EMPLOYMENT TRIBUNALS

Claimant: Miss D Trench

Respondent: Performance Bar Limited

Heard: in the Midlands (East) Region via CVP

On: 9th, 10th and 11th May 2022

Before: Employment Judge Ayre, sitting with members
Ms G Howdle
Mr J Purkis

Representatives:
Claimant: Ms R Jiggens, paralegal and academic
Respondent: Mr J Castle, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant was unfairly dismissed.

2. There should be no reduction from any compensation awarded to the claimant under Polkey.

3. The claim for automatic unfair dismissal under section 103A of the Employment Rights Act 1996 fails and is dismissed.

4. The claim for victimisation fails and is dismissed.

The judgment of the Tribunal by majority is that the claimant did not contribute to her dismissal.

The minority of the Tribunal found that the claimant contributed to her dismissal by 20%.

REASONS

Background

1. The respondent is a bar in Lincoln. The claimant was employed by the respondent as a member of bar staff.

2. On 4 November 2020 following a period of Early Conciliation that started on 3 November 2020 and ended on 4 November 2020 the claimant issued proceedings in the Employment Tribunal. In the claim form she stated that her employment began on 4 November 2018 and ended on 8 November 2020, and that she had been unfairly dismissed.

3. The respondent says that the claimant's employment started on 4 November 2018 but disputes the date of termination given by the claimant in her claim form. It says that the claimant was dismissed with immediate effect on 30 October 2020 for gross misconduct. At the start of the final hearing the claimant's representative confirmed that the claimant now accepts that her employment terminated on 30 October 2020, but argues that her employment started on 26 October 2018.

4. The claim, which appears to have been prepared and filed by the claimant as a litigant in person, named Mr Himesh Patel as the respondent to the claim. Mr Patel is, we understand, the owner of Trebles / Performance Bar Limited. On 24th February 2021 the claimant's representative wrote to the Tribunal. In her email, amongst other things, she asked for Performance Bar Limited to be added as a respondent to the claim.

5. On 25 February 2021 Employment Judge Adkinson ordered that Performance Bar Ltd be added as a respondent to the proceedings in accordance with Rule 34 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**"). He also ordered that the final hearing, which had originally been listed in March 2021 be postponed and that a telephone case management discussion take place.

6. On 14 July 2021 a Preliminary Hearing took place by telephone before Employment Judge V Butler. The claimant, who was represented at that hearing, indicated that she wished to amend her claim. She was ordered to make any application to amend by 30 July 2021, and the respondent was ordered to respond to the application to amend by 20 August.

7. On 21 September 2021 Employment Judge V Butler:

    a. Refused the claimant's application to amend her claim to include complaints of automatically unfair dismissal under section 103A of the Employment Rights Act 1996 ("**the ERA**") and of

victimisation under section 27 of the Equality Act 2010 ("**the EQA**"); and

b. Dismissed the claim against Mr H Patel and removed him as a respondent to the proceedings;

8. On 19 January 2022 Employment Judge Butler allowed the claimant's application to amend the claim to include claims for automatically unfair dismissal under section 103A of the ERA and for victimisation under section 27 of the EQA. She refused the claimant's application to amend the claim to include a complaint of victimisation against Mr Patel.

The Proceedings

9. The hearing took place via Cloud Video Platform ("**CVP**").

10. We heard evidence from the claimant and, on behalf of the respondent, from Ian Hughes, General Manager, and Dale Robinson, former General Manager.

11. The Tribunal was provided on the first morning of the hearing with an electronic bundle of documents in a pdf format. The bundle, which ran to a total of 215 pdf pages comprised an index, 196 paginated pages and three witness statements which were not paginated.

12. Both advocates also provided written skeleton arguments, for which we are grateful.

13. The parties had not agreed a List of Issues, and we therefore spent some time at the start of the hearing identifying the issues which the Tribunal would have to decide, and which are set out below.

14. The main area of dispute between the parties in relation to the List of Issues was about the alleged protected disclosures which the claimant relies upon in relation to her complaint that her dismissal was automatically unfair under section 103A of the ERA. The claimant sought to rely upon disclosures made orally on 25 October 2020 before she was suspended and by sharing and liking a Facebook post on the 24 October 2020 which she says disclosed information tending to show:

    a. That the respondent breached its legal obligation to avoid the sexual harassment of workers when the respondent's owner, Mr Patel, repeatedly attempted to kiss a member of staff whilst they were working; and
    b. That the respondent had breached its legal obligations under the Working Time Directive by failing to provide breaks for staff.

15. The respondent objected to the claimant putting her case in this way. It said that the case is not pleaded in that way, despite the claimant having made two applications to amend her claim, and objected to the claimant being given leave to amend her claim. The respondent submitted that the pleaded case refers to disclosures of information

tending to show a breach of health and safety legal obligations in relation to PPE.

16. The respondent also objected to the claimant relying on a 'combined' disclosure of (1) liking and sharing a Facebook page on 24 October and (2) comments made orally on 25 October in a meeting with Dale Robinson and Ian Hughes. These changes to the pleaded case, in the respondent's submissions, required an application to amend the claim.

17. Both parties made submissions as to whether the claimant should be allowed to argue her case by relying on the disclosures set out at paragraph 14 above. Ms Jiggens clarified that she was not seeking to argue that liking and sharing the Facebook post was a discrete protected disclosure, but rather that, when combined with the information disclosed orally on 25 October, there was a protected disclosure.

18. After considering carefully the submissions made by both parties, the Tribunal decided unanimously to allow the claimant to amend her claim to include the disclosures set out in paragraph 14 above. Whilst we were concerned by the timing of the application to amend the claim, the nature of the amendment was a minor one, and amounted to a mere relabeling of facts previously pleaded. No further evidence would be required as a result of the amendment, but merely a change in submissions. Given that the respondent is legally represented we saw no prejudice to the respondent in allowing the amendment.

The Issues

19. The parties had been unable to agree a List of Issues to be determined at the hearing. At the outset of the hearing and following the claimant's successful application to amend the claim, the following issues were discussed and agreed.

Ordinary Unfair dismissal

20. What date did the claimant's employment start? The claimant says 26 or 29 October 2018, the respondent says 4 November 2018.

21. Should the effective date of termination of the claimant's employment be extended from 30 October 2020 to 6 November 2020 in accordance with section 97(2) of the ERA?

22. What was the reason or principal reason for the dismissal? The respondent says that it was conduct. The claimant says that it was because she made a protected disclosure.

23. If the reason for dismissal was conduct, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

    a. Did the respondent genuinely believe that the claimant had committed misconduct?

b. Did the respondent have reasonable grounds for holding that belief?
c. At the time the belief was formed had the respondent carried out a reasonable investigation?
d. Did the respondent act in a procedurally fair manner?
e. Was dismissal within the range of reasonable responses?

24. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

25. If so, would it be just and equitable to reduce the claimant's compensatory award and/ or basic award? By what proportion?

26. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

Automatically unfair dismissal: section 103A of the ERA

27. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant says that she made a disclosure orally to her employer on 25 October 2020, which incorporated and referred to a Facebook post that she had shared and liked on 24 October 2020.

a. Did the claimant disclose information?
b. Did she believe that the disclosure of information was made in the public interest?
c. Was that belief reasonable?
d. Did the claimant believe that it tended to show that:
    i. A person had failed, was failing or was likely to fail to comply with any legal obligation; and / or that
    ii. The health or safety of any individual had been, was being or was likely to be endangered?
e. Was that belief reasonable?

28. The claimant says she made a protected disclosure orally in a meeting with Ian Hughes and Dale Robinson on 25 October 2020 when she disclosed information about a Facebook post that she had liked and shared on 24 October 2020 and other information tending to show:

a. That the respondent breached its legal obligation to avoid the sexual harassment of workers when the respondent's owner, Mr Patel, repeatedly attempted to kiss a member of staff whilst they were working; and
b. That the respondent had breached its legal obligations under the Working Time Directive by failing to provide breaks for staff.

29. The claimant asserts that these disclosures fall within section 43B(1)(b) and (d) of the ERA.

30. If the claimant made a qualifying disclosure was it a protected disclosure under section 43C of the ERA because it was made to the claimant's employer?

31. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

Victimisation: section 27 Equality Act 2010

32. Did the claimant do the following protected acts:

    a. Share and like a Facebook post written by Dan Sergeant on 24 October 2020 which contained allegations of sexual harassment of female staff and customers; and/or
    b. Make allegations of sexual harassment of female staff to Ian Hughes and Dale Robinson in a meeting on 25 October 2020?

33. Did the respondent believe that the claimant had done or might do a protected act?

34. Did the respondent dismiss the claimant because it believed that she had done, or might do, a protected act?

Remedy

35. If any of the claimant's claims succeed, what sums should be awarded to her by way of compensation?

36. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

37. If so, should the claimant's compensation be reduced? By how much?

38. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

39. If so, would it be just and equitable to reduce the claimant's compensatory and/or basic award because of that conduct?

Findings of Fact

40. The following findings of fact are made unanimously by the Tribunal.

Background

41. In October 2018 the claimant applied for a job in the respondent's bar, Trebles. She was interviewed for the post by Dale Robinson who was, at the time, General Manager of the bar. The interview took place on 22nd October 2018 and went well. Mr Robinson indicated that the claimant was likely to be offered the job, subject to the completion of a trial shift. The purpose of the trial shift was for both parties to decide whether they wanted to go ahead with the claimant's employment.

42. On Friday 26 October 2018 the claimant worked a trial shift of one hour. She was not paid for the trial shift at the time and, had she not gone on to take up employment with the respondent, would not have

been paid for it. The trial shift was part of the respondent's recruitment process and was much shorter than a normal shift for employees. At the time she applied for the job with the respondent, and at the time of the trial shift, the claimant had a job at another bar in Lincoln.

43. On Monday 29 October 2018 Dale Robinson sent an email to the claimant asking her whether she was still interested in the position and if so, what her notice period was in her current employment, so that he could get her added to the respondent's rota.

44. The claimant replied the same day saying that she was still interested and that her last shift in her other employment would be on 3 November.

45. On 31 October the claimant resigned from her job in the other bar.

46. On 4 November 2018 Mr Robinson sent an email to the claimant at 2.11 am to confirm her start with the respondent. He told the claimant that the respondent had rota'd her to work from the following Friday, that he would get her added to the Facebook staff page, and asked her to bring in some form of identification and her National Insurance number on the Friday.

47. The claimant's first full shift was on 9th November 2018. She was not issued with a contract of employment or a statement of employment terms and conditions. On her first shift Dale Robinson went through an induction process with her. This included giving her copies of certain documents including the respondent's House Rules, but he did not give her a contract of employment or a statement of terms and conditions. At no point during her employment with the respondent was the claimant provided with a written contract or statement of terms and conditions.

48. Throughout the period that the claimant was employed by the respondent the respondent did not have a disciplinary policy, a grievance policy, a policy dealing with harassment and equality, or a social media policy. A social media policy was drafted at one point, but it was not shared with the claimant.

49. The respondent is owned by Himesh Patel. Mr Patel visits the bar most days both as owner and as a customer. He often drinks in the bar and leaves the day to day management of the bar to Mr Hughes and the rest of the management team. There are four members of the management team who were, at the relevant time, Mr Hughes, Dale Robinson and two female supervisors.

50. The respondent is a small business with approximately 14 employees at any one time. Many of its staff and customers are students.

Events of 24 October 2020

51. The claimant's partner, Dan Sargeant, also worked at the respondent's bar. On 24th October 2020 he resigned with immediate effect at the end of his shift. The reason he resigned was because he was told by

the respondent that it believed he had been drinking alcohol during his shift, and that he had been repeatedly late for work. The respondent explained that disciplinary action would be taken, but also offered him the opportunity to resign. He chose to resign rather than face disciplinary action.

52. After resigning from the respondent's employment, Mr Sargeant went home and wrote a Facebook post which was highly critical of the respondent and its owner, Mr Patel. He shared the post on a Facebook page called "Overheard at University of Lincoln" which has approximately 20,000 members, some of whom may be customers of the respondent.

53. In the post Mr Sargeant wrote:

"*TREBLES is a messed up place I've worked there over a year until tonight. The owner HIMESH PATEL is a creepy and wildly inappropriate man he has made countless creepy comments to most of the female staff including asking a member of staff who still works there if he could have a threesome with her, he came in drinking one night and tried to kiss a member of staff, she had to stop him 3 times before he finally fucked off, these are just a couple of the many times he's acted like this with staff. He does the same to customers, recently a 17 year old managed to sneak in and he joined their table and creeped on them, he tends to approach girls and tell them he's the owner, buy them drinks and creep on them, he does this most times he comes in. He has no interest in the wellbeing of the staff, cutting corners in PPE for Covid leaving the staff and customers unsafe, as well as not following Covid safety rules, such as not wearing a mask. Some of the staff aren't given breaks after having shifts over 7 hours. Mate I'm not saying don't go trebles because I actually like the place, but the owner is a creepy cunt that treats his staff like this"*

54. Mr Sargeant originally made the post at approximately 11 pm on 24 October 2020. Within 20 minutes however the moderators of the Overheard at University of Lincoln Facebook page took the post down, because they were concerned that it was defamatory and contained hearsay. Mr Sergeant then posted it on his personal Facebook page with the comment "*Overheard took this down so back up it goes*". The post was also shared on a Facebook page called "Lincoln Girl Gang Safety Chat" where several people commented on it.

