EMPLOYMENT TRIBUNALS

Claimant: Mr L Touray

Respondent: Courtyard Leisure Limited

Heard at: Manchester **On:** 3-6 September 2024

Before: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: In person (with Ms Sutton, mother, on 3-4 September 2024)
Respondent: Mr M Ramsbottom, Consultant

JUDGMENT having been sent to the parties on 9 September 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a case which in the normal course of things would have been heard by a three person Employment Tribunal. However, due to the unavailability of a non legal member, the parties were asked and consented to me sitting on this case as a Judge sitting alone.

Claims and issues

2. The claimant claimed detriment suffered as a result of raising health and safety issues under s.44 Employment Rights Act 1996 (ERA) and detriment on the grounds of making protected disclosures under s.48 ERA. The complaints and issues were agreed to be as set out in a list of issues which is annexed to these reasons.

Evidence

3. I heard evidence at this hearing from the following witnesses: the claimant and, for the respondent, Ms Peaman, Mr Barker and Mr Murphy. I had witness statements for those witnesses. I also had witness statements from Charley Coop and Faran

Donkor for the claimant and from Nicola Simmons and James Allsopp for the respondent, although those witnesses did not attend to give evidence.

4. Two of the respondent's most significant witnesses (Mr Simmons and Mr Allsopp) did not attend to give evidence. Mr Barker told me that he had been unable to contact them. It does not appear that the respondent sought witness orders to compel their attendance although they had contact details for them.

5. Mr Simmons' witness statement had his name typed in the signature section and a date of 20 May 2022 put on his statement. The statement of Mr Allsopp had nothing in the signature section and no date on it. I had nothing to indicate its contents had been approved by Mr Allsopp.

6. Although I read all the statements of the witnesses who did not attend, I consider that I can give very little weight to the evidence of the witnesses who did not attend where their evidence is in dispute.

7. I had an agreed bundle of documents to which some further documents were added during the hearing.

8. One document which was admitted into evidence without the respondent accepting its authenticity (which I numbered pages 184-230) appeared to be an email from Mr Barker responding to questions put by the claimant in the appeal against the grievance outcome. Mr Ramsbottom viewed this in emails received by the claimant on the claimant's laptop and accepted that it appeared to have been received by the claimant. Mr Barker said he had no recollection of this email and it did not appear in his sent emails although he had kept all his emails. I do not consider it essential that I make a finding on whether this is an authentic email since I can reach my conclusions without reliance on the information in this email. However, if it had been necessary to decide on its authenticity, I would have concluded that it is more likely than not that it is an email received by the claimant from the respondent on 10 April 2021, around the same time as the claimant received the grievance appeal outcome. This is for the following reasons.

a. On 12 April 2021 the claimant acknowledged receipt of two emails from Mr Barker (page 176).

b. The email incorporates the contents of an email from the claimant dated 3 March 2021 sent as an appeal but taking the form of questions about various matters in the grievance report, with answers apparently added by Mr Barker after consulting with various witnesses.

c. Ms Peaman recalled having discussions with Mr Barker and recognised some of the comments attributed to her.

It is curious that the email does not appear in Mr Barker's sent emails, but sometimes emails are inadvertently deleted. Since this related to something back in spring 2021, it would not be surprising that Mr Barker does not specifically recall this email.

9. I consider there may have been failures of disclosure on both sides. We added in some documents during the hearing at the claimant's request and with the agreement of the respondent, other than the document I have referred to. The

claimant could not confirm that all of these documents had been previously disclosed to the respondent. There were some documents which I would have expected the respondent to have disclosed but which were not in the bundle and may not have been disclosed to the claimant, for example rotas which the claimant said he had asked for, and source material on which Mr Murphy drew for his grievance outcome report, such as email exchanges with witnesses, and the source material for the table of hours at page 117.

10. The claimant had referred in his witness statement to making a video on his phone on 27 September before leaving work. He said he had sent the respondent a link for this some time ago but Mr Ramsbottom (who has not had conduct of the case throughout) said he was not aware of this. If the video was not disclosed, the respondent had not asked to see it when made aware of it on receipt of the claimant's witness statement at the latest. During the hearing, at my request, the claimant showed this video to Mr Ramsbottom, who agreed that it was relevant and that I could view it. I then viewed the video three or four times during the course of the hearing, making notes on this.

Conduct of the hearing

11. I dealt with liability first, hearing evidence and submissions relevant to this and then giving oral judgment. I then went on to hear further evidence and submissions relevant to remedy and gave oral judgment on remedy. The claimant made an application for a preparation time order which I refused. These reasons incorporate the reasons for liability, remedy and the refusal of a preparation time order.

The Facts

12. The Courtyard is a busy pub with a large student clientele close to Manchester University and Manchester Metropolitan University.

13. The claimant's employment with the respondent as a chef began on 30 April 2019. He had a zero hours contract under which he was not obliged to accept work offered nor was the respondent obliged to offer him work. The claimant generally worked 2-3 days a week but there were times when he did not work at all during a week. The claimant also had other work including roleplay for the GMC, work for a charity and acting jobs.

14. In March 2020 the first national lockdown took place due to the Covid-19 pandemic and the business was closed for a period.

15. In the summer of 2020 restrictions were eased but, by August and September, Covid cases were rising again, particularly in the North West.

16. In September 2020 the pub was very busy with more food service than usual due to the requirements which had been introduced that food must be served with drink (reference to what people have called the scotch egg rule or the chip butty rule).

17. On 27 September 2020, the claimant arrived for work around 5.00pm. He found out from another staff member that Charley Coop (another chef and the claimant’s Kitchen Manager) had opened up and turned things on. The claimant knew that Mr Coop was self-isolating because Mr Coop’s partner had tested positive for Covid.

18. At 17:12 the claimant messaged Mr Coop. Mr Coop said he had come in because no-one knew how to turn stuff on in the kitchen and he had no choice.

19. At 17:22 there were further messages exchanged between the claimant and Mr Coop. The claimant said, “So you just tested positive and still came in?”. Mr Coop replied, “it was either Facetime Faron who was late anyway or just go in rapid and do it and Nick said to go in”. Mr Coop did not say that he did not know that he had tested positive until after he had arrived at work. In further messages that day when asked by the claimant when Mr Coop’s results came back, Mr Coop said it was late the previous night.

