



EMPLOYMENT TRIBUNALS

Claimant

Mr D Singh

Respondent

Wasabi Co Ltd

v

Heard at: Watford (in person)
On: 29 April – 3 May 2024
Before: Employment Judge S Cowen
Members: Mr D Wharton
Mrs L Thompson

Appearances

For the Claimant: Mr Singh (in person)
For the Respondent: Mr Powis (representative)

JUDGMENT having been sent to the parties on 13 May 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. In accordance with the case management orders in this case an agreed bundle was provided along with a witness statement bundle which the Claimant also received a copy.
2. The Tribunal heard from the following witnesses:
 - Claimant,
 - Ms Kamala Tamang,
 - Ms Catherine-Gayle Sampson.

The Issues

3. The Following issues were identified in the case management order of 5 September 2022 and were confirmed by the parties at the start of the hearing

1. Time limits / limitation issues
 - 1.1. Were all of the claimant's complaints presented within the time limits set out in

- 1.1.1. section 123 of the Equality Act 2010 (“EQA”)
 - 1.1.2. section 48 of the Employment Rights Act 1996 (“ERA”)?
 - 1.1.3. section 111 of the Employment Rights Act 1996 (“ERA”)?
 - 1.2. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended.
 - 1.3. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 September 2021 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it, subject to consideration of the matters mentioned in the previous paragraph.
2. Constructive unfair dismissal & Constructive wrongful dismissal
 - 2.1. Was the claimant dismissed, i.e.
 - 2.1.1. was there a fundamental breach of the contract of employment, and/or did the respondent breach the so-called ‘trust and confidence term’, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?
 - 2.1.2. did the claimant affirm the contract of employment before resigning?
 - 2.1.3. did the claimant resign in response to the respondent’s conduct (to put it another way, was it a reason for the claimant’s resignation – it need not be the reason for the resignation)?
 - 2.2. The conduct the claimant relies on as breaching the trust and confidence term is everything set out in the resignation letter of 9 December 2021, which was attached to the ET1 when the claim was presented.
 - 2.3. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”); and, if so,
 - 2.4. Was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called band of reasonable responses?
3. Remedy for unfair dismissal
 - 3.1. If the claimant was unfairly dismissed and the remedy:
 - 3.1.1. Should reinstatement or re-engagement be ordered
 - 3.1.2. What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant might still have been dismissed had a fair and reasonable procedure been followed?
 - 3.1.3. Would it be just and equitable to reduce the claimant’s basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2)? If so to what extent?

- 3.1.4. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent? If so, is it just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
4. Public interest disclosure (PID)
- 4.1. Did the claimant make one or more protected disclosures (ERA sections 43B and 43C to 43H) as set out below?
- 4.2. The alleged disclosures the claimant relies on are as follows:
- 4.2.1. Email to Christopher Charalambous (MD) on 21 January 2021.
This is alleged to be a protected disclosure because (i) it related to Food Health & Safety and/or it (b) it also alleged bullying and harassment
- 4.2.2. Email to Christopher Charalambous (MD) on 22 September 2021
This is alleged to be a protected disclosure because it related to Food Health & Safety.
- 4.3. The claimant relies on the follow subsection(s) of section 43B(1) in
“ relation to the alleged disclosure.
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(d) that the health or safety of any individual has been, is being or is likely to be endangered, & / or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.”
- 4.4. If the Claimant was dismissed, was the principal reason for the dismissal that the Claimant had made a protected disclosure?
- 4.5. Did the respondent subject the claimant to any detriments, as set out below?
(Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.)
- 4.6. If so, for each detriment, was the Claimant subjected to that detriment on the ground that they had made one or more protected disclosures?
- 4.7. The alleged detriments the claimant relies on are as follows:
- 4.7.1. Following first protected disclosure (21 January 2021 email) the Respondent did not give the Claimant a grievance outcome (though there was a grievance hearing 4 February 2021 at 2pm)
- 4.7.2. Following second protected disclosure:
4.7.2.1. the Claimant was suspended on 30 September 2021 (and until 18 November 2021)

