EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
Mr. A. Pelicaric	**AND**	**Pubs of Distinction Ltd**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON: 22 & 23 August 2019**

EMPLOYMENT JUDGE Mason

Representation
For the Claimant: **Mr. G. Price-Rowlands, counsel**
For the Respondent: **Mr. J Bromige, counsel**

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claims of breach of contract and unlawful deduction from wages fail and are dismissed.

2. The Claimant's claim of unfair dismissal succeeds but he contributed to his dismissal; the Compensatory Award is reduced by 100% and the Basic Award is reduced by 25%. The Claimant is awarded the sum of £2,750.62.

3. The Respondent breached the Claimant's contract of employment by failing to pay monies in lieu of his full notice entitlement (5 weeks) and (by consent) is ordered to pay the Claimant £653.84 (gross) being one week's pay representing the balance of notice pay due to the Claimant.

The Remedy Hearing provisionally listed to be heard on 28 October 2019 is vacated.

REASONS

Background and procedure at the Hearing

1. In this case Mr. Pelicaric ("the Claimant") claims that he has been unfairly dismissed (constructively or otherwise) by the Respondent; that the Respondent breached an agreement in early 2018 that he would be made redundant and receive on termination a payment of £3,600; that he is owed a bonus of £4,000 which was agreed in 2016; and that he is owed one week's pay in respect of the balance of his notice period.

2. The Respondent denies that the Claimant was dismissed (constructively or otherwise); denies that a redundancy payment is owed; and denies that there was an agreement (in 2016 or otherwise) to pay him a bonus of £4,000. The Respondent accepts he was entitled to five weeks notice and was paid four weeks and is therefore owed one week's pay.

3. The Respondent provided a joint bundle of documents (pages 1-113).

4. Having agreed with the parties the issues (para. 7 below), I retired to read the witness statements and the agreed joint bundle. The witnesses all affirmed and adopted their respective witness statements as their evidence-in-chief and were cross-examined. English is not the first language of the Claimant and two of the witnesses; none asked for an interpreter and I explained to each of them that they should make me aware of any difficulties in understanding any questions put to them.

5. I heard from the Claimant and also from his witness, Mr. Piotr Goszczynski. On behalf of the Respondent I heard from Mr. Philip Strongman and Mr. Stan Stanchev.

6. Mr. Bromige provided a Skeleton Argument and I heard oral submissions from both representatives. I reserved my decision which I now give with reasons.

Issues

7. The issues as agreed with the parties at the outset are as follows:

8. Unfair Dismissal

8.1 Did the Claimant resign from his employment or was he dismissed? The Claimant's primary case is that he was constructively dismissed.

(i) What was the Claimant's effective date of termination?

(ii) What, if any, was the date that the Claimant resigned?

8.2 If the Claimant was dismissed did the Respondent have a potentially fair reason for the dismissal? The Respondent would rely on conduct and/or some other substantial reason as a fair reason.
8.3 Did the Respondent follow a fair and reasonable procedure in dismissing the Claimant?
8.4 If the Claimant resigned, did he do so in response to a repudiatory breach by the Respondent? The breach(es) relied upon by the Claimant are:
(i) Breach of a redundancy agreement on or around 5 January 2018;
(ii) The unreasonable treatment by Mr. Stanchev between March and 30 April 2018;
(iii) The Respondent's treatment of the Claimant between 30 April to 2 May 2018, namely not contacting him after he left on 30 April 2018 and culminating in the letter sent on 2 May 2018.
8.5 Did the Claimant contribute to his dismissal and/or would the Claimant have been dismissed for gross misconduct in any event?
(i) If so, what reduction (if any) would it be just and equitable for the Tribunal to make to the Claimant's basic and compensatory award?

9. Breach of Contract
9.1 Did the Respondent make a contractually binding redundancy offer to the Claimant between 2-5 January 2018?
9.2 Did the Claimant accept the contractually binding offer either orally and/or via text message on or around 5 January 2018?
9.3 What were the terms of the redundancy offer?
9.4 Did both parties agree for the Claimant not to be made redundant on 5 February 2018 and for his employment to continue?
9.5 If there has been a breach of contract, namely the redundancy agreement, what losses flow from that breach?
9.6 If the Claimant either resigned or was dismissed with notice, what is the correct notice pay for the Claimant? The Claimant accepts he has received four weeks' notice pay.

10. Unlawful deduction from Wages and Extension of Jurisdiction claims
10.1 Does the "Employment Reference" document dated 14 April 2016 accurately reflect the material terms of the Contract at the time (and if not, what were the contractual terms at the material time)?
10.2 Was the Claimant's contract varied subsequent to 14 April 2016 (and if so, what were the amended contractual terms)?
10.3 What monies was the Claimant paid by way of bonus between April 2016 and the end of his employment?
10.4 What, if any, jurisdictional issues arise and are the Claimant's claims in time? The Claimant asserts that it is a continuing liability.

Findings of fact

11. The Respondent operates Public Houses across five different sites, of which four trade as "local beerhouse" branded outlets. The Respondent employs 66 people [ET3 2.7]. Mr. Philip Strongman is a director and founder member of the Respondent.

12. The Claimant was employed by the Respondent as Head Chef at the Hack & Hop site. His employment commenced on 22 October 2012 at the Dean Swift site and he was transferred to the Hack & Hop in 2016. From 5 March 2018, the Claimant's Line Manager was Mr. Stanchev (General Manager); Mr. Strongman oversaw the Claimant in conjunction with Mr. Stanchev.

Bonus Claim

13. On **9 June 2015**, the Claimant signed a Statement of Main Terms of Employment [37A-37B].

13.1 Key terms relevant to these proceedings are as follows:

"*"REMUNERATION*
Your salary is currently £30,000 per annum payable monthly in arrears by credit transfer as detailed on your pay statement. Your salary is set at such a level as to compensate for the need for occasional additional hours."
"CAPABILITY AND DISCIPLINARY PROCEDURES
The disciplinary rules that form part of your contract of employment and the procedures that will apply when dealing with capability or disciplinary issues are shown under the headings "Capability Procedures" and "Disciplinary Procedures" in the Employee Handbook to which you should refer."
"CAPABILITY/DISCIPLINARY APPEAL PPROCEDURE
Should you be dissatisfied with any decision to take action or dismiss you on capability/disciplinary grounds, you should apply, either verbally or in writing, to the Operations Director within five working days of the decision you are complaining against. Further information can be found in the Employee Handbook under the heading "Capability/Disciplinary Appeal Procedure" to which you should refer."
"GRIEVANCE PROCEDURE
Should you feel aggrieved at any matter relating to your employment, you should raise the grievance with your Manager either verbally or in writing. Further information can be found in the Employee Handbook".

