THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Luengo Garcia	**v**	**Imperial London Hotels Ltd**

Heard at: London Central

On: 18, 19 & 20 December 2017 and 21 December in Chambers

Before: Employment Judge J Wade

Representation:

Claimant: In person
Respondent: Mr M Hopkins, Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Respondent did not: -

(a) Automatically unfairly dismiss the claimant in breach of the Employment Rights Act 1996 section 103A; or
(b) Unfairly dismiss the Claimant contrary to 98.

REASONS

1. Mr Luengo Garcia worked as a night porter for the Respondent. The company runs seven hotels in the Russell Square area of London and he was dismissed after he refused to sign a new contract amending his working hours. He says that the real reason for his dismissal was that he had made protected disclosures or, in the alternative, that the dismissal was unfair but the respondent argues that it was a fair dismissal "for some other substantial reason" (The Employment Rights Act 1996 section 98(1)(b).

The law

2. The Tribunal had to decide the only or principal reason for the dismissal. Was it that the claimant made a protected disclosure (blown the whistle) or, alternatively, for "some other substantial reason" as the Act describes it? If it was for some other substantial reason was the dismissal fair taking into account whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant and in accordance with equity and the substantial merits of the case (the Employment Rights Act 1996 section 98(4)). The respondent has resources, an HR function and also access to legal advice.

3. The respondent provided a list of issues which I agreed. I talked the issues through with the claimant, making several attempts to explain them to him and pointing out the overriding objective and my commitment to ensure that he was not legally disadvantaged by being a litigant in person.

4. I am not sure how successful I was in that the claimant repeatedly said that he could not have raised the fact that he had been badly treated because he blew the whistle because he did not know what whistleblowing was until June 2016. I tried to explain that if he believed at the time that the respondent was motivated by the fact that he had complained about, for example, health and safety, he could have articulated this without knowing the legal definition. Whilst he frequently talked about a "witch hunt" he did not seem to have made the connection at the time. Of course, this is not fatal but it would have helped if the claimant had identified the links earlier. Instead, his accusations were always general and never specific.

5. I also tried to explain that there was a difference between a claim by someone who had blown the whistle and had then been dismissed and a claim by someone who had blown the whistle and *as a result* had been dismissed. Only the latter is automatic unfair dismissal. I am not sure the claimant understood this and this might make it difficult for him to understand why I have found against him.

6. I must say that I do, however, fear that the claimant has a tendency doggedly to pursue his arguments without much regard for the legal framework. For example, he arrived at the hearing without a witness statement having overlooked the clear directions order that he provide one. The respondent preferred to proceed with the claimant's extempore evidence rather than postpone but I was concerned by the claimant's lack of regard for the procedure and it is very rare indeed for even litigants in person to behave in this way.

The evidence

7. The claimant gave extempore evidence. For the respondent, I heard from Ms Gemma Todd, Head of HR who dismissed the claimant, Ms Fiona Howarth, independent HR consultant who heard an appeal against an earlier disciplinary decision of Ms Todd and Mr Alexander Walduck who heard the dismissal appeal. I also read the statement of Ms Katharine Waller who heard a grievance appeal. I was provided with a medical letter to confirm that she had been admitted to

hospital and underwent surgery on 17 December. I took her statement into account although noted that she was not available to be cross-examined. The claimant objected to my considering her statement but when I asked him whether there were any particular points in it which he wished to challenge, there were none.

The facts

8. The claimant was first employed as night porter at the Morton Hotel on 19 June 2013. The contract provided that the company was entitled to change his usual place of work.

9. His gross working hours were 42.5 a week. The net hours were 37.5. The difference was that he was not paid for his rest breaks. The actual hours of work were 10.30pm to 7am 5 days a week. He worked 7.5 hours with a 1 hour break. The company provided the claimant with accommodation which meant that he lived fairly centrally and he says that he was home by 7.30 and asleep very shortly after that. He slept until about 3:30pm and then had some time to himself before going back to work.

