EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 6 and 7 April 2022

Claimant: Ms A Bailey

Respondent: Diverse Dining Ltd

Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Mr B Hendley (Consultant)

JUDGMENT

1. The Respondent unfairly dismissed the Claimant contrary to section 98 and 103A Employment Rights Act 1996

2. The compensation payable by the Respondent is £21563.03. Of this £400 must be paid to the Claimant by 21 April 2022 and any balance due to her must be paid when the Employment Protection (Recoupment of Benefits) Regulations 1996 have been complied with.

REASONS

1. The Claimant claimed Unfair dismissal ("ordinary" under section 98 and/or under section 103A ERA 1996). I heard evidence on liability from the Claimant and then from Ms H Clark, (who had worked as Head Pastry Chef alongside the Claimant and been made redundant at the same time) and then from the Respondent's witnesses Mr C Mueller (Business Director of Alshaya a parent company of the Respondent - based at all material times in Dubai) and from Mr R Slade, Area Manager of the Respondent, I was referred to a bundle of documents of 218 pages and I also listened to two audio recordings of part of the conversations between (i) the Claimant and Mr Mueller and (ii) Mr Mueller and Ms Clark and on 22 July 2020. I received oral submissions in closing.

2. The Claimant and Ms Clark impressed me as credible witnesses and I prefer their version of events where it differs from that of the Respondent's witnesses.

Facts

3. The Claimant started work for the Respondent on 11/7/2017 and was the restaurant general manager at an establishment called Chang's Asian Table in Great Newport Street London from 1/1/2019 onwards.

4. About 2 years prior to the Claimant's dismissal she had been instructed by Mr J Dunn (the Respondent's Vice-President), to fire one of the Respondent's employees - Mr Dunn giving no reason and said he wanted this to be "done by tomorrow". This dismissal had ended up in an Employment Tribunal at which the Claimant had to give evidence.

5. In 2018 the Claimant while in Kuwait had a conversation with Mr Dunn about the poor state of the restaurant air conditioners. He said "nothing will be done so its better to get used to it".

6. There were also ongoing issues with the restaurant fridges which were not fitted properly so perishable food was not being stored at sufficiently low temperatures.

7. The Claimant and Mr J Dunn were on good terms - on 9/1/2020 Mr Dunn called saying that the Respondent was very pleased with her and confirming a second pay rise and talking about promotion.

8. There were also no problems between the Claimant and Mr Mueller until 20/7/2020.

9. The restaurant was closed because of the Covid pandemic in March 2020 at which point 75 members of staff (who had started after 28/2/2020) were dismissed and the Claimant put on furlough.

10. The Claimant ended furlough and the restaurant re-opened in July 2020. At this stage Mr Mueller stated a few times to the Claimant that he forecasted that the business would return around 25% of the pre-Covid business plan at £20k a week.

11. In the first two weeks of opening, and despite difficult conditions in the restaurant because of equipment failures, the restaurant under the Claimant's management doubled the forecasted sales making £40k the first week and £47k in the second.

12. I was shown at page 94/95 copy emails from Mr Mueller to Mr D Graham an HR advisor on 13/7/2020 in which Mr Mueller explained that he and Mr J Dunn had had a discussion and concluded that (the Respondent) no longer required a General Manager to lead the London restaurant and asked Mr Graham for advice as to what was required to move forward with a plan to restructure the management team; and Mr Graham replied the same day saying that "from an HR perspective this would be a simple exercise to complete" and planning a team call to discuss the matter the next day.