55. The claimant, at approximately 11.30 pm, and after she became aware that Overheard at University of Lincoln had taken the post down, liked Mr Sargeant's post and shared it both on her own Facebook page and on SnapChat. The reason she did this was because she agreed with the content of the post and wanted to spread awareness about Mr Patel's behaviour. She was concerned to protect female customers and potential customers of Trebles from possible harassment by Mr Patel, and to protect all customers against possible breaches of Covid safety rules.

56. The claimant had approximately 1,200 Facebook friends at the time and did not know how many people would have seen her SnapChat

post. The claimant accepted that her Facebook friends would have seen her post, and that her Facebook friends included people who worked in other bars in Lincoln and customers of the respondent.

57. The claimant was the only member of the respondent's staff to share the Facebook post, as her partner Mr Sargeant was no longer an employee of the respondent. There was no evidence before us of any other member of staff having posted criticism of the respondent on social media. Except for the comments about not providing staff with breaks, the claimant had not raised any of the issues set out in the Facebook post with any members of the respondent's management team before she shared and liked the post publicly.

58. The claimant knew on the evening of 24th October that the Facebook post reflected badly on Trebles. Not only did the moderators of Overheard at University of Lincoln take the post down quickly, but members of Trebles' staff contacted Dan Sargeant to ask him to take the post down due to it looking badly on Trebles. The claimant and Mr Sargeant were living together at the time and the claimant was aware that colleagues contacted Mr Sargeant and asked him to delete the post.

59. The claimant deleted her post on both SnapChat and on her Facebook page within an hour or two of having originally posted it. Before she did so however, several people liked and commented on her Facebook post.

60. The managers of Trebles - Mr Hughes and Mr Robinson, also saw the Facebook post and were very concerned about it. On 25th October 2020 the claimant was invited to a meeting at which Ian Hughes, Dale Robinson and Gaby Smithson (Trainee Assistant Manager) were present. Dale Robinson took notes of that meeting, which were not a verbatim record of what was said.

61. During the meeting Mr Hughes and Mr Robinson went through the Facebook post in detail with the claimant. The claimant was told that the respondent was concerned that by liking and sharing the post she was essentially showing that she supported the things that it said about Trebles. The claimant appeared to understand and accept this but said that she was supporting the allegations made about Mr Patel, rather than the allegations about the bar.

62. The focus of the respondent's concerns were the comments made at the start of the post about Trebles being "messed up", and about the suggestions in the post that the respondent was not providing PPE for staff, or following Covid safe operating procedures, was not allowing staff to take breaks and was allowing under age drinking. Ian Hughes and Dale Robinson had both been involved in implementing Covid safe ways of working at Trebles, and Mr Hughes therefore had personal knowledge of the safety measures in place. He believed that the allegations made in the post about providing insufficient PPE and not following Covid safe procedures were untrue.

63. Mr Hughes also knew that staff were now provided with breaks. There had been occasions previously when the bar had reopened following lockdown when staff had worked more than six hours without a break. The claimant had raised the question of breaks with the respondent in August 2020 and, as a result of this, the respondent had put systems in place to ensure that all staff got breaks. Mr Hughes therefore knew that the allegations about lack of breaks were no longer true at the time that they were made, and that the claimant would have known that.

64. The claimant accepted in her evidence that when she had raised concerns about breaks with the management of the bar, they had listened to her and responded by making sure that, from then onwards, all staff got breaks. There was no adverse action taken against the claimant when she raised the question of breaks in the past, but to the contrary the respondent responded positively to her concerns and made changes in working practices.

65. During the meeting on 25 October, the claimant was asked if she wanted to put in a complaint about Mr Patel's behaviour and she said that she did. She believed that her complaint would be dealt with when she returned to work following her suspension. In the event, no investigation was carried out into the claimant's complaints about the behaviour of Mr Patel.

66. Mr Hughes held a meeting with staff, after the claimant was dismissed, to ask them if they had any concerns that they wished to raise. Nobody raised any concerns. This did not however lead us to conclude that the allegations of sexual harassment against Mr Patel were untrue, given that Mr Patel owned the bar and there was no process or policy enabling staff to speak up about sexual harassment.

67. During the meeting on 25 October Mr Hughes told the claimant that the post could be seen as 'negative against Trebles', and she agreed with this. He also told her that if the post hadn't referred to Trebles as a 'messed up' place, it might have been OK, and that if the post had just been about Hamesh Patel then it would have been fine.

68. We found Ian Hughes to be a straightforward and honest witness, who was willing to admit when he couldn't remember what had happened given the length of time that has elapsed since October 2020. He was very clear in his evidence that it was the comments about Trebles, PPE, Covid safety, breaks and underage drinking that were of concern to him, and not the comments about Mr Patel's behaviour. We accept his evidence.

69. At the end of the meeting on 25 October the claimant was suspended with immediate effect. The respondent sent her a letter confirming her suspension. The letter stated that the claimant was being suspended "*pending investigation into an allegation of misconduct*" and that "*When we have carried out our investigation, we shall write to inform you whether we intend to hold a disciplinary hearing. If we consider that there are grounds for disciplinary action we shall inform you of those grounds in writing and you will have the opportunity to state your case at the hearing, in accordance with the Disciplinary Procedure*".

70. Although the respondent told the claimant that an investigation would be carried out, none was in fact carried out. Instead, Mr Hughes took advice from a business consultant who advised him that the respondent should focus on the comments made in the Facebook post about the business and dismiss the claimant for the comments made about Trebles.

71. The claimant was subsequently invited to a disciplinary meeting. Contrary to what the respondent had written in the letter suspending the claimant, the grounds for disciplinary action were not set out in writing, and the respondent did not have a disciplinary procedure in place. The claimant was however told that she could bring a representative to the meeting with her.

72. The meeting was originally scheduled for 28 October 2020, but the claimant was unwell, so it was rescheduled to 30 October. At the meeting on 30 October the claimant was dismissed for gross misconduct. It was clear to us that the decision to dismiss had been made before the meeting on 30 October.

73. Mr Hughes told us that the decision to dismiss was his, on the advice of the business consultant. He also told us that he had considered sanctions other than dismissal but formed the view with the advice of the consultant, that given the severity of the comments in the post, the claimant should be dismissed.

74. One of the concerns that Mr Hughes had was that the allegations that the claimant had made about breaks and PPE were not true at the time she liked and shared them, and he believed that she knew they weren't true. This was because she had been instrumental in getting the issue of breaks sorted for staff several weeks earlier, and she knew the steps that had been taken to make the bar Covid secure. Mr Hughes said in evidence that had the concerns she'd raised about health and safety been true, they would not have dismissed her but would have worked with her to resolve them. In light of the approach taken when the claimant raised the issue about lack of breaks previously, we accept this evidence.