20. I prefer the contemporaneous evidence of the WhatsApp to the statement given by Mr Coop in the grievance and his statement for this hearing in finding that Mr Coop did in fact know that he had tested positive for Covid when he came in to turn the kitchen on in the morning of 27 September. At the least, I find that Nick Simmons knew when he required or agreed on the morning of 27 September that Mr Coop should go in to open the kitchen that Mr Coop was self-isolating because Mr Coop’s partner had Covid. Mr Coop and Mr Simmons agreed that Mr Coop should go in briefly to turn things on in the kitchen.

21. When the claimant learnt about this, he tried to speak to Nick Simmons and to Marcus Barker (neither of whom were at the premises) but he got no answer. At 18:09 the claimant messaged Nick Simmons, the General Manager, who said he was driving for the next couple of hours and that the claimant should speak to the managers. The claimant spoke to Andrea Peaman and Danny Gage who were the managers on duty that day. They did not feel that they had authority to make a decision to close the kitchen. I accept the claimant’s evidence, supported by what I have heard the claimant say on the video, that Danny Gage would have liked to close the kitchen but did not feel able to do so without the agreement of Mr Simmons or Mr Barker. Ms Peaman also tried to contact Nick Simmons and got the same response (that he was driving). Ms Peaman also tried contacting Public Health England for advice but they were not available on a Sunday.

22. During all this time, customers’ orders for food were being taken but not processed by the kitchen. At the time, in accordance with the regulations for the time, drinks could only be served if people ordered food, so there were a lot of food orders.

23. At 6.32pm, the claimant filmed a video of the kitchen with him providing a commentary explaining what was happening. He said in that recording that someone had tested positive for Covid and had been in the kitchen that day. He said he had taken it upon himself to turn off the kitchen because it was not safe. He said a manager had agreed to shut the kitchen but did not want to do so out of fear. He said he was filming this to protect his worker’s rights. He said he did not want any retribution and wanted to keep his job. Contrary to a submission made by the respondent, I did not find that the claimant’s voice was raised in that recording, I find that he spoke in a calm manner.

24. The respondent has not satisfied me that the claimant's tone in speaking to any of the managers on 27 September was aggressive. This would not be consistent with the tone of the video recorded at 6.32pm which I watched and heard.

25. The only witness who gave evidence for the respondent who had been present on 27 September was Ms Peaman. Her witness statement alleged that the claimant raised his voice and was becoming quite aggressive, but she did not specify what he was doing or saying which caused her to form that view. The account given by her in the grievance outcome report does not refer to the claimant raising his voice or being aggressive: it refers to the claimant being vehement and the forceful nature of his representations, which do not carry implications that the claimant was shouting or acting in some way which could reasonably be perceived as aggressive.

26. I accept that Ms Peaman was upset, but this does not satisfy me that it was improper behaviour on the part of the claimant which caused her to be upset. She was a very inexperienced manager left in a very difficult position.

27. The comments of Mr Gage and Mr Allsopp reported in the grievance investigation make some negative comments about the claimant, alleging that the claimant was "raving" and "beyond reason", but they do not identify any specific conduct which could reasonably have led them to reach those conclusions or which could reasonably be regarded as aggressive conduct. They did not allege that he had raised his voice. Mr Allsopp's witness statement is in a similar vein without specific allegations about anything the claimant did or said which is alleged to be unacceptable behaviour.

28. Ms Peaman then approached Mr Allsopp, another more senior manager, who was not on duty but was drinking at the pub. Mr Allsopp decided not to close the kitchen but he came and spoke to the claimant and told the claimant to go home. Mr Allsopp's account in the investigation report says that the claimant said before he left that he was going to report everyone. The claimant in his evidence said he did not recall saying this and thought he had decided on the way home to report to the police and council because of his concerns about safety, but he could not rule out having said this at the time. At some time after taking the video and before 7.00pm, the claimant left the premises.

29. The claimant did not say that he was resigning or that he would not be returning to work. If the respondent's managers thought, as alleged in various statements, that the claimant had or may have resigned, they took no steps to clarify this with the claimant. Some of the statements for this hearing and made for the grievance investigation assert that they thought the claimant had resigned, but they are unspecific as to what they say the claimant did or said that made them form this view. None of the witnesses say that any words used by the claimant were interpreted by them as words of resignation. Ms Peaman, the only witness for the respondent who gave evidence at this hearing and was present on 27 September, said in oral evidence that she did not think that the claimant would want to come back after having an argument with three managers.

30. The respondent has not satisfied me that any of the respondent's managers thought on 27 September that the claimant had resigned. Mr Allsopp telling the claimant to go home also appears inconsistent with the suggestion that the claimant was, by his conduct, resigning.

31. The claimant contacted the police after leaving the premises. Sometime later that evening the police and the council visited the Courtyard.

32. There is a difference between diary entries on pages 61 and 62 which remains unexplained. However, on the basis of one of those entries and the evidence of Ms Peaman, I find that the visit was likely to have been around 8.30pm. I find, based on the note at page 62, that the respondent's managers understood from what they were told that the visit was as a result of a concern having been raised with them about staff being forced to work with Covid rather than it being one of the routine visits occurring frequently during that stage of the pandemic. I consider it likely that the respondent's managers believed this was because the claimant had reported them to the police and the council, given the earlier discussions with the claimant which (according to the information given by Mr Allsopp in the grievance investigation) included the claimant saying that he was going to report them.

33. The pub was closed that evening. The respondent says this was a decision of Mr Allsopp, not because of the police requiring this. I find that the closure would not have happened had the police and council not visited since nothing else had changed since the claimant left the premises. If it was Mr Allsopp's decision rather than being required by the police, it was a decision influenced by things said by the council and/or the police.

34. I accept Ms Peaman's evidence that new measures relating to keeping staff in bubbles were implemented after 27 September, and I consider this most likely to be as a result of advice received in that visit. In accordance with Ms Peaman's evidence, the bubble system was communicated to staff by the Facebook group, but since (as I will go on to find) the claimant was no longer a member of that group, he was not informed of that new bubble system.