The claimant's complaint about Mr Krause, December 2014

10. In December 2014, the claimant made a complaint against his deputy manager Mr Krause. He had various grievances including changes to his hours and what he considered to be false accusations about his body odour. Mr Krause told HR that the claimant was difficult to manage but he agreed to a mediation meeting following which an action plan was produced. The respondent says it was a success but the claimant disagrees although he did not protest in writing.

11. The claimant says that during the whole of 2015 he raised lack of rest breaks and ensuing health and safety risks. These were raised verbally and he does not have any proof. They are not mentioned in his ET1 and the claimant is not sure who he complained to, it might have been a colleague. The respondent says it was not aware of them.

Complaint about out of date food, October 2015

12. His ET1 does state that in October 2015 he complained about out of date food in the fridge. This consisted of a note stuck onto a packet of ham which may have been out of date saying "To whoever is in charge, this is illegal and may end up in jail sentence, in case of being discovered by authorities, to the person responsible, be careful, please. Andros". He does not know who the note was seen by and the respondent does not agree that it was a protected disclosure. There is no evidence of this note being discussed at the time.

13. The claimant argues that from November 2015 management started to retaliate. For example, he was sent to do a shift at another hotel which was unfair. The claimant explains the fact that two others were also sent by saying that they were also being punished for something, he cannot recall what. On the face of it

however it appears difficult for the claimant to say that he was being singled out for punishment.

The claimant's grievance, 15 Nov 2015

14. On 15 November, the claimant raised an informal grievance against the hotel manager Ms Engler. He referred to a number of problems but made no mention of rest breaks, health and safety risks or out of date food. This became a formal grievance on 22 November when he complained of unfair and discriminatory treatment. The claimant clarifies that he did not mean discrimination in the legal sense. In his grievance, he said that if he was not upheld he would consider that the staff office (the HR team) agreed with the unfair and discriminatory attitude of the company. He said this sort of thing a number of times which suggested that he was not prepared to accept a finding unless it was in his favour.

15. On 27 November Ms Todd wrote to the claimant saying that she did not uphold the grievance. However, she would talk to Ms Engler about putting a more transparent system in place with set criteria. Her objective was to develop a system which meant that the claimant didn't end up thinking that he had been treated unfairly. This response was thoughtful and fair in that the claimant was being offered some changes even though the grievance was not upheld. The claimant says that the suggestions were ridiculous and unachievable but I have no reason to conclude that they were not honestly intended to assist and improve relationships between the claimant and his managers. Thus, I find no evidence that Ms Todd was retaliating against the claimant either because he was generally being difficult or, specifically, because he was a whistle blower about rest breaks and food safety issues. There is no evidence that Ms Todd even knew about the alleged whistle blowing activity.

16. The claimant appealed and accused the staff office of being unfair and discriminatory. He said "this is either a retaliation to my complain or a very poor opinion. Mine, opposing yours, is based on facts not guesswork." The complaint he was referring to was about being sent to do a shift at another hotel not about health and safety as he did not accept that the instruction was reasonable.

17. The grievance appeal hearing took place on 4 December. It was chaired by Katie Waller (nee Walduck). The claimant had a colleague with him and he was welcome to take his own notes but did not. He says that at this meeting he tried to raise concerns about food and rest breaks but was shouted down. There is no evidence at all in the notes of the meeting, the ET1 or Ms Waller's statement. If this had happened the claimant or his companion would have complained about it at the time or afterwards, the claimant was not backward in raising complaints.

18. On 8 December, the appeal was rejected as no further evidence had been provided.

19. I conclude that up to this point Ms Todd, Ms Walduck and the senior managers were not aware of any concerns that the claimant might have about rest breaks or safety and so had no grounds for retaliating. The company was

conscientiously trying to follow procedures and give the claimant the opportunity to have his concerns aired. He says that every time a complaint was rejected, or a disciplinary decision made, this was part of a snowball effect stemming from the earlier complaints but there is no evidence of this. There is in fact evidence that he thought at the time that any retaliation was caused by his complaints about his managers and this would indeed be a more likely reason that his unsubstantiated informal and/or verbal "whistle blower" activity.

