EMPLOYMENT TRIBUNALS

Claimant: Nadine Fallone

Respondent: Peckham Levels Limited

Heard at: London South (Croydon)

On: 28th, 29th, 30th and 31st May 2024

Before: Employment Judge L Clarke
Members: Ms J Cook
Mr N Westwood

Appearances
For the claimant: Mr S Patel (FRU)
For the respondent: Mr Astair (Head of Finance)

WRITTEN REASONS

Introduction

1. The Claimant was employed by the Respondent as a Duty Manager at Peckham Levels from 8th August 2022 until 16th February 2023. Early conciliation started on 20th February 2023 and ended on 31st March 2023.

2. The claim form was presented on 28th April 2023 and sought compensation for protected disclosure detriment and for automatically unfair dismissal. The claimant was unable to bring a claim or ordinary unfair dismissal as she had less than 2 years of continuous service.

3. The Respondent's ET3 denies that the Claimant made any protected disclosures or that she was dismissed because of any disclosure and submits that the Claimant was dismissed for some other substantial reason, namely a business reorganisation. During the course of the hearing, various other reasons for the Claimant's dismissal were put forward including that she was unreliable due to

missing shifts and sickness absence and was a troublemaker having spread unfounded rumours or gossip about other staff members and creating disharmony.

4. The claims were listed for a 4-day final hearing to deal with liability and remedy which was heard between 28th and 31st May 2023.

5. The Tribunal heard evidence as to both liability and quantum then received oral submissions regarding liability from both Mr Patel and Mr Astair. After delivering an ex-tempore oral judgment on liability the parties made further oral submissions on quantum before the Tribunal delivered a further ex-tempore oral judgment on this issue.

6. The written judgment of the Tribunal was dated 7th June 2024 and sent to the parties on 25th June 2024.

7. On 3rd July 2024 the Tribunal received a request for written reasons on behalf of the Claimant. These Reasons are produced in response to that request.

The Issues

8. At the commencement of the hearing, the list of issues that had been agreed between the parties was reformulated to set out the issues more clearly and expanded to include the issues relating to remedy. The final list is appended to this judgment.

The Evidence

9. The Tribunal considered a paper bundle numbered to page 275. An electronic bundle was also available. References hereafter in bold within square brackets are to the pages of the bundle. The Tribunal was also provided with a revised schedule of loss dated 28th May 2024, and 5 documents evidencing the Claimant's benefits payments and earnings since her employment terminated. Also, a copy of an e-mail submitting a fit note to the Respondent on 6th February 2024 which included a copy of that fit note. cast list and brief chronology.

10. The Tribunal was also referred to, and considered, witness statements from each witness who gave oral evidence.

11. At the hearing, the Claimant was represented by Mr Patel and gave sworn evidence.

12. The Respondent was represented by Mr Astair, who called sworn evidence from Mr Preston Benson, Ms Maysoon Matthysen, Ms Dee Stewart, Ms Jessica Lambourne and Ms Nicola Mori.

13. The Tribunal also considered a witness statement from Anisa Morgan Howell. Ms Howell did not attend to give oral evidence.

14. On the 28th May 2024 the Respondent applied for a witness summons in respect of Anisha Morgan Howell as it had been informed late on 27th May 2024 that she did not intend to attend. A witness summons was issued by the Tribunal on 28th May 2024 and sent to Anisa Morgan Howell by e-mail which required her to attend on 30th May 2024 at 10am. She did not do so. No further applications were made by the Respondent.

The Submissions

15. The Tribunal heard oral submissions from both Mr Patel and from Mr Astair and were referred by Mr Patel to the case reports of ***Kilraine -v- LB Wandworth 2018 ICR 1850, CA*** (in particular paragraph 36), ***Darnton -v- University of Surrey [2003] IRLR 133*** (in particular paragraphs 29 and 30) and ***Copper Contracting Ltd -v- Lyndsey [2015] 10 WL UK 609*** (in particular paragraph 16).

16. Mr Patel made submissions on behalf of the Claimant to the effect that the Respondent's evidence was inconsistent in material ways (and provided details) and that the Claimant's evidence was to be preferred. He submitted that the 3 alleged disclosures had occurred and were protected as the Claimant had the requisite belief. He addressed the Tribunal as to each of the alleged detriments. In respect of the reason for dismissal he pointed to the lack of any consistent or coherent reason given in evidence and asserted that the suggestion that it was for a "business" reason was so generic as to be meaningless and was undermined by the job advertisement for an equivalent position immediately after the dismissal. He invited the Tribunal to infer from the timing relative to the disposal, Mr Benson's comments in evidence and the lack of consistent reason that the dismissal was as a result of the protected disclosure.

17. In relation to remedy, Mr Patel confirmed that the Claimant relied on the updated schedule of loss and had acted reasonably , starting to look for a new job within days of dismissal but that her health issues as a result of the dismissal had impacted on her ability to find work and that the job she took and retraining were reasonable in light of her overall circumstances. He sought an ACAS uplift for the Respondent's failure to operate any disciplinary process or provide any transparency but did not claim interest or grossing up.

18. On behalf of the Respondent, Mr Astair submitted that the Claimant's memory of events was too precise to be accepted as accurate and should not be given any weight given the lack of documentation to support it. He further stated that any confused recollection by the Respondent's was natural in view of the lapse of time since events it concerned. He asserted that the reason for the Claimant's dismissal was principally a business reorganisation and seeking to upskill her role and that secondary reasons were that the Claimant was an unreliable member of the team who spread hurtful and false rumours about other staff. He asked the Tribunal to prefer the Respondent's evidence as to what was said over the Claimant's and highlighted that the Claimant did not put any of her concerns in writing. He further submitted that none of the alleged disclosures were protected as they did not relate to any of the six specified protected categories. He addressed the Tribunal as to each detriment and sought to persuade the Tribunal either that they had not

occurred or that they did not amount to a detriment in any event or were unrelated to the alleged disclosures. He did not address the Tribunal as to the law although he was invited to do so.

19. In relation to remedy, Mr Astair sought to persuade the Tribunal that the Claimant had failed to mitigate her loss and should have taken a new job in hospitality within 4 weeks (although no evidence of the availability of such jobs had been presented to the Tribunal) and sought to minimise the impact of the detriments the Tribunal had found on the Claimant by relying on her previous mental health difficulties. He suggested the ACAS code was not applicable because the Claimant was principally dismissed as a result of a restructure and that as she had received 4 weeks pay in lieu of notice no compensatory award should be made. He also submitted that the Claimant had caused or contributed to her dismissal due to her 2 week sickness absence during a critical period.

Law:

Standard of Proof

20. The party who bears the burden of proving the claim, or any element of the claim, must do so on the balance of probabilities.

Unfair Dismissal

21. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

22. The Claimant must show that she was dismissed by the Respondent under section 95 but in this case, there is no issue regarding the dismissal. Both the Claimant and Respondent accept that the Claimant was dismissed by the Respondent on 16th February 2023.

23. Where, as in this case, the Claimant has less than 2 years continuous service, the Claimant must prove that the reason or the principal reason for the dismissal was the making of a protected disclosure: ***Maund –v- Penwith District Council [1984] ICR 143 (CA).***

24. If the reason, or principal reason for the dismissal is that the employee made a protected disclosure, the dismissal will be automatically unfair under s103A of the 1996 Act. If the protected disclosure was merely a subsidiary reason, the dismissal will not be automatically unfair.

Protected Disclosure Detriment

25. Section 47B(1) of the 1996 Act confers on workers (including employees, see section 43K) the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Enforcement of that right is by way of complaint to the Tribunal under section 48(1A).

26. The Claimant must show that he made a qualifying disclosure within the meaning of s43B of the 1996 Act.

27. In order to be a qualifying disclosure, the Tribunal must be satisfied of all of the following: - ***Williams v Michelle Brown AM, UKEAT/0044/19/OO***.

    (1) It is a disclosure of information.

    (2) The Claimant believes the disclosure is in the public interest.

    (3) The Claimant's belief that the disclosure is in the public interest is reasonable.

    (4) The Claimant believes that the disclosure tends to show one (or more) of the six specified categories in s 43B(1), namely:
        (a) That a criminal offence has been committed, is being committed or is likely to be committed
        (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
        (c) That a miscarriage of justice has occurred, is occurring or is likely to occur
        (d) That the health or safety of any individual has been, is being or is likely to be endangered.
        (e) That the environment has been, is being or is likely to be damaged.
        (f) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be, deliberately concealed.

    (5) The Claimant's belief that the disclosure the disclosure tends to show one (or more) of the six specified categories in s 43B(1) is reasonable.

28. "Information" will only be disclosed if the disclosure conveys sufficient factual content. This is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case - ***Kilraine v London Borough of Wandsworth [2018] ICR 1850***. It is for the Tribunal to decide whether a series of communications should be read together so that an amalgamation of their contents amounts to a disclosure of information - ***Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 (EAT)***.

29. The requirement of reasonable belief is both a subjective and objective test.

30. There must be some objective basis for the belief but the focus is on whether it was reasonable for the Claimant to believe it, not whether a hypothetical reasonable worker would have done so. It is a low threshold but rumours, unfounded suspicions and uncorroborated allegations will not be sufficient to found reasonable belief. If the threshold is met, the disclosure will be a qualifying disclosure even if the information disclosed turns out to be untrue or inaccurate - ***Babula v Waltham Forest College [2007] ICR 1026***.

31. All the circumstances including the workers belief in the factual basis of the information as well as what the facts tended to show had to be considered together in determining whether for the purposes of s43B(1) of the ERA the Claimant held a reasonable belief that the disclosure tended to show a relevant failure - ***Darnton -v- University of Sussex [2003] ICR 615***.

32. An event should be construed as being "likely" if there is more than a possibility or a risk.

33. In considering whether the Claimant reasonably believed the disclosure was in the public interest, it is necessary to consider whether the Claimant considered the disclosure to be in the public interest, whether the Claimant believed the disclosure served that interest, and whether that belief was reasonably held. It is not for the Tribunal to determine whether a disclosure was in the public interest.

34. There should be features of the case which make it reasonable to regard it as being in the public interest. The Tribunal must take into account:
    (i) The numbers in the group whose interests are affected.
    (ii) The nature of the interests affected and the extent to which they are affected by the wrongdoing.
    (iii) The nature of the wrongdoing.
    (iv) The identity of the alleged wrongdoer.

    See ***Chesterton Global Limited (t/a Chestertons) and anor -v- Nurmohamed (Public Concern at Work Intervening) 2018 ICR 731 CA and Dobbie -v- Felton t/a Felton Solicitors EAT 0130/20***.

35. A disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests as motive is irrelevant. What is required is that the worker reasonably believed disclosure was in the public interest in addition to their own personal interest - ***Chesterton Global Ltd v Nurmohamed.***

36. In relation to disclosures concerning breaches of legal obligations, unless the legal obligation is obvious, there must be some disclosure that actually identifies the legal obligation although strict legal language is not required, the identification need not be detailed or precise and a common-sense approach is to be adopted. A "legal obligation" can be a contractual obligation, statutory or secondary legislation or a breach of common law (e.g. negligence, nuisance, defamation). It does not cover guidance, best practice or moral obligations.

37. A qualifying disclosure will be a protected disclosure if it was made to the employer or certain other relevant persons – s43A and s43C of the 1996 Act. In this case all the disclosures were made to the Claimant's employer so will be protected disclosures if she made qualifying disclosures.

38. A "detriment" in the context of s47B(1) is a disadvantage. It covers most adverse treatment at work and need not involve economic detriment. It should be viewed from the perspective of the worker. The matters which may be considered to be detriments are wide ranging and can include deliberate failures to act, suspension, disciplinary action, moving the worker and subjecting the worker to performance management – see ***Shamoon -v- Chief Constable of the RUC 2003 ICR 337 HL***, ***Merrigan -v- University of Gloucester ET 1401412/10***, ***Keresztes -v- Interserve***

FS (UK) Ltd ET 2200281/16 and ***Chief Constable of West Yorkshire Police -v- B and anor EAT 0306/15*.**

39. The detriment must have been caused by the protected act. In determining this the Tribunal should consider:
    (1) Was the Claimant subjected to a detriment by the employer?
    (2) Was the Claimant subjected to a detriment because they made a protected disclosure?

40. It is for the Claimant to prove that there was a protected disclosure, detriment and that the employer subjected the Claimant to that detriment. Once she has done so, the burden of proof passes to the employer to prove that the worker was not subjected to a detriment on the ground that they made a protected disclosure.

41. The Tribunal is entitled to draw inferences as to the real reason why the employer acted the way that they did in the absence of direct evidence and on the basis of its findings of fact.

42. The making of the protected disclosure must be the real reason, core reason or motive for the detriment the employer subjected the Claimant to, that is the disclosure must have materially (more than trivially) influenced the employer's treatment of the Claimant but the employer's motive need not be malicious – ***Chief Constable of West Yorkshire Police -v- Khan [2001] ICR 1065 HL, Fecitt & oths -v- NHS Manchester (Public Concern at Work intervening) [2012] ICR 372, CA*** and ***Croydon Health services NHS Trust -v- Beatt [2017] ICR 1240, CA***.

43. The person who subjects the Claimant to the detriment must know that the Claimant made the protected disclosure unless they have been influenced or manipulated to carry out the detriment by a different person who was aware of the protected disclosure.

ACAS Uplift

44. Failure to follow the ACAS Code of Practice may result in an adjustment of compensation under S.207 and s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 up to a maximum of £25% of the award.

45. Whilst the Code may not be applicable to all dismissals, where the substance of the dismissal falls within the intended remit of the Code (misconduct or capability) and in cases where the employer relies upon the breakdown of mutual trust and confidence (in particular where the employer had initiated disciplinary proceedings relating to conduct prior to the dismissal) the ACAS Code will apply but it may not be appropriate to impose a sanction for failure to comply (see ***Hussain -v- Jurys Inns Group Ltd EAT 0283/15 EAT, Phoenix House Ltd -v- Stockman 2017 ICR 84, EAT*** and ***Lund -v- St Edmund's School, Canterbury 2013 ICR D26***).

46. In any event, the ACAS Code is be had regard to but is not a prescriptive list of actions which must be followed in all circumstances. The ACAS guidelines themselves specifically indicate that that the Tribunal may take the size and

resources of the employer into account and that it may not be practical for all employers to take all of the steps set out in the Code.

Mitigation of Loss

47. If the claimant has failed to mitigate her loss, the Tribunal may make deductions from any compensatory award to reflect that failure.

48. The principles relevant to mitigation of loss are set out in paragraph 16 of ***Copper Contracting Ltd -v- Lyndsey [2015] 10 WL UK 609*** which provides a list of relevant factors to be taken into consideration.

49. The burden of proving failure to mitigate falls on the Respondent. The Claimant has no obligation to prove that she has mitigated her losses. There is a difference between acting reasonably and not acting unreasonably.

Contributory Fault

50. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

51. Section 122(2) provides:

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

52. Section 123(6) provides:

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

53. In determining whether any deduction should be applied to either part of the Claimant's award as a result of contributory fault, the Tribunal must first identify what conduct on the part of the Claimant could give rise to contributory fault. The Tribunal must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.

Relevant Findings of Fact and Associated Conclusions

The evidence

54. The Tribunal found the Claimant to be an honest, credible and largely reliable witness. She gave straightforward, consistent evidence that was substantially

supported by the documentation in the bundle. Whilst the Tribunal had some doubts as to the accuracy of her recollection as to precise words spoken during discussions (and cited in quotation marks in her witness statement) the Tribunal was satisfied that she believed them to be entirely accurate as a result of her repeated rumination of them over the time since they occurred.

55. The Tribunal did not consider any of the Respondent's witnesses to be as reliable or credible, and where there was a conflict between their evidence and that of the Claimant the Tribunal preferred the evidence of the Claimant.

56. The Respondent's witnesses frequently contradicted each other and their evidence was notable for being virtually entirely unsupported by any contemporaneous documentary evidence. In particular, Preston Benson's evidence was confused, vague, and inconsistent and both Dee Stewart and Maysoon Matthysen displayed palpable animosity towards the Claimant whilst giving their evidence.

57. The Tribunal considered it particularly remarkable that with the exception of [**71-72**], some correspondence setting up meetings and the Claimant's termination letter there were no notes disclosed by the external HR consultants employed by the Respondent and they told the Tribunal that none were made. In particular, the Tribunal found it inherently incredible that specialist external HR consultants did not make or retain any notes concerning their instructions, their discussions with the Claimant regarding any information she provided to Preston Benson, their advice to Preston Benson, the interviews they carried out with staff members, their feedback of their findings from those interviews to Preston Benson, or their instructions regarding the Claimant's termination. This failure to make or retain notes and the manner in which Nicola Mori in particular gave evidence (with repeated "no comment" responses, evasion and obfuscation) was far from straightforward and suggested that neither she nor the Respondent wanted there to be any evidence that would allow scrutiny of the Respondent's actions.

58. The Tribunal also noted the conspicuous absence of relevant documentary evidence that may have either supported or undermined the Claimant's case and which either should have been, or was accepted to be, in the Respondents possession but which had not been disclosed and was not available to the Tribunal. This included the Local Authority (London Borough of Southwark)'s licence for the venue, PBS Fire Safety reports or certificates, draft rotas for the period 6th February 2023 to 14th February 2023, various e-mails, a more detailed history of WhatsApp ALLTeams correspondence, and the questionnaires referred to by Maysoon Matthysen in evidence as having been provided by Bespoke HR during the investigation into the Claimant's allegations made to Preston Benson.

59. The Tribunal concluded, that on the balance of probabilities, the Respondent's failures regarding the evidence went beyond being merely slapdash or misunderstanding their obligations but indicated that the Respondent had deliberately attempted to hide some of the evidence from the Claimant and from the Tribunal.

The Claims

60. There was relatively little factual dispute between the parties in relation to the majority of the key factual elements and most of actions relied upon.

61. Peckham Levels is a former multi storey car park that has been converted to a community space housing around 100 independent business, operating a café and bar and hosting various events. It is owned by Preston Benson through a Company vehicle and operated by the Respondent. Mr Benson's intention on purchase was to improve the business then sell it as a going concern. At a similar time, he purchased a sister venue, Hackney Bridge, which was improved/stabilised and subsequently sold off.

62. The Respondent is a fairly small business with a small number of employees, no internal HR department but a standing retainer with an external HR service, Bespoke HR Consultancy, to provide 2 hours HR support per calendar month. Any additional work over and above these 2 hours which the Respondent required would be subject to separate agreement and an additional fee, in respect of which Bespoke HR Consultancy would provide an estimate which the Respondent would then approve.

63. The events this case concerns took place in the immediate aftermath of the COVID-19 pandemic, and whilst its effects were still being felt. The COVID-19 pandemic created a very difficult climate for successfully operating hospitality venues such as this one and many such businesses did not survive.

64. In May 2022 the Claimant applied for the advertised job of duty manager at Peckham Levels [**105-109**]. Prior to this she had experienced poor mental health, namely severe anxiety and depression. She was not prescribed anti-depressants but undertook a course of CBT [**271-272**] and by the time she applied for the job with the Respondent was substantially better, with her PHQ-9 (depression) and GAD-7 (anxiety) scores having reduced from 21 and 20 respectively (severe) to 0 for each.

65. The Claimant's employment with the Respondent commenced on 8th August 2022. She was not provided with a contract of employment or any other employment particulars prior to the termination of her employment. However, there is no dispute that she was employed on a full-time basis to undertake 40 hours per week over rota'd varying 8 hour shifts. The failure to provide a contract of employment or other written particulars was not the Respondent's general practice but was an isolated oversight on part of the Respondent. It was probably contributed to by the Respondent's temporary lack of a general manager at the time and during the Claimant's period of employment. There was no evidence before the Tribunal that the Claimant requested a written contract or particulars and was refused.

66. The parties agreed that the Claimant's weekly gross pay was £541.67, her weekly net pay was £457.61 and that in addition the Respondent made a monthly pension contribution of £65.01. as set out in Part A of the Claimant's updated Schedule of Loss dated 28th May 2024 and her payslips [**273-275**].

67. As duty manager the Claimant had a wide-ranging role. She was responsible for day-to-day operations, opening and closing the site and ensuring its smooth

running, being a point of contact for all site users, event set up, break down and delivery, supporting café and bar operations, monitoring of various matters including cleanliness, security, and customer behaviour, ensuring health and safety and compliance with policy and procedure.

68. The duty manager was an important role as there was a licensing requirement for a duty manager to be on site during operational hours. There were at least 3 duty managers.

69. The Claimant initially reported to Rosie McGregor. After Ms McGregor's departure, in January 2023 she reported to Anisa Morgan Howell. In the later weeks of her employment the reporting structure was due to change as a result of a re-structure.

70. During the early weeks of her employment the Claimant was present during a PBS fire safety inspection along with Rosie McGregor. In the course of this inspection the Claimant was informed that smoking on the terraces was not allowed under the terms of the licence for the venue as a result of the size and level of enclosure of the terraces.

71. On 10th December 2022 Peckham Levels hosted an event for watching the England/France Euro football game. During the evening bar staff reported to the Claimant that Maysoon Matthysen the Senior events Manager, and Yahya Amal, the events manger, were taking drinks, including bottles of wine from the bar. The Claimant later observed them to be drunk and behaving in a manner she considered to be inappropriate and potentially dangerous.

72. On 31st December 2022 whilst on shift the Claimant observed Maysoon Matthysen removing no smoking signs from the terraces and spoke to her about this. Although several of the Respondents witnesses denied that this had occurred and Preston Benson stated the signs were still present, Maysoon Matthysen admitted in her oral evidence that she had removed no smoking signs for the terrace (and that they had not been replaced) albeit that she asserted that she did this on a much earlier date, sometime in November 2022.

73. The Tribunal preferred the evidence of the Claimant. 31st December was New Years Eve and a memorable date. A large number of guests were expected and this is consistent with the reasons given for the signs being removed, namely a business operations reason. It is also consistent with the timing of subsequent events.

74. The Claimant was concerned regarding this behaviour (smoking on terraces, removal of signs and staff drinking). She considered the conduct inappropriate and to create a situation that could be dangerous for others. In particular, she thought, (as a result of the conversations with her line manager Rosie and PBS, the fire inspectors) that smoking on the terrace was against the licence, a fire hazard, and therefore a health and safety risk.

75. The Claimant initially raised her concerns about both these matters with her line Manager Rosie McGregor and Anisa Morgan Howell but as the issues were not resolved, and she remained concerned about them, on 10th January 2023 she sent

an e-mail to Jess Lambourne, one of the external HR consultants from Bespoke HR.

76. The e-mail the Claimant sent on 10th January 2023 [**55**] explained that the Claimant had already spoken to her line manager but that she had (unspecified) unresolved concerns. The Claimant offered to speak to her or put her complaints in an e-mail.

77. She subsequently also e-mailed Preston Benson in similar terms on 11th January 2023 [**52**] stating that she had concerns, had contacted Jess and again asking how he wanted the concerns communicated to him, offering to speak or set them out in an e-mail.

78. In response to that e-mail, the Claimant and Preston Benson spoke on the telephone on 11th January 2023. During that telephone conversation, which lasted 21 minutes [**116**], the Claimant spoke about the situation at Peckham levels and in particular informed Mr Benson that:
    (i) The events team go to the bar and take alcohol, including bottles of wine for their own use;
    (ii) The events team drank whilst on duty and acted inappropriately, in particular at the England vs France Euros football game;
    (iii) Guest were being allowed to smoke on terraces contrary to the licensing requirements;
    (iv) Maysoon Matthysen had removed the no-smoking signs from the terrace; and
    (v) The duty mangers were being overridden by management and were unable to perform their health and safety role.

    There was also discussion about the need for a clearer management structure.

79. On 13th January 2023, Anisa Morgan Howell told the Claimant that she had been offered cocaine by James Davies, one of the bar staff, the previous night at Rosie McGregor's leaving party. There is no dispute that this conversation occurred as it is confirmed by Anisa Morgan Howell in her witness statement and referred to in private WhatsApp messages passing between Anisa and the Claimant after this date [**117-118**].

80. The Claimant considered this to be a serious issue and that it needed reporting. Although Ms Morgan Howell had asked her not to report it to Dee Stewart (who was James Davies' line manager), on 14th January 2023 the Claimant spoke to Dee Stewart and informed her of what Anisa had told her. There is no dispute that this conversation took place and it was confirmed by both Dee Stewart and Anisa Morgan Howell. The Claimant's account is that Dee Stewart's response was to tell the Claimant that she and James Davies had done cocaine together at New Years. Dee Stewart subsequently spoke to James Davies about this conversation.

81. Ms Morgan Howell was made aware of the report made by the Claimant to Dee Stewart and was unhappy. She considered it a breach of trust and private messaged the Claimant on WhatsApp about it on 15th January 2023 [**117**].

82. During the course of the conversation the Claimant stated at 11:07 "*I can't work like this so I won't be returning*" [**118**]. Later in the day at 20:23 as part of the same conversation she effectively resiled from suggesting she would not be returning

and confirmed that she would be attending future shifts as she noted that she was exhausted and said "*I think its best if its best I don't come in tomorrow. I will come in on Tuesday for my shift ..*". Subsequently, on 17th January she also offered to come in early for a shift [**120**].

83. The Claimant spoke to Preston Benson again on 16th January 2023 by telephone when he called her to update her as to changes to the line manager structure ahead of a meeting to be held the next day. In addition to this discussion the Claimant reported to him that Anisa had told her that James had offered Anisa cocaine at Rosie's leaving party and that Dee had told her that she had done coke with James following the NYE shift and she did not think Dee would investigate the situation.

84. The Claimant says she reported this because she was concerned about staff drug taking and the health and safety implications as well as the illegality and breach of legal obligations, namely the employment contracts. Although she did not specifically point out that these were her concerns.

85. Although Preston Benson disputed the Claimant's accounts of the 2 telephone conversations, he accepted that she had raised concerns about staff drinking and drug taking. His witness statement was equivocal as to whether the Claimant also mentioned smoking but in his oral evidence, he conceded that she may have mentioned something regarding smoking. He did not give evidence that there was in fact no issue with smoking on the terrace.

