EMPLOYMENT TRIBUNALS

Claimant: Mr S Moore

Respondent: Casa El Pastor Ltd

Heard at: London Central (by video using Cloud Video Platform)

On: 9-13 January 2023

In chambers: 28, 29 & 30 March 2023

Before: Employment Judge Khan
Ms S Went
Mr R Baber

Representation
Claimant: In person
Respondent: Ms P Hall, Tribunal Advocate

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The complaint of automatic unfair dismissal by reason of making a protected disclosure succeeds.
(2) The complaint of detriment on the ground of making a protected disclosure succeeds in part (allegations: (a), (d), (6), (e), (8), (g), (9), (10), (h), (11), (12) (18), (j)).
(3) The complaint of detriment on the ground of carrying out designated health and safety activities succeeds in part (allegations: (a), (d), (6), (e), (8), (g), (9), (10), (12) (18), (j)).
(4) The allegations of detriment are deemed to be in time.
(5) The complaint of discrimination arising from disability fails and is dismissed.

REASONS

1. By a claim presented on 2 November 2021 the claimant brought complaints of health and safety detriment, whistleblowing detriment, automatic unfair dismissal by reason of making a protected disclosure, unfair dismissal and disability discrimination. The respondent resisted these complaints.

2. By consent, the name of the respondent was amended as set out above.

The issues

3. The issues we were required to determine were enumerated in the Case Management Order ("CMO") of Employment Judge Heath dated 22 April 2022 and refined following discussion with the parties during this hearing as follows.

Factual allegations

4. The claimant relies on the following allegations as enumerated in the Annexe[1] to the CMO dated 22 April 2022.

Constructive dismissal (Employment Rights Act 1996 ("ERA"), section 95(1)(c))

5. Was the claimant dismissed? The claimant relies on allegations (a), (3), (b), (c), (5), (d), (6), (e), (8), (g), (9), (10), (12), (15), (16), (i), (17), (19), (k), (20)-(22) as being the conduct which repudiated his contract of employment.

6. The claimant claims that the final straw was being told by Ms Jones on 10 May 2021 that he would never receive a pay rise and that she implied that the respondent did not have a duty of care towards him.

7. Did that breach the implied term of trust and confidence? The Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between employer and employee; and whether it had reasonable and proper cause for doing so.

8. Did the claimant resign in response to this breach?

9. Did the claimant waive this breach or affirm his contract?

Automatic unfair dismissal (ERA, section 103A)

10. If the claimant was dismissed, was the reason or principal reason for dismissal that he made a protected disclosure?

[1] The Annexe, which is appended to this judgment, includes a limited number of amendments in square brackets. In all other respects it recites the allegations listed in the Annexe which is a composite of the two sets of allegations enumerated by the parties: (a)-(n) by the respondent, and (1)-(30) by the claimant. This has resulted, inevitably, in a degree of repetition.

Unfair dismissal (ERA, section 98)

11. Alternatively, if the claimant was dismissed, the respondent does not rely on a potentially fair reason for dismissal, so that the dismissal will be unfair.

Protected disclosures (ERA, sections 43A – C)

12. It is agreed that the claimant made the following protected disclosures to his employer:

    a. From September 2020 onwards the claimant made numerous disclosures orally and by WhatsApp message to Mr Galvez that chefs were not wearing masks.
    b. On 5 October 2020 made a disclosure to the Covid committee that chefs were not wearing masks.
    c. On 7 October 2020 the claimant disclosed to Mr Bown by email that chefs were not wearing masks.
    d. On 1 November 2020 the claimant disclosed to a WhatsApp group, which included Mr Bown, that the chefs were not wearing masks.
    e. On 13 November 2020 the claimant made a disclosure in his grievance to Ms Jones that the chefs were not wearing masks.
    f. On 9 December 2020 the claimant disclosed in an email to the Operations Team and to Mr Kumain that the chefs were not wearing masks.

Detriment – Protected disclosure (ERA, section 47B)

13. Was the claimant subjected to a detriment? The claimant relies on allegations (a), (b), (d), (6), (e), (8), (g), (9)-(12), (18), (j), (20)-(22).

14. In respect of any such conduct that is found to have occurred, was it done on the ground that the claimant made a protected disclosure?

Detriment – Health and safety (ERA, section 44)

15. Was the claimant subjected to a detriment? The claimant relies on allegations (a), (b), (d), (6), (e), (8), (g), (9)-(12), (18), (j), (20)-(22).

16. It is agreed that the claimant was designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work, and he carried out or proposed to carry out such activities (section 44(1)(a)).

17. In respect of any such conduct that is found to have occurred, was it done on that ground?

Disability (Equality Act 2010 (“EqA”), section 6)

18. Did the claimant have a disability as defined by section 6 EqA at the material time? The claimant claims that he has been disabled by virtue of depression since January 2021.

Discrimination arising from disability (EqA, section 15)

19. Did the respondent treat the claimant unfavourably by denying him a pay rise? The claimant alleges that this decision was made on 19 April 2021 by Mr Bown, Mr Matthews and Ms Jones.

20. Did the following things arise in consequence of the claimant's disability? The claimant's turning down a transfer because of physical manifestations of his depression.

21. Did the respondent deny the claimant a pay rise because he turned down a transfer which he had done because of his depression?

22. Was the treatment a proportionate means of achieving a legitimate aim? The respondent relies on the following aims:

    a. The claimant was not the number one at the place where he worked i.e. he was not eligible for a pay rise.
    b. There was no contractual right to a pay rise.
    c. The respondent was recovering from the impact of Covid.

23. Did the respondent know or could it reasonably have been expected to know that the claimant had a disability? From what date?

Time limits (ERA, section 48; EqA, section 123)

24. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 June 2021 may not have been brought in time?

25. Were the detriment complaints made within the time limit in section 48 ERA? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained?
    b. 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?
    c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
    d. 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?

26. Were the discrimination complaints made within the time limit in section 123 EqA? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    b. If not, was there conduct extending over a period?
    c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

(i) Why were the complaints not made to the Tribunal in time?
(ii) In any event, is it just and equitable in all the circumstances to extend time?

Relevant legal principles

EMPLOYMENT RIGHTS ACT 1996

Detriment

27. Section 44(1) ERA provides that an employee has the right not to be subjected to any act, short of dismissal, or any failure to act, by his employer, which is done on one or more of the grounds set out in subsections (a) to (e).

28. Section 47B ERA provides that a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground he made a protected disclosure.

29. Once it is established that a worker qualifies for protection under section 44(1) or 47B ERA and is subjected to a detriment, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)).

30. The correct approach on causation is for the Tribunal to consider whether the making of the detriment materially influenced, in the sense of being a more than trivial influence, the employer's treatment of the complainant (see NHS Manchester v Fecitt [2012] IRLR 64, CA).

Constructive dismissal

31. For there to have been a constructive dismissal the following three conditions must be met:

(1) There must be a fundamental breach on the part of the employer.
(2) The employee must not, by the time of the resignation, have conducted himself in such a way as to have relinquished the right to rely on the breach. This is known as affirmation.
(3) The fundamental breach must be a contributing cause of the resignation though it need not be the principal cause.

19. The implied terms of a contract of employment include the implied term of mutual trust and confidence i.e. that a party not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the other party to the contract (see Malik v BCCI [1997] IRLR 462, HL). This breach can be the result of a single act/omission or of cumulative conduct which culminates in a last straw. A last straw need not amount to blameworthy or unreasonable conduct but it must contribute in some meaningful way to the overall breach.

20. Whether there has been a fundamental breach is an objective test. Accordingly, there will be no breach of trust and confidence simply because

the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held.

21. If there has been a constructive dismissal and the respondent does not rely on a potentially fair reason for this dismissal, it will be unfair.

Automatic unfair dismissal – Protected disclosure

22. The burden is on the claimant to show that the reason or principal reason for dismissal was that he made a protected disclosure (see Ross v Eddie Stobart Ltd UKEAT/0068/13/RN).

23. The focus of the Tribunal's enquiry must be the factors that operated on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said this (at p. 330 B-C):

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

This guidance was approved by Underhill LJ in Beatt v Croydon Health Services NHS Trust [2017] IRLR 748:

> *"As I observed in Hazel v Manchester College [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it sometimes put, what 'motivates' them to do so…"*

Time limits

24. Section 48 ERA provides that

> *(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 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;*
> …

EQUALITY ACT 2010

Disability

25. Disability is defined by section 6 EqA:

> *(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *…*
> *(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)— (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
> *…*
> *(6) Schedule 1 (disability: supplementary provision) has effect.*

26. Section 212 EqA defines 'substantial' as meaning more than minor or trivial.

27. Paragraph 2 of schedule 1 EqA provides, in respect of 'long-term' effects:

> *(1) The effect of an impairment is long-term if— (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.*
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

28. 'Likely' means that it could well happen (see SCA Packaging Ltd v Boyle [2009] ICR 1056; and also the EqA Guidance on matters to be taken into account in determining questions relating to the definition of disability).

29. It is necessary for a Tribunal to decide whether the definition of disability is met at the time of the alleged discrimination (see McDougall v Richmond Adult Community College [2008] ICR 431). The question, therefore, is whether, as at the time of the alleged discriminatory act, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A Tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. Anything that occurs after the date of the alleged discrimination is not relevant to this assessment.

Discrimination arising from disability

30. Under section 15(1) EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

31. Unfavourable treatment is not defined, the EHRC Code of Practice of Employment ("the Code") says "must have been put at a disadvantage". There is no need for a comparator.

32. The Tribunal must ask what the reason for the alleged treatment was. This need not be the sole reason but it must be a significant or at least more than trivial reason (see Secretary of State for Justice and anor v Dunn UKEAT/0234/16/DM). If this is not obvious then the Tribunal must enquire about mental processes – conscious or subconscious – of the alleged discriminator (see R (on the application of E) v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

33. In Pnaiser v NHS England [2016] IRLR 170 Mrs Justice Simler set out the following guidance:

    (1) A Tribunal must first identify whether there was unfavourable treatment and by whom.
    (2) The Tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and amount to an effective reason for or cause of it. Motive is irrelevant. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.
    (3) The Tribunal must determine whether the reason or cause is something arising in consequence of B's disability. The causal link between the something that causes the unfavourable treatment and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
    (4) The "because of" enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

34. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

35. Nor will the employer be liable for any unfavourable treatment if it lacked actual or constructive knowledge of the disability. The correct approach to be taken in relation to a complaint of discrimination arising from disability (section 15(2) EqA) was analysed by HHJ Eady in A Ltd v Z [2020] ICR 199:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment (see York City Council v Grosset [2018] ICR 1492);

(2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect (see Donelien v Liberata UK Ltd (unreported) 16 December 2014; and also see Pnaiser v NHS England [2016] IRLR 170).

(3) The question of reasonableness is one of fact and evaluation (see Donelien); none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Borough Council [2017] ICR 610), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in Donelien 16 December 2014, para 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows: "5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'. "5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: Ridout v TC Group [1998] IRLR 628 ; Secretary of State for Work and Pensions v Alam [2010] ICR 665.

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code.