Christmas 2015

20. The next problem arose in quick succession. The claimant wanted 24 or 31 December off but was on the rota to work both. He complained and said that he wanted the rota changed. Again, he says that this detriment was because he was a whistle blower. It transpires that the claimant was probably put on the rota because he did not cooperate with the request made by management in June that staff who wanted holiday over Christmas should book it. Of course, a number would have booked holiday in which case those remaining would have to cover unpopular shifts. In the end, the claimant did not work 24 or 31 because he was off sick. There is no reason to attribute an ulterior motive to this management action.

Disciplinary action, January – March 2016

21. Meanwhile, a number of fairly low-level concerns about the claimant were raised by the hotel manager, Ms Engler, which Ms Todd decided should be investigated with a view to possible disciplinary action. Ms M Ramhit was the investigator but the claimant objected to being interviewed by her so he was instead interviewed by Craig Proctor who was in charge of the porters. The claimant did not raise any concerns about retaliation or about rest breaks or health and safety although he did complain that he was not being treated fairly.

22. One of the management concerns was that the claimant had issues with the Christmas tree in the lobby. He had been uncooperative, saying that locating it there got in the way of the laundry and because the lobby was crowded there was a health and safety risk.

23. A decision to take the matter forward to a disciplinary hearing was made and when the claimant asked for more time to prepare for disciplinary this was agreed.

24. The disciplinary hearing took place on 22 February 2016, chaired by Ms Todd. The claimant had a trade union representative with him who could have taken notes and who would have advised him on what to say. The minutes do not record that he alleged that the company was retaliating because he had raised health and safety concerns and the claimant does not remember otherwise. He did say in the meeting that he felt the company was trying to bring him down in order to get him fired but provided no more detail.

25. During the meeting the representative suggested that given the relationship difficulties in the hotel, it was desirable for the claimant to move to another hotel in the group.

26. The disciplinary outcome was sent to the claimant on 1 March 2016. Not all of the allegations were upheld and Ms Todd decided to issue a final written warning. She identified that there had been a breakdown in working relationships and she took up the suggestion of the claimant's representative and decided to move him away from the Morton hotel. In her view, this would allow him to develop new positive working relationships. The claimant says that he was being banished and that this was not fair but could not deny that the suggestion came from his representative.

27. There is no evidence that Ms Todd's decision was made because the claimant was a whistle blower in particular:

a. the whole process was careful and thorough which indicates that Ms Todd was genuinely trying to come to a fair conclusion based on the allegations made.
b. Ms Todd did not uphold the allegation that the claimant had caused difficulties relating to the Christmas tree. Had she been irritated by the fact that he was complaining about health and safety this would have been an obvious thing to do.
c. She issued a final warning but did not dismiss.
d. In her decision letter, she records that the claimant complained that he had been targeted ever since he complained about Mr Krause back in December 2014. This was in fact a much more likely link because the claimant had made a direct formal complaint about his manager on that occasion.
e. Apart from the Christmas tree, there is simply no evidence that Ms Todd knew or had concerns about possible protected disclosures which the claimant had made.

Transfer to the Bedford and then the President hotels

28. On 15 March, Ms Todd told the claimant that he was to transfer to the Bedford Hotel. Mr Proctor was in charge of the porters so it was for him finalise arrangements. At that time, it had been understood that one of the porters at the Bedford was leaving so there was a vacancy. The Bedford porters worked the same hours as the porters at the Morton.

29. In fact he did not leave and so, because Mr Proctor had vacancies at the President/ Imperial Mr Luengo Garcia went there. This was not confirmed in writing at the time which was an oversight but it was well known that this was the position and the claimant agrees that in the end there was no vacancy at the Bedford. Furthermore, he did not protest at the time. He would have protested if he thought that he had been moved to the wrong hotel. Whilst he did a few shifts at the Bedford, the majority of his time was spent at the President/ Imperial which are conjoined hotels.