35. The pub was closed during the day on 28 September 2020 for a deep clean and then reopened at 4.30pm.

36. On 29 September 2020, the claimant was removed from the staff Facebook group – this appears to have been by Mr Allsopp but with the agreement of Mr Simmons. This Facebook group was used to send out rotas amongst other things. This has been confirmed by Ms Peaman in oral evidence.

37. Mr Allsopp in his witness statement says that the claimant was removed from the Facebook group because he agreed with Mr Simmons that the manner of the claimant's departure strongly suggested that the claimant was not coming back. This is repeated in a statement given in the grievance investigation. I note that a different explanation is given in the alleged Barker reply to questions in April 2021, with Mr Allsopp reported as saying that the claimant was removed from the Facebook group as there was a potential that false information would be shared among the staff and it was necessary to remove him while an internal investigation was conducted with PHE to establish if any breaches of safety had occurred. However, as I explained earlier, I am not relying on that document for anything said in it because of the doubts Mr Barker has raised about its authenticity.

38. The respondent's submissions suggest that the removal from the Facebook group and other alleged detriments were because of the way the claimant behaved on 27 September. Mr Allsopp, who removed the claimant from the group, did not say this in his statements for this hearing and the internal investigation. The statements of Mr Simmons also assert that the claimant was removed from the Facebook group because he and Mr Allsopp had concluded that the claimant had resigned. There was

no effort to contact the claimant by any of the managers before or after his removal from the Facebook group to clarify if he had resigned.

39. The claimant sent Nick Simmons a message on 29 September asking about his removal from the Facebook group. He asked if he still had a job. Mr Simmons replied, "yes". Mr Simmons said he did not know why the claimant had been removed and said he would put him back in the group, but he never did so.

40. On 29 September 2020, the respondent put out a Facebook post saying that they were open and referring to "vicious rumours to the contrary".

41. The claimant, unfortunately, caught Covid and had a period of self-isolation from 29 September until 18 October.

42. In the period 29 September to 1 October there were messages between Mr Simmons and the claimant about the claimant self-isolating and the claimant waiting for test results. The claimant said he had not yet been added back to the Facebook page. Mr Simmons replied, "Busy at the min. You aren't on any shifts as self-isolating if that helps".

43. On 2 October 2020, the claimant sent a message to Nick Simmons setting out his safety concerns and seeking assurances for the future. Mr Simmons did not reply to this message.

44. On 3 October 2020, the claimant got confirmation of a positive Covid test result. He sent it to Nick Simmons on 4 October. There was no reply to this, and Mr Simmons did not check in to see how the claimant was. The claimant considered that this indicated that Mr Simmons did not care. Mr Simmons said in his witness statement that he attempted to call the claimant on a number of occasions but got no reply, but I prefer the claimant's evidence that he received nothing to suggest that this had been done.

45. On 13 October 2020, by WhatsApp message, Mr Coop asked the claimant when he would be available the following week. The claimant agreed that he would work Thursday, Saturday and Sunday.

46. On 18 October 2020, when a rota was sent out by a chefs' WhatsApp group, the claimant found he had been removed from the shifts he had agreed with Mr Coop. He asked Mr Coop about this and Mr Coop said he did not know why this was. I have had no evidence from the respondent as to why the claimant was not given the hours agreed by Mr Coop.

47. The practice prior to 27 September 2020 was that the claimant agreed his hours with Mr Coop. I accept, as asserted by the respondent, that the final say on the rotas was that of Mr Simmons, but the claimant was not aware of shifts which he had agreed with Mr Coop having been changed prior to 18 October 2020.

48. Mr Barker says that the lack of work for the claimant was because the pub was becoming less busy and they prioritised hours for full-time staff over zero hours staff. I note as an aside that whether (as the claimant asserts) this was unlawful under other legislation is irrelevant for what I have to decide in relation to the detriment complaints.

49. Mr Barker relies on the table at page 117 in the bundle, which was part of the grievance outcome report, for the data supporting his argument. The source data for this table has not been provided. Taking the table at face value, the number of hours available in the kitchen, in fact, increased in the week ending 25 October 2020 and was the highest since the week ending 20 September 2020. A substantial number of these hours appear, on the face of the table, to relate to full-time and redeployed staff in the kitchen. However, the number of kitchen hours available to part-time staff (which I understand to be a reference to staff on zero hours contracts) was still slightly higher than the previous week and the third highest of the seven weeks shown on the table.

50. The statement of Nick Simmons asserted that the reason for the claimant not being given work was that he had not informed anyone that he was fit to return to work or requested any shifts. This is incorrect given the messages exchanged between the claimant and Mr Coop. In addition, Mr Simmons refers to the prioritisation of full-time and salaried workers over part-time workers on zero hours contracts.

51. Around 21 October 2020, Mr Coop told the claimant in a message that he had never seen it that busy and that they were going to have three of them in the kitchen. The claimant told Mr Coop that he could work Thursday night, Sunday day or night the following week, which would be the week ending 1 November 2020. Mr Coop replied, “Sound, we’ll sort it once rota done”. The claimant was not given these hours to work, and I have not been shown the rota for the week ending 1 November 2020.

52. On 22 October 2020, the claimant was removed from the WhatsApp group by Mr Barker. Mr Barker asserted in his witness statement that this was because he had been informed by managers that the claimant had left. His oral evidence, however, did not support that he had been given clear information that the claimant had left the business. He said he was getting confusing messages. He then suggested that he may have closed the group down to everyone at this time. This seems unlikely since page 182 shows the claimant specifically being removed and is not prefaced by any message to all staff that the group was to be closed. It also seems to be an unlikely time to be closing down a method of communication with staff when many people were anticipating that there might be another lockdown on the horizon.

53. On 24 October 2020 the claimant worked one shift. The claimant had not been put on the rota to work that day but had agreed with another chef to cover his shift. Another employee said to the claimant when seeing him “I thought you’d been sacked”. I accept the claimant's evidence that the managers on duty that day (Mr Gage and Mr Allsopp) did not speak to the claimant. However, the claimant wrote in a subsequent message to Mr Barker that the shift went relatively smoothly.

