



Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Mr C Fernandes

St James Court Hotel Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central

ON: 8-16 February 2022

BEFORE: Employment Judge A M Snelson

MEMBERS: Mrs N Sandler
Mr P Secher

On hearing the Claimant in person and Ms G Hirsch, counsel, on behalf of the Respondents, the Tribunal determines that:

- (1) The Claimant's complaint of unfair dismissal is not well-founded.
- (2) The Claimant's complaint of failure to make reasonable adjustments is not well-founded.
- (3) Accordingly, the proceedings as a whole are dismissed.

REASONS

Introduction

1 The Respondents are a company which owns and operates hotels including the St James Court Hotel ('the Hotel').

2 The Claimant, Mr Carlton Fernandes, was continuously employed by the Respondents at the Hotel between 6 July 2018 and 14 August 2020 in the role of Food and Beverage Supervisor. The employment ended with his resignation.

3 By a claim form presented on 19 August 2020, the Claimant brought complaints of unfair (constructive) dismissal, and disability discrimination. The latter complaint was later clarified as a claim for failure to make reasonable adjustments. The Respondents disputed the claims in their entirety.

4 In a document dated 6 August 2021 sent following a case management hearing the previous day, Employment Judge ('EJ') Joffe analysed the claims. Her formulation of the issues to which the unfair dismissal claim gave rise was as follows.

Unfair dismissal

i) Was the claimant dismissed?

ii) Did the respondent do the following things:

a) In the summer of 2018, the general manager, Mr Singh, in his office shouting at the claimant in front of Mr Singh's secretary that the claimant was too qualified for the job he was in and that he should look for a job somewhere else as his knowledge was too dangerous for the company. Mr Singh then saying to the claimant he should get out of the office and not show his face again.

b) On 26 July 2019, after the claimant raised concerns about the general manager's behaviour to the food and beverage manager, Aman Kapur, and also concerns about health and safety, the high temperature in the workplace, the shortage of staff, the poor quality uniform provided and the desk and computer causing back pain, the claimant being sent a 'letter of concern' by HR telling him not to send further emails.

c) In about October or November 2019, the food and beverage manager, Aman Kapur, shouting at the claimant and his colleague Shahanand that the new room service manager was taking them out of their comfort zone.

d) The IRD manager, Victoria, asking the claimant to prepare training but not giving him enough time to do it.

e) The IRD manager, Victoria, denying that the claimant was providing training and saying that he was getting people to sign the training document when they had not done the training, which allegations were untrue.

f) Some time in November 2019, the IRD manager, Victoria, saying to the claimant in front of Shahanand that the claimant was not capable of controlling staff, especially in relation to not stopping them from using their personal phones at work. When the claimant told staff not to use their personal phones the following day, Victoria saying in front of the team that the claimant was creating a military boot camp atmosphere at work and that he should give the people freedom to work.

g) On or about 19 December 2019, Victoria taking the claimant to HR and seeking to have him disciplined for not sending home a member of agency staff who had brought alcohol to work.

h) In about December 2019, the F and B manager and room service manager being angry with the claimant for raising health and safety concerns with the health and safety officer, asking the claimant why he had approached the H and S officer in an angry tone of voice

i) Imposing unhealthy shift patterns [in] November and December 2019 – a morning shift after working an evening shift - and Victoria being unhappy when the claimant and his colleague complained about that

j) On or about 9 February 2020, when the claimant complied with Victoria's instruction that extra amenities should not be added after the amenities list was submitted for the day, Victoria denying that she had given that instruction and Mr

Kapur shouting at the claimant that he was not even fit to be a kitchen porter, banging the desk and saying the claimant should get out of the office.

k) In or about January 2020, when the claimant raised a concern with the HR department by email, the F and B manager speaking to the claimant and saying that the claimant was too good at sending emails to HR and that he would make sure to use the email against the claimant.

l) Throughout his employment, the claimant being forced to work in circumstances of understaffing.

m) The HR director (who sent the letter of concern) being involved in the grievance meeting despite the claimant requesting that no manager linked to his grievance be involved as this was causing him stress.

n) Mr Sharma interrogating the claimant at his grievance meeting as if the claimant was being disciplined.

o) Mr Sharma putting pressure on the claimant at the grievance meeting by asking about matters which were not the subject of the grievance before asking about the grievance.

p) Not sending the claimant meeting notes despite his requests.

q) As part of the grievance outcome not accepting the recommendation of the claimant's psychologist about a change of workplace.

r) In the grievance outcome, Mr Sharma saying that the claimant was taking shifts for personal gain and not team benefit.

s) Mr Sharma, in the grievance outcome letter, threatening the claimant with disciplinary action in relation to the agency worker bringing in alcohol incident

t) Failing to take action about the claimant's complaints that he was suffering from stress in June 2019 and February 2020

iii) Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

a) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

b) whether it had reasonable and proper cause for doing so.

iv) Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

v) Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that [he] chose to keep the contract alive even after the breach.

vi) If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

vii) Was it a potentially fair reason?

viii) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant.

