EMPLOYMENT TRIBUNALS

Claimant: Miss S Powell

Respondent: Tattu Manchester Limited

Heard at: Manchester **On:** 2 and 3 March 2020

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Ms Jones (Counsel)
Respondent: Mr Boyd (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that she was constructively dismissed and that that dismissal was unfair succeeds.

2. The claimant's claim that the respondent breached her contract by failing to pay her the Super Bonus succeeds.

3. The Tribunal does not have jurisdiction to consider the claimant's claim that the respondent breached her contract by failing to grant her the reward trip to Asia because entitlement to it was not outstanding on termination of her employment.

The case will be listed for a remedy hearing to decide the amount to be awarded to the claimant in relation to her successful claims.

REASONS

Introduction

1. The claimant was the General Manager of the restaurant run by the respondent in Manchester. The case arises from her resignation on 30 January 2019. She said that that resignation was a constructive dismissal and that that dismissal was unfair. She also said that the respondent had failed to pay her two bonuses which she said she was contractually entitled to. The first was a "Super Bonus" based on performance in the calendar year 2018; the second was a "reward trip" which in this judgment I refer to as "the Asia Trip". The respondent denied that the claimant was contractually entitled to those bonuses. At the start of the hearing Mr Boyd for the respondent raised a jurisdictional issue which was that in his submission the Tribunal did not have jurisdiction to hear the bonus claims because they were not outstanding on the termination of the claimant's employment.

Preliminary Matters

2. I heard the case over two days at Manchester Employment Tribunal. I heard evidence from the claimant in support of her case and from Adam Jones (Managing Director) and Laura Morgan (HR Manager) for the respondent. Each witness had provided a written statement and was cross examined and answered questions from the Tribunal. References in this judgment to paragraph numbers are to paragraphs in the relevant witness's written witness statement.

3. There was an agreed bundle of documents consisting of pages 1-267I. On the second day of the hearing we added three further pages (pages 59A-59C) which was the respondent's Disciplinary and Capability Procedure. References in this Judgment to page numbers are to page numbers in that bundle.

4. At the end of the evidence on the afternoon of the second day of the hearing I heard oral submissions from Mr Boyd and Ms Jones. I then reserved my decision. I have taken the submissions I heard into account in reaching my decisions but have only specifically referred them in this judgment where necessary rather than setting them out in full. I apologise to the parties for the delay in finalising and sending them this judgment due to my absences from the Tribunal and the impact of the current pandemic on the Tribunal.

5. On the morning of the first day of the hearing counsel for the claimant and the respondent agreed a List of Issues. They were as follows:

(1) Did the Respondent breach the implied term of trust and confidence? That is, did the Respondent act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?

The Claimant relies on the cumulative effect of the following acts:

a) The misconduct of an investigation into the conduct of the Assistant General Manager;

b) The behaviour of the respondent's Operations Manager Vasco Carvalho including sending excessive emails, his demeanour towards staff, and his behaviour on 17/10/18;

c) Breach of confidence by HR in telling Mr Carvalho about a confidential conversation and in sending the claimant's private correspondence to the Assistant Manager;

d) Unfounded and unwarranted allegations that the claimant was failing in her duties regarding staff paperwork, lack of support to complete this, unjustified invitations to disciplinary and then investigation, failure to properly investigate;

e) Unfounded and unwarranted allegations that the claimant was failing in her duties regarding site maintenance and cleanliness;

f) Management withholding the Asia trip contrary to terms of the competition and previous assurances.

(2) Did the Claimant resign at least in part because of any such breach such that she was dismissed within the meaning of s95(1)(c) of the Employment Rights Act 1996?

(3) If there was a constructive dismissal, has the Respondent established a fair reason for the dismissal and that it acted reasonably in the circumstances? The claimant says the potentially fair reason is conduct.

(4) If the Claimant was unfairly constructively dismissed, what is the appropriate remedy?

(5) Does Tribunal have jurisdiction to hear the contract claim?

(6) Was the Claimant contractually entitled to a bonus and/or holiday and if so what is the appropriate remedy?

6. Although the list of issues referred to my making decisions about remedy the parties agreed as the case progressed and time became short that that we would not deal with the issue of remedy at this hearing. However, it was agreed that it would assist the parties if I made findings of fact relating to any **Polkey** deduction as part of this liability Judgment and I have done so. Ms Jones conceded that **Polkey** was an issue that I could consider although it had not been specifically pleaded by the respondent.

Relevant Law

<u>The unfair dismissal complaint</u>

7. S.94 of the Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by her employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

8. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

9. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."

Remedy for unfair dismissal

10. S.118(1) ERA says that:

"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

11. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

12. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

13. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee would have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

14. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

15. Where the Tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive dismissal

16. Section 95(1)(c) ERA provides that "an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". This is known as "constructive dismissal". The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

17. The claimant says that the acts at 1(a)-(f) in the List of Issues cumulatively amounted to a breach of the implied term of trust and confidence. The existence of that implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. It confirmed that the obligation on each party is that it will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

18. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

19. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

20. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate his contract and claim constructive dismissal need not be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

21. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55**:

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?

(5) Did the employee resign in response (or partly in response) to that breach?"

22. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

Breach of Contract – establishing contract terms

23. Lord Clarke explained the relevant principles for determining the terms of a contract in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753**, para 45:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. "

24. In **Blue v Ashley [2017] EWHC 1928** Leggatt J noted that where the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis.

Breach of Contract – implied terms

25. When it comes to implied terms, the courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

a. the term is necessary in order to give the contract business efficacy: In **Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC**, Lord Hughes explained that: "A term is to be implied only if it is necessary to make the contract work, and this it may be if…..it is necessary to give the contract business efficacy.……The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

b. it is the normal custom and practice to include such a term in contracts of that particular kind: the custom in question must be reasonable, notorious and certain (see, for example, **Devonald v Rosser and Sons 1906 2 KB 728, CA**, and **Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA)**.

c. an intention to include the term is demonstrated by the way in which the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it, see **Mears v Safecar Security Ltd 1982 ICR 626, CA**.

d. the term is so obvious that the parties must have intended it (known as the 'officious bystander' test). In **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA**, **affirmed by the House of Lords in Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL** held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

Breach of Contract - Jurisdiction

26. The Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see **Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994**.

27. In **Capek v Lincolnshire County Council [2000] ICR 878**, the Court of Appeal cited with approval Keene J's statement in **Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR 673** that the intention of the 1994 Order was '… to avoid the situation where an employee (or for that matter an employer) is forced to use both a tribunal and a court of law to have all his or her claims determined. In simple terms, the purpose of the extension of jurisdiction was to enable an employement tribunal to deal with both a claim for unfair dismissal (which we take as an obvious example) and a claim for damages for breach of the same contract of employment. Two sets of proceedings are thus avoided.'

28. Mr Boyd drew my attention to and provided copies of two cases which he submitted were relevant to the contractual jurisdiction of the Tribunal in this case, **Miller Bros and F P Butler Ltd v Johnston [2002] IRLR 386** and **Peninsula Business Services Limited v Sweeney [2004] IRLR 49.**

29. In **Miller** the EAT held that the word 'on' used in the phrase 'outstanding on the termination of the employee's employment' was meant in a purely temporal sense (i.e. pertaining to time). Article 3(c) had to be interpreted as applying only to claims that were either outstanding on the termination of employment or arose on termination in a purely temporal sense. That means, for example, that settlement agreements made after termination, if broken, are enforceable only in the ordinary civil courts.

30. In **Miller** the EAT also held that "termination of the employee's employment" should be interpreted consistently with s.97 of the ERA which deals with the meaning of "effective date of termination". In the case where an employee gives notice this means that the "termination of employee's employment" means the date on which the notice expires.

31. In **Staffordshire County Council v Secretary of State for Employment 1989 ICR 664, CA,** the Court of Appeal (by a majority) held that the voluntary waiver of a notice period (including by the acceptance of a payment in lieu) did not bring forward the relevant date of termination for statutory purposes.

32. In **Sweeney** the EAT held that a claim will only be 'outstanding' within the meaning of Article 3 if it is a claim which, as at the date of termination, was immediately enforceable but remained unsatisfied. If a payment is only contingently due, it is not possible to claim payment until the contingency has happened. Before then, all that can be claimed is a declaration of entitlement to the payment if and when the contingency does happen, but a claim of that sort does not fall within Article 3. In **Sweeney** itself that meant the employment tribunal did not have jurisdiction to hear the employee's claim for the payment of commission on sales which he had achieved during his employment but which, under the terms of the contractual commission agreement he had signed, did not fall due for payment until after the date of the termination of his employment.

Findings of Fact

33. I set out my finding of fact below under the following headings:

- Background Facts
- The Super Bonus
- The Asia Trip
- Events on 17 and 18 October 2018
- The disciplinary investigation into the claimant's AGM
- Alleged breaches of confidence
- The HR audit
- Other allegations including site maintenance and cleanliness
- The proposed disciplinary proceedings
- Adam Jones's email of 28 January 2019 and the claimant's resignation
- Polkey findings.