13. The Claimant under cross-examination pointed out several anomalies regarding these documents. Firstly, the email from Mr Graham does not appear in the same format as all other emails from him in the bundle - notably the standard form in which he usually signs off his communications is missing. Secondly, one of the pages (94) is heavily redacted by part being obscured before copying. Thirdly, the emails were not referred to or given to Mr Slade who determined the Claimant's internal appeal against dismissal in October 2020, although they would have been highly material to one of the two grounds raised by the Claimant in her appeal. The documents appeared only during disclosure and the first time Mr Slade saw them was when he read the tribunal bundle. The Claimant contended that these documents were not genuine and had been manufactured for the tribunal. Mr Graham without explanation was not called as a witness by the Respondent during the liability stage of the proceedings either to deal with these emails (or to explain the letters which he drafted dated 21/7 which I refer to below). In the circumstances I am unwilling to give the documents at pages 94/95 any weight.

14. On 14/7/2020 the Claimant sent an email to inter alia Mr Mueller complaining about the following problems in the restaurant - that (i) the walk in fridge had been broken for two weeks (ii) the phone had been down for nearly a week (iii) none of the electric sockets in the pastry department were working so there was no electricity (iv) the pastry fridge was not keeping temperature and (v) that the air-conditioning was not working so that the staff and customers were enduring "unbelievably hot" working conditions with sweat "dropping off people's faces" which was especially unsatisfactory given the attempt to keep "extra clean during coronavirus" and asking for a solution because "*these are not healthy working conditions*". The email ended "*I send numerous emails and contact Ronaldo on a daily basis. However things are not getting fixed. I need your support".* This email (page 98) is relied on as the Claimant's first protected disclosure.

15. The Claimant sent an email to all Alshaya management including Mr Dunn early on 18/07/2020 (page 108) stating that the fryers in the restaurant were not working, and that *"the service in the restaurant (the evening of 17/7) had been unbearable - long delays, guest complaints, very stressful*

on the chefs. 50 minute plus ticket time - due to equipment. If we do not fix the fryers before service tomorrow we will not be able to open" .

16. Although this was not expressly mentioned in the email - the "guest complaints" were mainly about the ongoing lack of effective air-conditioning which had subjected staff and customers to great heat and poor air conditions. As shown by contemporary customer reviews, (see for example pages 123 and 124) this adversely affected not only the customers dining experience but also their health. Some customers suffered real illness - feeling faint, vomiting etc. A photo in the bundle showed a customer receiving aid where she had collapsed on the pavement outside the restaurant where she had gone to try to escape the conditions inside, where an air temperature of 44 degrees had been recorded. The Claimant relies on this email as her second protected disclosure.

17. The Claimant did not receive any reply to these emails and did not receive any direct express support about these serious matters, although some steps were taken to instruct engineers to fix the faults.

18. Soon afterwards on 18/7/2020 the Claimant received a text from Mr Mueller asking her to send him the managers' schedule for the following week. The Claimant sent him the schedule. The purpose of the request was so that Mr Mueller could plan a call with the Claimant.

19. She then received an email on 19/07/2020 at 7:15pm asking her to join a call at 9:00am on 20/7/2020 and that her shift had been covered so it would be her off day for the week.

20. On 20/07/2020 the Claimant joined a call from Mr Mueller in which he stated that the Claimant had been made redundant, and Ms Clark received a similar call. I have no hesitation in accepting the Claimant's and Ms Clark's versions of these telephone conversations - what they say is consistent with the letters of 21/7 and also with the written and audio transcripts of what they said subsequently on 22/7. Also without explanation the Respondent's notetaker Mr Paul Atallah who was present on the calls on 20/7, was not called as a witness.

21. Mr Mueller said that one of the reasons they were letting the Claimant go was because the business was forecasted to return less than 50% of its normal takings in the 2020 business plan. This was a change from what Mr Mueller had said when the restaurant was re-opening earlier in July and contrary to the Claimant's actual performance since then.

22. On 20/7/20 Mr Mueller did not refer to the role being "at risk" and spoke as if the decision had already been made. I do not accept that Mr Mueller at that stage read from the script which appears at page 191 of the bundle. That script refers to the Claimant's and Ms Clark's positions *"being at risk of redundancy*". However, that is not what Mr Mueller said to either Ms Clark or to the Claimant in the calls on 20/7. Instead he presented the decisions to them as already made and to be given effect to on 31 July 2020. In the meantime, he told them not to return to the restaurant.