13.2 There is no mention in the Statement of the Claimant's entitlement to a bonus.

13.3 I have not been provided with a copy of the Employee Handbook.

14. On **21 January 2016**, the Claimant signed a "Notification to Payroll Dept. Key Performance Bonus" [37c] which shows an amount of £250.00 (100%) to be paid to the Claimant for quarter 4 (Q4). The Claimant accepted on cross-examination that it was agreed that if gross profit on food reached 71% he would receive a KPI bonus of £250.00 per quarter; he also accepted that he in fact received this.

15. On **3 February 2016**, the Claimant singed a "*Notification of Change of Employee Pay Details*" [38] which shows (with effect from 1 January 2016):

"*CURRENT PAY BEFORE REVIEW: £30,000*
OTHER BONUS/EXTRAS: [left blank]
NEW RATE OF PAY: £31,000.
NEW BONUS/EXTRAS: [left blank]"

16. On **4 February 2016**, the Respondent wrote to the Claimant [39] confirming an increase in his salary from £30,000 p/a to £31,000 p/a backdated to 1 January 2016. The letter is silent on the subject of bonus.

17. Minutes of a Board of Directors Meeting held on **4 and 5 April 2016** [40-42] record (as relevant to these proceedings):
"*There is also some confusion with [the Claimant] and his interpretation of his GP bonus and we need to start by investigating the notes on his HR file. [The Claimant] does not have any other documentation. We have not got to the bottom of this one and agreed that we need to determine is there a grievance or not and what is the resolution*" [41]
It was noted that the Claimant "*seems demotivated at the moment*" [41].

18. On **14 April 2016**, Mr. Strongman completed (in manuscript) and signed a document headed "Employment Reference" [42A] the purpose of which was to provide information about the Claimant's income to an Estate Agent/letting agent to assist the Claimant with his endeavours to find accommodation:

18.1 Mr. Strongman gave the date the Claimant's employment commenced, the Claimant's role and current address. He also stated that the Claimant's current gross salary was £33,000 and in answer to "Details of any bonuses" he stated "Bonus of 4k"; he was given the option of ticking one of two boxes - "discretionary" or "guaranteed" – and ticked the latter.

18.2 It is not in dispute that the stated salary of £33,000 was incorrect as the Claimant's correct salary at that time was £32,000. Mr. Strongman says this was an error and I accept this.

18.3 With regard to the bonus figure of £4,000, Mr. Strongman says [w/s 4] that this was "*the maximum he [the Claimant] could achieve if the dry take, GP and staff costs exceeded the financial projections for the site*".
In a supplementary witness statement (22 August 2019) Mr. Strongman says:
"*2. The bonus that was set up for [the Claimant] consisted of him being paid £250.00 per quarter for achieving a pre-determined food GP if these figures were met.*
3. If he reached the agreed figure his bonus would appear on his pay slip. If he did not achieve the required figure then he would not receive this. Thus his total bonus in one year could have amounted to £1,000.
4. The reason for the discrepancy in the bonus figure is because in the past, if a site had performed exceptionally well, the Head Chef had received a bonus, in one case this was £3,000. Admittedly, this is very rare but has happened.
5. It was possible for [the Claimant] to earn this, but it was discretionary and the site would have to produce an exceptional over performance. I explained this to [the Claimant] at the time and he was keen for me to put this in as a bonus".
On cross-examination, Mr. Strongman said he based the £4,000 figure on (i) the assumption the Claimant would receive £250 per quarter (therefore £1,000 per annum) and (ii)) the fact that it was possible he could achieve a

further £3,000 in an exceptional year as some chefs have in the past; therefore £4,000 was the maximum bonus the Claimant could earn.

18.4 Mr. Strongman says [w/s 4] that although he ticked to state the bonus was guaranteed, it was not guaranteed "... *and would depend on rolling factors such as monthly GP, staff costs and weekly sales*". He says: "*The Company has historically paid bonuses based on KPIs and this was no different. The bonus was guaranteed and not discretionary provided he met the criteria set out in the bonus scheme".*

He goes on to say [w/s 5] that *"... in truth ... the bonus was difficult to achieve but not impossible"*

In verbal evidence, Mr. Strongman told me that he ticked the box "guaranteed" as opposed to "discretionary" in error. I accept this.

19. In **May 2016**:

19.1 The Claimant's place of work changed to the Hack & Hop.

19.2 A "*Notification of Employee Pay Details-2015*" [43] shows (with effect from May 2016):

"CURRENT SALARY BEFORE REVIEW: £31,000 BONUS/KPI (per annum) £1,000
OTHER BONUS/EXTRAS: [left blank]
NEW SALARY TO BE PAID: £32,000."

The Claimant signed this document to confirm his agreement.

20. In **Decembe**r **2016** a "*Notification of Employee Pay Details-2015*" [45] shows (with effect from 1 December 2016):

"CURRENT SALARY BEFORE REVIEW: £32,000 BONUS/KPI (per annum) [left blank]
OTHER BONUS/EXTRAS: [left blank]
NEW SALARY TO BE PAID: £34,000."

21. The Claimant refers in his witness statement (para. 7) to a text he received on **22 November 2017** from "Oliver/Manager" with regards to his bonus. He says: "*After meeting with Oliver on the previous day I found it unprofessional the way company is dealing with bonuses, pays etc*". However, I place no weight on this as a copy of the text is not in the bundle and the Claimant has not explained what the text said or what was said at the meeting beforehand or why he considered the Respondent's conduct "unprofessional".