54. On 24 October 2020, the claimant messaged Mr Barker asking why he had been removed from the staff WhatsApp group. He also asked about entitlement to sick pay. He got no reply from Mr Barker. Mr Barker said in evidence that he had not got a clue why he did not reply.

55. On 25 October 2020, the claimant followed up the message to Mr Barker with another one with a simple question mark since he had not received a reply. He received no reply to this further message.

56. In relation to the week ending 1 November 2020, it is unclear from the evidence I have had as to exactly when, during that week, the business closed. It appears to

have been around 30 or 31 October or possibly at the latest 1 November. The second national lockdown was announced on 31 October and legally took effect on 5 November 2020.

57. It is unclear, in relation to the figures provided on page 117, how many days in the week ending 1 November 2020 these hours relate to. The claimant worked no shifts in that week. He could not see the rota since he was no longer on the Facebook group and apart from the exchange with Mr Coop he was not asked whether he could work on any particular days. As I have noted, the rota for that week is not in the bundle.

58. I have no information as to who worked in the kitchen that week and no witnesses have been able to tell me who (apart from the claimant) was employed on a zero hours' contract.

59. I find, based on the table, that the total hours worked in the week ending 1 November 2020 declined but, since I do not know how much of the week was worked, I cannot tell whether the figure is for the full week or one or more days short of a week. The number of hours in the table said to be available to part-time staff reduced to 4.5 hours from 32.5 the previous week. I accept, on the basis of this table, that there is a decline in this week of the hours being offered to zero hours staff working in the kitchen due, to some degree, to an overall reduction in hours and due to a lower percentage of those hours being offered to employees on zero hours contracts.

60. As previously noted, the business closed some time in the period 30 October to 1 November 2020. All staff, including the claimant, were put on furlough for the week ending 8 November 2020 and subsequent weeks during that lockdown.

61. The claimant initially received payments of just over £7 a week for furlough. This was subsequently increased after the claimant brought his grievance. I find that the payment was calculated as an average of pay in the four weeks in October. Since the claimant only worked one shift during that period and was self-isolating for several weeks his payment was low. I accept Mr Murphy's evidence that he calculated the payments for all staff based on the prior four weeks because this is what he had done for the previous furlough. The respondent subsequently accepted that the calculation of furlough pay was wrong and recalculated, correcting this in March 2021 as part of the grievance outcome.

62. The claimant presented a grievance on 22 December 2020. I accept his evidence that he had previously tried to send this on 14 December to the General Manager but, having had no reply, he re-sent it on 22 December 2020 to the general email address for the respondent. The grievance included a grievance about unjustified cutting hours, detriments for raising legitimate health and safety concerns and public interest disclosures and reduced furlough payments.

63. The claimant began early conciliation with ACAS on 17 December 2020.

64. Peter Murphy, the respondent's bookkeeper, was appointed to hear the grievance. He proposed to the claimant a meeting on 22 January 2021. He wrote that he would be accompanied by Nick Simmons who would take minutes. The claimant wrote on 21 January 2021 that he could not attend the grievance meeting because of other work commitments. He also objected to Mr Simmons attending as

he was one of the parties mentioned in the grievance. Mr Murphy made further attempts to arrange a grievance meeting with the claimant, but the claimant said to go ahead without him and that he would answer questions in writing. The claimant gave evidence that he was not in a union and the respondent would not let him bring an advocate.

65. On 28 January 2021 the ACAS early conciliation certificate was issued and the claimant presented his claim to this Tribunal on that day.

66. On 17 February 2021 Mr Murphy produced his grievance outcome. With the exception of correcting the furlough payments, he did not uphold any of the grievances. He attached a grievance report to his letter.

67. On 3 March 2021, the claimant sent, by way of an appeal, a form of questions about the grievance report.

68. On 29 March 2021 (about two months after Tribunal proceedings had begun) James Turner, the respondent's new manager, asked the claimant if he was coming back to work and said he would invite the claimant to join the Facebook work group. The claimant replied that he was not currently available but suggested he contact him again later. I understand no work has been arranged by either party for the claimant at the Courtyard since then.

69. On 9 April 2021, Mr Barker, who was dealing with the appeal, sent the claimant an appeal outcome. The appeal was unsuccessful.

70. The business reopened on 12 April 2021.

71. I heard no evidence from the respondent about any health and safety committee or there being a health and safety representative at the Courtyard.

Submissions

72. Mr Ramsbottom made oral submissions on behalf of the respondent. The respondent submitted that all events arose from the interactions between the claimant and the managers on 27 September 2020. The managers were concerned about how the claimant behaved that day; about the manner in which he raised his health and safety concerns. His treatment was not because he had raised protected disclosures. The burden fell on the respondent to show a reason for his treatment. The respondent submitted that they had done that.

a. In relation to the staff communication channels, the claimant was removed because the manner of the claimant's departure suggested he was not coming back. Whether or not the claimant had resigned, Andrea Peman could not see how he could come back.

b. In relation to removal from the rota, the respondent submitted that he was given hours on 25 October and then was not given work because of a reduction in hours as we were heading into a second lockdown.

c. The claimant's Whatapp message on 2 October 2020 was not ignored. There was an email trail around Covid results. The business was going

through an unprecedented upheaval. It was not surprising every email was not replied to.

d. In relation to 24 October 2020, the claimant's claim did not say he was ignored. The claimant did not say how they created a hostile environment.

e. The respondent accepts furlough pay was miscalculated. This was done for all hourly paid because of confusion as to how this should be done.

73. The respondent accepted that, in relation to the s.44 complaint, either 7.1 or 7.2 in the list of issues applied. The respondent accepted that the claimant, on 27 September 2020, brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

74. The claimant read out his submissions from a document which he then emailed to the Tribunal and the respondent. I do not seek to summarise all his submissions on the facts, since this document can be read, if required.

75. The claimant's submissions included that the respondent's assertions were full of contradictions. They had given contradictory reasons for why the claimant had been removed from staff communication channels. The respondent said he was not offered hours because of reduced trade but Charlie Coop said the pub was busier than ever.

The Law

76. The law which is relevant for these complaints is as follows.

77. The provisions relating to protected disclosure detriments are contained in section 47B of the Employment Rights Act 1996. Section 47B(1) provides:

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

78. Since it is conceded that the claimant made protected disclosures by his conversations with managers on 27 September 2020, it is not necessary for me to set out the provisions about what constitutes a protected disclosure.