23. Shortly after the call with Mr Mueller, the Claimant emailed Mr Graham in HR. She wrote "*Can I please have some details/clarity regarding redundancy with diverse dining. As I have had a call thismorning..not really been giving (sic) any information in it".* I do not accept the Respondent's submission that this email is inconsistent with the Claimant's version of her conversation with Mr Mueller. On the contrary, if Mr Mueller had been reading from the script, he would have provided considerable information to the Claimant which he clearly had not provided by then.

24. The Claimant if consulted, when plans were at a formative stage, about any need on the part of the Respondent to cut costs, as a diligent and experienced General manager, she would have had much that she could have suggested. For example, she would have suggested that other roles could have been dispensed with such as the £38k pa marketing manager role and/or the assistant general manager role which the Claimant felt she could have absorbed - and she would have suggested that the Respondent could dispense with the services of an external PR company costing £3k a month.

25. The Claimant would also have wished to suggest other alternatives such putting her back on furlough for a few months so that the Respondent could make a more considered decision at a later date. Another possibility which it might have been sensible to discuss was the possibility of the Claimant taking a reduction in pay until the business had recovered from the effect of the pandemic.

26. Later on 20 July 2020 Mr Mueller contacted Mr O Alvarez who had been, up to then, the Assistant General Manager at the restaurant, and told him that the Claimant and Ms Clark had been made redundant and that they were not to be allowed back onto the premises. Mr Alvarez was given a pay rise from £38K to £42K per year and asked to take on additional duties.

27. While the Claimant had had more responsibility especially in financial matters, many areas of Mr Alvarez's role and the Claimant's had been very similar.

28. Mr Mueller stated in evidence that after the Claimant's dismissal Mr Alvarez became the first point of contact for the London restaurant for the more senior managers in Kuwait. Before this the Claimant had been the first point of contact.

29. Mr Mueller said that he himself rather than Mr Alvarez had then taken on some of the Claimant's former responsibilities but Mr Mueller is based in Kuwait.

30. The general manager role is to be performed on the spot and consists in the close overseeing of the day-to-day running of all the activities of the restaurant. The Claimant did this before with the assistance of Mr Alvarez and Mr Alvarez stepped up and took over responsibility when the Claimant was dismissed.

31. He became the defacto General Manager in place of the Claimant although his official job title was not changed, for cosmetic reasons.

32. Also on 20/7/2020 Ms H Clark, who was also being made redundant in tandem with the Claimant, and going through a similar process, was told by Mr E Abdullah whose role was closely connected to the restaurant, that he was shocked and that it had not been a planned decision - that it had been made over the weekend (ie 18 and 19 July 2020) and that they (the Respondent's managers) were now "*scrambling around to find cover*".

33. Mr D Gilroy (London Area manager) texted the Claimant on 20/07/2020 in the afternoon completely unaware of the fact that she had been made redundant.

34. The Claimant was upset by what she was told and took advice from ACAS and then emailed the HR manager Mr D Graham who replied the same day setting up another call on 22/7/20.

35. On 21/7/2020 the remaining restaurant staff messaged the Claimant saying that they had been told that she had been made redundant and was banned from the restaurant. The Claimant felt she was being portrayed as having done something wrong.

36. Mr Mueler sent the Claimant and Ms Clark each a letter dated 21/7 (pages 118 and 119) in similar terms. The letter had been drafted by Mr Graham and given to Mr Mueller to send out. The letter contains numerous references showing that the decisions to reduce the number of leadership roles had already been made and in the Claimant's case that her role of Restaurant General Manager would be made redundant on 31/7/21. A similar letter was sent to Ms Clark the Head Pastry Cook saying that her role had also been made redundant.