5 We will refer to the individual allegations under para ii) by their lettering. In the event, issues v)-viii) fell away because the Respondents sensibly conceded that if the Claimant succeeded in showing that he had been constructively dismissed, the dismissal was unfair.

6 EJ Joffe explained the nature and scope of the claim for failure to make reasonable adjustments as follows.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

xii) A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

a) Requiring the claimant to work with managers who had caused or contributed to his mental health condition?

b) Requiring the claimant to work in his existing role?

xiii) Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability?

xiv) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

xv) What steps could have been taken to avoid the disadvantage? The claimant suggests that he should have been moved to a role where he did not have to work with the relevant managers, such as reception.

xvi) Was it reasonable for the respondent to have to take those steps?

xvii) Did the respondent take those steps?

7 By the end of the hearing before us, issue xi) had fallen away as the parties were agreed that the Claimant was disabled by anxiety and depression in and at all material times after March 2020 and that the Respondents had at least constructive knowledge of that fact¹ from 6 March 2020 onwards.

8 The case came before us in the form of a final, liability-only hearing held remotely by CVP on 8 February this year, with seven days allowed. The Claimant appeared in person and the Respondents were represented by Ms Georgina Hirsch, counsel. A large bundle of documents was produced. Certain preliminary matters were discussed. In the first place, we granted the Respondents’ unopposed application for permission to amend their response form in accordance with the draft included in the bundle. Second, it was confirmed that the list of issues properly defined the dispute subject to the addition of a point under the Trade Union & Labour Relations (Consolidation) Act 1992, s207A(3) (strictly a remedy issue). Third, for reasons given orally, we refused the Claimant’s

¹ As issue xi) recognises, constructive knowledge is sufficient: see the Equality Act 2020, sch 8, para 20(1)(b), cited below.

application for permission to rely on a witness whose statement was served at the last minute. (In summary, our reasons were that (a) the evidence was served much too late, (b) it appeared to have no relevance, or very little, to the issues for decision, and (c) admitting it would entitle the Respondents to a postponement of the hearing to enable them to file fresh evidence in response and the Claimant had made it clear that if we took that view we should treat the application as withdrawn.)

9 Having read into the case for much of day one, we heard evidence from the Respondents' witnesses, Mr Gagan Sharma, at all relevant times Hotel Manager, Mr Annan Kapur, at all relevant times Food and Beverage Manager and Mr Amin El Guennouni, Senior Assistant Manager (IRD).² In addition, we received evidence from the Claimant and his supporting witness, Mr Shahanand K. K. Kottiyadath, at all relevant times Food and Beverage Supervisor. We also read a statement produced by the Claimant in the name of his wife. Ms Hirsch did not wish for the opportunity to cross-examine that witness. Regrettably, it emerged in the course of the hearing that the Respondents' disclosure was incomplete. We were satisfied that the error was accidental. The missing pages (730-743) were added to the bundle. Closing argument, supported by very helpful written outlines, was presented on day four, whereupon we reserved judgment.

The Legal Framework

Unfair dismissal

10 The first prerequisite for an unfair dismissal is a dismissal. By the Employment Rights Act 1996 ('the 1996 Act'), s95 it is provided that:

- (1) For the purposes of this Part an employee is dismissed by his employer if ...
...
(c) the employee terminates the contract ... (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

The provision embodies the common law. A party to an employment contract is entitled to terminate it summarily in circumstances where the other party has breached an essential term.

11 Terms of employment contracts may be express or implied. The courts have long recognised that the employment relationship is subject to the implied duty of trust and confidence. In *BCCI v Malik* 1997] ICR 607 HL, the duty was expressed as being to refrain from acting "without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence" between employer and employee. Other implied terms have from time to time been recognised. These include the duty upon an employer to provide his employee with access to a means of redress in respect of any grievance (see *W A Gould (Pearmak) Ltd v McConnell* [1995] IRLR 516 EAT and *Hamilton v Tandberg Television* UKEAT/2002/65).

² In-Room Dining

12 A course of conduct or series of events may cumulatively amount to a repudiation of an employee's contract of employment entitling him to resign and treat himself as constructively dismissed. In such a case, the 'last straw' need not itself amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157 CA). On the other hand, it cannot be an entirely innocuous act or omission: it must add something to the overall breach (*Omilaju v London Borough of Waltham Forest* [2005] ICR 481 CA).

