EMPLOYMENT TRIBUNALS

Claimant: **Miss H Lancey**

Respondent: **Sea View Hotel Swansea Limited**

Heard at: **Cardiff** **On: 17 March 2020**

Before: **Employment Judge Harfield (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr Rhys John (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant was unfairly dismissed.

REASONS

Introduction

1. The claimant worked for the respondent as a cook and a receptionist until 11 October 2019. Acas early conciliation took place between 15 October 2019 and 5 November 2019. On 5 November 2019 the claimant presented a claim form complaining of unfair dismissal. The respondent presented a response form denying the claim.

2. The claimant said in her claim form:

> *"I was dismissed from work because I would not take 20 days holiday as it should have been 28 days but they refused me and all the staff our rightful holidays, also they make a mistake with my tax in 2018/2019 and claimed I earned 2500 more than I did and are refusing to correct it which caused some conflict in work due to me having to pay more take this year. "*

3. In their response form the respondent denied that the claimant was dismissed at all and that she left of her own free will by walking out at 11:30 am in the middle of a 7:30am to 2:30pm shift. They said the CCTV evidence showed this. They denied an error with the claimant's tax. They said that they offered the statutory minimum of 28 days holiday and often more to cover the Christmas shutdown. They said that the 28 days holiday for 2019 had been paid in full to the claimant with 6 days rolled over from the year before as a gesture of goodwill.

4. In an undated letter received by the Tribunal on 28 January 2020 the claimant said:

> "*I have since found out that the reason for my sacking was to give my job to Director and Shareholder [DK]. I was talking to [DK] on the 11 October where he informed me that he could not claim benefits since leaving work at another hotel of [KB] due to being Director and Shareholder and informed me he had a meeting with my manager on Saturday 13th October to which he then took over my job."*

A copy of that letter was sent by the Tribunal to the respondent on 6 February 2020 when refusing an application by the respondent to list the case for a preliminary hearing to consider strike out.

5. On the morning of the full hearing I was given a bundle extending to 82 pages. The claimant provided written witness statements for herself, and her witness and former colleague, Lorna Price. The respondent provided written witness statements for Kanwaljit Singh, managing director, Leena Balian, Director, and Mohammad Gulammamodo, shift manager. The respondent also attended with the CCTV footage, no application having previously been made to rely upon it and which had not been seen by the claimant. The respondent explained that the CCTV footage had been on their disclosure list but the claimant had not asked for a copy. The claimant said this was because the list referred to a "thumbnail."

6. I questioned why the individual who the claimant said had dismissed her, KB, another Director of the respondent, was not a witness. I was told he was attending an important meeting in London. I asked the respondent's counsel if the respondent understood the potential implications of not

calling as a witness the person the claimant says dismissed her (or on the respondent's alternative account had a conversation with her around the time of the claimant's alleged resignation). Mr John confirmed that they did and he asked for a short adjournment to take instructions. Mr John then made an application for an adjournment so that KB could be called as a witness. I heard the parties' submissions and refused the application.

7. Oral reasons were provided at the time. In short form I refused the postponement on the basis that the respondent had been in receipt of the claimant's witness statement since at least 5 February 2020, was legally represented, but had failed to make any application for permission to call KB as an additional witness or indeed bring him along to the full hearing and make an application that day that he be called. Applying the overriding objective which including balancing not only the potential prejudice to the respondent but also the need to deal with the case in a proportionate way, avoiding delay and placing the parties on an equal footing, I declined the application. I stated, however, that if the respondent wanted to test their competing account they could do so by asking the claimant questions in cross examination. I granted the application to rely on the CCTV evidence and gave time to the claimant to view it.

8. Pre-reading, dealing with the applications and the viewing of the CCTV took a large proportion of the morning and I indicated to the parties that this may mean that there would be insufficient time to deal with remedy issues if the claimant were to succeed in her claim. But that we would keep it under review.

9. I then heard oral evidence from the claimant, Ms Price, Mr Singh and Ms Balian. Mr Gulammamodo was not present and did not give oral evidence. As I told the parties at the time this limited the weight I could give to his written statement. In particular he states: "*As far as I am aware, the Claimant walked out half way through her shift on the morning of 11 October 2019"* and "*as far as I am aware, all employees (including myself) are offered 20 days paid holiday per year with the addition of a further 8 – 10 days paid holiday a year to cover the hotel's shutdown period."* There was no opportunity to clarify or test with the witness as to what he meant by: "as far as I am aware." His written statement was therefore of no real assistance to me.

