Case Number: 2200385/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A. Williams	**v**	**The Westbury Hotel Limited**

Heard at: London Central (by video) **On**: 16, 17 and 18 November 2020

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms M. Tutin, of counsel

For the Respondent: Mr J. Mitchell, of counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent (section 94 Employment Rights Act 1996).

2. The issues of compensation, including
    a. mitigation,
    b. the amount of any reductions in relation to contributory fault or under *Polkey v. AE Dayton Services Ltd* [1987] UKHL 8, or
    c. the amount of any increase under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992

shall be determined at the remedy hearing on 21 December 2020.

REASONS

The issues

1. The issues for the tribunal to determine are set out in the agreed list of issues appended to this judgment as Annex A. This judgment determines issues 1 to 8, issues 9 to 12 will be finally determined at the remedy hearing on 21 December 2020.

History of proceedings

2. By a claim form presented on 31 January 2020 the claimant brought a complaint of unfair dismissal. The claimant seeks compensation and an uplift of 25% due to the respondent's alleged unreasonable failure to comply with ACAS Code of Practice on Disciplinary and Grievance Procedures.

3. The respondent admits that it dismissed the claimant. It denies that the dismissal was unfair. It avers that the dismissal was by reason related to the claimant's conduct and that in all the circumstances the dismissal was fair.

4. In the alternative, it avers that if the dismissal was found to be procedurally unfair:

   (i) the claimant would have been dismissed in any event;

   (ii) the claimant contributed overwhelmingly to his dismissal and any compensation awarded should be reduced to reflect the claimant's contributory fault, and

   (iii) the claimant shall be put to strict proof of any and all losses occasioned by his dismissal, including his attempts to mitigate such losses.

5. The claimant was represented at the hearing by Ms Tutin (of counsel) and the respondent by Mr Mitchell (of counsel). I am grateful to both counsels for their cooperation and assistance to the tribunal in dealing with this case.

6. The respondent called two witnesses, Mr Heinrich Dominici, the former Hotel Manager of the respondent, and Mr Andrew Henning, the former General Manager of the respondent. Both gave sworn evidence and were cross-examined.

7. The respondent submitted a witness statement of Ms Liliana Gutierrez, the former Director of Human Resources of the respondent, but did not call her to give sworn evidence. The respondent confirmed that it was not seeking postponement or a witness order in relation to Ms Gutierrez. Mr Mitchell submitted her witness statement as a written representation under Rule 42 of the Employment Tribunal Rules of Procedure, acknowledging that since her evidence was not tested on cross-examination, the statement should carry less weight.

8. The respondent also submitted on the first day of the hearing a witness statement of Mr Francesco Antanazzo, HR Officer of the respondent, and sought the tribunal's permission to admit his evidence. The claimant opposed the application, arguing that the tribunal order of 28 July 2020 stated that all witness statements must be exchanged no later than 5 October 2020 and no other witnesses may be called at the hearing "*except with special permission of the tribunal*". The claimant said that the statement had only been served on Friday, 13 November 2020, in the afternoon and with no explanation for the lateness. The claimant argued that allowing the statement at this stage of the proceedings would be prejudicial to the claimant's interests and that the respondent conduct in presenting the witness statement that late was unreasonable.

9. Mr Mitchell for the respondent argued that it was a very short witness statement, which deals with the events following the claimant's dismissal. It was relevant to the remedy issues only. Both parties were technically in breach of the tribunal's orders, as the exchange of other witness statements did not happen until 8 October 2020. He offered the claimant the opportunity to cross-examine Mr Antanazzo in relation to the investigation, disciplinary and appeal meetings, at which he was the note-taker. Ms Tutin said she did not wish to cross-examine Mr Antanazzo on those matters.

10. Mr. Mitchell further submitted that any possible prejudice to the claimant could be addressed by cross-examining the witness, that it was the tribunal's role to do justice to both parties, and that it would be prejudicial to the respondent's case on remedies if the evidence related to the restaurant's closure staff redundancies were excluded. He pointed out that the claimant had served an updated schedule of loss late and the respondent did not raise any objections to that. Finally, he argued that the claimant would not have to incur any additional costs as a result of the statement being admitted.

11. I balanced the reasons advanced by the parties and decided to give permission for Mr Antanazzo to give evidence for the following reasons. His witness statement is short (13 paragraphs), it deals with the events after the claimant's dismissal. These events are relevant for the tribunal to determine the issues of remedy, there is no clear prejudice to the claimant, which could not be addressed by cross-examining Mr Antanazzo, no additional disclosure will be required, on the claimant's proposed timetable the issues of remedy were due to be heard on Friday, in four days' time, which should give the claimant's counsel sufficient time to take necessary instructions and prepare.

12. The claimant gave sworn evidence and was cross-examined. The claimant also presented a witness statement of Mr Tom Booton, the former Sous and then Head Chef at the restaurant. The respondent accepted Mr Booton's evidence and did not wish to cross-examine him. I accepted Mr Booton's evidence as given under oath.

