EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondents**
Mr S Kedracki		Kingsway LIF Holdings Ltd

Heard at: London Central Employment Tribunal

On: 24, 25, 26, 29, 30 April 2024

Before: Employment Judge Adkin
Members: Mrs L Moreton
Ms S Campbell

Representations

For the Claimant: Claimant in person
For the Respondent: Mr O Lawrence, of Counsel

REASONS

Introduction

1. By a judgment given orally on 30 April 2024 and confirmed in a written judgment the following day the complaint of unfair dismissal succeeded and complaints of automatic unfair dismissal because of a protected disclosure pursuant to section 103A of the Employment Rights Act 1996 and claim for failure to provide particulars pursuant to section 4 of the Employment Rights Act 1996 were dismissed.

2. The Claimant received no basic award nor any compensatory award because of a 100% reduction for contributory conduct and a 100% reduction to reflect the likelihood that the claimant would have fairly dismissed in any event ("Polkey").

3. The reasons below in large part are a transcript of the oral decision with very minimal tidying up to aid clarity. The delay in providing this to the parties is due to an oversight for which Employment Judge Adkin apologises.

Complaints

4. This is a claim of unfair dismissal and automatic unfair dismissal (section 103A) and also a claim under s.1 of the Employment Rights Act for failure to provide particulars.

Evidence

5. We have heard evidence and submissions over a five day hearing, these are our findings of fact which are based on balance of probabilities based on the oral and documentary evidence that we have received and also what we find to be inherently plausible.

Rule 50

6. It is not necessary for us to make an anonymisation Order under Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 for the purposes of this oral judgment. We are going to refer to a young female colleague of the Claimant who was investigated and subject to a disciplinary sanction as AB rather than her name. The parties will know the name of this individual.

Findings

History

7. The Claimant had an early period of employment with the Respondnet between November 2013 and January 2015 he returned to the employment of the Respondent on 28 August 2015 that is when the current period of employment commenced. The Respondent is a hotel group which operates the Club Quarters Hotel in Lincolns Inn Fields. That establishment has approximately 33 employees.

8. The Club Quarters Group has four hotels and approximately 181 employees in London. It is owned by a company based in the US.

9. The Respondent has a very small HR function. The reality is that Matimo Varriale who was the Appeal Manager in this case is a Hotel Manager but also deals with HR issues, supported by an external HR consultant. There is some support from the US but that is limited given that there are different employment law and considerations that apply.

Staff staying in hotel rooms

10. On 19 February 2020 Mr Thum the Claimant's Line Manager emailed Guest Services to say that all staff staying in the hotel should be booked in on the SMS system and that they would need authorisation from himself or a couple of colleagues before they could do that. The Tribunal heard evidence that during parts of the Covid-19 pandemic the Claimant stayed in the hotel quite frequently including a period of approximately 18 months where he no longer had his own accommodation and stayed in the hotel full time.

11. On 17 May 2021 the Claimant was promoted to Senior Guest Experience Manager. That decision was taken by Mr Thum and meant that the Claimant was apart from Mr Thum himself the most senior person within the hotel.

12. On 16 June 2021 there was an email exchange about a speaker that appeared in the Claimant's office. That was a professional exchange between the Claimant and Mr Thum. Mr Thum noticed that the Claimant had a speaker in his office requested that he did not play his music loud and that it should not be heard from the walk way.

13. In September 2021 by this stage guests staying in the hotel were picking up again following a lull due to the Covid-19 pandemic. As a result the Claimant needed to find somewhere to live again not in the hotel as he had been doing.

First jacket incident

14. On 23 February 2022 Mr Thum sent the Claimant an email headed note to file which was a reference to the disciplinary file requesting that the Claimant should wear a suit jacket as part of his uniform at the front desk other than on the warm days of summer, he recommended cooler cotton shirts rather than nylon shirts, he made it clear that he needed to put on a jacket if leaving the office to go onto the front desk.

15. On 1 March there was a somewhat bad tempered exchange by email which followed on from that. The Claimant said he found it too hot to wear a jacket, he kept the temperature in the lobby higher for the benefit of colleagues and guests and then perhaps somewhat surprisingly accused his manager of having "other motives" for this intervention. Mr Thum replied that afternoon to assure him that the only motive was to ensure a professional appearance and as the head of department to lead by example. He even offered to allow the Claimant to have one of his jackets.

16. On the 4 March 2022 Mr Thum sent an email to various people including the Claimant confirming or reiterating that staying in rooms needed approval and he said this "in the case that someone is taking a room late due to finishing work late and I am not around please give me a courtesy email to let me know that they have stayed in, any member of staff who stay in without informing me will not be given this privilege again".