10. I had opportunity to view CCTV evidence which was partial and of limited assistance. It did not cover all of the phone calls that the claimant says happened that day and it was visual only: it was not possible to hear what was actually being said.

11. I received oral closing submissions from both parties which I have taken into account. In this judgment references in brackets [ ] are references to the page numbers in the bundle.

12. In summary form, the heart of this case was about whether the claimant resigned or was dismissed. If dismissed, the claimant was asserting that there was no fair procedure followed and no fair reason for her dismissal. She expressed the view that the reason for her dismissal was (i) because she had refused to accept only 20 days paid holiday a year and/or (ii) because the respondent wanted to give DK her job and/or (iii) because she had been complaining about mistakes about her tax.

13. The claim form and response form indicated a potential dispute about the claimant's length of service. The claimant says that she worked for the respondent from 30 October 2001 until 12 October 2019. The respondent's response form asserts the claimant's employment started on 6 August 2018 and ended on 11 October 2019. They stated that they only acquired the business on 31 July 2018 and hired the claimant on 6 August 2018. However, it was not asserted before me that the claimant lacked two years qualifying service to bring an ordinary unfair dismissal claim and Ms Balian's evidence accepted that the Transfer of Undertakings (Protection of Employment) Regulations 2006 ["TUPE" as it is usually referred to] applied to the claimant.

Findings of fact

14. I make the following findings of fact by applying the balance of probabilities.

15. The trading name of the hotel is Tudor Court Hotel. The hotel is in Swansea. The previous owner was Mrs Quick. The staff, including the claimant, who worked for Mrs Quick received 28 days paid holiday a year which included a compulsory shutdown over the Christmas period.

16. The respondent acquired the hotel on 31 July 2018 but the initial operations of the business were managed by KLJ Group of Hotels Ltd, a sister company of the respondent. This was whilst systems were put in place by the respondent for things like payroll and pension provision. The employees of the hotel were then moved over to the respondent's payroll from 24 October 2018.

17. The claimant did not receive any new contractual documentation from the respondent including anything about holiday entitlements. She was told she would transfer with the same terms and conditions.

18. Some time on or before 1 April 2019 the claimant contacted KB and Ms Balian about her holiday entitlement and whether the holiday year ran from April to April or January to December. The claimant explained in evidence that there were only 3 members of staff working downstairs in the hotel and that they thought they had quite a lot of unused holiday which they wanted to book and coordinate to make sure there was adequate cover.

19. The claimant states that she sent various emails both at that time and later about issues to do with holiday pay. They were sent from a generic email address belonging to the respondent of klj.mngmt@gmail.com as opposed to being a personal email account of the claimant. There has been no disclosure by the respondent of emails sent to and from this address. The claimant says this is because the respondent would delete her emails and their responses about holiday pay. She said that on occasion this led to her taking photographs on her phone of emails. Ms Balian told me that there were no other emails and that the only email she recalled the claimant sending with details of Government advice about holiday pay entitlement was after the claimant had left and which Ms Balian said remained in the email account undeleted. I return to this point below.

20. I have not seen the original email the claimant sent (if indeed it was an email query). All I have is a poor quality copy of a photograph of an email in reply from Ms Balian of 1 April 2019 [29]. This states:

> "*Kindly note the company's holiday period runs from January to December as per payroll and compliance purposes, wherein the staff is offered 20 paid holidays a year which they are expected to use in that period. Any unused holidays are not rolled over to the next year nor are the employees expected to get paid for those un-used holidays.*
>
> *Since you joined our payroll in August 2018 therefore you had total of 8.3 (20 holidays a year / 12 months in a year = 1.6 holidays per month) days of holiday where you had used 6 days. In usual circumstances we would not offer to roll over holidays in next year however just a* ***one off exception in your case*** *considering you were not aware of holiday period. I approve for you to take the remaining 1.5 days of holiday this year.*
>
> *Lastly, moving forward I would appreciate if you avoid speaking on behalf of others. I would rather have everyone voicing their doubts themselves."*

21. The claimant became concerned that she and her colleagues were being denied their entitlement to 28 days paid holiday a year. At the hearing

before me, the respondent's position in relation to the email of 1 April 2019 was that the 20 days paid holiday was in addition to a further paid period of holiday in December every year when there was a compulsory shut down over Christmas. It was said that this was always at least 8 days and sometimes more depending on what day Christmas day fell in a particular year. It was said that the reference to 20 days in Ms Balian's email was a reference to the additional days that an employee could elect to take whenever they wished as opposed to being a compulsory period of leave over the Christmas shutdown.