22. The Claimant said on cross-examination that he spoke to Mr. Strongman about this bonus but I do not accept this as he was unable to recall when this conversation took place and when asked why he did not complain, he said he was fed up with asking but did not say who he complained to or when.

23. In verbal evidence the Claimant referred to an alleged verbal agreement with Mr. Strongman. However, I do not accept this. Significantly, this alleged verbal agreement is not referred to in his ET1 or in his witness statement and and I accept Mr Strongman's evidence that only the KPI £250 per quarter bonus (dependant on GP) was discussed.

Redundancy

24. On **3 January 2018**, the Claimant attended a meeting with the Respondent at which changes in the Respondent's business were discussed in light of economic circumstances [46-47]. There then followed further communications between the Claimant and the Respondent (via text 47A-47B] and by email 48 -52).

25. On **5 January 2018**, the Respondent wrote to the Claimant confirming that his employment was to be terminated by reason of redundancy on 5 February 2018 and that he would receive a redundancy payment of £3,667.50 (7.5 weeks @ £489.00). It is not in dispute that the Claimant accepted his redundancy [Claimant's w/s para. 13].

26. As a result of the Respondent unexpectedly losing two chefs, the Claimant's employment did not in fact end on 5 February as planned and on **7 February 2018**, he received an email from Ms. Vanessa Hamer (Respondent's Finance Director) [53] advising that the "*risk of redundancy*" had been concluded and apologising for any distress caused.

27. The Claimant did not at any point complain or raise a grievance (informally or formally) about the withdrawal of the redundancy and continued working. I do not accept that there was any arrangement or agreement that the Claimant would carry on working only on a temporary basis and/or that he would still be paid the redundancy payment.

Other matters prior to 30 April 2018

28. On **22 March 2018**, I accept the Claimant's evidence [w/s para. 15] that he asked Mr. Stanchev for a copy of the "Working Alone Health & Safety Policy". The Claimant says he never received a copy and I accept this. Mr Stanchev says he recalls "googling" it and asking HR if he had found the right copy but cannot recall printing it out and giving a copy to the Claimant.

29. The Claimant says he was on shift alone most of the time [w/s para 15] and that he mentioned this to Mr. Stanchev several times. It is not in dispute that following a restructure, there was a reduction in kitchen staff. However, the Claimant accepted in evidence that since Mr. Stanchev started working at the Hack & Hop on 5 March 2018, the occasions when he was required to work alone reduced. In fact, based on Mr. Stanchev's evidence and the time sheets which show kitchen staff rotas [76A – 76SS] I find that the Claimant was not on shift alone during the period 5 March 2018 to 30 April 2018. Whilst the Claimant does not accept the accuracy of these rotas and suggests they have been created retrospectively, he was unable to point to any particular day when he says he was working alone during this period despite having been provided with these documents some weeks prior to the hearing.

30. The Claimant says in his witness statement [w/s 26] that he was demoted but I do not accept this. After the redundancy exercise was abandoned, he continued working in the same role (Head Chef) on the same terms and conditions. When questioned on this, he said felt pushed to one side and that Mr. Stanchev did not treat him as a Head Chef should be as Mr. Stanchev would talk to the sous chef rather than the Claimant. However, this falls far short of showing a demotion.

31. I find that the Claimant and Mr. Stanchev on the whole had a good working relationship:

31.1 I accept Mr. Strongman's evidence [w/s 12] that this was not always the case and that the Claimant *"...in passing mentioned he didn't like Mr. Stanchev's attitude to him".*

31.2 The Claimant refers in his ET1 to Mr. Stanchev making regular "*nasty comments*" to him and says [w/s 17] that Mr. Stanchev made *"inappropriate comments*" or interrupted him but on balance I do not accept this was the case as the Claimant gives no examples.

31.3 The Claimant says [w/s 16] that on 12 April 2018, he had an informal meeting with Mr. Strongman with regard to Mr. Stanchev's "*behaviour and work ethic*". However, on cross-examination, he contradicted this and said in fact it was Mr. Strongman who initiated that discussion and it was Mr. Strongman asking the questions and that he [the Claimant] was not complaining about Mr. Stanchev on that occasion. He does not give examples of any other occasions when he raised concerns or complaints about Mr. Stanchev's conduct.

<u>Events on 30 April 2018</u>

32. On Monday **30 April 2018** the Claimant was working in the kitchen at lunchtime; he was scheduled to work 10.00 to 22.00. There was an altercation between the Claimant and Mr. Stanchev. Having heard witness evidence from the Claimant, Mr. Stanchev and Mr. Goszczynski and considered Mr. Stanchev's account in his email to HR (cc Ms Hamer) [59], I find that the gist of the events on that day was as follows:

32.1 Mr. Stanchev asked the Claimant if he had seen the chargeable batteries for the kitchen 'phone. The Claimant replied that he had not and asked to be left alone as he was stressed doing the stock count and preparing for the lunch service.

32.2 Mr.Goszczynski then entered the kitchen and Mr. Stanchev asked him the same question. The Claimant told Mr. Stanchev to stop asking silly questions and focus on more important things; Mr Stanchev said words along the lines of "*you do your job and I'll do mine*"; the Claimant took offence and asked if Mr. Stanchev was saying he [the Claimant] was not doing his job.

32.3 Mr. Stanchev said "*You got it sweet here*", and the Claimant replied that he had not.

32.4 The Claimant then left his apron on the side and went to the office to change (all kitchen staff change in the office). This was at about 13.00 hrs.

32.5 I accept Mr. Stanchev's evidence that he followed the Claimant out of the kitchen and asked him to finish his shift and discuss the matter after the lunch service. Mr. Goszczynski says Mr. Stanchev did not ask the Claimant to "stay for service and discuss the matter afterwards" but I place no weight on this as he was not privy to what was said after the Claimant left the kitchen.

32.6 The Claimant says [w/s 20] that he took his rucksack with him "*the same way I do every day and some of the belongings I have left on the premises*". Mr. Goszczynski says [w/s 4] the Claimant "*took some of his belongings*" before leaving the premises. In verbal evidence, the Claimant told me he took his uniform home to be washed; he left his shoes; he did not keep anything else at work.