Disciplinary re: jacket

17. On 4 May 2022 the Claimant attended a disciplinary hearing. This was for "continuous breaking of hotel policy regarding wearing of jacket in public places" and "poor team leadership" which related to colleagues not wearing masks and not being challenged by him. It appears from the note of the disciplinary meeting that some sort of compromise was reached about the Claimant wearing a vest which we assume was a reference to a waistcoat. Nevertheless notwithstanding that compromise on 10 May 2022 a formal written warning was given about repeated failure to wear a jacket in public areas of the hotel which he was due to remain live for 12 months, also arising from the same disciplinary a note of file for leadership, not challenging colleagues wearing a mask unless exempt.

18. Moving forward in the chronology to the 6 June 2022 a colleague of the Claimant Mr Suliman Grass (who was a witness against the Claimant at a later stage) was given a final written warning for leaving the nightshift three hours early, the explanation that he had given was that he had eaten too much after fasting for Ramadan which had led to an upset stomach. It seems to have been the source of conjecture that he had been drinking alcohol but that is not what the Respondent found had taken place.

19. Sometime during the Summer of 2022 we accept Mr Thum's evidence that the Claimant had raised with him that Mr Suliman's lack of English was a health and safety risk.

Two alleged protected disclosures - December 2022

First

20. There are two alleged protected disclosures which are said by the Claimant to have taken place in December 2022 although he has not given a date for either of them.

21. The first was an alleged protected disclosure to Mr Thum about Mr Suliman being inebriated while on duty, absent during critical times in his shift and departing early. We accept Mr Thum's evidence and find that a discussion between the two men about Mr Suliman had happened in the summer of 2022 rather than in December given that this ties in with him being given a final written warning at that time circumstances where he had left early.

22. The burden is on the Claimant to establish a protected disclosure and to establish each necessary element of it. We find that the Claimant has not proven in respect of the first allegated disclosure that in December 2022 he made a protected disclosure, he has failed to establish specific words that were said, specific context in which words were said and the date on which those words were said.

Second

23. Moving to the second alleged protective disclosure, which the Claimant said took place in December 2022, this was an alleged disclosure to Mr Thum about the obstruction of fire exists and in particular staircases by chairs, hoovers and rubbish.

24. The Tribunal has received photographic evidence in the bundle from page 681 onwards showing photographs of obstructions which the Claimant says were provided to him by others. The date of those photographs is not entirely clear, they show stacked chairs in quite close proximity to stairs. The chairs are not completely blocking the stairs but they certainly might conceivably be a source of obstruction in the event of an evacuation for example.

25. We have also received in the supplementary bundle page 20-21 evidence of an email exchange on 1 January 2023, which is referred to further below. That is an email exchange between guess services and the Claimant in which concerns raised by a guest on the 1 January are responded to by the Claimant. The Claimant's position in that email exchange is essentially a debunking or a dismissal

of guest's criticism of the fire protocol following a fire alarm and their alleged need being rubbish on the floors.

26. We received oral evidence from a witness Mr Graham Venour a witness whose witness statement was provided late to respond to the Claimant's claim of protected disclosure dismissal (a claim added late by way of amendment). He talked about their occasionally being items in stairwells although not in areas where guests went, he described there being items in the back entrance near Kingsway close to a "closed down" restaurant. We have the content of the guest's complaints relating to the fire alarm and safety.

27. Even taking into account of that evidence we find that the Claimant has not proved words that were said by him, nor a specific context or a date on which words were said by him and we do not accept that there was a protected disclosure made him in December 2022.

Alleged incident of gross misconduct

28. On 29 and 30 of December 2022 the Respondent says that the Claimant was drinking and intoxicated with a colleague AB late in his office and that he later stayed overnight in room 115 without permission either granted beforehand or retrospectively, playing very loud music which disturbed a guest between 3am and 4am in the morning.

29. This incident was found by the Respondent to be gross misconduct and was the reason relied upon by the Respondent to dismiss him.

30. There were two eye witnesses, employees from the Respondent's night shift who gave written statements as part of an internal investigation. Their accounts we summarise further on in the chronology at the point at which they gave those accounts.

Fire alarms

31. There was something of a dispute between the parties as to how frequently fire alarms went off in the hotel. It seems to be common ground that the fire alarm did go off fairly frequently and sometimes at night. It seems that if the fire panel was not attended to quickly by someone who understood how to use it there would need to be a full blown evacuation of the hotel.