75. Having heard the evidence of Mr Hughes, we find that the reason the claimant was dismissed was because of the health and safety issues that the claimant had raised and the comments about the bar, which Mr Hughes felt could have seriously damaged the reputation of the bar and which had been shared, albeit briefly, with customers and competitors of the respondent. We accept Mr Hughes' evidence that the claimant was not dismissed because she raised allegations of sexual harassment against Mr Patel. The claimant's own evidence was that Mr Hughes told her on 25 October that if it was just the allegations against Mr Patel, they wouldn't be there.

76. Mr Hughes wrote to the claimant confirming her dismissal. In his letter he stated that:

"*After our investigation meeting, we found that by sharing and liking the post on social media that's in question, it is detrimental to our business (Trebles). This is an act of gross misconduct and cannot be taken lightly.*

We have decided to terminate your employment with immediate effect due to the seriousness of your act…"

77. There was no mention in the letter of the right to appeal against the decision. The claimant did not appeal against the decision to dismiss her because, quite simply, she did not know that she could.

The Law

Length of service

78. In order to bring a complaint of ordinary unfair dismissal, an employee must have two complete years' service with the respondent, in accordance with section 108(1) of the ERA:

"*Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.*"

79. The definition of the 'effective date of termination' is set out in section 97 of the ERA which provides that:

"*(1) Subject to the following provisions of this section, in this Part "the effective date of termination" –*
…
(b) In relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect…

(2) Where –

(a) The contract of employment is terminated by the employer, and
(b) The notice required by section 86 to be given by an employer, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1))
for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means –

(a) The date when notice of termination was given by the employer, and
(b) Where no notice was given, the date when the contract of employment was terminated by the employer.

80. Section 86 of the ERA sets out the minimum periods of notice that an employer (and an employee) must give to terminate a contract of employment. The relevant provisions are –

"*(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*

(a) Is not less than one week's notice if his period of continuous employment is less than two years,
(b) Is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years…

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party…"

81. The combined effect of these provisions is that, where an employee who has more than one month's service is dismissed without notice, the statutory period of notice of one week is added on to the employee's period of continuous employment, unless the employee is guilty of gross misconduct.

82. Section 211 of the ERA (Period of continuous employment) provides that:

"*(1) An employee's period of continuous employment for the purposes of any provision of this Act –*
(a) …begins with the day on which the employee starts work, and
(b) Ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision…"

83. Continuous employment starts upon the first day that the claimant works for the respondent. Work carried out before an official start date will not count towards continuous employment under section 211(1)(a) ERA unless it is clearly carried out under a contract of employment. **Smith v The International Development Co plc EATS 1422/01**

84. There is therefore a distinction between preparatory work or work carried out under an ancillary contract and work carried out under a contract of employment.

Ordinary Unfair dismissal

85. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) and (2) of the Employment Rights Act 1996.

86. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to*

justify the dismissal of an employee holding the position which the employee held."

87. Section 98(4) states 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) –*
> *(a) Depends on 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*
> *(b) Shall be determined in accordance with equity and the substantial merits of the case. "*

88. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant: -

> "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*. "

89. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following: -

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

90. The leading case on contributory conduct is ***Nelson v BBC (No.2) 1980 ICR 110*** in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-
    a. There must be conduct which is culpable or blameworthy;
    b. The conduct in question must have caused or contributed to the dismissal; and
    c. It must be just and equitable to reduce the award by the proportion specified.

91. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (Nelson v BBC (No.2)).

92. In ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** the House of Lords held that it is, in most cases, not open to an employer to argue

where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (ie the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

Automatically unfair dismissal: section 103A of the ERA

93. Section 103A of the ERA provides that "*An employee who is dismissed shall be regarded for the purposes of this Part 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.*

94. In a complaint under section 103A of the ERA an employee does not need to have two years' continuous employment. Where an employee does not have two years' service however, the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair one lies with the employee (***Smith v Hayle Town Council 1978 ICR 996***).

95. A Tribunal can draw an inference as to the real reason for the dismissal

96. Section 43A of the Employment Rights Act 1996 ("**the ERA**") defines a protected disclosure as "*a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

97. Section 43B of the ERA ("*Disclosures qualifying for protection*") provides as follows:

"*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*

(a) That a criminal offence has been committed, is being committed or is likely to be committed,
(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) That a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) That the environment has been, is being or is likely to be damaged, or
(e) That information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed…"

98. Under section 43C of the ERA ("*Disclosure to employer or other responsible person")*:

"*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure*
(a) To his employer…

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

99. In ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325*** the EAT considered what amounts to a 'disclosure of information' and held that there is a distinction between disclosing information, which means 'conveying facts' and making allegations or expressing dissatisfaction. It gave, as an example of disclosure of information, a hospital employee saying 'wards have not been cleaned for two weeks' or 'sharps were left lying around'. In contrast, the EAT held, a statement that 'you are not complying with health and safety obligations' is a mere allegation.

100. The Court of Appeal, in ***Kilraine v London Borough of Wandsworth [2018] ICR 1850***, established that 'information' and 'allegation' are not mutually exclusive. There must, however, be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in order for there to be a qualifying disclosure.

101. The information disclosed by the worker does not have to be true, but rather, the worker must reasonably believe that it tends to show one of the matters falling withing section 43(B)(1). The employee must also reasonably believe that the disclosure is in the public interest. When deciding whether the worker had the relevant 'reasonable belief' the test to be applied is both subjective (ie did the individual worker have the reasonable belief) and objective (ie was it objectively reasonable for the worker to hold that belief). See ***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4***, which was endorsed in ***Phoenix House Ltd v Stockman [2017] ICR 84***, in which the EAT held that, on the facts believed to exist by an employee, a judgment must be made, first, as to whether the worker held the belief and, secondly, as to whether objectively, on the basis of the facts, there was a reasonable belief in the truth of the complaints.

102. When considering whether a disclosure is in the public interest, the Tribunal must decide what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether that belief was held reasonably. In ***Chesterton Global Ltd (t/a Chestertons) and anor v Murmohammed (Public Concern at Work intervening) [2018] ICR 731*** the EAT held that it is not for the Tribunal to consider for itself whether a disclosure was in the public interest, but rather the questions are (1) whether the worker making the disclosure in fact believes it to be in the public interest and (2) whether that belief was reasonable.

Tribunals should be careful not to substitute their views of whether disclosures are in the public interest for that of the worker.

103. Following ***Chesterton***, there are four questions for the Tribunal to consider when deciding whether a disclosure is made in the public interest:

a. the numbers in the group whose interests the disclosure served;
b. the nature of the interests affected and the extent to which they are affected by the matters disclosed;
c. The nature of the wrongdoing disclosed, and in particular whether it was deliberate or inadvertent; and
d. The identity of the employer.

Victimisation: section 27 Equality Act 2010

104. Section 27 of the Equality Act 2010 states as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…"

105. Although Tribunals must not make too much of the burden of proof provisions (**Martin v Devonshires Solicitors [2011] ICR 352**) in a victimisation claim it is for the claimant to establish that she has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

106. It has been suggested by commentators that the three stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in **Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841** can be adapted for the Equality Act so that it involves the following questions:

a. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?

b. If so, did the respondent subject the claimant to the alleged detriment?
c. If so, was the reason the claimant was subjected to the detriment that the claimant had done, or might do, a protected act?