32.7 It is not in dispute that the Claimant did not at any point say that he was resigning.

32.8 I find that this altercation was tantamount to an argument; Mr. Stanchev agreed that both he and the Claimant raised their voices and he described in verbal evidence how the Claimant "*exploded"* when he [Mr. Stanchev] asked about the batteries on the second occasion.

32.9 I also accept Mr. Stanchev's evidence (which was not challenged) that two tables of two people were waiting to be served when the Claimant walked out and he had to refund the food and give both tables drinks for free.

Events after 30 April 2018

33. On Tuesday **1 May 2018:**

33.1 The Claimant was scheduled to work but did not attend and did not contact the Respondent. When asked why he did not call, he said he was upset and waiting to see if anyone would call him.

33.2 Mr. Stanchev was not scheduled to work that day. He says he emailed HR but a copy of his email is not in the bundle. I accept his evidence that the information he gave HR reflects the contents of his witness statement; he did not report to HR that the Claimant had said he was resigning or had used the word "resignation".

33.3 I accept Mr. Stanchev's evidence that he asked his assistant Estathios ("Stafio") to call the Claimant and that Stafio tried on two occasions using a landline but without success. I also accept Mr. Stanchev's evidence that he did not try and contact the Claimant personally as he thought the Claimant would recognise his mobile phone number and not take the call.

34. On Wednesday **2 May 2018**, Mr. Stanchev signed a letter to the Claimant [57] which was sent to the Claimant by email that day at 17:50 [56]. The opening paragraph of the letter states:

"*Further to recent events on Monday 30th April 2018, I write to confirm that on behalf of Pubs of Distinction I accept your resignation from the role of Head Chef at The Hack & Hop. In line with your contract of employment, you are required to give four weeks' notice, therefore your last working day will be 28 May 2018".*

Mr. Stanchev explained in evidence that he did not write this letter; it was written by Ms. Linda Lloyd, HR. He also said that it was HR's decision, not his, to assume that the Claimant had resigned

35. On Thursday **3 May 2018**:

35.1 The Claimant was scheduled to work but did not report for work.

35.2 The Claimant sent two emails to the Respondent:

(i) At 09.45 [58A]

"*dearest site manager i need notes of events from april 30 . Cheers"*

(ii) At 20.31 [58] (cc Mr. Stanchev):

"Hi there,
In regards to your recent email I would like to confirm that I will be on my shift on Sunday 6th May and my last shift will be 25th May.
As stated in your email I will be expecting my remain [sic] salary together with holiday to be paid into my account after termination of my contract.
Furthermore, I would like to confirm that I am not in possession of any company goods."

The Claimant says [w/s 20] that he felt "*pushed"* to confirm "*Resignation Acceptance Letter created by Mr. Stanchev*" and that he did not have any intention of resigning as he had family responsibilities.

However, on cross-examination, he said that by that time he had had enough. He said he wrote this email to show goodwill and "*to finish without further troubles";* on re-examination, he said he wanted to finish on good terms.

36. On Friday **4 May 2018:**

36.1 The Claimant was scheduled to work but did not report for work.

36.2 Mr. Stanchev sent an email to HR (cc Ms. Hamer) [59] giving his account of events on 30 April 2018:

"*On Monday 30.04.2018 at lunch time I was having an argument with [the Claimant] and shortly after that he left the kitchen and since then he didn't call or email to apologise or explain his weird behaviour.*
From the morning when he came he was moody and grumpy.
In my question "Have you seen the chargeable batteries for the phone in the kitchen" (they keep disappearing) he said "please leave me alone I'm stressed doing stock count and preps for lunch".
At lunch time Peter came to take his part of the tips from Sunday and I've asked him the same question about the batteries then [the Claimant] just start shouting at me to stop asking silly questions all day.
My answer was "Not a problem Alex just low your voice and keep doing your job – I'll do mine and we'll sit down after lunch time to talk as we are bit busy on service at the moment".
He replied: "Are you saying that I'm not doing my job?"
I've replied: "Please Alex lets finish lunch service and we'll talk – You got it sweet here" (at Hack).
He replied: "No I'm not. The management want to steel [sic] all my staff and you've involved pretty much on that",
He left his apron on side and went to the office to change.
I followed him and told him "please don't go now let's talk after lunch we are grown up people,", but he didn't want to listen and left the kitchen with two tables of 2 people waiting to be served.
Sadly I have to refund the food and give away both tables drinks for free
That's all."

36.3 Ms. Hamer sent an email to the Claimant [60] at 12.32 in response to his email of 3 May; key parts state as follows:

"... I note that your last day at work will be 25th May 2018"

"With regard to this week, you were due to work the following shifts:
Monday 10am-4pm
Tuesday 10am-4pm
Thursday 10am-4pm
Friday 10am-4pm
Sunday 10am-5pm
You worked part of your shift on Monday, but did not arrive for work on Tuesday, Thursday or Friday and did not request that the time be taken as holidays in advance of taking the leave. I will therefore treat these three days as unauthorised absence, which is unpaid. With regard to your shift on Sunday, I note that you have offered to work this shift, however we have already arranged cover. We will not therefore require you to work on Sunday, however as this is our decision, you will still be paid for Sunday 6th May 2018. The Hack & Hop will be closed on Monday 7th May 2018 for the Bank Holiday, hence I would be grateful if you would contact Phil on Tuesday with regard to your shifts for next week".

36.4 At 21.36, the Claimant sent an email to Ms. Hamer [61] with a Statement of Fitness for Work attached [62]. The email states:

"*Thank you for your recent email.*
Please find attached my Sick Note.
*If you would like to discuss anything [sic] further you more than welcome to email me or call me on ***889.*
I look forward to hear from you soon"

The Statement of Fitness for Work shows that the Claimant was assessed by his GP on 4 May 2018 and was advised that he was not fit for work due to sciatica from 30 April 2018 to 25 May 2018; the statement is dated 4 May 2018.