Detriment

36. Section 39(2) EqA provides that:

> *An employer (A) must not discriminate against an employee of A's (B) –*
> *…*
>
> *(a) by subjecting him to any other detriment.*

37. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC

[2003] IRLR 285, HL). Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841). This is reflected in the guidance provided in the EHRC Employment Code of Practice that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

Discrimination – Burden of proof

38. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

39. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must establish a prima facie case at the first stage. This requires the claimant to prove facts from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination. This requires something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA). If the burden shifts, it is for the respondent to show an adequate i.e. non-discriminatory reason for the treatment. This explanation does not have to be reasonable or sensible provided it has nothing to do with the protected characteristic relied on (see Laing v Manchester Council [2006] ICR 1519).

40. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a Tribunal can make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870, SC).

The evidence and procedure

41. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal.

43. We heard evidence from the claimant.

44. For the respondent, we heard from: Vikas Kumain, Head Chef; Harry Bown, Operations Director; Katarzyna de Morais, Group HR Advisor; Lisa Jones, Chief People Officer and formerly People Director; Steven Edgson, Chief Finance Officer and Company Secretary.

45. Owing to his limited availability, Mr Kumain was interposed and his evidence was heard before the claimant's evidence on the first day of the hearing.

46. There was a hearing bundle of 559 pages to which we added a limited number of additional documents by consent, and a separate bundle of medical evidence of 160 pages.

47. We considered the written and oral submissions made by both parties.

48. References below to [ ], [S] and [X/] are to the primary and supplemental bundles, and witness statements, respectively.

The facts

49. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

50. The respondent is a restaurant business located in Kings Cross, London, ("the restaurant") which is part of a group of restaurants that are owned and operated by Harts Group Ltd.

51. The claimant was employed by the respondent from 29 December 2018 to 26 June 2021 as Restaurant Manager. His line manager was Alejandro Galvez, General Manager. Vikas Kumain, the Head Chef at the restaurant, who was at the same level of seniority as the claimant, reported to Marvin Jones, Executive Chef. Gustavo Souza, Sous Chef, was the second in command in the kitchen and reported to Mr Kumain. Mr Galvez reported to Harry Bown, Operations Manager, who reported to Ben Matthews, Operations Director, who worked alongside Lisa Jones, then Head of People.

52. The claimant's contract of employment included the following term [52]:

> "Entirely at the Company's discretion, your salary will be reviewed annually. However, a salary review will not necessarily result in a salary increase."

53. The claimant was employed throughout the three lockdowns imposed by the UK government in response to the Covid-19 pandemic: from 23 March – 4 July 2020 (the first lockdown); 5 November – 2 December 2020 (the second lockdown); and 6 January 2021 – 6 April 2021 (the third lockdown). A three-tier system of restrictions was introduced on 2 December 2020, with London placed initially in tier three, before it was moved to a new, stricter, tier four, on 21 December 2020.

54. The claimant claims to have had depression since September 2020, some five months before he was diagnosed with depression by his GP, on 28 May 2021. He says that the date from which it was likely that the substantial adverse effect of depression on his day-to-day activities would last for at least 12 months, was January 2021.

55. The claimant was designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. We find that this was not limited to the claimant's involvement as a member of the respondent's Covid committee and also arose from his position of seniority at the restaurant at a time of a global pandemic.

56. From 24 September 2020 it became mandatory for hospitality workers to wear masks in England. It is agreed that from that date until 9 December 2020, the claimant regularly complained to chefs and kitchen staff that they were failing to comply with this legal requirement; and that by escalating this issue he made protected disclosures and raised health and safety concerns to:

    a. Mr Galvez, throughout this period;
    b. the Covid committee, which included Mr Bown, on 5 October 2020;
    c. to Mr Bown, on 7 October and 1 November 2020;
    d. to Ms Jones, on 13 November 2020; and
    e. to the Operations Team and Mr Kumain, on 9 December 2020.

    We find that the claimant's actions in seeking such compliance / challenging non-compliance with kitchen staff clearly (in addition to the occasions when he reported to his managers, as above) amounted to activities in connection with preventing and reducing risks to health and safety at work which he was designated to carry out.

57. It follows from the fact that the claimant was having to constantly enforce and escalate this issue to his senior managers, kitchen staff were routinely failing to comply with the law. This is underlined by the admission made by Ms Jones to the claimant on 13 November 2020, that this issue was well-known to her [197]. As Head Chef, Mr Kumain was directly responsible for ensuring that his staff were compliant. He was evidently failing in this regard. Notably, his evidence was that the hot and noisy working conditions in the kitchen made mask-wearing uncomfortable, and staff would ease their discomfort by moving their mask away from their nose and or mouth, or removing it to communicate. He also agreed that he did not wear his mask when he worked alone in the kitchen because he did not feel this was necessary notwithstanding that he was preparing food. We therefore reject his evidence that most of the kitchen staff complied with mask-wearing.

58. We find that the claimant was the only manager at the restaurant who was regularly enforcing mask-wearing, as this is consistent with statements made by him, including on 29 September, 5 October and 13 November 2020 (see paragraphs 59, 61 and 78), and there is no evidence that Mr Galvez engaged with this issue. Being a lone and unwanted voice made it harder for the claimant to achieve compliance as well as bringing him into conflict with kitchen staff and Mr Kumain, in particular. As the claimant put it to Mr Kumain, in cross-examination, he was perceived as a constant and rude nag by kitchen staff who were working in a highly pressurised environment. We find that there was nothing improper about the way in which the claimant raised this issue with kitchen staff. Mr Kumain agreed that the claimant regularly complained that kitchen staff were not wearing their masks correctly. His evidence was also that this upset staff regularly because the claimant began to ask staff to wear masks in an aggressive way, which we do not accept. Mr Kumain clarified that by aggressive he meant that the claimant raised his voice. However, as Mr Kumain had emphasised, the kitchen was a busy and noisy working environment so that it is likely that raised voices were commonplace. It is also notable that in his evidence, Mr Kumain stated that the claimant approached him during times when he needed to focus and he often felt that the claimant wanted to have a longer

conversation about this issue. We find that in fact Mr Kumain and his team did not respond well to being reminded repeatedly by the claimant to comply with the law – as will be seen, this was the cause of the incident with another chef, Abdel, on 9 December 2020 – and Mr Kumain resented the claimant's interference in his kitchen.

59. Consequently, the claimant needed support from his managers not only in ensuring compliance but being safeguarded from retaliation. The claimant initially raised this issue with his senior colleagues and managers on 29 September 2020 [519-520], when he wrote "Can we please all help to enforce this as it is the law" and, as will be seen, he asked for support from his managers on 5 and 7 October, 6 and 13 November and 9 December 2020. As will be seen, this support was not forthcoming.

60. We would pause here to emphasise that the effects of the claimant's protected disclosures and designated health and safety activities all of which centred on achieving compliant facemask-wearing were in many important respects indivisible. The claimant's interventions towards Mr Kumain and his staff brought them into conflict, as we have found, and as Mr Kumain and Mr Bown agreed in evidence. As will be seen this hostility towards the claimant was aggravated not only by the claimant's persistence but when he reported their non-compliance to senior managers. As a close-knit working group, we find it likely that the kitchen staff all knew, via Mr Kumain and Mr Sousa, that the claimant had reported their non-compliance to senior management. The reluctance of the claimant's senior managers – which included Mr Bown who we find was irritated by the claimant's conduct in relation to this health and safety issue – to intervene to enforce compliance, and safeguard the claimant from retaliation, fostered an environment in which Mr Kumain and his colleagues aggressed the claimant with apparent impunity.

<u>Covid committee meeting on 5 October 2020 (allegation (3))</u>

61. The claimant attended a Covid committee meeting on 5 October 2020 when it is agreed that Mr Bown complained that facemask wearing was not being complied with at all sites. We do not find that this was a reprimand, as the claimant alleges. We find that Mr Bown was highlighting the need for compliance, at a time when mandatory mask-wearing had only recently been implemented, at a meeting of managers who were responsible for ensuring such compliance. We accept his unchallenged evidence that he reported that chefs were becoming angrier and behaving more aggressively towards him because he was the only manager raising this issue with them. As the respondent's record of this meeting noted, the claimant "seemed to have the feeling to be left alone and needed more support" [314].

<u>The claimant's request for support on 7 October 2020 (allegation (b))</u>

62. Two days later, on 7 October 2020, the claimant asked Mr Bown to intervene when Gustavo Sousa was not wearing a mask. We accept the claimant's evidence that Mr Bown asked Mr Sousa to put one on and when Mr Sousa ignored him he took no further action, because the claimant discussed this incident with Ms Jones on 14 November 2020 [193-194]; she appeared to accept that it was likely to have occurred because Mr Bown "likes to stay

away from stress…and he could definitely support you on this one"; and when Mr Bown was questioned at the subsequent grievance investigation, he agreed that the claimant had asked him to speak to Mr Sousa but could not remember their subsequent interaction. We also find that Mr Bown was not altogether a reliable witness as his evidence was at times obfuscatory, vague or lacking in clarity and we preferred the claimant's evidence over his where the two conflicted because we found the claimant to be a consistently credible and reliable witness. We do not find that this was materially influenced by the claimant's disclosures or designated health and safety activities. The reason for Mr Bown's conduct was his tendency to avoid confrontation. However, we do find that Mr Bown's failure to intervene to support the claimant and ensure that Mr Sousa was wearing a facemask contributed to the claimant's loss of trust and confidence in the respondent, coming after the claimant's entreaties on 29 September and 5 October 2020, and Mr Bown's instruction to the managers at the committee meeting, on the second of these dates.

The claimant's transfer request on 12 October 2020 (allegations (c), (4) & (5))

63. This was evidently impacting on the claimant's mental health because he wrote to Ms Jones on 12 October 2020 to request a transfer to another site "preferably Barrafina" when he explained "I just feel that my mental health would benefit from a change in environment" [143-144]. Ms Jones replied that there were no vacancies in the Barrafina Group and noted "I appreciate your desire to move, but this is exceptionally difficult times [sic] for the group…" She advised him that if he wanted to move to Barrafina he would need to start as an Assistant Restaurant Manager, as this was a different brand, and offered to meet the claimant that week "if you want to chat and discuss at all". The claimant complains that he was told that a transfer would only be possible by accepting a demotion which was not consistent with the treatment of another colleague. It is relevant that Ms Jones was giving this advice about what the claimant would need to do, hypothetically, to transfer to Barrafina, in the context of the current external pressures on the business which included managing redundancies at other sites and the fact that there was no available vacancy at Barrafina. As will be seen, when circumstances changed, in May 2021, Ms Jones floated a position at Barrafina which was inconsistent with this initial advice (when Ms Jones' denial of her previous conflicting advice greatly exercised the claimant – see paragraph 118). To the extent that Ms Jones' initial advice was inconsistent with the treatment of another colleague, and in the absence of any evidence about the specific circumstances relating to the transfer of that colleague we make no finding of inconsistent treatment, we find that this was likely to be explained by the prevailing circumstances, which included the availability of a suitable vacancy, as happened in the claimant's case between October 2020 and May 2021.

