EMPLOYMENT TRIBUNALS

Claimant: Miss A Harrison

Respondent: Rainhill Ex-Services Club

Heard at: Liverpool **On:** 27, 28, 29 and 30 March 2023

Before: Employment Judge Aspinall
Mr R Cunningham
Mrs J Pennie

Representation

Claimant: In person supported by her father
Respondent: Mrs Evans-Jarvis

JUDGMENT

Background

1. By a Claim Form dated 29 November 2020 the claimant brought a complaint for constructive automatically unfair dismissal under Section 103A Employment Rights Act 1996 and detriment under section 48 Employment Rights Act 1996 on the ground of her having made protected disclosures. She claimed notice pay.

2. She also complained that she had not been given rest breaks in accordance with the Working Time Regulations 1998 and that she had not been provided with payslips in accordance with Section 8 Employment Rights Act 1996.

3. The claimant worked as a bar attendant at the respondent's premises from 2 December 2018 until her resignation on 5 October 2020. She said that she had raised concerns about breaches of COVID safety measures by club members and that after raising those concerns, and others about her safety when locking up, she was ignored and humiliated, denied rest breaks and had all work removed from her and that treatment breached her contract of employment entitling her to resign.

4. The respondent defended the complaint and after a case management hearing at which the complaints were clarified it provided an Amended Response Form. It says that the claimant did not make protected disclosures and that she

resigned because she was aggrieved after finding out that a colleague was paid to lock up the premises after the end of the shift whereas the claimant had been doing it without additional payment.

5. It said the claimant did not raise payslip or rest break issues until her resignation, was offered the opportunity to withdraw her resignation and have a grievance hearing but chose not to do so. It says, in relation to her public interest disclosures, that her health and safety and breach of legal obligation beliefs were not reasonable, that she could have found other ways to do things but deliberately chose to take actions that put her in vulnerable positions and that she brings the complaints vexatiously.

List of Issues

6. A list of issues had been agreed following the case management hearing as follows:

1. Protected disclosure(s) ("PD")

    1.1 The claimant relies on the same protected disclosures for her claim that she suffered detriment and for her claim that she was automatically unfairly constructively dismissed for making protected disclosures. The questions for the Tribunal will be as follows:

        1.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

            PD1 The claimant said to Shannon Long, her supervisor, on or around 5 September 2020, that tables had been moved from the bar into the lounge , and the table was placed in the way of the bar exit. No-one was allowed at the bar unless being served, meaning the claimant and another staff members had to squeeze past committee members when collecting glasses.

            The claimant raised these concerns with her manager because they flouted the COVID-19 guidelines. The main bar and the lounge bar had been laid out in line with spacing regulations.

            PD2 The claimant informed Graham Hedges, a committee member, on 5 September 2020 that he was not meant to stand at the entrance to the bar. The claimant raised that concern because committee members were meant to remain seated and not to stand at the bar unless being served, in accordance with COVID-19 social distancing guidelines.

            PD3 On or around 6 September 2020 the claimant spoke to the treasurer, William Devling, and raised her

concerns, as did her supervisor, Shannon, that a table had been moved from the bar into the lounge, breaking Covid spacing safety rules, and a table was placed in the way of the bar exit so the claimant and another staff member had to regularly squeeze past committee members when collecting glasses.

PD4 The claimant told William Devling on 6 September 2020 that Graham Hedges the previous day had breached social distancing rules by standing at the entrance to the bar.

PD5 On 1 October, the claimant spoke to Andrew Ormesher, her manager, and informed him that she was concerned about personal risk because she was a young lone female locking up premises late at night and the exit was at a vulnerable part of the premises. The CCTV covering that exit had not been working for some time, and a nearby fire exit was not secure and had been broken into before. The claimant gave her keys to Mr Ormesher who agreed it was the best thing to do.

PD6 The claimant raised concerned with William Devling and Andrew Ormesher about not being provided with a break. She raised her concerns with William Devling in early September 2020 before he stepped down from the committee, and she raised her concerns with Andrew Ormesher in the period 1-5 October 2019. The claimant told them she had not head a break whilst working alone in excess of six hours despite requesting cover.

1.1.2 Did she disclose information?

1.1.3 Did she believe the disclosure of information was made in the public interest?

1.1.4 Was that belief reasonable?

1.1.5 Did she believe it tended to show that:

1.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

1.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered.

1.1.6 Was that belief reasonable?

1.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer, namely

her manager and/or members of the committee. S43(C)(1)(a.) In the alternative, she relies on sections 43C(1)(b) Employment Rights Act 1996.

2. Detriment (s 48 Employment Rights Act 1996)

2.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 The claimant was ignored by members of the committee. Before she made disclosures of information Colin Lowry and Graham, Hedges used to say “hi” to her and smile when they were on the premises. After the claimant made the disclosures referred to above they would come in and glare at the claimant and not speak to her. They would make sure they were served by Shannon instead of the claimant.

D2 The respondent removed the claimant's Wednesday shift, which the claimant had been guaranteed.

D3 The claimant was not given breaks as required by law despite working more than six hours.

2.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?

2.3 If so, was it done on the ground that she made a protected disclosure?

3. Remedy for Detriment

3.1 What financial losses has the detrimental treatment caused the claimant?

3.2 Has the claimant taken reasonable steps to replace any lost earnings, for example by looking for another job?

3.3 If not, for what period of loss should the claimant be compensated?

3.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

3.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

3.6 Is it just and equitable to award the claimant other compensation?

3.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.8 Did the respondent or the claimant unreasonably fail to comply with it?

3.9 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

3.11 Was any protected disclosure made in good faith?

3.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

4. Unfair Constructive Dismissal (Automatic)s103A ERA 1996

4.1 Was the reason or principal reason for the dismissal that the respondent failed to action the claimant's protected disclosures, which amounted to a breach of the implied duty of trust and confidence?

4.2 Did the claimant resign because of that breach?

4.3 Did she delay too long and waive the breach?

4.4 If not, the claimant was automatically unfairly dismissed.

5. Failure to prove itemised payslips pursuant to section 8 Employment Rights Act 1996

5.1 Did the respondent fail to provide the claimant with itemised payslips?

6. Failure to provide rest breaks pursuant to regulation 12 and regulation 30(1)(a) Working Time Regulations 1998

6.1 Did the respondent fail to provide the claimant with rest breaks as required by regulation 12?

6.2 Is the claimant entitled to compensation?

6.3 What is the compensation to which the claimant is entitled?

7. Remedy for unfair dismissal

7.1 What basic award is payable to the claimant, if any?

7.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

7.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.3.1 What financial losses has the dismissal caused the claimant?

7.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

7.3.3 If not, for what period of loss should the claimant be compensated?

7.3.4 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?

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

7.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.3.7 Did the respondent or the claimant unreasonably fail to comply with it ?

7.3.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

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

7.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

7.3.11 Does the statutory cap of fifty-two weeks' pay apply?

7.4 What basic award is payable to the claimant, if any?

7.5 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

8. Failure to Provide Payslips

8.1 Was the claimant provided with payslips during her employment ?

8.2 If not, how much should she be awarded to reflect that omission ?

The hearing

Documents

7. The parties had prepared a bundle of 129 pages.

8. The Tribunal commented at the start of the hearing about the apparent absence from the bundle of the following documents the Tribunal would have expected to see. The Tribunal referred the parties to the order for disclosure made by EJ Ross. Neither side had an adequate explanation, other than poor record keeping, as to the absence of the following:

(1) A schedule of shifts which the claimant says she worked and during which she had no rest breaks. The claimant said she had not kept records but worked 12 -12 shifts pre lockdown and 12-7 shifts after lockdown without breaks save for two occasions on which Mr Devling had attended to give her a break. She could not provide dates or durations of shifts with no breaks. All she could say was it was most likely every Saturday other than the one's Mr Devling knows he covered. The respondent said it did not have records of who had worked which shifts, the duration of any shifts nor any breaks offered.