37. On **10 May 2018**, the Claimant sent an email to Ms. Hamer [66] stating:
"I would like to state that I disagree with the email from your side dated 2nd May and attached letter from Site Manager Stan Stanchev mentioning my resignation.
Please note that I have never provided Mr. Stanchev with any formal/informal notice and on the 30th May I have felt harassed in the work place in which my health has been significantly affected.
I must say that I am very disappointed with the fact that nobody from the company, not even my site manager have called me to finds out about my wellbeing. Instead I've received email stating when my last day with the company will be. I must say I have find this email very disrespectful.
Furthermore, I felt "pushed and rushed" that I needed to confirm my last day with the company and I've send my reply on the 3rd May even if I totally disagree with it.
All in all, I am still awaiting reply from your side in regards to my recent email with attached sick note and I must say I am very confused and I find it very disrespectful considering the fact that I have been with the company for 5 years.
All in all I hope to hear from you soon".

38. On **11 May 2018**, the Respondent replied [67] recounting events on 30 April and summarising the subsequent exchange of emails. The writer states:
"I am sorry that you feel we have been disrespectful, but you will appreciate that we needed to confirm your intentions with you as your site manager understood that you had resigned with immediate effect. Your lack of contact on 1 May 2018 reinforced our view that [Mr. Stanchev's] understanding was correct and that fact that you did not dispute the letter, but actually put your resignation in writing and confirmed your last working day left us with the understanding that you had resigned on 30 April as stated by your site manager."

39. On **23 May 2018**, the Claimant replied [68]. He repeated that he had "*never provided notice verbally or in writing*" and that the email of 2 May had *"pushed" him to "state that in afterwards email*". He says:
"*Please take into your consideration that on that day I have been verbally abused and provoked. Furthermore, on that day I felt very ill and till present I am on very strong medication"*
"I am very surprised that as an experienced HR Team you didn't take any form of actions in regards to Manager Stan and his behaviour."

40. On **24 May 2018**, Ms. Linda Lloyd (HR) wrote to the Claimant [69] inviting him to a meeting to discuss the issues he had mentioned.

41. There then followed correspondence between the Claimant's (former) solicitors and the Respondent [70-71 and 73-76]:

41.1 In the first letter from the Claimant's solicitors (dated **29 May 2018**), it is made clear that the Claimant's case is that he did not resign and it states [70]:
"*Furthermore, our client's email dated 3rd May 2018, has been sent to you as a direct consequence of the extreme pressure you have exerted on him since January 2018 when you tried to make him redundant only to change your mind shortly after this. In addition, Mr. Stanchev indicated that, in the near future only one chef would be allowed during one shift. Following our client's concern, on the 22 March 2018, Mr Stanchev has requested a copy of the Health and Safety procedures/Risk Assessments regarding working lone shifts which was never provided".*

41.2 On **1 June 2018**, the Respondent obtained a statement (by email) from Mr Goszcyznski [72] giving his recollection of events on 30 April 2018. He recounts the verbal exchange between the Claimant and Mr. Stanchev and concludes:
"[The Claimant] just took off his apron, packed his stuff and left. Polite way, no shouting, no swearing".

41.3 On **4 June 2018**, the Respondent replied to the Claimant's solicitor's letter of 29 May 2018 [73-75] explaining and defending its position.

42. I accept Mr. Strongman's evidence [w/s 20] that if the Claimant had not "resigned" then it is likely he would have been disciplined and dismissed for his conduct.

The Law

Unfair dismissal claim

43. Reason for dismissal

43.1 Section 98 (1) ERA**:**
In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(i) the reason (or if more than one the principal reason) for the dismissal

(ii) that is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held ("SOSR").

43.2 Section 98(2) ERA:

"*A reason falls within this subsection if it—*

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

43.3 If an employer incorrectly identifies the reason for dismissal, the Tribunal may ignore the "wrong label" if the mistake was genuine and the facts (or beliefs) that led the employer to dismiss were known to the employee at the time of the dismissal and those facts were fully aired in the Tribunal proceedings (***Abernothy v Mott, Hay and Anderson [1974] IDR 323***).

43.4 In circumstances where an employer has maintained in error that an employee has resigned and in fact the Tribunal finds that the employee was dismissed, it is open to the Tribunal to conclude that the employee was dismissed for "some other substantial reason" (***Ely v YKK Fasteners (UK) Ltd [1993] IRLR 500.***

44. Constructive dismissal

44.1 Section 95 and 136(1) Employment Rights Act 1996("ERA")

In order to show unfair dismissal, an employee must first show that he or she has been dismissed; an employee will be treated as dismissed if:

(i) the contract of employment is terminated by the employer (s95(1)(a); or

(ii) the employee has been constructively dismissed having terminated the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (s95(1)(c)).

44.2 For an employer's conduct to give rise to a constructive dismissal, the employee must show that there was a fundamental breach of the contract going to the root of the contract of employment "*... which shows that that the employer no longer intends to be bound by one or more of the essential terms of the contract*" (***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***). An employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably; the behaviour must amount to a fundamental breach.

44.3 A course of conduct can cumulatively amount to a fundamental breach of contract following a "a last straw" incident:

(i) The last straw incident does not itself have to amount to a breach of contract (***Lewis v Motorworld Garages Ltd 1986 ICR 157, CA***)

(ii) However, the last straw incident "*must contribute, however slightly, to the breach of the implied term of trust and confidence*" (***Omilaju v Waltham Forest London Borough Council [2005] ICR 481 CA***).

(iii) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in their employer. The test of whether the employee's trust and confidence has been undermined must be objective.

44.4 The test of whether there was a repudiatory breach is an objective one; the Tribunal is not required to make a factual finding as to what the actual intention of the employer.

45. Resignation

45.1 A resignation by an employee need not be expressed, and may be inferred from the employee's conduct and the surrounding circumstances (***Johnson v Monty Smith Garages Ltd EAT 657/79***). All the circumstances (both preceding and following the incident) and the nature of the workplace must be considered.

45.2 The Tribunal should ask itself what a reasonable employer would have understood in light of the circumstances.

Harrison v George Wimpey and Co Ltd [1972] ITR 188:

"*Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, then the contract is terminated*".