4.7.2.2. the Claimant was issued with a (written final) warning on 2 November 2021. (which was reduced on 18 November as result of appeal)

4.7.2.3. on or around 30 September 2021, David Felix lied to HR by saying (untruthfully) that the Claimant did not have permission to use his phone / take photos

4.7.2.4. in September 2021, the Respondent did not take action to prevent Kamala Tamang call the Claimant “crazy”

5. Disability

5.1. The Respondent admits that the claimant was a disabled person in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of epilepsy.

6. EQA, section 26: harassment related to disability

6.1. Did the respondent engage in conduct as follows:

6.1.1. On or around 27 October 2021 in a meeting with Caroline de Silva of HR (at which the Claimant was not present), Kamala Tamang called the Claimant “crazy” and this was recorded in the meeting notes. (The allegation is not that Ms Tamang was aware that the Claimant had epilepsy, but that Ms de Silva was).

6.2. If so was that conduct unwanted

6.3. If so, did it relate to the protected characteristic of disability?

6.4. Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7. EQA, section 13: direct discrimination because of disability

7.1. If not harassment, then did the respondent subject the claimant to the following treatment:

7.2. On or around 27 October 2021 in a meeting with Caroline de Silva of HR (at which the Claimant was not present), Kamala Tamang called the Claimant “crazy” and this was recorded in the meeting notes. (The allegation is not that Ms Tamang was aware that the Claimant had epilepsy, but that Ms de Silva was).

7.3. Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?

7.4. If so, was this because of the claimant’s disability?

8. Reasonable adjustments: EQA, sections 20 & 21

8.1. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

8.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

8.2.1. A requirement to work on the night shift, from 8.30pm to 5am?

8.3. Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: the Claimant had troubled sleep and headaches as a result of not having proper sleep during the day time.

8.4. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

8.5. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

8.5.1. Agree to his request to move to another shift

8.6. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

9. Remedy

9.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Findings of Evidence and Facts

4. Having considered all the evidence, we find the following facts on a balance of probabilities.
5. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.
6. The Tribunal made the observation that the task of deciding what happened in this case and making findings of fact has been hampered by the lack of evidence of the Respondent and in particular the lack of any witness relevant to the disciplinary process. The Tribunal have therefore not been able to receive specific evidence of what was thought/discussed at the time of the disciplinary process. The Tribunal therefore had to rely on the limited evidence available from the Respondent. There remain gaps in the Respondent's evidence which the Tribunal was not able to fill.
7. The Claimant initially worked as a daytime dispatcher for the Respondent. During the Covid pandemic he was furloughed. When a redundancy exercise was

undertaken, the Claimant chose to apply for a position as a hygiene operative, which was a night shift job. He started this job in September 2020.