79. The health and safety provisions are contained in section 44 of the Employment Rights Act 1996. Subsection (1) of section 44 provides that an employee has the right not to be subjected to any detriment by an act or any deliberate failure to act by his employer done on one of the grounds set out in (a)-(c) of that subsection. The relevant parts for this claim are in subsection (c). This provides that:

> "Being an employee at a place where (1) there was no such representative or safety committee, or (2) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety."

80. Detriment is not defined in the Employment Rights Act 1996 but will have the same meaning as has been interpreted in case law about discrimination. In the case of **Ministry of Defence v Jeremiah** [1980] ICR 13 CA, Lord Justice Brandon said that detriment was putting someone under a disadvantage. Lord Justice Brightman said that there was a detriment if a reasonable worker would or might take the view that the action of his employer was in all the circumstances to his detriment.

81. Section 48(2) of the Employment Rights Act 1996 provides that, in relation to a complaint, (including a complaint that the worker has been subjected to a detriment because of making a protected disclosure or raising health and safety concerns as defined in section 44):

> "On such a complaint it is for the employer to show the ground on which any act of deliberate failure to act was done."

82. In a case which related to protected disclosures, **Fecitt v NHS Manchester (Public Concern at Work intervening)** 2012 ICR 372 CA, the Court of Appeal held that the employer must show that the protected disclosure did not materially, in the sense of more than trivially, influence the employer's treatment of the claimant. That same principle would apply to cases brought under the health and safety provisions in section 44 of the Employment Rights Act 1996.

Conclusions

83. It was conceded that the claimant made protected disclosures by raising health and safety concerns with his employer and the police on 27 September 2020.

84. The respondent had not disputed in its amended grounds of resistance that one of the circumstances in section 44(1)(a)-(c) (that is the health and safety provisions) applied, although it did not identify which one.

85. In submissions, Mr Ramsbottom suggested, on instructions, that there was a health and safety representative, but I had heard no evidence to that effect. Mr Ramsbottom accepted that either 7.1 or 7.2 in the List of Issues (which reflect the two limbs of 44(1)(c) of the Employment Rights Act 1996) were satisfied. Mr Ramsbottom agreed that the live issues in the section 44 complaint were the same as for the protected disclosure complaints, that is whether the claimant suffered the alleged detriments and, if so, whether that treatment was on the grounds that he had done a protected disclosure and/or raised the health and safety concerns.

<u>Detriments</u>

86. I deal first with the alleged detriments and I take together issues 6.2 and 6.3 from the List of Issues i.e. whether the alleged treatment took place and, if it did, whether the claimant was subjected to a detriment by that treatment.

(a) *That on 28 September 2020 Nick Simmons and other managers failed to contact the claimant to clarify whether he had resigned.*

87. I have found that Nick Simmons and other managers did fail to contact the claimant after 28 September 2020 to clarify whether he had resigned. However, I also found that the respondent had not satisfied me that any of the respondent's managers thought on 27 September that the claimant had resigned. Given this, I do not conclude

that failing to contact the claimant to clarify whether he had resigned was to subject the claimant to a detriment.

(b) Removing the claimant from the staff communication channels – Facebook on 28 September 2020 by Mr Allsopp and the WhatsApp group on 22 October 2020 by Mr Barker.

88. I have found that the claimant was removed from the staff Facebook group on 28 September 2020 by Mr Allsopp. I conclude that this was detrimental treatment. The Facebook group was used for the communication of information to staff, including about rotas. Once he was removed from the group, the claimant could no longer see this information, although I note the rota for the week ending 25 October was reproduced on the chefs' WhatsApp group to which the claimant continued to belong.

89. I have found that the claimant was removed from the staff WhatsApp group by Mr Barker on 22 October 2020. I conclude that the claimant could, and did, reasonably take the view that this was to his detriment since the WhatsApp group was used for the communication of some information to staff, albeit not perhaps to the same degree as the Facebook group. I conclude that this was subjecting the claimant to a detriment.

(c) The claimant unfairly removed from the rota after initially being offered shifts causing him loss of earnings and emotional distress?

90. This refers to the claimant not being given the hours to work in the week ending 25 October 2020 that he had agreed with Mr Coop. Previously, the claimant had always been put on a rota for the shifts agreed with Mr Coop, even though I have accepted that Nick Simmons had the final say on rotas.

91. I conclude that not being given the three shifts agreed with Mr Coop was to the claimant's detriment. This adversely affected him financially. Although he was able to arrange by covering for another chef to work one shift that week, he worked only one, rather than three, earning less as a result. I conclude that the claimant thought the removal was unfair since he thought it to be in retribution for raising his concerns on 27 September 2020, and I conclude that not being given the expected shifts caused the claimant distress. Whether it is objectively unfair is not something I need to decide to reach a conclusion on his complaints. Whether the treatment was on the grounds of the protected disclosure of raising health and safety concerns is something I return to when considering the issue of causation.

(d) Ignoring the claimant's WhatsApp message on 2 October 2020 regarding safety concerns and his Covid-19 diagnosis on 4 October 2020.

92. Nick Simmons did not reply to the claimant's message on 2 October 2020. I conclude that this was subjecting the claimant to a detriment. The claimant had legitimate concerns about safety following what had happened on 27 September 2020. He was seeking assurances about safety for when he returned to work after self-isolating. It was reasonable for him to consider the lack of a reply was to his detriment. He did not have the assurance he sought for the future, that his employer would take appropriate safety steps.

93. Nick Simmons did not reply to the claimant sending him a copy of his positive Covid test result. Whilst it is true that the email did not specifically seek a reply, I find

that the claimant considered the lack of a response to indicate a lack of care on the part of Nick Simmons. Coupled with a lack of response to the claimant's email on 2 October, I conclude that the claimant reasonably considered the lack of a reply was to his detriment – his employer was not engaging with him in relation to news that the claimant did have what was, at the time, a potentially very serious condition.

(e) After 18 October 2020, the end of the claimant's period of isolation, not giving the claimant hours to work apart from on 24 October 2020, the claimant substituting for another chef by private agreement with that chef.