22. The email, however, did not say that. Further the respondent's own witness evidence was not that this position had been clearly explained to the claimant whether orally or in writing when she was questioning what her entitlement was. Instead the respondent's evidence was, in effect, that the claimant should have known the Christmas shutdown leave was additional as that had always been the position.

23. I find as a matter of fact that the claimant did not understand that Ms Balian when referring to 20 paid holidays a year was in fact intending to refer to 20 paid holidays a year plus 8 days (or more) Christmas shutdown period (if indeed that was ever really the respondent's intention). That is nowhere implied within the email. Indeed, the email itself refers to the holiday period running from January to December and that the staff were expected to use their 20 paid holidays a year "in that period" (i.e. including December). It does not mention at all any special provision for December or Christmas. That is particularly odd bearing in mind by April 2019 there had been the first Christmas period with the claimant and her colleagues being employed by the respondent. Ms Price's evidence was likewise that it had never been said to her that the 20 days entitlement had an additional 8 days or more to be added for the Christmas shutdown.

24. The claimant was therefore concerned that the respondent was seeking to deny her and her colleagues their entitlement to 28 days paid holiday a year.

25. I have already said that the claimant's evidence was that she had other exchanges with Ms Balian and KB about paid holiday entitlement after this email of 1 April 2019. The claimant said that she also spoke to Mr Singh about it face to face. As I have also already commented, there are no documents available about this and little evidence was put before me about the detailed content of any exchanges.

26. On the balance of probabilities I consider it likely that the claimant did continue to pursue the issue with Ms Balian and KB. I also consider it likely that the claimant did email Ms Balian with information from the Government website about entitlement to paid holiday and that this was

done sometime in the period between April 2019 and the lead up to the claimant ceasing to work for the respondent. I also find it likely that in any responses the respondent did not set out any view or explanation that the entitlement was to 20 days paid holiday and a further 8 days or more for the Christmas shutdown. I reach these conclusions in part because it is not in dispute, that in due course the claimant and some colleagues asked to see their own individual holiday schedules, which of itself tends to suggest there was an ongoing dialogue.

27. Because of the change of payroll function from, firstly, Mrs Quick to KLJ Group of Hotels Ltd and, secondly, from KLJ Group of Hotels Ltd to the respondent, HMRC records showed the claimant as having 3 notional employers in quick succession. This caused the claimant problems with her tax for the financial year 6 April 2018 to 5 April 2019. In particular, she says that her earnings reported to HMRC for the period she was on the books for KLJ Group were mistakenly overstated which led to HMRC saying that she had paid too little tax. [79] is a letter to the claimant from HMRC thanking her for a letter of 10 September 2019 and stating that for any correction to be made the claimant's employer needed to send an Earlier Year Update. The claimant asked the respondent to assist with this. She stated that she could not get them to send what HMRC had asked for.

28. Ms Balian's email of 1 April 2019 shows that the claimant was attempting to ask questions about holiday entitlement on the behalf of colleagues too but had been told that people had to make contact directly themselves. It is implicit in what happened next that there were ongoing discussions amongst some hotel staff but I do not have the details of those discussions. However, it led to some colleagues, including Ms Price, signing a letter to say that they gave permission for their holiday rotas to be sent to the claimant.

29. Sometime in the week leading up to 11 October 2019 the letter with permissions from the claimant's colleagues was sent to the respondent. Sometime later that week a reply was sent with the holiday schedules attached. I was not given the letter or letters or any of the email correspondence or the full version of the colleagues' schedules. The claimant took some photograph snapshots of some of her colleagues' schedules at [26 to 28] but they do not show the full document. There was also a schedule for the claimant. The respondent has produced a version of this at [25] but the claimant disputes that this is the version that she saw on 11 October 2019.