13 If there is a dispute as to whether a claimant was dismissed, the burden is upon him or her to prove dismissal. Subject to that, the outcome depends on the proper application of the 1996 Act, s98. In view of the concession referred to in para 5 above, it is not necessary to set that section out here.

Failure to make reasonable adjustments

14 The Equality Act 2010 protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics'. These include disability.

15 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include discrimination in the form of failure to make reasonable adjustments (s21(2)).

16 The duty to make reasonable adjustments for disabled persons is enacted by the 2010 Act, s20, the material parts of which state:

(2) The duty comprises the following three requirements.

(1) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

The duty is applied to the employment sphere by s39(5).

17 The duty does not arise where the employer "... does not know, and could not reasonably be expected to know ... that the Claimant has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement" (sch 8, para 20(1)). The burden is upon the employer to make out the defence. In *Wilcox v Birmingham CAB Services Ltd* EAT 0293/10, it was held by the EAT (Underhill J) that the effect of the 'knowledge' defence under the predecessor legislation (Disability Discrimination Act 1995, s4A(4)) was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, *and* (ii) that he or she was disadvantaged by the disability (for example through the application of the relevant PCP). Although the wording of sch 8, para 20 could certainly be clearer, we take this authority to represent the current legislation. In the context of disability discrimination law, the word 'likely' is generously interpreted: an outcome or consequence is 'likely' if it "could well happen" (see *SCA Packaging Ltd v Boyle* [2009] ICR 1056 HL).

The Primary Facts

18 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision, we find as follows.

Background and outline narrative

19 The Claimant worked in the IRD section of the Food and Beverage Department. When Mr Kapur joined the Respondents as Food and Beverage Manager in May 2019, the Claimant reported to him. At that time there was no IRD Manager. Ms Viktorija Pomeranceva was appointed to that position in the summer of 2019. As such, she became the line manager of the Claimant and Mr Kottiyadath and reported to Mr Kapur. Mr Kapur reported to Mr Sharma, the Hotel Manager.

20 The Claimant was subject to a probationary period during his first six months' service. Within that period, as a result of complaints from at least four staff members in different Departments, he was spoken to about the need to avoid an unduly abrupt and/or insistent (or "pushy") manner in interacting with colleagues. The suggestion from HR that consideration might be given to dispensing with his services because of his communication style was not taken up.

21 The Claimant was acknowledged by the Respondents' witnesses to have performed his duties well for the most part. On the other hand, he had a tendency to respond poorly to feedback and was resistant to ideas and perceptions which he did not share.

22 The Claimant raised a number of complaints and concerns in the course of his employment. These related to diverse matters, including the unsatisfactory positioning of a computer screen in the Food and Beverage Department, defective air conditioning and the need to replace staff uniforms. His requests for changes and improvements were not met with any hostility; most resulted in positive responses. That said, as already noted, the *manner* in which he raised and pursued his concerns did lead to friction on occasions.

23 On 29 June 2019 the Claimant sent an email to Mr Kapur which referred to an incident "recently" in which the General Manager had told him to "get lost" and verbally abused him, which experience had caused him to consult a psychologist. Mr Kapur spoke with him and asked if he wished to take the matter further. The Claimant replied that he did not and that he had been in an emotional state when he wrote the email. The "recent" incident (the subject of allegation a)) had in fact happened about a year earlier.

24 On 6 February 2020 the Claimant sent an email to Ms Jessica Perra in the HR Department complaining of what he perceived as bullying and harassment by Ms Pomeranceva and stating that he had an anxiety issue which had recently "developed very badly". Ms Perra responded at once, inviting him to a meeting

which was held the same day. She reported the matter to Ms Yusrah Kandeerally, HR Director, on 7 February.

25 On 9 February 2020 an incident (the subject of allegation j)) occurred at the Hotel which resulted in the Claimant leaving the Hotel mid-shift, citing “stress”. He did not return to work thereafter.

26 On the same day, the Claimant presented a formal grievance complaining principally of being placed under “immense mental pressure and stress” and subjected to “unbearable harassment” by Mr Kapur on 9 February 2020. He also alleged that Mr Kapur had humiliated and abused him on prior occasions. The grievance is the subject of allegations m) – s), on which we make findings below.

27 The first GP fit note, dated 11 February 2020, referred to a “stress-related problem”.

28 The Claimant commenced a course of psychotherapy and counselling on 15 February 2020.

29 By an email of 18 February the Claimant provided further details of his grievance.

30 On 20 February 2020 the Claimant sent an email to the Respondents attaching a further fit note and stating that he was on medication and would be for a year. The source of that belief is not identified.