37. A further telephone call took place on 22/7/20. By then Mr Mueller had taken advice about the requirements of UK employment law and was reading from a script which now referred to "*the risk of redundancy*" and trying to row back from the previous communications which showed that the decision had already been made. During the call the Claimant referred to the letter dated 21/7 which had presented a completed decision. The Claimant pointed out that Mr Mueller was then on 22/7 for the first time introducing the term "*risk of redundancy*" which was in contrast to how he had

presented the matter on 20/7/20. It is notable that when the Claimant pointed this out, Mr Mueller did not deny or dispute what the Claimant said but instead answered "*Sure*" (page 210).

38. The Claimant expressed her upset as a result of the manner in which the decision had been presented to her and her staff. She went on to query the basis on which she was to be made redundant and queried why other roles had not been selected instead. She stated that she believed she was being targeted by Mr Dunn because she had voiced her concerns about equipment by email on 18/7. The subject of alternative roles was discussed - the Claimant was offered a Head Chef role but this was unsuitable for her and she turned it down.

39. Mr Mueller sent the Claimant a letter dated 24/7/20 confirming that no selection criteria had been applied because she was the only person in the role which had already been selected for redundancy. It was stated that one of the reasons for the redundancy was that the restaurant would rely exclusively on dinner and delivery services for the foreseeable future.

40. Further telephone calls between the Claimant and Mr Mueller took place on 28/7/20 (at which the Claimant voiced similar complaints) and on 30/7/20.

41. After the final meeting the Claimant was told orally that she was dismissed with immediate effect. She had to chase up HR to get her letter of dismissal which was issued on 2/8/20 - she was paid one month's pay in lieu of notice and offered an appeal.

42. On 1/8/2020 the restaurant started opening on Saturdays and Sundays at 11am and 2pm on weekdays indicating that the Mr Mueller's reference in the letter of 24/7/2020 to the restaurant offering dinner and deliveries only for the foreseeable future had been inaccurate.

43. The Claimant was informed subsequently by Mr Alvarez that in the few weeks after her dismissal the business returned to 80% of its forecasted sales.

44. The Claimant appealed her dismissal by email on 5/8/2020 - her main grounds being (i) that the decision was personal not professional and (ii) that an incorrect process had been followed.

45. Mr R Slade acted as the appeal manager. The appeal took place on 27/8/2020. He dismissed the appeal on 6/10/2020. It was then for the first time suggested on behalf of the Respondent that the letters dated 21/7/20 contained typographical errors where they referred to completed decisions having already been made.

<u>The law</u>
<u>Redundancy dismissals</u>

46. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

a. the fact that his employer has ceased or intends to cease –(i) to carry on the business for the purpose of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or

b. the fact that the requirements of that business –(i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"

47. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

– depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.'

48. Where redundancy is established, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.

49. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. R v British Coal Corp ex parte Price 1994 IRLR 72 at para 24.

50. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. Thomas Betts Manufacturing Ltd v Harding 1980 IRLR 255 CA. However in choosing the pool the employer must act reasonably and must have a justifiable reason for excluding a particular group of employees from the selection pool where the excluded category do the same or similar work to those who are up for selection. British Steel PLC v Robertson EAT 601/94.

51. The employer must seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service. Williams v. Compare Maxam Ltd 1982 IRLR 83

52. The employer should try as far as reasonable to find alternative work within its own organisation and where appropriate within other companies in the same group

53. It is not the function of the Industrial Tribunal to decide whether it would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

Protected disclosures

54. A protected disclosure is a disclosure of information which in the reasonable belief of the worker (which term includes but is not limited to "employee") making the disclosure, is made in the public interest and tends to show one of the states of affairs listed in section 43B(1)(a) to (f) and it must be made in accordance with any of the sections 43C to 43H ERA 1996.

55. Section 43B(1)(d) refers to one such state of affairs namely "that the health and safety of any individual has been is being or is likely to be endangered".