8. In approximately October 2020 the Claimant began to notice that bins which were supposed to be emptied before the end of the day shift were being left for the night shift employees to empty. Some were so full that they were spilling over. He also noticed that floors were left with food and other debris on them. This caused more work for the night shift. Unfortunately the night shift was short staffed and this extra work placed greater pressure on the team to complete work.
9. The Respondent has a Personal Hygiene policy which included at para 7.3 "*only authorised personnel are permitted to carry and use mobile phones in the factory*". The Claimant was aware of this policy.
10. In approximately December 2020 the Claimant began to take photos of the problems he saw in the workplace. He began to highlight them to his seniors. He tried to speak to Jaspreet Singh, one of his managers, who was not receptive to the Claimant raising this issue. The Tribunal has no evidence that Jaspreet Singh told the Claimant to take photos of the problems, although it accepts that the Claimant thought that he had some agreement that he could, when Jaspreet Singh told him to 'tell his supervisors about any problems'.
11. On 9 December 2020 the Claimant discovered at the end of his shift that Jaspreet Singh had moved his green safety shoes, meaning the Claimant had nothing to change into when exiting the high risk area, in accordance with the Respondent's rules. The Claimant asked to be allowed to wear his white safety shoes to exit, but was told by Jaspreet Singh to wear his socks and blue plastic shoe covers. The Claimant believed this to be dangerous as the floor was wet and electrical machinery was connected to the power. The Claimant took a video and photos of his feet.
12. This incident was part of the first protected disclosure which the Claimant made to Mr Christopher Charalambous on 21 January 2021. This email contained details of the incident on 9 December 2020 as well as information about bins being left overflowing and being too heavy to lift. The Claimant attached photos he had taken inside the 'CPU' which is part of the factory.
13. Mr Charalambous' reply answered each point raised by the Claimant and told him that he could respond further if he wanted to. Mr Charalambous made no mention of the fact the Claimant had used his phone to take photos inside the CPU, against the company rules. He referred the Claimant back to managers with regard to support for the issues he raised.
14. A meeting was held on 4 February 2021 under the grievance policy, to consider the issues raised by the Claimant. He was told he would receive an outcome to this grievance, but never did so. The Respondent believed that one had been sent, but has no evidence of this. The Tribunal therefore conclude that no such outcome was ever sent to the Claimant.

15. In approximately May 2021 Jaspreet Singh left his employment with the Respondent and was replaced by David Felix. At some point prior to 21 September 2021 the Claimant raised the issue with Mr Felix about the heavy and overflowing waste bins. Mr Felix told the Claimant to send him reports about the state of the CPU and he would deal with it. The Claimant took 'reports' to mean that he should take photos of the CPU and send them to Mr Felix. Mr Felix was not aware whether the Claimant had permission to do this from a previous manager or not. There was no express conversation about permission to take photos in the CPU. This lack of clear communication led to problems later, when it became clear that the Claimant was taking his phone into the CPU, in order to take photos to make 'reports' to Mr Felix and believed that the request to provide 'reports' was authorisation to use his phone.
16. Prior to October 2021 the Claimant spoke to Kamala Tamang, manager of a different team, about the problems in the hygiene team. The Claimant showed her photos and told her that he could get the factory closed down, if he showed these photos to the relevant food hygiene authorities. This conversation was of great concern to Ms Tamang who was scared that the factory may close and she and others would lose their jobs. She reported this conversation to Mr Felix.
17. On 21 September 2021 the Claimant wrote another email to Mr Charalambous indicating that there was an incident on 18/19 September where they could not carry out all the work due to staff shortages and this meant trays were left unwashed for a whole weekend. This is accepted by the Respondent as a Protected Disclosure, which raises an issue of health and safety. The Claimant referred to sending photos with the email.
18. Mr Charalambous replied to this email the same day. He addressed the other issues raised by the Claimant with regard to pay and then reassured him that the issue with the trays had been rectified. He concluded by saying " Also can I recommunicate that here is a no phones policy within the factory and they should not under any circumstances be used within the factory without prior approval".
19. The email conversation between them continued the following day about the number of people in the team. Mr Charalambous offered that the Claimant could speak to him and Mr Felix about it. On 27 September HR representative Ms Chohan invited the Claimant to a meeting to discuss his concerns.
20. This was the Claimant's second grievance relating to these issues. He did not mention that he had previously raised these matters but had no response. A meeting with Mr Felix and the Claimant took place at 2pm on 30 September. This meeting discussed the Claimant's concerns about the staff shortages. The Claimant was then asked to wait for another meeting. This time with Ms Chohan of HR.
21. That meeting commenced at 3.08pm and was the start of a disciplinary investigation into whether the Claimant had acted in breach of health and safety by using his phone in the factory. During this meeting the Claimant told Ms

Chohan that both Jaspreet Singh and Mr Felix had given him permission to use his phone in the factory. This was his belief based on the conversations he had had. In fact, neither had every given him express permission. It was an inference which the Claimant had taken from their discussions.