31 Ms Kandeerally wrote to the Claimant acknowledging receipt of his further information and stating that if he was not comfortable with the idea of attending a grievance meeting at the Hotel another location could be selected.

32 On 1 March 2020 the consultant psychiatrist who saw the Claimant on 15 February signed a report containing a diagnosis of a “severe depressive episode without psychotic episodes” and mentioning the possibility of PTSD. The initial care plan proposed a combination of anti-depressant medication and CBT.

33 The report was sent by the Claimant to the Respondents on 6 March 2020.

34 Also on 6 March 2020 the Claimant attended a grievance meeting with Mr Sharma, at which Ms Kandeerally took a note. For want of time the meeting was reconvened on 11 March.

35 Between 12 March and 27 April 2020 Mr Sharma, assisted by Ms Kandeerally, held meetings with eight witnesses other than the Claimant to explore the matters which he had raised. These included Mr Kapur, Ms Pomeranceva, Ms Marques Sa, Ms Zhang and Mr Singh. He also followed up certain points by email, calling for documentary evidence in some instances.

36 On 23 March 2020 the national lockdown resulted in the closure of the Hotel. It did not reopen until 4 July.

37 On 24 March 2020 Ms Kandeerally sent an email to the Claimant wishing him well in his recovery and advising that disruption resulting from the pandemic was likely to delay the grievance process.

38 On 16 April 2020 Ms Kandeerally wrote again to the Claimant asking how he was and observing that his current sick certificate was about to expire.

39 On 17 April 2020 the Claimant replied to Ms Kandeerally attaching the latest sick certificate and adding that he was expecting to receive "a longer term one". He also asked her to contact him by email only.

40 On 22 April 2020 the psychologist who had been providing psychotherapy to the Claimant since February wrote a report noting that he was continuing to present with symptoms of severe depression and anxiety and recommending a phased return to work. The report included this passage:

Carlton understands that it is important he returns to work, but it is also very important that, in order for him to progress, he does not return to work in the same department, or with the same people he was working with before. Since the grievance Carlton raised against his manager has not yet been addressed, nor resolved, by his workplace, it could be harmful and re-traumatising for him to return to working within the same context.

41 The report was sent to the Respondents the following day.

42 On 30 April 2020 the Claimant attended a 'return to work meeting' held remotely at which Mr Sharma and Ms Kandeerally were also present. Mr Sharma asked after the Claimant's health. He replied that he was well but needed to be careful, lacked confidence and could become "clouded" and lack "control". His treatment was continuing. He also said that he hoped to return to work in a new environment (he may have referred to a new department). Mr Sharma explained that the Hotel was shut and there was no work and he would, like most of the other staff, be furloughed from 1 May.

43 The Claimant attended a further grievance meeting with Mr Sharma on 11 May 2020.

44 The grievance outcome was delivered in a letter from Mr Sharma of 12 June 2020, delivered to the Claimant the following day. The Claimant's complaints were not upheld. Some were unequivocally rejected; others were found not proved for want of adequate or independent evidence. Turning to the Claimant's request to return to work in a different department, Mr Sharma reached the conclusion that he should return with a different reporting line (outside IRD), but still within the Food and Beverage Department. He also stated that all Departments would be reminded that shouting in the workplace was not acceptable. The Claimant was made aware of his right of appeal.

45 In later correspondence Mr Sharma agreed to the Claimant's request for an extension of the standard time for appealing.

46 On 23 June 2020 the Claimant submitted an appeal against Mr Sharma's decision on his grievance.

47 The Claimant's last sick note expired on 8 July 2020.

48 An appeal hearing was fixed for 9 July 2020 and later postponed to 16 July.

49 On 14 July the Claimant gave one month's notice of resignation.

50 The Claimant later rejected the Respondents' offers to (a) hold the grievance appeal in any event and (b) waive his resignation and work with him to secure his continued employment in a department acceptable to him.

51 The Claimant made surprising and troubling allegations before us about the Respondents falsifying notes of meetings and tampering with, or even concocting, documents. We regret these intemperate claims, which the evidence does not begin to justify. The notes are just that. They do not claim to be *verbatim* records. We accept that they capture in a broad way the essence of what was said. There was no manufacturing or manipulation of documents.

The individual allegations – miscellaneous matters (allegations a) - I)

52 On allegation a), we find that there was an uncomfortable exchange in the summer of 2018 in which Mr Singh rebuked the Claimant. We do not accept that he made the precise comments alleged (which do not seem plausible). As already mentioned, the Claimant raised the matter with Mr Kapur almost a year later but then said that he did not wish to take it further.