1 January 2023 fire alarm & guest complaint

32. On 1 January 2023 there was a guest complaint about a fire alarm which also extended to an alleged fire risk. This is captured in an email that was sent by someone on the front desk at 19:23 on 1 January 2023 and the Claimant then responded to it point by point writing in green. That exchange is as follows:

> Guests services: we had a guest come to speak regarding their concerns after the fire alarm. The guest explained he is a builder and works in and around hotels with fire procedures and systems. The guest continued to speak about the fire protocol of the hotel and the lack of communication

> The Claimant replied: He is right if we did not communicate to the guests outside or around the lobby/back door that it was a false alarm. From the incident report it seems we have established it was a false alarm not sure why we needed the fire brigade to tell us that.
>
> Guest services: the backdoor was not opening and in his opinion all doors should be enabled to be open without a key in the event of a fire.
>
> The Claimant responded: The back door is fine and I checked the CCTV – it seems a few was by the door inside as maybe they did not want to go out in the cold, again there was people who went out …
>
> Guests services: According to him the MSD on the front desk did admit to not knowing what to do and how to proceed.
>
> The Claimant replied: Not knowing what exactly?
>
> Guest services: The guest said they felt extremely unsafe and asked if we do have a fire alarm or not tonight and unaware of where the file panel is and how to proceed. The guests also commented on the rubbish on the floors and the evac chair still be out on the floors in front of the stairs, he showed me the pictures of the stairwells as well as the pictures of the file panel on Kingsway.
>
> The Claimants reply: Well this is absolutely right, why would there be rubbish on the staircases at 3am?
>
> Guest services: The Guest informed me he will contact London Borough Council as well as the senior he says he feels that the hotel is not up to standards or regulations.

33. That exchange was forwarded to Mr Thum by the Claimant and Mr Thum responded on 4 January as follows:

> "Michael really needs to be retrained on the panel, this was very badly managed it should have been investigated on time and the alarm would never had gone on full alarm, GSR should have been on the backdoor during the evacuation but as I say we should have stopped it in time to evacuate lets speak about this tomorrow".

34. Michael here was a reference to Michael Kiberu about whom we will hear more later.

Second jacket dispute

35. On 10 January there was a culmination of a dispute involving a second dispute involving a jacket belonging to the Claimant. This is a completely separate dispute to the one referred to earlier in 2022.

36. In summary the Claimant said a jacket worth £300 belonging to him went missing with a dry cleaner. This dry cleaner was a long standing supplier of the Respondent

but it was the Claimant's personal jacket that was the subject of the dispute. There was a lengthy email exchange between the Claimant and the dry cleaner about the missing jacket which ended with the Claimant threatening the dry cleaner that he would go to three social media outlets to give them bad publicity, the Claimant was using his work email address when he did this. The dry cleaner responded by approaching Mr Thum directly asking, "is this a threat and is this how you work with your clients".

37. It is disputed what then happened the Tribunal find on the balance of probabilities was that Mr Thum spoke to the Claimant telling him this was not an appropriate way to deal with suppliers of the Respondent. We have come to this conclusion because we have accepted Mr Thum's evidence on this point which seemed consistent and plausible and furthermore that the email from the dry cleaner sent on 10 January to him personally plainly required some action to be taken by him. We accept his evidence that he contacted that supplier directly and raised it with the Claimant, we accept that this was a reason why Mr Thum was upset with the Claimant.

Third alleged protected disclosure

38. Also on 10 January 2023 the Claimant alleged that he made a third protected disclosure. He says that this was a disclosure to Mr Thum about inadequate management or fire alarm systems and associated training particularised at page 69.

39. The Claimant's case on this matter has changed in a number of material respects. First, in relation to the location where this discussion or disclosure took place. On 19 October in the further particulars he said it was at a staff party. Next in his application to amend the claim made on 21 November 2023 he said it was on the way to/at a staff party. It is common ground that there was a party for the Respondents employees from its various hotels on the 10 January 2023.

40. After the Claimant made the application to amend his claim and after that was granted by the Tribunal on the first day of this hearing a witness statement was produced by Mr Graham Venour who said that he was in a taxi with the Claimant and Mr Thum and he did not hear this alleged protected disclosure being made. During the course of this hearing and in the course of cross examination by Respondent's Counsel the Claimant said that it was in the process of collection boxes of alcoholic drinks to take to the party that this disclosure occurred.

41. The content of the alleged disclosure also changed. The original formulation in November 2023 was that he raised noticeable gaps in health and safety measures inadequate management of fire alarms and training associate and Michael Kiberu's continuous non-compliance. During the course of cross examination in this hearing it became clear that in the Claimant's mind the real source of the dispute in the conversation was that the Claimant was suggesting that Mr Thum take action regarding Michael Kiberu given that he was struggling with the fire panel. The Claimant suggested that he intimated possible disciplinary action although he admits that he did not put it in exactly those terms.