64. The claimant also complains that Ms Jones failed to follow up with him about his mental health. Given that Ms Jones offered to meet the claimant the same week to discuss his email and there is no evidence that the claimant took her up on this offer, we do not find this to be the case.

65. We accept the claimant's unchallenged evidence that when he told Mr

Galvez about his difficulties in enforcing mask-wearing with kitchen staff, his manager told him to keep his head down and ignore the aggressive behaviour of the chefs. As the only manager at the restaurant who was trying to enforce compliance with mask-wearing, we find that the claimant was becoming resigned that the support he required to achieve this objective would not be forthcoming.

The conduct of Mr Kumain towards the claimant between 31 October – 4 November 2020 (allegations (a), (6), (e) & (8))

66. On 31 October 2020, during a visit by Mr Jones to the restaurant, Mr Kumain called him over to the pass to complain about the hot food which he felt had been left to spoil. It is agreed that this was the busiest day the restaurant had had for many months, in advance of which the claimant had sent a message to the managers' WhatsApp group about needing more staff. We accept the claimant's evidence that Mr Kumain instructed kitchen porters to refrain from taking out tubs to the runner area as he felt that the front of house ("FOH") staff were "lazy" because this is what the claimant wrote in a contemporaneous WhatsApp message [522 & 525]. We do not accept Mr Kumain's evidence that he did not intend to criticise the claimant as we find his actions on this date – not only his critical comment but his withdrawal of support which would have placed additional pressure on FOH staff and the claimant, who had overall responsibility for FOH – demonstrate his animosity not only towards FOH staff but also to the claimant, who had overall responsibility for FOH. We find that Mr Kumain's hostility towards the claimant was materially influenced by the claimant's repeated attempts to ensure that he and his staff wore facemasks, which we have found were designated health and safety activities and brought them into conflict, and in the absence of any evidence being adduced by the respondent to explain the source of this hostility we also find that the claimant's ongoing disclosures to Mr Galvez and his disclosure on 7 October to Mr Bown were likely a material influence.

67. Earlier on the same date, the claimant texted Mr Galvez to complain about a stabbing pain in his chest [523].

68. The next morning, the claimant forwarded photographs of two chefs, including Mr Souza, who were not wearing masks, to the managers' WhatsApp group which included Mr Bown and Mr Jones. Mr Souza responded by sending a message containing a row of six clapping-hand emojis [526]. A few minutes later, the claimant added the following comment:

> "People walking around outside and we [are] going into lockdown and chefs working without face masks".

In his oral evidence, Mr Kumain said that Mr Souza's response was appropriate. His evidence was also that he did not know what the emojis meant, which we find to be implausible as this was a patently sarcastic retort. We find that Mr Kumain's refusal to criticise Mr Souza's patently inappropriate response was indicative of his allegiance with Mr Souza, his attitude towards mask-wearing, and hostility towards the claimant. Within 30 minutes of the claimant's message, the staff dinner which normally took place at 3pm was moved to 4pm, without discussion. This impacted on the

claimant's deployment of FOH staff. We find that it is likely that this decision was taken by Mr Kumain because he was unable to recall who made this decision, and did not deny that it could have been him; as Head Chef, he was best placed to make this decision; and this is consistent with a contemporaneous WhatsApp message sent by the claimant [529] that Mr Kumain had come into work "seriously [pissed] him off" at him [529].

69. The next day, on 2 November 2020, Mr Kumain sent the claimant a photo which we were unable to view in the document in the bundle but which it is agreed depicted the rubbish that had been left on the floor of the restaurant overnight, together with the following message [531]:

> "Mate is that how they leave floor at the end of the night. If I have an eho [Environmental Health Officer]. I'm fucked…"

Mr Kumain said that he removed some of the rubbish bags and agreed that he left the bulk of the rubbish where it was. We do not accept his evidence that he did not have the time to clear away all of the rubbish because Mr Kumain agreed that that there were three other chefs and a kitchen porter on shift when the claimant arrived at work later that morning, so that he could have delegated this task to a member of his team. In his evidence, Mr Kumain was critical of FOH staff for failing to put the rubbish in the bins. The fact was that the cleaners had not come into the restaurant overnight. We find that it is likely that Mr Kumain held the claimant responsible for this oversight because we accept his evidence that this was one of the criticisms Mr Kumain made about the claimant during their heated exchange two days' later (see paragraph 72) as well as for cleaning up the mess (as is clear from the WhatsApp correspondence, it was not part of the claimant's remit, as he had to ask Mr Galvez for the cleaner's contact details). We therefore find that Mr Kumain deliberately left the claimant and his FOH team to clean up despite his reference to the EHO. Coming the day after his decision to move the staff dinner to 4pm, this was another act of hostility towards the claimant and the FOH team, which we find was made in retaliation to the photos the claimant had circulated together with his WhatsApp message on 1 November and was also materially influenced by the claimant's designated health and safety activities carried out in relation to Mr Kumain and kitchen staff.

70. Ahead of the second lockdown, coming into effect from 5 November 2020, Mr Galvez needed to organise a rota for the takeaway service the restaurant would be offering to customers. When he canvassed the claimant on 3 November, the claimant replied "I'm keen" [533].

71. The next day, on 4 November 2020, the claimant called Mr Bown to report the ongoing issue of chefs not wearing masks and Mr Bown handed over the call to Mr Jones so that the claimant could also discuss this with him. Mr Kumain was not yet at work. When the claimant messaged Mr Galvez to tell him about the call he noted "Vikas gonna be p[i]ssed off with me all over again" [535]. He went on to explain:

> "Sorry man, I'm really not trying to make issues but it is literally law that we should be wearing masks and I don't think its okay that they are putting the business at risk of fines just because they don't care…I asked Gustavo first why he thinks its okay and he literally doesn't give a fuck."

Mr Galvez replied "It is what it is man. They need to get it one way or another", without any suggestion that he would take any action himself to ensure compliance. In the same exchange, the claimant told his manager "I don't know what to do anymore" and that he felt "[r]eally useless and without any hope of improving the situation" [536] which was why he had escalated this issue to Mr Bown, having considered contacting more senior colleagues including Mr Matthews and Ms Jones.

72. When Mr Kumain came in to work the claimant asked to speak to him. It is agreed that there was a heated discussion between them but there is a dispute about what Mr Kumain is alleged to have said to the claimant. In his oral evidence, Mr Kumain said that he was upset because the claimant had not come to him before referring the facemask issue to Mr Bown. He agreed that he spoke loudly but denied shouting as well as most of the comments he is alleged to have made, although he accepted that he may have told the claimant that he "didn't want to fucking talk to you" [C/30]. We prefer the claimant's evidence that Mr Kumain called him a "baby", told him that he was "shit" at his job and that he had "fucked up with the cleaners": we have found that Mr Kumain acted with hostility towards the claimant between 31 October and 2 November 2020; we found the claimant to be a credible witness, these allegations were very specific, and plausible, and the claimant referred to these allegations in several documents: in his grievance on 6 November 2020 [145-6], in a WhatsApp message to Mr Galvez on 10 November 2020 [540] when he wrote:

> "I tried to talk to vikas on Wednesday [4 November] and he went ballistic. Wasn't interested in hearing me, only shouting at me about what he sees as my failures. Was really really shit";

and at the meeting with Ms Jones on 13 November 2020 when he stated that Mr Kumain "was furious that I'd gone to Harry to ask for supports [sic] again..." [179] and "said, I don't fucking want to talk to you" [196]. We also find that the claimant made a further allusion to this incident on 1 December 2020 when he told Mr Galvez "I'm nervous to go back. Hope Vikas has cooled off" [541]. We find r that Mr Kumain abused the claimant because he had escalated the facemask issue to Mr Bown and Mr Jones.

73. We also find that the events between 31 October and 4 November 2020 contributed to the claimant's loss of trust and confidence in the respondent not only by reference to Mr Kumain's conduct itself, which we find amounted to bullying, but by the respondent's failure to support the claimant with health and safety compliance and safeguard him from retaliation, particularly in the circumstances in which he had asked his managers for support.

74. In a message he sent to Mr Galvez on 5 November 2020 [538], the claimant told him that he was contemplating raising a grievance against Mr Kumain and Mr Souza. When Mr Galvez asked "Why would you do that?" the claimant explained "I cannot accept the way they act" and "most managers agree", and he alluded to another manager, Indira, who felt "sick thinking about coming to work…Having to deal with them[.] And I feel the same[.] This has to change". Mr Galvez replied "give me until the end of day". Absent any evidence being adduced by the respondent to the contrary, we find that no action was taken by Mr Galvez.

75. The claimant emailed Ms Jones the next day, on 6 November [145-6]. Although he did not refer to this as a formal grievance, we accept the claimant's unchallenged evidence that he understood that he was making a formal grievance because he had told Mr Galvez that he was contemplating taking such action, his email was headed "Complaint", it was sent to the head of HR and included detailed allegations of repeated breaches of health and safety, and detrimental treatment. We accordingly find that Ms Jones should have treated it as a grievance. She replied to the claimant on 11 November [145]. They agreed to meet via Zoom two days later.

The allocation of work during the second lockdown (allegations (g) & (9))

76. In the meantime, the claimant asked Mr Galvez about the rota on 10 November who told him that it had been completed and he would let the claimant know if he was needed. The claimant's immediate response was "Don't mind too much, just would like to know" [539]. When he checked the rota, he saw that he had not been rostered to work for the whole month. He asked Mr Galvez whether this had anything to do with "me emailing Lisa" [540] to which Mr Galvez responded "Lisa hasent [sic] told me anything". This is contradicted by Ms Jones' oral evidence that she discussed the claimant's complaint with Mr Galvez. Notwithstanding the claimant's immediate response to Mr Galvez on 10 November, we accept his oral evidence that he wanted to be busy because this is consistent with the claimant telling Mr Galvez that he was "keen" to work and with him chasing his manager a week later to find out whether he had been rostered. We therefore find that this exclusion from work amounted to a detriment. Accepting the claimant's unchallenged evidence that Mr Galvez intended but was unable to work (owing to surgery) throughout the second lockdown, and the undisputed fact that Mr Kumain and Mr Souza worked throughout this period, we do not find that the reason the claimant was not rostered was cost-saving, as the respondent maintained. Nor, for completeness, do we find that other staff were used instead of the claimant because they were more experienced in preparing drinks because we accept the claimant's unchallenged evidence that Chiara, who was given shifts, was a junior supervisor with no bar experience. We find that it is more likely that the reason that the claimant was not rostered was to avoid any further conflict between him and the two senior chefs owing to their hostility towards the claimant as a result of the claimant's repeated attempts to ensure health and safety compliance, including his WhatsApp message and photo on 1 November and escalation to Mr Bown and Mr Jones on 4 November, and it is notable that Mr Kumain had also spoken to Mr Galvez about the altercation with the claimant on that date, at the start of lockdown (see paragraph 84). Furthermore, Mr Galvez not only knew about the claimant's intention to pursue a grievance against Mr Kumain and Mr Souza but was cognisant of the claimant's complaint to Ms Jones. We find that this contributed to the claimant's loss of trust and confidence in the respondent.