53 The 'letter of concern' (allegation b)) was written by Mr Kapur and sent to the Claimant on 4 September 2019 (not 26 July). The background was that the Claimant had encountered difficulty in obtaining approval for a travel pass loan and had had to chase up settlement of a bonus and another payment. He had pursued these matters with two departments, HR and Payroll, through face-to-face communication, phone calls and emails. This ignored the established procedure, which required staff to raise such matters with their own department in the first instance, and caused irritation to those affected, one of whom complained to Mr Kapur, pointing out that it was not the first time that the Claimant had chosen to do things his own way to the inconvenience of others. In his letter Mr Kapur reminded the Claimant of the need to follow the correct process and to allow time, once an issue had been raised, for a considered response. The letter of concern was not a disciplinary sanction under the Respondents' procedures.

54 In a conversation in autumn 2019 Mr Kapur made a remark to the Claimant and Mr Kottiyadath that Ms Pomeranceva was trying to take them out of their comfort zone (allegation c)). The evidence does not enable us to fix the precise context but the comment arose from Mr Kapur's consciousness that Ms

Pomeranceva, new in her role and with relevant experience to rely on, was anxious to drive through changes to improve the IRD Department and that the Claimant and Mr Kottiyadath did not look on her plans, or some of them at least, with enthusiasm. We are not persuaded that Mr Kapur shouted at the Claimant.

55 As to allegation d), the complaint about being denied sufficient time to complete training-related tasks is not established on the evidence. We were shown an email from Ms Pomeranceva to the Claimant of 3 October 2019 which demonstrates clearly that she had regard to the time demands of particular tasks.

56 Allegation e) cannot bear on the complaint of unfair dismissal because the email on which the Claimant relies (dated 16 April 2020) was not seen by him until disclosure in the Tribunal proceedings, and therefore could not have influenced his decision to resign. Accordingly, we decline to make any further finding on it.

57 In relation to the “military boot camp” complaint (allegation f), we are disadvantaged by the fact that Ms Pomeranceva did not give evidence. Doing the best we can, we think it more likely than not that something was said about a military boot camp. But we do not think it likely that the remark was intended, or taken at the time, as some sort of slur aimed at the Claimant. We suspect that she was seeking to make the point that, while it was important to avoid staff members being slaves to their mobile phones when on duty, an absolute ban on their use during working hours was an unduly harsh rule to impose. And we think that the Claimant understood that that was what she was trying to get across. He may not have liked her turn of phrase, but he was not seriously offended by what she said. If he had been, his complaint would have come much sooner.

58 As to allegation g) the complaint about Ms Pomeranceva’s conduct here is not valid. There had been a serious breach of the Respondents’ procedures and it was obvious that the matter, including the responsibility of those in supervisory roles, called for investigation. The Claimant’s theory that Ms Pomeranceva sought to have him disciplined for “spilling the beans” about alcohol being drunk at work (rather than suppressing the story) is implausible and does not sit easily with her email of 10 January to the HR Department.

59 Turning to allegation h), we find that the Claimant raised a concern about air conditioning and about a desk in July 2019 and that he raised the air conditioning again in November or December 2019. We do not accept that Mr Kapur or Ms Pomeranceva were “angry” with the Claimant. Ms Pomeranceva may have exhibited a degree of frustration but in so far as she did it was because she felt that he had not kept her properly informed of the steps which he had taken.

60 Allegation i) collapsed. The Claimant’s final position went no further than to say that he was asked to work certain shift combinations which he regarded as unhealthy and refused. On his own case, no unhealthy shift was imposed upon him. We are satisfied that he was not subjected to any adverse treatment by Ms Pomeranceva related to shift allocation or any refusal by him of particular shifts.

61 Allegation j) refers to an “instruction” that additions be not made to the daily “amenities” (high-quality pastries) list after it was “submitted” (presumably to the chef). In cross-examination, the Claimant told us that Ms Pomeraceva had let it be known that extra amenities were “not to be encouraged”. When it was put to him that there was a significant difference between refusing to place orders for additional amenities and not encouraging such orders, he strongly disagreed, insisting that the two phrases meant exactly the same thing. We do not share his opinion. In our view, her likely aim was, where possible, to spare the chef burdensome, last-minute work at the end of his or her shift, but not in circumstances where doing so might compromise the quality of the Hotel’s service or disappoint a guest. We find that he misunderstood her guidance. As a result, when a ‘platinum’ (or ‘VIP’) guest took a room at the Hotel without pre-booking, the Claimant refused the order for extra amenities placed by the Front Desk. Mr Kapur became aware of the incident and directed that the order be honoured. He then spoke to the Claimant who insisted that he had refused the order in compliance with Ms Pomeraceva’s instruction. Mr Kapur attempted to point out the importance of taking considered decisions on the facts as they arise. The Claimant became increasingly agitated and raised his voice. Further constructive dialogue became impossible and Mr Kapur brought the meeting to an end. We do not accept that Mr Kapur shouted at the Claimant in reprimanding him, although he may well have had to shout in requiring him to leave, given that the Claimant himself was shouting. We are not persuaded that he said anything about the Claimant being unfit to be a kitchen porter (an allegation notably different from that made in the grievance).