30. [26] is a snapshot from an extract of the 2019 holiday schedule of a colleague, RD. It says "Holiday entitlement this FY 20.0." [27] is another snapshot for another colleague, SY. It is difficult to read but appears to

again show a holiday entitlement for the financial year of 20. [28] is a further snapshot for Ms Price which again shows a holiday entitlement for the financial year of 20 days.

31. [25] is the disputed holiday schedule for the claimant. There are parts of it that are not very easy to read because of the shading of some of the boxes. It says in a box in the top left hand corner: "Holiday entitlement this FY 22.0" Another entry says: "Total holiday taken this FY 12.0". There is a table which purports to show days that the claimant was not in work each month. Underneath the table some text has been inserted to say:

> *"29 and 30 march – sick*
>
> *Left job on 11 oct total holidays due 22 days – 12 holidays taken*
> *Remaining due 10 holidays*
>
> *Holiday pay – 10 days (2019) + 6 days (2018) = 16 days*
> *Total - £919.52"*

Further to the right of this entry is a further entry that simply says "28 days." [69] is the claimant's last pay slip which shows a manual entry for holiday pay in that sum of £919.52 (before deductions).

32. The claimant states that the holiday schedule she saw at the time said that she had 20 days entitlement for the year; the same as her colleagues' schedules. She said that the version at [25] was amended by the respondent after she left employment and she had not seen it until the disclosure stage of these proceedings. There must of course have been some editing of the document after the claimant left because it has been updated with entries relating to the claimant leaving her job and the pro-rating of the holiday year.

33. On the balance of probabilities I accept that the version of the holiday schedule that the claimant saw for herself that week ending 11 October 2019 said that she had a holiday entitlement for the year of 20 days, in the same format as her colleagues. I also find it likely that part of those 20 days was already pre-allocated against 7 days in December for the Christmas shutdown as it has on the face of it been for the colleagues' extracts at [26 – 28]. I find this gave the claimant cause to believe she and her colleagues were not being given what she understood to be an entitlement to 28 days paid holiday a year.

34. On receipt, the claimant contacted KB about the schedules and holiday entitlements saying that they still showed an entitlement of 20 days. KB told the claimant that he would speak to her about it on the morning of 11

October as he would be at the hotel. That morning the claimant asked Mr Singh about her meeting with KB and Mr Singh told her that KB had gone out for another meeting at the Village Hotel. Mr Singh then went out himself. The claimant telephoned KB while he was at the Village Hotel.

35. The claimant says that she asked KB why the holidays shown were only 20 days a year and not 28 as required by law. She states that he replied that this was all he gives his staff in his hotels. She states that she told him that this was against the law and that KB responded to state that's what it is and that if the claimant did not like it she was to leave the hotel. She states she asked KB if he was sacking her and KB replied "If that's what it takes yes I am."

36. As set out above, I did not receive any evidence from KB with his version of what was said. There were no other direct witnesses to the conversation between the claimant and KB. The respondent's position is that the claimant resigned at about 11 o-clock, halfway through her shift. They do not say who on their account that resignation was initially communicated to. Ms Balian's witness statement says that the claimant "also" rang KB whilst he was in a meeting at the Village Hotel. Ms Balian states that the claimant demanded to discuss her holidays and that KB told her he would discuss it after the meeting. Ms Balian's account (albeit she was not a direct witness) is that the claimant said she was now leaving her job and will make sure she gets paid her wages. It is therefore not in dispute a telephone call took place between the claimant and KB that related to holiday entitlement. It was put to the claimant in cross examination that she said she was resigning on principle. The claimant denied this saying she could not financially afford to do so.

37. On the balance of probabilities, I accept the claimant's account and that the gist of what was said in the conversation between her and KB is at paragraph 35 above.

38. The claimant telephoned Mr Singh as she did not want to leave the hotel unattended. She waited for Mr Singh to return. The claimant says that she told Mr Singh what had happened, including that she had been sacked by KB and that Mr Singh wanted to contact KB to try to sort it out but that she was upset and told him not to bother. Mr Singh states the claimant told him that she was leaving, not that she had been sacked and that he tried to get her to discuss her issues with KB. He knew that the claimant was in dispute with KB about holiday entitlement. He accepted in evidence that he himself had told the claimant that day (and later Ms Price) that the entitlement was to 20 days paid holiday (albeit he also said that given it was October they should have known that there was also the Christmas shutdown period and that this should not have needed to be expressly mentioned to them)

39. The claimant told her colleague, Ms Price, what had happened. Later that day Ms Price attended work and spoke with Mr Singh. Ms Price asked herself about holiday entitlement and Mr Singh told her that it was 20 days and that the respondent would not change it as it was all they had ever given their staff in all of their hotels. Ms Price then resigned.

