



EMPLOYMENT TRIBUNALS

Claimant Ms H Taylor Davies
Respondent Creative Hospitality Payroll Ltd
Heard at: Swansea
On: 18 March 2019
Before: Employment Judge S Davies

Representation
Claimant: in-person
Respondent: Mr D Seale, solicitor

RESERVED JUDGMENT

It is the judgment of the Employment Judge sitting alone that:

- a. the claim of unpaid bonus is upheld in the sum of £2500;
- b. the claim of unfair dismissal is upheld;
- c. compensation for unfair dismissal is subject to a '**Polkey**' deduction of 75%;
- d. compensation for unfair dismissal is subject to a deduction for contribution of 25%; and
- e. compensation is subject to an uplift of 25% for unreasonable failure to comply with the ACAS Code.

REASONS

Claims

1. The Claimant brings claims of unfair dismissal and for non-payment of bonus.

Issues

2. A draft list of issues was provided by the Respondent and discussed at the start of the hearing. The issues were clarified as follows:
 - What was the reason for dismissal; was it a potentially fair reason?
 - Did the Respondent follow a fair procedure, in particular were there breaches of the ACAS Code (paragraphs 6, 9, 11, 22 & 27)?
 - Was the decision to dismiss the Claimant predetermined? (in particular because of the CEO's presentation: 'Hugs not drugs')
 - Was the sanction of dismissal outside the range of reasonable responses?
 - Is a **Polkey** deduction appropriate?
 - Did the Claimant contribute to her dismissal?
 - Is the Claimant entitled to receive bonus payment?

Hearing

3. I heard evidence from the Claimant and on behalf of the Respondent from Mr Bruno Nunes, chief executive officer and Mrs Alexis Nunes, head of HR. Mr and Mrs Nunes are a married couple and Mrs Nunes is pregnant. Breaks in the proceedings were permitted, as requested, to accommodate Mrs Nunes, who felt unwell due to her pregnancy.
4. The Claimant had not received a copy of the finalised bundle, of 149 pages, in advance of the hearing. Mr Searle confirmed that his office had posted a copy to the Claimant, but it had not arrived. In light of this issue, the hearing was adjourned for 30 minutes for the Claimant to familiarise herself with the structure of the bundle. After the adjournment the Claimant confirmed that she was able to continue with the hearing.
5. References in this judgment in square brackets are to page numbers in the bundle.
6. Due to the nature of the allegations made by the Respondent, I gave the Claimant the appropriate warning against self-incrimination prior to her giving evidence.

Background facts

7. The Respondent business includes running nightclubs in Swansea and Cardiff. The Claimant was employed between 25 January 2016 and 26 June 2018, initially as a bartender, at Peppermint and then was promoted to assistant manager of Bambu Beach Bar in Swansea (Bambu). The Claimant held the assistant manager role for approximately 12 months and had no disciplinary matters on her employment record.
8. The Respondent employs approximately 180 staff across its various sites. The head office team employs 12 – 13 staff, including 1.5 in HR.

Contract and policy documents

9. The Claimant was issued with a contract of employment [unsigned copy at 100-101]. The contract states, at paragraph 8, that the Claimant agrees to the company's policies and procedures [101].
10. The Respondents disciplinary and grievance policy [117-126] is internally contradictory and therefore unclear on whether it has contractual effect. At [120] the policy states "the disciplinary and grievance policy does not form part of your contract of employment' but at [123] states "the disciplinary rules and procedures which form part of your contract of employment incorporate the right to lodge an appeal in respect of any disciplinary action'.
11. The disciplinary policy provides:
 - 'the employee has the right to have reasonable opportunity prior to disciplinary hearing, to consider their response to the information provided on the allegation' [117]
 - 'the employer will take all reasonable steps to ensure that confidentiality is maintained throughout the process' [118]
 - 'Disciplinary authority – where reasonable all disciplinary meetings will be held by a general or assistant manager. However gross misconduct hearings will be held by the general manager. Appeals will be heard by the HR manager or company director' [120]
 - Disciplinary examples include: stage 3 final written warning: '3.7 taking part in activities which result in adverse publicity to ourselves or which cause us to lose faith in your integrity' and at stage 4 dismissal: '4.3 possession, supply or use of illegal drugs.' [122]
 - 'the disciplinary appeal procedure will normally be conducted by the HR manager or company director who was not previously connected with the disciplinary process so that an independent decision into the severity and appropriateness of the disciplinary action can be made' [123]
12. The Respondent's social media policy [113-116] provides that staff should be aware that use of social media websites may be monitored (para 8.1) and gives examples of potential gross misconduct which include "statement which is likely to create any liability whether criminal or civil and whether to you or us" (para 8.4 e) [115]
13. The Respondent's health and safety and licensing policy [102-108] stipulates the objectives of the Licensing Act 2003, including the 'prevention of crime and disorder' and 'public safety' [105].