94. I have dealt with the week ending 25 October 2020 already in relation to a previous detriment, so I consider under this heading weeks from the week ending 1 November 2020 until the presentation of the claimant's claim in January 2021.

95. I found that the claimant had offered hours to Mr Coop for the week ending 1 November 2020 in a WhatsApp message and Mr Coop said he would sort it out when the rota was out, but the claimant was not notified or given any hours in that week. I conclude that the claimant was subjected to a detriment by not being given any hours to work in that week.

96. After the business closed, around 30 October 2020, there was no work available, with all staff on furlough until some time after the claimant presented this claim. I conclude that the claimant was not subjected to detrimental treatment in relation to not being given hours to work for the week ending 8 November 2020 up to the date of presentation of his claim in January 2021.

(f) On 24 October 2020 the managers Danny Gage and James Allsopp ignored the claimant, not asking him about the incident on 27 September, his supposed conduct, safety measures or recovery from Covid, and a staff member Tash said that he thought the claimant had been sacked.

97. I have accepted the claimant's evidence that these managers did not speak to him when he attended for work on 24 October 2020. I conclude that this was detrimental treatment making it an unpleasant atmosphere for the claimant to work in.

(g) Initial email miscalculating the claimant's furlough payment, although this has since been rectified.

98. The claimant was initially given a very low furlough payment of £7.38 per week which was rectified in March 2021 increasing to £44.22 per week. I conclude that receiving such a low and inaccurate payment was detrimental treatment.

Whether the detriment treatment was on the ground that the claimant made a protected disclosure and/or for bringing health and safety concerns to his employer's attention

99. The protected disclosures and the raising of health and safety concerns are the same things done by the claimant, so I can deal with the issue of why those were done in relation to both types of complaint at the same time. I deal only with those matters which I have concluded, for the reasons I have already given, were subjecting the claimant to detrimental treatment.

100. In accordance with section 48(2) of the Employment Rights Act 1996, it is for the respondent to show the ground on which the detrimental treatment was done. They must satisfy me that the protected disclosure or raising of health and safety concerns did not materially (in the sense of more than trivially) influence their treatment of the claimant.

Removing the claimant from the Facebook group

101. This was done by Mr Allsopp on 28 September, the day after the claimant made his protected disclosures of raising health and safety concerns. Neither Mr Allsopp who removed the claimant from the Facebook group, nor Mr Simmons, who appears to have been involved in the decision, attended to give evidence. Both said in their witness statements that the claimant was removed from the Facebook group because they had concluded that he had resigned.

102. I conclude, based on facts I have found, that the claimant did not do or say anything on 27 September 2020 to suggest he was resigning. I conclude that the respondent's managers could not reasonably have concluded that the claimant was resigning. If they were uncertain about his intentions, I would have expected them to clarify this with him before taking the step of removing him from the Facebook group. Indeed, when the claimant contacted Nick Simmons on 29 September and asked if he still had a job, Nick Simmons said he did. This is inconsistent with believing the claimant had resigned.

103. It appears from Mr Ramsbottom's submissions that he may have been arguing that this and other detrimental treatment was because of the manner of the claimant raising his concerns, alleged to be in an aggressive way, rather than being in any material sense because of the protected disclosures of raising health and safety concerns. There are cases where detrimental treatment is found not to be on the grounds of a protected disclosure but because of the way that a claimant behaved when making a disclosure, but great care has to be taken, firmly based on the facts, if such a distinction can be drawn. I do not consider that the evidence in this case supports such an argument in relation to this or any of the other detrimental treatment. I have found that the claimant did not behave aggressively. In any event I consider this submission, if I have correctly understood it, does not reflect the evidence given by the witnesses directly involved in the decision to remove the claimant from the Facebook group.

104. Since I have rejected the explanation given by the respondent for the removal of the claimant from the Facebook group, the respondent has failed to satisfy me that the detrimental treatment was not materially influenced by the protected disclosures of raising of health and safety concerns. I conclude, therefore, that the removal from the Facebook group was on the grounds of the claimant making protected disclosures/raising health and safety concerns.

Removing the claimant from the Whatsapp group

105. This was done by Mr Barker on 22 October 2020. Mr Barker's evidence as to the reason why this was done was inconsistent. Mr Barker asserted, in his witness statement, that this was because he had been informed by managers that the claimant

had left. His oral evidence, however, did not support that he had been given clear information that the claimant had left the business. He said he was getting confusing messages. He then suggested that he may have closed the group down to everyone at this time. As I noted in my findings of fact, this seems unlikely since the message shows the claimant specifically being removed and is not prefaced by any message to all staff that the group was to be closed. It also (as I have previously noted) seems to be an unlikely time to be closing down a method of communication with staff.

106. The respondent has failed to satisfy me that the detrimental treatment was not materially influenced by the protected disclosures/raising health and safety concerns. I conclude that the removal from the WhatsApp group was on the grounds that the claimant made protected disclosures of raising health and safety concerns.

Removal from the rota after initially being offered shifts (w/e 25 October 2020)

107. This related to not being given hours to work in the week ending 25 October 2020, after the claimant had agreed with Mr Coop that he would work three shifts that week.

108. The respondent submits, and Mr Barker gave evidence, that the lack of work for the claimant was because the pub was becoming less busy and they prioritised hours for full-time staff over zero hours staff. Mr Simmons also refers to prioritisation of full-time workers. I reject this explanation in relation to the week ending 25 October 2020. The table on page 117, taken at face value, does not support this argument. The number of hours available in the kitchen that week was the highest since the week ending 20 September 2020, and the number of kitchen hours available to part-time staff was still higher than the previous week. The table appears consistent with Mr Coop's message to the claimant around 21 October 2020 that he had never seen it so busy. Pubs were still open at this time and people wanting to drink had to order food to go with drink, making the kitchen busier than it would have been outside pandemic times when many people would have gone to the pub to drink but not to eat.

109. Mr Simmons, the respondent says, (and I have accepted) had the final say on the rotas. Mr Simmons asserted in his statement, in addition and in apparent contradiction to the reason given about prioritising full-time workers, that the reason the claimant was not given work was that he had not informed anyone he was fit to return to work or requested any shifts. This explanation has been demonstrated to be incorrect by the messages between the claimant and Mr Coop. The claimant was following the procedure used prior to the week ending 25 October 2020 to arrange shifts by contacting Mr Coop – he had not been informed of any change in the procedure.