(2) Copy payslips for the duration of the claimant's 23 month employment and documents to evidence their delivery to the claimant at the relevant times. The respondent had produced some payslips and explained that its accountant had emailed staff their weekly slips prior to lockdown and monthly during furlough and thereafter but that its accountants had not retained the emails sending the payslips to the staff so that it could not show what the claimant had received.

Oral evidence

9. The Tribunal heard oral evidence from the claimant. She gave her evidence in a clear and ordered way. The Tribunal found her to be a reliable witness who remained consistent in her account of key events. She readily accepted that she had not kept a schedule of dates on which she had had no rest breaks and that she could not provide that evidence to the Tribunal.

10. Mr Devling gave evidence for the claimant. He gave his evidence in a helpful way though there was important content as to exactly what and when he had told Mrs Lowry and Mr Lawton about the claimant's disclosures that came out in cross examination that he had not put in his witness statement. The Tribunal accepted his apology and explanation that matters had not been included as he had not realised their importance. The claimant was not legally represented and Mr Devling said that he had not had legal advice but had written a statement to be helpful. The Tribunal found him to be a reliable witness and found that his recollection of his conversations with Mr Lawton and Mrs Lowry were more reliable than their's because he was so dissatisfied with their responses to what he said that he made the decision to stand down from his role as Treasurer at the respondent.

11. The Tribunal had regard to the written statement of Shannon Long. Ms Long did not give oral evidence. It was agreed at the outset of the hearing that it would be a matter for the Tribunal as to how much weight, if any, to attach to unchallenged evidence. The Tribunal attached corroborative weight to her statement on the point of the information disclosed to Shannon Long by the

claimant on 5 September 2020.

12. Mr Lawton, the respondent club Chairman gave evidence to the Tribunal. He was a witness who was keen to say the right thing to exonerate the respondent from any liability without being fully aware as to what that would need to be

13. Mrs Lowry was a witness who was keen to defend matters that the Tribunal was not here to determine. She wanted to assure the Tribunal of the stringency of the respondent's covid measures, the Tribunal was concerned only with the *reasonableness of the claimant's belief* that there were breaches of legal obligations and health and safety measures and not, whether or not in fact the respondent had complied with or breached any government COVID guidelines.

14. Mrs Lowry also wanted to exonerate her husband from remarks he had made to the claimant, unrelated to her detriment or dismissal complaints, saying that it was banter and needed to be viewed in context. The remark in question was not part of the claimant's detriment complaint and so this evidence was not determinative of any issue on the List.

Applications

15. At the conclusion of its case Mrs Evans-Jarvis indicated that the respondent may want to make an application for specific disclosure to order Mr Devling, the claimant's witness, to produce work rotas that the respondent said it thought he had, so that it could show the shifts worked by the claimant and the breaks allocated to her so as to defeat the rest breaks complaint. She made this request even though her own witness Mr Lawton had given evidence that the claimant had never had more than a 6 hour shift so rest breaks would never have been relevant. She also wanted time to allow the respondent to be able to get payslip emails from its accountants so as to defeat the failure to provide payslips complaint.

16. The Tribunal referred the parties to the case management order and disclosure provisions of it. The respondent had no explanation as to why it had not sought its own rotas from its own staff, its own WhatsApp group history on which it said Mr Devling had shared all the rotas with staff at the time and no explanation as to why it had not asked Mr Devling earlier in the process if he could provide those rotas when they had clearly been relevant from the Claim Form date, and then, if not provided, made an application.

17. The respondent had no explanation as to why it had not approached its accountant earlier in the process when proof of provision of payslips was clearly relevant from the Claim Form.

18. The claimant objected to any application saying that the respondent had had time to provide documents and had not done so. The claimant wanted the matter concluding with an oral judgment that week if possible.

19. The Tribunal adjourned to consider the respondent's proposed specific disclosure application and consequent need for the case to go part heard. It had regard to:

a. The overriding objective; the impact of an application on the case would be that it would go part heard, witnesses may need to be

recalled and

b. the evidence adjourned for may or may not be forthcoming and may or may not show what the respondent hoped it would show, it could only show planned shift duration / planned breaks, not actual time worked or breaks taken, the evidence may be of corroborative value only in the face of direct oral evidence that the respondent said the claimant had not worked long shifts so hadn't been entitled to breaks and the claimant and Mr Devling said she had

c. The claimant opposed any application and said an adjournment was disproportionate

d. the fact that the respondent had been represented throughout,

e. that the evidence was concluded and the Tribunal about to begin deliberation,

f. that production of documents might need witnesses to be recalled (the claimant and particularly Mr Lawton who had said the claimant had not worked shifts of over 6 hours), that the claimant would have very little time to take in any documents adduced this late and that

g. the respondent had never before made a request of Mr Devling as to whether or not he had any relevant documents, nor made any application, and

h. the fact that the Tribunal had raised the absence of a schedule of shifts and of payslips at the outset and neither side had made any application at that point,

i. that Mr Devling had given evidence that since July 2020 the respondent also had physical time sheets that staff signed to declare that they had worked the shift and the respondent had not disclosed or adduced the time sheets,

the Tribunal declined to hear a specific disclosure application and decided, in the interests of justice, to proceed to deliberation on the basis of the oral evidence it had heard and the content of the agreed bundle.

The Facts

Background to employment

20. The claimant started working for the respondent on 2 December 2018 as a bar attendant. Her father was a member of the respondent club which was run by a committee. At the time of events complained of Mr Lawton was the Chairman of its committee. Mr Devling was the Treasurer and Mrs Lowry was the Secretary.

21. The claimant worked on the bar and carried out ancillary duties such as cashing up and entering takings figures onto a spreadsheet at the end of her shift. She regularly worked the 12 – 7pm shift on Saturdays during 2019. She sometimes worked 12-12. She was paid weekly and for the most part got a weekly

pay slip by email attachment from the respondent's accountant.

22. She raised with Mr Devling the fact that she did not always get a payslip. Four other members of staff also complained about not receiving payslips. Mr Devling raised this with Carla, from the accountant's practice and was told it would be put right. Mr Devling was aware that some staff got some of their outstanding payslips but the issue was not wholly resolved with some payslips still outstanding when the coronavirus pandemic lockdown began in March 2023.

23. The claimant was put on furlough during the coronavirus pandemic, returning to work in July 2020. During furlough the accountants moved to providing monthly pay slips. The claimant was one of the three staff, Ms Long and Mr Ormesher were the other two, who had been put on furlough and in respect of whom the respondent was trying to maintain employment so as to achieve the £1000 payment from the government for having retained staff. Ms Long was her supervisor and Mr Ormesher was the bar manager.

24. During July and August 2020 the claimant regularly worked Monday and Wednesday shifts and worked shifts to support functions that were booked at the club. They might be football matches or social functions. Mr Devling did the rotas with Mr Ormesher and the claimant had regular hours every week. There was not a week when she did not have any shifts. Some of her shifts were long shifts of around 6 – 7 hours. She usually earned around £ 500 a month.

25. The claimant agreed sometimes to lock up after her shift. She would be the only person on duty and solely responsible for gathering up the takings, safely disposing of them and securing the premises. This meant leaving through the cellar and by a door into a dimly lit area at the rear of the club. There was supposed to be a CCTV camera so that the member of staff could be sure the carpark area was safe before opening the rear door, exiting and locking up but the camera had been out of order since before lockdown.