22. During the meeting Ms Chohan asserted that the Claimant was told by HR in December that he was not to use his phone. We have found no evidence to support that assertion. This is a point which Ms Da Silva went on to rely on in her disciplinary outcome letter. This was a mistake and it was corrected by way of Mr Radowski's disciplinary appeal which reduced the penalty to the Claimant.
23. Ms Chohan adjourned the meeting to speak to Mr Felix and came back and told the Claimant that Mr Felix denied giving permission. This was a position which Mr Felix maintained in two interviews, where he said he gave no express permission, but also said he never told the Claimant to stop or that he was not allowed to take photos.
24. At the end of the meeting the Claimant was suspended. The Respondent's right to suspend is set out in the disciplinary procedure and is said to be a contractual term.
25. Ms Chohan then carried out an investigation of the Claimant's grievance, interviewing Mr Felix and and Jordy Pineda. Mr Pineda said that he recalled that Mr Felix had asked for pictures or reports and that Mr Felix had given the Claimant permission to use his phone. Mr Pineda said that he knew it was not allowed, but felt that if the manager had asked for them, then it was ok to do it. This was Mr Pineda's understanding of Mr Felix's request for reports.
26. The Respondent submitted that the Claimant had asked Mr Pineda to give supportive evidence to the investigation and that a text message thanking him was proof of this. We have not seen the text message, but we have seen an interview at which the Claimant was challenged about this and denied it. We do not consider that it has been proved there was collusion over the evidence Mr Pineda gave.
27. A disciplinary hearing was held on 15 October with Caroline Da Silva. Ms Da Silva then conducted her own investigation by interviewing Mr Pineda once again, who repeated his assertion that Mr Felix asked the Claimant to take pictures. Ms Da Silva also interviewed a number of others including Ms Tamang. Ms Tamang said with regard to the conversation she had with the Claimant about the closure of the factory, that the Claimant was crazy. She was discussing the Claimant's intention to report the health and safety issue to authorities who could close the factory. Ms Tamang did not know of the Claimant's epilepsy. Whilst Ms Da Silva knew of the Claimant's epilepsy she did not tell Ms Tamang about it, as to do so would be to divulge private and personal information about the Claimant to other staff. Ms Tamang therefore did not make a comment about the Claimant's disability.

28. It seems that Ms Da Silva also interviewed Miss Chohan about her role. A second meeting was held with the Claimant on 27 October. Ms Da Silva's outcome letter on 2 November 2021 indicated that she believed that the Claimant was aware that he did not have permission to use his phone, and that he purposefully did not tell Mr Felix, that he had been told by HR not to use the phone. The sanction was a Final Written Warning which would remain for 12 months.
29. The Claimant appealed this outcome and the outcome of his grievance which had not been upheld. He did so, despite the fact that notes from the meetings had not been provided to him. These were sent shortly after his appeal was lodged. The Claimant did not attempt to add anything to his appeal as a result of obtaining the notes. The Respondent's process does not outline any timescale for providing meeting notes.
30. The Claimant's disciplinary appeal took place on 18 November 2021 with Stephan Rakowski. He looked at the points raised by the Claimant and concluded on 3 December 2021 that the Claimant had used his phone in the CPU despite being told not to do so. But he recognised that the Claimant believed that he had permission from managers to do so, and reduced the sanction to a first written warning to last for 6 months.
31. On the same day the Claimant received notice of the outcome of his grievance appeal. This indicated that the Claimant had already been offered a move to the department he wanted to work in (despatch) and a day shift. It also dealt with the other issues the Claimant had raised such as the bullying by Jaspreet Singh, by confirming that Jaspreet Singh had left the company. Paul Hine who dealt with the appeal acknowledged that no action had been taken at the time Mr Hine concluded that there was no bullying by the HR department.
32. In response to this outcome the Claimant considered that he had no choice but to resign from his employment. He believed that this was the 'last straw' following a number of breaches by the Respondent. His resignation letter is dated 12 December 2021.