34. I have only made the findings of fact necessary to decide the issues in the case. Where there was a significant dispute of fact between the parties I have briefly explained whose evidence I preferred and why.

Background Facts

35. The respondent is a restaurant business. The business started trading in Manchester in April 2015 and is co-owned by Adam Jones and his brother Drew. At the time of the incidents giving rise to this case, the respondent had restaurants open in Manchester and Leeds and was in the process of opening the Birmingham restaurant.

36. The claimant had been with the business from its early days and became General Manager of the Manchester restaurant on 15 May 2017. Adam Jones was at the Manchester restaurant once or twice a week, but the opening of the Birmingham restaurant took up a lot of his time when the events relevant to this case took place.

37. Although I did not hear evidence from him, the other significant person in this case was the claimant's then Operations Manager (now Operations Director) Vasco Carvalho. He was the claimant's line manager. The parties were agreed that he was heavily involved in managing the opening of the Birmingham restaurant and that at the time of incidents in October 2018 he was under a great deal of work pressure. To lighten the load on him, the respondent in Autumn 2018 recruited Ms Morgan as HR Manager as well an in-house Finance Manager and a Brand Manager.

The Super Bonus Scheme

38. It's convenient to deal next with the Super Bonus Scheme operated by the respondent. Dealing with it first helps explain the Asia trip which in turn is central to the "last straw" relied on by the claimant as justifying her claim that she was constructively dismissed.

39. The only reference to a bonus in the claimant's contract of employment (p.47-59) was in clause 14.1(a) which makes it clear that any payment in lieu of notice shall not include any element in relation to bonus. The only written documentation of the bonus schemes was an undated one-page document (p.238).

40. That document ("the Bonus Scheme Document") refers to three kinds of bonuses. The first two are a period bonus and a quarterly bonus, neither of which was in dispute in this case. A "period" for these purposes is one of the 13 x 4 week periods into which the respondent divides the calendar year. The third bonus described in the Bonus Scheme Document is the "Super Bonus" paid to the General Manager and to the Operational Manager. The information about it on page 238 is relatively short and can be quoted in full:

> "Super Bonus – paid period 2…
>
> **Super Bonus – EBITDA beat**:
>
> £50 per £1,000 above "yearly" EBITDA".

41. It was agreed that EBITDA means "earnings before interest, tax, depreciation and amortization". As I explain later, a central issue in this case was what exactly the parties understood EBIDTA to mean as it applied to the Super Bonus scheme and to the Asia trip.

42. It was agreed that the relevant period 2 in this case ran from 29 January 2019 to 18 February 2019. I find that the Super Bonus was payable by 18 February 2019.

43. The Bonus Scheme Document says that the periodic and quarterly bonuses can be forfeited by failed audits and GP (gross profit) and wage percentage not being hit. The respondent conceded that this condition did not apply to the Super Bonus.

44. The document also says that "Bonus will be forfeited by misconduct. Directors retain the right to amend the bonus scheme at any time". There is no definition of misconduct and no indication of what, if any, notice had to be given to amend the bonus scheme.

45. Ms Morgan in her evidence accepted that the super bonus was not forfeited by an employee resigning and Mr Boyd for the respondent confirmed that that was the respondent's case.

46. Turning to the issue of what the parties understood by EBIDTA. Adam Jones's unchallenged evidence was that in previous years the respondent had used external accountants to prepare its accounts. However, in 2018 it decided to bring the accounts function in-house. This involved the appointment of in-house accounts staff and the appointment of BDO LLP ("BDO") as external auditors.

47. At the heart of the dispute about EBIDTA was the advice from the BDO to the respondent that in calculating EBITDA for accounting purposes it should make a number of adjustments. Those adjustments are set out on page 237 and for convenience I will refer to them as "below the line" adjustments.

48. The significance of those below the line adjustments is that prior to them being made, the "actual EBITDA" for the Manchester restaurant for periods 1-13 in 2018 was £68,054 over the EBITDA budget for the same period. Since the bonus scheme paid £50 for every £1,000 over EBITDA budgeted, that would have entitled the claimant to a bonus of up to £3,400. (In her submissions for the claimant Ms Jones accepted that that was the maximum amount which the claimant could claim rather than the £15,000 claimed by the claimant in her claim form).

49. BDO's advice to the respondent was that it should include as below the line adjustments accrued holiday pay to which employees were entitled but which had not yet been paid for the holiday year to March 2019. This led to an adjustment of £56,395. When other adjustments relating to rent release, loss on disposal and interest were added, this reduced the "adjusted audit EBITDA" to £867,518 which was lower than the budget EBITDA of £874,625

50. In simple terms, this means that if the EBIDTA applicable to the bonus scheme is the "adjusted audit EBIDTA" the claimant loses any entitlement to a Super

Bonus. If, on the other hand, the EBIDTA is the "Actual EBIDTA" the claimant is potentially entitled to her Super Bonus.

51. Mr Boyd submitted that since "EBIDTA" was an accounting term the auditor's decision should be final. The difficulty with that is that the final version of the respondent's audited accounts use EBIDTA in two different ways-as "actual EBIDTA" and "audit adjusted EBIDTA" (p.237). The question for me is how the parties to the Super Bonus scheme were using the term.

52. In terms of what the parties understood EBIDTA to mean, the claimant's unchallenged cross examination evidence was that she would go over the EBIDTA figures on a monthly basis with Mr Carvalho and that throughout the year she was told that she was above target (para 7). On 2 January 2019 Adam Jones emailed the claimant to say that it looked like EBIDTA was above target (p.100). In cross examination evidence he said that when he sent that email it was "incomprehensible" that the claimant would not beat EBIDTA. That was based on sales being approximately £300,000 over target. Some three weeks earlier he had sent a Whatsapp to the claimant saying that she was beating the Leeds restaurant in terms of performance "by a clear mile" (p.77).

53. I find that for both the claimant and Mr Jones their understanding of what EBIDTA meant was based in "real world" performance in terms of sales and costs, i.e. the "actual EBIDTA". That seems to me to make sense given that the purpose of the Super Bonus scheme was to incentivise the general manager to improve restaurant performance throughout the year. It does not seem to be it could fulfil that purpose if the EBIDTA to which the bonus was linked bore no real relation to month on month figures discussed by the claimant and Mr Carvalho and could only be calculated by applying auditing conventions at the end of the financial year.

54. I accept that the final actual EBIDTA figure would need to be checked by auditors to ensure its accuracy. However, I find that for both parties their understanding of EBIDTA was "actual EBIDTA" rather than "audit adjusted EBIDTA".

55. I find that the written Super Bonus scheme terms meant it was payable by 18 February 2019. I accept that this created a conundrum where the actual EBIDTA amount had not been signed off by then. On one view, there could be nothing payable until there was confirmation that the EBIDTA budget had been beaten. I accept Ms Jones's submission that the practical problem that caused for the respondent could not be allowed to override the clear written terms of the scheme.

56. Finally, I find that although there was no definition of "misconduct" in the Bonus Scheme Document. that term is used in the respondent's own Disciplinary and Capability Procedure (pp.59A-59C). I find that is the obvious interpretation to apply to "misconduct" in the context of the Bonus Scheme Document, i.e. misconduct established following a disciplinary process.

<u>The Asia Trip</u>

57. The other "bonus" which the claimant says she is entitled to took the form of a trip to an Asian destination.

58. In an email on 27 December 2017 Adam Jones told the claimant and the then manager of the Leeds restaurant that in addition to their bonus schemes he wanted to run a competition between the two sites. He said that "on top of the Super Bonus, the General Manager who beats their EBITDA target by the most will win a luxury holiday for two at the start of 2019". He said that he would give the details when he returned from annual leave. (p.60). Ms Morgan in her email to the claimant on 15 February 2019 (i.e. after the claimant resigned) said that the trip was "not a contracted reward". I find that was not the case-Mr Jones's email Is unequivocal that the winner of the competition "will win" the trip. I find that language is consistent with a contractual entitlement rather than, for example, a reward to be given (or withheld) at the discretion of the respondent.

59. Mr Jones did not confirm the details in writing. However, his evidence was that in a conversation with the claimant in January 2018 he confirmed that the "holiday" was a business trip to an Asian destination and that it would require visiting a number of similar operations to their own. He explained that part of the reason for doing this was that he would be unable to undertake any research trips himself because of the commitments he foresaw for himself in opening the new restaurants in Birmingham and Edinburgh (paras 6 and 7). The claimant denied that conversation took place. On balance I prefer Mr Jones's evidence. I find that the claimant was not always a reliable witness. I accept Mr Boyd's submission that at no point in her oral evidence did she seek to mislead the Tribunal. I also accept his submission that her evidence was subject to a degree of what Mr Boyd called confirmation bias, i.e. that she remembered events which fit her narrative and this at at times led her to exaggerate (albeit honestly) her evidence of what happened (see, e.g. para 70). Mr Jones gave evidence in a straightforward and clear way and was willing to make concessions, e.g. that it had been presumptuous of him to send the email at p.100. I also find that there is some corroboration for his version of events in the Whatsapp message at p.77. He refers to "an Asian destination" and the claimant clearly immediately knows what he means despite there being no reference to Asia in Mr Jones's email at p.60. That supports my findings that Mr Jones's version events is to be preferred and that there had been further discussion about the trip between them.