86. His evidence as to the content of the discussion was unclear and inconsistent and the Tribunal preferred the Claimant's account which was entirely consistent with, and therefore corroborated by, the nature of the questions [**71-72**] put to staff during the course of an HR investigation conducted by Nicky Mori on 25th January 2023 (see below). The Respondents witnesses confirmed both the investigation and the questions posed had arisen from the matters Preston Benson asked HR to consider solely as a result of information provided to him by the Claimant during the call on 11th and/or 16th January 2023

87. The outcome of the two discussions between the Claimant and Preston Benson was that the Claimant was asked to speak to Jess Lambourne to discuss her complaints. There were delays in arranging this discussion, which eventually took place by telephone on 27th January 2023. No written record was made of this meeting.

88. Further, Mr Benson spoke to Bespoke HR and asked them to investigate concerns raised by the Claimant. Although both Mr Benson and the Bespoke HR staff said they did not tell anyone that the Claimant was the cause of the investigation, Dee Stewart said that she had been told that the Claimant was the source and Anisa Morgan Howell's witness statement states that she knew that the Claimant was the source of the information. Further, Dee Stewart, Anisa Morgan Howell and James Davies were all aware of the Claimant's report to Dee Stewart about James Davies offering cocaine to Anisa Morgan Howell as set out above.

89. It is unclear precisely what instructions were given, or what discussions took place between Mr Benson and Bespoke HR as no documentation was provided to the

Tribunal in respect of these matters. However Bespoke HR arranged to visit Peckham Levels on 25th January 2023, when an important team meeting was scheduled regarding the issues, for the purpose of that investigation. When Jess Lambourne and Nicky Mori attended Peckham Levels on 25th January 2023 they spoke to 6 staff members and asked each of them 4 specific questions [**71-72**]. Those questions were:

(i) Any knowledge or concerns of drugs being offered by staff in the workplace?
(ii) Any knowledge or concerns of alcohol being consumed whilst at work?
(iii) Have any concerns on the above ever been brought to your attention?
(iv) Are you aware of restricted areas such as fire escapes being used as smoking areas?

90. Apart from being told by some employees that they had heard rumours about drugs being offered by staff in the workplace and that there were "blurred lines" after work regarding both drinking and drug taking by staff, they received no additional information to corroborate the Claimant's concerns.

91. The Claimant was not present on 25th January 2023. She was not scheduled to be on shift that day but had intended to attend. She was unable to do so as she locked herself out of her house with her car keys inside. Although she contacted the Respondent by e-mail asking to attend the meeting remotely [**123**] she did not receive a response and was not therefore able attend this way.

92. The Respondent has sought to suggest that the Claimant was repeatedly asked to provide a formal written account her complaints and failed to do so and asked the tribunal to draw conclusions from her failure to do so that her complaints were not serious or genuine and were nothing more than tittle tattle or gossip.

93. No document in the bundle clearly requests a statement or formal complaint from the Claimant and there is only tangential reference to a "statement" in an e-mail from the Claimant dated 30th January 2023 in which she apologises for not providing it yet, and in the record of a back to work interview on 14th February 2023 [**157**]. In relation to this latter document 2 versions are contained in the bundle. One (seemingly more critical of the Claimant's failure to provide a statement) produced by the Respondent [**95-96**] and one which merely refers to the Claimant being asked on the week of 23rd January 2023 to provide a statement (that sent to the Claimant) [**154-157**]. No credible explanation was given by Nicky Mori, the author of the document for the difference between the 2 versions. She suggested that that disclosed by the Respondent was a different version printed in error and that the Respondent and the Claimant were sent the same documents, the one provided by the Claimant. The Tribunal considered this inherently unlikely.

94. Shortly after reporting her concerns to Preston Benson and Dee Stewart, the Claimant detected a change in attitude towards her by other staff at work.

95. From about 17th January 2023 until 6th February 2023 when she was went onto sick leave, the Claimant gained the impression that she was being ignored by numerous people including Dee Stewart, Yayha Amal and Maysoon Matthysen

and was not being included in conversations and group chats or copied into correspondence regarding group events (the first alleged detriment).

96. Although there is a dispute as to whether the Claimant was copied into group chats or correspondence, both Dee Stewart and Maysoon Matthysen gave oral evidence admitting that they had been ignoring the Claimant during this period. Although the Respondent could easily have disproved the Claimant's assertions regarding the exclusion from group chats and correspondence by producing a more comprehensive selection of the WhatsApp team messages than the very limited extracts contained in the bundle it failed to do so. The Tribunal had no reason to disbelieve the Claimant who gave an account of her reasons for thinking this occurred and could find no evidence that she was not telling the truth in respect of this matter. For the reasons set out more comprehensively above, Tribunal preferred the Claimant's evidence and concluded that she had been ignored and excluded in the manner she described.

97. On a date around or after 25th January 2023 James Davies was promoted to the role of assistant Food and Beverages Manager. This was a role that the Claimant would have wished to apply for, but she was unaware of (the fourth alleged detriment). Although the Respondent's witnesses initially suggested that she could have applied for the role, the oral evidence of Dee Stewart was clear that the role was not advertised in any way internally or externally and that James Davies recruited to the assistant food & beverage managers role as a direct recruit without notification to anybody of the availability of this role. The Claimant did not have the opportunity to apply for the role but was not specifically excluded from applying for it. No-one was able to apply for it and even James Davies did not do so, he was simply offered it.

98. On a date unknown after 15th January 2023, it is not disputed that Anisa Morgan Howell told Dee Stewart that the Claimant had handed in her notice, and that the Claimant was not coming in for shifts and was swapping shifts without authorisation (the second alleged detriment).

99. This, and her conversation with Jess Lambourne of Bespoke HR regarding the information that the Claimant had given to Mr Benson, led to Dee Stewart removing the Claimant from the rota entirely from 28th January 2023 onwards and allocating all her shifts to others (the third alleged detriment).

100. Although there is dispute re whether this occurred, the Tribunal found that it did. The Claimant's account is that she was on the draft rota initially circulated on 28th January 2023 and was then removed from rota around 29th January 2023 is supported by documentary evidence which shows that prior to 29th January 2023 the Claimant had initially been scheduled for at least 3 future shifts and that those 3 shifts were cancelled on 29th January 2023 [**130**] when the Claimant was notified that 2 shifts were cancelled and that she had been unassigned from a further shift (which Dee Stewart accepted was essentially also the equivalent of a cancellation). No reason was given by any of the R's witnesses for those 3 cancellations

101. By contrast the evidence given by Dee Stewart to the effect that she was never on draft rota was inconsistent and contradictory as to the reason why she was not. She alternatively suggested that the Claimant was not included on the rota as she

did not provide her availability when requested to do so. However, in response to a contemporaneous message from the Claimant challenging her failure to be included on the rota [**101**] she responded saying she had not seen the Claimant and did not mention a request for availability not being complied with. Her oral evidence to the Tribunal was equally inconsistent between those 2 accounts as to whether because Claimant had not provided availability or hadn't been seen.

102. Further there is limited contemporaneous doc evidence to support the Respondent's assertions. There is no copy of the draft rota that is referred to in message [**233**] and that message circulating the draft rota sought responses only if there was disagreement with the draft rota. It did not request availability and no message requesting availability before circulation of the draft rota has been provided to the Tribunal, although it was within the Respondent's ability to provide such a record if one existed.

103. On 30th January 2023 the Claimant sent an e-mail to Jess Lambourne complaining that she had been removed from shifts. Jess Lambourne responded to the claimant on 31st January 2023 enquiring as to her last shift worked and whether she had any future scheduled shifts. The Claimant's e-mail response, also on 31st January 2023, confirmed that she had in fact been assigned some shifts going forward [**145-146**]. The immediate and pressing matter of shift allocation had therefore been resolved (albeit not necessarily by Bespoke HR). The Claimant dd not subsequently receive any further response to the concerns that she raised in her correspondence of 30th January 2023 (this was no disputed by any witness and no documentation suggests any further response) (the eight alleged detriment).

104. The impact on the Claimant of being ignored and feeling sidelined at work, as well as being removed from the rota and the other slights she perceived was significant and she was already vulnerable as a result of her previous mental health difficulties. As a result of her treatment by the Respondent, the Claimant became mentally unwell and on 6th February 2023 she messaged the group chat, including Anisa Morgan Howell, to advise that she was sick, had been signed off work by her GP for 9 days and could not attend work but would return on 15th February 2023[**150-152**]. Ms Morgan Howell's immediate text response was to say "*You'll have to come and cover this evening's shift. There's no-one else hun*" [**152**] (the fifth alleged detriment).On receiving no immediate response she sent a further message 3 minutes later saying "*Okay well. Since you're ignoring me. No worries. I'll cover this shift. Thanks. Get better soon…"* Ms Morgan Howell's witness statement accepts that this was an inappropriate thing to say. Notwithstanding the contents of those messages, the Tribunal was satisfied that neither those messages, nor subsequent messages, any other evidence or the contents of her witness statement suggest any animosity towards the Claimant. The Tribunal accepted that the comments on 6th February 2023 were precipitated in the moment because of the stress, the pressure of needing to ensure that a duty manager would be available to enable the venue to open and the knowledge that she was likely to have to cover the Claimant's shift and were not made for any other reason.

105. Following that message on 6th February 2023, the Claimant was absent from work until 16th February 2023.

106. At some point in February 2023 Mr Benson and Ms Mori discussed the Claimant and Mr Benson told Ms Mori to dismiss her. No written record of these discussions or any advice that Mr Benson received from Ms Mori (or anyone else at Bespoke HR) was provided to the Tribunal and it was asserted that no such documents had ever existed, which the Tribunal considered to be incredible. When pressed during her oral evidence Ms Mori stated Mr Benson had told her that he had "had enough" of the Claimant and that is why she was to be dismissed.

107. On 15th February 2024 the Respondent began advertising a Duty Manager role with a higher salary than that of the Claimant and new reporting lines but which, in terms of job responsibilities, was essentially the equivalent of the Claimant's role [**240**].

108. On her return to work on 16th February 2023 the Claimant attended a meeting with Ms Mori. During the course of that meeting she was dismissed with immediate effect. She was given no reason for her termination, although Ms Mori may have mentioned that it was for "business reasons" which the Tribunal concluded was so vague as to be meaningless.

109. At no time prior to the meeting was the Claimant informed what was happening, told of any concerns the Respondent had regarding her work which might have led to her dismissal, warned that she might be dismissed or what the case for dismissal that was being considered was. Nor was she given any opportunity to have anyone present at meeting with her [**97-98**]. At the meeting she was merely dispensed with, told that her employment would be terminated. Not only was she not told the reason for her dismissal at the meeting on 16th February 2023, neither the covering e-mail [**103**] nor the dismissal letter that she subsequently received [**102**] set out the reasons for her dismissal (the sixth alleged detriment).

110. Following her dismissal the Claimant was paid 4 weeks' pay in lieu of notice, totalling £1,895.45.

111. On 17th February 2023 the Claimant wrote to Ms Mori seeking to appeal against her dismissal [**104**]. She was informed by Ms Mori in an e-mail of the same date that "*As this was purely a business decision there is no appeal for this*" [**104**]. She was therefore denied an appeal (the seventh alleged detriment). This was, as Ms Mori stated in her evidence, Ms Mori's decision which she made without reference to Mr Benson, as it was within her authority to do. She gave inconsistent and unconvincing explanations for her failure to offer a right of appeal. In her witness statement she gave the reason as the Claimant's short (7 month) length of service but this contradicts the reason given in her e-mail [**104**]. In her oral evidence she initially suggested that she adopted the process set out in the Respondent's handbook but subsequently had to conceded that there was in fact no such handbook, at which point she suggested that she was following the ACAS procedures. This was plainly incorrect as it is contrary to the ACAS code of practice not to offer a right of appeal.

112. In the absence of any consistent, credible or convincing explanation for the failure to offer a right of appeal, the Tribunal was satisfied that the real reason for the Claimant's being told that she was not able to appeal was to prevent further enquiry into the reasons for the dismissal so as to conceal that the reason for dismissal

related to the Claimant's conversations with Mr Benson on 11th and 16th January 2023 and the information that she had provided to him during those conversations.

113. The Respondent does appear to have subsequently addressed issues regarding staff drinking and drug taking but no details as to how that was undertaken were provided. It is not disputed that no disciplinary action or sanction was taken by the Respondent in respect of people who made complaints about the Claimant's conduct, namely Dee Stuart and Maysoon Matthysen. Nor was any action taken against them or James Davies, in relation to drinking or drug taking on the premises. There was no consistency in the Respondent's approach to these individuals and to the Claimant.

114. Subsequent to her dismissal, and as a result of both the treatment she had been subjected to during her employment and her dismissal, the Claimant's mental health deteriorated. She attended a 6 week course of CBT from 27th February 2023 [**265**] which was not as successful as her previous course and on 15th May 2023 she saw her GP who prescribed her anti-depressants (which she took out of necessity despite not wishing to be on anti-depressants) and provided her with a fit note confirming that she was not fit for work for a period of 1 month [**266-267**]. The Claimant gave oral evidence, which the Tribunal accepted, that GP had wanted to sign her off work for a longer period but the Claimant considered that it would be helpful for her to be signed off for longer than 1 month.

115. The Claimant's confidence was substantially knocked by her experiences with the Respondent and in particular her dismissal and she did not feel confident applying for similar roles. Additionally, at the date of the hearing she continued to experience poor mental health as a result of her treatment and dismissal by the Respondent which impacted on her ability to work full time and in similar roles to that she had with the Respondent. The continuation of the Tribunal proceedings and need to re-live her experiences during the preparation for, and hearing of this case have continued to impact her recovery.

116. The Respondent asserted that there were lots of equivalent and suitable jobs that the Claimant could have applied for following her dismissal but provided no evidence of any jobs available to her that were appropriate to her circumstances with her mental health difficulties. The Tribunal was not prepared to simply assume that there were a wealth of suitable jobs out there that she was both suitable for and could have applied for in the state of mind that she was in the in the aftermath of her dismissal.

117. The Claimant provided evidence of a number of job applications made subsequent to her dismissal [**192-196**] albeit that those jobs were not the equivalent of her role with the Respondent and were in different areas in which she had prior experience or training. She made substantial efforts to locate a job notwithstanding her state of mind and eventually obtained a job with Choice Support on 2nd June 2023 on a zero hours contract [**198**].

118. Despite undertaking required training shortly thereafter, she was not able to start work immediately as a result of delays (which were no fault of her own) in obtaining her DBS check [**176**] and additional training requirements which became required.

She eventually started work in 2024 and to the date of trial the Claimant's post-dismissal earnings were agreed by the parties to total £516.00. She has also received income from benefits but no other earned income.

119. Simultaneously, from August 2023 the Claimant also took steps to retrain, commencing a programme of study with the Football Association to become a football coach. Her first in a series of required qualifications was obtained in mid-August 2023 [**177-178**].

120. She was also placed on the Restart programme via the jobcentre in October 2023 and made further unsuccessful job applications [**179-190**].

Discussion and Conclusions

Public Interest Disclosure

121. Both the claims for automatic unfair dismissal pursuant to s.103A of the 1996 Act and the claim for detriment pursuant to s48 of the 1996 Act require the Claimant to have made a protected disclosure.

122. The Tribunal is satisfied, for the reasons given above at paragraphs 78 & 83, that the Claimant disclosed to Preston Benson, the owner of the business, during phone calls on either 11th and/or 16th January 2023 the following information:
    (i) The events team go to the bar and take alcohol, including bottles of wine for their own use;
    (ii) The events team drank whilst on duty and acted inappropriately, in particular at the England vs France Euros football game;
    (iii) Guest were being allowed to smoke on terraces contrary to the licensing requirements;
    (iv) Maysoon Matthysen had removed the no-smoking signs from the terrace;
    (v) The duty mangers were being overridden by management and were unable to perform their health and safety role;
    (vi) James Davies had offered Anisa Morgan Howell cocaine at Rosie McGregor's leaving party on 12th January 2023;
    (vii) Dee Stewart had done coke with James Davies following the NYE shift.

123. Further, on 14th January the Claimant disclosed to Dee Stewart, that James Davies had offered Anisa Morgan Howell cocaine at Rosie McGregor's leaving party on 12th January 2023.

124. All of the above was factual information and amounted to a disclosure of information.

125. The claimant believed that the information that she provided was correct. She had seen the staff drinking and the removal of the smoking signs with her own eyes. She had been present at the PBS fire inspection and, whilst it is unclear whether she saw the licence itself, she reasonably believed what she was told during that inspection regarding the restrictions imposed by the licence on smoking on the terrace. Anisa Morgan-Howell also lends some weight to Claimant's assertion that

there was a restriction as she seems to accept that that had been her understanding at one point. Further, the Claimant gave a clear and plausible explanation as to why she believed smoking on the terrace was prohibited by reference to the location and the nature of the terrace and the degree of enclosure.

126. Although some of the information which she disclosed came from others rather than from her own direct knowledge, in the main the information came from people who it directly concerned, Anisha Morgan Howell (who told her she had been offered cocaine) and Dee Stewart (who said she had taken coke), or had been provided to her by other staff members in the course of their duties (the bar staff). The Tribunal could find no reason why she would have disbelieved these directly involved participants or the information they gave her as to what had happened. She simply had no reason to disbelieve what they would say or infer that it was not in fact true.

127. The Tribunal was satisfied that the Claimant genuinely believed the matters she disclosed were true. The Tribunal is not required to ascertain whether they were in fact true or not. Even if they were not true, it would not prevent the disclosures being qualifying disclosures.

128. The Claimant's genuine belief that they were true was not unreasonable.

129. The Tribunal concluded that the Claimant reasonably believed, both at the time she made the disclosures and subsequently, that it was in the public interest to make the disclosures or that the disclosures served the public interest and that her belief was reasonable.

130. In her witness statement and oral evidence to the Tribunal the Claimant suggested that her disclosures were in the public interest because they had potentially serious consequences. These included, potential impacts on both visitor and staff safety from drugs being on the premises (which could be dropped or left in places where vulnerable users could access them), smoking in inappropriate places giving rise to unacceptable fire risks, staff behaviour putting the staff themselves and users at risk of injury or assault, risks to the business viability through loss of money due to theft of alcohol, and the risk that the premises could be shut down for failure to comply with the licence or fire regulations.

131. The nature of this venue was such that there were a range of individuals who used it, including vulnerable individuals and children and that there was a children's area within the venue. The venue had a high footfall, at weekends between 1500 to 2000 users and that on weekday nearer 200 users per day. Around 100 independent businesses operated within the Peckham Levels premises. There were also a number of staff (31 at the time of the ET3) [**25**]. All, a large number of individuals in total, could potentially have been effected by the behaviour which concerned the Claimant and which she disclosed. The matters disclosed concerned the Respondent's senior management and raised more than merely one potential isolated small problem but an ongoing situation.

132. The Tribunal also notes that Mr Benson considered the disclosures of sufficiently serious concern to launch an independent HR investigation.

133. The Tribunal also considered whether the Claimant reasonably believed that the disclosures tended to show any of the s43B(1) factors.

134. The Tribunal was satisfied that, for the reasons set out above, the Claimant reasonably believed that the information she provided tended to show either that a criminal offence had been or was being, or was likely to be committed and similarly that there had been, was being, or was likely to be a failure to comply legal obligations and that health and safety of an individual had been, was being, or was likely to be endangered.

135. Cocaine is a controlled drug. Drug offering, drug taking and stealing are all illegal acts. Smoking in breach of fire regulations is also potentially illegal. All three disclosures therefore concerned potentially criminal matters.

136. The Claimant identified a breach of a legal obligation (the licence agreement) regarding smoking. Although she did not specifically state what other legal obligations were not being, or had not been complied with, the disclosures she made so obviously amounted, or could have amounted to, breaches of legal obligations not merely regarding licensing but also in respect of employment contracts and health and safety rules that the Tribunal considered that she was not required to spell out more precisely what legal obligations she says were being breached.

137. In terms health and safety, clearly endangering any individual, any breach of fire regulations or fire safety could potentially have that consequence. Similarly, the use or potential use of drugs on the premises and a drug acceptance culture might lead to either unacceptable sexual or violent behaviour under the influence of alcohol and/or drugs. There was also a risk to the health and safety of the individual staff members individuals concerned. The Tribunal also noted the Claimant's unchallenged evidence of individual staff members carrying kegs up 6 flights of stairs, which raises a potentially serious risk to them if they are intoxicated by alcohol or drugs or encounter others who are during the task.

138. For the reasons set out above, there was an objective basis for the Claimant's belief and in all the circumstances it was reasonable for her to have reached the conclusions that she did about what the information she disclosed tended to show.

139. All the disclosures set out above were therefore qualifying disclosures.

140. All of these disclosures were made to the Claimant's employer, the Respondent. Therefore, they were also protected disclosures.

Protected Disclosure Detriment

141. The Tribunal considered the alleged detriments listed at paragraph 3(1) to 3(8) of the Agreed List of Issues.

142. For the reasons set out in the factual findings, the Tribunal accepted that all the alleged detriments in fact occurred.

143. Further, having considered the Claimant's evidence of the impact of the alleged detriments upon her, viewing these actions from her perspective, the Tribunal was satisfied that all of the matters listed at paragraph 3(1) to 3(8) of the Agreed List of Issues amounted to detriments to the Claimant. Many of the alleged detriments created a very unpleasant environment for the Claimant and had a significant impact on her mental health. Some also had real world consequences, for example not being rostered onto shifts and being unable to challenge her dismissal.

144. The Tribunal also considered whether the Claimant was subjected to the detriments because she had made the disclosures to Preston Benson and Dee Stewart, noting that the Respondent bore the burden of showing that they were not.

145. The Tribunal is satisfied that a material reason for the first detriment (the Claimant being ignored and excluded from conversations, group chats and messages) was that the Claimant made the protected disclosures. The behaviour started fairly contemporaneously with the disclosures. Dee Stewart and Maysoon Matthysen showed clear animosity towards the Claimant in their evidence and the Respondent's evidence referred to unfounded rumours being spread by the Claimant and it was the Respondent's case the Claimant was responsible for disquiet amongst staff as a result of things she had said. For the reasons set out above, Dee Stewart, Anisa Morgan Howell, James Davies and Maysoon Matthysen were all aware to a greater or lesser extent of the claimant's disclosures and that they had resulted in the HR investigation. Maysoon Matthysen's evidence referred to difficulties between herself and Yayha Amal, as a result of matters said by the Claimant which on her evidence were unrelated to the disclosures but the Tribunal was not satisfied that her explanation as to the reason for her treatment given the weak and implausible explanation given and the timing (the issue described took place in late 2022, far earlier than Maysoon Matthysen began ignoring the Claimant.

146. The Tribunal was not satisfied that the disclosures were a contributing factor to the second detriment (Anisa Morgan Howell telling Dee Stewart that the Claimant had resigned). Rather, the Tribunal was satisfied that the reason for this was Anisha Morgan Howell's concerns about staffing levels and the need to ensure scheduling of a duty manager at all times, as set out in her statement, and the risk that the Claimant may not always be available for that purpose. Although Ms Morgan Howell did appear to give evidence and be cross-examined the Tribunal notes that at the time of the conversation she had recently become the Claimant's line manager, that there was a requirement to have a duty manager on shift at all times as a consequence of the licence obligations and that neither Ms Morgan Howell's witness statement nor contemporaneous messages to the Claimant even after she became aware of disclosures made by Claimant showed any real animosity or hostility towards her although there may have been a slight change/cooling in their relationship.

147. In relation to detriment 3 (the Claimant being taken off the rota), the Tribunal was satisfied that this was because of the Claimant's protected disclosures. Dee Stewart's animosity towards the Claimant was clear, and it was equally clear that she considered that it was easier if the Claimant was not around. For the reasons set out above, the Tribunal did not accept Dee Stewart's evidence that the

Claimant was not removed from the rota and she gave no explanation as to her reasons for excluding the Claimant from the rota after 28th January 2023 Dee Stewart did give clear evidence that swapping shifts was commonplace for all staff and indeed that she entirely expected it and that would therefore not form a reason for keeping the Claimant off the rota. There is no supporting evidence that the Claimant was not coming in regularly for shifts or was missing shifts she was scheduled for. There were only three occasions disclosed by the evidence of the Claimant not attending work when she was expected to. The first related to the meeting on 25th January 2023 when the HR consultants came in to conduct their investigation. Whilst it was universally accepted that the Claimant did not attend that meeting the Tribunal heard evidence that she was not on shift those days and no-one has sought to suggest that she was. The Claimant gave reasons for not attending and sought to attend remotely in light of those reasons. The second occasion was as a result of a last-minute strike by her daughter's school teachers which meant that her daughter was unable to go to school and the Claimant could not attend work until she was able to secure alternative childcare during her shift. There was contemporaneous evidence of her notifying the staff she would be a matter of 2 hours late. The Tribunal was not satisfied these 2 isolated events were evidence that the Claimant was not attending shifts on a regular basis and was satisfied that these were each unusual one-off events any employer may have had to deal with respect to any employee. The third occasion was when the Claimant was signed off work sick as a result of the impact of the Respondent's acts and post-dates her removal from the rota.

148. It was also not clear that the Claimant was resigning. Her message to Ms Morgan Howell [**118**] did not say that she is resigning and are informal and more suggestive of her letting off steam. Further, Ms Morgan-Howell confirmed that this was not the only occasion that the Claimant had suggested that she would not continue working for the Respondent, but she had not formally resigned at any time. Additionally, the subsequent messages between them on WhatsApp later the same day made clear that the Claimant was intending to attend work future shifts. The Tribunal did not consider that in this context the message stating ""*I can't work like this so I won't be returning*" could realistically have been taken as notice of resignation. As there was clear evidence that at least 3 of her shifts were cancelled [130] and given the timing of those cancellations and the lack of any other plausible explanation from the Respondent for the cancellations, the Tribunal was satisfied that the Respondent had failed to show on balance of probabilities any other viable reason for cancelling those shifts other than making protected disclosure and was satisfied that the cancellations related to the protected disclosures the Claimant made.

149. The Tribunal was not satisfied that the fourth detriment (that the Claimant was not given the opportunity to apply for the role given to James Davies) was related to the protected disclosures she made. The Tribunal is satisfied on the evidence that the job was not advertised at all and was a direct hire so that no-one (including the Claimant but not limited to her) had the opportunity to apply for it. Even James Davies did not apply for the role.

150. In relation to the fifth detriment (Ms Morgan Howell telling the Claimant she was required to work when sick), the Tribunal notes and repeats those matters considered in relation to detriment 2. For the reasons set out above, the Tribunal

was satisfied that Ms Morgan Howell's comments, whilst inappropriate (which Ms Morgan Howell accepted), were not linked to the protected disclosure but were a reaction in the moment prompted by the stress of needing to find cover and the realisation that she might be required to work to provide cover.

151. The Tribunal was influenced by the evidence of Ms Mori in reaching its conclusion that the reason for detriment 6 (not being told the reason for her dismissal) was as a result of the protected disclosures. It is clear that Ms Mori was told the reason for the Claimant's dismissal by Mr Benson because when pressed she indicated that Mr Benson had "had enough" of the Claimant and she gave that as the reason for dismissal. The Tribunal notes that the Claimant did not have 2 complete years' service and that any reason other than any of the impermissible reasons set out int the ERA would have been unlikely to lead to adverse consequences for the Respondent. The Tribunal further noted that standard practice is to give reasons for dismissal and that although there is no legal obligation to do so unless a formal request for the same is made by the employee pursuant to s.92 ERA, it is usually considered important to include reasons so as to exclude impermissible reasons. Ms Mori is, on her account, an HR specialist, employed by an HR specialist consultancy. She attributed the dismissal to "business reasons" on numerous occasions during her evidence but she was not an impressive witness, and her evidence went beyond that as set out above. Having considered all the evidence, the conclusion the Tribunal reached is that the Claimant was not provided with the reasons for her dismissal in a deliberate attempt to conceal the real reason for dismissal, because it was an impermissible reason, namely that she was dismissed because she had made the protected disclosures – see further below.

152. Ms Mori gave clear evidence that it was her decision not to allow the Claimant a right of appeal against her dismissal (the seventh detriment) and that she did not need to refer the decision not to include or to include a right of appeal to Mr Benson. She gave inconsistent reasons for not offering a right of appeal. In her witness statement she stated it was due to the Claimant's length of service (only 7 months) but in her e-mail to the Claimant [**104**] she stated that it was not necessary because the dismissal was purely a business decision. In her oral evidence, when questioned about her reasons for not affording a right of appeal she initially suggested that she was following the handbook of the Respondent in the processes she adopted. She then accepted that there was no such handbook and asserted that she was following ACAS procedures. It is however contrary to ACAS procedures not to offer right of appeal. The Tribunal was satisfied that reason for the refusal was to prevent further enquiry into the reasons for the dismissal and to conceal those reasons. Ms Mori's evidence was so inconsistent and implausible that the Tribunal was unable to conclude that there was any reason for refusing the right of appeal other than one that related to the protected disclosures.

153. The Tribunal was satisfied that detriment 8 (the Respondent's failure to deal with the Claimant's concerns expressed in an e-mail to Jess Lambourne on 30th January 2023) was not related to her protected disclosures. E-mail correspondence immediately after 30th January 2023 [**145-6**] indicates that there was an immediate response to the Claimant's e-mail enquiring as to the last shift that she had worked and whether she had any future scheduled shifts. In response the Claimant confirmed on 31st January 2023 that she had in fact been assigned some shifts going forward. The Tribunal was satisfied that the immediate pressing

matter of the Claimant not being allocated shifts had been dealt with (not necessarily by HR but it had been dealt with). Bespoke HR were contracted to undertake only 2 hours per calendar month for the Respondent and further work outside those 2 hours was subject to separate agreement and additional fees, which was likely to require estimation and approval and a certain time taken to go through that process. The Claimant was dismissed on 16th February 2023 some 17 days after sending the initial e-mail. The Tribunal was satisfied that this was the reason why there was no further investigation into her complaints after 16th February 2023 and that the need to arrange authorisation for additional work was the most likely reason for the failure to progress the Claimant's concerns further between 31st January 2023 and 16th February 2023 once the immediate concern about allocation of shifts to the Claimant had been allayed. There was no direct nexus between the failure to investigate and the protected disclosures and the Tribunal considered it to be too remote to find that as the dismissal itself was connected to the protected disclosure that the protected disclosures were the reason for not investigating further.

154. Accordingly, the claim for protected disclosure detriment is proved in relation to detriments 1, 3, 6 and 7 succeeds. The claim for protected disclosure detriment is not proved in relation to detriments 2, 4, 5 and 8 must fail.

Automatic Unfair Dismissal

155. There is no dispute between parties that the Claimant was dismissed, so the only issue the Tribunal had to consider was what the reason or principal reason for the dismissal was.

156. The Tribunal considered the reason for the dismissal, having regard to the legal tests set out above and its discussions and conclusions. For the reasons set out above, the Tribunal concluded that protected disclosures had taken place.

157. The Tribunal heard oral evidence from Mr Benson, the undisputed decision maker in relation to the dismissal, and also from Ms Mori who was involved in communicating the decision to the Claimant, as to the reason for the dismissal. Although Mr Benson suggested that he had taken advice regarding the dismissal, it was impossible for the Tribunal to ascertain what advice he was given or by whom. Both HR professionals who gave evidence had limited recollection outside of the witness statements that they had provided and there was virtually no documentation regarding any aspect of the communications between Mr Benson and the HR consultants.

158. Mr Benson gave evidence that the Claimant was a pain in his side for a number of different reasons. He was clearly unhappy that she had triggered an investigation which required him to involve Bespoke HR consultancy and then failed to attend the arranged meeting on 25th January 2023 to address the issues she raised. It was understandable that he was unhappy about this and perhaps thereafter he was not well-disposed towards her. However, the Tribunal did not consider that this was sufficient for him to dismiss her and no "business reasons" were explained that would justify her dismissal. Although it was suggested there had been a reorganization and a change to the Claimant's role, for the reasons set out above,

the job being advertised at the time of the Claimant's dismissal was essentially equivalent to the Claimant's role and the Tribunal could find no material difference to justify her dismissal and replacement. Further, although it had been suggested that the Claimant spread unfounded rumours and promoted disharmony, for the reasons set out above, the Tribunal did not accept the evidence in relation to this.

159. The Tribunal found that the underlying and principle reason for Mr Benson's decision to dismiss the Claimant were the protected disclosures that she had made which, if properly acted upon, would require him to undertake a substantial reappraisal of the management and operational procedures at the Peckham Levels. The Claimant had in effect rocked the boat at a stressful time. The Tribunal noted amongst other things that, the timing of these events was in the tail end of the COVID 19 pandemic and Mr Benson had stressed the difficulty in running a hospitality venue such as Peckham Levels during the pandemic – something the Tribunal accepted as common knowledge, The Tribunal also heard evidence that this particular venue had difficulties, it hadn't been turned round and sold on as the sister location at Hackney had been, and it was the events aspect of the business which made the majority of the money. The Tribunal considered that it was for that reason that smoking on the terraces was being permitted to maximise events revenue and the Tribunal noted that Mr Benson did not clearly say in his written or oral evidence that there was in fact no problem with the licence or that the Claimant had clearly been told that there was not a problem with the licence. The Tribunal concluded that the fact that during the HR investigation question were posed regarding smoking suggested that Mr Benson was aware that this was not something that should be ignored as being irrelevant.

160. The Tribunal noted that there was some evidence that the issues of staff drinking and drug taking and/or drug culture did appear to have been addressed subsequent to the Claimant's dismissal. The Tribunal was nevertheless satisfied that the Claimant raising and pursuing these and the other issues represented an unwelcome problem to Mr Benson and that the easiest way for him to remove that problem was to dismiss the Claimant and that is what he did.

161. The Tribunal was unanimously satisfied on the balance of probabilities that even if the protected disclosures were not the only reason for the Claimant's dismissal, they were the primary reason why the Claimant was dismissed. Accordingly, the Claimant's protected disclosures were the reason for the dismissal and the claim for automatic unfair dismissal is well founded and succeeds.

Remedy

Protected Disclosure Detriment

162. As set out above, the Tribunal found 4 separate detriments spanning a 1 month period and found that the impact of those detriments on the Claimant were cumulative. The earliest of the detriments was ignoring and sidelining of the Claimant and the Tribunal did not share the Respondent's view that this was not serious and would or should not have had a significant effect on the Claimant. The Tribunal noted that the impact that such exclusion can have on an individual is well-documented to be significant and such conduct is not appropriate in a work place. Further, that on the Claimant's evidence, which the Tribunal accepted, the

impact of this conduct on her was significant. Her history of mental health difficulties made her more vulnerable to such conduct and it may have had a greater impact than perhaps the same kind of treatment would have had on a less vulnerable individual. However, the Respondent must take the Claimant as it finds her and her pre-existing vulnerability does not justify reducing her compensation.

163. Further, the Claimant's evidence, supported by contemporaneous documents, shows that whilst she was not in a particularly good place mentally in 2022 she did not require antidepressants and following her 2022 course of CBT [**271**] it is abundantly clear she was in a significantly better (good) place mentally prior to starting her employment with the Respondent.

164. The impact of the detriments she was subjected to began before her dismissal and resulted in her requiring 2 weeks off sick from the beginning of February 2023. The Claimant's evidence as to the substantial impact upon her of the events at Peckham levels was extremely compelling. Having not previously required antidepressants despite being severely impacted by both anxiety and depression in 2022, she required antidepressants in May 2023 despite not wanting (on her oral evidence) to take them and having first tried a further course of CBT which started not long after her dismissal. The Tribunal was satisfied that the impact, although having lessened over time and with treatment, persisted to date.

165. The Tribunal concluded that the impact of the detriments the Claimant was subjected to as a result of her protected disclosures was both protracted and multi-factorial. The detriments were neither a single isolated incident nor a very lengthy series of acts of detriment and they weren't on the basis of either sex or race. Taking all relevant circumstances into consideration, the Tribunal concluded that appropriate Vento band was the mid- band and considered that the appropriate award for injury to feelings was £25,000 before any uplift.

No contract of employment

166. It was not disputed that the Claimant was given no contract of employment. The Tribunal was satisfied, for the reasons set out above, that this was an isolated oversight on the part of the Respondent, not deliberate, widespread or general practice. The Claimant gave no evidence that she had requested a contract and was refused. Taking all matters into consideration the Tribunal considered that the lower award of 2 weeks' pay was appropriate in this case.

167. The parties agreed the amount of £457.61 as the Claimant's net pay and this equates to an award of £915.22.

Unfair Dismissal: basic award

168. The parties were agreed that, as the Claimant had less than 1 years complete service, no basic award was payable. The Tribunal, applying the calculation set out in s.119 ERA and being satisfied that s.120 ERA was not applicable, concurred.

Unfair Dismissal: Compensatory loss award

169. The Tribunal took into account the factors referred to in paragraph 16 of ***Copper Contracting Ltd -v- Lyndsey [2015] 10 WL UK 609*** in relation to mitigation of loss and noted that the Respondent bears the burden of proving failure to mitigate and there is no corresponding obligation on the Claimant to prove that she has mitigated her loss. Further, that there is a difference between acting reasonably and not acting unreasonably.

170. The Tribunal was satisfied that the Claimant's confidence was knocked by the events at Peckham Levels, the detriments she was subjected to and ultimately her dismissal and that this impacted on whether it was reasonable for her to apply for jobs of the same kind to the one that she had at Peckham levels.

171. The Tribunal also took account of the impact on the Claimant's mental health, that she was prescribed anti-depressants and required mental health treatments and noted that she was signed off sick for a month on 15th May 2023 (a period of time included in the period for which a compensatory award was claimed) as a result of the mental health injuries she suffered from the Respondent's conduct. Also, that she attended therapy. The Tribunal accepted the Claimant's oral evidence that her GP wanted to sign her off work for a considerably longer period, but she did not consider that would be either a helpful thing for her.

172. The Respondent provided no evidence whatsoever that there were any jobs available for the Claimant to apply for that were appropriate to her circumstances with her mental health difficulties and taking all relevant factors into account. Indeed, they produced no evidence of the availability of alternative jobs at all.

173. The Tribunal was not prepared to simply assume that there were a wealth of suitable jobs that the Claimant was both suitable for and could have applied for in the state of mind that she was in the in the aftermath of her dismissal.

174. By contrast the Claimant provided evidence of job applications, accepting a job, and also retraining as set out above.

175. Taking into account all the evidence the Tribunal was satisfied that the Claimant had made substantial efforts to apply for and obtain alternative employment, albeit not in an equivalent area. Also, that her mental health precluded her from undertaking equivalent work to the job she had had at Peckham Levels during 2023 and early 2024 and that it was reasonable for her to retrain. The Tribunal was not satisfied that the Claimant had failed to mitigate her loss.

176. The Tribunal adopted the Claimant's calculations for past loss (as set out in schedule B of her Schedule of Loss) up to today's date. Accordingly, on the basis of 66 weeks' worth of net earnings at £457.61 totalling £30,202 plus pension contributions at 15 months at £65.01 per month totalling £975.00 the total award made for past losses was £31,777.

177. In respect of future losses, there was very little evidence before the Tribunal as to when the Claimant might be expected to achieve equivalent earnings to her employment with the Respondent. The Claimant sought future compensation to

the end of August 2024. The Tribunal noted that the impact on the Claimant was continuing and found the evidence compelling that she was still suffering to some degree to date and would take some time after hearing today to be at position to earn at the same level as she was before.

178. The Tribunal noted that the conclusion of these proceedings would probably assist to reduce the ongoing impact. The Tribunal also took into account that she had now commenced work, with first choice albeit on a zero hours contract, and that the Claimant is progressing with her football qualifications and may also be in position to take other alternative or additional jobs now that these tribunal proceedings have concluded. The Tribunal considered that taking all factors into account, it was reasonable to conclude that the Claimant would continue to suffer some limited ongoing impact on her earning potential for a short period and the appropriate assessment of her future losses if to award a further 4 weeks compensation from today's date.

179. The Tribunal therefore awarded further compensation of 4 weeks at £457.61 loss of earning (£1,830.44) plus1 month of pension contributions (£65.01) giving a total future loss of £1,895.45.

Damages Adjustments

180. The Tribunal considered whether the Claimant's award should be uplifted or reduced.

181. The Tribunal did not consider, for the reasons set out above, that there had been any lack of good faith in respect of the protected disclosures or any blameworthy contributory conduct and made no deductions for either.

182. The Respondent contended for a reduction in the Claimant's damages on the basis of the Claimant's absence from work for 2 weeks at a difficult time for the business. The Tribunal had no difficulty in concluding that it would bot be appropriate to consider that the Claimant had caused or contributed to her dismissal as a result of her sickness absence that was supported by a fit note. The Tribunal also noted that the Respondent had also sought to suggest that the Claimant's behaviour towards her colleagues had been a secondary reason for her dismissal but having found that the primary reason was the protected disclosures did not consider it necessary to make detailed findings regarding her behaviour as alleged as the Tribunal did not consider any behaviour outside the protected disclosures had made a material contribution to the dismissal.

183. The Tribunal noted however that both the sickness absence and behaviour contended for by the Respondent as a cause or contribution to the dismissal should have engaged the provisions of the ACAS Code of Practice.

184. The Tribunal noted the Respondent's conduct leading to and after the Claimant's dismissal as set out in paragraph 108, 109 and 111 above and unhesitatingly concluded that there had been virtually no compliance with the ACAS Code of Practice. The Claimant was not told what was going on in advance of the termination meeting, was not warned that she might be dismissed, was not given any opportunity to have anyone present at meeting where she was dismissed, was not told what case was being brought against her or given an opportunity to

address then and was given no reason why dismissal was being considered she was merely dispensed with. She was then given no reason for her dismissal and was not afforded the right of appeal even when she requested it.

185. The Tribunal considered that lack of transparency in the process and the lack of an appeal to be highly lamentable and was further concerned that the Respondent's actions lacked consistency. Although the Claimant lost her job as a result of disclosures made, there did not appear to have been any disciplinary process, sanction imposed, or termination in respect of Maysoon Matthysen who made complaints about the Claimant, or in respect of Dee Stewart who also made various comments about the Claimant and on the Claimant's information was potentially involved in drug taking on the premises, or against James Davies who was also involved in drug taking.

186. The Tribunal took into consideration that the Respondent is a small business with a small number of employees, no internal HR department and only limited contact with external HR services. Nevertheless, there was an abject failure to follow the ACAS Code, and the primary witness from Bespoke HR, Ms Mori, had clearly identified that the Code was relevant. Taking all factors into consideration the Tribunal assessed the failures to merit a 15% uplift on both the compensatory and injury to feelings awards.

187. It was agreed between the parties that following her dismissal the Respondent had paid the Claimant £1,895.45 in lieu of 4 weeks' notice. Also, that the Claimant had earnt £516.00 in alternative employment to the date of the hearing. The claimant had to give credit for these sums, which were deducted prior to the application of the uplift at paragraph 186 above.

Interest & grossing up

188. No interest or grossing up was claimed or awarded.

Benefit Deductions

189. The Claimant received state benefits during the period covered by her compensation award as set out on her Schedule of Loss. This will be subject to recoupment pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996 and is ultimately a matter for the DWP.

190. The relevant period is the past period covered by the compensation claim and the prescribed element was calculated using the total past compensation award (without the uplift) of £31,177 less the £1,895.45 pay in lieu of notice, less the Claimant's earnings of £516.00 during the relevant period with that total (£28,766) then uplifted by 15% to give the total prescribed element of £33,080.90.

CONCLUSION

191. For the reasons set out above, the claims for automatic unfair dismissal and protected disclosure detriment are well-founded and succeed.

192. The judgment dated 7th June 2024 sets out the full compensation award and the relevant period and prescribed element for recoupment purposes.

Employment Judge L Clarke
21st September 2024