14. The Claimant was potentially eligible for a bonus based on net profit; the terms of the bonus are at [109-110].

All staff meeting and investigation

15. On or around 19 June 2018, the Respondent became aware of the existence of a Facebook messenger group chat called 'Bamboosing' consisting of staff and ex-staff of Bambu. The Respondent became concerned about the content of the group chat which appeared to make open reference to illegal drug taking.

16. The Respondent convened an all staff meeting on 25 June 2018. During the course of this meeting, the Claimant and three other managers were removed to a different part of the building to meet with Mr and Mrs Nunes for the purpose of investigating alleged misconduct. The Claimant and her colleagues had no prior notice of the investigation meetings and were removed from the all staff meeting in full view of their colleagues.

17. Both Mr and Mrs Nunes were present at the investigation meeting with the Claimant. No notes of the investigation meeting were made. Mr Nunes asked the Claimant whether she was part of the Facebook messenger group chat, which she confirmed. Mr Nunes asked other questions about the Claimant's involvement, the content of the chat and the Claimant's access to it, he also asked questions about Claimant's personal use of drugs. The respondent submitted that Mr Nunes only posed 2 questions then left the meeting. The Tribunal prefers the Claimant's account (unchallenged evidence at paragraph 4 of the Claimant's witness statement) and finds on the balance of probability that Mr Nunes asked more than 2 questions; his strength of feeling on the matter was evident and the Tribunal concludes that the Claimant's version of events is more probable, particularly in light of the content of the minutes of the appeal meeting, which reflect questions asked at investigation [eg 80].

18. The Claimant agreed to disclose the content of the group chat and did so by allowing Mrs Nunes to film the content from her phone while she held it and scrolled through. The chat included messages which spanned a period of a year and half and included the Claimant saying the following (reference to 'him' / 'Andy' is to Mr Andrew Kerr, who had taken over as the new general manager of Bambu [39]):

- *sorry guys but for confidentiality reasons it's best I remove people who no longer work for us from this group and would appreciate it if you didn't let them back in*

(after the Claimant removed group members from the chat on 9 May 2018)

- *he's not coming to sin but ye, please don't bring up drugs lol*
- *just don't talk or do drugs around him*
- *warning Andy has a zero drugs policy*

- *please refrain from talking about narcotics around him*

In an undated earlier part of the chat the Claimant says [40-41]:

- *Drugs were sniffed let's move on*
- *Gonna rack a line up now*

19. The Claimant's position is that these comments were 'banter' and that she was not a drug user.

20. In other parts of the group chat there is discussion about a doorman selling drugs [42-43] but the Claimant does not participate in this part of the chat; her evidence was that she had not seen it, as she had muted the chat (so that she was not alerted constantly to new messages).

21. At the conclusion of the investigation meeting Mrs Nunes presented the Claimant with letter of suspension "because of participation in the sale and usage of drugs" [47] and a letter inviting her to a disciplinary meeting the next day at 2pm [46]. The letter inviting the Claimant to disciplinary meeting was dated 24 June 2018 and incorrectly stipulated the disciplinary hearing would be held on Tuesday 25 June (the correct date being Tuesday 26 June). The letter indicated that disciplinary action would be considered, which could include dismissal, with regard to "possession, supply and use of illegal drugs". The letter indicated that it enclosed photographic evidence of messages between staff, but Mrs Nunes accepted that the letter was incorrect, and no copies of evidence were included with the letter.

22. Mrs Nunes' evidence to the Tribunal was that no one else was available to deal with the investigation meeting that day, as her HR colleague, Rosalia Harley, was absent on leave. This evidence was not contained in Mrs Nunes' witness statement.

Presentation by CEO and Mr Kerr

23. After the investigation meeting the Claimant was escorted from the premises, having to return first to the all staff meeting to collect her belongings. Subsequently the Claimant learned that during her absence, that Mr Nunes and Mr Kerr conducted a presentation to the remaining staff entitled "hugs not drugs" [48-62]. This presentation included screenshots from the group chat of which she was a member. The screenshots had been partially anonymised with the use of the emojis to cover photographs of participants. However, the names of group chat participants were not obscured; the Claimant's nickname in the group was "tits". It was the Claimant's unchallenged evidence that colleagues in the all staff meeting would have known that this was her nickname and so would have linked her to the screenshots in the presentation.

Disciplinary

24. The disciplinary meeting on 26 June 2018 was chaired by Mrs Nunes who was accompanied by Mr Kerr as notetaker [64-66]. Due to the short notice with which the meeting was arranged, the Claimant was unable to arrange to bring a companion with her. The Claimant's explanation for her participation in the group chat was that she had engaged in "banter" but that she had not been involved herself in the possession, supply or use of drugs. The Claimant admitted she had been naive, and the chat should have been 'deleted a long time ago'. The Claimant also accepted that she removed former staff from the group chat and said that she monitored the group to make sure that drugs were not being taken within Bambu.
25. The Claimant's unchallenged evidence was that the group chat was established by a former general manager, who was more senior to her. When that general manager left, she became the most senior participant in the group chat. The Tribunal accepts the Claimant's evidence that the group chat was originally set up a private messaging forum but she herself said that latterly she was changing it from 'banter' to a work group [65]. There was blurring of the boundaries between personal and work life because the members of the group chat were all staff or former staff of Bambu. A separate Facebook platform was used for purely work purposes; to deal with rotas and shift changes.
26. At the conclusion of the Claimant's disciplinary, Mrs Nunes met with the three other members of staff subject to disciplinary for being part of the group chat. After those 3 meetings, Mrs Nunes informed the Claimant that she was dismissed with immediate effect. Although Mrs Nunes asserts that this was her decision alone, the minutes of the meeting state "Bruno wants you to reflect and take into account your reputation, position and moving forward etc" [66] which suggests that Mr Nunes' wishes were reflected in the outcome.
27. As a result of losing her job with immediate effect, the Claimant was required to move out of her accommodation which was provided with her position. The Respondent permitted the Claimant two weeks to move out.
28. The Claimant was not provided with a dismissal letter by the Respondent and had to approach the Respondent to request an appeal, which she did by email of 18 July 2018 [70]. Mrs Nunes explained that there was an issue with the software the Respondent uses [71] and that once the Claimant was processed as a leaver she was not able to access her dismissal letter dated 4 July 2018 on the system [67]. The Tribunal accepts Mrs Nunes explanation for not providing a dismissal letter, however the Claimant was placed in the position of having to pursue her rights to an appeal rather than being informed of her rights as is incumbent on employers.
29. The reason for dismissal given in the original letter of 4 July 2019 is 'Possession, supply or use of illegal drugs'. The Respondent submitted during the Tribunal hearing that part of the reason for dismissal was the Claimant failing to report rumours that a doorman was selling drugs; this

reason is not reflected in the letter of dismissal (or the amended version provided after appeal).