26. The claimant had raised the broken camera with Mr Devling and he and Mr Ormesher had contacted the security company to get it fixed but it remained broken. The claimant felt vulnerable when locking up alone and so arranged for her dad to come to the club to be with her sometimes when locking up.

27. The claimant found out in August 2020 that when a colleague, Tracey, locked up at the end of a shift she received a payment of £15. The claimant heard that this arrangement was made direct between Mrs Lowry and Tracey. Tracey and the claimant each complained to Mr Ormesher and Mr Devling about their safety and the broken CCTV when locking up.

28. No provision was made for an uninterrupted break during shifts. There was often just one member of staff on the rota and that member of staff would have to eat and drink behind the bar during a quiet moment. They could not be certain that they would get 20 minutes uninterrupted and were not expected to leave the bar unattended, other than perhaps to take a toilet break if a member of the club was on site to keep an eye on the bar. Mr Devling tried to notice when a member of staff would be on a long shift on their own and as a kindness to attend the club and cover the bar for 20 minutes to allow the person a break. He did this for the claimant on two shifts in August 2020.

29. The respondent had social distancing measures in place and gave guidance to its staff about using personal protective equipment (PPE). Mr Devling marked out the function space with tape to show the social distancing zones. There were Perspex screens fitted to the bar areas and the room capacity for each part of the club was reduced to ensure adequate, 2 metre, social distancing.

The party on 5 September 2020

30. On 5 September 2020 there was a party at the club. The room had been set out so that the tables were socially distant. Strict instruction was given that the tables were not to be moved. There were signs above the bar telling people to collect their drinks and move away. There was to be no gathering at the bar.

31. Mrs Lowry, a committee member, had arranged the party for her son's 30th birthday. Mrs Lowry offered, as an increased measure of protection for the bar staff and so as to maximise the headcount allowed in the room and minimize contact between staff and party goers, to collect used glasses from around the room herself and place them on the bar for the staff to wash and re-use during the party. Mrs Lowry was not as diligent about this task as she might have been so that the claimant and her colleague bar attendant Ms Long had to leave the bar area to gather up glasses.

32. Mr Lowry was attending the event and became impatient whilst standing at the bar and called out to the claimant to get her attention so that he might be served. He shouted across the bar area to other customers to ask if the claimant was serving them. The claimant said she was in the middle of serving someone else and Mr Lowry replied, *"Ay Lippy, you're not too old for a smacked arse".* The claimant felt humiliated by this remark.

33. Mrs Lowry's guests included Mr Hedges, a committee member, who for medical reasons needed to sit at a tall table, not one of the lower tables in the social distancing plan. Mrs Lowry agreed that a tall table could be brought through from another room and placed less than 2 metres from the bar near the bar exit and less than 2 metres from a snack table that Mrs Lowry had set up. Mr Hedges sat at this table and was joined by other guests so that there was a huddle of 5 or more people seated or standing around this table and between this table and the bar.

34. This huddle meant that the claimant and Ms Long could not leave the bar to collect glasses without having to pass in close proximity, shoulder to shoulder, with guests. The claimant was very concerned about this. She raised it with Ms Long. She asked Ms Long if she had known that the tall table would be there and Ms Long said she had not. The claimant said that the location of the table and the people around it was a health and safety risk, that it was in breach of COVID regulations and that it put her and others at the party at higher risk of contracting COVID. Ms Long agreed.

35. The claimant raised it with Mr Hedges when he was standing at the bar. She said that the tall table should not be there and that it was in breach of COVID regulations. Mr Hedges laughed at her and said that he could do what he wanted.

36. The claimant and Ms Long had to seek to avoid the increased risk by using a different exit from the bar to get into the room to collect glasses. They did this by

passing through another room and corridor and two sets of fire doors so as to collect glasses.

The complaint to William Devling on 6 September 2020

37. On 6 September 2020 when the claimant went in to work Ms Long was talking to Mr Devling about the table incident from the day before. The claimant again said that the table should not have been placed where it was, that there was a group of people around it that meant it was not safe for the bar staff or guests and that this table and the group were in breach of COVID regulations. The claimant asked Mr Devling if he thought it was OK for the table to have been put there and he said it was not. He was the person who had done the tape markings and table spacings. He agreed with the claimant and Ms Long that the table and group were in breach of regulations and a risk to health and safety. He said he would raise it with the committee.

38. The claimant also told Mr Devling about Mr Hedges, *"I can do what I want"* remark and Mr Lowry's *"not too old for a smacked arse"* remark.

What Mr Devling did

39. Mr Devling contacted Mrs Lowry and told her that he had had complaints from the claimant and Ms Long about events at her party. He relayed the complaints in full (except he did not say what it was alleged her husband had said to the claimant). He said the table and group of people was a serious health and safety issue. He said that she ought to be setting an example complying with the regulations. Mrs Lowry's response was angry. She wanted to know why the claimant and Ms Long had gone to him about it and not her. She said that she was the club secretary and she had told the staff not to come out from behind the bar and had said that she would collect the glasses herself. Her view was that there would not have been a problem if the staff had stayed behind the bar. Mr Devling said the problem was the location of the tall table and the people around it and he asked why the table had been put there when it was not on the social distancing plan for the room. Mrs Lowry said that Mr Hedges had needed a tall table. Mr Devling said that there were plenty of places the table could have been put at a safe social distance. The conversation ended with Mrs Lowry angry that the claimant had raised this with Mr Devling and not her.

40. Mr Devling met with Mr Lawton and relayed to Mr Lawton, in full his conversations with the claimant and Ms Long and with Mrs Lowry. This must have been on a date after 5 September and before 10 September 2020. He told Mr Lawton about the remarks made by Mr Hedges and Mr Lowry. Mr Devling told Mr Lawton, with whom he had been friends for a long time, that he was very unhappy with the way Mrs Lowry had responded. Mr Lawton said he would speak to Mrs Lowry about it.

41. On 9 September 2020 there was a board meeting attended by the claimant's father as an observer, he was thinking about joining the committee but decided not to. No one raised the claimant's complaints at the board meeting.

42. The respondent had a Grievance Procedure. It provided

If you feel aggrieved at any matter relating to your work you should first raise

the matter with your Line Manager either verbally or in writing , explaining the full nature and extent of your grievance. You will then be invited to a meeting at which your grievance will be investigated fully. You will be notified of the decision, in writing, normally within ten working days of the meeting, including your right of appeal.

43. On 10 September 2020 Mr Devling sent out the rotas for the next week on the WhatsApp group. He gave the claimant her usual shifts.

44. Mrs Lowry was at her workplace when she saw the rota on 10 September 2020 and texted Mr Devling to challenge him about it, querying why there were two people on a shift, one of the two being the claimant. Mr Devling went to Mrs Lowry's place of work to discuss her challenge to the rota. They talked about the shifts. Mrs Lowry said she wanted Tracey to have the shifts. Mr Devling said that he had given the shifts to the usual people, the three who had been furloughed and in respect of whom the club hoped to achieve the £ 1000 retention payments, one of whom was the claimant. Mrs Lowry said she would check about the retention payments with the accountant.

45. She did and came back to him by telephone. He put her on speakerphone with his wife present. Mrs Lowry said it did not make financial sense to keep offering the claimant shifts that would cost more than they would recoup in retention payment. He understood that Mrs Lowry did not want the claimant to have the shifts. The conversation was again heated and Mr Devling's wife commented to him that he should not be spoken to like that and ought to give up his work for the respondent.

46. Mr Devling had had enough of Mrs Lowry. Her response to the Covid issue and her challenge to him about the rotas (coupled with an earlier dissatisfaction that he believed she had covered up for staff who were falsifying time sheets) meant that he no longer wanted to have to work with her. He resigned his role as Treasurer at the respondent at the end of September 2020 in direct response to his call with Mrs Lowry and gave his keys back to the respondent.

47. The claimant continued to attend work during September. She knew that Tracey Hewitt had refused to lock up anymore because of security concerns and had handed her keys back in. Tracey was paid a higher hourly rate than the claimant and had been getting an extra £15 for the lock up duty. The claimant was told by Mr Ormesher that the club was struggling financially and that the staff would have to be limited to one per shift unless there was a function on. The claimant said she was worried about her shifts and Mr Ormesher said she would still have her regular Wednesday shift and would be offered any functions and football matches as usual. During September the claimant worked her Wednesday and other shifts and was ignored by Graham Hedges, who before the complaint had been ordinarily friendly with her. Now he refused to make eye contact or speak to her and called out to Ms Long to serve him. When the claimant had a parcel to pass to him he took it without acknowledgment or thanks. Mr Lowry came into the club and refused to be served by the claimant, calling out to Ms Long to serve him. He ignored her greeting and made no eye contact with her. When, at the end of an evening he needed to settle his bill and there was no one else present to take the payment, he presented his card, the claimant took payment but he did not speak to her or look at her whereas before her complaints he had been ordinarily

friendly towards her.

PD5 complaint to Mr Ormesher on 1 October 2020

48. On 29 September 2020 the claimant messaged Andy Ormesher and said she was not happy locking up alone at night. She said as far as she was concerned what she was paid for was bar work, not locking up. She said, "*I don't feel comfortable locking up alone as a 19 year old".* She said *"to be given that kind of responsibility full time on £6.45 per hour isn't fair".*

49. On 30 September 2020 Mr Ormesher messaged the claimant who was working a long shift to tell her to take a break between 4.30pm and 5.00pm because Tracy was going home at 5.00pm.

50. On 1 October 2020 the claimant saw Mr Ormesher and told him that she would not lock up because the exit was poorly lit and the CCTV camera was still broken. She said she did not feel safe because she could not be sure whether or not there was anyone on the other side of the shutter in the dark car park before opening the shutter. She said she felt vulnerable locking up, that her dad could not always be with her and the nights were getting darker. Mr Ormesher said he understood. The claimant handed her keys back and it was agreed that she would not lock up again.

51. After Mr Devling's resignation at the end of September 2020 the committee took control of the rota. Mr Devling had always done it with Mr Ormesher but now Mr Lawton and Mrs Lowry, who had been scrutinizing it since early September, were involved. On Saturday 3 October the rota for the coming week was posted to the WhatsApp group. For the first time ever there were no shifts on there for the claimant. Her Wednesday shift had been given to Tracy Hewitt. A Tuesday shift for a funeral function had been given to a new member of staff LC.

52. The claimant messaged Mr Ormesher, the texts were not dated but occurred after the claimant saw the rota on Saturday 3 October and before she resigned on Monday 5 October 2020, to ask why she had no shifts. He replied that he had had no control over the rota and had been told by Mr Lawton that any queries were to be sent to Mr Lawton. He gave the claimant Mr Lawton's number. She messaged Mr Lawton:

> *"Can you explain to me why I have no shifts whatsoever and a new member of staff gets priority of shifts over me. Andy told me he's been told due to current financial situation we are reducing hours and trying to fit people in where possible and that you said if I want to know more then to contact you personally, what I can't understand is I've been given a set shift on a Wednesday, but now that has been given to Tracy and LC even has a shift and I don't though I've worked here longer than both and had more responsibility. Is this because I put my keys in?"*

53. Mr Lawton replied:

> *"The keys thing was a consideration when giving the shift to Tracey. We have also reduced our opening hours so financial requirements are less. Having to lay some staff off is under consideration at the moment. Sorry*

about this but the club's survival is at risk."

54. He also said that if she would like a face to face meeting to discuss things he would meet with her.

55. The claimant replied pointing out that Tracey also had refused to lock up anymore and that the claimant was on a lower rate of pay than Tracey so that if financial saving was the driver it would have made more sense to give shifts to the claimant than Tracey.

The claimant's resignation

56. On 5 October the claimant sent a resignation letter. She made links between her complaint about the 5 September party and the way she had been treated by Mr Hedges and Mr Lowry and the withdrawal of her shifts and between her complaint about safety and refusing to lock up /giving her keys back and the withdrawal of her shifts. She raised not having been given rest breaks. She said:

> *"I do not feel that I can continue to work at a place where health and safety is compromised and where challenges to unsafe behaviour are met with punishment."*

57. The claimant said she resigned with immediate effect. She said:

> *"You should be aware that I am resigning in response to a repudiatory breach of contract by my employer and I therefore consider myself constructively dismissed."*

Response to resignation

58. Mr Lawton saw the resignation letter by email. He looked again at the rota and messaged the claimant offering her the Tuesday shift that had been offered to LC. He wrote to the claimant on 6 October 2020. He invited her to withdraw her resignation and attend a grievance hearing he had arranged for Friday 9 October at 6.00pm. He said he would chair the hearing and Mrs Hedges would take notes.

59. The claimant did not accept the shift and did not attend the grievance meeting. She had already resigned. She had lost confidence in the respondent. The claimant brought her tribunal complaint.

Relevant Law

60. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act"). The relevant sections are as follows:-

> "s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.
>
> s43B(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) …

(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) …

(d) that the health and safety of any individual has been, is being or is likely to be damaged

(e) … or

(f) ….

61. The necessary components of a qualifying disclosure are clearly set out in section 43B ERA. They were summarised helpfully by HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00:

> "It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

62. The first stage involves a consideration of whether there has been a disclosure of information. The correct approach to the disclosure of information is set out in the decision of the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] ICR 1850, in which Sales LJ held:

> "30. I agree with the fundamental point made by Mr Milsom, that the concept of 'information' as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and 'allegations' on the other."

63. In Parsons v Airplus International Ltd UKEAT/0111/17**,** the EAT said:

> **"**23. As to whether or not a disclosure is a protected disclosure, the following points can be made:
>
> 23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.
>
> 23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.
>
> 23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."

64. In Kilraine in the EAT, Langstaff J said at [30] "reality and experience suggest that very often information and allegation are intertwined. The claimant

argued for a bright line distinction between the two. The statute had no such dichotomy.

65. In the Court of Appeal in Kilraine**,** Sales, LJ held that whatever is claimed to be a protected disclosure must contain "sufficient information" to qualify under Section 43B(1). There is in effect a spectrum so that pure allegation would not qualify but a disclosure may contain *sufficient* information even it if it also includes allegations. Context and background to the disclosure may be relevant but the information must, in itself, be sufficient. The Kilraine sufficiency point was applied in the Court of Appeal in Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601.

66. The information disclosed need not be true Darnton v University of Surrey EAT [2003] IRLR133. The worker may be wrong about the matters disclosed but that is not material, what matters is what the worker reasonably believed the information disclosed tended to show. It is for the Tribunal to assess the employee's state of mind on the facts understood by her at the time.

What the worker reasonably believes the information tends to show

67. The individual characteristics of the claimant are to be taken into account when considering what the claimant reasonably believed the disclosure tended to show, Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR4. It may be that a higher test is set for an expert with insider knowledge as opposed to a lay person's reasonable belief as to what the information tended to show.

Reasonable belief that it was made in the public interest

68. In Chesterton Global Ltd and another v Nurmohamed [2017] IRLR 837 the Court of Appeal approved the following factors that would normally be relevant to the question of whether there was a reasonable belief that the disclosure was 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 wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

To whom the disclosure is made

69. A disclosure may be made to the employer.

> s43C(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—
>
> (a) to his employer...

70. A complaint may be presented to an employment tribunal that a person has been subjected to a detriment on the ground that, more commonly *because* they made a protected disclosure.

71. A complaint may be presented to an employment tribunal that a person has been dismissed if the principal reason for the dismissal was a protected disclosure.

> **103A Protected disclosure**
>
> 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.]

72. The claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"**the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

73. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27. The employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

74. The term of the contract upon which the claimant relies in this case was the implied term of trust and confidence. In Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 the House of Lords considered the scope of that implied term and approved a formulation which imposed an obligation that the employer shall not:

> "…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

75. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls said at page 611A:

> **"**The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances**."**

76. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

77. In Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> "12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:
>
> > "… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."
>
> 13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.
>
> 14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.
>
> 15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."

78. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. The decision of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35 demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

79. In 2020 Auerbach HHJ in the Employment Appeal Tribunal in Williams v The Governing Body of Alderman Davies Church in Wales Primary School applied Omilaju and Kaur:

> "28. The starting point is that there will be a constructive dismissal, that is to say an dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 where a) there has been a fundamental breach of contract by the employer b) which the employee is entitled to treat us terminating the contract of employment and c) which has materially

> contributed to the employee's decision to resign. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced the decision to resign.
>
> 30. If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of *contributing* to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?

80. The answer comes at paragraph 34.

> 34. …so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it, has not been lost and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent conduct has also contributed to the decision to resign. It would be true in such a case that *in point of time* it will be the later conduct that has "tipped" the employee into resigning: but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign.

81. A resignation in response to the employer's conduct must be made in unambiguous words. The words can be informal or imperfect and can be taken at their face value without the need for analysis of the surrounding circumstances.

82. Section 95(1)(c) provides that the employee must terminate the contract *by reason of* the employer's conduct. The question is whether the repudiatory breach played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he or should would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

83. Where there are mixed motives the tribunal must decide whether the employer's conduct was an effective cause of the resignation. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in Wright v North Ayrshire Council [2014] IRLR 4. If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in Nottingham County Council v Meikle [2005] ICR 1. At paragraph 20 of Wright Langstaff P summarised it by saying

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

84. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract W E Cox Turner (International) Limited v Crook [1981] IRLR 443

85. Section 207(A) Trade Union and Labour Relations (Consolidation) Act 1992 provides that, where an employee brings a claim under Section 48 Employment Rights Act 1996 for public interest disclosure detriment and or under section 111 Employment Rights Act 1996 for unfair dismissal (including a complaint for

automatically unfair dismissal under Section 103A), an award for compensation can be increased or reduced by up to 25% if the employer has unreasonably failed to comply with the relevant code of practice relating to the resolution of disputes.

86. The relevant code of practice will have been issued either by ACAS or the Secretary of State. ACAS Code of Practice 1: Disciplinary and Grievance Procedures 2015 is a relevant code of practice. The ACAS code is not engaged unless a grievance is raised in writing.

87. The ACAS code provides the following keys to handling grievances in the workplace:

(1) let the employer know the nature of the grievance;

(2) hold a meeting with the employee to discuss the grievance;

(3) allow the employee to be accompanied at the meeting;

(4) decide on appropriate action;

(5) allow the employee to take the grievance further if not resolved.

88. In relation to deciding on appropriate action the code provides that a decision should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

89. The Employment Rights Act 1996 provides that workers are entitled to an itemised pay statement:

> **8 Itemised pay statement**
>
> (1) [A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.
>
> (2) The statement shall contain particulars of—
>
> (a) the gross amount of the wages or salary,
>
> (b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,
>
> (c) the net amount of wages or salary payable, …
>
> (d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment[, and
>
> (e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as —
>
> (i) a single aggregate figure, or
>
> (ii) separate figures for different types of work or different rates of pay].

90. Where a statement is not provided a worker may bring a complaint to a

tribunal

11 References to [employment tribunals]

[(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.]

(2) Where —

[(a) a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been given to a worker, and]

(b) a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part,

either the employer or [the worker] may require the question to be referred to and determined by an [employment tribunal].

(3) For the purposes of this section—

(a) …

(b) a question as to the particulars which ought to have been included in a pay statement or standing statement of fixed deductions does not include a question solely as to the accuracy of an amount stated in any such particulars.

(4) An [employment tribunal] shall not consider a reference under this section in a case where the employment to which the reference relates has ceased unless an application requiring the reference to be made was made —

(a) before the end of the period of three months beginning with the date on which the employment ceased, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the application to be made before the end of that period of three months.

91. Workers are entitled by the Working Time Regulations 1998 to rest breaks.

12 Rest breaks

(1) Where [a worker's] daily working time is more than six hours, he is entitled to a rest break.

(2) The details of the rest break to which [a worker] is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.

(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

(4) Where a young worker's daily working time is more than four and a half hours, he is entitled to a rest break of at least 30 minutes, which shall be consecutive if possible, and he is entitled to spend it away from his workstation if he has one.

(5) If, on any day, a young worker is employed by more than one employer, his daily working time shall be determined for the purpose of paragraph (4) by aggregating the number of hours worked by him for each employer.

92. Where rest breaks are not provided a worker may bring a complaint to an employment tribunal and seek compensation.

30 Remedies

(1) …

(2) …

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal —

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to —

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

Applying the Law to the Facts

93. The List of Issues had been prepared by the parties in this case. Before turning to apply the law the Tribunal comments on the List as follows:

99.1 At paragraph 1.2 it was not disputed by the respondent that the disclosures were made to the employer. The Tribunal has not had to determine that point.

99.2 At paragraph 2.2, in relation to detriment, the List said

Did the claimant reasonably see that act or deliberate failure to act as subjecting her to a detriment?

A detriment is not defined in the Employment Rights Act 1996 but a detriment will be established if *a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment*. It is a mixed subjective and objective test and was approved by the

Court of Appeal in Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73

> "In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. *There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*.

99.3 The Tribunal notes that ERA 1996 s 48(2) applies to all detriment claims which are brought under ERA 1996 s 47B (which includes public interest disclosure cases) and is drafted in the following terms: 'On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

99.4 At paragraph 4.1 the List recited that the claimant *resign(ed) because they failed to action her complaints.* Discussion at the outset of the hearing clarified that that was not, *exactly,* her case. Everyone agreed, prior to any evidence being heard, that her case was that she resigned because her shifts had been taken from her, she said her shifts had been taken from her because she had complained about both the breach of covid restrictions at the party and that it was unsafe for her to lock up.

99.5 Paragraph 8 was added by consent to reflect the failure to provide an itemised pay statement complaint.

Disclosures

Did the claimant make qualifying protected disclosures?

PD1

Information

94. Applying Kilraine, the Tribunal finds that on 5 September 2020 the claimant gave the following information to Shannon Long her supervisor.

(1) That a tall table had been moved from the bar into the lounge.

(2) That the tall table was not supposed to be there as it had not been on the plan for the room to be safely socially distant.

(3) That the tall table was too close, that is less than 2 metres away, from the bar.

(4) That the tall table was so close to the bar that staff and party goers would come too close to one another if going to the bar, leaving the bar by the bar exit or going to the snack table.

(5) That this was a problem for complying with COVID social distancing.

95. The Tribunal accepts the claimant's oral evidence that words to this effect

were said as part of a conversation with Shannon Long and finds that evidence to be corroborated by the written statement of Shannon Long. This amounts to sufficient information, and opinion or allegation, to meet the test of information in law.

Reasonable belief that it tended to show a breach of a legal obligation or health and safety

96. The claimant reasonably believed that this information tended to show that there was a risk to her health and safety and that of others; Shannon working on the bar and people attending the premises that day, because if would put her and them at increased risk of contracting COVID.