60. I find that Adam Jones had sometime in January 2019 told the claimant that the Asia trip was a reward trip but one which was intended to benefit the business through information gathering.

61. On 7 December 2018 there was a whatsapp exchange between the claimant and Adam Jones (p.77). He asked "Which Asian destination do you want to go to". She responded with "I'm winning then" and Mr Jones said "If you convert this period beating wages and GP then yeah by a clear mile".

62. On 2 January 2019 Adam Jones emailed the claimant to say "there is no question you have won the competition so I am keen to get your reward trip planned and booked over the next few weeks" (p.100). Mr Jones's evidence, which I accept, was that at that point he thought the claimant had exceeded her EBIDTA target and that GP and labour targets would also be beaten given sales were £300,000 over forecast (para 17). That email also supports a finding that the intention was that the respondent would have an active part in planning the trip rather than it being simply

a holiday to any destination which the claimant had a completely free hand to choose. That in turn supports the respondent's case that the trip was meant to benefit the respondent as well as being a reward for the claimant.

63. The email does refer to a "few things we can improve on in 2019" but does not suggest that there were any contingencies which needed to be met to confirm the claimant's reward trip other than finalising the EBIDTA, GP and Labour figures. The email was sent after the 18 October 2018 when various performance issues were discussed with the claimant and after the exchange of emails in December 2018 about the failure to meet the initial HR Audit (para 102 below).

64. The claimant responded the following day to "thank you for this wonderful opportunity" and express her gratitude for "this wonderful prize" (p.101).

65. The next mention of the trip is in the claimant's email to Mr Carvalho on 28 January 2018 when she asks for more details of the "holiday I won last year" (p.212). Mr Carvalho referred the claimant's query to Adam Jones. His response at 18:49 of the same day was that there were "a large amount of things we need to discuss before I am prepared to even look at this. He then referred to "numerous failed audits" and to issues at the site (discussed from para 114 below).

66. Mr Jones reiterated the purpose of the trip was a research trip and that it "was a trip for a star performer that was fully self-sufficient in delivering the year end result." He said he wanted to see improvement in the claimant's performance before there would be "any more given [to her] by the company" (p.210). That was a reference to the offer of a week's paid leave to the claimant at the meeting on 18 October 2018 (para 77 below (2 days' of which she took). I find that this was the first indication that the claimant was not guaranteed to be taking the reward trip. It was an about turn compared to the email of 2 January 2019 which clearly told the claimant the trip was going ahead. Adam Jones had not previously given any indication that the trip was conditional on performance issues other than those linked to beating EBIDTA by more than the Leeds restaurant.

67. I find that the relevant EBIDTA for this bonus was also the actual EBIDTA. I can see no reason why a different basis for measuring performance would have been used from that which I have found applied to the Super Bonus. When it comes to when the contractual entitlement to the trip crystallised, there was nothing explicit in writing as clear as the Bonus Scheme Document statement that the Super Bonus was payable in period 2. Adam Jones's email of 27 December 2018 refers to the reward being taken "at the start of 2019" (p.60). Although I accept that Adam Jones's "you've won" email of 2 January 2019 suggests the claimant's entitlement was confirmed at that point, I accept Mr Boyd's submissions that it could only be confirmed when the final EBIDTA figure was confirmed by BDO. Although I have found that the relevant figure was the "actual EBIDTA" rather than the "audit adjusted EBIDTA" I find that figure was not confirmed until 10 April 2019 (p.234A-234H). I find that any contractual entitlement to the trip did not become "payable" until that date. Unlike the Super Bonus, there was no contrary written term rendering it payable at an earlier date than the date the auditors confirmed the actual EBIDTA.

Events on 17 and 18 October 2018

68. On the 17 October 2018 there were incidents involving the claimant and Mr Carvalho at the Manchester restaurant which led to her emailing Adam and Drew Jones to ask for a meeting with them (p.62-63). The claimant's email resulted in a meeting with them on 18 October 2018. The respondent's notes of that meeting were in the Tribunal bundle (pp.64-74).

69. Since my findings about what happened on the 17 and 18 October 2018 are based in part on those notes, it is convenient to deal first with the claimant's allegations that they were not accurate. In her witness statement (paragraph 25) the claimant said that those minutes were "completely inaccurate and falsified as to what was actually discussed" and that she "believed these minutes to have been falsely altered". In cross examination, the claimant was asked by Mr Boyd to clarify what she said the inaccuracies in the notes were. Having had the opportunity of re-reading the notes, the claimant said that there was nothing included in the minutes which had not taken place but there were two omissions. They were her reference to the fact that she had been pulling her hair out (literally) because of stress and also a reference to the then manager of the Leeds restaurant, Jo, also having problems with Mr Carvalho. The claimant was emailed the notes by Adam Jones immediately after the meeting (page p.74A). He asked her to let him know "if all was as discussed today and you are happy with the outcome". On 20 October 2018 (p.74C) the claimant emailed to say that "I have read the minutes and they look to be accurate". She added two minor clarifications, neither of which are relevant to the incidents on the 17 October 2018. Adam Jones's evidence was that the notes covered everything that was discussed at the meeting.

70. Given the claimant's cross-examination evidence and her email on 20 October I find that the notes at pp.64-74 are an accurate record of what was discussed and agreed at the 18 October 2018 meeting. I do find that the inconsistency between the claimant's evidence and the documentary evidence and the exaggerated language of some parts of her written statement did undermine her credibility as a witness and the reliability of her evidence.

71. I find that by October 2018 Mr Carvalho was under a great deal of pressure from Adam Jones both in relation to the Birmingham restaurant opening and, to quote Mr Jones, "salvaging the dire kitchen situations we have faced" (p.72). That referred to problems with the Head Chefs at Manchester which meant that by October 2018 Mr Carvalho was involved in the kitchen side of the Manchester restaurant in a very hands-on and day-to-day way. In her cross-examination evidence, the claimant agreed with Mr Boyd's characterisation of Mr Carvalho as a micromanager.

72. I find that this caused issues for the claimant. Those issues were threefold.

a. Although she was general manager of the Manchester restaurant, Mr Carvalho effectively excluded her from the kitchen and was making decisions about matters such as recruitment but failing to communicate with her about them. Specific examples were recorded in the claimant's notes for the 18 October 2018 meeting (pp.63A-63K). This made it

more difficult for her to fulfil her role as general manager of the restaurant.

b. Mr Carvalho's tendency to micromanage meant he sent the management team what the claimant saw as an "excessive" amount of emails on a daily basis. Although there were no copies of emails from Mr Carvalho in the bundle for the period leading up to 17 October 2018 I accept the claimant's explanation that was because she did not start keeping emails to document the situation until later. I accept the claimant's evidence that Mr Carvalho would send the management team a number of emails on a daily basis. That seems to me consistent with his tendency to micromanage.

c. Mr Carvalho and the claimant had very different management styles. The claimant accepted at the 18 October meeting that she needed to be stricter with managers and that she was "too nice to them" (p.67) and in cross examination evidence that it was part of her personality to get friendly with people. In contrast, it is clear from the claimant's evidence and from the emails from Mr Carvalho in the Tribunal bundle (e.g. pp.137, 172-174, p.184A) that his management style was more brusque and direct.

73. When it comes to this third issue, the claimant went further and said the tone Mr Carvalho adopted with her and colleagues as "inappropriate". In her notes for the meeting on the 18 October 2018 (pp.63A-63K) she included examples of Mr Carvalho swearing at her; giving her a "huge telling off" to stay out of the kitchen; snapping at staff and being prone to "outbursts". I did not hear evidence from Mr Carvalho and neither of the respondent's witnesses gave evidence about these incidents. The notes of the 18 October 2018 meeting do record Adam Jones as accepting that Mr Carvalho was "stretched very thin" and that "it is possible [that] is having an impact on him" (p.65). Mr Jones confirmed in his cross-examination evidence that Mr Carvalho was very stressed at the time and that he agreed at the 18 October meeting he would have a word with him about the way he talked to colleagues. On balance I find that by mid-October 2018 the pressure on Mr Carvalho meant he was prone to outbursts and to speaking to the claimant and colleagues in an inappropriate tone, on occasion shouting at them and swearing at them.

74. Mr Carvalho's behaviour up to 17 October 2018 had not, however, led to the claimant raising concerns about him with Adam and Drew Jones. What prompted her to do so was what happened on 17 October 2018.