110. I have accepted based on Ms Peaman's evidence that, after the visits on 27 September 2020, the respondent was trying to organise staff into bubbles. The claimant was not informed of this. However, even if it is correct that the claimant would be allocated to work for the same chef or chefs each time, this does not explain why he does not appear at all on the rota produced for the week ending 25 October 2020.

111. In practice the claimant worked on 24 October 2020 but this was not because he had been allocated a shift on the rota but rather because he arranged directly with another chef to cover for that chef.

112. I reject the respondent's explanations for not allocating the claimant shifts in the week ending 25 October 2020. The respondent has failed to satisfy me that the detrimental treatment was not materially influenced by the protected disclosures/ raising health and safety concerns. I conclude that the removal from the rota in the week ending 25 October 2020, after having agreed shifts to work with Mr Coop, was on the grounds that the claimant made protected disclosures/raising health and safety concerns.

Ignoring the claimant's Whatsapp message on 2 October 2020 regarding safety concerns and his Covid diagnosis on 4 October 2020

113. No explanation has been provided by Nick Simmons in his witness statement for ignoring these messages. Mr Ramsbottom has suggested in his submissions that this was because Nick Simmons was busy, with the business going through unprecedented upheaval and it was not surprising every email was not replied to. This is speculation rather than evidence. Although I would accept these were very difficult times and Mr Simmons may not have had time to respond to everything, these were significant emails, particularly the one seeking assurances about safety.

114. The respondent has failed to satisfy me that the detrimental treatment was not materially influenced by the protected disclosures of raising of health and safety concerns. I conclude that the failure of Mr Simmons to reply to the emails was on the grounds that the claimant made protected disclosures/raised health and safety concerns.

After 18 October 2020, not giving the claimant hours to work (apart from 24 October)

115. I have already dealt with the week ending 25 October 2020 in relation to an earlier detriment, so I deal now with the week ending 1 November 2020 onwards.

116. I concluded that there was detrimental treatment in relation to the week ending 1 November 2020 but not in the period week ending 8 November 2020 until presentation of the claim in January 2021 during which period the business was closed and all employees on furlough, so I only deal now with the week ending 1 November 2020.

117. The evidence in relation to the week ending 1 November 2020 is unclear in some respects, as identified in my findings of fact. The business closed at some point during this week, which may have been as early as 30 October 2020. No rota for the week is included in the bundle and I have no evidence as to who, apart from the claimant, in the kitchen staff was on a zero hours' contract. I have accepted that the hours available to zero hours kitchen staff reduced to 4.5 hours from 32.5 the previous week. At most, therefore, if the claimant had been allocated all the available hours, he would have been given 4.5 hours to work. I note again that even if (as asserted by the claimant) it was unlawful under other legislation to prioritise full-time staff, this does not assist in whether the failure to give the claimant hours was on the grounds of making protected disclosures/raising health and safety concerns.

118. I previously concluded that in relation to the week ending 25 October 2020 the claimant was not given hours agreed with Mr Coop on the grounds of making protected disclosures. I consider it more likely than not that this reluctance to allocate work to the claimant would continue. This is supported by the removal of the claimant from

the staff channels of communication (the WhatsApp group and the Facebook group), suggesting an attempt to cut ties with the claimant.

119. These factors, together with the unsatisfactory evidence relating to the week ending 1 November 2020, lead me to conclude that the respondent has not satisfied me that the respondent not offering the claimant any hours was not materially influenced by the protected disclosures/raising health and safety concerns. I conclude, therefore, that the failure to allocate the claimant any shifts to work in the week ending 1 November 2020 was on the grounds that the claimant made protected disclosures/raised health and safety concerns.

On 24 October 2020, the managers, Danny Gage and James Allsopp, ignored the claimant

120. The respondent has provided no explanation for the managers not speaking to the claimant. The respondent, therefore, has not satisfied me that the respondent managers ignoring the claimant on 24 October 2020 was not materially influenced by the protected disclosures/raising of health and safety concerns.

121. I conclude that the managers ignoring the claimant on 24 October 2020 was on the grounds that the claimant made protected disclosures/raised health and safety concerns.

Initially miscalculating the claimant's furlough payment

122. I concluded that this was detrimental treatment. However, I accepted the evidence of Mr Murphy, who did the calculations, that he used the same reference period for all employees doing what he had done in calculating furlough payments during the previous lockdown. Whether or not there was some guidance available at the time which should have suggested a different calculation (and if there was this has not been produced for me), I accept that Mr Murphy simply did what he had done before. He subsequently recognised that this was incorrect and put it right.

123. The respondent has satisfied me in relation to this detrimental treatment that the treatment was not materially influenced by the protected disclosures/raising health and safety concerns, and this complaint is not well-founded.

Remedy

124. In relation to loss of earnings, the claimant has limited his claim for loss of earnings to the two weeks during which I found he had suffered detrimental treatment by not being allocated shifts at work. The parties have agreed that the claimant was paid at the National Minimum Wage rate and that a shift was five hours' work. The claimant was aged 24 in October 2020.

125. The applicable National Minimum Wage rate for someone aged 21-24 at that time was £8.20. The claimant lost the opportunity to work two of the three shifts he had agreed with Mr Coop for the week ending 25 October 2020. I conclude his loss of earnings for that week was for ten hours' work (so two shifts): 10 x £8.20 = £82.

126. In the week ending 1 November 2020, the claimant could have been allocated 4.5 hours' work. Although there is no certainty about whether he would have been

given this work but for the detrimental treatment, I consider it just and equitable to award him compensation for 4.5 hours' work for that week, so 4.5 x £8.20 = £36.90.

127. Adding those two together, the total financial loss is £82 + £36.90 = £118.90.

128. In relation to injury to feelings, I accept the claimant's evidence as to how the detrimental treatment made him feel, as expressed in his original witness statement, the additional injury to feelings statement and his oral evidence. I note, particularly, his upset at being painted as an aggressor, which I have found he was not, when he was acting on genuine and real health and safety concerns. I accept that the upset had an impact on his sleep and his behaviour towards family and friends. I accept also that the failure to allocate work to him made him worry about his financial position.