The meeting between the claimant and Ms Jones on 13 November 2021 (allegation (10))

77. The claimant had a video call with Ms Jones via Zoom on 13 November 2020 which he recorded covertly. The respondent does not dispute the veracity of the transcript which the claimant produced from this recording

[176-203]. At the start of this call, when talking about the purpose of the meeting, Ms Jones explained: "we can have a casual chat…then we can make a decision. What to do next…." [178]. We accept the claimant's evidence that he expected his complaint would result in disciplinary action being taken against one or more of his colleagues and he was anxious about the repercussions of that, and he relied on Ms Jones to decide how to proceed.

78. The claimant started by explaining about the difficulties he was having as the only manager on site trying to enforce mask-wearing with the chefs. He referred to the incident with Mr Souza on 7 October 2020, and about Mr Bown's lack of support in relation to it. He also referred to the argument with Mr Kumain on 4 November 2020 that had been witnessed by Indira, and about Indira's comment about feeling sick when she thought about coming in to work. The claimant explained [184]:

> "I'm actually very easy going until there is something…that I think is wrong. Like, uh, I, I will unfortunately stand up for myself more than I should".

We accept his unchallenged evidence that because of his moral code he would confront wrongdoing. This is entirely consistent with his repeated attempts to challenge health and safety breaches by kitchen staff during a pandemic despite the hostility he received. However, as the claimant had already told Ms Jones [179-180]:

> "I'm actually stopping pushing now because I, I feel like I'm becoming the bad guy...it's such a sad thing…why am I fighting?...my goal at work is to try and enjoy myself and get on with people".

Ms Jones acknowledged that there was a particular issue with mask-wearing at the restaurant. She agreed from what the claimant was reporting that it "feels like quite a divide" between FOH and the kitchen [181] and at a later part of the discussion commented "Those chefs think that the pass is…[a forcefield] [t]hat makes them super fucking strong and powerful" [192].

79. She turned her focus on the claimant's actions in posting photos on the managers' WhatsApp group (she had therefore already discussed this with another member of this group, most likely Mr Bown) and suggested "[t]hat would probably piss people off though" [181]. When the claimant explained that he had tried speaking to Mr Kumain, then Mr Galvez, Mr Bown, and to Mr Kumain again, before posting the photos, which had resulted in Mr Kumain "becoming more and more aggressive…" [181], Ms Jones told the claimant that this was "because he feels like you are the agitator". She asked the claimant to refrain from using the WhatsApp group to enforce mask-wearing, which she agreed was a "serious" matter [182], and to instead communicate directly with Mr Galvez, Mr Jones or Mr Bown – which he had been doing – and to blind copy her in to any emails he sent. Later, she also advised the claimant to speak to Mr Kumain again and to involve her directly to mediate between them, if needed. Agreeing that "it's good to challenge things…" [184] Ms Jones went on to state that [185]:

> "part of HR's mantra is courage to challenge, to stop things happening to people, to stop things being wrong, and, and not just letting shit happen.

As will be seen, she failed to follow her own mantra.

80. When asked about Mr Bown, the claimant said [191]:

> "I feel like, I…wind him up sometimes and I get that because I can be annoying…but…when I have needed support on this issue, which has been troubling me a lot, I have felt a lack of support from him…"

Ms Jones appeared to accept this lack of support when she explained that Mr Bown [194]:

> "quite likes to stay away from stress and that's not how that world works…he could definitely support you on this one.

81. Ms Jones agreed that she would discuss facemask-wearing with Mr Bown and Mr Matthews, and if they failed to deal with this issue, she would take disciplinary action. She also told the claimant that she would speak to Indira when she would invite her to make a formal grievance. Ms Jones did not extend the same courtesy to the claimant despite his serious complaints about Mr Kumain's aggressive conduct and the repeated failure of the chefs to comply with the law. She instead suggested that they met again informally "And then if it doesn't work, we can escalate it in a very serious way" [202]. Ms Jones also agreed to look into an issue with time-recording by the chefs which the claimant had raised.

82. We accept Ms Jones' evidence that following this meeting, she discussed mask-wearing with Mr Matthews, Mr Bown and Mr Jones which resulted in an email being sent from Mr Matthews on 1 December 2020 to the 'Senior Management Team' [290], ahead of the re-opening from lockdown the next day. This email listed four reminders, including "Masks to be worn back of house and front of house teams at ALL times". No reference was made to the consequences of failing to comply with this instruction nor was there any instruction to support managers who were seeking to enforce mask-wearing. This light-touch approach did not tally with the allegations that the claimant had reported to Ms Jones nor her undertaking that transgressors would in future be subject to disciplinary action.

83. Ms Jones thereby treated the claimant's serious complaints informally, and failed to follow this up with the claimant. We find that the reason for this initial failure to follow up was not materially influenced by the claimant's protected disclosures or designated health and safety activities but by the fact that Ms Jones treated the meeting as an informal discussion with which approach she assumed, incorrectly, the claimant had agreed voluntarily. Given the nature of the claimant's complaints, the nature of her role and seniority, this was unreasonable and we find that Ms Jones' inaction contributed to the claimant's loss of trust and confidence in the respondent.

84. On the same date, with the claimant's return to work imminent, he sent a WhatsApp message to Mr Galvez when he alluded to the incident with Mr Kumain on 4 November [541]. He told his manager that he was "nervous to go back" and "Hope vikas has cooled off". Mr Galvez agreed "I hope so too" and noted that Mr Kumain had "mentioned what happend [sic] at the beginning of lockdown but hasent [sic] mentioned [it] since". When the claimant underlined that he would continue to enforce mask-wearing, Mr

Galvez replied "Don't worry, and if you ever have an issue on that subject again, I will deal with those 2" [542] by which we find he was referring to Mr Kumain and Mr Souza. This was unlikely to have reassured the claimant as Mr Galvez had evidently not been as exercised by this issue as the claimant, he had failed to take any action in relation to the recent incident with Mr Kumain, and in the meantime, Mr Kumain and Mr Souza had worked throughout lockdown working whereas he had been excluded from work.

85. The claimant increased his alcohol intake in November, including before midday to clear his mind, and this continued in December although we accept the claimant's unchallenged evidence that he did not drink during the day on workdays. We also accept the claimant's evidence that he found work therapeutic as he was able to immerse himself in activity.

The incident on 9 December 2021 (allegations (a) & (12))

86. The claimant complained about a further and final act of hostility from one of the chefs which related to facemasks, on 9 December 2021. He reported this incident to Mr Kumain in an email at 18:08 on the same date (which was copied to Mr Bown, Ms Jones, Mr Galvez and Mr Jones), in the following terms [303-304]:

> "Hi Vikas
>
> I am still having issues with chefs not wearing facemasks and reacting negatively when I ask them to put them on and I'm hoping you can help me with this. I have even given up on asking chefs to cover their noses as this is just causing too much conflict for me to handle, despite instructions from head office being extremely clear that all staff need to wear facemasks at all times, which I consider to be the most important during service as well as during the day as people are walking around outside and can see clearly into the kitchen.
>
> Today when I arrived at work, I first saw Cee with his facemask just below his nose where it normally sits, Gustavo with his facemask just below his mouth where it normally sits, Marilyn with her facemask in it's usual place under her chin and Abdel wearing no facemask at all. I had ignored the first three as I'm so tired of having to repeat the same requests and the amount of flak I am receiving for it but when I saw Abdel without even having made any attempt at wearing a facemask, I just had to say something.
>
> Unfortunately, Abdel didn't take me asking him to wear a facemask very well and an argument ensued in which he came out of the kitchen and was telling me in an aggressive manner not to piss him off.
>
> I hate that I am having to be the bad guy in trying to follow clear and direct instructions from head office – all staff must wear facemasks covering mouth and nose.
>
> Please can you suggest a way that we can achieve this?"

87. Although we find that the main purpose of this email was to ensure that all staff were complying with facemask wearing, it is evident that the claimant was also complaining about the ongoing conflict with the chefs in seeking to enforce compliance, and specifically to being threatened by Abdel. In considering the respondent's response, it is relevant that the claimant had

recently discussed these wider issues with Ms Jones and this had culminated in Mr Matthews' email of 1 December, to which the claimant had alluded in his email.

88. In emailing Mr Kumain, the claimant had followed Ms Jones' instructions, as he had also done by copying this email to her. Ms Jones forwarded this email to Mr Matthews two minutes later with the comment "FYI was Bcc'd in, Let's see what happens" [302]. She then emailed the claimant at 18:37 to agree "your email is the right thing…I expect Marvin Jones to jump on this" [289]. Although Ms Jones expressed support to the claimant, she was standing back and waiting to see what transpired. This did not correspond with her reassurance to the claimant, on 13 November, that HR were there to challenge and support.

89. Mr Bown emailed the claimant at 23:23 [315] to confirm that he would be meeting with Mr Kumain, Mr Galvez and Mr Jones the next day to "discuss this at length". Having had this discussion he emailed Mr Kumain, Mr Sousa, Mr Galvez, Mr Jones and the claimant the next day, in the following terms [313]:

> "Following on from the conversations had today and in the previous weeks – please take this as absolute confirmation that you have to wear face masks at all time [sic] whilst at work and especially whilst in the kitchen."

No reference was made to Abdel's alleged conduct, or that of the other chefs, including Mr Kumain, towards the claimant. Nor, in common with Mr Matthews' email of 1 December, was reference made to there being any consequences for non-compliance or adverse behaviour towards managers who were seeking to enforce the law. In his oral evidence, Mr Bown explained that the allegation concerning Abdel, had not warranted an investigation by him because the focus of the claimant's email was facemasks, and the claimant had not made a formal complaint under the Grievance Procedure. He therefore failed to act upon the claimant's allegation that he had been threatened by Abdel for raising this health and safety issue. As the claimant said in evidence, the respondent knew that kitchen staff were breaking the law, he had been bullied and victimised, and Mr Bown, and by implication, his managers with whom it is likely he conferred, felt that his email was an adequate response. It was not. It failed to acknowledge the magnitude of the complaints the claimant had made i.e. a persistent breach of health and safety by chefs who were handling food, the risk of transmission of Covid to customers and colleagues, insubordination towards a senior manager and a chef acting aggressively towards the claimant and threatening him.

90. Mr Kumain's evidence was that he spoke to kitchen staff on 10 December 2020 and concluded that Abdel had screamed and shouted at the claimant not to keep telling him to wear a mask when he had already said this once. On his own evidence, the issue was not therefore the manner in which the claimant had raised this issue but the claimant's persistence. Although Mr Kumain found that Abdel had walked out of the grill section of the kitchen into the corridor he did not agree that this meant that he was walking towards the claimant. We find that by walking out of the kitchen after he had threatened the claimant, it was reasonable for the claimant to have apprehended that Abdel was coming towards him. To the extent that Mr

Kumain conducted an investigation, it was informal, incomplete because he had only spoken to kitchen staff, and lacked impartiality because of the animus Mr Kumain held towards the claimant, his loyalty to his staff and his own lax attitude towards mask-wearing – all of which were or should have been known to Mr Galvez, Mr Bown and Ms Jones. Furthermore, despite all of these defects, Mr Kumain had still established sufficient grounds to warrant formal action being taken under the Disciplinary Policy, yet no such action was pursued by the respondent.