Disciplinary appeal and protected disclosures, April 2016

30. On 1 April, the claimant appealed Ms Todd's disciplinary decision. Rather than taking umbrage Ms Todd entered into correspondence with him to try to help him develop his grounds of appeal as none had been provided.

31. Ms Todd decided that the fairest thing was for an independent external person to manage the appeal and Ms Haworth, who worked for an independent HR company, was appointed. This was a very reasonable step to take given that an external person will always have a more independent view of the situation (albeit that they are being paid by the respondent). This was the perfect opportunity for the claimant to explain the connection between his raising concerns about rest breaks and health and safety and where he found himself now, his complaints rejected and subject to a final written warning.

32. The claimant declined the opportunity to meet Ms Howarth but sent her a 17-page document detailing his complaints. First, he dealt with the disciplinary allegations, both those which were upheld and those which had not been. This included the allegation that emergency exits were being blocked by the Christmas tree/laundry problem. Then he made apparently unconnected allegations and:

a. Attached three photographs which he said showed out of date food in the fridge in 2015 which management had ignored,
b. Alleged that a colleague had been dismissed unfairly,
c. Alleged abuse of power in relation to daily rest and
d. Ended "I could keep going with more examples of harassment, lack of ethics, illegalities et cetera but being honest I am tired. I think all previously written on this appeal should be enough reasons to absolve me of any disciplinary actions and fire those incompetents….. I would like to keep working at the Morton but I refuse to do so as long as they are still there to harass, defame and victimise me".

33. The respondent accepts that three protected disclosures were made in this note relating to out of date food, rest breaks and emergency exits being blocked.

34. Ms Haworth then explained to the claimant in an email that she would need to meet with him to discuss his allegations. She also said that she would only deal with points which related to the appeal. This meant that allegations which had not been upheld and the pages about food safety etc would not be considered. The claimant may have intended to make a connection but none was apparent and his allegations appeared to be intended to be a retaliatory attack upon the respondent rather than identifying a hidden motive for the disciplinary action.

35. Ms Howarth forwarded these unconnected matters to Ms Todd on 4 May correctly saying that she was not the appropriate person to deal with them. Ms Todd investigated the allegations further. She visited the kitchens and spoke with the head chef and also made further enquiries with Ms Engler. Having decided that the answers received were satisfactory and so took no more action.

36. She had known Mr Luengo Garcia some time and there had been ample opportunity but he had never raised such issues before. She did not see the need

to talk to him now because her investigations were satisfactory and also there has never been a complaint about such things from staff or guests. I am satisfied that, although it might have been better to have talked to the claimant at the time, her omission is not an indication that Ms Todd was aggravated by what she saw or that it influenced her going forward. Indeed, she took it all seriously and carried out a conscientious investigation given that the claimant had not made a formal complaint.

37. The claimant says that the problem with the laundry bags in the lobby whilst the Christmas tree was up was a clear H&S risk. Ms Todd disagrees and says that the internal professionally qualified H&S/ fire safety team had no concerns. Indeed, the diary entry at the time, in December 2015, shows the night staff complaining about lack of space but not raising a H&S risk. I conclude that the claimant has enlarged his complaint into a protected disclosure after the event, partly for litigation purposes and partly because he felt he was always right.

38. I also conclude that the claimant had a fixed view about what was right and wrong and that he was unlikely to divert from that. On the other hand, Ms Todd conscientiously followed procedure and did not let external factors divert her. I do not agree with the claimant that by this time Ms Todd should have realised that his whistleblowing activity was being held against him by unidentified members of "the respondent".

39. The appeal hearing took place on 23 May and whistleblowing was not discussed in any shape or form. The claimant did not protest either at the time or afterwards. Indeed, he never made an enquiry about what had happened to the allegations about food safety et cetera.