40. [24] is a Facebook post by the claimant dated 12 October in which she says:

> *"So after 21 years in the same job I get sacked for sticking up for myself and arguing my rights to my holidays hope you are ready for this TUDOR COURT HOTEL I'll have the last laugh you will not get the better of me I will get what I'm owed" [there is then three angry face emojis].*

41. Either that day (12 October) or within the next few days after her departure the claimant returned to the hotel and spoke to Mr Singh. It is not in dispute that the claimant said words to the effect that she wanted to be paid what she was owed. Mr Singh states that the claimant said she wanted to be paid for all her holidays including what she was owed from the previous year or she would make a claim. The claimant denies this saying she was not expecting the previous year's outstanding holiday and that what she had been seeking was what she was owed at the time of termination of her employment and to make sure it was actually put into her bank account.

42. When the claimant went to speak with Mr Singh, DK was also present. The claimant says that some time in the days prior to her departure DK had told her he was unable to claim benefits because he was down as a director and shareholder of one of KB's other hotels. The claimant considers that DK was given her job and that when she saw him at the hotel after her departure he apologised and said he had nowhere to live and needed the job. Mr Singh accepted that DK was present. He said DK was helping out unofficially as they had been left short staffed with the claimant's sudden departure and that DK was officially put on the payroll on or around 16 October.

43. On 16 October, the claimant was sent her final payslip which included a sum for outstanding holiday pay. The final calculation gave the claimant a 28 day paid holiday pay entitlement pro-dated to 22 days for the period in the holiday year that she had worked. 12 days taken was offset from that reducing it to 10 days. The respondent also paid a further 6 days for the previous holiday pay year (more than the figures in the email of 1 April 2019).

Relevant legal principles/ the issues to be decided

"Ordinary" unfair dismissal

44. Section 94 of the Employment Rights Act 1996 gives qualifying employees the right not to be unfairly dismissed. As already stated, the respondent has not disputed that the claimant qualifies for that right. There is, however, a dispute as to whether the claimant was dismissed or resigned.

45. Section 95 sets out the circumstances in which there is a "dismissal." This includes where the contract under which the employee is employed is terminated by the employer, either with or without notice.

46. If there has been a dismissal, Section 98 sets out the statutory test to be applied to determine if there has been unfair dismissal. Section 98(1) states:

> *"(1) In determining for the purposes of this Part whether dismissal of an employee is fair or unfair it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it 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."*

47. Section 98(2) states:

> *"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;*
> *(d) or that the employee could not continue to work in the position which he held with contravention (either on his part of on that of his employer) of a duty or restriction imposed by or under an enactment."*

48. Section 98(4) states:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) 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 sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

49. Notice of dismissal can only generally be effective if and when received by the employee i.e. the dismissal has to be communicated to be effective. As a general rule, if an employer uses unambiguous words of dismissal, so understood by the employee, they will thereby dismiss the employee and terminate the contract of employment. If ambiguous words or actions are said to be in play, the Tribunal has to ask how they would have been understood by a reasonable recipient, taking into account what the recipient knew about the circumstances. Later events can be taken into account in that interpretation provided that they are genuinely explanatory of what happened; *East Kent Hospitals University NHS Foundation Trust v Levy* UKEAT/0232/17/LA.

50. Even where unambiguous words are used, the case law suggests there can in limited circumstances be exceptions to the general rule. The classic example of such an exception is where words are spoken in the heat of the moment or under emotional stress, where those words can be withdrawn if it is done timeously or the recipient ought to know that the words should not be taken seriously so that the purported dismissal will be of no effect.

"Automatic" unfair dismissal

51. The relevant parts of Section 104 of the Employment Rights Act state:

> *"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*
> *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*

(2) It is immaterial for the purposes of subsection (1)—
(a) whether or not the employee has the right, or
(b) whether or not the right has been infringed;
but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—…
(d)the rights conferred by the Working Time Regulations 1998…

52. Section 101A of the Employment Rights Act states:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,

(c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations, or

(d) being—

(i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or

(ii) a candidate in an election in which any person elected will, on being elected, be such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.