91. It is difficult to reconcile the lack of any formal investigation and disciplinary action with these facts and with the corresponding admission by Mr Bown, Ms Jones and Mr Kumain, when giving evidence, that Abdel's actions were capable of amounting to gross misconduct. When taken to the non-exhaustive examples of gross misconduct in the Disciplinary Policy: Mr Bown agreed that Abdel's conduct amounted to threatening behaviour, serious insubordination and a serious breach of health and safety; Ms Jones agreed that this was a serious allegation which should have been investigated, and that if proven, Abdel's actions amounted to threatening behaviour, serious insubordination and a breach of health and safety, but she was uncertain whether this was a serious breach; and Mr Kumain did not agree that what Abdel had done amounted to threatening behaviour nor serious insubordination although he did agree, when pressed, that this was a serious breach of health and safety.

92. Given Mr Kumain's findings and the undisputed features of the conduct which the claimant reported, and our assessment that the claimant was a consistently credible and reliable witness, we find that Abdel verbally and physically threatened the claimant and did so in retaliation to being asked to wear a facemask by the claimant which he had done as part of his designated health and safety activities. We also find that it is likely that Abdel along with his colleagues were cognisant of the fact that the claimant had reported kitchen staff to senior managers in relation to the same issue and this materially influenced his conduct towards the claimant.

93. We also find that the nature of this conduct allied to the respondent's failure to support the claimant with health and safety compliance and safeguard him from retaliation, in the circumstances in which he had asked his managers for support was sufficiently serious to have irretrievably damaged the claimant's trust and confidence in the respondent. Additionally, we find that the lack of follow up from Ms Jones, or Mr Bown, which is not disputed, contributed to the claimant's loss of trust and confidence in his employer. In addition, we find that this failure to follow up and take action commensurate with the magnitude of the claimant's allegations was materially influenced by the claimant's protected disclosures and designated health and safety activities, given the lack of any cogent explanation for the continued informal approach taken by these managers – principally Mr Bown to whom Ms Jones had delegated this issue, but also Ms Jones – and given our finding, as set out below, that Mr Bown was irritated by the claimant because of his persistent interventions, with his colleagues and managers, in relation to facemask-wearing (see paragraph 104).

94. We accept the claimant's evidence that he was traumatised not only by the incident on 9 December 2020 but also by the ongoing failure of the

respondent to support him or take any steps to regulate the behaviour of the chefs and ensure that they were complying with the law. The claimant gave up trying to enforce facemask-wearing after this incident. We also accept his evidence that he did not make a formal complaint because he gave up, his managers had continued to ignore the facemask issue, including Ms Jones who had agreed that this was a serious issue in respect of which she would take disciplinary action if needed.

95. We also accept the claimant's unchallenged evidence that from January 2021 he was consumed with the fear that he was dying because of what appeared to be cardiac symptoms of palpitations, chest pain and shortness of breath. The claimant experienced these symptoms on 1 January 2021 and they were intermittent thereafter. The first material entry recorded in the claimant's GP notes is on 7 January 2021, which refers to slight tightness in chest, palpitations, and a panic attack, when he was prescribed GTN spray [20S]. The claimant attended A&E with chest pain and palpitations on 10 January 2021.

96. By this date the third lockdown had begun, on 6 January 2021.

The claimant's disclosures about his health to his managers (allegations (15), (16) & (i))

97. The claimant met Mr Galvez on 15 February 2021 when he told him about his chest pains, palpitations, shortness of breath, that he had been to hospital on several occasions, including A&E. He understood that these symptoms were related to his heart. He told Mr Galvez that he was unable to do simple things like going shopping and unable to make decisions, and his life was on hold.

98. The claimant had a CT scan later that month and an echocardiogram in mid-March 2021. Although neither of these investigations revealed any significant issues with his heart, the claimant remained focused on his heart and the lack of a diagnosis.

99. The claimant attended a meeting held remotely on Zoom on 22 March 2021 to discuss staffing when the third lockdown ended. He was very relieved to hear that Mr Kumain would be relocating to another restaurant. Afterwards, Mr Bown called the claimant about a vacancy for a number 1 position at the Stoney Street restaurant and encouraged him to apply for it. We accept the claimant's evidence over Mr Bown's evidence to the contrary, that during their call he discussed the ongoing issues with his heart, his struggle to obtain a diagnosis and the effect this was having on him, and the need to be able to walk to work. This is consistent with an email that he sent to Mr Bown later that day [151], when he referred to their earlier call and explained that he would not be applying for the role as "I think in terms of my health, it wouldn't work for me as I wouldn't be able to walk to work and back anymore". This is also consistent with what Ms Jones was recorded as saying to the claimant at a meeting on 10 May 2021, which the claimant recorded covertly, that Mr Bown had told her "you told him that you didn't want [to] take the position in [Stoney] [S]treet, you have a heart condition and you prefer to walk" [216]; and, at the same meeting, that the claimant had referred to his heart symptoms when he spoke to Mr Matthews, two

days later, on 24 March 2021, a fact which is not disputed by the respondent. Ms Jones did not say that the claimant's transcript of the 10 May meeting was inaccurate, her evidence was that her recollection in respect of Mr Bown (but not Mr Matthews), as recorded in the transcript, was mistaken. We reject this evidence as wholly lacking in credibility and find that in resiling from what she did not dispute she told the claimant at the meeting, to avoid contradicting Mr Bown's evidence, Ms Jones gave evidence which she knew to be untrue.

100. The claimant reiterated that he was not interested in the Stoney Street position when Mr Matthews called him to encourage him to apply for the role on 24 March 2021. It is accepted that during this call the claimant referred to his heart symptoms, told Mr Matthews that he was still undergoing tests and awaiting a diagnosis.

101. The restaurant reopened on 12 April. The claimant remained preoccupied and anxious about his health. We accept his evidence that he expected Mr Bown and Mr Matthews to follow up on the health issues he had reported and was concerned when they did not. We find that the failure of the claimant's managers to follow up with him in relation the health issues he had reported on 22 and 24 March, contributed to the claimant's loss of trust and confidence in the respondent. Notably, when giving oral evidence, Mr Bown agreed that if the claimant had told him about his heart issues then he should have followed up to offer support, and Ms Jones, conceded that the respondent had a duty of care to the claimant to do this.

<u>The claimant's request for a pay rise on 18 April 2021 (allegations (17), (18) & (j))</u>

102. The claimant emailed Mr Bown on 18 April to request a pay rise [156-7]. We accept that the claimant's evidence that he mistakenly viewed a pay rise as something that would improve his mood. In seeking a pay rise, the claimant asserted that his current role was on a par with the Stoney Street role and also with Mr Galvez. Mr Bown forwarded this email to Ms Jones (and it is likely that he also sent it to Mr Matthews because he was copied in to Ms Jones' responses) the next day with the comment: "This guy. Will take some responding – any particular points you'd like me to mention?!" In a follow up email to his senior colleagues, Mr Bown wrote [154-155] that the claimant was "offered" the Stoney Street position "almost against our instinct" and went on to explain:

> "Mainly I feel like every decision that's made, he fights us on. Whether it be the companies [sic] holiday pay procedures, health and safety, his career path and opportunities or even staff discounts…
>
> "I don't know, do you think I'm being too closed minded on this because I am fed up with there always being something with him? What do you guys think?"

Ms Jones responded [153-154]:

> "…I think that he does no way deserve that of a number 1 in stoney, I'm not allergic to reviewing his pay but the way he goes about it is really abrasive.

> Salaries above that of FM are not being reviewed currently, the company has had to afford NMW increases (two) with no trading and we gave him an opportunity to develop his skills and pay in a way the business can afford.
>
> It's a no from me as a direct comparison to Stoney. I think he is inline [sic] with other roles at this level although would suggest he has more experience than some of the other RM's at no 2 position. I would need to check levels of pay here."

She queried the merit of a future bonus "at this level" before noting that one was unlikely to be paid until the next financial year, before concluding:

> "My worry is the negativity this will cause with new team members etc. Are we okay if he leaves?"

Thus, in foreshadowing the possibility that the claimant might leave if his request was rejected, Ms Jones was canvassing her colleagues to understand the extent to which they were committed to retaining the claimant in the business, which was evidently a relevant factor in her assessment of how to respond to the claimant's request. Although this made practical sense, we do not find that it was a neutral enquiry in the circumstances in which Ms Jones had expressed her concern about the claimant's "negativity" if he remained at work.

103. In his reply [152], Mr Bown agreed:

> "I don't know where else there is to go for him within the company having rejected our proposals. I'm happy for him to leave – my concern is he doesn't leave just becomes bitter and twisted."

Whilst acknowledging that with over two years' service and "having had numerous good contributions" he understood why the claimant "feels justified to ask for a pay rise", he also agreed that the claimant's "way of asking for it [a pay rise] highlights everything that frustrates me about him". Returning to the claimant's refusal of the Stoney Street position, Mr Bown concluded "that's the end of it for me". They therefore decided not to offer the claimant a pay rise.

104. In writing to the claimant on 21 April 2021 [324-325] to confirm this decision, Mr Bown recognised the claimant's "significant positive contributions" and portrayed his recommendation for the Stoney Street position as an acknowledgement of the claimant's "achievements and developments" noting that the salary he had been offered exceeded the amount that was advertised externally. The reason Mr Bown gave for this decision was that "salaries above FM are not under review". We find that this decision was materially influenced by the claimant's disclosures and designated health and safety activities in relation to facemasks. Firstly, whilst Ms Jones had referred to the undisputed fact that salaries for staff at the claimant's level of seniority were not being reviewed, and to the other financial pressures on the business, in her correspondence with Mr Bown, she was clear that she "was not allergic to reviewing" the claimant's pay which suggested that a review remained possible, as did the fact that they were engaging in this dialogue. Secondly, it is also clear from Ms Jones' email that she took exception, as did Mr Bown, to the manner in which the claimant had

requested a pay rise, however, there was nothing inherently abrasive about the claimant's email and, as Mr Bown agreed in oral evidence, it was not unreasonable for the claimant to have promoted himself in this way. We find that the underlying reasons for this were that the claimant had requested a pay rise having only recently declined an opportunity for a role with greater pay and, more generally, that Mr Bown was "fed up with there always being something with" the claimant, which included "health and safety". In oral evidence, Mr Bown conceded that he was irritated by the claimant in relation to health and safety, which he agreed was likely to be a reference to the facemask issue. We do not accept Mr Bown's evidence that there was anything about the manner in which the claimant had raised these issues which was objectively separable from the protected disclosures and health and safety activities he had done. The fact was that the claimant was the only manager, including Mr Bown and Ms Jones, who had taken active and persistent steps to safeguard health and safety at the restaurant, until the incident with Abdel. This patently remained a live issue for Mr Bown and contributed materially to his disinclination to consider and support a pay rise for the claimant, and to his willingness for the claimant to leave the business. We also find that this same factor extended to Ms Jones' disinclination to offer the claimant an increase in pay, as evidenced by her concern about the claimant's "negativity".