75. Three incidents took place on that day:

a. Mr Carvalho shouted at the claimant because of the way she was changing one of the strip lights in a restaurant booth. The claimant's cross examination evidence was that Mr Carvalho said she was doing it wrong. I find that he did so because she was changing the strip light without first having turned off the electricity to the light. At the meeting on the 18 October 2018 the claimant accepted that it was a "silly and dangerous" thing for her to do and told Adam Jones that it "would not happen again" (p.74).

b. According to the claimant, Mr Carvalho spoke to her unprofessionally. Her evidence was that Mr Carvalho told her that she was acting differently since she had split up with her partner. That break-up had happened in the summer of 2018 and had been made more difficult because the claimant's former partner was the bar manager at the Manchester restaurant. The claimant's evidence was that Mr Carvalho told her that she should take a week off work. I did not hear evidence from Mr Carvalho so the only direct evidence of what was said came from the claimant. However, her version is corroborated by the email sent to Adam and Drew Jones the same day (p.74). I find that Mr Carvalho did tell the claimant that she was acting differently since the break-up and that he advised her to take a week off work.

c. Mr Carvalho issued the claimant with a verbal warning for failing to issue a contract to an employee (Sarah) who had left the business. There was no written confirmation of the verbal warning in the Tribunal bundle other than in the notes of the 18 October 2018 meeting (p.71) and it was not given after a formal disciplinary process. At the 18 October meeting the claimant accepted the verbal warning for the contract not being issued to Sarah (p.71). Although in her witness statement the claimant seemed to imply that she was given the warning because she had raised the complaint about Mr Carvalho, (para 26) that is not an argument that was pursed at the Tribunal hearing.

76. I find that the incident which concerned the claimant the most was the second of these. It is the reason she gives in her email dated 17 October 2018 for wanting to meet with Adam and Drew Jones.

77. That meeting took place on 18 October 2018. It was led by Adam Jones with his brother Drew taking notes. As I have said, at the meeting Mr Jones did acknowledge that Mr Carvalho was under pressure and that that was possibly "having an impact on him" (page 65) in terms of his behaviour towards the claimant and colleagues. Adam Jones also confirmed that the suggestion that the claimant take a week's paid leave was his suggestion because of concerns raised by Drew Jones that the claimant was struggling to sleep and not getting enough rest between shifts. He made it clear the offer was not a punishment but something intended to help the claimant (p.69). The claimant did take 2 days off as a result of that offer (p.74C).

78. What is also clear from those minutes is that the respondent had by that time concerns about a "decline" in the claimant's performance and about ongoing issues at the Manchester restaurant. They included ensuring staff documentation was up to date and accessible; ensuring that the takings were taken to the bank daily; ensuring environmental health practices and standards were complied with; and a failure to deal with repeatedly raised concerns such as expensive chairs being stored piled up in the performance booth and failures to close the fire door. At the meeting, Adam Jones said these issues had not been flagged previously because the respondent had decided "to be lenient due to the success of the unit" but that they were setting a benchmark against which the claimant's future performance would be judged (p.74).

79. At the end of the meeting a series of action points/standards were agreed (p.73-74). Of relevance to what happened later is that one of the action points was that "All staff documentation and eligibility recorded and stored physically and online, all H & S documents up to date in the books and online" (p.73 point 5).

80. That action point resulted from the discussion during the meeting in which Adam Jones highlighted the fact that if the respondent had people working for them who did not have the relevant right to work eligibility documents the company could be fined tens of thousands of pounds per person. The claimant's response in the notes is "no, I didn't know that, that's crazy". In her evidence, she said that she was aware that fines could be levied for failing to provide right to work documents. She said that the reference to "crazy" was to the amounts involved of which she was not aware. The claimant at the meeting said that she was "going to do a full audit of staff paperwork and filing" (p.65).

81. I find that at the meeting the claimant accepted the validity of most of those concerns and agreed she needed to be stricter with her staff to ensure their performance was improved. She had raised concerns that some of the issues she had been criticised for resulted from Mr Carvalho's failure to communicate matters to her. However, she did not at the time nor in her Tribunal evidence suggest she was unhappy with the outcome of that meeting.

82. In summary, I find that the claimant had raised concerns with Adam and Drew Jones about Mr Carvalho's behaviour and they had addressed them by clarifying why she had been offered a week's leave and by agreeing to speak to him about the way he was speaking to the claimant and colleagues. They had also used the meeting to clarify their expectations of the claimant in a "professional and structured manner" which is what the claimant had requested in her email of the 17 October 2018 (p.62-63). There was no evidence the claimant raised a complaint about Mr Carvalho's behaviour after that meeting.

<u>The disciplinary investigation into the claimant's AGM</u>

83. It was part of the claimant's case that there had been misconduct by the respondent of an investigation into the conduct of her Assistant General Manager ("AGM"), Jennifer Grimes. The AGM left the respondent's employment at the end of January 2019. She had been the subject of a disciplinary investigation and gave notice in December 2018 before the resulting disciplinary hearing took place. I accept the unchallenged evidence of Ms Morgan that had the disciplinary hearing gone ahead the claimant, as the AGM's line manager, would have been the disciplining officer which is why she had not been involved in the investigation.

84. There was no evidence in the Tribunal bundle to substantiate the allegation of misconduct in the way the investigation was conducted. The claimant gave little or no evidence about what the alleged misconduct was beyond suggesting in her witness statement (para 25 and 27) that it was based on lies spread by the restaurant manager, Ms Njunina who wanted her and the AGM's jobs. The claimant referred to a "diary of lies" (para 27) but this was not included in the Tribunal bundle nor did the AGM give evidence at the Tribunal hearing.

85. The claimant's evidence (paras 25 and 27) was that she raised this issue with the respondent on two occasions. The first was at the 18 October meeting and the second was at the later off-site meeting with Laura Morgan.

86. The notes of the 18 October meeting (pp.64-74) contradict the claimant's evidence that she told Adam and Drew Jones at that meeting that she thought that the way disciplinary proceedings were being conducted against the AGM was "morally and professionally wrong" (para 25). They record Adam Jones saying to the claimant that "as you know" there had been accusations made against the AGM and that the respondent had to investigate those because "if substantiated they will be serious and require action". The claimant's response is recorded as "yes I totally agree, if it is true it is disgraceful". The notes also record the claimant saying that she was aware that Mr Carvalho did not think the AGM was good enough (p.69). The issue is not mentioned in the claimant's email on 17 October 2018 to Adam and Drew Jones requesting a meeting (pp.62-63) nor in her notes for that meeting (pp.63A-63K).

87. The claimant's evidence was that she also referred to this issue in the off-site meeting with Laura Morgan after she started as HR Manager on 5 November 2018 ("the off-site meeting"). I record my findings of fact about that meeting at paras 89-95 below. For the reasons given in para 92, I prefer Ms Morgan's version of events at that meeting. I do not accept the claimant's evidence that she told Ms Morgan at this meeting that there was a malicious employee who was trying to "get [her and the AGM] a disciplinary" because that employee wanted their jobs and that she had a "diary of lies" about herself and the AGM (para 27). It was not suggested that the issue was raised in any of the other emails and messages included in the Tribunal bundle.

88. I find that by the time of the 18 October 2018 meeting the claimant was aware of concerns about the AGM's performance and that the respondent was investigating specific accusations against the AGM. I find that although she had concerns that colleagues at the restaurant were undermining her and the AGM, she did not, as she claimed in her witness statement, raise objections to the investigation into the AGM either at the 18 October 2018 meeting or subsequently. I find there was no evidence to substantiate her claim that there was misconduct in the way the investigation into the AGM was carried out.

Alleged breaches of confidentiality

89. The claimant said that Ms Morgan breached her confidentiality twice. The first time was by sharing with Mr Carvalho the content of the conversation they had at the off-site meeting. The second was by sending her invitation to a disciplinary hearing to her AGM. That second incident did not happen until January 2019 but for convenience I will deal with it here with the first alleged breach.

90. I find that the off-site meeting took place because Ms Morgan was aware of tensions between the claimant and her AGM on the one hand and Ms Njunina on the other. I find that the meeting was a genuine attempt by Ms Morgan to try and help resolve the issue. At the meeting the claimant raised her concerns about the impact that the personal relationship between Ms Njunina and Mr Carvalho was having on work decisions. She also raised concerns that the relationship was undermining her

and her AGM because Ms Njunina was going straight to Mr Carvalho about issues rather than coming to them. The claimant was upset and cried during parts of that meeting.

91. There were three matters of dispute about what happened at the meeting. The first was whether or not the claimant told her that she had been pulling her hair out due to work-related stress. The second was whether the claimant raised concerns about the disciplinary investigation into the AGM. The third was whether what was said at the meeting was meant to be confidential.