The Law

33. Disability

The parties agreed that the Claimant was a disabled person within s.6 Equality Act 2010 (EqA) and therefore the Tribunal do not need to make factual findings on this.

34. Direct discrimination – s.13 EqA

“s.13 (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

35. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.
36. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.
37. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

38. Harassment – s.26

“Section 26 of the Equality Act provides:

- (1) A person (A) harasses another (B) if – a. A engages in unwanted conduct related to a relevant protected characteristic, and b. The conduct has the purpose or effect of – i. Violating B's dignity, or ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2)*
- (3)*
- (4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –*
- a. The perception of B;*
- b. The other circumstances of the case;*
- c. Whether it is reasonable for the conduct to have that effect”*

39As set out in the EHRC Code, “unwanted conduct” can include “a wide range of behaviour” (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8).

40When looking at the effect of harassment, this involves a subjective and objective test. The subjective test is to assess the effect that the conduct had on the complainant, and the objective test is to assess whether it was reasonable for the conduct to have that effect (Pemberton v Inwood 2018 ICR 1291, CA). The conduct complained about must however “reach a degree of seriousness” in order to constitute harassment, so as not to “trivialise the language of the statute” (GMB v Henderson [2015] IRLR 451, at 99.4).

41 Public Interest Disclosure

“43B Disclosures qualifying for protection.

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a)....

(b).....,

(c).....

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e)..... or

(f)....”

41.1. The law on protected disclosure is a little more complex. In this case the protected disclosures are accepted. That is something which provides information to the Respondent which indicates that there is a health and safety issue which is not being addressed.

42. A Detriment

42.1 Jesudason v Alder Hey Children’s NHS Foundation Trust [2020] EWCA Civ 73, says that the concept of detriment is wide and that it must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment.

42.2 *s.48(2) Burden of Proof -Where the C has proved to the Tribunal that there was a protected disclosure, a detriment and that the Respondent was responsible for the detriment, the Respondent then has the burden of proof to show the reason for their actions was not related to the protected disclosure.*

42.3 The Tribunal can draw inferences from the evidence they have, as to whether the actions of the respondent had an unlawful motive. The Tribunal considered Thomas v Network Rail Infrastructure Ltd ET Case No.1801877/15, where the Claimant was suspended and dismissed for verbal harassment of a colleague after whistleblowing. The Tribunal found that the suspension was not related to the protected disclosure as the action was solely related to the grievance brought against the Claimant and there was no unlawful motivation. The dismissal was found to be related to the protected disclosure, as the Respondent did not discharge the burden of showing that the real reason for dismissal was the Claimant’s misconduct.

42.4 There requires a causal nexus between the act by the Respondent and the protected disclosure. The Tribunal are therefore required to consider the employer's reason or motive for the treatment. Aspinall v MSI Mech Forge Ltd EAT 891/01 set out that the protected disclosure has to be "the real reason, the core reason, the causa causans, the motive for the treatment complained of". Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372, CA, provides the test the Tribunal must apply as whether the PH materially (in the sense of more than trivially) influenced the employer's treatment of the whistleblower.

42.5 The Tribunal must take into account Bolton School v Evans [2006] IRLR 500, EAT which stated that the conduct of the employee and his PD are separable and therefore the reason for the detriment needs to be considered carefully.

Decision

Disability

43. The Respondent conceded that the Claimant was disabled by way of his epilepsy throughout his employment. We therefore were not required to make any detailed findings on this point.

44. In relation to the allegation that Ms Tamang said to HR in her interview that the Claimant was "crazy"; the Tribunal considered the notes of this interview, which they accepted as accurate but not verbatim. The Tribunal also took into account that Miss Tamang gave this interview in English, which is not her first language, although it saw from her oral evidence that she has a good command of the language.