105. The claimant complains that Mr Bown erroneously stated in this email that he had been the only number 2 to have been invited to head office reviews. We accept Mr Bown's evidence that he was not referring to the period when the claimant and Mr Galvez were both number 2 and attended the review meetings.

106. The claimant also claims that this decision was because of something which arose in consequence of his alleged disability. Although we have found that the claimant put Mr Bown on notice that he would not be applying for the Stoney Street position on health grounds related to his heart symptoms and his need to walk to and from work to manage these symptoms, it is evident that Mr Bown viewed this as part of a continuum of conduct by which the claimant was being obstructive and it is likely that he was sceptical about the health-related reason which the claimant had given for declining to pursue this vacancy.

Mr Hart's email dated 4 May 2021 (allegation (19) and (k))

107. On 27 April 2021 the claimant emailed Katarzyna de Morais, Group HR Advisor, about the tronc [230] which is no longer relied as an alleged protected disclosure but which the claimant claims resulted in a noticeable change in attitude towards him by senior managers and owners. Notably, in a related email sent on the same date [231], Mr Bown referred to the claimant's query and warned Ms de Morais:

> "Feels like he's on a bit of a war path because he feels like he should be GM…even though we offered him Stoney Street – he's not happy".

Ms de Morais replied to the claimant on 7 May 2021 when she explained how the tronc worked. The claimant claims that his query led to a critical email from James Hart, one of owners of the business, on 4 May 2021 [162-163]. This was an End of Day ("EOD") report for 3 May when Mr Hart had

visited the restaurant, in which he complained that there was no music and the heater was not working. The claimant found this email unwarranted, undermining and humiliating. We accept his evidence that the music was playing in the restaurant because in his reply the next day [481-482] the claimant explained that the volume had been reduced because of a Covid risk assessment and also that the heater issue was known about, and was being actioned, and that he had discussed both of these issues with Mr Hart during his visit. The respondent adduced no evidence to contradict this. We find that Mr Hart had written a critical email which was circulated to the entire group of senior managers without reasonable and proper cause. The respondent was unable, in our view, to adduce any comparable EOD reports. We find that Mr Hart's email contributed to the claimant's loss of trust and confidence in the respondent, although we do not find it was linked to the tronc issue as there was no evidence to suggest that Mr Hart was cognisant of it.

108. The claimant emailed Ms Jones on 9 May 2021 [287-288] to complain that neither Mr Bown nor Mr Matthews had offered him any support or follow up about the health issues he had discussed with them when they had contacted him about the Stoney Street position i.e. on 22 and 24 March 2021. He noted that having "had a serious health scare in January and I have been left feeling quite unsupported at work". He confirmed that he had since been diagnosed with "a minor blockage of the left anterior descending artery…a mildly dilated left atrium, and numerous electrical issues…" The focus remained his heart. He explained that the lack of support from these managers:

> "has left me hurt and angry and I really don't know what to do. I keep fighting with myself not to do what I've done too often in the past and just give my notice without having something else lined up…Please can you let me know if you think I am being too sensitive or if this situation should have been dealt with another way."

This was a cry for help. The claimant was evidently upset and anxious, on the verge of resigning, and seeking validation from Ms Jones that he was not overreacting. Ms Jones replied 9 minutes later with a supportive email and offered to meet the claimant the next day.

<u>The meeting between the claimant and Ms Jones on 10 May 2021 (allegations (20), (21) & (22))</u>

109. They met the next day. Once again, the claimant covertly recorded the discussion. The respondent does not challenge the veracity of the claimant's transcript [204-223].

110. The claimant explained the issues with his heart and the investigations he had had which he had already discussed with Mr Bown and Mr Matthews and he complained about the lack of any follow up. When Ms Jones asked the claimant if he had declined the Stoney Street position primarily because of his heath, his answer suggested that it had more to do with feeling undervalued: the claimant complained that he had not been considered for the number 1 position in the new Soho restaurant; he was upset that by being of offered the Stoney Street post, he was being asked to move to cover someone who had joined the business after him who was taking on

the Soho site; when Ms Jones talked about succession planning, the claimant responded that he would have agreed to the Stoney Street role "if there had been [an] open, honest conversation a month before" [213]; he said that a "final decision factor" [214] was that he wanted to be able to walk as he had done for last two years which he had benefitted from in that he had lost weight and felt healthier.

111. In relation to his pay, Ms Jones highlighted that until the claimant or Mr Galvez moved "you're kind of capped at where you are in that site. Right?...But it is…you are not gonna earn more money in the role you are in right now…How does that feel?...shit?" [215]. She repeated the point twice during this meeting. Whilst we agree that Ms Jones was labouring the point, we find that she was underlining that if the claimant wanted a substantive pay increase he would need to become a number 1 either at his restaurant or elsewhere. The obvious subtext to this was that the claimant had recently declined the Stoney Street opportunity. Although Ms Jones failed to qualify what she said by reference to annual reviews or bonus payments, we do not find that she was ruling out a pay rise in perpetuity as the claimant alleges, or a salary review, and we find that the qualification she provided to the claimant in her email of 13 May was a genuine clarification of what she had meant to convey to him.

112. Returning to his health, the claimant noted that the point of his email to Ms Jones was [216]:

> "to find out if it's okay that…I've disclosed to senior managers that I've had heart issues and I've not had so much as a word of support…or any kind of follow-up".

Ms Jones confirmed that she had spoken to Mr Bown and Mr Matthews about this issue earlier that day when, as we have found, both managers agreed that the claimant had discussed his heart condition and his preference to walk to work in the context of their discussions about the Stoney Street vacancy. She told the claimant that it was his responsibility to bring this issue to her or HR if he wanted any support such as reasonable adjustments although she agreed that his managers should [217]:

> "check on and see how you are. I do agree with that as a kind and courteous thing. And I expect them to say, is there anything I need to do? Do you need any help?"

Ms Jones agreed to ask the claimant's managers what had prevented them from doing this, although she suggested that the explanation was their focus on dealing with the pandemic. The claimant explained that he wanted them to care to which Ms Jones said that the respondent did care about him and "I definitely want you to feel cared about" [218] and added that being "earmarked" for promotion was a "sign of respect", which we find was a somewhat disingenuous assertion, given Ms Jones' own view that the claimant in "no way deserve[d]" this position (see paragraph 101). When she suggested that the main issue for the claimant was the lack of "care and recognition that causes you the most anguish", not money, the claimant agreed "100%", Ms Jones acknowledged that the claimant "was feeling undervalued and worrying about his health". She said she wanted to help and told the claimant that she did not want the claimant to "move on" as he

had alluded to in his recent email, and questioned whether this was "the right thing to do" [219]. Ms Jones referred to coping therapy, coaching and a potential though unspecified opportunity at Parillan, which was part of the same group.

113. We do not find that Ms Jones told the claimant, or otherwise implied, that the respondent had no duty of care to follow up on his heart issues because these had not been reported to her directly, as he alleges. However, in advising the claimant to contact HR if he wanted reasonable adjustments to be made, and in framing any follow up from his managers as a matter of kindness and courtesy, and not something which the claimant was entitled to expect, Ms Jones failed to provide the reassurance that the claimant had expressly sought from her in relation to an issue about which he remained distressed.

114. Nor do we find that Ms Jones said anything to the claimant during this meeting in an attempt to bully him into leaving the respondent, as is alleged. Notwithstanding our findings in relation to Ms Jones' disinclination to offer the claimant a pay rise, and the way in which she had framed her enquiry about retaining the claimant to Mr Bown and Mr Matthews, we find that the support she offered the claimant was made genuinely as was consistent with her response to the claimant's email of 9 May both in respect of the email she sent and her availability to meet with the claimant the next day, and her reference to the Barrafina opportunity when she met with the claimant on 13 May.

115. Notably, in an email sent to Ms Jones on 12 May 2021 [238], the claimant acknowledged that he had reacted "more strongly than I should due to stress caused by my health" – as he had explained to Ms Jones during their meeting, he was not sleeping, was feeling depressed and was fighting to get a diagnosis for his heart symptoms. As was made clear by the claimant in this email, he remained exercised by the lack of follow up about his health issues from Mr Bown and Mr Matthews, and being told by Ms Jones that he would never get a pay rise unless he changed role.

116. The claimant resigned via email the next day, on 13 May 2021 [239], with notice effective on 26 June 2021 in which he promised to provide his reasons at a later date. We accept his evidence [C/92] that he resigned because he felt that he:

> "had been thrown to the wolves with regards to facemasks, been subject to victimisation for having escalated these issues on numerous occasions, been lied to by LJ [Ms Jones] and HB [Mr Bown] on numerous occasions and felt completely uncared for."

117. Ms Jones had evidently not seen the claimant's resignation when she emailed him later that morning to respond to his email of 12 May [236-237]. She "agree[d] that a follow up from both Ben and Harry would have been ideal" although this fell short of acknowledging any duty of care to take such action. In relation to pay, she clarified that this was "not a never situation" and although there would be no pay increases at the claimant's level of seniority, this would be reviewed in the future – we do not find that this was inconsistent with what she told the claimant during their meeting, which related to the kind of substantive pay rise the claimant had requested on 18

April and not annual pay reviews. Ms Jones offered to catch up with the claimant in the same or the following week.

118. Later that day, Ms Jones came into the restaurant to speak to the claimant about his resignation. It is agreed that during this discussion the claimant accused Ms Jones of lying to him: firstly, when she floated a Restaurant Manager vacancy at Barrafina and denied giving him contradictory advice previously (see paragraph 63); and secondly, when she denied that she had told him he would never get a pay rise on 10 May 2021 but had instead told him he would not have his salary reviewed at that time. The claimant was upset and angry. He walked off before returning to Ms Jones and accusing her of twisting the truth. The claimant emailed Ms Jones on 14 May to apologise for losing his composure [240-1] when he explained "I know I overreacted yesterday but you cannot lie to me and simply expect me to accept that".

119. Having discussed this incident with Ms de Morais, Ms Jones submitted a statement by email on 14 May [264-5]. The claimant claims that Ms Jones exaggerated their argument which resulted in an unfair disciplinary investigation. Although we have found that Ms Jones gave unreliable and untruthful evidence, in some respects, we find that her account of the discussion is detailed, plausible and credible, and represented her genuinely held recollection. Ms de Morais had already emailed the claimant at 11:19 to arrange a meeting [241]. This can be contrasted with the failure to follow a formal process in relation to the claimant's serious allegations about Adbel.

120. When the claimant was interviewed that afternoon, he agreed that it had been a heated discussion, they had both raised their voices, he was frustrated and "quite angry" [249], spoke "forcefully" [251] and that he lost his composure. He referred to his higher stress levels and an ongoing health issue although he confirmed that this had no effect on his work or daily tasks [252].

121. In an email on 14 May [244], the claimant explained that he had resigned for various reasons which included:

> "…lack of due care, breach of contract, lack of support, and unfair treatment…I cannot continue to work in an environment where I feel constantly undervalued and unsupported and senior staff think it is okay to lie and manipulate facts to suit their own agenda".