56. Section 103A provides that an employee who is dismissed shall be treated as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

57. In claims for unfair dismissal if the employer fails to show a legitimate potentially fair reason and fails to disprove the section 103A reason contended for by the Claimant, then it must be held that the dismissal is for the section 103A reason.

58. Section 105 provides in part:

"Redundancy.
(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a)the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,

(b)it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c)it is shown that any of subsections (2A) to (7N) applies.

. . . . . .

(6A)This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.

59. King v Eaton Ltd no 2 1998 IRLR 686 held that the Tribunal has discretion as to whether the employer can lead evidence as to damages to show that breach of procedure would have made no difference and employee would have been dismissed anyway. (This is known as the Polkey principle). The question is "Can one sensibly reconstruct the world as it might have been or would this mean embarking on a sea of speculation?" This in turn depends on whether the omission is merely procedural or more fundamental and substantive.

Conclusions

60. The Respondent relies on redundancy as the potentially fair reason for dismissal, but it has not satisfied me that there was a genuine redundancy situation affecting the Claimant's particular role. Even in final submissions Mr Hendley did not make any attempt to explain how the situation could fit with the definition of redundancy in section 139(1). Instead he referred to the Respondent's need to cut costs in the face of the pandemic. A need to cut costs could be some other substantial reason but it is not necessarily the same as a redundancy.

61. If a need to cut costs as SOSR had been advanced as the potentially fair reason for dismissal, then to make good that reason the Respondent would have had to produce proper financial information to show what its costs were and how and why it was a reasonable decision in the light of that information to make the decisions that it did. However, no real financial information has been produced except by the Claimant, which shows that despite the problems caused by equipment and by the pandemic, the restaurant performed much better than expected from July 2020 onwards, and what she had been told by Mr Mueller about the restaurant's performance and trading hours was inaccurate.

62. I have nevertheless considered whether there was a redundancy as defined affecting the Claimant's role. Has the Respondent shown that it had a reduced need for a General Manager? Mr O Alvararez immediately on the Claimant's dismissal became the General Manager in all but name. There was therefore a continuing need for a General Manager doing much the same amount and type of work as before.

63. Alternatively, and if I should have found that there was a redundancy situation, I am not satisfied that the Respondent's decision to put the Claimant in a pool of one was within a range of reasonable decisions. Given the similarity of roles between Mr Alvarez and the Claimant, if there was a genuine redundancy situation, they should have been pooled together.

64. A final decision was made to dismiss the Claimant before the telephone call from Mr Mueller on 20 July. This is shown by what was said to her on 20 July and by the letter of 21 July. I do not accept that the letter dated 21 July had typographical errors. The whole letter was written to communicate a completed decision. Furthermore, if the decision had not been final by 20 July, then Mr Alvarez and the other staff would not have been told that day that the Claimant was being dismissed and was barred from the premises.

65. What happened between the Claimant and Mr Mueller and Mr Slade after 20/7/20 was therefore nothing other than the Respondent seeking to justify and gift-wrap a dismissal decision rather than carry out genuine consultation before the decision was made.

66. The Claimant was not some junior inexperienced employee whose views about any restructure of the management of the restaurant could be ignored reasonably. In this case reasonable consultation would have consisted in telling the Claimant at an early stage that the senior managers were consider changes with a view to reducing operational costs include merging or deleting roles, and asking for her input. Having invited that input and given the Claimant a reasonable time to communicate her views and suggestions, and having given reasonable consideration to what she said, the managers would then have had the right to make up their own minds. That plainly did not happen in this case.

67. It is clear that Mr Mueller also did not consult with or even inform other persons apart from the Claimant whose input would have been valuable also if there was a genuine restructure going on - such as Mr Abdullah and Mr Gilroy.

68. It was unfair and unkind to the Claimant to summarily exclude her from her work in the restaurant and to tell the other employees on 20/7 that she had been made redundant.