42. On this version it seems from the context that the Claimant was "pushing back" against the suggestion made in an email six days earlier by Mr Thum that the Claimant needed to manage Michael Kiberu regarding fire training. On this version the Claimant was trying to put that responsibility back onto Mr Thum since the Claimant says he was suggesting that he was struggling to manage him on that point. Although the Respondent's witness Graham Vinour, the maintenance manager, was there he did not remember any of this being discussed nor did he remember in general terms that the Claimant and Mr Thum were arguing about something.

43. In conclusion on this point, ultimately the Tribunal has formed the conclusion that there was some sought of dispute about management of Michael Kiberu in relation to fire alarms as well as the dry cleaning matter. We accept the Claimant's suggestion that he and Mr Thum were in disagreement about next steps with Michael Kiberu and whose responsibility it would be to manage him. Whether or not that amounted to protected disclosure made by the Claimant we deal with that in our conclusions further below.

11 January 2023

44. After the party on 10 January 2023 and the late evening of 10 and early hours of 11 January 2023 something in the region of 15 to 20 staff who were employed at the Respondent came back to the Club Quarters Hotel in Lincolns Inn Field. All but two of these staff members were from different hotels to the Lincolns Inn Hotel. This was after one of their party had been refused entry to a pub for having drunk too much.

45. The staff went into the room that was prepared for breakfast for guests the following day. The Claimant was the most senior person from the Lincoln Inns Infield Hotel that was present.

46. The Tribunal finds that this event on the evening of 10 and 11 January 2023 was the catalyst for two different members of the Claimant's team to raise with the hotel manager Mr Thum that the Claimant was abusing his position and also raised with him rumours although they were not direct witnesses themselves of events of 29 and 30 December 2022. Mr Thum said that this is the first that he became aware of the allegations regarding the 29 and 30 December 202.

Mr Thum investigates 29/30 December

47. On 11 January 2023 Mr Thum spoke to both the Claimant and AB about the events of the evening on 29 and 30 December. This was awkward for Mr Thum because AB was relatively inexperienced and was the daughter of a family friend whom he had offered a job. It was common ground that she was good at her job.

48. The Claimant was also asked about the evening on 29 and 30 December. His position was that he did not remember what had occurred. He said that if Suleiman Grass who was one of the two eye witnesses said something about it that should not be trusted given that Mr Grass had something against him. On the other hand Mr Kiberu the Claimant said he would trust. The Claimant checked the tracker on

his iPhone which he said would demonstrate that it was not in the hotel that night or day. Unfortunately for him the iPhone showed that he was still in the hotel at 11am the next morning which was significant because it was his day off.

HR consultant

49. On 13 January 2023 Massimo Varriale (who ultimately heard the appeal) emailed an external HR consultant, Sue Gilbert copying Mr Thum requesting a meeting.

50. On 17 January 2023 the Claimant was suspended at 7am at the end of having worked the night shift. Also on 17 January the Claimant provided his first written version of events on 29 and 30 December. He said this,

> I do remember taking my gym bag and leaving I don't know what time and I don't remember coming back but as we both know I woke up in the hotel somehow still dressed and confused how I ended up there and not where I was planning to go when I was leaving the evening before.

51. He also claimed that the source of the rumour was an employee whom the Claimant had made clear to a lot of people was a health and safety risk due to his communication skills and he suggested that it had been done in bad faith as revenge by "bad faith actors" he queried whether there was any actual feedback from guests.

AB's account

52. On 20 January AB described her version of events in an email to Mr Thum. She said the Claimant was in the office working late, she tried to help him with his work. She says he pulled a bottle of something out of his bag as he was supposed to be going to a friend's after work. She said there was difficulties with TFL rail and she was struggling to get a taxi, she said they decided to have a drink in the Shakespeare Head but she was not able to find her way home and asked if she could stay in the hotel. She realised she should have spoken to Mr Thum about staying in the hotel and this was not a good choice. She was embarrassed to find herself in this situation and apologised for staying in the hotel without permission and took full responsibility for her actions.

Mr Kiberu's account

53. On 28 January 2023 Michael Kiberu who had been in hospital for proceeding weeks and unable to participate in the investigation provided a written statement that appears at page 181.

54. He said that approximately 11:30pm there was music from the back office which was loud it sounded like a disco club with the volume on maximum. He went to speak to the Claimant an AB who were in the office, later at midnight the doors were double locked he again said the music was too loud, AB was dancing and the lights were switched off, there were several bottles of alcohol around. The music continued to play loudly. At 1:15am the music was still loud they went out at 2:20am to look for a taxi, at about 3:40am there was a complaint from a lady in room 124 he quotes her

> "there is very loud music coming from the club and my husband cannot sleep because he has a tour tomorrow and I don't want him to be tired because of having no sleep".

55. This account was corroborated by the internal phone records which showed a call from that room at 3:38am of 1 minute 18 seconds. He sent a colleague Suliman Grass to investigate. Mr Grass went to the room 115 looked in a shower and saw according to him saw the Claimant and AB having a shower, Mr Kiberu said he was shocked because he thought they had gone home, he himself then went down to speak to them and said the music was very, very loud. He said that he banged on the door with energy but they did not hear, he used his master key to open the door (that is substantiated by the electronic records of that door) he saw AB and the Claimant on the bed. The statement to the internal investigation contained no description of what was going on, in his statement to the Tribunal he stated that the two of them were "having sex", an allegation which the Claimant did not challenge in cross examination.

Account of Mr Grass

56. Shortly thereafter or about the same time there was an unsigned witness statement from Suliman Grass which confirmed that the office on the ground floor had the Claimant and AB dancing and that there was loud music. Later in his shift he said room 115 had "very noisy music like a discotheque" he put his key in the door, the door was slightly open he shouted house keeper, house keeper there was no answer he then walked towards the bathroom, he said the bathroom door was open he looked and said hello and he saw two bodies with no clothes on.

Disciplinary

57. On 31 January 2023 Mr Thum invited the Claimant to a disciplinary the disciplinary charge was "allegation of abuse of position misuse of facilities and damage reputation".

58. The Claimant emailed Mr Bray who is Mr Thum's line manager to complain about the investigation and that despite his track record the Respondent was proceeding with an outrageous witch hunt based on inadequate evidence. That does not appear to have been investigated as a grievance nor separately dealt with.

59. On 6 February 2023 there was a disciplinary hearing held by Mr Thum with the Claimant in attendance with a note taker Ann Duklaiet. In that meeting the Claimant suggested that there was a lack of complaints from guests regarding loud music, he was asked if he had been drinking in the office, he stated that he did not remember. He then went on to say that AB's statement referring to a bottle of something being brought out of his bag could have been something medical he said I could have brought home a bottle of home-made liquor. In the Tribunal hearing the Claimant suggested that home-made liquor is a reference to his mother's cough syrup.

60. The Claimant said that he remembered waking up in his underwear, his recollection was not good as he had a long day at work and had not slept very well, later on he admitted he may have had one glass of something but no more than that. He

apologised if the music had been too loud although suggested it would have been on the usual volume which he describes as being "level 4". The Claimant placed a great deal of emphasis in that hearing and in the Tribunal hearing on a complaint made by a guest in room 103 about several matters but which did not include loud music.

61. The CCTV footage was viewed which showed the Claimant leaving the hotel then returning 20 minutes later via the entrance at the back of the hotel at 3:20am that is an entrance onto Kingsway rather than onto Lincolns Inn Fields.

62. The Claimant claimed that he had booked two rooms by calling Michael Kiberu at the front desk from the lobby phone, one room for himself 115 and another room for AB 114. Michael Kiberu, it transpired in subsequent investigation did not remember this. In the hearing the Claimant alleged that Michael Kiberu was at Mr Thum's mercy as he had to be flexible with his request because he was sick.

63. The Claimant said he was popular with his team and asked about one colleague complaining about him and he referred to the only witness statements from Mr Suleiman and Mr Kiberu.

Claimant's written follow-up to disciplinary

64. The following day on 7 February the Claimant's second version of events was given in writing, that was at page 202 of the bundle. That was an email in which he asserted that the allegation that he was in the shower or on the bed with his colleague was "completely baseless and unfounded" and also "this is untrue and disrespectful accusation and I strongly deny it".

Call log

65. Also on 7 February the telephone call log was generated to investigate the Claimant's allegation that he had called from the lobby. The telephone log did not show this.

66. The telephone call log did show the call from a customer from a client of the hotel from room 124, which at corroborated Mr Kiberu's account of a guest calling to complain.

Dismissal

67. On 9 February 2023 the Claimant was summarily dismissed for gross misconduct (i.e. without notice) for abuse of position, misuse of facilities and damage to reputation. A summary of findings was given.

Appeal

68. There was a letter of appeal from the Claimant on 13 February 223 alleging abuse of power and that the evidence presented was not sufficient to support the allegations against him. He claims there was an inconsistent in treatment between himself and Mr Grass he said there was no credible evidence of him having a party and drinking. He queried the track record of the Respondent's IT and suggested that Mr Thum had a tendency to lie, he further queried the absence of a complaint

about noise from a room which had complained about other matters, that was a reference to 103.

Discussion about appeal

69. There was an email exchange between Mr Thum the dismissing manager and Mr Varriale the appeal manager from 14 February onward. Mr Thum sent to Mr Varriale the documents regarding the disciplinary including witness statements, CCTV footage, call logs and key reading (in respect of which "strangely enough our computer for the key has gone missing in recent weeks"). Mr Thum suggested

> "During Sebastian disciplinary he clearly feels as per the recoding and minutes that I do not have the key reading, as I believe he took the computer or hid it to help him not to have that evidence brought forward during his disciplinary"

70. No evidence was put forward in support of the suggestion that the Claimant had stolen or hidden the computer system which ran the hotel keys.

71. It seems from the subsequent exchange of emails that the telephone call alleged to have been made by Mr Kiberu did not show on the call log. It was not on Mr Kiberu's mobile phone recent calls section. Mr Thum explained to Mr Varriale that Mr Kiberu had received a lot of calls during his recent hospital stay with the result that he did not research this point. There was an exchange back and forth between the two in which Mr Thum mentioned various evidential points and explained why he had taken the decision he had. Eventually Mr Thum wrote:

> "I have just spoken to Michael K. he is going to check his call log on his bill. He told me Seb has been texting him, saying thank you for getting him sacked etc. I asked him to send it to me which he did, and I reassured him that he didn't do anything wrong he actually did the right thing, that what Seb did was wrong and he should take his responsibility for his action."

72. Mr Varriale wrote "this is all good stuff that play into our hands".

Appeal hearing & outcome

73. The appeal hearing took place on 23 February 2023 it was 1 ½ hours in length according to Mr Varriale.

74. The outcome of the appeal in a short email on 24 February 2023 was that the appeal against dismissal was not upheld.

Claim

75. The Claimant presented a claim to the Tribunal on 11 July 2023 in the claim form he ticked the box 10.1 which refers to referral to a regulator which was referred to in our consideration of earlier application to amend the claim.

76. The case management hearing was in 27 September 2023.

77. On 20 November the Claimant made an application to amend his claim to bring a protected disclosure claim on 21 November that application was granted by the Tribunal on the first day of this hearing for reasons given orally.

The Law

Protected disclosure detriment ("whistleblowing")

78. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> 47B Protected disclosures.
>
> 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.
>
> 48.— Complaints to employment tribunals
>
> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
>
> On a complaint under subsection … (1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
>
> (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for

> the complaint to be presented before the end of that period of three months.

Disclosure

79. In **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."
>
> [emphasis added]

Burden of proof causation

80. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to a respondent to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The tribunal is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no mandatory adverse inference mechanism (**Dahou v Serco Ltd** [2017] IRLR 81, CA).

Public interest

81. The Court of Appeal in **Chesterton Global Ltd & Anor v Nurmohamed & Anor** [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot relate solely to the interest of the person making the disclosure.

Causation

82. The causation test for *detriment* is whether the alleged protected disclosure played more than a trivial part in the Claimant's treatment (**Fecitt v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 372, CA).

Conclusions

83. We have used the draft list of issues which was produced by the Tribunal and approved by the parties on the second day of the hearing this is essentially a refinement of a list which had been provided by the Respondent at an earlier stage.

Time limits

84. The application to amend to add a complaint of automatic unfair dismissal was made on 21 November 2023. That application to amend was successful. The date of presentation of the claim of automatic unfair dismissal is 21 November following the case of (per **Galilee v Commissioner of Police of the Metropolis**: UKEAT/0207/16/RN).

[1.2.1] Was it not reasonable practicable for the Claimant to present his claim in time?

85. We find it was not reasonably practical for the Claimant to present his claim in time.

86. We had regard to the case of **Software Box Ltd v Miss S Gannon**: UKEAT/0433/14/BA and the decision of the Employment Appeal Tribunal in that case the Claimant believed that she had a live claim albeit it was defective. We find there is an analogy with this present case where the Claimant believed he raised a complaint relating to protected disclosures, he ticked the box relating to protected disclosures and that the hearing in September 2023 there was a discussion of a claim related to protected disclosure dismissal. We find that while the Claimant believed that the protected disclosure had been raised and believed was live it was not reasonably practicable for him to present a claim while under that misapprehension.

[1.2.2] Was the claim presented within such time as reasonable thereafter?

87. Our conclusion is that the Claimant did not delay the day after Employment Judge Hodgson explained to him that there was no live protected disclosure claim he made an application to amend the next day. In summary it was not reasonably practicable to present the claim and the Claimant did present the claim within such period thereafter was reasonable. Given this the Claimant does get the benefit of the time extension and so we have dealt with this claim on its substantive merits

PROTECTED DISCLOSURE

[2.1] Did the Claimant make one or more qualifying disclosures as defined in s.43(b) of the Employment Rights Act 1996?

88. We find that there was just a comment we find there was a kernel of fact at the heart of each one of the protected disclosures. We did not find however that the Claimant established the facts necessary to satisfy the statutory test for protected disclosures.

89. [2.2.1 & 2.2.2] Two of those are dealt with in detail in the findings of fact and the other we will deal with in more detail now. In essence the two protected disclosures alleged to have taken place in December 2022 we do not find that the Claimant has established the facts needed to establish a protected disclosure so those cannot succeed.

90. [2.2.3] The third alleged protected disclosure was alleged to have been made on 10 January 2023, in relation to the inadequate management of fire alarm systems

and associated training. Based on our findings of fact accepting what both Mr Thum and the Claimant said about two respective matters that they were discussing on that day i.e. the jacket saga and also about who was going to give Michael Kiberu training based on those findings of fact we do not find that this is the same thing as a protected disclosure. In relation to Mr Kiberu there was simply a difference of views about appropriate next steps. The Claimant has not established that this was a protected disclosure. We find it was a difference of opinion rather than disclosing information.

(2.3) In each case was there a disclosure of information?

91. The Claimant has not established for the reasons given above that there was a disclosure of information and therefore this complaint cannot succeed. By way of a comment in relation to 2.4 did the Claimant believe that the disclosure of information was made in the public interest, we have not found that there was a disclosure of information but in general terms we do accept that the matters which are the subject of the discussion referred to by the Claimant were matters of public interest, they did relate to health and safety.

92. Given that there are no protected disclosures the claim of automatic unfair dismissal under s.103(a) cannot succeed.

93. In any event, had we been wrong about any of these three alleged disclosures we did not find that they were the sole or principal reason for dismissal. The reason for dismissal was the Claimant's conduct, which we accept perfectly naturally required a disciplinary response.

ORDINARY UNFAIR DISMISSAL

94. This often called "ordinary" unfair dismissal to distinguish it from "automatic" unfair dismissal.

[3.1] What was the reason or principle reason for dismissal?

95. The Respondent says it had a potentially fair reason which was the Claimant's conduct.

96. The Tribunal accepts that it was the Claimant's conduct that was the reason for dismissal.

[3.4] If the reason was misconduct did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

97. There were three elements of the test that we need to look at. First were there reasonable grounds for that belief in the Claimant's guilt. We have looked at the grounds that the Respondent had. There were three eye witnesses, Michael Kiberu, Suleiman Grass and AB.

98. There were also the Claimant's admissions: he admitted that he had had a glass of something alcoholic; he admitted that he could not remember what had happened; he admitted that he had woken up in room 115.

99. Furthermore there was something of an evolution in the Claimant's account of what had happened.

100. As to other evidence, there was the evidence of the electronic door lock for room 115 which corroborated evidence given by eye witnesses. There was the evidence of the telephone log which also corroborated evidence that was given and showed that there was an absence of call from the lobby telephone which is what the Claimant had said had happened. There was the CCTV footage although not much had turned on that since it simply confirmed that the Claimant and AB had returned to the hotel which was not seriously in dispute.

101. We therefore concluded that there were reasonable grounds for the belief.

(3.4.2) At the time of the belief was formed had the Respondent carried out a reasonable investigation.

102. Mr Lawrence characterised this as a case where the Claimant was caught red handed. There was something of a debate amongst the panel about whether that was the right terminology to use. We did not really resolve that debate but it is right to record the context. The context is of an investigation that took place largely between 2-4 weeks after the material event. It first started to be investigated 12 days after the alleged incident.

103. Looking at the investigation itself, Mr Thum went to the call log to investigate the Claimant's claim that he called reception, in other words there was some attempt to see if there was evidence that corroborated his account. It might have been better had that log been shown to the Claimant but in our view the document was not something that obviously needed to be shown to be interpreted and in any event this was part of the investigation to potentially corroborate the Claimant's case.

104. The Claimant says that the Respondent should have spoken to guests. The Respondent' s case is that was not justifiable or necessary and that there was not an absence of other evidence. We have borne in mind that this was an investigation in a commercial context. This was not a criminal investigation. We accept that the Respondent had a genuine reasonable concern about affecting its reputation with guests. Emailing guests might have reasonably be thought to be irritating or embarrassing. This was not a case in which there was so little evidence that speaking to guests was essential and in our view the potential for reputational damage was obvious.

105. In conclusion we find that there was a reasonable investigation.

(3.4.3) Procedure: the Respondent otherwise acted in a procedurally fair manor.

106. There were two potential problems with this investigation and it was realistic of Mr Lawrence to address these two concerns because they were from the Tribunal's point of view matters that obviously came to our attention.

107. First was the Respondent did not adhere to the ACAS guidance that where practicable there should be a separate investigator and disciplinary officer. Mr Varriale in his evidence acknowledged with the benefit of hindsight that another employee involved would have been better and that concession was realistic in our view that that was right. We do bear in mind that the management in the UK part of this organisation is fairly light, there is no dedicated HR function but on the other hand there are three hotel managers, there was the potential to engage an HR consultant, there was a US parent company, this was not a tiny company with no resources. We find that having the same individual investigate and carry out the disciplinary was unfortunate.

108. Turning to the second problem the appeal. We had particular regard to pages 161 (Mr Varriale spoke to an external HR consultant about the Claimant's case), 244 (the brief given by Mr Thum to Mr Varriale) and the lengthy exchange at 269-272 in which Mr Thum commented on the evidence in the case and commented on his approach). It is clear from the evidence that not only was the appeal manager in this case was very close to the investigation at the disciplinary stage, but crucially in an email sent shortly before he was due to be conducting the appeal it is absolutely clear that he did not have an open mind. This was not a fresh independent pair of eyes, this was someone who had been involved throughout and moreover already had a view of the case.

109. We look at now at whether the dismissal was in the range of reasonable responses and at the moment we are principally concentrating on the procedure. We do accept the submissions put forward by Mr Lawrence, first that the Respondent should not simply focus on a particular defect but must step back and look at the whole process and second that the status of ACAS guidance is merely that, it is guidance and not a statement of law, the guidance in not in categoric terms.

110. Had the only defect been that the investigator and dismissing manager are one and the same we would not for that reason only have found that this was outside the range of reasonable responses. Looking at the overall picture however, Mr Thum was both investigator and dismissing manager, he was a family friend of one of the named protagonists AB and there were also difficulties in his relationship with the Claimant which were becoming clear. Given those circumstances and the small world of the hotel staff involved in this case it was especially important that the appeal manager was genuinely independent and was considering the matter afresh. In this case there was not at any stage someone was unconnected with the people and events who could evaluate the evidence afresh. And in those circumstances for all those reasons we find that the procedure leaving to the dismissal was unfair. That leads to our conclusion that his was an unfair dismissal for procedural reason.

[5.6.4] "Polkey"

111. We then go on to deal with matters relating to remedy.

112. There were two parts of the remedy consideration that we identify that we would consider at this stage which are colloquially called Polkey and contribution.

113. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason? This is what is usually called “Polkey” following a decision of the House of Lords.

114. What difference would it have made our conclusion is if there had been a procedurally fair procedure with a separate investigation, separate disciplinary process and an independent appeal manager? It is overwhelmingly likely we find that the Claimant would have been fairly dismissed, this is based on the clear evidence of the Claimant’s wrong doing. For this reason we find that there should be a 100% reduction.

[5.6.9] Contribution

115. Dealing with the other point which was the Claimant’s contribution.

116. If the Claimant was unfairly dismissed did he cause or contribute to the dismissal by his blameworthy conduct. In our assessment the Claimant’s contribution to his own dismissal was at the highest level.

117. He was first of all already on a previous warning. He ought therefore to have been especially careful to stay out of trouble. Based on the evidence we have considered his conduct on 29 and 30 December 2022 as a senior employee in that hotel did amount to an abuse and a breach of trust as regards his management responsibility and also using hotel facilities without getting permission, playing loud music and drunkenly partying with a junior employee. He inconvenienced other guest and put his colleagues working on the night shift in an embarrassing and awkward position. He was not contrite or genuinely apologetic as he should have been during the investigation, in particular the letter of page 202 he simply dismisses the account of witnesses as lies. In our view there was not a good reason to disbelieve or discount the account of the two principal eye witnesses when on the Claimant’s own account he could not remember what had happened.

118. Given these matters the level of reduction for both basic and compensatory award is 100%

STATEMENT OF PARTICULARS

119. Finally we turn to complaints brought under s.1 or s.4 of the Employment Rights Act 1996. These complaints would not succeed as standalone complaints, but in case we are wrong about that we have considered these complaints on the substantive merits.

120. There is in the bundle the contract that was provided to the Claimant at the beginning of his employment on 21 August 2015 which appears at pages 101-105 and is signed by both Mr Thum and by the Claimant himself on page 105.

121. There is also in the bundle a document which is dated 17 May 2021 which is a letter from Mr Thum to the Claimant where he confirmed the promotion, his new job title of senior guest experience manager and his new renumeration of £28,800 per annum plus a potential annual bonus of £3,000 payable in two six monthly instalments. Mr Thum’s evidence was that this had been provided by him and in

fact we can see it signed by him but was never returned by the Claimant, that evidence was not challenged by the Claimant. In those circumstances we find that the Respondent was not in breach of its duty to provide a written statement of particulars of change given the Claimants promotion to senior guest experience manager and on that basis that part of the claim fails.

Summary

122. For the reasons given above all complaints are not well founded and are dismissed.

Employment Judge Adkin

21 April 2025

Sent to the parties on:

25 April 2025

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For the Tribunal:

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