<u>Ms Jones' recollection of the discussion with the claimant on 13 November 2020 (allegations (h) & (11))</u>

122. The claimant submitted a formal grievance on 15 and 16 May 2021 [267-272] in which he complained about being subjected to threatening and aggressive behaviour, a lack of support from his managers in relation to facemasks, and being discriminated against for raising a grievance about health and safety.

123. Ms Jones was interviewed, on 26 May 2021, as part of the investigation into the claimant's grievance [277-281]. She was able to recall the parts of the discussion which related to Mr Bown and the time-recording issue, and she

told the grievance investigator that the focus of the meeting with the claimant on 13 November 2020, and his preceding email, was the behaviour of two chefs towards Indira. We do not accept that this was Ms Jones' genuine recollection. Whilst we note that Ms Jones did meet with Indira after her meeting with the claimant, and we take account of the fact that she was being asked to recall a discussion which had taken place more than six months before, and she did not have the benefit of the claimant's record of their discussion, it is difficult to reconcile this with that record from which it is very clear that the discussion about Indira was ancillary to the central issue the claimant had ventilated which was his difficulty in enforcing compliance with mask-wearing, the adverse conduct from Mr Kumain and Mr Souza in response to this, in addition to Mr Bown's lack of support and to the fact that the claimant's email of 6 November 2020 began with the sentence "I need to discuss issues I am experiencing [our emphasis] at work due to the behaviour of Vikas and Gustavo". We also take account of our findings that Ms Jones gave evidence that lacked credibility and was not reliable (see paragraph 99). We find that it is relevant that by this date, the claimant had not only submitted a grievance but had resigned. The fact was that Ms Jones had failed to deal with the claimant's serious allegations of bullying and ongoing breaches of health and safety, which had escalated with the incident on 9 December 2020. We therefore find that Ms Jones' recollection was wilfully misleading and was materially influenced by the claimant's protected disclosures to her on 13 November and 9 December 2020 which put her inaction in sharp relief.

124. The claimant was diagnosed with mixed anxiety and depressive disorder by his GP on 28 May 2021 [10S]. He was prescribed mirtazapine in June 2021 which he has continued to take since this date save for August 2022 when he came off this medication and this caused a relapse in his physical symptoms.

Conclusions

The allegations that fail on the facts

125. We have found that the claimant has not established that the following factual allegations took place: (3), (c), (4), (5), (17), (20), (21) and (22).

Unfair dismissal

Constructive dismissal

126. We find that the claimant was constructively dismissed.

(1) Allegations (a), (d), (6), (e), (8): We have found that Mr Kumain acted with hostility towards the claimant, and bullied him, on 31 October, 1, 2 and 4 November 2020. We have also found that the respondent failed to support the claimant in achieving health and safety compliance and in protecting him from such retaliatory conduct.
(2) Allegation (b): We have found that Mr Bown failed to support the claimant on 7 October 2020.
(3) Allegations (g) and (9): We have found that the claimant was excluded from working during the second lockdown which took place

from 5 November to 2 December 2020.

(4) Allegation (10): We have found that Ms Jones treated the claimant's serious allegations informally and failed to follow up with the claimant on and after 13 November 2020.

(5) Allegations (a) and (12): We have found that Abdel threatened the claimant on 9 December 2020. We have also found that the respondent failed to support the claimant in achieving health and safety compliance and in protecting him from such retaliatory conduct. We have also found that Ms Jones and Mr Bown failed to follow up with the claimant directly in response to his written complaint.

(6) Allegations (15), (16) and (i): We have found that Mr Bown and Mr Matthews failed to follow up with the claimant when he returned to work on 6 April 2021, in response to the health issues he had reported to them on 22 and 24 March 2021.

(7) Allegations (19) and (k): We have found that Mr Hart's email dated 4 May 2021 was critical of the claimant and was circulated to the entire group of senior managers, with reasonable and proper cause.

127. We find that taken together, this conduct had the effect of breaching the implied term of mutual trust and confidence. For the reasons set out above we have found that the conduct which took place on 9 December 2020 together with the respondent's failure prior to this date to support the claimant with compliance and protect him from such retaliatory conduct was sufficiently serious to have breached the implied term of mutual trust and confidence on its own. We also find that the conduct which we have upheld up to 10 December 2020 when the claimant received Mr Bown's inadequate response to his complaint about facemasks, including allegations which amounted to gross misconduct, if proven, had the cumulative effect of breaching the implied term of mutual trust and confidence.

128. We do not find that the claimant affirmed his contract. It is relevant that London was placed under tier four restriction on 21 December 2020, the third lockdown took place from 6 January to 6 April 2021, and we have found that the claimant was preoccupied with his health from January 2021. It is also relevant that: the claimant knew that Mr Kumain had transferred to another site so would not be returning to the same restaurant when the third lockdown ended; we have found that the failure by Mr Bown and Mr Matthews to follow up with the claimant in relation to his health, upon his return to work in April 2021 contributed to the claimant's loss of trust and confidence; he wrote to Ms Jones on 9 May 2021 to complain about this lack of support, which he genuinely perceived to be a failure by his employer to comply with its duty of care towards him, to seek her reassurance and support; and that in the meantime, he had received Mr Hart's email on 4 May 2021 which we have found contributed to his loss of trust and confidence. For completeness, we do not find that in requesting a pay rise on 18 April 2021, the claimant waived any prior breach or affirmed his contract because we have accepted that the claimant mistakenly believed that a pay rise would improve his mood, and it is clear that from the terms of this request Ms Jones understood that there was a prospect that he would resign if a pay rise was not forthcoming which underscored that the claimant was not content with the status quo, albeit ostensibly by reference to his pay; and when the claimant subsequently raised the tronc issue he was

viewed by Mr Bown, at least, as being on a "war path".

129. We have found that at the meeting on 10 May 2021, Ms Jones neither told nor implied that the respondent did not have a duty of care towards the claimant, in the terms alleged, however we find in the circumstances in which Ms Jones understood that the claimant sought her reassurance about the respondent's duty of care, and there was no reasonable basis for not providing the same, her failure to give this reassurance contributed to the repudiatory conduct which preceded it. We find that this amounted to a final straw which prompted the claimant to submit his resignation on 13 May 2021.

Reason for dismissal

130. As the respondent does not rely on a potentially fair reason for dismissal, the effect of our finding that the claimant was constructively dismissed is that that the dismissal was unfair. However, we now go on to consider whether the reason or principal reason for this dismissal was that the claimant made a protected disclosure.

131. We have found that allegations (a), (d), (6), (e), (8), (g), (9), (10) and (12) were part of the repudiatory conduct above and were done on the ground that the claimant made a protected disclosure (see paragraph 135).

132. We find that this was the principal reason for the claimant's dismissal because of the nature and magnitude of this conduct which was that: the claimant was bullied by Mr Kumain between 31 October and 4 November 2020; he was excluded from work from 5 November to 2 December 2020; he was threatened by Abdel on 9 December 2020; and Mr Bown and Ms Jones failed to follow up on the claimant's complaint of the same date and to take appropriate action.

133. We therefore find that the claimant's dismissal was automatically unfair by reason that he made a protected disclosure.

Detriment

Protected disclosures and the carrying out of designated health and safety activities

134. The respondent conceded that the claimant made protected disclosures and raised health and safety concerns from 24 September to 9 December 2020. The respondent also conceded that the claimant was designated to carry out activities in connection with preventing or reducing the risks to health and safety at work, and that he carried out or proposed to carry out such activities. We have found that on the occasions between late September and early December 2020 when the claimant tried to enforce compliant mask-wearing with Mr Kumain and kitchen staff, and when he escalated this issue to his managers on the occasions when it is agreed that he also made protected disclosures, he was carrying out designated health and safety activities.

Detriment on the grounds that the claimant made a protected disclosure or carried out designated health and safety activities

135. We have made the following findings in respect of the allegations of detriment:

    (1) Allegations (a), (d), (6), (e), (8): We have found that Mr Kumain's conduct on 31 October, 1, 2 and 4 November 2020 was done on both grounds.
    (2) Allegation (b): We have found that Mr Bown's failure to support the claimant was done on neither ground.
    (3) Allegations (g) and (9): We have found that the claimant's exclusion from work during the second lockdown was done on both grounds.
    (4) Allegation (10): We have found that Ms Jones' failure to follow up on the meeting with the claimant on 13 November 2020 was done on neither ground.
    (5) Allegations (a) and (12): We have found that Abdel's conduct was done on both grounds. We have also found that the failure by the claimant's senior managers, principally Mr Bown, but also Ms Jones, to follow up and take action commensurate with the magnitude of the claimant's allegations was done on both grounds.
    (6) Allegations (18) and (j): We have found that the refusal by Mr Bown and Ms Jones, on 19 April 2021, to support the claimant's request for a pay rise was done on both grounds.
    (7) Allegations (h) and (11): We have found that Ms Jones' wilfully misleading recollection, on 26 May 2021, of the discussion on 13 November 2020 was done on the ground that the claimant made a protected disclosure.

Time limits

136. The relevant early conciliation dates are 24 September to 1 November 2021. The claimant presented the claim on 2 November 2021. It is agreed that a complaint about something that took place before 25 June 2021 will be prima facie out of time.

137. Allegations (a), (d), (6), (e), (8), (g), (9), (10) and (12) being part of the same course of repudiatory conduct which culminated in the claimant's resignation were brought within the relevant time limit.

138. In respect of allegations (18), (j), (h) and (11) which are not relied on as part of this repudiatory conduct and are prima facie out of time, we find that they are deemed to be in time as they are part of the same series of acts or failures to act.

139. Alternatively, we find that it was not reasonably practicable for the claimant to have brought these complaints in time – 18 July 2021 for allegations (18) and (j); and 25 August 2021 for allegations (h) and (11) – and the further period taken to present these complaints thereafter was reasonable, in the following circumstances:

    (1) The claimant contacted ACAS on 11 May 2021 from which he understood that the time limit for bringing a claim was three months

less one day from the date that his employment terminated. He therefore fixed the date of 25 September 2021 to contact ACAS again. As noted, he contacted ACAS to initiate the early conciliation process on 24 September 2021.

(2) The claimant was affected by the new medication he started in June 2021 with the effect that his mental health deteriorated before it started to improve in mid-July 2021.
(3) In the meantime, he received a response to a data subject access request on 16 June 2021, as a result of which he believed he had new evidence to substantiate complaints for protected disclosure and health and safety detriment, and disability discrimination.
(4) There was an ongoing grievance process which concluded on 20 July 2020.
(5) We accept that this process combined with the new medication the claimant was taking impacted on the claimant's mental health so that it was not reasonably practicable for the claimant to have brought his claim within that period.
(6) The claimant was away from home from 23 July to 23 August 2021.
(7) He commenced new employment on 24 August 2021 working between 50-60 hours, 7 days a week, starting up a new restaurant.