53. The Working Time Regulations 1998 govern the statutory provision of paid annual leave. Regulation 13 provides an entitlement to 4 week's annual leave in each leave year. Regulation 13A provides an additional entitlement to an additional 1.6 weeks' annual leave each year. There is a maximum aggregate entitlement for both of 28 days. Regulation 16

provides the right to be paid a week's pay for each week of statutory annual leave.

Discussion and Conclusions

Was the claimant dismissed?

54. I have found as a matter of fact that KB used the words or the gist of the words the claimant described in his phone call with the claimant. The respondent asked me to prefer the account of Mr Singh that the claimant was not dismissed. It is said that is consistent with the CCTV and the holiday schedule at [25] which says the claimant "left." I did not find the CCTV of any real assistance on the point. In relation to document [25] it appears likely to me that its final edited version was completed at around the time the respondent processed the claimant's final payslip on 16 October, some days after the claimant's departure and at a time the claimant had indicated she may bring a Tribunal claim. The word "left" is a loose word and does not of itself rule out including a dismissal. Ultimately neither Mr Singh or Ms Balian can give a direct account of what was said between the claimant and KB and notwithstanding the points the respondent makes, on balance and having had the benefit of the claimant giving live evidence, I accepted the claimant's account of what was said. Her reference to being "sacked" was supported by the claimant's use of the same language in her Facebook the following day on 12 October 2019.

55. I find that KB's words were unambiguous words of dismissal and were understood by the claimant to be a summary dismissal without notice. Whilst I have not heard from KB I accept that it may well be that his conversation with the claimant was somewhat terse and it is likely he did not appreciate being interrupted in his meeting at the Village Hotel. However, the claimant would not have known that she was not to take his words seriously; it was a serious conversation about a point about entitlement to holidays that the claimant had been pursuing both for her and colleagues. Further the words were not withdrawn by the respondent. I therefore find that the claimant was summarily dismissed by KB on 11 October 2019. It was a dismissal not a resignation.

The reason for the dismissal

56. "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" (Abernethy v Mott Hay and Anderson [1974] ICR 323).

57. What matters is therefore what was operating in the mind of KB when he decided to dismiss the claimant. The respondent pointed out to me in closing submissions that a distinction could be drawn between, on the one hand, a mindset that may amount to an automatic unfair dismissal in terms of the legislation set out above, and, on the other hand, a mindset to dismiss because of a claimant's own conduct in the way in which she raised and pursued her rights, or because it was borne of a genuine misunderstanding about what the provision for paid holiday was, or indeed a belief that trust and confidence between employer and employee had broken down. It was said that the latter types of mindset could amount to a fair reason for dismissal on the basis that they were of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

58. I accept the conversation between the claimant and KB may have been direct and terse from both perspectives but I do not find it established on the balance of probabilities that whether during that call or the claimant's wider conduct in pursuing questions about paid holiday entitlement she engaged in improper conduct that justified KB dismissing her. I find that the claimant fairly and appropriately thought the respondent was seeking to limit paid holiday pay entitlement to 20 days a year and she legitimately thought that was less than what her legal entitlement was.

59. Applying the balance of probabilities, I find it unlikely that KB was operating under a misunderstanding. I have found as a matter of fact the respondent sent holiday schedules to the claimant that showed on the face of them entitlements to 20 days a year paid holiday including a pre-set period for the December shutdown. I have found as a matter of fact that he also said to the claimant that 20 days was what was given at his other hotels. In my judgment, if the provision were for 20 days plus the Christmas shutdown this would be shown on the schedules, and someone from the respondent would have clarified that to the claimant and her colleagues both then and previously. It is said on behalf of the respondent that there was no need to do so because nothing had changed since Mrs Quick owning the business. But there was every need given the reference to 20 days in the email of 1 April 2019, in the holiday schedules and given the claimant's pursuit on behalf of her colleagues that they did not think they were receiving what they were entitled to. In any event, even if there were a misunderstanding, it would not amount to a substantial reason of a kind such as to justify the dismissal of an employee holding the claimant's position. It would require further clarification, explanation, and discussion and not the words that I have found that KB used in dismissing the claimant.