45. Miss Tamang accepted that she used the word 'crazy' when recounting what the Claimant had told her. She described in evidence that she felt that the Claimant saying that he could have the factory closed, was an unreasonable thing to say, as this would put the livelihood of the Claimant, Miss Tamang herself and many others at risk. Miss Tamang agreed that she felt scared by the Claimant asserting that his photos could result in the factory closing. Her use of the word 'crazy' was therefore as an adjective to describe the Claimant's proposed course of action and not an adjective to describe the Claimant himself.

46. The Tribunal also accepted that Miss Tamang was not aware of the Claimant's disability at the time and therefore her comment could not have related to the Claimant's disability.

47. The Tribunal dismissed the claim for disability harassment.

Direct discrimination

48. The Tribunal accepted Miss Tamang's evidence that she would have said the same of anyone who was suggesting that they could do something which

could have the effect of closing the factory. Her comment did not amount to less favourable treatment.

49. In any event, the Tribunal found no evidence or basis to infer that her comment was made in relation to the Claimant's disability. The Tribunal dismissed the claim for direct discrimination.

Reasonable Adjustment

50. The Respondent accepted that there was a provision, criterion or practice ('PCP') to work the night shift.

51. The evidence shown to the Tribunal did not indicate that the Claimant was placed at any substantial disadvantage in working night shift as a result of his epilepsy. In particular, the Tribunal noted a lack of any medical evidence to support that view. The evidence of the Claimant's own neurologist in 2019 was that he was fine to work nights as long as it is consistent and not switching between day and night shifts. The Claimant's evidence to the Tribunal was that his troubled sleep was due to having a young child and that this was also one of the reasons he wanted to change to a day shift.

52. The Tribunal therefore did not accept that the Claimant was at a substantial disadvantage by being rostered to work a night shift and noted that in any event the Respondent did allow the Claimant to move to a day shift in late November 2021, but that the Claimant resigned before he could start this job. The claim for reasonable adjustment is dismissed.

Public Interest Disclosure

53. The Tribunal accepted that the Claimant's emails to Mr Charalambous on 21 January 2021 and 21 September 2021 contained information with regard to an actual or potential breach of Health and Safety. The Tribunal were not clear whether the Claimant was asserting that the Health and Safety issue was one of a tripping/slipping nature to the Respondent's staff, or whether his concern was one of food hygiene safety, but were satisfied that either of these would meet the requirement of s. 43B Employment Rights Act 1996. Either of these would be in the public interest.

54. The issue of time limits is relevant to this claim as the first protected disclosure and detriment occurred prior to the time limit of 11 September 2021.

55. The first protected disclosure was made on 21 January 2021. Part of the same email was also treated by the Respondent as a grievance, and a meeting was held on 4 February 2021 to hear the Claimant's complaints.

56. Whilst there is mention in the Respondent's documents that it was assumed that the Respondent had sent an outcome, the Respondent had shown no evidence of any outcome letter and the Claimant denied receiving it. The

Tribunal found that the Claimant did not receive an outcome to his grievance and therefore factually, this detriment did occur.

57. With regard to when a claim in respect of this allegation arose, it was not obvious, as the complaint was that no outcome was received. Therefore finding a date when the outcome was not given is a hypothetical task. The Tribunal considered the Respondent's own policy on grievance, which does not set a time limit for the outcome to be provided. The ACAS Code on Grievance says that the outcome should be given "without unreasonable delay". The Tribunal also looked at the timescales of the Respondent when handling the Claimant's second grievance. The outcome there was provided one month after the meeting (30 September to 1 November)
58. The Tribunal therefore concluded on balance of probabilities that it would have been reasonable for the Respondent to have provided the outcome of the first grievance by 4 March 2021. This is the date time reasonably started to run.
59. The time limit therefore expired on 3 June 2021. The Claimant did not issue his claim until 12 December 2021. The claim is therefore over 6 months out of time. The Tribunal heard no evidence from the Claimant at all as to why he was not able to issue his claim in time. It was noted that the Claimant made no mention of this first grievance when he raised a second grievance in September 2021. There was no medical evidence, or other reason given by Claimant as to why the claim was not brought before December 2021. The Tribunal therefore concluded that it was reasonably practicable for the Claimant to have brought that claim in time and he did not do so.
60. This first detriment claim is out of time.