62 The Claimant told us that allegation k) refers to his email of 8 January 2020, in which he had raised a number of matters with Ms Kandeerally and Mr Kapur. We are not persuaded that Mr Kapur made any comment of the sort alleged.

63 As to allegation l), we find that, on occasions during the Claimant’s employment, the Hotel was understaffed, resulting in some increase in the workload of those on duty. The Respondents sometimes had to call on agency staff. It is not shown that understaffing happened to such an extent or with such frequency as to impair the mental or physical health of the Claimant or any other employee or to cause a realistic risk of such harm.

The individual allegations – grievance (allegations m) – s))

64 As already stated, the grievance was initiated by the Claimant’s email of 9 February 2020. Further amplification (if not clarification) was supplied in his email to Ms Kandeerally of 18 February 2020. We have sketched in our general narrative above the investigation which followed and the outcome which Mr Sharma delivered on 12 June 2020. It is convenient to set out some brief further findings here.

65 As a result of reading the emails of 9 and 18 February 2020 and hearing from the Claimant at meetings on 6 March, 11 March and 11 May 2020, Mr Sharma understood the grievance to be concerned principally with:

- Alleged shouting by Mr Kapur
- Ms Pomeranceva's management style and alleged lack of support
- A health and safety issue to do with heating and the position of a desk
- An alleged comment by Ms Catarina Marques Sa in 2019
- Being shouted at and aggressively treated by Ms Angie Zhang
- Refusal of a holiday request in August 2019
- The encounter with Mr Singh in 2018

The complaint about Ms Pomeranceva rested on a number of discrete events.

66 At the meeting on 11 March 2020, asked by Mr Sharma what he was looking to get from the grievance, the Claimant replied to the effect that he did not wish to work with Ms Pomeranceva or to be shouted at or ordered out by Mr Kapur. At the return to work meeting on 30 April 2020 he expressed a similar sentiment, saying that he wished to work in a different environment (or perhaps department). On neither occasion, nor at any other material time, did he say or suggest that he was unable or unwilling to work with Mr Kapur.

67 As to allegation m), it is common ground that Ms Kandeerally was present at the grievance meetings of 9 and 11 March and 11 May 2020. Her role was to take a note. The Claimant did not object to her presence.

68 It is convenient to take allegations n) and o) together. We accept that in his meetings with the Claimant Mr Sharma sought to explore the various complaints in some detail and asked a number of probing questions. On the other hand, we are satisfied that he stopped well short of conduct capable of being seen as intimidation or harassment. And if he strayed outside the scope of the (poorly-defined) grievance, he did so only to a very minor extent. It is, however, right to say that, in the grievance outcome letter, he included an extraneous matter, namely the fact that it had come to light that the Claimant had been sending work emails to his private email account and that that conduct would be addressed separately.

69 As to allegation p), we find that the Claimant's original assertion that his interview notes were not sent to him is wrong. Ms Kandeerally sent them to him on 25 April 2020 and he acknowledged receipt the following day. Nor are we persuaded by his revised position (as presented to us), that he received the notes but was unable to open them. His claim in oral evidence that he raised this problem in the return to work meeting of 30 April 2020 is not substantiated by the notes of that meeting or by any contextual evidence, and we reject it.

70 Turning to allegation q), we record the undisputed fact that Mr Sharma decided to propose a change in the Claimant's reporting line but not to grant his request for transfer to a new department. It was his unchallenged evidence, which we accept, that there was no vacancy in the Reception Department at the time and that the Claimant did not have relevant experience in reception work.

71 As to allegation r), Mr Sharma found that the Claimant had on one occasion manipulated a shift allocation for his own advantage. There was ample evidence to substantiate that finding.

72 Finally, in relation to allegation s), we note that the grievance outcome letter placed on record that the incident involving staff drinking alcohol on duty had been under investigation prior to the Claimant's sick leave and would be re-visited on his return. It did not contain a "threat" of disciplinary action. Moreover, we do not accept his assertion that the episode had ever been treated as "closed".