40. The appeal was rejected on 2 June. Ms Haworth said "as a general observation, it appears that you require the hotel to justify its reasons why requires an employee to carry out a reasonable instruction, whether this is a verbal instruction or set out in the staff handbook. I consider that …. you deliberately chose to disobey a lawful order and failed to comply with reasonable requests." The claimant says that Ms Howarth was incompetent but I am sorry to say that her conclusion was well observed.

Change to working hours

41. The Imperial/ President has 12-hour shifts for night porters who work four rather than five days a week. They have a 3-hour rest break during their shift and so work and are paid for nine hours each night.

42. In June 2016 Ms Todd had a discussion with Mr Nick Walduck, a director and her manager, about the claimant. The Walduck family own the group of hotels. There were two problems, one that the claimant was not wearing the right uniform and the other that he was working on a completely different shift pattern from the other night porters, not in keeping with the common standard.

43. Management saw this as a problem because there was no handover between the claimant and the day shift because he did not go on duty until

10:30pm and Ms Burns, head of reception, was also unhappy. Similarly, the claimant left before the day shift came on duty and he was not around during the hotel's busiest periods.

44. Ms Todd was asked to come up with a plan as to how to resolve this problem but the decision was not hers because as head of human resources her role was not operational. Mr Proctor was also not very involved because he was about to leave. Her research confirmed that the claimant was the only night porter working an unusual shift and Mr Walduck wondered about asking him to at least start or finish in line with his colleagues.

45. Ms Todd identified that by changing the pattern this would have a negative impact on the claimant's wages and hours so that his explicit agreement was needed. She told Mr Walduck that if the claimant did not agree there was a legal route which she could go down.

46. With her director's consent Ms Todd therefore proceeded to try to get the claimant's agreement. She expected that this would be achieved and was not setting out to sack him. This is evident from her first letter to him 10 June. It emphasised that no decision had been made and that the purpose of the letter was "to advise you of the proposal and allow you some time to comment on it. Should you wish to discuss the proposal or raise any representations in regards it, please notify me of such in writing…" She explained that the proposed change would "enable all members of the team to be fully aligned in regards to hours of work, shift start and end times, and breaks thereby meeting the needs of the hotel and its guests". She also pointed out that this would affect the claimant's holiday entitlement as well as his working hours. The letter was clear, explained the business need and sought to initiate dialogue.

47. At this time a night supervisor, Mr Bakanovas, wrote Ms Todd a note saying that the night staff were happy to accommodate the claimant's current rota of 10:30pm until 7am. Ms Todd saw the note but did not have a discussion with him. She says the decision was not hers, that had been made by the Walduck family and that Mr Bakanovas was not a manager and was not entitled to be consulted; this sounds harsh but was true.

48. The respondent's motive for initiating this discussion has been challenged. However, from the documentation generated at the time I conclude that the single motive for doing so was that the managers wanted all night porters to be working on the same shifts.

49. On 16 June, the claimant replied in a very short email simply saying, "I do not accept your proposal to change my working hours."

50. At the hearing, the claimant explained that he did not want to sign a new contract for a number of reasons, the first being that the modern hotel is a 4-star hotel whereas the others are only 3-star so this would not look good on his CV. More importantly, the new hours meant that he would have no time for himself on working days. He discounted the possibility of being able to sleep during the 3 hours of rest breaks. This would mean that he would get home and go to sleep at

9am, get up at about 4pm and then only have about 4 hours before it was time to leave for work. On the old system, he would have 7 hours. Of course, he would have three rather than only two days off but he gave this no weight.

51. Ms Todd wrote to the claimant again on 21 June. She explained that the proposed changes were essential, necessary and relevant so that his hours would be fully aligned. She quite correctly pointed out that because the claimant would only be working 4 days his holiday entitlement would drop from 28 days to 22.5 days per annum. This was a real drop in days off although if the claimant took it in multiples of weeks of course he would be entitled to the same number of weeks.