69. These matters were not cured by the appeal.

70. The Claimant was therefore unfairly dismissed contrary to section 98 ERA 1996.

71. Turning to the whistleblowing claim, I find that the email dated 14/7/2020 was a protected disclosure as defined in section 43b(1)(d) because the poor refrigeration and lack of air-conditioning did pose a real health and safety concern which the Claimant had a reasonable belief about and was communicating to her managers in good faith and in the public interest.

72. I find that the email dated 18/7/2020 was a protected disclosure also because, while it refers mainly to the fryers which were not a health and safety issue, it also refers to guest complaints which were about the intolerable heat - which was a health and safety issue. In the light and context of the Claimant's numerous previous complaints and communications about the air quality problems, Mr Mueller and or Mr Dunn acting reasonably as competent senior employees, would have understood easily that this is what was being referred to.

73. I turn to the question under section 103A whether these emails of 14 and 18 July 2020 were the cause or if there was more than one cause, the principal cause for the Claimant's dismissal.

74. As stated above, the proper approach is that if the employer fails to show a legitimate potentially fair reason and fails to disprove the section 103A reason contended for by the Claimant, then it must be held that the dismissal is for the section 103A reason.

75. As already stated I am not satisfied about the redundancy potentially fair reason relied on by the Respondent.

76. I have taken into account the fact that previously the Claimant appears to have got on well with Mr Dunn and Mr Mueller.

77. However, neither Mr Mueller or Mr Dunn showed any sympathy or support for the Claimant who over months had asked for support and who had been struggling to deal with these serious issues which posed a risk to the health and safety of not only staff but members of the public. On the contrary, when the Claimant had previously raised the air-conditioning issue with him, Mr Dunn had expressly told the Claimant to drop the subject.

78. The Claimant had not followed this advice and had become increasing vociferous about the air-conditioning issue, particularly as the heat intensified in the heat wave of July 2020.

79. Mr Dunn had previously shown a tendency to dismiss an employee in a summary manner without good reason.

80. There is no reliable evidence that the Claimant was targeted for dismissal until after she had written her emails.

81. The decision appears to have been rushed, poorly planned and clumsily implemented without genuine consultation of the Claimant or others who it is to be expected should have been consulted. This tends to indicate that the dismissal was not based on any proper business decision.

82. The financial and business information put forward in justification was inaccurate and unreliable - for example that the restaurant would not be opening for lunch.

83. The decision was obviously made by 20/7/20 no matter what the Claimant had to say.

84. Taking these factors into account, I find on a balance of probabilities that the decision to select the Claimant for dismissal, albeit taken against a backdrop of wanting to reduce costs, was principally because the Claimant had persisted in her whistleblowing emails in complaining about and disclosing significant health and safety issues which Mr Mueller and Mr Dunn had failed to deal with for many months if not years, and which they did not want to hear about, or which they preferred to turn a blind eye to, and which they had been and were unwilling to deal with effectively.

85. Hence the section 103A claim also succeeds.

86. If I should have found that the principal reason for dismissal was redundancy then I find that the Claimant was unfairly dismissed under section 105 because in such a case the circumstances constituting the redundancy applied equally to Mr Alvarez who held a similar position to the Claimant but who was not dismissed, and the principal reason why the Claimant was selected for redundancy was because she had made protected disclosures.

87. To try to calculate for purposes of Polkey what would have happened in terms of dismissal, absent the unfairness/unlawfulness which I have found, would be to embark on a sea of speculation which I do not regard appropriate in the circumstances.

Remedy

88. The Claimant and Mr D Graham gave evidence during a remedy session. The Claimant said she did not want re-instatement or re-engagement. I was referred to an updated schedule of loss and to numerous screenshots showing the Claimant's job applications, most of which she made through Catering.com, which is a recruitment agency. The respondent sent me two documents showing the current shortage of employees and large numbers of vacancies in hospitality.

89. The Claimant is entitled to £400 for loss of statutory rights. She was paid a redundancy payment so she is not entitled to a basic award. I do not find that she was entitled to bonuses - these were discretionary and no bonuses have been given in the restaurant since her dismissal. She was paid in lieu of one month's notice so her financial losses run from the end of August 2020.

90. The Claimant made numerous applications for a new job in manager and assistant manager positions, when she was first dismissed. It is agreed that in 2020 the catering industry was badly affected by the pandemic and it is not surprising that the Claimant could not obtain another job that year. In December 2020, sadly her mother died unexpectedly and the Claimant suffered bereavement and had to go back to Birmingham to deal with family issues. She made a few job applications in January 2020 but none from 1/2/21 to 28/4/21. During this period she moved back from London to live with her sister in Birmingham and was dealing with family matters.

91. While sympathy is due to the Claimant for her bereavement, it is usual to expect an employee to take bereavement leave for only a week or so, and I do not find the bereavement and the Claimant's

move back to Birmingham to be adequate excuses for her not searching for any jobs during the three month period February - April 2021. It is not just and equitable for the Respondent to be required to compensate the Claimant for months when she was not trying to mitigate her loss.

92. The Claimant resumed job searching on 28/4/21 applying both in Birmingham and London but in total made only 18 applications in the whole of 2021. In December 2021 she decided to change her career and stopped applying for a new job, and she started an on-line course with a view of becoming a personal trainer, which course she hopes will be completed in a few month's time.

93. I accept Mr Graham's evidence that while employment in hospitality was very difficult until about March 2021, since then things have changed and increasingly until now there has been a great demand for and shortage of both hourly and salaried employees in hospitality. Currently there are numerous general manager and assistant general manager vacancies in the Respondent's own organisation. Nationally there are currently 178000 vacancies in the food/accommodation industries, and the ratio of hospitality jobs has reached an all-time high of one vacancy for every eight filled positions. I was also taken to an extract from the current Catering.com website which shows that currently there are 523 restaurant general manager vacancies in London and ten miles around London.

94. I find that the Claimant did not take full steps to try to mitigate her loss in 2021 but that if she had done so, it is likely that with the great increase in demand for employees such as her, she would have obtained a fully compensating job by the end of June 2021.

95. The Claimant told me that the two previous general managers of the restaurant where she worked for the Respondent had each in succession left after one year of service and Mr Alvarez (who was the person who I have found succeeded the Claimant in general management of the restaurant) had also left subsequently last year. This accords with Mr Graham's evidence that in any event there is a high turn-over of staff in the catering industry. The Claimant told me that if she had not been dismissed she would have stayed in her employment with the Respondent because Mr Dunn had promised her promotion, but on the other hand it is clear that the Claimant was exasperated by the lack of support and poor conditions caused by equipment problems so I find that in any event there is a risk that she would have chosen to leave anyway within one year of dismissal. Perhaps the risk would have been higher in the light of her mother's death which has been a factor motivating her move back to Birmingham.

96. Taking all these factors into account, I find it just and equitable that the Respondent should compensate the Claimant for her loss of income for the period from 1st September 2020 to the end of January 2021 and then for the months of May and June 2021 - ie for 7 months which I round up to 30.5 weeks. This is the period from the expiry of the notice pay to the end of June 2021, less the three months February to April 21 when she was not looking. Her previous rate of pay was £693.87 net per week. 30.5 x £693.87 = £21163.03 plus £400 LOSR = £21563.03 total award.

97. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply as the Claimant has been receiving Universal Credit since dismissal. The prescribed period is 1/9/2020 to 7/4/22. The prescribed amount is £21163.03. The balance is £400.

J S Burns Employment Judge
London Central
7/4/2022
For Secretary of the Tribunals
Date sent to parties 07/04/2022