Second PD – email on 21 September

61. The second protected disclosure, made on the 21 September 2021 was in a similar manner to the first and also included information with regard to a Health and Safety matter. The Tribunal were satisfied that this did qualify as a protected disclosure.
62. The evidence indicated that the Claimant was suspended from work on 30 September 2021. A letter in the bundle sets out the terms of the suspension. The Tribunal were satisfied that a suspension, although a neutral act, could amount to a detriment to an individual, as it prevents them from attending work to engage in their contract of employment. The Tribunal were satisfied that this did occur and that it did amount to a detriment.
63. The Tribunal considered whether the detriment occurred due to the second protected disclosure. The Tribunal did not hear any evidence from the person who took the decision to suspend. However, the documentary evidence showed that the Respondent had the right to suspend the Claimant within its' procedure; the investigation was of taking a phone into the CPU; a potential breach of health and safety within the factory and potentially a gross misconduct.

64. The Tribunal concluded that the suspension was therefore related to a serious disciplinary matter and was not about the protected disclosure itself. To make it clear, the suspension was related to how the Claimant had gathered the information, not the fact that he had provided the information. This was not therefore a detriment on grounds of the protected disclosure.
65. The documents showed that the Claimant was issued with a final written warning on 2 November 2021 and that this was reduced on appeal to a written warning on 18 November 2021. This detriment did occur.
66. The Tribunal considered whether this detriment occurred on the ground of the second protected disclosure. No evidence was given by the person who made the decision to give the warning, nor from the appeal officer who reduced the warning. The Tribunal were only able to consider the documentary evidence of the hearings and the outcomes. Further evidence in the form of the Respondent's disciplinary procedure was seen, which highlighted that breach of food safety or company policy may amount to gross misconduct.
67. The Tribunal took into account the fact that no action had been taken previously when the Claimant had provided photos, but concluded that the policy still remained in place and the Respondent had the right to enforce it. The Claimant's mitigation that he was asked to provide reports was taken into account at the appeal. The Tribunal concluded that the Respondent's written warning to the Claimant was due to his breach of the policy and disruptive behaviour and not due directly to the protected disclosure. Once again, it was about how the Claimant had obtained the information and acted and not about the fact he had made the protected disclosure.
68. The Tribunal carefully considered the wording of this allegation in the list of issues and in the Claimant's ET1 and resignation letter. The Tribunal considered that that this allegation was set out with respect to Mr Felix's own actions in giving (or not) permission to the Claimant to take photos. Mr Felix did not give the Claimant express permission to use his phone. What he did say was that he wanted the Claimant to report to him the problems.
69. The Tribunal concluded that there was a misunderstanding of the use of the word 'report'. The Claimant believed that to mean that Mr Felix was asking him to provide photos, and hence he had permission from Mr Felix to take his camera phone with him. No-one ever told the Claimant that this was not the meaning of 'report'. Mr Felix neither expressly told the Claimant not to take photos, nor did he expressly tell him he could.
70. The Tribunal decided that Mr Felix had not lied. He did not actively mislead HR with regard to what he had said to the Claimant. This detriment therefore did not occur.
71. This allegation is that the Respondent failed to prevent Ms Tamang from describing the Claimant as 'crazy'. The Tribunal found that Ms Tamang did not

say anything which was inappropriate or required to be corrected by the Respondent. Therefore, there was no failure on the part of the Respondent. This detriment did not occur.