Allegation t) – failing to react to the Claimant's complaints about stress

73 Our factual findings relevant to allegation t) are included in the 'background and outline narrative' section above. As can be seen, the Respondents did react to his concerns about stress and supported him in his sickness absence.

Secondary Findings and Conclusions

Rationale for primary findings

74 To the extent that we have had to resolve conflicts of evidence, we have largely preferred the evidence given on behalf of the Respondents to that given by or on behalf of the Claimant. Their witnesses were careful and measured and gave evidence which was broadly consistent, rational and in keeping with the contemporary documents. We cannot pass similar comment on the Claimant's evidence, which tended to be muddled, confusing and at times implausible. He often appeared to miss the point (something which, we suspect, may have led to difficulty and frustration in his dealings with managers and colleagues).³ He seemed more intent on scoring points than answering questions put to him. He exhibited unshakable confidence in the correctness of his views and a constitutional reluctance (not to say inability) to contemplate the possibility that he might be in error. And it seemed to us that his recall of events was in parts so severely skewed by his utter conviction (despite ample evidence to the contrary) that he was the victim of a co-ordinated campaign to do him down that it could not safely be relied upon. His credibility was also undermined by some troubling evidence which he gave concerning his experience (before and after his resignation) as a FOREX trader – evidence which we greatly struggled to reconcile with documents appearing to show that he had given a quite different account to the medical professionals by whom he was treated.

Unfair dismissal

75 Did the Respondents repudiate the Claimant's contract of employment by breaching any essential term? Having reviewed our primary findings, we have arrived at a list of five matters about which, in our view, he may hold an arguable sense of grievance. These are captured in allegations a), f), l), o) and q). As to a), Mr Singh did speak sharply to him in the summer of 2018. As to f), Ms Pomeranceva's message was unobjectionable: it was her job to offer guidance and

³ We have been alive to the possibility that a certain lack of clarity in giving evidence and presenting his case orally may have stemmed wholly or partly from his disability. That said, and to his considerable credit, he responded positively to our guidance concerning closing submissions, producing a notably clear and well-constructed document to support his arguments.

direction to those in her charge. Her choice of language, on the other hand, was perhaps ill-advised, particularly as the Claimant was liable to misunderstand and readily disposed to take offence. But any offence here was minor. As to l), there was a degree of understaffing on occasions. No doubt it caused an increase in work pressures for all concerned from time to time, although it was certainly not, we find, a major issue for the Claimant or anyone else. As to o), we think that Mr Sharma departed from best practice in his handling of the grievance by including in the outcome letter criticisms of the Claimant relating to his use of a personal email account. As to q) we accept that Mr Sharma's decision not to grant the Claimant's request to move to the Reception Department, despite it being supported by his treating clinicians, gave rise to an arguable sense of grievance on his part.

76 We find in the other lettered allegations nothing on which a justifiable sense of grievance could rest or about which sensible complaint could be made.

77 Did the five matters which we have isolated, considered singly or in combination, constitute or give rise to a breach of the Respondents' duty to preserve mutual trust and confidence? The only and obvious answer to the question is no. Allegations a), f), l), and o) were, on any view, minor. They were not intended to cause harm to the Claimant and any upset or annoyance which he experienced was trifling. They entailed no breach of any express term of the contract and it would offend language and common sense to say that they were calculated or likely to destroy mutual trust and confidence. Moreover, for the purposes of the *Malik* test, the one more substantial complaint (allegation q)) seems to us to take the Claimant's case no further forward. The implied term plainly did not oblige Mr Sharma to reach a particular decision on the Claimant's request to transfer to the Reception Department. He had no contractual *right* to an affirmative answer. No doubt he had a right to have the request (and the grievance generally) considered and decided in good faith, but in our view there was no infringement of that right. Mr Sharma weighed a number of factors in the balance, came to a decision which was, we think, manifestly permissible, and offered a means of appeal. The decision was permissible because the Claimant did not make the case (which he now advances) that a transfer out of the Food and Beverage Department was needed in order to safeguard his mental health.

78 Allegations o) and q) may alternatively be analysed in accordance with the *McConnell* and *Hamilton* authorities cited above but by this route the Claimant fares no better. Those cases show that, if there is an implied duty on an employer relating to grievance procedures that adds anything to the *Malik* duty, it does not extend beyond an obligation to provide the employee with *access* to a grievance process (which we take to mean a serviceable procedure operated in good faith). If that duty applied (we proceed on the footing that it did), it was fully honoured.

79 For these reasons, we find no breach, much less repudiation, of the Claimant's contract of employment. Accordingly, the unfair dismissal claim falls at the first hurdle.