107. Following the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877** it is not necessary in a victimisation case for the Tribunal to find that the employer's actions were consciously motivated by the claimant's protected act. Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Submissions

108. Both parties made detailed written and oral submissions which we have taken into account when making our decision. We summarise below the oral submissions made by each party.

Claimant

109. Ms Jiggens submitted that the claimant's employment started on 26 October 2018, which was the first day that she had been paid to work and lasted until she was dismissed on 30 October 2020. In the alternative she argues that employment started on 29 October when the claimant and respondent exchanged emails confirming the claimant's employment.

110. She also argues that if the Tribunal finds that employment started on 4 November 2018, then under sections 97 (2)(b) and 108(1) of the ERA the nature of the misconduct that the respondent asserts is the reason for the dismissal is a brief period overnight on a Saturday when the claimant liked and shared someone else's Facebook post. In the absence of any disciplinary policy and any social media policy these were not circumstances that entitled the employer to terminate the contract without notice. As such the effective date of termination should be deemed to be 6 November 2020, giving the claimant the required length of service to pursue a claim of ordinary unfair dismissal.

111. Ms Jiggens submitted that it is for the employer to show the reason for dismissal and, if more than one reason, the principal reason for dismissal. She reminded the Tribunal that it should consider whether dismissal is within the range of reasonable responses and must not substitute its view for that taken by the employer.

112. She also submitted that the ACAS Code of Practice must be considered by the tribunal in deciding the fairness of the dismissal. The claimant's case is that the respondent failed at every step to comply with the ACAS code. The respondent did not even carry out the steps

set out in the suspension letter. The respondent did not articulate a specific disciplinary charge and no investigation was carried out. The decision to dismiss was based on the advice of a business consultant that liking and sharing a Facebook post amounted to gross misconduct. Mr Hughes' evidence was that he did not consider any alternatives to dismissal.

113. When asked what investigation the respondent should have carried out, Ms Jiggens submitted that the respondent should have found out if the claimant was aware of the alleged unwritten social media policy, and whether the claimant did believe the comments made in the Facebook post to be untrue. There was no investigation into the impact of the claimant's liking and sharing the Facebook post, as opposed to any damage caused by her partner writing and sharing the post. There was no investigation into the truth of the allegations in the post. Mr Hughes criticised the claimant for not appealing against the decision to dismiss her but gave her no opportunity to appeal.

114. In relation to the victimisation complaint, the claimant argues that it is not plausible for the respondent to maintain that the claimant was dismissed for the health and safety complaints within the Facebook post, rather than the allegations of sexual harassment. The comments that the dismissal was not linked to the allegations of sexual harassment were merely an attempt to cover up that protected acts were at the heart of the reason for dismissal.

115. Ms Jiggens relies on protected acts made under both section 27 (c) and 27(d) of the EQA. The claimant's act of liking and sharing the post fell within section 27(c), she argues. A protected act does not necessarily have to be an allegation of a breach of Part 5 of the EQA act, namely the work provisions, and allegations of breach of the legislation applying to service providers can amount to a protected act.

116. Ms Jiggens referred to ***Martin v Devonshire*** and in particular to paragraphs 22, 23 and 24 of the Employment Appeal Tribunal's judgment. She accepts that a distinction can be made between the content of a protected act and the manner in which it is made.

117. The claimant's submission is that it is not credible that the respondent had a genuinely separable reason for dismissal. Mr Hughes' evidence was that the respondent did not investigate any of the sexual harassment complaints. This is not a case in which the claimant had been instructed not to speak to the media but continued to do so.

118. The protected act does not need to be the only or even the principal reason for dismissal for the claimant to succeed in her victimisation complaint. If the protected act had a more than trivial impact on the decision to dismiss then victimisation is made out in Ms Jiggens' submission.

119. In relation to the automatic unfair dismissal under S103A of the ERA, Ms Jiggens said that the question is whether the principal reason for the dismissal was the protected disclosure. She accepts that

protected disclosure has a much narrower definition than protected act. She relied on the case of ***Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540*** as authority for the proposition that multiple disclosures (namely the sharing and liking of the Facebook post on 24 October and the verbal disclosures on 25 October) can be aggregated to make a single disclosure.

120. The claimant shared and liked the Facebook post to raise awareness of the risks to women of the behaviour of Mr Patel. The claimant's position is that the respondent's reaction to her liking and sharing the Facebook post and her ultimate dismissal were precisely because her protected disclosures contained allegations of breaches of legal obligations.

121. Ms Jiggens also submitted that the respondent had not followed a fair procedure, had made no attempt to do so, and had presumed that the contents of the Facebook post were false without any investigation. The decision to dismiss was therefore way beyond the range of reasonable responses and was because the claimant raised health and safety concerns and allegations of sexual harassment.

122. In relation to ***Polkey*** and contributory conduct Ms Jiggens submitted that liking and sharing a Facebook post without any policy prohibiting her from doing so cannot justify a dismissal and that any fair procedure would have resulted in a lower sanction. It was not reasonable for an employer which employs almost exclusively people of the claimant's generation and who did not tell staff that they could not post on social media their legitimately held views to dismiss someone who did so. If an employer wishes to restrict what employees can say on social media than it has to say so. It is natural behaviour for the claimant's generation to post on social media. They have the right to post whatever they want on social media if they believe it to be true and have not been told not to do it.

Respondent

123. Mr Castle submitted that the claimant's submissions are not supported by the evidence in the case. The evidence of both of the respondent's witnesses was clear and both witnesses made appropriate concessions. He described the evidence of Mr Hughes as being frank and artless. Mr Hughes, he says, does not know the jargon of the employment legislation but came across as someone having a sense of natural justice. He did not come across as Mr Patel's enforcer. The claimant in her evidence had accepted that Mr Hughes 'heard her out' both during the disciplinary hearing and on other occasions, and that Mr Hughes was not concerned with the allegations made against Mr Patel from a disciplinary perspective. The claimant's evidence therefore mainly coincides with that of Mr Hughes.

124. In Mr Castle's submission, the evidence of both sides was that Trebles is a friendly bar with a friendly atmosphere and good relationships between staff and managers. Staff concerns were taken seriously and there was always someone to go to. The claimant

accepted in her evidence that the Facebook post she liked and shared was negative about Trebles. It was also common ground that other people had commented on the post she shared. Mr Hughes' evidence was that the 'likes' of the post were from the post that she shared (as opposed to her partner's post) and that there was therefore evidence of widespread sharing of the post and of reputational damage.

125. The claimant conceded in cross examination that the question of breaks had now been resolved and that there were rules in place to keep staff and customers safe from Covid, including social distancing. It was also common ground that Mr Hughes told the claimant that facemasks were not compulsory at the time the post was written. It therefore follows from the common ground that the final third of the Facebook post (the allegations about breaks and PPE) was not true, and that the claimant knew it wasn't true.

126. Ian Hughes properly took advice after he had already told the claimant that his concerns about the Facebook post were the first sentence (that Trebles was 'messed up') and the final third. There was, Mr Castle submitted, no need for any further investigation because the disciplinary charge had been admitted by the claimant.

127. The claimant understood that she had been dismissed for sharing a Facebook post that could have caused damage to the business. It was also the claimant's evidence that the post had been flagged as defamatory by the moderators of the Overheard at Lincoln Facebook page, and that she knew that when she shared it. The claimant acknowledged that she had made a mistake and paid the price for it.

128. It is, in Mr Castle's view, commonsense that whether or not there is a policy in place; if an employee says publicly to customers and competitors that her employer's venue is unsafe, that amounts to gross misconduct.

129. Mr Castle submits that the claimant was dismissed for the first sentence and the final third of the Facebook post. The claimant had accepted that the people she shared the post with included friends in Lincoln, people who work in bars in Lincoln and customers of the respondent. She also accepted that she was the only member of staff to share the Facebook post.

130. Mr Castle also submitted that for the reasons above, if the tribunal were to find that the dismissal was unfair, the claimant's compensation should be reduced by 100% to reflect ***Polkey*** and or contributory conduct.

131. In relation to the allegation of victimisation, Mr Castle submitted that in order for an allegation to amount to a protected act, the seriousness of the allegation of a breach of the Equality Act must be such that, if the allegation were proved, it would be a contravention of the Equality Act. The respondent submits that an allegation that Mr Patel as the owner of the business repeatedly tried to kiss a member of staff whilst she was not whilst she was at work in his bar is not a

protected act. He was not there in his capacity as an employer, but rather as a customer. The post does not, in his view, contain sufficient information to make good an allegation of harassment against anyone.

132. Mr Castle also submits that the Tribunal has to identify which part of the Facebook post amounts to the protected act. The protected acts are a minority of the Facebook post. On the question of causation, even if Mr Hughes considered the whole of the Facebook post, the claimant's best case is that 25% of the post amounts to a protected act. Therefore, the ratio of potential protected acts to the rest of the post means that looking at the post as a whole, the protected acts it contains were not more than a trivial cause of the dismissal.

133. Turning now to with the whistleblowing complaint, it is Mr Castle submits, common ground that the allegations that the claimant made about breaches of the Working Time Regulations were no longer true. It was, he says, nonsensical to suggest that Mr Hughes would have dismissed the claimant for something raised months earlier and resolved. In the meeting on 25 October when the claimant was told that wearing a mask was not compulsory, she appeared to have accepted that.

134. Mr Castle also submitted that the disclosure made by the claimant was not in the public interest as her stated goal was to damage Mr Patel personally and that is incompatible with the belief in the public interest.

135. In relation to unfair dismissal, Mr Castle referred to the case of ***General of the Salvation Army v Dewsbury 1984 ICR 498*** as authority for the proposition that continuous employment starts when the contract of employment starts and not when the employee first turns up for work. In that case he said, the contract of employment started on a Friday, but the claimant didn't start work until the following Monday. The court held that the contract of employment was formed on the Friday and that was when employment started. Relying on this case, he says that the start date for the claimant's employment was the date her contract was formed, namely 4 November 2018. Her trial shift was part of the recruitment process, and her employment was contingent on completing a trial shift.

136. A contract is formed when there is a clear offer and acceptance. In light of the email from the respondent to the claimant on 29 October in which Dale Robinson asked the claimant if she was still interested in the job, it was clear that at that point there was no contract in place. The Tribunal should, he submitted, look at the totality of the parties conduct and the fact that the claimant did not resign from her previous job until 31 October.

137. Mr Castle also argued that section 86(6) of the ERA makes clear that the right to a minimum period of notice does not apply if the employer has the right to terminate the contract without notice because of the behaviour of the claimant. Notice is therefore not required to be given in a gross misconduct case, and the effective date of termination

of the claimant's employment for the purposes of section 108(1) of the ERA was 30 October 2020.

138. The reason for the claimant's dismissal was, in Mr Castle's submission, conduct. He reminded the Tribunal that it needs to be cautious and whilst a lot of evidence had been submitted that was not reasonably available before to Ian Hughes, the focus should be on how the respondent saw matters at the time. The question is not 'would a lesser sanction have been appropriate', but rather whether the decision taken was within the range of reasonable responses. Mr Hughes had conceded that there could have been other ways of dealing with the issue but that did not mean that dismissal was outside the range of reasonable responses.

139. Mr Castle also argues that the respondent is a small organisation and that it was recognised long ago in ***Mackaler v Bolton [1979] IRLR 59*** that in a small employer there is no need for an elaborate disciplinary or appeals process. Personal ties between an employer and employees generally remove the need for formal procedures.

140. Mr Castle also referred us to the case of ***ILEA v Gravett [1988] IRLR 497*** in which Justice Ward said that at one extreme there will be cases where the employee is virtually caught in the act and the other involving pure inference. As the scale moves towards the latter end, so the amount of enquiry and investigation that may be required including the questioning of the employee is likely to increase. This is, he says, a 'caught in the act' case in which further investigation was not necessary.

141. The respondent, in Mr Castle's submissions, followed the ACAS code by establishing the facts of the case, informing the claimant of the problem during the meeting on 25 October and deciding appropriate action.

Conclusions

142. In reaching our conclusions we have considered carefully the evidence before us, the legal principles set out above, and the detailed written and oral submissions made by the parties. The following conclusions, with the exception of that on contributory conduct, are made unanimously

Start date of employment

143. We find that the claimant's employment started on 4 November 2018. The one hour of work that the claimant carried out as a trial shift on 26 October 2018 fell into the category of preparatory work. It was not carried out under a contract of employment, but rather was part of the recruitment process. At the end of the shift both parties could have decided not to enter into a contract of employment.

144. There was no clear offer and acceptance by 26 October and therefore no contract had been formed. This is evidenced by the email sent by Dale Robinson on 29 October asking the claimant if she was still interested in the job. He would not have asked that question if the claimant was already employed and a contract had already been agreed.

145. The claimant had not resigned from her other employment by 26 October and did not do so until 31 October. This is further evidence that, when she carried out the trial shift on 26 October, she did not consider herself to be an employee of the respondent. When she presented her claim to the Employment Tribunal, she wrote on her claim form that her start date was 4 November, which indicates what her view of her start date was, and it was only sometime later that she took a different view.

146. The contract of employment was, we find, formed on 4 November 2018 when Mr Robinson sent a clear offer to the claimant of work starting later that week, and the claimant accepted that offer.

Date of termination of the claimant's employment

147. In order to decide this issue, we have had to consider whether the respondent was entitled to dismiss the claimant without notice by reason of her conduct. Did the claimant's behaviour amount to gross misconduct and a repudiatory breach of her contract of employment?

148. Factors such as the nature of the employment and the employee's past conduct will be relevant in deciding whether behaviour amounts to a repudiatory breach of contract. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence **— Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA,** and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood EAT 0032/09.**

149. On balance, we find that there was no evidence of the claimant acting willfully to harm the respondent. The claimant did not write the post, she merely shared and liked it. She took it down within an hour or two of having originally posted it and acknowledged on 25 October that what she had done was wrong. There was no attempt on her part to cover up her behaviour or to justify it. She accepted that she made a mistake.

150. The respondent did not have a disciplinary policy or a social media policy defining this type of behaviour as gross misconduct or explaining to employees the consequences of engaging in such behaviour. The ACAS Code of Practice states that "*Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination*".

151. The ACAS Code also contains, in Appendix 2, a sample disciplinary procedure which lists some suggested examples of gross

misconduct. Whilst not exhaustive, this list does not cover behaviour of the type that the claimant was dismissed for.

152. On balance therefore, whilst the claimant should not have shared and liked the post publicly, we find that her conduct did not amount to gross misconduct. It was not conduct entitling the respondent to treat the contract as terminable without notice under section 86(6) of the ERA.

153. As a result, the claimant's period of employment is extended under section 97(2) of the ERA and her effective date of termination is 6 November 2020. She therefore has sufficient service to bring an ordinary unfair dismissal claim.

Ordinary unfair dismissal

154. We conclude that the reason the claimant was dismissed was conduct. Specifically, that she liked and shared a post on Facebook which publicly criticised the respondent and alleged that it had breached health and safety, when she knew that the issue of breaks for staff had already been resolved some time previously, which could have seriously damaged the respondent's reputation. We accept Mr Hughes' evidence that the reason for dismissal was not linked to the allegations made about Mr Patel's behaviour.

155. Turning now to the ***Burchell*** tests, we find that Mr Hughes, who was a compelling and genuine witness, genuinely believed at the time he made the decision to dismiss the claimant that she was guilty of gross misconduct. This was the advice that he had received also from the business consultant, and he had no reason not to accept that advice.

156. We also find, on balance, that Mr Hughes had reasonable grounds for holding that belief. He had seen the Facebook post and the claimant had admitted liking and sharing it. He had received professional advice on the issue also.

157. We do not find however that the investigation carried out by the respondent was a reasonable one. There was no investigation other than the meeting with the claimant on 25 October. There were a number of steps that the respondent could have taken which would have brought the investigation within the range of reasonable responses.

158. The respondent could have done more to find out how many people had viewed the post and whether it had done any damage to the business. It could have asked staff how many of them had seen the post. It could have investigated whether what the claimant said about PPE and Covid safety was true because that could have made a difference to the outcome.

159. We have reminded ourselves that it is not our role to step into the shoes of the employer and substitute our view for that taken by the

employer, however in this case we find that the failings in the investigation were such as to render the investigation outside the range of reasonable responses. We therefore find that the third of the ***Burchell*** tests was not satisfied.

160. We also find that the dismissal was procedurally unfair. We accept that a small employer is not required to have as detailed or complex a disciplinary procedure, but the ACAS Code of Practice suggests, at Appendix 1, ("Disciplinary rules for small organisations") that as a minimum a small employer should have rules which:

a. are simple, clear and in writing;
b. are displayed prominently in the workplace, known and understood by all employees; and
c. indicate examples of the type of conduct which will normally lead to dismissal without notice.

161. There were a number of failings in the procedure followed by the respondent in this case:

a. There was a total lack of a disciplinary policy and procedure;
b. There was a lack of investigation;
c. There was no written invite to the disciplinary hearing setting out the allegations against the claimant and warning her she may be dismissed;
d. The decision to dismiss was made before the 'disciplinary hearing' on 30 October; and
e. There was no appeal. The claimant cannot in our view be criticised for not raising an appeal in circumstances where she was not told that she had the right to appeal and wasn't aware that such a right existed.

162. We are also concerned that the same person (Mr Hughes) did the investigation and made the decision to dismiss, although this alone would not have rendered the decision to dismiss unfair. The evidence before us was that there were four members of the management team, so it would have been possible for different people to do the investigation and the disciplinary hearing.

163. For these reasons we find that the dismissal is procedurally unfair.

164. We also find that dismissal is not within the range of reasonable responses. The claimant's behaviour was not gross misconduct. The respondent had no social media or disciplinary policy warning employees that the behaviour engaged in by the claimant is even a disciplinary issue. There was no evidence of any previous misconduct by the claimant, she took the Facebook post down very quickly and apologised for it. She clearly had insight into what she'd done and that it had the potential to damage Trebles. She did not write the post and was not acting vindictively or deliberately to damage the respondent's interests. She made a mistake, for which she paid.

165. No reasonable employer would, in our view, have dismissed in these circumstances. We therefore find that the dismissal of the claimant was both substantially and procedurally unfair.

Automatic unfair dismissal (s103A ERA)

166. In deciding this issue, the first question to be addressed is whether the claimant made a protected disclosure within the meaning of section 43A of the ERA. The disclosure relied upon by the claimant is a combination of the liking and sharing of the Facebook post on 24 October and the information provided by the claimant during the meeting on 25 October.

167. We find that the claimant disclosed information both by sharing the Facebook post and during her meeting with the respondent on 25 October. The post, and her comments during the meeting, went beyond mere allegations, but also contained factual information, such as that employees were not being allowed breaks, that Mr Patel was sexually harassing staff, and that he was not wearing a mask.

168. Applying ***Kilraine v London Borough of Wandsworth [2018] ICR 1850***, 'information' and 'allegation' are not mutually exclusive. There must, however, be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in order for there to be a qualifying disclosure. The information disclosed by the claimant does not have to be true, but rather, the claimant must reasonably believe that it tends to show one of the matters falling withing section 43(B)(1).

169. That information did, in our view, tend to show that the respondent had failed to comply with a legal obligation to protect staff from sexual harassment and to provide breaks in accordance with the Working Time Regulations, as well as that the health and safety of individuals may be affected by behaviour of Mr Patel. It is not necessary for the allegations to be true in order for them to be qualifying or protected disclosures. We accept that the claimant reasonably believed at the time that she made the disclosures, that they tended to show that sexual harassment was taking place at the bar, that there had been a failure to provide breaks and that Covid safety measures were not being followed.

170. The disclosure therefore falls within sections 43B(1)(b) and (d) of the ERA and was a qualifying disclosure.

171. We have then gone on to consider whether the claimant reasonably believed, at the time she made the disclosure, that the disclosure was made in the public interest. In deciding this question we have considered whether the claimant reasonably believed that it was in the public interest and whether it was objectively reasonable for her to hold that belief.

172. We accept that the motivation of the claimant in making the disclosure about Mr Patel and about Covid safety rules, was to protect customers and potential customers of Trebles. Although no specific

numbers were provided, we take judicial notice of the fact that as a public bar, Trebles would have potentially large numbers of customers and potential customers. We also accept that concerns about sexual harassment and Covid safety are serious. The wrongdoing to which the claimant referred appeared to be deliberate, and she reasonably believed that to be the case.

173. There was no evidence before us to suggest that the claimant personally had anything to gain from making the disclosures that she did, and we accept that she genuinely believed when making them that she was doing so in the public interest.

174. We also find that the disclosures made during the meeting on 25 October, which included a detailed discussion about the Facebook post, were made to her employer in accordance with section 43C of the ERA and are therefore protected disclosures. Ms Jiggens did not seek to argue that the Facebook post itself was a disclosure falling within section 43G of the ERA, so we have not had to decide that question. It does however seem to us that a disclosure made on Facebook would not have fallen within section 43G as the claimant had no reason to believe that she would have been subjected to a detriment by her employer if she made a disclosure to her employer (a requirement set out in section 43G(2)(a)). When she had previously raised concerns about the lack of breaks for staff the respondent responded positively and made changes to working practices.

175. We therefore find that the claimant made a protected disclosure during the meeting on 25 October 2020 which included a discussion about the Facebook post she shared and liked the previous day.

176. The claimant was not however dismissed because of the protected disclosure she made on 25th October 2020. She was dismissed because she publicly criticised the respondent on 24 October in a post on Facebook which made serious criticisms about the respondent, referred to the bar as being 'messed up' and alleged that it had breached health and safety. At the time she shared and liked the post she knew that the issue of breaks for staff had been resolved some time previously. Her post could have seriously damaged the respondent's reputation.

177. The claimant was therefore not dismissed because she made a protected disclosure, and the automatic unfair dismissal claim fails and is dismissed.

Victimisation

178. The following allegations contained within the Facebook post about the behaviour of Mr Patel are in our view protected acts:

a. *Asking a member of staff to have a threesome;*
b. *Trying to kiss a member of staff repeatedly in the workplace whilst she was working;*
c. *Doing the same to customers;*
d. *'creeping' on a 17 year old who managed to sneak in; and*

e. Making 'creepy' comments to staff.

179. The behaviour described would, if true, amount to a breach of the EQA. As such, these are allegations falling within section 27(d) of the EQA.

180. The claimant also made an allegation during the meeting on 25 October 2020 about Mr Patel trying to kiss a staff member whilst she was working on shift. This is an allegation of harassment and is also a protected act.

181. An allegation does not have to be made to the employer to fall within section 27 of the EQA, so sharing and liking a Facebook post containing allegations of sexual harassment is, in our view, making an allegation within section 27(d) of the EQA.

182. We were not impressed by Mr Castle's argument that the behaviour described did not fall within the legal definition of harassment. The claimant does not in our view have to prove that the definition of harassment is made out by her allegation, she does not have to show that the allegations were true in order to fall within section 27 of the EQA.

183. There was no suggestion by the respondent that the claimant was acting in bad faith such that her allegations fell within section 27(3). We accept that the claimant was motivated by wanting to protect others from the behaviour of Mr Patel. We therefore find that the claimant sharing and liking the Facebook page and the comments in the meeting on 25 October about Mr Patel trying to kiss a member of staff are protected acts.

184. We also find that the claimant was subjected to a detriment, because dismissal is clearly a detriment.

185. On balance however we find that the claimant was not dismissed for making allegations of sexual harassment. All members of the panel were concerned about the behaviour of Mr Patel, the lack of policies and procedures for dealing with harassment, and the lack of action taken in relation to the allegations made by the claimant.

186. We accept, however, the evidence of Mr Hughes that the claimant was dismissed for sharing comments about Trebles and alleging breaches of health and safety which could bring the reputation of Trebles into disrepute, and that the claimant would not have been disciplined for raising concerns about Mr Patel's behaviour.

187. On that basis, the claim for victimisation fails and is dismissed.

188. We should add that we were impressed by the claimant and her bravery in speaking up. We accept that she was acting out of what she thought was the public interest in protecting customers and potential colleagues.

189. We were also concerned that no investigation whatsoever was carried out into what were serious allegations of repeated sexual misconduct towards staff and customers. The respondent's suggestion that what Mr Patel did as a customer was nothing to do with the business is surprising and clearly not true. Another customer would not have got away with the behaviour that he did. Staff would be more inclined to complain about another customer than the owner, in respect of whom there is a clear power imbalance. The evidence suggested that most of the employees in the bar were young employees on low wages in a pandemic during which jobs were not readily available within the hospitality sector.

190. If a customer were behaving inappropriately, he or she would have been asked to leave and possibly barred. Mr Patel was not because of his position as owner of the bar. It is in our view articifial to try and draw a distinction between his behaviour as a customer and as the owner. He is always the owner, even when drinking in the bar, and staff know that. The claimant is to be given credit for speaking up in circumstances which ultimately led to her losing her job.

Polkey

191. In relation to the finding of unfair dismissal, we find that no reduction should be made under ***Polkey*** because dismissal was outwith the range of reasonable responses. Given the number of failings in the procedure followed by the respondent in dismissing the claimant, as set out above, it would be pure speculation for us to make a finding that the claimant may have been dismissed in any event had a fair procedure been followed. In addition in light of our finding that no reasonable employer would have dismissed in these circumstances, uit would not be appropriate to make a ***Polkey*** deduction.

Contributory conduct

192. The Tribunal's judgment on the question of whether the claimant contributed to her dismissal through her conduct is reached by majority. The majority of the Tribunal found that the claimant did not know that her behaviour on the evening of 24 October was wrong. The respondent had no disciplinary or social media policy in place to tell her what she was doing was wrong. It had not warned the claimant that this type of behaviour would be considered gross misconduct. Given the claimant's age and relative inexperience in the working environment, the fact that she did not write the post, and that she took it down quickly when made aware that it could damage the business, she was not, in the view of the majority of the Tribunal, guilty of culpable or blameworthy behaviour, and there should therefore be no reduction for contributory conduct.

193. The Employment Judge, in the minority, found that the claimant did contribute to her dismissal and that there should be a 20% reduction in compensation to reflect this. The claimant's behaviour in sharing and liking the Facebook page was, in the view of the Employment Judge, culpable and blameworthy. There is no 'right' to criticise an employer in a public forum, contrary to the submissions of

Ms Jiggens. Colleagues of the claimant realised quickly that the post was inappropriate and asked her partner to take it down. Overheard at Lincoln also took it down. It would, therefore, in the opinion of the Employment Judge, be just and equitable to reduce the claimant's compensation by 20%.

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Employment Judge Ayre

5 June 2022

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JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE