



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Nos: 4102289/2022

Held in Edinburgh on 12, 13, 14 and 15 June 2023  
and Members' Meetings on 19 and 26 June 2023

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Employment Judge M Sutherland  
Tribunal Member G Powell  
Tribunal Member Z van Zwanenberg

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**Nicole Seal**

**Claimant**  
**In person**

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**Summerhall Management Limited**

**Respondent**  
**Represented by:**  
**Ms L Usher, Solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaints of automatic and ordinary unfair dismissal do not succeed and are therefore dismissed.

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### REASONS

#### Introduction

1. The Claimant made complaints of automatically unfair dismissal by reason of protected disclosure and ordinary unfair dismissal. The complaints were denied by the Respondent.

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2. Parties had agreed a Joint Statement of Agreed Facts.
3. A joint bundle of documents was agreed and lodged. Parties also lodged supplementary bundles of documents.
4. A witness order had recently been issued for Keith Douglas, Head of Security. During the course of the hearing he advised he was unable to attend because of his attendance at the Sheriff Court. He also questioned his relevance as a witness because he was not employed by the Respondent and had no say in their working practices or ethics. The Claimant advised he would give evidence regarding staff drinking at New Year. Following discussion it was determined that he was not called upon to give evidence as part of the disciplinary process by either the Respondent or the Claimant and that the Claimant would therefore give this evidence herself.
5. The Claimant gave evidence on her own behalf. The Respondent called Alex Lyon, Finance/ HR Manager and Ciara McGovern, HR Consultant to give evidence.
6. Both parties made written and oral submissions.
7. The following initials are used in this judgment by way of abbreviation -

<b>Initials</b>	<b>Name</b>	<b>Job Title</b>
AL, Fin/HR	Alex Lyon	Finance/ HR Manager ( <b>Investigation officer</b> )
CM, ext HR	Ciara McGovern	External HR Consultant ( <b>Disciplinary chair</b> )
IA, FBM	Izzy Almond	Food and Beverage Manager
GM, GM	Graham Main	General Manager ( <b>Appeal Chair</b> )
MT, OM	Morgan Tooth	Operations Manager (Claimant's Line Manager)
RC, GM	Rowan Campbell	General Manager
SaL	Sam Leach	Bar Supervisor
TF	Tom Forster	Programme Coordinator/ Cinema Manager

**List of Issues**

8. The issues to be determined were identified as follows:

Public interest disclosure (Section 47B Employment Rights Act 1996)

a. Did the Claimant make the following disclosures of information-

5 i) On 15 November 2021 verbally to AL in the investigation meeting that there had been a possible misappropriation of alcohol and overcharging by IA, FBM?

ii) On 22 November 2021 in her first written statement provided to AL during the investigation that there had been a possible misappropriation of alcohol and overcharging by IA, FBM?

10 iii) On 7 December 2021 in her second written statement provided to AL and CM during the investigation that there had been a possible misappropriation of alcohol and overcharging by IA, FBM and lack of investigation or action taken by the Respondent?

15 iv) On 14 December 2021 verbally to AL and CM during the disciplinary hearing that there had been a possible misappropriation of alcohol and overcharging by IA, FBM and lack of investigation or action taken by the Respondent?

b. Did the Claimant reasonably believe the disclosure was in the public interest of customers and tended to show breach of a legal obligation and fraudulent behaviour?

20 Automatically unfair dismissal (Section 103A)

c. Was the sole or principal reason for the Claimant's dismissal that she had made a protected disclosure?

Unfair dismissal (Section 98)

25 d. What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?

- e. Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2)?
- f. Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996? In the circumstances (including the size and administrative resources of the undertaking) and determined in accordance with equity and the substantial merits of the case, did the Respondent act reasonably in treating the reason as a sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17
- g. If the reason for dismissal relates to the conduct of the Claimant - Did the Respondent have a genuine belief in the Claimant's guilt? Did the Respondent have reasonable grounds for that belief? Had the Respondent conducted a reasonable investigation into that conduct? *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303
- h. Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?

Remedy (Sections 119 and 123)

- i. To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?
- j. What loss has the Claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable? Did the Claimant contribute to her dismissal? Has the Claimant taken reasonable steps to mitigate her losses?
- k. If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974

- I. If there was any unreasonable failure to comply with the ACAS Code, would it be just and equitable in all the circumstances to increase or decrease the compensatory award?

**Findings in fact**

- 5 9. The Tribunal makes the following findings in fact:-
10. The Claimant is an Australian national who has permission to work in the UK on an ancestry visa.
11. The Respondent offers venues for diverse programmes of visual and performing arts. Summerhall is a 2 ½-acre site which hosts events and commercial tenants in a number of spaces. It also has 2 bars which are open  
10 to the public. It has around 70 to 100 staff depending upon the events. At the busier times there are around 500 people on site.
12. The Claimant was employed by the Respondent as a Duty Manager from 1 September 2018 until 17 December 2021. The Claimant reported to Morgan  
15 Tooth, Operations Manager (“MT, OM”). MT, OM is part of the senior management team and reports to the Director and Co-Owner. The senior management team also includes Alex Lyon, Finance/ HR (“AL, Fin/HR”) who has responsibility for financial and HR matters. She is not an HR specialist and used the services of an external HR consultancy.
- 20 13. The Claimant’s job description stated that its main focus was the delivery of events “whilst also being responsible for the wider building and public within Summerhall. This requires crossover into various departments within the company”. It also stated that “Job overview- safeguarding visitors, guests and event attendees; being responsible for the site, liaising with security and when  
25 necessary First Aid and Blue Light Services.” In the evening shift the Duty Manager is often the person with the highest responsibility on site.
14. The Respondent’s Drugs and Alcohol Policy provided as follows: “if employee is found under the influence of drugs or alcohol at work, there could be serious health and safety consequences (see the section below on misconduct). No  
30 drugs or alcohol must be brought onto or consumed on company premises at any time... a breach of these provisions is a disciplinary offence and will be

dealt with in accordance with the disciplinary procedure. Depending on the seriousness of the offence, it may amount to gross misconduct and could result in the employee's summary dismissal". The subsequent section then dealt with drug and alcohol related misconduct.

- 5 15. During the Summer of 2021 the Claimant and other staff experienced stress whilst working with the public when covid-related social distancing measures were in place.
16. On 2 September 2021 the Claimant was very disappointed to find out that she had not secured the position of Arts Manager within the Respondent.
- 10 17. On 13 September 2021 the Claimant attended a Pickering's Gin Tour whilst on duty with the permission of her line manager, MT,OM. On 14 September 2021 Alex Lyon, Finance/ HR ("AL, Fin/HR") emailed MT, OM asking him to "tell her not to drink while on shift as this is an area that we've been giving disciplinarys for in Hospitality over the past few years". Later on 14  
15 September 2021 the Claimant received a whatsapp message from MT,OM stating that HR "wants me to have a discussion with you about not doing that as we've given disciplinarys to hospo staff for doing so in the past...I don't think its an issue but worth bearing in mind that some eyebrows were raised...if anybody asks...just say it was a serious conversation". The  
20 Claimant replied "Yeah, that's totally fair enough...I was definitely still capable of doing myjob-but Izzy has been reiterating a strict zero drinking on shift with TRD staff...serious conversation had- lesson learned". She noted later "I've had arguments with HR before about removing a 0% alcohol tolerance in contracts for me & my staff- put in there that you can't be over the legal limit"
- 25 18. On 20 September 2021, Izzy Almond, Food and Beverage Manager ("IA, FBM") emailed MT, OM (copying in AL, Fin/HR) raising an issue with the Claimant's behaviour at the weekend event. (IA, FBM has a personal friendship with AL, Fin/HR.)
19. On 16 and 17 October 2021, the Claimant was a Duty Manager at a festival  
30 organised by the Respondent. On 17 October 2021, IA, FBM emailed MT, OM (copying in AL, Fin/HR) raising an issue with the Claimant's behaviour at that festival.

20. On 24 October 2021, the Claimant was the Duty Manager at a cinema showing, during which she called Tom Forster, Cinema Manager regarding equipment and technical issues. On 25 October 2021, Tom Forster submitted a written complaint regarding the claimant's behaviour during that cinema showing.
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21. On 28 October 2021, Rowan Campbell, General Manager ("RC, GM") wrote to the Claimant to advise her that her application for the role of Event Manager at the Respondent had been unsuccessful.
22. On 29 October 2021, the Claimant consumed alcohol during her shift (1 x baileys, and 1 x gin & tonic). This came to light because CCTV footage was viewed in response to allegations that another member of staff was drinking and dealing drugs on shift.
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23. On 1 November 2021, the Claimant met with: AL, Fin/HR; RC, GM; and MT, OM. At that meeting the Claimant was suspended from work on full pay, pending a disciplinary investigation into allegations that she had:
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- a. bullied, harassed and intimidated members of staff (specifically, at events on 17 October 2021, 23 October 2021 and 24 October 2021);
  - b. been regularly under the influence of alcohol in the preceding six months while working as Duty Manager (most recently, during a shift on 29 October 2021); and
  - c. committed time sheet fraud on 29 October 2021 by failing to sign out of her shift.
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24. On 1 November 2021 another member of staff was also suspended for being in possession of illegal drugs and drinking on shift on 29 October 2021. After investigation a disciplinary hearing was arranged for 12 November. That member of staff resigned immediately prior to the disciplinary hearing.
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25. AL, Fin/HR conducted an investigation into the allegations. She sought advice on the disciplinary process from Michaela McLean of The HR & HS Department (MM, ext HR).
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26. In October and November 2021 AL, Fin/HR held investigation meetings with eight named members of staff some of which were held by telephone. Six

anonymous statements were also obtained. The statements were not signed as accurate.

- 5 27. On 3 November the Claimant sought and was offered the right to be accompanied to the investigation meeting. In November 2021 the Claimant approached MT, OM to act as her representative during the disciplinary process. MT, OM advised she was unable to do because she was her line manager, she had been called to give evidence and the Claimant was not a member of the union.
- 10 28. On 8 November 2021 AL, Fin/HR wrote to the Claimant to provide her with more details regarding the allegations including that on 29 October 2021 she was scheduled to work as the duty manager from 5pm to 11 pm, that CCTV footage appears to show that on site and on shift she was poured and consumed a Baileys at 7.25pm and a gin around 8.50pm. On 11 November the Claimant emailed AL, Fin/HR advising that the allegations range from a complete misrepresentation of the facts to outright lies and the investigation has been initiated as a punitive response to her reaction to an employment decision and to justify it.
- 15 29. On 12 November 2021 AL, Fin/HR offered for the Claimant to attend the investigation meeting with a person external to the Respondent or alternatively agreed to her request to record the investigation meeting.
- 20 30. On 15 November 2021, AL, Fin/HR met with the Claimant to investigate the allegations. AL, Fin/HR offered to approach witnesses on her behalf. The Claimant said that Sam Marchbank (SM) and Jade would confirm that she told SM off for drinking on shift. The Claimant also said she would think about whether she wanted Babs called as a witness and would get back to her.
- 25 31. On 18 November 2021, AL, Fin/HR approached SM asking if she wanted to give a witness statement, explaining that it would be shown the Claimant and explaining she did not require to do so.
- 30 32. On 22 November 2021, the Claimant emailed AL, Fin/HR with a written response to all of the allegations including that on the evening of 28 October she had received a letter from RC, GM advising she had been rejected for a role for which she was clearly qualified and truly deserved, she was under



incredible stress, she had a long and emotional discussion with MT, OM who raised recent allegations regarding her temperament, she was offered and accepted a drink which was a lapse in judgement for which she apologised, she had only 2 drinks over 3 !4 hours which did not impair her from performing her duties even if an emergency had suddenly arose, it was a very quiet night - there was only 1 event and 4 cinema customers, and that on 13 September MT, OM had agreed for her to attend the Pickering's Gin Tour during her lunch break. As part of that statement (which extended to 7 close type pages) she raised concerns about Izzy Almond, Food and Beverage Manager ("IA, FBM") and her management of client provided alcohol namely that she had found a case of wedding wine under the bar which was then later distributed at the Fringe staff dinner which she queried with IA, FBM and that IA's false statements were motivated by her knowledge of this.

33. On 22 November 2021 AL, Fin/HR held a meeting with IA, FBM to consider the allegation that she had defrauded clients in respect of the box of wedding wine. AL noted in her record of the meeting that IA, FBM advised her that the wedding was chaotic (there was a fight and property damage), a case of wedding wine was missed from the total count and the client was therefore overcharged for this wine, and procedural changes were made to ensure the error isn't repeated. No further action was taken. AL, Fin/ HR considered that she had made a genuine mistake.

34. AL, Fin/HR discussed with MM, ext HR who should chair the disciplinary meeting. MM proposed Ciara McGovern who was Managing Director of The HR & HS Dept and who was an external HR consultant who had no prior involvement in the investigation process ("CM, ext HR"). AL, Fin/HR did not advise CM, ext HR of any expected outcome of the disciplinary process. There was no verbal or written communication between them on any substantive issue prior to the decision to dismiss (other than at the disciplinary hearing itself).

35. On 25 November 2021 the Claimant was invited to a disciplinary meeting on 1 December 2021 in respect of allegations regarding: drinking on shift on Friday 29 October 2021, bullying, harassing and intimidating staff (various

dates and events were specified), and timesheet fraud (failure to reflect the hours worked on 29 October 2021)

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36. The disciplinary invite letter advised her of the right to be accompanied, advised that a potential outcome of the meeting was her dismissal and enclosed copies of the witness statements and other evidence gathered as part of the investigation (that was also provided to the chair of the disciplinary meeting). She was advised that the hearing would be conducted CM, ext HR.
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37. On 7 December 2021 emailed CM, ext HR (cc AL, Fin/HR) providing her with a further written response to the allegations including expressing concern that no further inquiries have be made in respect of IA, FBM.
38. CM, ext HR was provided with copies of the witness statements and other evidence prior to the disciplinary meeting (the same evidence was also provided to the Claimant). CM, ext HR considered this evidence.
39. The Claimant asked and was permitted to record the disciplinary meeting.
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40. On 14 December 2021, a disciplinary meeting was convened by the Respondent. The meeting was chaired by CM, ext HR and was attended by the Claimant and AL, Fin/HR. At that meeting AL, Fin/HR presented the findings of her investigation (there was no written investigation report). The Claimant was given the opportunity to present evidence and to ask questions.
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- The Claimant said she should only have been given a written warning for a lapse of judgment after she was rejected for a job she was clearly qualified for, she had during the course of that same week explicitly told SM that she couldn't drink on shift, she had permission to go on the Pickering's Gin tour, that in Australia there is a legal limit rather than a zero percentage policy (the
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- Claimant is Australia and has an ancestry visa), that IA, FBM is motivated by the Claimant having made serious allegations of fraud against her which haven't been investigated and nothing has happened. AL, Fin/HR explained to her that she had discussed the matter with IA, FBM.
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41. On 16 December 2021, Ciara McGovern wrote to the Claimant to advise that her employment would terminate with effect from 17 December 2021 "by reason of gross misconduct for you drinking on duty and being in the position of Duty Manager". The letter stated:

"Drinking on shift

Taking each allegation separately you confirmed that you had drunk whilst on duty on the 29 October and said this was a lapse in judgement. You stated that you were not in your opinion intoxicated and had 2 drinks over a 2.5 hour period...You were aware of [Summerhall's Drug and Alcohol Policy] and knew that you should not have drunk. ...you had previously drunk whilst on duty during the Pickering's Gin Tour on 13 September 2021. This had been raised by your manager, Morgan Tooth to you, and he had advised you that within your role you should be presenting a better example and that you agreed you would not do it again...This is not the first time and I have no assurance that this will not occur again."

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42. She also made findings of bullying and harassment regarding her communication style with staff members but did not uphold the allegation of fraud.

43. On 23 December 2021, the Claimant appealed against the decision to terminate her employment on grounds that the decision was contrary to the evidence, did not give proper consideration to her submissions or weight to her evidence, gave weight to unparticularised and unsubstantiated allegations, gave weight to statements that were contrary to the evidence, failed to properly investigate relevant matters, lacked procedural fairness, the decision to dismiss failed to reflect the evidence and what occurred in the disciplinary process, failed to set out proper reasons for the termination, failed to follow a proper process and did not establish any clear basis.

44. On 17 January 2022 AL, Fin/HR emailed the Claimant to note that RC, GM was on 1 year's leave and would be replaced by a new General Manager, Graham Main ("GM,GM") who did not start until mid-February and will therefore chair the appeal on 16 February 2022. It was explained that she would be expected to provide details regarding her grounds of appeal including explaining why she thinks the outcome was wrong or unfair, say where she felt the procedure was unfair and present any new evidence.

45. On 24 February 2022 the Claimant was invited to an appeal meeting on 1 March 2022. The Claimant was advised of her right to be accompanied.

46. At the start of the appeal hearing the Claimant asked to record the meeting on her mobile telephone. The hearing was adjourned to allow this request to be considered.

47. On 11 March 2022 the Claimant was invited to attend an appeal meeting on 18 March 2022 and was advised that she could record the meeting.

48. On 18 March 2022, an appeal meeting was convened by the Respondent. The meeting was attended by the Claimant, Graham Main (General Manager) and Samantha Chapman (Visual Arts Manager - note taker). On being asked to set out her grounds of appeal the Claimant initially refused to do so stating that she had already given reasons. She then stated that: the act in and of itself of drinking on shift is not gross misconduct because she was not intoxicated and her duties were not compromised; she couldn't have her preferred choice of colleague because she was told to speak to anyone; CM, ext HR was paid by the Respondent and therefore not impartial; her dismissal is retribution for her allegations of theft of customer wine; she did not ask for but was offered the drink; she had just been told of the slanderous accusations; her job during lockdown was hell; other staff have consumed alcohol on duty and not been dismissed.

49. On 25 March 2022, Graham Main wrote to the Claimant to advise that he had decided not to uphold the Claimant's appeal against her dismissal. The letter stated:

*"Your dismissal was as a direct result of you drinking on duty, while carrying out the role of Duty Manager; allegations in relation to Bullying and Harassment, while founded, were not the reason for your dismissal. During the appeal hearing you admitted to drinking on duty, while you were responsible for public safety and the safety of the building, and confirmed that you were fully aware and understood the Alcohol and Drugs policy.../ do not consider that the decision to dismiss was contrary to the evidence as you suggest. There was a clear breach of policy in relation to drinking on duty, which gives significant cause for concern, while you are responsible for the safety of others. Following the appeal hearing I have taken the opportunity to review the investigation carried out in relation to the allegations, to ensure it was fair. Having done so, I am content that the investigation was completed fairly. I have not found evidence of unfair bias influencing the decision making process, as you indicated."*

50. As at the termination date the Claimant was age 46 and her net weekly pay was £240.35 plus an employer pension contribution of £11.88.

51. Given her dismissal for gross misconduct it would take her longer than average to secure alternative employment.

52. The Claimant secured employment with the Edinburgh International Film Festival from 21 March to September 2022. Her total net earnings from that employment were £11,967.77.

53. The Claimant secured employment with the Scotsman Picturehouse from 28 November 2022 to 12 January 2023. This was a permanent contract but was terminated during its probationary period. Her total earnings from that employment were £2,635.20.

### **Observations on the evidence**

54. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

55. The Respondent witnesses and the Claimant on the whole came across as generally credible and reliable in their testimony which was fair and measured, and consistent with the other evidence.

56. The Claimant had alleged that at the investigation meeting on 15 November 2021 she had disclosed information regarding possible misappropriation of alcohol and overcharging by IA, FBM and that this amounted to a protected disclosure. When it was put to her in cross examination that there was no such detail, she said in response it was a generalised comment. The investigation meeting was recorded, and having regard to the written transcript, the Claimant did not appear to make any such comment. Whilst she makes reference to a vendetta that is understood to be a reference to a situation with a previous employer. It is considered on balance that the Claimant did not make any disclosure of that information at that meeting.

57. The Claimant stated in evidence that staff were permitted to have 1 drink at New Year whilst on shift. AL, Fin/HR stated in evidence that she was unaware of any such practice and further that the Claimant did not raise this during the disciplinary process. The Claimant stated in evidence that other staff had been drinking on shift and no action was taken. There was however no

evidence that senior management were aware of that and had failed to take action. There was evidence that other staff had been issued with a warning for drinking on shift and told if they drank again they would be dismissed. There was also evidence that the other member of staff who also drank on shift on 29 October 2021 had been invited to a disciplinary hearing but resigned immediately prior to it.

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58. The Claimant believed senior management drank on shift and had not been disciplined. The Claimant did not raise this during the disciplinary investigation or hearing, and there was no evidence that AL, Fin/ HR was aware of any such issue. The Claimant put to AL in cross examination that the bar manager was aware that staff drank on duty. AL advised in response that she was not aware of this. At her appeal hearing the Claimant made an unspecified reference to management drinking on duty. She was then asked by GM, DM whether she was referring to other duty managers or the senior leadership team. She did not answer other than to say she was referring to anyone in the whole process.

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## **The law**

### *Protected disclosure*

20 59. Under Section 43A Employment Rights Act 1996 ('ERA') a protected disclosure is a qualifying disclosure made by a worker to her employer (Section 43C) or to a prescribed person (Section 43F). The burden of proving a protected disclosure rests upon the Claimant.

60. Under Section 43B ERA 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 relevant wrongdoing including "(d) that the health or safety of any individual has been, is being or is likely to be endangered."

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Disclosure of information

61. The disclosure must be an effective communication of information but does not require to be in writing. The disclosure must convey information or facts, and not merely amount to a statement of position or an allegation (*Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38, EAT*). However an allegation may contain sufficient information depending upon the circumstances (*Kilraine v Wandsworth London Borough Council [2018] ICR 1850, Court of Appeal*).

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Reasonable belief

62. The worker must genuinely believe that the disclosure tended to show relevant wrongdoing and was in the public interest. This does not have to be their predominant motivation for making the disclosure (*Chesterton Global Ltd v Nurmohamed [2018] ICR 731, Court of Appeal*). Their genuine belief must be based upon reasonable grounds. This depends upon the facts reasonably understood by the worker at the time.

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Relevant wrongdoing - (a) criminal offence or (b) breach of legal obligation

63. A qualifying disclosure arises where there is disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a criminal offence has been committed or a person has failed to comply with any legal obligation (in addition to other types of relevant wrongdoing).

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In the public interest

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64. 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 relevant wrongdoing.

65. The worker must genuinely believe that disclosure is in the public interest. That belief must be based upon reasonable grounds which may be easier to satisfy where the wrongdoing amounts to a criminal offence or an issue of health and safety. Where the worker has a personal interest in the relevant wrongdoing, it may be relevant consider the number of other workers affected, the nature and importance of the interest, and the identity of the wrongdoer (*Chesterton*).

*Automatically unfair dismissal*

10 66. Under section 103A ERA an employee who is dismissed shall be regarded 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.

67. The reason for dismissal is a set of facts known or beliefs held which operate on the mind of the decision maker and causes them to make the decision (*Abernethy v Mott Hay and Anderson [1974] ICR 323*, Court of Appeal). Where a decision maker is misled or manipulated by someone more senior within the employer's hierarchy of responsibility in pursuit of a hidden reason, that hidden reason should be attributed to the decision maker (*Royal Mail Group Ltd v Jhuti [2020] ICR 731*, Supreme Court).

20 68. The burden of proving the reason or principal reason is upon on the employer.

*Unfair dismissal*

25 69. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

70. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. If the reason is in dispute, the Tribunal must either make findings in fact on balance of probabilities as to what conduct caused the employer to dismiss or find that the employer has failed to discharge the burden of proving the reason. At this first stage of enquiry the Respondent does not have to prove



that the reason did justify the dismissal merely that it was capable of doing so.

- 5 71. The reason for dismissal is determined at the time of the decision to dismiss and not at the time of the internal appeal. However the issue of the fairness of that decision encompasses consideration of the whole process including any internal appeal and thus may take into account evidence relevant to that reason which emerges in the course of an internal appeal (*West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192, HofL*).
- 10 72. Where there are multiple reasons for dismissal the employer must establish the principal reason. The principal reason may encompass one reason or multiple reasons which are said to justify the dismissal cumulatively or individually.
- 15 73. If the reason for the dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.
- 20 74. Equity in this context is equivalent to fair play (e.g. that there should be a degree of consistency of treatment). It is part of and not separate to the test of reasonableness and is subject to the range of reasonable responses test. Inconsistency of treatment in sufficiently similar cases may support a complaint that it was not the real reason for dismissal or may be relevant to the fairness of the decision to dismiss (including that it has created a false sense of security) (*Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT*).
- 25 75. If the reason for the Claimant's dismissal relates to conduct, the Tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303*).
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76. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not “substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response” (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) The Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the Tribunal must consider the range of reasonable responses open to an employer acting reasonably in those circumstances.
77. The tribunal is not conducting a rehearing or an appeal but determining whether the decision to dismiss was procedurally and substantively fair. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*). The need to investigate mitigation depends upon the degree of relevancy to sanction, whether the employee advanced any evidential basis which merited further inquiry, and the extent to which it could have revealed information favourable to the employee (*Tesco Store Ltd v S EATS 0040/19*).
78. In determining whether the Respondent adopted a reasonable procedure the Tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal (*Taylor v OCS Group Ltd [2006] IRLR 613*).
79. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on

Disciplinary and Grievance Procedures provides in summary that: employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions; employers and employees should act consistently; employers should carry out any necessary investigations, to establish the facts of the case; employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made; employers should allow employees to be accompanied at any formal disciplinary or grievance meeting; employers should allow an employee to appeal against any formal decision made.

### **The Respondents submissions**

80. The Respondent's written and oral submissions were in summary as follows-
- a. The Claimant did not disclose any information to AL, Fin/HR regarding possible misappropriation of alcohol and overcharging by IA, FBM at the disciplinary investigation meeting on 15 November 2021 and there was accordingly no protected disclosure. However the Respondent accepts that she made a protected disclosure about this in the written statements sent on 22 November and 7 December and at the disciplinary meeting on 14 December.
  - b. It was wholly apparent from the evidence that the disclosures had absolutely no bearing on CM ext HR's decision to dismiss.
  - c. Only where an innocent decision maker is manipulated into dismissing a whistle-blower for an unfair reason is that manipulator's reason attributed to the decision maker (*University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhill 1050/20 EAT*). The Respondent did not attempt to inappropriately manipulate CM, ext HR into dismissing the Claimant.
  - d. CM, ext HR genuinely believed that the Claimant had consumed alcohol on shift whilst working as the duty manager on the basis that this was shown by the CCTV footage and the Claimant had then admitted it.

- e. The range of reasonable responses test applies as much to the investigation as to the decision to dismiss (*Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23*)
- f. AL, Fin/HR approached SM to give evidence on a voluntary basis and she declined but it was apparent that CM, ext HR had in any event accepted the Claimant's evidence regarding that incident.
- g. The Claimant did not advise AL, Fin/ HR to contact Babs. The Claimant said Babs would attest that she was not drunk on 29 October, it was a quiet night and no incidents had taken place. It was apparent that CM, ext HR had accepted that she was not drunk, it was a quiet night and that no incidents had taken place.
- h. It is not for the tribunal to ask whether a lesser sanction would have been reasonable (*Boys & Girls Welfare Society v McDonald [1996] IRLR 129*).
- i. The decision to dismiss was fair firstly because the Claimant was fully aware of the policy prohibiting drinking on shift, the Claimant had recently been told by her line manager not to drink on shift and was warned that disciplinary action had previously been taken, she had also referenced IA reiterating a strict zero drinking approach, the Claimant herself had recently reminded SM of that prohibition. Secondly the claimant accepted that in her role as Duty Manager she had responsibilities for staff and customer safety on site including administering first aid and operating the fire panel and she was responsible for setting a good example to more junior staff. Her responsibilities as Duty Manager were a material factor in reaching the decision to dismiss.
- j. The allegations which led to her dismissal were clear and explicit. She had numerous opportunities to respond to those allegations.
- k. The policy makes clear the risk of summary dismissal and the Claimant was warned of this in the disciplinary invite.
- l. CM, ext HR did not rely upon the witness statements in reaching the decision to dismiss because the Claimant had admitted the misconduct which was relied upon.

- m. CM, ext HR had read and properly considered the evidence obtained as part of the investigation. She was aware that she was upset by the rejection letter and after the meeting with MT, OM. She did not consider her upset mitigated her decision to drink alcohol whilst on duty.
- 5 n. CM, ext HR did consider that the Claimant had a clean disciplinary record - she did not consider that the Claimant had been given a formal warning after the Pickering's Gin Tour. However she considered that she had been reminded of the prohibition on drinking and warned of the disciplinary consequences.
- 10 o. CM, ext HR had no assurance that it would not happen again because she had ignored the informal warning and had focused on the fact she wasn't "drunk" indicating she didn't appreciate the seriousness of her conduct.
- p. CM, ext HR accepted that it was a quiet night and that no incidents occurred but she considered that her responsibilities remain the same.
- 15 q. The issue of inconsistency of treatment was not raised by the Claimant during the investigation or disciplinary meeting. The Claimant made vague generalised comments on appeal but failed to provide any names or details which would allow further investigation. AL, Fin/HR was only aware of a junior member of bar staff being given a lesser sanction in August 2020. Their
- 20 circumstances are not truly parallel. In any event the Claimant herself was informally warned about drinking on shift by MT, OM.
- r. The Claimant did not raise the alleged practice of staff being allowed to have a drink at New Year in the disciplinary investigation, meeting or on appeal. AL, Fin/HR and accordingly CM, ext HR had no awareness of this alleged
- 25 practice. GM also had no awareness. They had no cause to investigate this.
- s. The Claimant was offered but elected not to attend meetings with a support person
- t. If the dismissal was unfair (which is denied) the Respondent accepts that she mitigated her losses in the period to 12 March 2022 but thereafter she failed
- 30 to apply for jobs that would have supplemented her income and failed to apply for new jobs before the temporary contact came to an end. The Respondent is not responsible for the termination of the subsequent permanent contract.

- u. Any procedural irregularity (which is denied) would have made no difference and the compensatory award should be reduced to nil.
- v. If the dismissal was unfair (which is denied). Any award of compensation should be reduced by 100% to reflect her conduct which the claimant herself accepts was blameworthy and accepts she should have received a disciplinary penalty.

**The Claimant's submissions**

81. The Claimant's written and oral submissions were in summary as follows -

- a. The Respondent's alcohol policy is of itself inconsistent. Its not necessary or appropriate to have a no drink policy rather than a safe limit.
- b. The Respondent failed to apply their policy consistently in dismissing her for drinking on duty. Others had received warnings and not been dismissed. There were senior managers who drank on duty who had not been disciplined. She expected to receive a disciplinary warning.
- c. The Respondent failed to provide details or particulars of the allegations
- d. She was directed not to speak to other staff. They relied upon anonymous witness statements and they shared the allegations with staff, such that she didn't know who she could trust. Accordingly she couldn't obtain either relevant evidence or a support person.
- e. She had not received a warning (verbal or written) after the Pickering's gin tour and in any event it would have been unfair and therefore void because her line manager had given her permission to attend the tour
- f. Prior to the disciplinary hearing they failed to warn her she was at risk of dismissal for drinking on duty specifically. She faced multiple different allegations and the general warning did not make clear which allegations were considered gross misconduct.
- g. The Respondent failed to consider the evidence that she was not under the influence of alcohol to any material degree, it did not prevent her from doing her role, and there was no risk to health and safety.

- h. They failed to consider that she was very upset, she had explained this was an aberration and she had apologised. CM, ext HR failed to consider her evidence in mitigation.
- i. They failed to consider the motives of witnesses
- 5 j. They relied upon complaints which were never presented to her
- k. This was a first offence and she had no prior warnings
- l. There was an unreasonable delay in arranging the appeal, the decision maker was not impartial, failed to investigate matters raised and failed to engage in a proper review
- 10 m. The reason for her dismissal was that she made a protected disclosure and this can be inferred from the fact: she made a complaint about the case of wine prior to and during the disciplinary process which amounted to a protected disclosure; the complaint pertained to misconduct by a witness to that process; AL, Fin/HR was a friend of IA, FBM and they were both upset that the Claimant had made that complaint; the staff member who offered the  
15 Claimant a drink had been manipulated by IA, FBM into entrapping her; IA had elected to show the CCTV footage to AL; AL, Fin/HR had conducted a partisan investigation failing to obtain mitigatory evidence; AL had recommended a disciplinary hearing where there was no case to answer; AL  
20 had sought to influence CM, ext HR by indicating to her preferred outcome and by presenting the investigation in a bias manner; the sheer number of the allegations, the unfairness of the procedure adopted and the unfairness of the decision to dismiss is indicative of a witch-hunt.
- n. CM, ext HR was not independent because she was paid by the Respondent.
- 25 o. AL, Fin/HR admitted that no other employee had been fired for a first offence for drinking on duty

### **Discussion and decision**

*Did the Claimant make a qualifying disclosure?*

- 82. The Claimant did not make the alleged disclosure of information to AL in the  
30 investigation meeting on 15 November 2021.

83. The Respondent accepts that Claimant made a qualifying disclosure to AL, Fin/HR in her written statement on 22 November 2021 that there had been a possible misappropriation of alcohol and overcharging by IA, FBM.

5 84. The Respondent accepts that Claimant made a qualifying disclosure to AL, Fin/HR and CM, Ext HR in her second written statement on 7 December 2021 that there had been no further inquiries made in respect of IA, FBM's actions.

85. The Respondent accepts that the Claimant made a qualifying disclosure to AL, Fin/HR and CM, ext HR in the disciplinary hearing on 14 December 2021 that she believed nobody had investigated the possible fraud by IB, FBM.

10 *What was the reason for the Claimant's dismissal?*

86. There was no evidence that AL, Fin/HR was upset or irritated by the Claimant having raised the issue of the possible misappropriation of alcohol and overcharging by IA, FBM. When the issue was raised AL held a meeting with IA, FBM to consider the allegations. According to her notes of that meeting  
15 the wedding was chaotic (there was a fight and property damage) and a case of wedding wine was missed from the total count. AL, Fin/ HR considered that she had made a genuine mistake and took no further action.

87. The Claimant had been observed on CCTV footage drinking alcohol whilst on duty. The Respondent has a written policy prohibiting the consumption of  
20 alcohol on shift. The Claimant had been recently reminded of that policy after the Pickering's Gin Tour and had herself recently reminded a bar supervisor of that policy. The Claimant was a Duty Manager with health and safety responsibilities for the site.

88. There was no evidence that AL, Fin/HR was aware of staff drinking on duty  
25 but had failed to take any disciplinary action. There was evidence that other staff had been disciplined for drinking on duty. There was no inconsistency of treatment between sufficiently similar cases which might have supported an inference that it was not the real reason for dismissal.

89. There was no evidence that AL, Fin/HR sought to influence the decision to  
30 dismiss. There had been no discussion between AL, Fin/HR and CM, Ext HR on any substantive issue prior to the decision to dismiss (other than at the



disciplinary hearing itself). At that meeting AL, Fin/HR simply presented the findings of her investigation (there was no written investigation report).

- 5 90. CM, ext HR stated in evidence that the reason for the Claimant's dismissal was that she had consumed alcohol whilst on shift as the Duty Manager and that was the sole reason for her dismissal. The disciplinary outcome letter wholly reflected this. There was no evidence of AL, Fin/HR having sought to exercise an inappropriate influence over the disciplinary outcome and there was no evidence of CM, ext HR having been inappropriately influenced. When this issue was put to her, CM explained that any such influence would materially affect her professional standing as an independent HR consultant.
- 10 91. CM, ext HR stated in evidence that whilst she upheld the allegations of bullying and harassment this was not a factor in her decision to dismiss. CM, ext HR stated in evidence that she was aware of the complaints said to amount to whistleblowing but explained that it was not relevant and had no bearing on her decision. CM came across in evidence as competent, experienced and professional and there was no reason to doubt her credibility on this issue.
- 15 92. The reason for the Claimant's dismissal was her conduct (having consumed alcohol whilst on shift as the Duty Manager) and it was not that she had made protected disclosures. Her complaint of automatically unfair dismissal is therefore dismissed.
- 20

*Was the reason for dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996?*

- 25 93. The Claimant had fair notice of the allegation that she had consumed alcohol on duty which allegation was raised promptly with her.
94. The Claimant admitted that she had consumed 2 alcoholic drinks whilst on shift and accordingly the investigation on this issue was inevitably limited.
95. The Claimant had recently been given an informal warning by her line manager at the behest of HR that consuming alcohol on duty was prohibited and risked disciplinary action. It was accepted by AL, Fin HR, and also CM, ext HR, that the Claimant had been given permission by her line manager to
- 30

attend the Pickering's Gin Tour which had led to the informal warning. It was accepted by them that she had not been issued with a formal warning for doing so. There was no reasonable requirement to investigate that matter further.

5 96. It was also accepted by AL, Fin HR, and also CM, ext HR, that the Claimant had recently reminded SM that she couldn't drink on shift. Indeed it was apparent that CM, ext HR had also relied upon this event as evidence that the Claimant knew and understood the policy. There was no reasonable requirement to investigate that matter further.

10 97. There was evidence that other staff had been disciplined for drinking on duty. It was reasonable for the Respondent to issue different disciplinary penalties depending upon the seriousness of the offence. AL, Fin/ HR and CM, ext HR were not aware of any inconsistent treatment regarding the consumption of alcohol on whilst on duty. The Claimant did not raise any issues with consistency of treatment until the appeal hearing when she made an unspecified comment. GM, GM asked her to give specifics but she did not do so. There was therefore no issue for the appeal manager to investigate.

15 98. The Claimant had in these circumstances carried out a reasonable investigation.

20 99. The invite to the disciplinary hearing warned of the risk of dismissal. The invite enclosed a copy of the policy prohibiting the consumption of alcohol on shift which warns of the risk of dismissal.

100. The Claimant was advised of her right to be accompanied by a colleague or union representative. When she raised issues with that she was offered the opportunity to be accompanied by someone external which she declined. She sought instead to record the hearings and was permitted to do so.

25 101. The Claimant had adequate opportunity to respond to the allegations at the investigation meeting, disciplinary hearing and appeal stages and she did so.

30 102. The Claimant was afforded the right of appeal. There was a delay of 2 months between the submission of the appeal and the start of the appeal hearing. It had been explained to the Claimant that they were awaiting the start of a new General Manager. It was entirely reasonable for the Respondent to seek to

arrange the appeal hearing before someone who had no prior involvement. At the start of the hearing the Claimant asked to record it and this resulted in it being adjourned and reconveyed 2 % weeks later. There was no unreasonable delay.

- 5 103. There was in these circumstances no unreasonable failure to comply with their own disciplinary procedures. There was also no unreasonable failure to comply with the ACAS Disciplinary Code.
104. The Respondent has a written policy regarding the consumption of alcohol on shift. The effect of that policy is clear. The consumption of alcohol whilst on  
10 duty is prohibited and to do so risks disciplinary action up to and including dismissal depending upon the seriousness of the offence.
105. The Claimant had been recently reminded of that policy after the Pickering's Gin Tour and had herself recently reminded a bar supervisor of that policy. The Claimant was a Duty Manager with health and safety responsibilities for  
15 the site. CM, ext HR believed that her consumption of alcohol whilst on duty amounted to misconduct and that belief was based upon reasonable grounds (AL, Fin/HR having carried out a reasonable investigation).
106. The Claimant had explained in mitigation that she was upset both having received the rejection letter from RC, GM the day before and from the meeting  
20 with MT, CM that day regarding her temperament. It was a lapse in judgment for which she apologised. She was not drunk (she was not under the influence to any material degree), it was a quiet night and no incidents had taken place. It was apparent that CM, ext HR had taken this into consideration but she did not consider this to be sufficient mitigation.
- 25 107. The Claimant was the Duty Manager with health and safety responsibilities to staff and customers. The Claimant had recently been reminded that consumption of alcohol was prohibited and risked disciplinary action. Despite this the Claimant elected to drink whilst on duty. It was reasonable for CM, ext HR to take these factors into consideration when determining the seriousness  
30 of the offence and whether to dismiss her.
108. In the circumstances (including the size and administrative resources of the undertaking) and determined in accordance with equity and the substantial

merits of the case, CM, ext HR act reasonably in treating the reason as a sufficient reason for dismissing the Claimant. The decision to dismiss and the procedure adopted fell within the 'range of reasonable responses' open to a reasonable employer.

- 5 109. The Claimant was not unfairly dismissed and her complaint is therefore dismissed.

10 **Employment Judge: M Sutherland**  
**Date of Judgment: 06 July 2023**  
**Entered in register: 07 July 2023**  
**and copied to parties**