Appeal

30. Once the Claimant contacted the Respondent, an appeal meeting was arranged with Mr Nunes on 23 July 2018, which the Claimant attended with her companion. The Respondent's notes were taken by Rosalia Harley [72- 86]. The meeting took place in the Respondent's 'Brewstone' venue and was held in a public area amongst customers.
31. The Claimant followed up with emailed questions on 24 July 2018, which Mr Nunes responded to [89-90].
32. Mr Nunes rejected the appeal but agreed that the reason for dismissal should be amended to "gross misconduct due to loss of integrity and breach of trust and confidence". The Claimant's dismissal letter was amended to reflect this reason for dismissal [69] and this was sent to the Claimant on 14 August 2018 [94]. The outcome of the appeal was confirmed on the same date [95].
33. The Claimant was aggrieved by what she asserts was the lack of confidentiality surrounding the disciplinary process, which she asserts has led to difficulties with her obtaining alternative work and damaged her reputation.

Bonus

34. The Respondent introduced a Net Profit (NP) Bonus in January 2018, which Mr Nunes communicated to his general managers [109-110]. The terms of this bonus were shown to the Claimant by her general manager, Mr Dean. Mr Nunes asserts that staffing difficulties in the Respondent's finance team led to them falling behind with work and no bonuses had been paid.
35. The Respondent asserts that the bonus is discretionary not contractual. Relevant terms of the bonus are as follows:

'T&Cs

- reviewed and paid monthly
- company reserves all rights. That includes suspension of all bonus if that is deemed appropriate
- ...
- The NP bonus is achieved if the site achieves NP above budget. The management team (GM and AMs) will share 25% of NP achieved above budget.
- Currently we have decided to leave the bonus uncapped
- we can only pay bonus when the site is above budget YTD
- bonus could be capped dependent on results from the people (staff survey), product (mystery customer) and place (site audit)
- manager must have worked in the site for the full bonus period...
- 100% compliance with all licensing requirements and H & S...

Decreases:

- No bonus if disciplinary action has been taken in the bonus period
- ...
- The CEO's decision is final'

(Tribunal's emphasis in underline)

36. The Claimant contacted the finance team to enquire as to the payment of bonus on/around 21 June 2018 [44-45]. The member of staff dealing with the enquiry was seconded from the Respondent's accountant and was assigned a company email address. In her response to the Claimant, she states "I am dealing with your bonus, but I can understand your frustration and how it's making you feel. I've done everything I can for the moment and it's gone over to Bruno just to confirm that he is happy with the calculations... I'm hoping everything will be finalised in the next day or two, so I'll give you another update by Friday"
37. The Claimant raised queries about payment of bonus with Mr Nunes in an email of 24 July 2018 [89]. Mr Nunes replied that "not a single person in the business has been paid any bonus this year as the Finance Department has been struggling with staffing issues and had fallen significantly behind on their work"
38. No payment of bonus has been made to the Claimant to date.

Law

Unfair Dismissal

39. Section 98(2)(b) Employment Rights Act 1996 (ERA) provides that "conduct" is a potentially fair reason for dismissal. The burden of proof is on the Respondent to show the reason for dismissal.
40. Section 98(4) ERA provides that where the employer has shown conduct, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
- depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - shall be determined in accordance with equity and the substantial merits of the case.
41. **BHS v Burchell [1978] IRLR 379** sets out the three stage test for fairness of a conduct dismissal:
- did the Respondent have genuine belief that the Claimant was guilty of misconduct at the time of dismissal? (Burden of proof is on the Respondent)

- was that belief based on reasonable grounds at the time of dismissal? (neutral burden of proof)
- at the time the Respondent formed that belief on those grounds, had it carried out as much investigation as was reasonable in the circumstances? (neutral burden of proof)

Band of Reasonable Responses

42. The Tribunal must consider whether or not the dismissal is a fair sanction to impose. The test is whether it was within the band of reasonable responses for the employer to treat the misconduct as a sufficient reason to dismiss *(Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)*. The Tribunal must not substitute its own view on the action taken.

Remedy

43. Contributory fault affects the basic and compensatory awards and is mandatory. s.123(6) ERA says:

“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.” (a similar provision applies to the basic award – s.122(2))

ACAS Code

44. Potential adjustment under s.207(2) TULRA:

“(2) If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that— (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.”

45. The purpose of the uplift is an incentive to follow the requisite procedures and it should not be disproportionate to the nature of the breach.

Bonus

46. Even where bonuses are truly discretionary in nature, the Respondent is required to exercise that discretion rationally and in good faith.

Conclusion

47. The Tribunal concludes that the reason for dismissal was ‘conduct’, which is a potentially fair reason. This was as a result of the content of the Claimant’s participation in the group chat, in circumstances where she was the most senior member of staff of a group consisting of work colleagues.

48. Although it is accepted that the group chat was primarily for private use, the lines with work were blurred due to all members working together, as indicated by the name of the group chat and the fact that work related matters (such as Mr Kerr's zero tolerance policy to drugs) were discussed. The Claimant was aware from the social media policy that usage of social media may be monitored; the Claimant's statements in the group chat potentially come within clause 8.4 e [115]. Potential involvement with drugs was a legitimate cause for concern with reference to the Respondent's licensing obligations.
49. Of the two versions given, the more accurate reflection of the reason for dismissal is described in the amended letter of dismissal, provided after the appeal [96]: 'Gross misconduct due to loss of integrity and breach of trust and confidence'. There was no evidence, from the Claimant's participation in the chat, that she was involved in the sale of drugs, and no positive evidence of her use or possession of the same. Even if the Claimant's explanation that her participation was 'banter' was accepted, the Respondent could legitimately conclude that her participation was such that it led to the amended reason for dismissal.
50. The Tribunal is persuaded that the Respondent had genuine belief in the Claimant's misconduct based on the content of the group chat. Only a limited investigation was necessary to obtain the content of the group chat and seek the Claimant's explanation.
51. Turning to whether the Respondent followed a fair procedure, the Tribunal takes into account the ACAS Code. The Respondent has failed to comply with the Code, in that Mr Nunes was involved in the investigation stage and appeal. Mrs Nunes was involved at the investigation stage and disciplinary. The procedure adopted was in breach of the Respondent's own disciplinary policy, which indicates that disciplinary hearings will be dealt with by general managers and the appeal stage by either HR or chief executive officer. Additionally, the Respondent's disciplinary policy indicates that the appeal will be dealt with by someone independent of the process; yet Mr Nunes had been involved from the very outset. Even if Ms Harley was absent on leave, there were sufficient members of staff in head office/general managers that a process in compliance with the ACAS code and the Respondent's own policy could have been adopted. Mr Kerr attended the disciplinary as notetaker, illustrating that there were other members of staff available. The Respondent had already delayed a number of days between discovering the group chat and taking disciplinary action; it did not explain coherently why it could not have delayed a short while longer to allow a fair process.
52. The Tribunal considers that the Claimant was not given sufficient time to prepare for the disciplinary meeting, which was held with only 24 hours' notice. It was submitted by the Respondent that the Claimant could have asked for more time. She did not do so. The Tribunal accepts this as an understandable reaction; her focus was on retaining job and her accommodation. The Respondent's position was that it wished to conclude the disciplinary as soon as possible. This evidence would be more persuasive, were it not for the fact that it was aware of the group chat for six days before taking any investigatory action and permitted the Claimant

to remain in post, working over the intervening weekend at the club. The Tribunal considers there was a breach of the ACAS code and the Respondent's own policy; the Claimant was given insufficient time to prepare in the circumstances.

53. The process adopted had no regard for confidentiality, including, as it did, the Claimant being called to investigation in the middle of an all staff meeting and then escorted from the premises. To compound matters the Respondent's presentation included excerpts from the group chat, from which the Claimant's contributions were identifiable. This was in breach of the Respondent's disciplinary process which provides that all reasonable steps will be taken to preserve confidentiality; the Tribunal concludes that they were not. Mr Nunes' desire to make an impactful presentation overrode the Respondent's obligation to treat disciplinary matters with suitable confidentiality.
54. The Claimant was not provided with the evidence upon which the Respondent relied prior to the disciplinary hearing. This is in breach of the ACAS code and the Respondent's policy; however, the Claimant was in possession of the entirety of the group chat on her mobile. In the circumstances the Tribunal does not consider this failing caused unfairness (subject to the Claimant not having sufficient time to prepare).
55. There was a lapse in process in that a dismissal letter was not sent to the Claimant notifying her of her right of appeal. However, the Tribunal accepts the Respondent's explanation for this failure (and notes the Respondent's confirmation that they have taken steps to ensure that this would not happen again). In light of the Claimant asserting her right to an appeal in the absence of the letter, the Tribunal does not consider that the failure to provide the letter, of itself, has caused unfairness in the process.
56. The appeal was not dealt with impartially; it was clear from Mr Nunes' evidence about giving the presentation, that no other outcome than dismissal was possible from the outset. The notes of the appeal hearing itself and his subsequent email indicate that a decision had been made prior to the appeal hearing. The location of the appeal hearing also breached the Respondent's obligations of confidentiality; it is not appropriate to hold such a confidential meeting publicly with customers around.
57. Turning to the question of predetermination, having reviewed the presentation given by Mr Nunes and Mr Kerr the Tribunal concludes that Mr Nunes had formed a view as to the Claimant's guilt prior to the decision to dismiss. Mr Nunes' position on the matter had crystallised at the stage of giving the presentation. Mr and Mrs Nunes discussed how matters should be dealt with; this is evident from the minutes of the disciplinary meeting [66] *'Bruno wants you to reflect and take into account your reputation, position and moving forward'*. The letter of invitation to disciplinary was pre-written and therefore took no account of the Claimant's explanation at investigation meeting; further it alleged 'supply' of drugs, for which there was no underlying evidence. The lack of distance of the decision makers led them to fail to fully weigh the Claimant's explanation/mitigation when considering outcome, which is reflected in the

original reason given for dismissal. The Tribunal finds that the decision making at disciplinary and appeal stage was predetermined and lacked the impartiality required of a fair process.

58. The Claimant submitted that the amended reason for dismissal falls within the examples given in the Respondent's policy suitable for the sanction of a final written warning [122], rather than dismissal. The policy needs to be read in context and the examples are preceded by "this is a list of examples of acts which could be covered under the various types of misconduct (these are examples only and not an exhaustive list)" [120]. The reason for dismissal [96] 'gross misconduct due to loss of integrity and breach of trust and confidence' is wider than the example relied on by the Claimant and specifically refers to gross misconduct and a breach of trust and confidence. The underlying reason for dismissal remained the same; participation in and content of the group chat. The Tribunal is satisfied that in the overall context the decision to dismiss cannot be considered outside the range of reasonable responses. In particular taking into account the Claimant's seniority and the Respondent's licensing requirements.

59. The public manner in which the disciplinary was dealt with was regrettable and contrary to the Respondent's policy. The Claimant presented cogent evidence of the impact that rumours surrounding her dismissal have had on her ability to obtain alternative work. However, this breach of confidence with regard to disciplinary process is not something that the tribunal can deal with as a claim in its own right.

60. For the reasons outlined above the claim of unfair dismissal is upheld.

'Polkey' deduction (chance of fair dismissal if fair process followed)

61. In order to give the Claimant sufficient time to prepare for the disciplinary hearing, the Tribunal concludes that the Claimant would have been employed for an additional two working days following her investigation and therefore is due payment of salary in full for Monday, 25 June 2018 (investigation meeting), Tuesday 26 June and Wednesday, 27 June 2018.

62. Had a fair process been invoked, with due impartiality at all stages, the Tribunal concludes there is a chance the Respondent would have fairly dismissed the Claimant. A fair process could lead to dismissal for the reason given at appeal by the Respondent, which is capable of being a fair reason. Having considered the evidence of the Respondent the Tribunal concludes there is a 75% chance that the Respondent would have dismissed, rather than imposing a lesser sanction. This figure reflects the matters outlined above by way of mitigation by the Claimant, in particular that the group was established originally by a more senior member of staff, whilst recognising the potentially serious consequences for the business of perceived tolerance by management towards drug taking.

Uplift for failure to follow ACAS Code

63. The Tribunal concludes there has been an unreasonable failure to follow the ACAS Code in circumstances where the Respondent's administrative and other resources were sufficient to ensure a fair process could have

been followed. In particular: the breach of paragraph 6 - that the investigation and disciplinary were not dealt with by different people; the failure to give the Claimant adequate time to prepare her case – paragraph 11; and that the appeal was not dealt with impartially by a manager who was not previously involved in the case – paragraph 27.

64. These are significant failings in the basics of a fair process. Bearing in mind its purpose, an uplift of 25% is appropriate.

Contribution

65. The Tribunal must consider whether the Claimant contributed to her dismissal by culpable or blameworthy conduct which contributed to dismissal. It must be just and equitable to make a deduction.

66. At no point did the Claimant's participation in the group chat indicate that she sold drugs. The Claimant's evidence was that her comments were made as a joke with work colleagues. Whilst accepting this evidence, it is important to note that the Claimant had become the most senior person within the group made up of work colleagues. The Claimant's own evidence was that she removed individuals from the group, so as to turn its focus into a work group. The Claimant also acknowledged that she had been naive, and the chat should have been deleted. These comments indicate that she had an appreciation that the content of the group chat was inappropriate, particularly so for junior members of staff.

67. The Tribunal concludes that the Claimant's conduct was culpable once she became the most senior member of staff in the group and attempted to control it. The comments which she referred to as 'banter' predated her being the most senior member of the group. It is relevant that the group chat was set up by a previous general manager who was more senior to the Claimant; that general manager was presumably aware of the content which included references and jokes about drug taking and his or her continued participation set the tone for what was acceptable within the group.

68. Consideration of the appropriate level of deduction may take into account the deduction already made under **Polkey**. The Tribunal considers that in the circumstances a 25% deduction is appropriate.

Bonus

69. The Respondent's net profit bonus scheme was introduced in January 2018 with the intention to motivate managers to drive sales, control margins and manage costs. It is also described as self-financing, hence "net profit".

70. The Claimant as an assistant manager was potentially eligible for bonus payments. The relevant term notes the obligation of the Respondent to pay managers where nightclub sites achieve net profit above budget as follows: "NP bonus is achieved if the site achieves NP above budget. The management team (GM and AM's) will share 25% of the NP achieved

above budget.” This term is expressed as an absolute; the managers will share 25%. The bonus is uncapped.

71. The Respondent did not submit evidence to the Tribunal to suggest that Bambu had not reached NP above budget whilst the Claimant was assistant manager. The reason for non-payment given by the Respondent had nothing to do with figures achieved, rather Mr Nunes told the Claimant it was due to staffing difficulties in the finance department.
72. Mr Nunes suggested calculation of bonus was subject to surveys, mystery customer and site audit results. No evidence of these factors, whilst the Claimant was assistant manager at Bambu, was submitted in evidence to the Tribunal.
73. There was no indication given to the Claimant in June 2018 that she was not entitled to bonus payment, rather the individual working in the finance team referred the matter of payment to Mr Nunes for approval. The content of the email [45] infers that the calculations for payment had been made. There is no suggestion in June 2018 that the Claimant is not eligible for payment.
74. The ‘T&Cs’ state that bonus would be ‘reviewed and paid monthly’; indicating a monthly bonus period. The Respondent submits that no bonus is payable due to the disciplinary action taken against the Claimant. The Tribunal accepts that proposition with regard to the bonus period when disciplinary action was taken (June 2018). There was no disciplinary action taken against the Claimant in the five months from January to May 2018.
75. Finally, the Respondent submitted that Mr Nunes’ decision as CEO was final on whether payment would be made [110] however such discretion must be exercised rationally and not perversely. In the absence of any evidence to suggest that net profit had not been achieved in the months from January to May 2018, the decision not to pay bonus has not been made with the necessary rationality and good faith.
76. The Tribunal upholds the Claimant’s claim for payment of bonus in the sum of £2500.
77. A remedy hearing will be listed in due course.

Employment Judge S Davies

Date 10 April 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....14 April 2019.....

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