92. In relation to all three matters I prefer the evidence of Ms Morgan. I find she was a straightforward and credible witness who gave reliable evidence. As I have already recorded above (paras 59 and 70) I did not always find the claimant's evidence to be so reliable. That applied particularly to the evidence in her witness statement which at times I found to be inconsistent with the documentary evidence and her own cross examination evidence. In addition, when it comes to the off-site meeting, the claimant's own evidence was that she was distressed during the meeting and, in the absence of any notes or contemporaneous documents I find that her recollection of what was said at the meeting is less reliable than Ms Morgan's.

93. I find, therefore, that the claimant did not at the meeting tell Ms Morgan that she had been pulling her hair out due to work-related stress. I find that she did not raise concerns about the disciplinary investigation into her AGM.

94. The claimant's own cross examination evidence was that she did not say to Ms Morgan that she wanted to keep matters discussed confidential. Ms Morgan's evidence went further and said the claimant had agreed that Ms Morgan would raise the claimant's concerns with Mr Carvalho. As I have explained, I prefer her evidence to that of the claimant. Her version of events seems to me more consistent with Ms Morgan trying to help resolve the situation as part of her HR role. It also seems to me surprising that if Ms Morgan had indeed breached the claimant's confidence, the claimant did not raise a complaint about that (whether by formal grievance or informally to Adam Jones). It was not suggested she did at any point during her employment.

95. In summary I find that the claimant and Ms Morgan had agreed that Ms Morgan would raise her concerns with Mr Carvalho. There was no breach of confidence in her doing so. I find that she did raise those issues with Mr Carvalho. I accept the claimant's evidence that as a result Mr Carvalho shouted at her in the following day's management meeting for discussing his personal life with Ms Morgan.

96. When it comes to the second breach of confidence it was accepted by the respondent that on 14 January 2019 the letter and covering email inviting the claimant to a disciplinary hearing (pp.164-166) was sent in error to the claimant's AGM. In her cross examination evidence, the claimant accepted this was an accident. On 18 January 2019 Ms Morgan emailed the claimant to alert her to the error and to confirm that the respondent's IT support had confirmed that the email had been deleted from the AGM's inbox.

The HR audit

97. One of Ms Morgan's first tasks on appointment as HR Manger in November 2018 was to carry out an audit of the respondent's HR compliance. This involved reviewing the respondent's forms and policies and checking that it had all necessary employment documentation for each employee. A particular concern was ensuring that the respondent had verified that each employee had provided evidence of their right to work. This was an issue the importance of which Adam Jones had stressed to the claimant in the 18 October 2018 meeting (see paras 79-80 above). On 23 November 2018 Ms Morgan sent the claimant the audit for the Manchester restaurant outlining the documents needed for the employees working there (p.75).

98. In her email dated 29 November 2018 (p.76), Ms Morgan set the Manchester team a deadline of 11 December 2018 to check (and where missing provide) the following for each employee:

- Liquor indemnity form signed by the employee
- Right to work documents copied, signed and dated
- Health assessment questionnaire
- Food handler questionnaire
- Allergen
- Privacy Notice
- Health and Safety Booklets (the sign off sheet at the back of which needed to be signed).

99. She also said that by the start of January 2019 she required for each employee:

- Risk Assessments
- “Refresh fire training” [i.e. confirmation they had undertaken such training].

100. There was a dispute about the scale of the task. There was no agreement about the exact number employed by the respondent at the Manchester restaurant at the time but I find that it was around 90-100 staff. The claimant's evidence was that altogether the paperwork required for each employee came to about 50 pages. I prefer Ms Morgan's evidence that the documentation came to about 28 pages. Some of these were new forms created by Ms Morgan (the Health and Safety Booklet; new GDPR compliant Privacy Notice and Risk Assessment form). However, others were documents which should have been in place already. That applied in particular to the right to work documents which were a legal requirement.

101. The deadline of 11 December 2018 was not met by either the Manchester or the Leeds restaurants. On 19 December Ms Morgan sent an updated audit for Manchester. She said there were a significant number of documents missing,

including 20 Contracts and 63 Right to work documents. She also pointed out that some of the documents provided to prove right to work did not meet the legal requirements, because they had not been countersigned by a senior manager as verified; were not acceptable forms of ID; were incomplete. She set a new deadline of 9 January 2019 for provision of all the documents relating to the Manchester staff including the Risk Assessments and fire training documentation (pp.82 and 85).

102. Ms Morgan copied her email to Adam Jones and he followed up with his own email on the same day stressing that 9 January was the "FINAL deadline" and that the remaining documents must be provided by then "with nothing outstanding". He described the task as "paramount moving forwards" noted that the respondent had already extended the deadline twice but that most of the documentation "should have already been in position preventing it from being such a large task now" (p.84). There was no evidence that the deadline had been extended twice by 19 December 2018 and I find there had at that point only been one extension, i.e. from 11 December 2018 to 9 January 2019.

103. That "FINAL" deadline was not met. On Friday 11 January 2019 Ms Morgan emailed an updated audit to the Manchester management and Adam Jones (p.149). She noted the "alarming" number of right to work documents still missing (48) and highlighted the risk that caused to the respondent. She required that all missing right to work documents be provided, signed and dated by a senior manager by Tuesday 15 January 2019 otherwise the employees concerned would not be allowed to work. She asked the claimant to liaise with her teams and send a plan of action regarding all outstanding paperwork to herself, Mr Carvalho and Adam Jones by Sunday 13 January 2019.

104. At 14:31 that same day Adam Jones replied to Ms Morgan's email saying that what she had reported was "completely unacceptable" and a "disgrace". He accused the claimant of a "complete disregard for something so serious and dangerous to the business". He quoted his email of 28 December 2018 and told the claimant that it was her responsibility so he expected a full and clear explanation as to why the matter had not been actioned without absolute priority. He warned that "there will be consequences from this failure to complete such an important task after THREE chances" (p.147). As I have noted above, the evidence I saw suggested two deadlines rather than three. When asked in cross examination what he meant by "consequences" Mr Jones suggested that that consequence could simply been an investigation. I do not accept that is a plausible interpretation of the wording. I find that that viewed objectively the wording indicated that he had decided (before hearing the claimant's version of events) that disciplinary action would follow based on Ms Morgan's audit figures.

105. The claimant was off sick but responded at 14:42 to confirm the task was understood. She said that the audit list sent by Ms Morgan included people who no longer worked for the company (which I find was the case) and that her AGM was in the process of sending Ms Morgan that list and "looking into the files that are missing on the spreadsheet" (p.146). At 15:06 Ms Morgan sent an updated audit list with the leavers deleted. Amongst other missing documents this showed 38 Right to Work documents still outstanding (p.143).

106. Adam Jones responded at 17:24 saying that even with the leavers accounted for the "result is so atrocious so I would not hide behind that as they were working for us without Rights to Work". He said that he would at least have expected an apology and expressed his disappointment after the support he had offered the claimant and the "patience/lenience" he had demonstrated. He required the matter "rectified immediately" (p.145). I find that Adam Jones made the strongly worded criticism of the claimant without waiting to hear her side of the story and placing unquestioning reliance on the audit figures provided by Ms Morgan. As he accepted in cross examination evidence, there was in fact a genuine dispute about the extent of non-compliance by the claimant.

107. The claimant responded by email on the 12 January 2019. She did apologise, assured Mr Jones she had taken the matter seriously and said that when she liaised with managers on the eve of the deadline on the 9 January most documents were complete. However, later in that same email she also says that "a large proportion of outstanding documents were obtained from staff yesterday and other documents re-obtained and signed yesterday". She raised concerns that documents which had been completed were not shown as such on Ms Morgan's audit. She said that going forward she would physically check each employee's file personally to confirm each document needed was on it before it was collected by Ms Morgan. She confirmed she would have all outstanding documents done by the 15 January (p.155). On 13 January 2019 she emailed to confirm there were only 6 IDs/right to work documents still outstanding as well as 6 contracts and other documents (p.158).

108. The respondent's next step was to invite the claimant to a disciplinary hearing (paras 123 below). That was done on the 14 January 2019, i.e. the day before the deadline of the 15 January 2019 set by Ms Morgan for provision of the remaining documents.

109. I find (and indeed the claimant accepted) that the requirement to provide "all outstanding documentation" by 9 January 2019 was not met. As noted above, I also find that there was a genuine dispute about the extent of that non-compliance. Adam Jones accepted that in his cross-examination evidence. It is clear from the emails and whatsapp messages that not only the claimant but her AGM and kitchen colleagues were certain that employee documents which had been completed and as far they knew collected by Ms Morgan were not being reflected in the audits provided by Ms Morgan (e.g. pp.150B, 153A, 190). I find that confusion stemmed partly from the process used which involved Ms Morgan collecting the original hard copy documents from the Manchester restaurant (sometimes in large batches in boxes) but without copies being retained by the claimant which could be cross-checked.

110. I find the claimant did not "completely disregard" the task. There was evidence in the Tribunal bundle of her chasing colleagues for completed documents. I do find, however, that to a large extent she left her managers to get on with it. As her email of 12 January 2019 demonstrates, she did not start a process of herself carrying out any final checking of the documents until after the 9 January deadline had passed. I also accept the submission made by Mr Boyd that the emails tend to demonstrate matters being left until the last minute, with the claimant emailing her kitchen

colleagues on the eve of the deadline asking them to ensure documents were signed (p.117).

111. The claimant suggested that the task was such a big one that she had been "set up to fail". I do not find that was the case. However, I do accept that the task was a time-consuming one and that the claimant was at the same time under added pressure because the Manchester restaurant was already down by 2 managers and also had an AGM working her notice. She was under pressure from Adam Jones to recruit replacement managers (p.122) and was also unwell for a week with tonsillitis (p.136). The task was also taking place over a very busy time in a restaurant's calendar.

112. The claimant's case is that the allegations that she was failing in her duties regarding staff paperwork were "unfounded and unwarranted". I find that was not the case. I find the respondent did have legitimate concerns about the failure to provide staff paperwork by the deadline. Those concerns were particularly acute in relation to obtaining the right to work documentation which should have been obtained for all employees before they started work.

113. The claimant alleged she had a lack of support to complete this. I accept Ms Morgan's evidence that the Leeds manager did ask her for help and she sat down to go through the documentation with him. It would clearly have been open to the claimant to do the same but she accepted she did not ask for help. There was no evidence to suggest that Ms Morgan would have refused such help if it was asked for. As I record at para 127 below, however, I do accept the claimant's claim that the respondent pressed ahead with setting up a disciplinary hearing without first hearing her side of the story and, in particular, investigating the genuine dispute about the extent of non-compliance (including the accuracy of Ms Morgan's audit) and the reasons for it.

<u>Other allegations including site maintenance and cleanliness</u>

114. It was part of the claimant's case that the respondent made unfounded and unwarranted allegations that she was failing in her duties regarding site maintenance and cleanliness. I will also in this section deal with the other allegations which the respondent proposed to investigate at the meeting with the claimant on 4 February 2019 (see para 129) excluding the HR Audit issue dealt with already.

115. I will first deal briefly with those other issues and then deal with the cleanliness/site maintenance allegations.

a. <u>An employee on a student visa exceeding the hours she had a right to work during term time</u>; I find the employee concerned did have a student visa and there was evidence that she had exceeded the 20 hours a week she was allowed to work in term time (pp.201-202).

b. <u>Failure to ensure employees had completed online Health and Safety courses by a deadline of 31 December 2018</u>; There was no evidence of this issue being raised with the claimant prior to the investigatory invitation nor any evidence about it otherwise.

c. Not achieving the required standard within a mystery guest audit; the Claimant accepted that a mystery diner audit was failed in January 2019 (para 48). The audit score was 66%, significantly worse than previous audits (pp.184A-184J). It was reported on 21 January 2019.

d. Failure to comply with banking procedures by not banking takings for Saturday 5 January 2019 until the following Monday; There was no evidence about this incident. I have found that this was an issue raised with the claimant in the 18 October 2018 meeting but there was no oral or documentary evidence suggesting a recurrence on the 5 January 2019. As item (f) below notes, the claimant was not in fact in that day due to illness.

e. Repeatedly failing to enter rotas on the Fourth online system by 9 a.m. on Friday, specifically on 4, 11 and 25 January 2019; I find that this was an issue which had been raised repeatedly with the claimant. On 11 January she apologised for being late with the rota (pp.152-153).

f. Not arranging appropriate cover on 5 January 2019 and not informing senior managers she would not be on duty on that day; I find this was a genuine concern which was raised by Adam Jones by email on the 5 January 2019 (p.113).

116. I find that issues (a), (c), (e) and (f) were issues which had been raised with the claimant prior to the investigatory interview. I do not accept that they were "unfounded" in the sense of being fabricated. I find that they were issues which it would be legitimate for an employer to raise with a manager. I am not in so doing making findings about the appropriateness of how and when they were raised in this case. I do that at paras 130-135 below.

117. In terms of issues (b) and (d) there was no evidence put forward by the respondent about these incidents and nothing to suggest these were issues which had been raised with the claimant before.

118. The most substantial allegation and the one on which I heard most evidence was that of failure to take adequate care of the maintenance of the site leading to "a number of alarming defects" as well as "basic cleanliness aspects" being identified by Adam Jones in an inspection on 22 January 2019 (p.213). There was no copy of any such inspection in the Tribunal bundle and Adam Jones did not deal with it in his witness statement.

119. I find, however, that he did carry out an inspection visit on the 28 January 2018 when he found the bar area dirty; back of house stairs posing a slip hazard; a fridge door hanging on by Sellotape; the door handle to the music room missing and expensive furniture piled up in a cupboard becoming damaged (para 23). He raised these issues with the claimant in an email on 18:49 that same day (p.210). There was a suggestion by the claimant that those issues specifically to prevent her getting the Asia trip or Super Bonus. I find that Adam Jones had already emailed to raise his concerns about the storage of the chairs at 10:36 (p.207) some 5 and a half hours before the claimant sent her email asking when the Super Bonus and Asia trip would be paid/take place (p.212). I also find that the issue of the expensive chairs was one

Adam Jones had repeatedly raised before, including at the 18 October 2018 meeting.

120. Although the investigatory invitation refers to "basic cleanliness aspects", in cross-examination evidence Adam Jones said that the cleanliness aspect was less of a concern than those other matters he had raised repeatedly such as the storage of chairs, a plant being in the wrong place and the fridge and music door handles.

121. I accept the claimant's evidence (paras 41-42) that she did take steps to maintain the cleanliness of the Manchester restaurant. That is corroborated by the documentary evidence (e.g. p.103, p.121). I also find that on 10 January 2019 the feedback from a Landlord's inspection was very impressive (p.140) and on 24 January 2019 the result of a cleaning audit carried out by an external company was 95% with "no major issues". Adam Jones wrote to congratulate the team on that outcome (p.199). I also find that the claimant was in regular contact with the handyman about various jobs at the premises from October 2018 to January 2019 (pp.238A-238W).

122. Whilst I find that the claimant was taking steps to address cleanliness and maintenance at the restaurant I do also accept that Adam Jones had genuine concerns about some aspects of the maintenance at the premises when he carried out his inspection on 28 January 2019. I find that they were concerns which it would be legitimate for an employer to raise with a manager. I am not in so doing making findings about the appropriateness of how and when they were raised in this case. I do that at paras 130-135 below.

<u>The proposed disciplinary proceedings</u>

123. The claimant was invited to a disciplinary hearing on 16 January 2018 by a letter from Ms Morgan dated 14 January 2018 (pp.165-166). This was the letter emailed to the AGM in error.

124. In summary, the letter said that the hearing would consider whether the claimant had failed to adhere to company and legal requirements regarding employee records. It referred to the outcome of Ms Morgan's latest audit citing 38 missing right to work documents; 20 employees without contracts; 30 missing health assessments; 20 GDPR privacy notices missing and failure to take appropriate steps to train all employees in safe work practices, as evidenced by missing risk assessments and health and safety booklets. It said the respondent had taken into consideration that new processes were introduced in November but that the majority of documents missing were already part of the respondent's induction process. Those included the right to work documents and contracts. The claimant was told she would be given every opportunity to respond to the respondent's concerns but was warned that the hearing "may result in a disciplinary warning". I find the viewed objectively, the wording of the letter was not entirely neutral. In the last paragraph but two it says that "on this occasion [the claimant had] demonstrated a complete disregard to the importance of this situation and left the company exposed and vulnerable and have put the reputation of Tattu as an employer of choice, in jeopardy."

125. The claimant responded by email on the 15 January 2019 to say she would not be attending a disciplinary hearing until an appropriate investigation had taken place. She said that there had been no investigation of the dispute about how many documents had been completed and about documents which had seemed to go missing. She suggested there was a failure to comply with ACAS guidance requiring an investigation and that it "looks like victimisation and a decision already made" (p.168). I find that that was a legitimate view for the claimant to hold given Adam Jones's previously strongly worded criticism of the claimant (including accusing her of "completely disregarding" the HR audit task) before hearing her side of the story and the non-neutral wording of the invitation letter itself.

126. Ms Morgan responded by email that same day (pp.167-168). She rejected the suggestion that there had not been an investigation; confirmed no decision had been reached and one would not be until the claimant had been given an opportunity to respond at the disciplinary hearing; said the issue of missing documents had not been raised until after the 9 January 2019 final deadline; pointed out that it was clear from the claimant's email of the 12 January 2019 that outstanding documents were still being obtained from staff on 11 January 2019. She said the invitation letter set out the details of matters to be discussed and that the claimant had been given 48 hours' notice of the hearing but if she felt she needed more time to prepare she was happy to postpone the meeting for up to 5 days.