52. The paid hours of work would reduce slightly from 37.5 week to 36 but she said in this letter that the company would not adjust the wages which would remain at £232.55 per week on a live-in basis. This was the sort of concession which could be expected from a negotiation and which was offered anyway even though the claimant had not been prepared to enter into discussions.

53. Ms Todd also pointed out that if the claimant did not agree to the proposals and the company decided to go ahead it might be necessary to dismiss him on notice with an offer of re-engagement. She clarified that his continuity of employment would not be affected in the circumstances. She again offered a meeting to discuss any queries or concerns.

54. On 30 June, the claimant replied saying only “proposed changes worse than the offered on 10 June and answer remains the same as before: No”.

55. Ms Todd wrote again on 1 July. She reiterated the need to realign and set out the proposed new terms. She said “unfortunately, we have been unable to come to an agreement with you about the variation and the deadline for your acceptance of the terms…. We will now have to consider terminating your contract of employment and offering you re-engagement on the new terms. We would like to arrange an individual meeting with you to discuss the proposed termination and offer of re-engagement. We propose to hold this meeting on 7 July….” It should be remembered that because Ms Todd works daytime hours and the claimant nights it was difficult for them to meet without a specific arrangement.

56. The claimant responded on 5 July declining to meet, saying that “there is an existing and irrevocable breach of mutual trust and confidence” and “I won’t tolerate the company to continue with the threats or intimidation attempts”. He did not resign.

57. On 7 July Ms Todd made another attempt saying that “we have not yet taken a decision regarding the proposed changes to your employment terms and wanted you to attend a meeting before making that decision. However, it is clear that you do not wish to engage in the process of considering these proposed changes. In the circumstances unless you contact this office by 5pm tomorrow to agree a date to meet to fully explore all options, we will be confirming the termination of your contract on notice as proposed.”

58. The claimant replied saying that he did not refuse to speak to the company, he just refused to speak in person. However, given his very brief responses it is hard to see how he thought he was having a discussion about the proposals. The claimant also says that the company never told him that there was a plan to align the hours so it was hard to negotiate; this is surprising given that it was emphasised by Ms Todd in her letters.

Dismissal

59. No contact was made and on 8 July Ms Todd wrote to the claimant dismissing him. She said "the company has made attempts to meet with you to discuss the proposed changes to your contract and has made concessions as set out in my letter of 21 June to try to respond to your concerns about the changes but we have not been able to meet with you to reach an agreement over the proposed new terms….. We therefore confirm that it has unfortunately become necessary to terminate your contract of employment and offer you re-engagement on the new terms….This is a last resort after we were unable to come to an agreement to vary your contract of employment….Your current contract of employment will end on 5 August 2016 and your new contract of employment will take effect from 6 August 2016. It is imperative that, if you wish to take up our offer of employment on the new terms you confirm your agreement in writing by 18 July. If we have not received this by 18 July will we will have no option but to treat your employment as at an end." A right of appeal was offered to Mr Alex Walduck, director.

60. When asked whether it might be said that she was pleased to find a way to dismiss the claimant given that he was a troublemaker, Ms Todd was surprised. She said that she was simply following a process, one which she expected would result in him signing the new contract. Night porters were not easy to recruit and it was not her intention to dismiss. I was satisfied that Ms Todd was quite process driven and not easily susceptible to the influences of an ulterior motive. She also said that she was hoping for a compromise; she had already offered to ring fence the pay and would have negotiated on holiday if the claimant had been prepared to enter discussions. I am satisfied that, as an HR professional her objective was to conduct a successful negotiation and not to dismiss.

Appeal against dismissal

61. On 12 July, the claimant appealed. He said in his appeal that "I do consider that this is an unfair dismissal and that I have been under harassment from this office to accept new contract terms that not only are obviously worse than actual contract terms, but also have been against the suggestions from both hotel supervisors who clearly stated that my current working hours are more beneficial to the hotel than the ones you propose."

62. The claimant had spoken to ACAS in late June and he told the tribunal that they had explained what whistleblowing was, but he did not raise any whistleblowing issues in his appeal.