97. The claimant also reasonably believed that the information tended to show that there was a breach of a legal obligation because she had been told by Mr Devling there was in place a 2 metre social distancing requirement from each other for people seated at the event and she had been told by Mr Devling that there was a requirement that people should not gather at the bar, but should stay socially distant collect their drinks and return to their seated area.

98. The Tribunal accepts that claimant's oral evidence that Mr Devling had told the staff these requirements, Mr Devling's evidence that these requirements had been communicated by him to staff and Mrs Lowry's evidence that the staff had been informed of the requirements for compliance with government guidelines on social distancing. Mrs Lowry as Club Secretary also gave evidence that there were Perspex screens in place, a taped off zone around the bar area to remind customers not to gather at the bar but to remain socially distant, PPE provided and that there were limits on the number of people who could gather and that there was a notice behind the bar informing all staff of the distancing requirements.

99. The claimant reasonably believed that the respondent was taking these steps to comply with the law at the time. She saw the committee members, her supervisor and bar manager taking steps to put those measures in place.

Reasonably believed to be in the public interest

100. The Tribunal accepts that the claimant disclosed the information to Shannon Long as her supervisor in the public interest. The claimant believed herself and Shannon and others attending the event to be at increased risk of contracting COVID. She was reasonable in believing herself and others to be at increased risk because the location of the table meant that people would have to pass and were passing within less than a metre of each other. She was reasonable to believe her disclosure was in the public interest because it was to protect others, her colleagues and those attending the party, not just herself.

101. The first disclosure PD1 to Shannon Long on 5 September 2020 is a qualifying protected disclosures.

PD2

Information

102. At the party on 5 September the claimant challenged Graham Hedges

about standing at the bar entrance. She said he was not supposed to stand there, other than to collect his drink. She said he was supposed to return to his seated area to comply with the social distancing. She said that the table ought not to have been put there and that the committee members standing around the bar and table area were not complying with the social distancing guidelines.

103. Applying Kilraine this amounts to sufficient information, and opinion or allegation, to meet the test of information in law.

Reasonable belief that it tended to show a breach of a legal obligation or health and safety

104. The claimant reasonably believed that Mr Hedges remaining standing at the bar area was a risk to her health and safety and that of others; Shannon working on the bar and people attending the premises that day, because if would put her and them at increased risk of contracting COVID.

105. The claimant also reasonably believed that the information tended to show that there was a breach of a legal obligation because she had been told by Mr Devling there that there was a requirement that people should not gather at the bar, but should stay socially distant collect their drinks and return to their seated area.

106. The Tribunal accepts that claimant's oral evidence that Mr Devling had told the staff these requirements, Mr Devling's evidence that these requirements had been communicated by him to staff and Mrs Lowry's evidence that the staff had been informed of the requirements for compliance with government guidelines on social distancing. Mrs Lowry as Club Secretary also gave evidence that there were Perspex screens in place, a taped off zone around the bar area to remind customers not to gather at the bar but to remain socially distant, PPE provided and that there were limits on the number of people who could gather and that there was a notice behind the bar informing all staff of the distancing requirements.

Reasonably believed to be in the public interest

107. The claimant reasonably believed that she was challenging Mr Hedges, disclosing the information, because doing so would protect herself and others from an increased risk of contracting covid.

108. The second disclosure PD2 is a qualifying protected disclosure.

PD3

Information

109. On 6 September 2020 the claimant spoke to the treasurer, William Devling, and raised her concerns, together with the supervisor, Shannon, that a table had been moved from the bar into the lounge, breaking Covid spacing safety rules, and the table was placed in the way of the bar exit so the claimant and another staff member had to regularly squeeze past committee members when collecting glasses.

110. Applying Kilraine this amounts to sufficient information, and opinion or

allegation, to meet the test of information in law.

Reasonable belief it tended to show a breach of a legal obligation or health and safety

111. The claimant reasonably believed that the location of the tall table tended to show a breach of health and safety because it was not on the plan that had been prepared for safe spacing of the tables for the function. It was close to the bar and bar exit so that people gathering around it would put her and them at increased risk of contracting COVID.

112. The claimant also reasonably believed that the information tended to show that there was a breach of a legal obligation because she had been told by Mr Devling there that there was a room planner allocating tables to locations so as to ensure people could stay socially distant and she could see that the table was placed in contravention of that plan. The claimant understood the plan to be in place to comply with legal obligations given by government for social distancing. It may be that the government guidelines were or were not "legal obligations" what matters is that the claimant reasonably believed them to be so. The Tribunal accepts her evidence that she thought it was the law to have to space tables at least 2m apart. She was reasonable in that belief because she had seen Mr Devling and other committee members making a room spacing plan, relocating tables and putting up screens and making other plans for PPE.

Reasonably believed to be in the public interest

113. The claimant reasonably believed that she was raising this with Mr Devling because the location of the table close to the bar and bar exit was putting her and Shannon at increased risk as they would have to pass shoulder to shoulder with people at the party if they were to come out from the bar that way to collect glasses. She was acting in the interests of herself, Shannon and any party goers, possibly as many as 30 people, that she or Shannon might have to pass close to, and the interests of party goers who might want or need to visit the bar or the snacks table and would have to pass within a less than 2m distance of people at the tall table to do so, putting them at increased risk of contracting covid.

114. The third disclosure PD3 is a qualifying protected disclosure .

PD4

Information

115. The claimant told William Devling on 6 September 2020 that Graham Hedges the previous day had breached social distancing rules by standing at the entrance to the bar.

116. Applying Kilraine this amounts to sufficient information, and opinion or allegation, to meet the test of information in law.

Reasonable belief that it tended to show a breach of a legal obligation or health and safety

117. In the context of the conversation between the claimant and Mr Devling on

6 September 2020 the Tribunal finds that the claimant reasonably believed that the information disclosed tended to show those breaches and that damage. It was made explicit within that conversation by the claimant that the gathering around the bar by those at the tall table, and by Mr Hedges standing close to the entrance to the bar, put the health and safety of the claimant, Shannon Long and party goers at increased risk of catching COVID and was in breach of social distancing rules. The claimant reasonably believed those rules to amount to a legal obligation.

118. Her account of the conversation was corroborated by Mr Devling and in some part by the written statement of Shannon Long.

Reasonably believed to be in the public interest

119. The claimant reasonably believed that she was raising this with Mr Devling because the location of the table close to the bar and bar exit had put her and Shannon at increased risk as they would have had to pass shoulder to shoulder with people at the party if they were to come out from the bar that way to collect glasses. Instead she and Shannon had to use the other exit from the bar and take a longer route, through other rooms, at risk of passing close by other people, to collect glasses. The claimant was acting in the interests of herself, Shannon and any party goers, possibly as many as 30 people, that she or Shannon may have passed close to, and the interests of party goers who may have visited the bar or the snacks table and themselves passed within a less than 2m distance of people at the tall table to do so, which may have put them at increased risk of contracting covid.

120. The fourth disclosure PD4 is a qualifying disclosure.

PD5

Information

121. On 1 October, the claimant spoke to Andrew Ormesher, her manager, and informed him that she was concerned about personal risk because she was a young lone female locking up premises late at night and the exit was at a vulnerable part of the premises. The CCTV covering that exit had not been working for some time, and a nearby fire exit was not secure and had been broken into before. The claimant gave her keys to Mr Ormesher who agreed it was the best thing to do.

122. The Tribunal saw a relevant text exchange here. Applying Kilraine, the content amounted to sufficient information and allegation to attract protection in law.

Reasonable belief that it tended to show a breach of a legal obligation or health and safety

123. The claimant was reasonable to believe the disclosure tended to show a risk to her health and safety. The respondent had identified risk when it had placed a cctv camera at the rear exit The claimant had raised the broken camera before and the respondent had undertaken to get it fixed. The respondent had spoken to contractors but no repair had been undertaken. In the past the claimant had asked her dad to accompany her. She knew there had been a previous break in to the

club through those fire doors from people presumably in search of the bar takings. The claimant was charged with stowing those takings so she would have knowledge of their whereabouts and would be alone locking up and exiting through the rear doors without being able to see on camera first if anyone was waiting for her on the other side. The claimant was reasonable for those reasons in her belief of a risk to her health and safety.

124. The claimant believed the respondent had a legal obligation to provide a safe place of work for her and she reasonably believed requiring her to lock up alone at the end of a shift and exit through the doors without the camera was a breach of that obligation.

Reasonably believed to be in the public interest

125. The claimant knew that she wasn't the only person who locked up at night. Tracey had been doing it too as might any other member of staff if asked. Sometimes there was another person, her Dad or a club member to accompany her. They too might have been at risk. The claimant was acting primarily but not solely in her own interest. Her concern at the safety of the lock up arrangements whoever locked up was sufficient for her to be making her disclosure in the public interest.

PD6

Information

126. The claimant raised concerned with William Devling and Andrew Ormesher about not being provided with a break. She raised her concerns with William Devling before he stepped down from the committee, and she raised her concerns with Andrew Ormesher in the period 1-5 October 2019. The claimant told them she had been refused a break whilst working alone in excess of six hours despite requesting cover.

127. On this disclosure the claimant has not met her burden of proof. She has not shown evidence of sufficient information being disclosed. She raised that sometimes she did not get her breaks. She fails for not providing dates and times of shifts she had worked without a break to Mr Devling and or Mr Ormesher. Without that information what she was conveying was allegation only. She needed information. She needed to be able to say, look at these dates, these shifts, these times, look how long I worked. I had no break. That would have been information within Kilraine.

128. If she had pointed to a rota and said "I didn't get a break and that's not right" (or "look at these shifts, I should have had a break") then taking the documents and words together may have amounted to a disclosure of information.

129. Even if the claimant had provided sufficient information then this disclosure would have failed to attract protection on the public interest ground. The claimant was bringing her own working times to the attention of her manager, she was acting in her own interest. She could not have shown, on the evidence the Tribunal heard, that she reasonably believed that raising her lack of breaks was in the public interest.

130. The Tribunal finds that the claimant did not disclose sufficient information for PD6 to attract protection as a qualifying disclosure.

Detriment

Did the claimant suffer detriments?

D1

131. In relation to D1 The claimant was ignored by members of the committee. Before she made disclosures of information Colin Lowry and Graham, Hedges used to say "hi" to her and smile when they were on the premises. After the claimant made the disclosures referred to above they would come in and glare at the claimant and not speak to her. They would make sure they were served by Shannon instead of the claimant.

132. The Tribunal accepts the claimant's evidence that she had challenged Graham Hedges at the party. It accepts her evidence that Colin Lowry ignored her. There was no evidence from the respondent to challenge her assertion of detriment. Mr Hedges made a statement but did not refute her allegations. Mr Lowry gave no evidence.

133. The Tribunal finds that, applying the mixed objective and subjective test on reasonable belief on detriment, the claimant was reasonable to believe that Mr Lowry and Mr Hedges treatment of her post disclosure was different to the ordinarily friendly way they had treated her before and was detrimental to her. Failing to greet her, ignoring her, glaring at her and seeking to be served by Shannon instead of her, were detriments to her, and she was reasonable to believe they were.

134. The Tribunal accepts the claimant's evidence about the timing of their change towards her. Mr Devling reported her complaints to Mr Lawton and Mrs Lowry. The timing supports the view that the detriments were done on ground that she had made a protected disclosure. Nothing else had changed.

135. D1 amounts to a detriment on the ground of having made a protected disclosure.

D2

136. The respondent removed the claimant's Wednesday shift, which the claimant had been guaranteed. It was removed for first time on rota for week commencing 4 October. Prior to that she had never had a week without shifts or without being on furlough. She would have no paid work that week. This was clearly to her financial disadvantage and also embarrassing to her as her colleagues would see the rotas and see that she had no shifts and regulars in the club who might have expected to be served by her on her usual shifts would notice her absence. This was a detriment in law and the claimant was reasonable to believe removal of her shifts was a detriment.

137. The Tribunal finds it was done on the ground that she had made a protected disclosure. After Mr Devling's resignation in September the committee took charge of the rota. Mr Lawton made the decision to give the claimant's usual shift to

Tracey and not to the claimant. Mr Lawton's subsequent explanation that he gave the shift to Tracey because Tracey would lock up was not credible because Tracey had stopped locking up at that time. Mr Lawton's explanation that it was about finances wasn't credible either because the claimant was lower paid than Tracey.

138. Mr Lawton accepted in evidence that he took the shift from the claimant because she had refused to lock up and had handed back her keys. She had done that having made disclosures about it not being safe to lock up. Her health and safety disclosure was therefore a factor in the decision to take the shift from her.

139. The Tribunal also finds that her breach of legal obligation disclosure about the party was also a factor in Mr Lawton's decision. Mr Lawton had heard about the legal obligation aspect of the disclosure from both Mr Devling and Mrs Lowry. Mr Lawton had spoken to Mrs Lowry about the rota. The Tribunal notes her intervention in the rota in early October and her efforts to direct Mr Lawton to give the shift to Tracey not the claimant. Mrs Lowry told him there must be only one person not two on shift. The claimant was was the cheaper, longer serving and retained employee who had been furloughed, yet Mrs Lowry wanted Tracey to have the shift. That showed the Tribunal that the motive of Mrs Lowry was to punish the claimant for having complained about the table at the party. Mr Lawton also had that motive when he decided not to give the claimant a shift. Her complaints about Mrs Lowry's party were also a factor in his decision not to give her any shifts.

140. The claimant succeeds in establishing detriment on ground of protected disclosures in having her shift removed.

D3

141. The claimant alleged that D3 was that she was not given breaks as required by law despite working more than six hours.

142. This complaint fails for two reasons. The first is that the claimant could not establish the facts of the detriment. She could not show that the breaks did not happen. There was an absence of evidence on both sides. The Tribunal was faced with the claimant's assertion that she had no breaks and the respondent's assertion that she did. Mr Devling gave evidence, which the claimant did not dispute, that on at least two occasions he attended to give her a break. There was also a text message from Andy Ormesher that the Tribunal saw telling the claimant to take a break at 5pm. The balance of evidence therefore lay in the respondent's favour. The breaks were more likely to have happened than not.

143. The respondent's oral evidence of Mr Lawton was wholly unreliable on the point of rest breaks. This was an example of him wanting to say whatever would exonerate the club. He said there were no shifts of more than 6 hours from July to October so breaks would not be relevant when by the claimant's evidence and Mr Devling's evidence, and by implication in the message by text from Mr Ormesher, that was plainly not the case. The claimant had worked long shifts of over 6 hours.

144. Mrs Lowry also made assertions about rest breaks based on what must have been or what she wanted the case to have been rather than what she knew. The Tribunal notes that Mr Lawton and Mrs Lowry are volunteers who try to run a social club to support ex-servicemen. They are not lawyers. They were afraid that

they might say something that would cost the club money.

145. The respondent's lack of documentation and lack of accurate response on the point about rest breaks was compounded by its own representation. Mrs Evans-Jarvis put questions to the claimant in cross examination of which she had no lead evidence:

a. That rest breaks had been taken by the claimant with Mrs Lowry, sitting outside together having a drink and a chat. That was not Mrs Lowry's evidence.

b. That the claimant was supposed to walk off and leave the bar unattended to take her 20 minute rest breaks, that she was allowed to go out for a walk if she wanted to. That was not Mr Lawton's evidence and the Tribunal observed Mr Lawton was shaking his head signalling disagreement with his own representative at this point.