127. As I said in para 109 do find that there was a genuine dispute about the extent of non-compliance and that the claimant had raised this in her email to Adam Jones on 12 January 2019 prior to the invitation to the disciplinary hearing being sent to her. I find that despite the claimant highlighting that dispute again in her email on 15 January 2019 and suggesting it was an issue needed to be investigated, Ms Morgan's reaction was to press ahead with the proposed disciplinary hearing. I find that caused the claimant particular concern because the person whose audit she was challenging was the person due to conduct the disciplinary hearing. I also find that Ms Morgan's seeming disregard of the issue of the missing documents "because it had not been raised until after the deadline" would have further undermined the claimant's trust in the fairness of the process.

128. The claimant did not respond to Ms Morgan's email of the 15 January and on the 18 January 2018 Ms Morgan emailed her again rearranging the disciplinary hearing for Monday 21 January 2019 (p.185). The claimant responded that same day repeating that she would not attend a disciplinary hearing until a full investigation had been carried out, specifically into the concerns that the audit conclusions were wrong (p.183).

129. The rearranged meeting did not take place. Instead, on the 28 January 2019 Ms Morgan sent the claimant a letter inviting her to an investigation interview on Monday 4 February (pp.213-214). The scope of the investigation was wider than that of the proposed disciplinary hearing. It included that alleged failure to provide employment documentation but added:

a. An employee on a student visa exceeding the hours she had a right to work during term time;

b. Failure to ensure employees had completed online Health and Safety courses by a deadline of 31 December 2018;

c. Failure to take adequate care of the maintenance of the site leading to "a number of alarming defects" and "some basic cleanliness issues" being identified by Adam Jones in an inspection on 22 January 2019;

d. Not achieving the required standard within a mystery guest audit;

e. Failure to comply with banking procedures by not banking takings for Saturday 5 January 2019 until the following Monday;

f. Repeatedly failing to enter rotas on the Fourth online system by 9 a.m. on Friday, specifically on 4, 11 and 25 January 2019;

g. Not arranging appropriate cover on 5 January 2019 and not informing senior managers she would not be on duty on that day.

130. As I've recorded at para 116 above I found that the majority of these issues were genuine issues which it would be legitimate for an employer to raise with a manager. There was no evidence about items b. and e. being issues which had been raised with the claimant at all despite one relating to a deadline of 31 December 2018 and the other relating to an incident on 5 January 2019. Both had therefore happened by 14 January 2019 when the claimant was invited to a disciplinary hearing but neither was included as issues worth raising as part of those earlier proceedings.

131. I also find that item c. is both inaccurate and overstated. I found no evidence of an audit on 22 January 2019. I find that relates instead to the inspection of 28 January 2019. While in no way meaning to denigrate the importance of how a restaurant is presented, it does seem to me that it is difficult to characterise issues such as the storage of chairs; placement of plant and fridge and door handle issues as "alarming defects". I find that "some basic cleaning issues" also overstates the concerns which Adam Jones said he had and is contradicted by the 95% outcome on the external cleaning audit on the 24 January 2019.

132. The letter also lacks clarity in terms of the purpose of the meeting and its possible outcomes. It does not explain whether the outcome of the interview may be disciplinary action and, confusingly, refers to a "hearing" (p.214) and gives the claimant the right to be accompanied by a colleague or trade union representative. The respondent's disciplinary procedure says that right to be accompanied applies to a disciplinary hearing (p.59A para 3.2) and does not mention it in the context of an investigation.

133. It also, as the claimant correctly pointed out, relies in the paragraph dealing with the HR Audit on the audit figures as at 11 January 2019 despite further documentation having been provided since then. Finally, it confirmed the meeting was to be conducted by Ms Morgan (the validity of whose audit the claimant was in effect challenging).

134. Mr Boyd in his submissions suggested that the respondent had in some way given the claimant what she wanted by retracting the previous disciplinary hearing relating to the HR Audit and replacing it with an investigatory meeting. However, I find that what the respondent actually did was to add in to the investigatory interview a number of matters which had not been the subject matter of that previous hearing despite, in at least some cases, being issues present before it was convened. In a sense, it gave with one hand by holding an investigatory meeting instead of a disciplinary hearing but took away with the other by expanding the scope to cover a grab bag of other issues. some matters which might be regarded as "minor performance conduct and performance issues" which the respondent's disciplinary and capability procedure (pp.59A-59C) says "can usually be resolved informally with your line manager with formal steps to be taken only "if the matter is more serious or cannot be resolved informally" (para 1.2).

135. The investigation meeting did not take place because of the claimant's resignation.

Adam Jones's email of 28 January 2019 and the claimant's resignation

136. As I have recorded in making findings about the Asia bonus (paras 65-66 above) on 28 January 2019 Adam Jones made it clear that there were a "large amount of things" which needed looking at before Mr Jones was "even prepared to look at [the claimant going on the Asia trip]". For the claimant, Ms Jones submitted that the respondent had performed a complete about face within the space of less than four weeks. On 2 January Adam Jones was congratulating the claimant and colleagues on the finish to the year, saying there was "no question you have won" the Asia trip and was keen to get the trip planned (p.100). It is true that he referred to "a few things we can improve on" but there was no suggestion in that email that the trip might be withheld because of those "few things".

137. I find that the email on 28 January not only withheld the Asia trip but threw back at the claimant the week's paid leave which Adam Jones had decided to grant her at the 18 October 2018 meeting saying that he had "already authorised additional paid holiday" as an "act of goodwill" and wanted to see improvements before "any more is given" by the respondent. I do accept that in between the two emails there had been the strongly worded emails from Adam Jones relating to the failure to comply with the HR Audit deadline and the claimant being invited to a disciplinary hearing. However, and even accepting Mr Boyd's submission that this was a temporary withholding rather than a complete withdrawal of the trip, I accept Ms Jones's characterisation of the 28 January 2019 email as corrosive of the relationship between the claimant and the respondent. None of the previous emails had hinted that the Asia trip was not going ahead. I accept the claimants evidence that the withdrawal of the holiday made her feel "physically ill".

138. The claimant resigned by an emailed letter to Adam and Drew Jones on 30 January 2019 (p.219). She gave four weeks' notice which made her effective date of termination the 27 February 2019. She noted that she had 8 day's annual leave which she wished to take so calculated her last working day to be 19 February 2019.

139. Her resignation does not give her reasons for resigning nor does it suggest that she is claiming that she was constructively dismissed. On 31 January 2019 the

respondent confirmed in writing that the claimant would be paid in lieu of notice (p.227).

140. The claimant's evidence was that she resigned because she felt completely unsupported and because "false allegations being made against me". Her evidence was that the withholding of the Asia trip by Adam Jones in his email of 28 January 2019 (p.210) was the final straw which caused her to resign (para 57). I accept that evidence. I also accept that by the time she resigned she had lost faith in the respondent's HR department in the person of Ms Morgan and was not satisfied that she would get a fair hearing particularly in relation to the HR Audit issue.

Polkey Findings

141. At the point where the claimant resigned she was due to attend an investigatory interview. As I have noted (para 132) the invitation letter did not set out the possible outcomes of any disciplinary hearing which might result from the investigation interview.

142. Adam Jones's cross examination evidence was that he was not looking to dismiss the claimant but was rather wanting to seek to improve her performance. He said he did not want to lose another general manager after having dismissed the manager of the Leeds restaurant.

143. I find that the investigatory process into the claimant's performance was at a very early stage. Adam Jones in his evidence accepted that in relation to what might be seen as the most serious matter (the failure to comply with the HR audit deadlines) there was a dispute about the extent of non-compliance. I also note that the earlier letter inviting the claimant to a disciplinary hearing in relation to the failure to comply with the HR audit deadline (p.166) warned that the outcome might be a disciplinary warning but did not suggest that the outcome might be dismissal.

Discussion and conclusions

144. Applying the relevant law to the findings of fact, I reach the conclusions set out below.

(1) Did the Respondent breach the implied term of trust and confidence? That is, did the Respondent act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?

145. Since the claimant's case was put as a "last straw" constructive dismissal case, I have decided this issue by reference to the first four of the questions set out by the Court of Appeal in **Kaur**.

(i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

146. I find that this was the email from Adam Jones on 28 January 2019 (p.210) telling the claimant the Asia trip was on hold pending "big improvements" from her.

(ii) Has he or she affirmed the contract since that act?

147. No. The claimant resigned on 30 January 2019 two days after that "last straw".

(iii) If not, was that act (or omission) by itself a repudiatory breach of contract?

148. The claimant's case, as identified in the List of Issues, was that this act and others preceding it cumulatively amounted to a repudiatory breach

*(iv) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?*

149. The question I need to ask is whether, viewed objectively, the acts which I found did happen were calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. In summary, my findings in relation to the incidents relied on by the claimant were as follows;

a. There was no evidence to substantiate the claimant's claim that there was misconduct of an investigation into the conduct of her AGM and the claimant did not, as she alleged, raise concerns with the respondent about that investigation.

b. By October 2018 the pressure on Mr Carvalho meant he was prone to outbursts and did on occasion shout at the claimant and colleagues in an inappropriate way. He did send a large number of daily emails to the management team as a result of his tendency to micromanage. He did give the claimant a verbal warning on 17 October 2018 which the claimant accepted at the meeting on 18 October 2018 was justified. He also advised her on 17 October 2018 to take a week's leave, telling her that her performance had declined since the break-up of her relationship earlier in the year. He did shout at her when she was changing a strip light but that was because she was putting herself in danger by the way she was changing it. The respondent, in the person of Adam Jones confirmed at the meeting on 18 October 2018 that he had suggested the claimant take a week's paid leave and agreed he would speak to Mr Carvalho about the way he spoke to staff. There was no evidence the claimant raised a complaint about Mr Carvalho's behaviour after that meeting.

c. There was no breach of confidence by Ms Morgan in raising with Mr Carvalho the issues the claimant had raised with her at the off-site meeting. There was a breach of confidence in that the letter inviting the claimant to a disciplinary hearing was sent to the AGM. It was not suggested that this was anything other than human error and the claimant accepted it was an accident. The respondent apologised to the claimant about the error and ensured the email was deleted from the AGM's inbox.

d. The allegation that the claimant was failing in her duties regarding staff paperwork was not "unwarranted and unfounded". By her own admission, she did fail to meet the deadline for provision of HR documents including right to work documents. I do not find there was a lack of support – rather the claimant never asked for support which, as a general manager, she could

have been expected to do. However, I found that Adam Jones made very strongly worded criticism of the claimant and said that there would be "consequences" without waiting to hear her side of the story and that the respondent initially pressed ahead with setting up a disciplinary hearing without fully investigating the genuine dispute about the extent of non-compliance by the claimant and the reasons for it. I find that there were objective grounds for the claimant's lack of trust in the respondent and concern that the outcome of the disciplinary hearing had been pre-judged, including the seeming disregard of the dispute about missing documents; the non-neutral wording of the disciplinary hearing letter and the fact that the hearing would be conducted by the person whose audit she was challenging. I do not accept that by "converting" the disciplinary hearing into an investigation meeting the respondent had given the claimant what she wanted. She was still subject to investigation based on figures she had challenged weeks earlier (and which had been superseded) by the person whose audit she would be challenging and faced investigation into a wider range of matters, some of which had not been previously raised with her.

e. The allegations that the claimant was failing in her duties regarding site maintenance and cleanliness were not totally unfounded and unwarranted. However, I found that some matters were overstated in the investigation interview letter dated 28 January 2019 (p.213-214). I found that claims about the lack of cleanliness of the site were contradicted by the congratulations given to the claimant and her team for a 95% score in an external cleaning company a few days before that letter was sent. I found that letter added some matters which had not been previously raised with the claimant despite dating from before the previous disciplinary hearing.

f. I found the withholding of the Asia trip by Adam Jones's email on 28 January 2019 was corrosive of the relationship between the claimant and the respondent and made her feel physically ill. I accept that it was in stark contrast to the previous email about the trip sent on the 2 January 2019.

150. Taking those findings in the round, I do find that viewed objectively the respondent's conduct in items (d), (e) and (f) was such as cumulatively to be likely to seriously damage the relationship of trust and confidence between the claimant and the respondent. To my mind it is strongly arguable that the withholding of the Asia trip given previous assurances that it had been "won" and the content of Adam Jones's email of the 28 January 2019 were in themselves sufficient to have that effect. When the cumulative effect of the other earlier acts is also taken into consideration I do find that the respondent was in breach of the implied term of trust and confidence. Following **Morrow**, I find that breach was a repudiatory breach entitling the claimant to resign.

151. For clarity, I am not saying that the respondent was not entitled to investigate and potentially take disciplinary action against the claimant for potential performance failures on her behalf. What I am saying is that the way it did so breached the implied term.

152. My decision does not rely on item (b). Although I found that Mr Carvalho acted inappropriately, I also found the respondent took action to address that.

153. Returning then to the list of issues in this case.

(2) Did the Claimant resign at least in part because of any such breach such that she was dismissed within the meaning of s95(1)(c) of the Employment Rights Act 1996?

154. I find that the claimant did resign in response to that breach, and specifically in response to the last straw represented by Adam Jones's email of 28 January 2019.

(3) If there was a constructive dismissal, has the Respondent established a fair reason for the dismissal and that it acted reasonably in the circumstances? The claimant says the potentially fair reason is conduct.

155. This was not a point strongly pressed by Mr Boyd in his submissions. Even if it is accepted that the claimant's conduct (in particular in failing to comply with the HR Audit) meant there was a potentially fair reason for dismissal, I do not accept the claimant acted reasonably. Even leaving aside the flaws in its approach to the disciplinary and investigation meetings, as my findings in relation to **Polkey** record, the respondent's own case was that it was not intending to dismiss the claimant and the original disciplinary hearing invitation does not contemplate that being the disciplinary outcome. I do not find that the constructive dismissal was a fair one.

(4) If the Claimant was unfairly constructively dismissed, what is the appropriate remedy?

156. As agreed at the final hearing, the issue of remedy will be dealt with at a separate remedy hearing. I have, however, recorded my factual findings relevant to the **Polkey** issue at paras141-143 above. I will at the remedy hearing hear submissions about the impact of those findings on the compensation to be awarded, specifically whether in the light of those findings there should be a **Polkey** reduction in compensation and, if so, the extent of that reduction.

(5) DoesTribunal have jurisdiction to hear the contract claim?

157. I accept that I am bound by the EAT decision in **Sweeney** and only have jurisdiction to hear the claims in relation to the Super Bonus and the Asia holiday if they were outstanding on termination of the claimant's employment. Applying **Miller** that means the question is whether they were payable at the effective date of termination of the claimant's employment as defined by s.97 of the ERA.

158. The claimant's employment was terminated by her giving four weeks' notice on 30 January 2019. I find that the effective date of termination in this case was 27 February 2019. I do not accept the submission made by Mr Boyd that the respondent could bring forward that effective date of termination to the 30 January 2019 by paying the claimant in lieu – that does not seem to me consistent with the Court of Appeal's decision in **Staffordshire**.

159. I have found that the Super Bonus was payable by the end of period 2, i.e. by 18 February 2019. I find it was outstanding on the termination of the claimant's employment on 27 February 2018 so the Tribunal has jurisdiction to consider that claim.

160. I have found that the Asia trip did not become "payable" until the respondent's accountants signed off the accounts confirming the "actual EBIDTA". That did not happen until 10 April 2019. I therefore find that the Asia trip was not outstanding on the termination of the claimant's employment and conclude the Tribunal does not have jurisdiction to consider that claim.

(6) Was the Claimant contractually entitled to the Super Bonus and/or the Asia trip?

161. I have found that the terms of the Super Bonus were that it was payable at the rate of £50 for every £1000 that the Manchester restaurant exceeded the actual EBIDTA. I found it was payable by 18 February 2019, albeit its final amount could not be calculated until the accounts were signed off by BDO. I find that the claimant's resignation did not deprive her of entitlement to that Super Bonus and it was not suggested that she had been guilty of misconduct which would deprive her of that bonus.

162. I find that the actual EBIDTA did exceed the budget EBIDTA by £68,054 for 2018 and that as a result a Super Bonus calculated at £50 per £1000 over budget was payable to the claimant by 18 February 2019.

163. In terms of the Asia bonus, I have concluded I do not have jurisdiction to consider that claim. In case I am wrong about that and given I have heard evidence about it I record my conclusions about it.

164. I find that the trip was potentially "payable" to the claimant because the Manchester actual EBIDTA had exceeded its budget EBIDTA by more than the Leeds restaurant had. I find that it was not subject to any performance target other than that and that it would not have been legitimate for the respondent to fail to pay it because of the sorts of issues set out in Adam Jones's email of 28 January 2019.

165. However, I do find that it was a reward trip meant to benefit the respondent as well as the winner by gathering information about Asian restaurants and food which could be fed back to improve the respondent's own restaurants. Given that, it seems to me implicit that the person entitled to it remained in the respondent's employment at the time it was taken and long enough to share their experiences. Otherwise the knowledge gained from the trip would never be fed back to the respondent. Had I had jurisdiction I would have implied a term (relying on the "officious bystander" test in **Shirlaw** that to benefit from it the claimant would have to still be employed when the trip was undertaken and for sufficiently long afterwards to feed back her experiences. The claimant's resignation would therefore have led to her forfeiting the right to the Asia trip.

Next Steps

166. The case will now be set down for a remedy hearing. Directions relating to that hearing will be sent to the parties separately.

Employment Judge McDonald

Date: 27 May 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 May 2020

FOR THE TRIBUNAL OFFICE