63. The appeal meeting took place on 27 July. The claimant said that the dismissal was a witch-hunt and asked Mr Walduck to investigate "all issues that have happened to me in the last month to see that it is a witch-hunt. I will pursue this". He did not identify what he meant and did not say that he felt he was being persecuted because he had blown the whistle. This was perhaps odd given that he had raised health and safety issues during the last appeal and certainly had the information he needed, and the confidence, had he wished to do so again. He did make a rather half-hearted attempt in his oral evidence to say that he had raised whistleblowing although it was not minuted and that he had been forbidden from recording the meeting but there was nothing to corroborate this last-minute assertion.

64. He also said that he would be suffering a reduction in pay which was odd given that he had been told twice that his pay would be ring fenced. English is Mr Luengo Garcia's second language but he did not need an interpreter at the hearing and I did not identify any difficulty in understanding.

65. Mr Walduck investigated the point that the claimant's supervisors Mr Bakanovas and Mr Kennedy, along with Mr Nick Walduck, had thought that it was acceptable for the claimant to retain his old shift pattern. He found that the supervisors indeed thought that the old pattern was fine but that of course they had no authority to make that level of decision. On the other hand, Mr Nick had on reflection decided that alignment was necessary. From his emails, it sounds as if he had not been confident to upset the apple cart but when told that there was a way of doing it he had been pleased.

66. The appeal was rejected on 3 August. Mr Walduck had investigated the claimant's arguments but had decided that Ms Todd's reasons for dismissing were correct. He said that the claimant had been given sufficient opportunity to discuss the proposal which could have generated a workable compromise but that the claimant had not engaged. He could find no evidence that Mrs Todd had victimised him on any specific ground and said she had merely sought to manage the alignment of the night porter working hours/pattern. That is my conclusion too.

67. The company says that had the claimant not been dismissed for the reason he was further disciplinary action would have followed following a guest complaint. Having investigated the complaint, the main error turns out not to have been the responsibility of Mr Luengo Garcia.

68. On 5 August Mrs Todd gave the claimant one last chance. She wrote to him enclosing a copy of the new contract for signature but also acknowledged that since he had already cleared out his staff accommodation it seemed unlikely that he would be returning. She would not have done this, even after he had been dismissed, if she wanted to be rid of him.

69. Mr Alex Walduck told the tribunal more about the process of alignment. This was a company-wide initiative; a process of alignment of shifts in other teams had already started by the time the claimant was dismissed and, by the time of this hearing, alignment amongst all porters has also been achieved. All 90 porters are now working on the same 9-9 shift pattern. The process was not personal to

the claimant and the company had many business reasons why they needed to see it through. Not only did it assist with planning rotas but it is necessary to know exactly what hours staff are working in order to ensure payment of the living wage and auto-enrolment in pensions etc.

70. The claimant's employment ended on 5 August 2016. He seems to have argued to Ms Todd, and also raised an argument at the hearing, that he was entitled to be paid notice pay. This was not correct because he worked his notice, notice clearly given to him on 8 July. This is another example of the claimant not grasping fairly simple principles even though h had had advice from ACAS and knew of the term "mutual trust and confidence".

Conclusions

Automatic unfair dismissal for making a protected disclosure

71. The chain which the claimant sought to establish between his "whistle blower" complaints of 2014 and the dismissal has many breaks in it:

a. No one in a position of power over him seems to have been aware of anything which could be termed a protected disclosure until his appeal of April 2016.
b. That was an appeal against a disciplinary warning which was not connected to the dismissal.
c. Allegations of retaliation from the claimant are plentiful but never specific and Mr Walduck could find no evidence of any in the dismissal appeal.
d. Indeed, if there was a chain of events it was much more logical for it to stem not from whistle blowing but from the claimant's complaints against management.
e. Most importantly, there is no logical link to be made between Ms Todd's careful dismissal process and some random disclosures in an appeal against a previous and unconnected disciplinary warning.
f. Ms Todd had a complete reason to dismiss the claimant and there was no scope for another motive.
g. Also, it is very clear that she neither wanted nor expected to dismiss Mr Luengo Garcia over his working hours; it was his refusal to negotiate which led to it.