129. The claimant has asked for £9,000 in compensation for injury to feelings, putting his injury at the top end of the lower Vento band, having apparently sought some advice about this. The respondent does not resist an award of this amount. I consider an award of £9,000 to be appropriate having regard to the injury suffered by the claimant.

130. The total award to the claimant, adding those things together, is therefore £9,118.90.

Application for Preparation Time Order

131. I refused an application from the claimant for a preparation time order.

132. The power to make a preparation time order and the circumstances in which it can be made are contained in rule 76 of the 2013 Rules of Procedure. Subparagraph 1 of that rule provides that:

> "A Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:
>
> (a) A party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) Any claim or response had no reasonable prospect of success."

133. Point (c) has no relevance to this application as it relates to postponements.

134. The claimant relies on sections (a) and (b).

135. In relation to (a), the claimant argues that there was unreasonable conduct on the part of the respondent with them making false or exaggerated allegations, for example describing the claimant as aggressive and intimidating.

136. I have found, as a matter of fact, that the claimant was not aggressive and did not behave in any inappropriate way on 27 September 2020. However, I accept that Ms Peaman was genuinely upset by events on that day.

137. I consider the respondent came close to unreasonable behaviour by labelling the claimant "aggressive" in their witness statements. However, I cannot be confident that the respondent's witnesses knew that they were painting a false picture when they described the claimant in this way. Ms Peaman generally struck me as a witness attempting to assist the Tribunal by giving what she considered to be a true account of events. I consider, however, that her recollection has been affected by the emotion she felt on the day when she was placed in the very difficult position, as an inexperienced manager operating in unprecedented times, being asked to close the kitchen and not being able to contact the General Manager or owner of the business for guidance.

138. The fact that I have not accepted the respondent's version of events does not mean that they knew they were not telling the truth. I do not, therefore, consider that the threshold of unreasonable conduct is met.

139. The amount of printing etc. that the claimant had to do to prepare for this hearing (whilst not diminishing it in any way) is not one of the grounds on which I could make an award for a preparation time order.

140. The other ground that the claimant has relied on is that the response had no reasonable prospect of success. I consider that the respondent should have realised, after evaluating their witness and documentary evidence, that they had little prospect of successfully defending the claim, given the inadequacy of their explanations for most of the detrimental conduct. However, I do not consider that I can say that the response had no reasonable prospect of success.

141. For these reasons I conclude that the conditions for being able to make a preparation time order are not met and I refuse the application.

Employment Judge Slater
Date: 16 October 2024

REASONS SENT TO THE PARTIES ON
22 October 2024

FOR THE TRIBUNAL OFFICE

ANNEX
Agreed List of Issues

1. The claimant was employed by the respondent, who operates a licensed premises in Manchester city centre, as a Chef, from 30 April 2019 on a Zero

Hours contract. Early conciliation started on 17 December 2020 and ended on 28 January 2021. The claim form was presented on 28 January 2021.

2. The claimant alleges he made protected disclosures about health and safety in the workplace during the Covid 19 pandemic and that he was subjected to detriments because of those disclosures. The Respondent denies the Claimant was subjected to any detriments for making protected disclosures. The Respondent also contends the Claimant worked a Zero Hours Contract and remained on the Respondent's books available for work but never contacted them about his availability.

3. It is accepted by the Respondent at paragraph 28 of the ET3 response (Bundle page 33) that the issues raised by the Claimant in his claim form relating to health and safety concerns within the Respondent's business would qualify as protected disclosures.

The Complaints

4. The claimant is making the following complaints:

   4.1 Detriment suffered as a result of raising legitimate health and safety concerns.

   4.2 Detriment suffered as a result of making a protected disclosure (whistleblowing).

The Issues

5. The issues the Tribunal will decide are set out below.

6. Protected disclosure detriment (Employment Rights Act 1996 section 48)

   6.1 The respondent accepts that the claimant made protected disclosures by the following:

   On 27 September 2020, the Claimant disclosed to his employer and contacted 111 (Police) and made a complaint that the Respondent was not following COVID-19 regulations by allowing a Chef to undertake work despite knowing he was legally required to self-isolate.

   6.2 Did the respondent do the following things:

(a) On 28 September 2020, Nick Simmons and other managers failing to contact the claimant to clarify whether he had resigned.

(b) Remove the Claimant from the staff communication channels, Facebook on the 28th of September 2020 by the manager, James Allsopp (agreed in Mr Allsopp's witness statement), and WhatsApp on the 22nd October 2020 by the owner Marcus Barker (See page 182 of Bundle).

(c) Was the Claimant unfairly removed from the Rota after initially being offered shifts, causing him loss of earnings and emotional distress?

(d) Ignoring the claimant's WhatsApp message on 2nd October 2020 regarding safety concerns (see page 78 of the bundle) and his COVID-19 diagnosis on 4th October 2020 (see page 79 of the bundle).

(e) After 18 October 2020 (the end of the claimant's period of isolation), not giving the claimant hours to work (apart from, on 24 October 2020, the claimant substituting for another chef by private agreement with that chef).

(f) On 24 October 2020, managers, Danny gage and James Allsopp, ignoring the claimant, not asking him about the incident on 27 September, his "supposed" conduct, safety measures, or recovery from covid. A staff member, Tash, saying he thought the claimant had been sacked.

(g) Initially miscalculating the claimant's furlough payment (although this has since been rectified).

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

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

7. Health and safety detriment (s.44 Employment Rights Act 1996)

7.1 Was the claimant an employee at a place where there was no health and safety representative or safety committee; or

7.2 If there was such a representative or committee, was it not reasonably practicable for the claimant to raise his health and safety concerns on 27 September 2020 by those means?

7.3 If so, did the claimant, on 27 September 2020, bring to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

7.4 If so, did the respondent subject him to detriment in any of the ways set out in paragraph 6.2 on the grounds that he brought those matters to his employer's attention?

8. Remedy for Protected Disclosure/Health and Safety Detriment

8.1 What financial losses has the detrimental treatment caused the claimant?

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

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

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