60. I also do not accept, as was asserted by the respondent, that there was a misunderstanding on the claimant's part. The respondent said that they paid the claimant everything she was owed on termination which shows that there was never an intention to deny the full entitlement to paid annual leave under the Working Time Regulations. However, an alternative analysis could be that the respondent was simply trying to avoid further conflict with the claimant and reduce the risk of employment tribunal proceedings being brought. I therefore found that point of no real assistance when reaching findings in this case.

61. I also do not find that there was a breakdown in the relationship of trust and confidence between the respondent and the claimant other than that borne of KB's frustration with the claimant for pursuing what she believed to be her, and her colleagues' paid holiday entitlements. In Leach v Office of Communications [2012] ICR 1269 the Court of Appeal emphasised the mutual duty of trust and confidence, whilst being an obligation at the heart of the employment relationship, is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. Each case must be decided on its own facts. In my judgment, KB's sense of frustration with the claimant could not amount to a substantial reason sufficient to justify dismissing an employee holding the position which the claimant held.

62. In my judgment it is likely that KB largely dismissed the claimant out of frustration. A small part of that may have been due to being disturbed whilst at the Village Hotel. But in my judgment the principal source of frustration was the claimant's persistence that she and her colleagues were entitled at law to 28 days paid holiday each year and she was not going to agree to work for less.

63. I do not consider it likely that KB wished to honour such an entitlement as he wanted to keep Tudor Court Hotel in line with his other hotels. In effect, therefore his decision as communicated to the claimant was that if she was not prepared to work under those terms then she would have to leave, and he was dismissing her if that was what it took.

64. KB was in effect imposing or proposing to impose a requirement that entitlement to paid annual leave be limited to 20 days in a leave year. For a worker working 4 or more days a week this would be less than the statutory entitlement under the Working Time Regulations. I therefore find that that the principal reason for the claimant's dismissal was that she refused to comply with a requirement that the respondent proposed to impose that was in contravention of the Working Time Regulations. Alternatively, put another way, the principal reason for the claimant's

dismissal was that she refused to forgo a right conferred on her under the Working Time Regulations of an entitlement to 5.6 weeks paid annual leave a year. The claimant was therefore "automatically" unfairly dismissed under Section 101A of the Employment Rights Act.

65. If I am incorrect as to my analysis in relation to Section 101A I would in any event have found that the claimant was unfairly dismissed under the "ordinary" principles of unfair dismissal under Section 98. KB's frustration that the claimant would not let the issue of her and her colleague's entitlements drop and that she was refusing to work for 20 days paid holiday a year does not amount to a fair reason within section 98(1) or (2). Even if I was further wrong in that, and there was a potentially fair reason for the claimant's dismissal, I would find that the respondent acted wholly unfairly pursuant to s98(4) in dismissing the claimant. A fair dismissal in the kind of circumstances envisaged by the respondent would, to be within the range of reasonable responses open to an employer (and even if not a misconduct process) have to involve a procedure with some procedural safeguards and fairness. It would at the very least involve the claimant being called to a meeting, listening to her account, considering all the relevant factors before reaching a decision, and offering a right of appeal. Borne of frustration, the respondent's procedure offered no such safeguards and whilst Mr Singh did suggest to the claimant that he contact KB so there could be further discussion, it would not, in my view, be a sufficient procedural safeguard by itself or render the whole procedure as being within the reasonable range. Therefore, in all the circumstances, including equity and the substantial merits of the case, the respondent did not act reasonably in treating the reason as sufficient reason for dismissing the claimant.

66. For completeness I should add that I do not consider that the two alternative reasons put forward by the claimant were reasons for the claimant's dismissal. I do not find that she was dismissed because KB wished to give her job to DK. There was insufficient evidence of that before me and there was no suggestion that KB said that to the claimant at the time of dismissing her. I find it is likely that the claimant presumed this as being a reason after the event because of DK's employment and the comments that he made to her. I also do not consider it likely that the claimant's complaints about her tax situation was a reason for her dismissal. She said herself in evidence that, in effect, it was not a big deal.

Conclusion

67. The claimant's claim of unfair dismissal is therefore well founded and succeeds. There was not time at the hearing to address remedy issues

and I will send the parties a separate case management order about preparation for a future remedy hearing.

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Employment Judge Harfield
Dated: 23 June 2020

JUDGMENT SENT TO THE PARTIES ON 6 July 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS