flint with any questions. The claimant confirmed that he did not raise any questions until the telephone conversation on 20 April.

107. We find that the evidence that supports the claimant's case at its highest is that he was told that his role would not continue after the TUPE transfer. We find that this could ***not*** be interpreted as his being told that his employment would ***end*** on 30 June 2021. We make that finding because:

107.1. The claimant knew that the hotel was up for sale from the date his employment began.

107.2. He had been kept aware of developments by the respondent.

107.3. He was aware of the possibility of his being transferred under TUPE.

107.4. The words used by the respondent were not definitive.

107.5. The use of the words "wouldn't continue" indicate that the end of the claimant's employment was conditional on other matters that had not yet happened.

107.6. The claimant had purchased a property in Dumfries in February 2021. He had moved his family into the property on or around 13 April 2021.

107.7. We find that there was no mention of any termination date.

107.8. Nothing was confirmed in writing.

108. We therefore find that on 20 April 2021, Ms Barnes did not tell the claimant that he would lose his job and that he would definitely not have a job after the transfer.

109. We find the second part of the allegation concerning what the owners told the claimant later was disingenuous. We make that finding because:

109.1. An email dated 23 April 2021 [379-380] from Ms Barnes to Moses and Hersh Schreiber, who owned the hotel and who were proposing to take the management of the hotel back into one of the companies that they owned, indicated that she had spoken to the Claimant and that he was interested in staying on "for a couple of months to assist in bedding your systems in and helping you with the building.".

109.2. Moses Schreiber responded on 30 April 2021 [378-379] with a list of jobs that would be available post-transfer. This included a Building Manager role.

109.3. Ms Barnes replied the same day [378] and indicated that she had spoken to the Claimant, who "may be interested in carrying out the Building Manager role for a couple of months…" Ms Barnes asked if Hersh Schreiber would like to speak to the Claimant, who she said was moving to Edinburgh.

109.4. Moses Schreiber responded on the same day [377] indicating that, in respect of the Claimant "…we may want to take him on for temporary to assist in the first few months, Hersh will talk to him about this."

110. We therefore find that within 14 days of the conversation on 20 April 2021, the claimant was talking to the respondent and the potential new operators of the hotel about remaining at EFH. We find that to be inconsistent with the claimant's stated belief that he had been given notice of dismissal on 20 April 2021.

In around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave

111. We find that Ms Barnes refused the claimant's application for unpaid leave in May 2021, because she conceded the point. However, we find the evidence in Ms Barnes witness statement (§ 25 of her witness statement) to be credible. We make that finding because her evidence was corroborated by the emails we saw on the point.

112. The claimant emailed Ms Barnes on 3 May 2021 at 9:40am [388] to complain that his request for annual leave had been refused (this is the basis of the final allegation below).

113. Ms Barnes replied on the same date at 20:34pm to advise the claimant that he did not have sufficient annual leave remaining. The claimant did not dispute that he did not have enough annual leave to take the holidays he had requested,

114. The claimant responded on the same date at 22:01pm advising that he had revised his holiday request to three days. He then asked to take the balance of the holiday he had requested, but which had been refused, as parental leave.

115. The claimant also complained that his Deputy Manager, Ahsan, should not have been allowed to leave EFH until 30 June 2021.

116. So, for the avoidance of doubt, our findings on whether or not the respondent did the 10 acts complained of in the discrimination and whistleblowing detriment claims are as follows:

116.1. Ms Barnes **did not** ask the Claimant to act as a cleaner between May 2020 and July 2020.

116.2. Even after a housekeeping contract was confirmed, on occasions thereafter the Claimant **was** asked to clean, cook, and work as a receptionist.

116.3. From 18 May 2020, Ms Barnes **did not allow** the Claimant to increase staffing levels to agreed levels. However, we find that he was **not**

pushed to manage with around 10-15 members of staff instead of 26, he was required to utilise staff numbers that were commensurate with the occupancy rate and other measured parameters of performance.

116.4. Ms Barnes **did not** send her subordinates to find fault with the Claimant's performance: Mr O'Brien's visit in August 2020 when the Claimant was absent; and Mr Burnham visiting about every 2 months.

116.5. Ms Barnes **did not** recognise the Claimant's good performance during weekly Teams meetings (although there was no evidence that she recognised anyone else in the weekly Teams meetings, either).

116.6. At a meeting at the hotel on 2 September 2020, Ms Barnes **did not** focus on negative feedback to the Claimant.

116.7. The Claimant **has not shown on the balance of probabilities** that Ms Barnes was trying to push him out of the company.

116.8. In a telephone call on 20 April 2021, Ms Barnes **did not** tell the Claimant that he would lose his job and that he would not have a job after the transfer. The evidence shows that the claimant had bought a new house is Scotland in February 2021 and had moved his family into it on 13 April 2021. In late April 2021, the new owners decided that they wished to offer the claimant a contract as Property Manager.

116.9. In around May 2021, Ms Barnes and the HR Manager **refused** the Claimant's request for unpaid leave to help his family relocate, but the application was for parental leave, which can only be taken as a minimum of one week at a time, and alternative dates were offered.

116.10. In around May/June 2021, Ms Barnes and the HR manager **refused** the Claimant paid leave but did so because he had used all his holiday entitlement for the year.

117. Where we have found that the cats of discrimination or detriment did not happen, there is no need for us to make any findings as to whether such acts were unlawful.

Direct Race Discrimination

Even after a housekeeping contract was confirmed, on occasions thereafter the Claimant was asked to clean, cook, and work as a receptionist.

118. We find that this was not less favourable treatment because:

118.1. The claimant's own evidence was that three white GMs came to his hotel to help him and his line manager clean EFH.

118.2. The company Handbook allowed for the respondent to require the claimant to do this work.

118.3. The claimant did cleaning work in the first lockdown with no complaint.

118.4. We found Ms Barnes' evidence on the point to be credible.

118.5. We find that the claimant did not identify an actual comparator and that there was unchallenged evidence that white managers also did the types of work that the claimant complained about.

From 18 May 2020, Ms Barnes did not allow the Claimant to increase staffing levels to agreed levels

119. We find that this was not less favourable treatment because:

119.1. The only evidence that supported the claimant's version of events that he was discriminated against because of his race was his own assertion.

119.2. The evidence clearly showed a situation where plans and budgets were set before the effect of the pandemic had hit. We take judicial notice that guidelines for the hospitality industry changed rapidly during the pandemic.

119.3. The government guidance did not allow rooms to be cleaned whilst guests remained in residence. Cleaning was only allowed on the departure of the guests. The statistics referred to by the claimant only related to occupancy and contained no figures for departures or remaining guests.

119.4. The occupancy figures were low following the re-opening of EFH, as government guidelines only allowed key workers to stay in hotels. Her figure of 6% occupancy on the reopening of EFH in May 2020 was not disputed by the claimant. Nether was her figure showing that the occupancy target was 78.6%.

119.5. Ms Barnes' figures for occupancy in June (26% against a target of 82% - §20 of her witness statement) were not challenged either. The housekeeping company was not re-engaged until July 2020 and from that time, the company cleaned all bedrooms (Ms Barnes evidence on this point was unchallenged).

119.6. The contract between the respondent and the company that provided housekeeping required the company to provide an appropriate number of housekeepers to meet demand.

119.7. Ms Barnes did not dispute that the claimant was required to undertake cooking and reception work after July 2020, but we find that this was permissible under the claimant's handbook. This happened after the period specified in the claimant's allegation in any event.

119.8. The claimant did not complain about the duties at the time.

119.9. The claimant did not seek to identify an actual comparator and we find that the respondent would have treated a hypothetical comparator in the same way as it treated the claimant. We make that finding because the claimant's case was solely based on his assertion and there was no credible corroborative evidence that supported that assertion. We found

Ms Barnes' evidence which contradicted the claimant to be more credible than his assertion because she was able to speak to the practice across the whole of the respondent company.

120. We find that the claimant did not show on the balance of probabilities that there was anything untoward about the staffing levels at EFH from May 2020, even if he had been prevented from setting levels that had been fixed in a budget made when the effects of the pandemic were unknowable.

121. We find the claimant's emphasis on the small profitability of EFH to be neither relevant nor determinative of the point he was trying to show because it focussed on only one aspect of the performance of the business, whereas Ms Barnes' evidence properly took a holistic view of tits performance.

Ms Barnes did not recognise the Claimant's good performance during weekly meetings

122. We find that this was not less favourable treatment because:

122.1. There was no evidence that Ms Barnes recognised the good performance of others apart from the claimant's assertions. We repeat our findings on the point above.

In around May 2021, Ms Barnes and the HR Manager refused the Claimant's request for unpaid leave to help his family relocate

In around May/June 2021, Ms Barnes and the HR manager refused the Claimant paid leave but did so because he had used all his holiday entitlement for the year

123. We find that this was not less favourable treatment because:

123.1. We find that the claimant's application was for a mix of paid and unpaid leave, so it is legitimate to deal with both allegations together.

123.2. We find that the respondent applied the law by refusing to grant parental leave in blocks of less than full weeks.

123.3. We find that the respondent applied the claimant's contract to refuse paid leave.

123.4. We find that Chris Jennings was not a valid comparator because he was line managed by the claimant and was not the same as the Claimant in all material regards.

123.5. We find that the claimant's assertion that Ahsan was moved to the Burnley hotel to assist a white manager constituted race discrimination puzzling. By definition, a Deputy Manager is there to assist the GM. There was no evidence to support the claimant's assertion that the reason that Ahsan had been permitted to move location when he had was motivated by the Respondent's intention to remove support from the claimant in favour of

giving support to a white GM. We find Ms Barnes' evidence, which was not contradicted by the claimant was credible on the following points:

123.5.1. Ahsan was on the graduate trainee programme.

123.5.2. He had indicated a desire to relocate to the North West of England some months previously.

123.5.3. He had been unable to move earlier because of a family medical issue.

123.5.4. He had applied for the vacant post in Burnley and had been appointed. He had not been selected for transfer by the respondent.

123.6. We find that there were no valid actual comparators for these claims and that the respondent demonstrated that it would have treated a hypothetical comparator in the same way as it treated the claimant.

124. We found 5 of the allegations did not happen, and we found that all of the other five occurred for non-discriminatory reasons.

125. All the claims of direct race discrimination fail.

Harassment related to race

126. Based on our findings of fact above, we find that allegations 1, 4, 6, 7, and 8 were not proven to have happened on the balance of probabilities, so they fail as allegations of harassment at that stage.

127. We repeat the findings we made on the allegations of direct discrimination because of race, as they are relevant to the allegations of harassment in allegations 2, 3, 5, 9, and 10.

128. We find that the five remaining allegations were unwanted conduct.

129. We find that the claimant has not shown that any of the five remaining allegations were related to his race because of the findings set out above.

130. We therefore do not have to consider whether the conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We do acknowledge that the claimant was upset by the respondent's actions.

131. All the claimants of harassment related to race fail.

Protected disclosures

132. Our first task was to determine whether the seven protected disclosures identified by the claimant (noting that the eighth had been withdrawn by him in the hearing) were protected disclosures ("PDs") as defined in section 43B of the Employment Rights Act 1996.

133. We would make the initial comment that the law on what constitutes a PD is complex and technical. We would also comment that Mr Fernando understandably struggled to grasp some of the concepts in determining what constitutes a PD, particularly the definition of what is meant by "information" in the context of whistleblowing.

PD1 – 25 August 2020

134. We find that the alleged PD was an email from the claimant to Ms Barnes and Mr Griffiths dated 25 August 2020 [299].

135. We find that the email was a disclosure of information, as it highlighted specific instances of matters of health and safety that required attention, such as the requirement to engage a specialised kitchen cleaning company, the hanging wires in the kitchen and other specifics.

PD2 – September 2020 and 22 May 2021

136. This PD relates to electrical cables and electrical safety in general. We found the claimant's identification of the dates that this PD was made to be confused. The email of 22 May 2021 (not 2020 as in the List of Issues) was an email from Mr Burne to several people, including the claimant. It cannot be a disclosure by the claimant.

137. An email of 10 June 2021 [469] was about the termination of the claimant's employment and contained no information about a breach of health and safety.

138. The claimant's evidence about verbal disclosures (paragraph 4.9 of his witness statement) was vague. It lacked names, dates, and specifics. It did not meet the threshold of the standard of proof required to show that he had made PDs.

139. The email of 20 August 2020 [298] is a protected disclosure as it refers to loose wires hanging around specific areas of EFH. The risk to health and safety is obvious.

PD3 – 23 November 2020 and 20 April 2021

140. This alleged PD concerned an alleged abuse of the furlough scheme in lockdown. We found this not to be a PD because:

    140.1. We found the claimant's interpretation of the furlough scheme rules to be entirely misconceived. His evidence that a breach had been committed was a website page. His assertion was that because the website didn't say that an employer ***could*** re-employ workers previously made redundant and then place them on furlough, that meant that it could not do it.

    140.2. We take judicial knowledge that what the respondent did was within the law at the time.

140.3. We find that the claimant disclosed information, and that the information was disclosed in the public interest, but that his belief was not reasonable.

PD4 – Planning Consent

141. This alleged PD concerned the changes made to EFH by its owners that included changing some rooms from 'standard' hotel rooms to long stay rooms aimed at contractors working in the area who would rent a room for 90 days at a time.

142. The alleged disclosure concerned the planning aspect of changing the use of the rooms, the installation of a laundry room for long-stay guests to use, and the addition of new furniture into the long stay rooms.

143. We find that the claimant's evidence on this point was vague and showed a lack of evidence about what legal obligations or health and safety risks were engaged.

144. We find that the owners of the hotel were not persons to whom the claimant could make a protected disclosure. We find that the claimant did not show on the balance of probabilities that he made a verbal PD to Ms Barnes because his evidence on the point was vague.

145. We find that the email that the claimant referred to was one dated 4 June 2021 [431]. We find that the evidence shows that the claimant's attitude towards the respondent changed after 20 April 2021. We find that the claimant made many complaints about all sorts of matters that intensified in June 2021 as the end of his employment approached. The email of 4 June is indicative of his mindset at that time.

146. We find that the email disclosed information, but we do not find that the claimant believed that it was in the public interest. We find that it was made to force the respondent's hand to improve the offer that had been made to him.

147. We find that if the claimant had made the disclosure in the public interest, his belief would not have been reasonable. We found no evidence that the respondent was seeking to conceal anything or that it was reasonable for the Claimant to believe that it was.

PD5 – Staff Room Ceiling

148. We find that the claimant's evidence about verbal disclosures "on or around December 2020" was vague and did not meet the balance of probabilities test.

149. We find that the claimant's email of 10 June 2021 [470] disclosed information.

150. We find that the disclosure was made in the public interest as it concerned the health and safety of colleagues.

151. We find that the belief was reasonable.

PD6 – Plumbers

152. This allegation concerned the fitting of 2 hot water tanks, not two new gas boilers, as stated in the allegation. This is another allegation that was vague in nature and the evidence of the claimant lacked detail. The claimant could not say what legal obligation the respondent may have failed to comply with and could not provide a credible explanation of the risk to health and safety.

153. We find this allegation to be without merit. No information was disclosed.

PD7 – 23 June 2021 and 7 July 2021

154. We find that the claimant did not disclose information in his email of 23 June 2021 [532]. He was the DPS licence holder for the premises. He should have known that it was permissible for someone else to manage the licensed facility in his absence. The respondent had other DPS licence holders.

Detriments

155. The detriments contended for by the claimant are the same as those contended for in the direct discrimination and harassment claims.

156. Based on our findings of fact above, we find that allegations 1, 4, 6, 7, and 8 were not proven to have happened on the balance of probabilities, so they fail as allegations of detriment.

157. We find that the claimant has failed to show on the balance of probabilities that the remaining detriments that he alleges he was subjected to were because he made the PDs that we have fond he made. We repeat our findings above that show why we consider the respondent did the things that the claimant says were detriments. We have no doubt that none of the perceived detriments had any connection to the PDs made by the claimant.

158. The claims of detriment because the claimant made PDs all fail.

Automatic unfair dismissal

159. We do not find that the clamant was dismissed. We find that he terminated his own employment by refusing to TUPE transfer on 30 June 2021. We do not find that the claimant was expressly dismissed by Ms Barnes on 20 April 2021.

160. We have found that none of the claimant's allegations of detriment because he made PDs met the balance of probabilities test, so we cannot find that the reason that the claimant refused the TUPE transfer was because of protected disclosures.

Wrongful dismissal (notice pay)

161. We find that the claimant terminated his own employment by refusing a TUPE transfer. In those circumstances, he is not entitled to notice pay.

162. This claim fails.

Breach of contract (telephone expenses)

163. We find that this claim fails, as the claimant produced no evidence whatsoever to support the claim in his witness statement and when asked about it in cross-examination and questions from the Tribunal, he could not even say whether he had been paid the alleged monies due or not.

Employment Judge Shore
Dated: 3 November 2023