146. The Tribunal had to invite Ms Evans-Jarvis to withdraw questions in respect of which she had no lead evidence on at least two occasions. She apologised and explained that she had not had conduct of the case other than in advocacy.

147. Secondly, the claimant's own evidence was that lack of breaks had preceded the disclosures, and Mr Devling's evidence was that he had covered for her in August. If it had not failed on the first point the detriment rest breaks complaint would have failed on the causation point as the lack of rest breaks were not on the ground of a protected disclosure. The respondent's practice on rest breaks, whatever it was, preceded the disclosures and did not change after them.

Dismissal

Was the reason or principal reason for the dismissal that *the claimant's shifts had been taken from her because she had complained about breaches of health and safety and breaches of legal obligations – see para 99.4*

148. The claimant resigned in response to the withdrawal of her shifts from the rota. The Tribunal asked, in accordance with s95(1)(c) and Western Excavating and Malik had the respondent acted in such a way as to seriously damage or destroy the relationship of trust and confidence between them and if so had it done that without proper cause ?

149. The withdrawal of shifts from the claimant by Mr Lawton on the week commencing 4 October 2020 rota was a fundamental breach of contract. It met the Malik test. The claimant had never before had a rota with no shifts on it. It was tantamount to stopping her pay.

150. The Tribunal then considered why the shifts had been removed. Mr Lawton admitted that he took the shifts from her because, on health and safety grounds, she had refused to lock up any more.

151. Mr Lawton denied having been told by Mr Devling about the claimant's "party" disclosures. The Tribunal preferred Mr Devling's evidence on that point.

Even if the Tribunal is wrong about that then the Tribunal found that Mr Lawton knew about the claimant's party complaints from Mrs Lowry.

152. Mrs Lowry's account of the conversations with Mr Devling in which he told her about the claimant's concerns about her party was not credible. The Tribunal preferred Mr Devling's account as the more credible. Tribunal rejects her evidence that the first she knew of the whistleblowing disclosures was on 10 September when Mr Devling came to her office. This is because she and her husband were at the party on 5 September 2020 when the claimant challenged Mr Hedges about the location of the table. It was Mrs Lowry who had authorized the location of the table for Mr Hedges. It was implausible to suggest that the claimant's complaints that day to Ms Long and Mr Hedges and the remarks made that day by Mr Lowry and Mr Hedges had not come to the attention of Mr and Mrs Lowry.

153. The Tribunal rejected the evidence of Mrs Lowry that she had had no involvement in rotas. She contradicted herself, but did not seem to accept it was a contradiction, when she said she had no involvement in rotas at all and also that she had looked at the rotas on the WhatsApp group and contacted Mr Devling to say there should not be two members of staff on at once, that is that she instructed for the removal of a member of staff from a shift. She had even checked issues with the accountants as to the hours to be allocated to each member of staff so as to achieve a government retention payment and had given instruction in response to that information as to which member of staff should be taken off the rota. She had told Mr Lawton, in relation to the first week of October rota, it should be the claimant who was taken off the rota. The Tribunal found she was involved in the rotas in respect of both the number of people on shift and the identity of those people.

154. Mrs Lowry knew the claimant had complained about her party. Mrs Lowry spoke to Mr Lawton about that complaint. Mrs Lowry protested at the claimant being on the rota for the first week of October, in response to which Mr Lawton removed the claimant.

155. The Tribunal finds Mr Lawton was therefore also motivated by the knowledge that the claimant had complained about Mrs Lowry's party. The Tribunal finds that Mr Lawton made the decision to withdraw the shifts. The dismissal, motivated by her disclosures about locking up (health and safety) and her disclosures about the party (legal obligation) was automatically unfair because it (the conduct that entitled her to resign) was done on the ground that she had made protected disclosures.

156. His reasons for taking those shifts from her did not amount to reasonable and proper cause.

157. The claimant was dismissed by the respondent within section 95(1)(c). Its conduct was such that she was entitled to treat herself as dismissed.

Did the claimant resign because of that breach?

158. The claimant resigned in response to the removal of shifts on the rota and did not delay in doing so. She saw the rota on 3 October 2020 and challenged it immediately. The Tribunal saw the message exchange between her and Andy Ormesher and her and Mr Lawton between 3 and 5 October 2020. She resigned promptly on 5 October 2020.

159. The Tribunal did not accept Mr Lawton's evidence that he had offered the claimant a shift before he knew she had resigned. The Tribunal accepted the claimant's evidence about the chronology of events on 5 October 2020. At the point of her resignation her shifts had been removed and she had not been offered replacement. She was entitled to treat herself as dismissed.

160. The Tribunal had regard to the ACAS Code. At paragraph 32 of the Code it provides that a grievance if not resolved informally should be raised in writing and should set out the nature of the grievance.

161. The disclosures did not amount to a grievance. The claimant's disclosures were all verbal.

162. The text messages between the 3 and 5 October 2020 did not amount to a grievance. The Tribunal read them in full and found that they amounted to queries about shifts rather than a grievance.

Matters relevant to remedy

163. The Tribunal finds that the ACAS Code is not engaged. This clarification, which was not covered in the oral judgment may assist the parties in preparation for remedy. Standard case management instructions were sent out to prepare for remedy and the Tribunal apologises if they have given the impression that the Code would apply in this case. The Tribunal will hear submissions on this point at the remedy hearing if either side wishes to argue that the Code applies.

164. In the absence of evidence to the contrary to the Tribunal finds that the respondent failed to provide itemised payslips pursuant to section 8 Employment Rights Act 1996. The respondent had known that the claimant and others were not receiving payslips prior to lockdown and had done nothing to put that right.

165. The complaint succeeds but the provisional view of the Tribunal subject to submission at remedy hearing is that there can be no award because the Tribunal's jurisdiction would be to award the aggregate amount of unnotified deductions. The claimant did not earn enough to suffer deductions.

166. The claimant claimed a failure to provide rest breaks pursuant to regulation 12 and regulation 30(1)(a) Working Time Regulations 1998. The claimant could not establish as a fact that there were no rest breaks. The Tribunal saw the text message from Andy Ormesher telling her to take a break, accepted the evidence of Mr Devling that he had covered breaks for her and disregarded as unreliable the evidence of Mr Lawton that she had not worked long shifts. On balance the respondent's evidence was preferred. This part of her complaint fails.

167. The claimant will be due an award for injury to feelings for the treatment of her complained of as a detriment by Mr Hedges and Mr Lowry from around 10 September to her resignation date on 5 October 2020 and for having been left off the rota.

168. The claimant will be due unfair dismissal losses; a basic award and compensatory award.

169. The Tribunal makes the following comments to assist the parties in seeking to avoid the need for a remedy hearing but will of course hear submission on them if the remedy hearing is needed:

a. The Tribunal's provisional view is that it would not be just and equitable to reduce any award because of any conduct of the claimant. The Tribunal rejects the suggestion, from the respondent's cross-examination of the claimant and its closing submissions that the claimant was deliberately choosing a route from behind the bar to go to out and collect glasses that put her or others at risk; that she created the problem.

b. The respondent said that the claimant was a valued member of staff and it wanted her to reconsider her resignation and return and that Mr Lawton offered her a shift after she resigned. The Tribunal's provisional view is that the respondent may therefore have some difficulty in submitting that the claimant would have been dismissed in any event.

170. The matter is listed for remedy and case management orders have been made.

Employment Judge Aspinall
Date:28 June 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
30 June 2023

FOR EMPLOYMENT TRIBUNALS