45.3 In special circumstances, the employer should allow a reasonable time to elapse and investigate any facts which may arise which cast doubt on the employee's genuine intention to resign (***Kwik-Fit (GB) Limited v Lineham [1992] IRLR 156***). The need "*will almost invariably arise in cases in which the purported notice had been given orally in the heat of the moment by words that may be quickly regretted*" (***Willoughby v CF Capital PLC [2011] EWCA Civ 115).*** The test of what is a "reasonable time" is objective; it is likely to be relatively short, a day or two (***Willoughby).***

45.4 ***Zulhayir v JJ Food Service Ltd 2014 ICR****: A*n employer cannot unilaterally deem an employee to have resigned when he has not. To do so would arguably amount to a dismissal and that dismissal would be prima facie an unfair dismissal.

45.5 If a resignation cannot be inferred from the employee's conduct, and the employee's conduct amounts to a breach of the contract of employment, the contract of employment comes to an end when the employer accepts the breach i.e. by dismissing the employee.

46. Reasonableness of Dismissal**:**

46.1 Section 98(4) ERA:

Where the employer has fulfilled the requirements of s98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

(i) 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 the s98(2) reason relied on as a sufficient reason for dismissing the employee; and

(ii) shall be determined in accordance with equity and the substantial merits of the case.

46.2 A constructive dismissal is not always an unfair dismissal, and the tribunal will look at the employer's conduct and decide whether it acted fairly despite having breached the contract (***Allders International Ltd v Parkins [1981] IRLR 68***).

46.3 Range of reasonable responses

(i) In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards.

(ii) The Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether procedure was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

(iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

47. Unfair dismissal Compensation**:**

47.1 In addition to a Basic Award (s.119 ERA), **Section 123(1) ERA** provides for a Compensatory Award**:** "*... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

47.2 Mitigation:

S.123(4) ERA requires a Claimant to mitigate their loss and a Claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation..

47.3 ***Polkey v AE Dayton Services Ltd [1987] ICR 142 ("Polkey")****:*

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make:

(i) In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made.

(ii) In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out.

(iii) In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

47.4 Contributory conduct:

(i) S.122(2) ERA states:

"*Where the tribunal considers that any conduct of the complainant before the dismissal ... 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.*"

(ii) S.123(6) ERA states:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding".*

(iii) Before making any finding of contribution:

a. a claimant must be found guilty of blameworthy or culpable conduct;

b. the employee's conduct must be known to the employer at the time of dismissal and have been a cause of the dismissal.

(iv) Once a finding of blameworthy or culpable conduct is made the Tribunal must make a contributory fault reduction, the proportion of the reduction being such amount as it considers to be just and equitable.

Claims for redundancy payment, bonus and monies in lieu of notice

48. Unlawful deductions from wages:

48.1 S13 ERA 1996 gives workers the right not to suffer unauthorised deductions from their wages:

48.2 Ss.23-26 ERA 1996 sets out provisions relating to complaints to employment tribunal.

49. Breach of Contract

49.1 Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives the Employment Tribunal jurisdiction to hear claims for damages for breach of contract provided the claims arose or are outstanding on termination of the contract of employment and have been brought in time.

49.2 Express terms may be oral or written. Oral terms may be evidenced in a written document.

49.3 Where a contract does not cover all the matters on which the parties cae be presumed to have agreed, a Tribunal may take into account the surrounding circumstances including how the parties conducted themselves.

50. Redundancy payment claim

Notice of dismissal cannot unilaterally be withdrawn by the employer (***Harris and Russell Ltd v Slingsby [1973] ICR 454)***. The employee must also consent; consent may be inferred from the fact the employee continues to discharge his or her contractual obligations by continuing to work.

51. Monies in lieu of notice claim
In accordance with s.86 ERA, employees are entitled to one week's notice for each complete year of service unless dismissed fairly for gross misconduct. If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

Submissions

Respondent's submissions:

52. Mr. Bromige provided a written Skeleton Argument and made supplementary verbal submissions which can be summarised as follows:

52.1 The ability to revoke notice – Redundancy

(i) Once notice has been given it cannot be withdrawn save with mutual consent (***Riordan v The War Office [1959] 3 All ER 552***); the Respondent could not therefore unilaterally revoke notice of redundancy (given on 5 January 2018).

(ii) However, the Claimant by his conduct indicated that he agreed to the revocation of the notice by continuing to attend work after 5 February and receive salary; alternatively he waived any breach.

(iii) Further and in the alternative, it was an implied term that the redundancy payment would be paid on termination of employment; the termination did not occur and therefore no such payment is owed.

52.2 The Bonus

(i) The Claimant's employment was governed by the Contract of Employment [37A-B]. His remuneration was amended on several occasions:

a. 3 February 2916 [38]: his salary increased but no mention of a bonus;

b. 31 March 2016 [43]: salary increased from £31,000 plus a £1,000 KPI bonus p/a to £32,000 with no bonus.

(ii) The KPI bonus was paid in Q4 2015 [37C]; the Claimant accepts he was paid the KPI bonus.

(iii) The Claimant relies on the Employment Reference [42A] but this was a third party reference request and never intended by either party to amend the contract and the Claimant did not sign it. It also shows the Claimant's incorrect salary (£33,000 rather than £32,000) but the Claimant does not seek to argue that his correct salary was as stated on 42A i.e. £33,000.

(iv) Contemporaneous documents amending the contract make no mention of the £4,000 bonus. The Claimant has tried to rely on some sort of oral agreement but his ET1 relies solely on the Employment Reference and his witness statement is silent on this point.

(v) If there was a breach of contract, the claim crystallised on the proposed EDT (5 February) but the Claimant has remained silent for 2 years. He is out of time to bring an unlawful deductions claim.

(vi) The Claimant cannot show there was a contractual entitlement to a guaranteed bonus of £4,000 during 2016 or at all.

52.3 Resignation or termination?

(i) Mr. Bromige relies on ***Kwik-Fit*** and ***Willoughby.***

(ii) The Claimant's conduct amounted to an unambiguous resignation; he walked out with no explanation and failed to report for work the next day.

(iii) The Respondent waited 2 days to confirm the Claimant's resignation which is (objectively) a reasonable time (***Kwik Fit***). In the interim the Claimant made no effort to contact the Respondent, nor did he attend work subsequently and ignored two calls from Stafio.