72. Even if the claimant had not raised whistleblowing as a possible motive for all the experiences that he had with the respondent from December 2014 onwards he could still have argued that this was the reason for his dismissal. However, the fact that it was never raised supports the idea that it was not a theme that was on his mind or on the mind of the employer. He felt that there was a "witch hunt" but seemingly only narrowed it down to punishment of a whistle blower after his dismissal.

73. I conclude that the reason the claimant was dismissed was not only or principally because he made a protected disclosure.

Dismissal for some other substantial reason

74. The respondent had a potentially fair reason for the dismissal which "for some other substantial reason". The particular reason was that the claimant refused to change his hours to align with the other porters which the respondent considered necessary.

75. Whether the dismissal was fair depends on a mix of factors and requires the Tribunal to balance the needs of employer and employee. I explained this to the claimant as he should not be expected to understand the legal authorities on the subject. I regret to say that he was fairly unshakeable in his belief that the respondent could in no circumstances change his contract.

76. I have decided that on balance the dismissal was fair. I have taken into account the following facts:

a. There was some scope for the respondent to change place and hours of work under the existing contract but rather than impose these the respondent chose to go down the route of negotiating with the claimant. Sadly, he refused to engage which made negotiating impossible.

b. The claimant says that he was meant to be working at the Bedford Hotel and so should have been allowed to continue the old shift pattern. However, he agreed at the time to move to the Imperial/President and he knew that he was a night porter employed there and that his hours were not aligned. He said in his appeal against the final warning that he did not want to return to the Morton. Therefore, it was correct that his shifts should align with his colleagues.

c. Ms Todd went through a very thorough process which was aimed at negotiating with the claimant not dismissing him. She gave him plenty of notice and warned that dismissal was a possible consequence. If the ACAS Code applies, she followed it

d. She had no ulterior motive as demonstrated by the fact that she offered a new contract even after the employment had ended, the intent always being to dismiss but re-engage.

e. She made a concession on pay without the claimant even asking for it, showing her willingness to compromise.

f. It was very possible that the holiday issue would also have been compromised; it was not a massive issue in any event given that the claimant would be able to take the same number of weeks off as before and at the same rate of pay.

g. There was a business need for the new arrangement. The existing shifts could have been accommodated by the supervisors so it was not a case of absolute necessity, but the change was needed.

h. The process was genuine and part of a chain-wide initiative. A process of alignment of shifts in other teams had already started and by the time of this hearing alignment amongst porters has also been achieved so the company was genuine in this endeavour.

i. By contrast, the claimant's objections to do with time away from work were not known at the time of the dismissal because he refused to engage. The respondent was not aware of any personal reason for his objections at the time of the dismissal apart from the comment that the terms would be worse. This comment was addressed by the offer to ring fence to pay which the claimant ignored.

j. The reasonableness of the dismissal is decided by what the employer knew at the time. Even if the claimant had explained his unwillingness to sleep in the three-hour break and unhappiness about having little time at home between shifts, these are not powerful reasons, especially when it is remembered that he would be working four and not five days.

k. The claimant's refusal to negotiate was a significant factor leading to the dismissal. Ms Howarth's words at paragraph 40 are appropriate to describe his intransigence and his challenging attitude. It seems as if he may have wanted to be dismissed so that he could pursue a legal challenge.

When an employer seeks to change the terms of employment it is always a traumatic and uncertain time, especially when the employee is dismissed when they do not agree. Such as dismissal should not be done lightly. This change was not "make or break" for the employer but it was needed and it acted with care and attempted to find agreement. By contrast the claimant was intransigent and challenging. For all the above reasons the dismissal was, on balance, fair.

Employment Judge Wade on 28 December 2017