80 Had we somehow found that allegation q) disclosed a repudiation of the Claimant's contract, we would have held that his resignation was in substantial part

a response to that breach (but not to any of the other lettered complaints). Accordingly, the unfair dismissal claim would have succeeded (the Respondents having conceded that, if there was a constructive dismissal, it was unfair).

Failure to make reasonable adjustments

81 We have noted in our introduction how the PCPs were formulated. We have reminded ourselves that, whether or not the Claimant's case might have been framed differently, our duty is to deal with the dispute put before us.

82 The Claimant made it clear that both PCPs asserted requirements applied to him as a consequence of Mr Sharma's refusal to transfer him to the Reception Department. He does not rely on any prior requirement.

83 As to the first proposed PCP (issue xii a)), we interpret the Claimant's case, in his favour, as resting on a requirement to work with "managers" (Ms Pomeranceva and Mr Kapur) whom he *believed* to be responsible for causing or contributing to his mental health condition. We do not look to him to prove that that belief was well-founded. On the other hand, he does need to establish the fact of the belief. Not without hesitation, certainly in relation to Mr Kapur, we find that he did hold the belief that they had at least contributed to his anxiety condition.

84 The claim based on the first PCP fails in so far as it alleges a requirement to work with Ms Pomeranceva for the obvious reason that Mr Sharma proposed to move the Claimant out of the IRD section and place him under the direction of a new line manager. There was no requirement for him to work with her in the future.

85 The claim based on the second proposed PCP (issue xii b)) inevitably fails on the facts. Mr Sharma's decision did not require the Claimant to remain in his existing role: it sought to place him in a different one.

86 Did the first PCP in so far as it required the Claimant to remain in the Food and Beverage Department and so (albeit at one remove) under the management of Mr Kapur put him at a substantial disadvantage compared to someone without the his disability (issue xiii)? On the basis of our finding that he believed that Mr Kapur had at least contributed to his anxiety, it follows as a matter of natural inference that the substantial disadvantage test ('substantial' meaning more than minor or trivial)⁴ is also met.

87 This brings us to the 'knowledge' defence (issue xiv)). There is no dispute that, at the time of Mr Sharma's decision on the grievance, the Respondents knew (actually or constructively) of the Claimant's disability. Can they show (the burden being on them) that they did not know, and could not reasonably have been expected to know, that the requirement to continue to work with Mr Kapur would be likely to put the Claimant at the requisite substantial disadvantage? In our judgment, the Respondents clearly make out their defence. At the relevant time (up to 12 June) they had no good reason to think (despite the recommendation in the Psychologist's report of 22 April 2020) that requiring him to work with a different

⁴ See the 2010 Act, s212(1).

reporting line within the Food and Beverage Department would, or “could well”, cause him any disadvantage. The fact that he had expressed a wish to move elsewhere did not by itself point to such a risk, especially as, when invited to say what he was looking for in his grievance, he had asked not to work with Ms Pomeranceva but had *not* made a similar request in relation to Mr Kapur. We would add that the picture might have changed had the Claimant pursued the appeal and developed his grounds for challenging Mr Sharma’s decision. Doing so would (or should) have left the decision-maker with an understanding never conveyed to Mr Sharma of his grounds for asserting that leaving him in the Food and Beverage Department, even with a new manager, would harm or at least jeopardise his mental health. In such circumstances, any decision on appeal affirming Mr Sharma’s decision would have been vulnerable to a separate challenge by the Claimant and any ‘knowledge’ defence in relation to that (appellate) decision might well have failed.

88 Our finding on the ‘knowledge’ defence is fatal to the reasonable adjustments claim. There was no duty to make any adjustment. Accordingly, issue xv) does not arise, but in case we are mistaken in any stage of our reasoning we will consider it anyway. We are satisfied that, given what was known to Mr Sharma at the time of his decision on the grievance, transferring the Claimant to the Reception Department in which there was no vacancy to perform duties for which his experience did not qualify him was not a step which it would have been reasonable for him to have to take in favourable trading times, let alone in circumstances where, owing to Covid-19 measures, the Hotel was closed and faced an uncertain future. There was nothing to suggest that such an adjustment was necessary. Here again, we observe that, had the appeal been pursued, the analysis at the end of the process might have swung in the Claimant’s favour: knowledge of the disadvantage might have led to a different view as to the reasonableness of the adjustment sought.

89 It follows that the complaint of failure to make reasonable adjustments fails.

Outcome

90 For the reasons given, we are satisfied that the Respondents did not infringe the Claimant’s legal rights in any respect. Accordingly, his claims fail and the proceedings are dismissed.

Employment Judge Snelson
18/02/2022

Judgment entered in the Register and copies sent to the parties on: 21/02/2022

For Office of the Tribunals