Discrimination arising from disability

Disability

140. Although the claimant claims that he was disabled by virtue of the likely future duration of the effects of his depression on his day-to-day activities from January 2021, we are required to consider the position on the relevant date on which the impugned act of discrimination is alleged to have taken place. The material date is 19 April 2021 which is when Mr Bown and Ms Jones agreed to reject the claimant's request for a pay rise.

141. We remind ourselves that it is necessary to consider the facts, such as they are relevant, as at this material date and to discount any later facts.

142. We do not find that the claimant was disabled by reason of depression on 19 April 2021 because we do not find that at this date it was likely that it amounted to a mental impairment which would have a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities for at least 12 months or to recur at least 12 months after the date of the first occurrence of the substantial adverse effect. The claimant had no clear diagnosis and understood that the symptoms he was experiencing were related to his heart rather than to his mental health. Without understanding the underlying cause for these symptoms, we find that there could be no reasonable basis on which to conclude that the effects the claimant was experiencing would be long-term, for the purposes of the meeting the statutory definition of disability, at the material date.

Knowledge of disability

143. For completeness, even had we concluded that the claimant was a disabled person at the material date, we would not have found that the respondent had actual or constructive knowledge of the claimant's disability. The

claimant was not diagnosed with anxiety and depression until 28 May 2021 and did not discuss his mental health symptoms with the respondent. Although we find that he did discuss his heart symptoms with Mr Galvez, Mr Bown and Mr Matthews in February and March 2021, and with Ms Jones in May 2021, as he agreed in evidence, he did not inform any of his managers in terms from which they would have reasonably understood that he had an impairment which substantially adversely impacted on his day-to-day activities and that this was likely to last for 12 months or to recur 12 months from the first incidence of such substantial adverse effect. We agree with Ms Hall's submission that even had the claimant obtained a report from the claimant's treating physicians or referred the claimant to Occupational Health, at the material time, this was unlikely to have provided a clear prognosis because the claimant's medical investigations were ongoing and inconclusive.

144. The discrimination complaint accordingly fails.

Remedy

145. A preliminary hearing will be held to list a remedy hearing and make any necessary case management orders.

146. Finally, I would like to apologise to the parties for the very lengthy delay in promulgating this judgment.

Employment Judge Khan

22.12.2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22/12/2023

FOR EMPLOYMENT TRIBUNALS

ANNEXE

The Claimant relies on the following allegations:

1. That after having reported himself to Lisa Jones for having screamed at an employee in 2019, there was no investigation into the incident as it centred around one of owners having spent half an hour in a toilet cubicle with a junior member of staff. He alleges that this set a precedent and also diminished his trust and confidence in the company.
2. That the respondent breached trust and confidence in dealing with an objection to a change in established working terms and conditions in July 2020

a. On 24 September 2020 through to early December 2020, arguments with chefs who were not happy to wear face masks, inclusive of bullying from the Head Chef, a verbal and physical threat from another chef on 9 December;

3. On 5th of October, being reprimanded for covid policies not being followed and stating at that time that he needed support but not receiving any.

b. On 7 October 2020, not being given support by the Operations Manager;
c. On 12 October 2020, the Respondent [Ms Jones] refused the Claimant's request to transfer to a different site and failed to follow it up;

4. On the 12th of October the claimant said in their email that a change in site would benefit their mental health, clearly indicating significant issues (ERA 1996 44.1.a).
5. On the 12th of October the respondent [Ms Jones] said that a transfer would only be possible with a demotion which has been shown to not be consistent with other employees

d. The next few weeks were dominated by arguments with chefs about face masks;

6. Multiple documented examples of bullying towards the end of October and early November as a result of the ongoing issues arising from a lack of support in enforcing health and safety law which further diminished his trust and confidence in the company
7. On the 31st of October, the claimant sent a message to his manager complaining of stabbing pains in his chest which he claims were caused by his disability and as a direct result of bullying from chefs (ERA 1996 44.1.a).

e. On 1 November 2020, the Head Chef was angry with the Claimant as he sent a photo of chefs not wearing face masks;
f. On 3 November 2020, the Claimant was asked to work during the second UK National lockdown;

8. On the 4th of November, the head chef verbally assaulted the claimant (ERA 1996 44.1.a) after him having called the ops manager again about chefs refusing to follow the law regarding the wearing of face masks which he claims to have been a protected disclosure (ERA 1996 43B.1.a,b,d).

g. On 10 November 2020, the Claimant was told he was no longer required to work during the second UK National lockdown;

9. The claimant alleges that he was not offered any shifts over the lockdown period due to the head chef being angry at him for repeatedly raising the issue with the operations manager of the chefs refusing to wear face masks (ERA 1996 44.1.a) which he claims to have been a protected disclosure (ERA 1996 43B.1.a,b,d).

10. On the 13th of November, a grievance meeting is held with the HR director, Lisa Jones in which details of bullying from the head chef are discussed and the claimant clearly says he needs support in dealing with the head chef and ensuring that the laws regarding facemasks are adhered to. The claimant also details the incident from the 7th of October where he alleges a lack of support from his operations manager. There is no follow up from this meeting. ACAS states that a grievance meeting should be summarised and an action plan communicated. This further diminished his trust and confidence in the company.

h. Following a Zoom meeting with Lisa Jones (HR Director) on 13 November 2020, she is alleged to have lied about the contents of the meeting (the Claimant covertly recorded the Zoom meeting);

11. 13th November. The claimant recorded a meeting with the HR director from home while he was on furlough. The HR director later claimed in a grievance hearing that the conversation centred around a junior manager that was having trouble with the head chef but the claimant alleges that this issue was covered in less than five minutes and the rest of the conversation (~1 hour) was focused on the claimant's own struggles with the head chef. The claimant alleges that there should have been some follow up to this meeting and that the lack of follow up further diminished his trust and confidence in the company.
12. 9th of December, the claimant claims to have been physically and verbally threatened by one of the chefs after asking him to wear a facemask (ERA 1996 44.1.a). The claimant has blind copied the HR director in an email to the head chef where this has been reported. The claimant claims that there should have been some follow up to this email and that the lack of follow up further diminished his trust and confidence in the company.
13. On the first of January, the claimant started suffering from heart arrhythmia which he alleges has later been attributed to depression caused by stress from work by his gp.
14. Jan - Feb the claimant alleges that he visited his gp and hospital several times due to issues including heart arrhythmia, chest pain, and shortness of breath and that his gp has since attributed these symptoms to depression caused by stress from work which he claims resulted directly from his role as a health and safety representative (ERA 1996 44.1.a) and the failure of the company to act in response to his repeated protected disclosures (ERA 1996 44.1.a).
15. That he informed his manager in February that he had been having investigations into the issues he had been experiencing with his health
16. The complainant alleges that he informed the operations manager and operations director in March that he had been having issues with his heart and he alleges that the lack of follow up was a failure in their duty of care which amounts to a breach of contract and further diminished his trust and confidence in the company.

i. On 6 April 2021, the Respondent [Mr Bown and Mr Matthews] is alleged to not have followed up on the Claimant's notification to them of his heart issues;

17. On the 18th of April, the claimant requested a pay rise and alleges that the response [Mr Bown] contained factually incorrect statements which further diminished his faith and confidence in the company amounting to further breach of contract.
18. The claimant alleges that the requested pay rise was turned down due to reasons including his having raised issues of health and safety in his role

as a health and safety representative (ERA 1996 44.1.a) and his not accepting/applying for a transfer to another site due to his disability (EA 2010 6.1.a). The claimant relies on emails received through a SAR as evidence of this.

j. On 19 April 2021, the Respondent refuses the Claimant's request for a pay rise and indicate that they would be happy for the Claimant to leave the Respondent's business;

19. On the 27th of April, the claimant sent an email querying the calculation of the tronc and claims that there was a noticeable change in attitude towards him following this email. The claimant alleges that an email sent on [4] May from one of the business owners demonstrates this change in attitude towards him as it is a clear case of bullying and must have been due to him raising issues with the way the tronc is calculated. The claimant alleges that according to Government Guidance E24 on tips, gratuities, service charges and troncs, national insurance contributions are due on the tronc due to a it being a guaranteed amount rather than a true tronc and so his querying the calculation of the tronc was a protected disclosure as it was pointing out wrongdoing and was in the public interest.

k. On 4 May 2021, the Claimant says the Respondent was bullying him following his questioning of the tronc;

20. On the 10th of May, the claimant alleges that Lisa Jones claimed that the company had no duty of care to follow up on him having reported issues with his heart as it was not reported directly to her. The claimant alleges that this goes directly against the company's own policy on reporting sickness/disability and was a further breach of trust and confidence and further diminished his trust and confidence in the company.
21. That Lisa Jones told him on three separate occasions during this conversation that he would not receive a pay rise in his current position (in perpetuity) which he alleges was a breach of his contractual right to annual consideration for a pay review.
22. That Lisa Jones had agreed with Ben Matthews and Harry Bown that they would be happy for him to leave the company and that the statements Lisa Jones made during the grievance on the 10th were made in an effort to bully him into leaving the company. The claimant covertly recorded this meeting which was held outside of work and outside of working time
23. On the 12th of May the claimant felt he had no choice other than to give notice that he would be leaving the company due to lack of due care, breach of trust and confidence, breach of contract, detriment suffered (bullying) as a result of his position as a health and safety representative, detriment suffered as a result of having made protected disclosures

I. On 11 May 2021, Lisa Jones tell the Claimant that he will never receive a pay rise (a meeting which the Claimant covertly recorded), triggering the Claimant to give his notice of resignation;

m. On 13 May 2021, Lisa Jones is alleged to have falsely changed what she said about the pay rise on 11 May; and

24. On the 13th or 14th of May, following an argument between Lisa Jones and the claimant, Lisa Jones submitted a witness statement in which she falsely alleged that the argument had been about a pay rise when it was in fact only about her being dishonest.

n. On 14 May 2021, the Claimant is investigated as part of the Respondent's disciplinary procedure for having argued with Lisa Jones.

25. On the 14th of May, the claimant recorded a conversation with his manager about the argument the previous day in which his manager is very clear that although it was obvious that the claimant was upset, he was definitely not shouting which contradicts witness statements
26. The claimant alleges that the disciplinary investigation against him was in breach of the ACAS code of conduct due to:
    a. The company did not follow its own policy on disciplinary investigations
    b. The investigation was not consistent with past issues
    c. The respondent failed to gather all the facts in that they didn't interview all witnesses
    d. The claimant was not informed of the problem
    e. The respondent refused to provide witness statements
27. That he contacted ACAS on the 19th of May in order to try to start proceedings against the respondent but was told that he was unable to do so whilst he was still employed by the respondent and that he would have three months from termination of his employment to bring forward any claims and so this date (19th of May) should be used as the date of having satisfied the requirement to notify ACAS of intention to bring forwards a claim
28. That he only received some conclusive evidence of detriment suffered and discrimination on the 16th of June in the form of emails between Lisa Jones, Ben Matthews, and Harry Bown and since he had already contacted ACAS in an attempt to start proceedings that the complaint of detriment has been brought well within time
29. That although he started work on the 24th of August, he was forced to leave that position due to ongoing depression which he alleges is a direct result of detriment suffered
30. That he has ongoing health issues as a result of the detriment suffered.