(iv) If the Claimant had not intended to resign, or he had changed his mind during a period of "cooling off", he would have responded to Mr. Stanchev's letter of 2 May [57] confirming he had not resigned and that he intended to continue the contract. However, his email on 3 May [58] is unambiguous and he made no effort to protest the termination of his employment because he always intended to resign.

(v) Any contention that the Claimant's "unambiguous" email of 10 May 2018 [66] was capable of revoking his notice is plainly wrong in law.

52.4 If the Claimant resigned – constructive dismissal

(i) The repudiatory breaches relied upon are:

a. breach of a redundancy agreement on or around 5 January 2018;

b. the unreasonable treatment by Mr. Stanchev between March and 30 April 2018.

(ii) The conduct of the Respondent must be viewed objectively and assessed in accordance with the term of implied trust and confidence (***Malik v BCCI [1997] IRLR 462).***

(iii) Taking the Claimant's case at its highest, he affirmed the first alleged breach by continuing to work for the Respondent and receiving salary for his work after 5 February 2018.

(iv) A repudiatory breach which has been affirmed can be "revived" by further conduct which would amount to the last straw (***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***) but the last straw must be more than "*utterly trivial*"(***Omilaju***).

(v) However, the exchange between the Claimant and Mr. Stanchev on 30 April 2018 was "*utterly trivial*".

(vi) The Claimant asserts other reasons for his resignation in his witness statement [w/s 26] but these do not appear in the list of issues nor the ET1 and he cannot rely on any events after 30 April.

(vii) The Claimant's constructive dismissal claim is not well-founded and should be dismissed.

52.5 If the Claimant did not resign- termination by the Respondent

(i) If the Claimant did not resign and his employment was terminated by the Respondent the fairness of that dismissal must be assessed according to s.98 ERA.

(ii) The Respondent would rely upon s.98(1)(b), that the dismissal was for SOSR, the Respondent having relied on a genuine but erroneous belief that the Claimant resigned (***Ely v YKK Fasteners***).

(iii) The fact that the Claimant emailed the Respondent on 10 May to state he had not resigned has no bearing on the Respondent's duty under s.98 as the decision to terminate the contract of employment had already been made.

(iv) Even if the Tribunal finds that the Respondent should have done more to clarify whether the Claimant was resigning, it was within the band of reasonable responses for the Respondent to interpret his conduct as a resignation.

(v) Given the Claimant's own confusion, it would be understandable if the Respondent had the same difficulty in divining the Claimant's intention.

52.6 Contributory Fault and ***Polkey***

(i) The Claimant walked out mid-shift and the Respondent had to refund food and drinks to diners. The Basic and Compensatory awards should be reduced by 100% for the Claimant's contributory conduct which must be "*culpable and blameworthy conduct*" (***Nelson v BBC (No2) [1980] ICR 110***). As a bare minimum, the Claimant's conduct was "*foolish, bloody-minded or merely unreasonable in the circumstances*" (***Nelson***).

(ii) In the alternative, had the Claimant returned to work, the Claimant accepts there would have been disciplinary proceedings and Mr. Bromige submits the only possible outcome would have been dismissal. Any disciplinary process would have been completed within the Claimant's five week notice period and as the only possible outcome would have been his dismissal a ***Polkey*** reduction of 100% is appropriate.

Claimant's submissions:

53. Mr. Price-Rowlands made verbal submissions as follows:

53.1 Bonus claim:

(i) The written evidence "wholly supports" the Claimant's case. Mr. Strongman's explanation for the Employee Reference (42A) is inadequate and vague.

(ii) The Claimant says there were two meetings; he was unable to recall the dates but 42A was signed and completed by Mr. Strongman around the time of these discussions.

(iii) Either the information on 42A is correct or the Respondent was attempting to mislead.

(iv) The only written evidence (42A) supports the Claimant's case and should be taken at face-value.

53.2 Redundancy

It is the Claimant's case that this should have been paid on the effective date of termination of his employment. He did not agree to the notice of dismissal by reason of redundancy being withdrawn.

53.3 Termination of employment

(i) The Claimant's primary case is now that he was directly dismissed, rather than constructively dismissed.

(ii) The Claimant never said that he was resigning nor did he give written notice of resignation.

(iii) The Respondent's letter of 2 May 2018 [57] led to the Claimant treating himself as dismissed. The letter of 2 May was constructed by HR and this was a defacto dismissal to get rid of the Claimant. He thought his employment was over so on 3 May he accepted termination of his employment.

(iv) His dismissal was unfair. The letter of 2 May was sent within a very short time span, and the Respondent failed in its duty to make proper and reasonable enquiries before terminating the Claimant's employment.

(v) When the Respondent received the Claimant's email of 10 May making it clear he had not resigned, it was under a duty (s.98 ERA) to remedy its earlier letter of 2 May. The absence of an express resignation meant the Claimant's clarification in his email of 10 May was relevant.

(vi) It is accepted that there were prima facie grounds for disciplinary proceedings and perhaps a warning following an investigation and disciplinary hearing.

Conclusions

Bonus claim

54. The Contract of Employment does not mention bonus and I may therefore take into account the surrounding circumstances including how the parties conducted themselves. Having weighed up all the evidence on this issue, I have concluded that on the balance of probabilities there was no agreement to pay the Claimant a guaranteed bonus of £4,000 and I believe he was mistaken on this issue. I have taken into account the following:

54.1 On the one hand, the obvious and only interpretation of the information given on the Employment Reference [42A] by Mr. Strongman was that the Claimant was earning a gross salary of £33,000 per annum and entitled to a guaranteed bonus of £4,000.

54.2 However, this sole piece of evidence is outweighed by the following factors:

(i) The Claimant has not provided any documentary evidence to support his claim that he is entitled to the £4,000 bonus other than the Employment Reference [42A] and in fact the documentary evidence that has been provided all points the other way:

a. On **21 January 2016**, the Claimant signed a "Notification to Payroll Dept. Key Performance Bonus" [37c] which only shows an amount of £250.00 to be paid to the Claimant for quarter 4 representing 100%. There is no evidence he challenged this.

b. On **3 February 2016**, the Claimant singed a "*Notification of Change of Employee Pay Details*" [38] which shows (with effect from 1 January 2016) his salary but left the bonus column blank. There is no evidence he challenged this.

c. On **4 February 2016**, the Respondent wrote to the Claimant [39] confirming an increase in his salary from £30,000 p/a to £31,000 p/a backdated to 1 January 2016. The letter is silent on the subject of bonus. There is no evidence he challenged this.

d. The Minutes of the Directors Meeting held on **4 and 5 April 2016** [40-42] do not assist the Claimant and only show that he was confused about his bonus.
e. There is no documentary evidence that the Claimant took any steps to chase up payment of this considerable sum of £4,000; I have not accepted that he spoke to Mr. Strongman about it (para. 22 above). Given the size of this sum and the length of the delay in payment, it is reasonable to expect the Claimant to have emailed Mr. Strongman and/or HR if it was genuinely overdue
f. I have found that there was no verbal agreement with Mr. Strongman (para. 23 above).

55. Having found that there was no agreement to pay the Claimant a guaranteed bonus of £4,000, it follows that there was no breach of contract and this claim fails and is dismissed.

Redundancy payment claim

56. It is not in dispute that on 5 January 2018, the Respondent gave the Claimant notice of termination of his employment by reason of redundancy and that the Claimant accepted his redundancy.

57. It is also not in dispute that the Claimant did not complain or raise a grievance about the withdrawal of the redundancy and continued working and I have found that there was no arrangement or agreement that he Claimant would carry on working only on a temporary basis and/or that he would still be paid the redundancy payment.

58. I am mindful that notice of dismissal once given cannot unilaterally be withdrawn by the employer. However, in this case I find that the Claimant's consent is inferred from the fact he continued to discharge his contractual obligations by continuing to work without protest or complaint and was paid and accepted salary.

59. As the Claimant consented, there was no breach of contract and this claim fails and is dismissed.

Unfair dismissal

Resignation or dismissal?

60. It is not in dispute that on 30 April the Claimant never said that he was resigning and therefore I must consider what a reasonable employer would have inferred from his conduct on 30 April and 1 May and the surrounding circumstances:

60.1 The conduct was specifically:
(i) walking out mid-shift on 30 April with diners waiting to be served;
(ii) failing to contact the Respondent later on 30 April to explain his actions;

(iii) failing to report for shift the next day, 1 May; and
(iv) failing to contact the Respondent on 1 May.

60.2 The surrounding circumstances must include the undisputed fact that the Claimant did not state that he was resigning, that he walked-out in the context of an argument and he had at that point five years blameless service.

61. I accept the Claimant's evidence that it was not his intention to resign and have concluded that the Respondent wrongly inferred from the Claimant's conduct that he was resigning. He was clearly in breach of contract by walking out and failing to report and his contract came to an end when the Respondent accepted that breach on 2 May. In other words, the Claimant was dismissed and the decision to dismiss was made on 2 May 2018; the effective date of termination (EDT) was 28 May 2018.

Reason for dismissal

62. The Respondent relies on two potential reasons for the Claimant's dismissal (i) conduct or (ii) SOSR. Both are potentially fair reasons.

63. I find that the real or core reason was SOSR which is a potentially fair reason (s98 ERA). The Respondent did not dismiss the Claimant directly because he walked out mid-shift and subsequently failed to report; the decision was made because it was inferred from his conduct that he had resigned (***Ely v YKK Fasteners).***

Fairness of dismissal

64. I have accepted that the Respondent relied on a genuine (but erroneous) belief that the Claimant had resigned (***Ely v YKK Fasteners***). However, the procedure followed by the Respondent fell outside the band of reasonable responses given its size and administrative resources which includes an HR team. A reasonable employer would have investigated any facts which may cast doubt on his genuine intention to resign (***Kwik-Fit*** *and* ***Willoughby)*** before jumping to this conclusion. There is little evidence of any attempts to investigate the facts prior to the Respondent's email of 2 May. Stafio tried to contact the Claimant twice on 1 May but it has not been suggested that HR made any attempts and an obvious step would have been for the Respondent to contact the Claimant in writing (by email or text) to establish his intentions.

Unfair dismissal Compensation

65. Before considering a possible **Polkey** reduction in compensation I have considered whether or not and to what extent the Claimant contributed to his own dismissal by his conduct.

66. The Claimant's conduct in walking out and failing to report for work the following day was blameworthy pre-dismissal conduct which entirely caused

the Claimant's dismissal and in accordance with s123(6) ERA I am obliged to reduce the amount of the Compensatory Award by such proportion as I consider just and equitable. I may also reduce the Basic Award (s122(2) ERA) but have more discretion and it is acceptable, if unusual, to make different percentage assessments.

67. Dealing first of all with the Compensatory Award, I have reminded myself that only the Claimant's conduct is relevant, not the Respondent's. With this in mind, I have reduced the Compensatory Award by 100% taking into account the Claimant's conduct was the sole reason for his dismissal; walking out and failing to report for duty were serious breaches of his contract of employment.

68. In view of my decision to reduce the Compensatory Award by 100%, there is no purpose in considering **Polkey** but had I done so, I would have also made a 100% reduction on this basis:

68.1 It would have been within the band of reasonable responses to discipline and dismiss the Claimant for his conduct.

68.2. The disciplinary process would have been completed within the Claimant's five week notice period.

69. Given the Claimant's unblemished service of 5 years I have not reduced the Basic Award by the same percentage but reduced it by 25%. Based on his age at EDT (49 years) and length of service at EDT (5 years), the multiplier is 1.5. The applicable weekly cap is £489 and therefore the Basic Award is £489 x 5 x 1.5 = £3,667.50 of which 75% is £2,750.62 .

70. As I am not making a Compensatory Award, the Remedy Hearing on 28 October 2019 is vacated.

71. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which I have identified as being relevant to the claim are at paragraphs 7 to 10; all of these issues which it was necessary for me to determine have been determined; the findings of fact relevant to these issues are at paragraphs 11 to 42; a statement of the applicable law is at paragraphs 43 to 51; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 54 to 70.

Signed by - on 2 September 2019

Employment Judge - Mason

Judgment sent to Parties on

03/09/2019