Constructive Dismissal

70. The Claimant said that he resigned due to 4 specific points contained in his resignation letter dated 12 December 2021.

71. The Tribunal considered whether these 4 points amount to repudiatory breaches of the term of trust and confidence by the Respondent. By which, we considered whether the Respondent acted in such a way as to indicate that it no longer intends to be bound by the contract of employment.

72. If so, the Tribunal then considered whether the Claimant resigned in response to that breach within a reasonable time. Each of the points in the resignation letter were considered, in turn;

The suspension and warning

73. As set out above, the Respondent is entitled to both suspend and discipline an employee for use of a phone within the factory. This is set out in their policies. Suspension is a neutral act and does not indicate an outcome to the disciplinary before the investigation is completed. There is no fundamental breach of trust and confidence by suspending an employee.

74. Nor was there a fundamental breach in giving the Claimant a warning for his use of the phone in the factory. It is within the Respondent's disciplinary procedure to do so. The Claimant was given an appeal and an appropriate process was followed. His appeal took account of his points of mitigation. The tribunal therefore did not consider that these actions amounted to a breach of trust and confidence which warranted the Claimant to resign.

Jaspreet Singh's bullying

75. Whilst the lack of action by the Respondent at the time was noticeable and was later acknowledged by the Respondent, the Tribunal considered that had the Claimant thought that these actions by Jaspreet Singh or lack of action by the Respondent amounted to a breach of trust and confidence, he would not have remained in employment and continued to work for 12 months after the event which he complained about.

76. The Tribunal concluded that the period of time since the actions of Jaspreet Singh was too long to consider that the resignation was 'in response' and therefore that the Claimant had waived any breach. This was not therefore a timely response to a repudiatory breach.

The comment by KT

77. The Claimant didn't hear the comment at the time. He read it later when he obtained the notes. His issue in his resignation was that HR should have reprimanded Ms Tamang for saying this. Ms Tamang did not say anything inappropriate, even though the Claimant may have thought it to be so. Objectively that was not a reasonable interpretation of what was said. In any event, HR telling Ms Tamang of the Claimant's disability would be a breach of his privacy. There is no breach of trust and confidence in HR not telling Ms Tamang about the Claimant's disability. This cannot be a source of constructive dismissal.

Not dealing with his complaints in a timely manner

78. The Tribunal could not see how this could be a source of the Claimant's resignation. The documents show that before his resignation the Claimant was aware that his grievance had been decided on appeal and that he was being allowed to move to a day shift in dispatch as he had requested. Any delay therefore was no longer of significance as he had the outcome he wanted. This cannot have been a just cause for him to resign.

Failure to provide notes in a timely manner

79. It was accepted that the Respondent did not give the Claimant the notes of all the meetings in a timely manner, However this did not prevent him from appealing his grievance or disciplinary and he was successful in both. The Tribunal saw no action that would indicate that the Respondent no longer wished to honour the contract of employment.

80. The Tribunal therefore concluded that the Claimant had no just cause to resign and/or did so too late.

S.103A ERA

81. the Tribunal considered whether the Claimant's resignation for the reasons set out (in particular reason 1) was related to a protected disclosure;

82. As set out above, the Tribunal concluded that the Claimant indicated his resignation was because of his suspension and disciplinary warning. The Tribunal concluded that neither of these acts amounted to a fundamental breach. As set

out above; the Respondent was entitled to suspend and to give a warning about the Claimant's conduct. This was not directly related to his protected disclosure, but was about his conduct in obtaining the information he relied upon.

- 83. He therefore did not resign for reasons related to his protected disclosure .
- 84. The Claimant's claims are therefore dismissed.

Employment Judge S Cowen

Date:5 June 2024.....

Sent to the parties on: 12 June 2024

For the Tribunal Office

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>