13. I was referred to various documents included in the bundle of documents of 390 pages, which the parties introduced in evidence. In the course of the proceedings the respondent disclosed a further four documents, which I read, and on which contents the respondent's witnesses were cross-examined.

14. During the claimant's cross-examination Mr Mitchell showed the tribunal CCTV footage related to the lunch event on 28 July 2019. There were some minor technical issues with the playing of the footage, which made it run a little staccato. After the hearing I watched the footage on my computer, and I am satisfied that I saw all the parts of the footage that Mr Mitchell wished me to watch fully and clearly.

15. The hearing was originally listed for five days. At the beginning of the hearing I discussed with the parties the timetabling. I decided to adopt the timetable proposed by the claimant. The hearing was split into three parts - to deal with the issues of liability first (days 1 to 3), deliberation and decision on liability (day 4) and remedy (if required) on day 5.

16. At the conclusion of the liability hearing I decide to reserve my judgment on liability and relist the remedy hearing (if required) for a later date. By agreement, the remedy hearing (if required) was listed for 21 December 2020.

The parties agreed that the claimant should provide to the respondent mitigation documents by 23 November 2020 and a supplemental witness statement on the issues of mitigation by 30 November 2020.

Findings of fact

17. The respondent is the operator of a five-star hotel based in Mayfair, London (the "Hotel"). It is owned by Cola Holdings Group Limited, the director of which is Mr Azad Cola. Mr Azad Cola is also the sole director of the respondent. His father, Mr. Bakir Azad was a director of the respondent and Cola Holdings Group Limited until 30 March 2012. Since 2017, the Hotel has been part of the Luxury Collection by Marriott International franchise.
18. The claimant is a Michelin-starred chef. During his 36 years' career in the hospitality industry he has worked in various prestigious restaurants in the UK, France and the USA. Prior to joining the respondent, the claimant worked as the Head Chef at "Marcus Wareing at the Berkley", a two Michelin-starred restaurant.
19. In or around June 2010, the claimant was told that the owners of the Hotel were interested in recruiting him to run the Hotel's restaurant. The Hotel had a five-star ranking at the time, and the owners wished to gain accolades for the main hotel restaurant, such as a Michelin star and more AA rosettes. The owners sought to address this issue by finding a suitable executive head chef to take over the running of the restaurant rather than have the restaurant run by the Hotel's management.
20. Mr Azad Cola, and his father, and the then Hotel's General Manager, Mr Zeljko Stasevic ate the claimant's food at the Marcus Wareing at the Berkeley restaurant on several occasions and decided to offer the claimant the opportunity to the run the restaurant.
21. The negotiations over the claimant's employment continued over a period of five months, resulting in the parties signing the claimant's employment contract on 23 November 2010.
22. It was Mr Azad's wish that the restaurant had the claimant's name, however he rejected the claimant's request to make him an equity partner in the restaurant business.
23. The claimant commenced his employment with the respondent in January 2011. There is a disagreement between the parties as to the exact start date, however it is not material for the issues I need to determine.
24. The restaurant was refurbished and opened to the public on 28 November 2011 under the name "Alyn Williams at the Westbury". It soon started receiving many recognitions and accolades, including an entry into the AA restaurant guide with a three-rosette award, gaining a fourth rosette three years later. In October 2012, the restaurant was awarded one-star rating in the Michelin guide, which it kept for the entire period of the claimant's employment.
25. From January 2011 until May 2018 the claimant worked full time at the restaurant, and in addition to preparing food, was responsible for all aspects of the running of the restaurant, including, recruiting staff, designing the look of

the dining room, choosing and ordering all of the fixtures and fittings, re-designing the kitchen layout, ordering kitchen equipment, designing and implementing all of the food menus and setting the standards and the ethos of the restaurant.

26. The claimant was regarded as the ambassador and the face of the restaurant and had a great deal of control and autonomy in the running of the restaurant. That was accepted by Mr Henning in his evidence.

27. The claimant tried to engage Mr Azad Cola in the details of the restaurant business but was told by Mr Cola that he was not interested in the details and just wanted the claimant to make a success of the restaurant. Mr Cola told the claimant that he was the expert, and that Mr Cola wanted the claimant to see the restaurant as his own.

The Wild Rabbit

28. In November 2017, the claimant accepted an offer to join the Wild Rabbit restaurant in Oxfordshire in the position of Chef/Patron. He informed Mr Azad Cola and Mr Stasevic of his intention to leave his job at the respondent. It was agreed in subsequent discussions between the three of them that the claimant would stay involved in the restaurant, acting as a consultant and remaining "the figurehead" of the restaurant until the Hotel closed for refurbishment, which was planned for the end of 2018.

29. The arrangement was then extended to become open ended, as the planned closure had been delayed until the end of 2019. It was also agreed that the claimant would put in place a team to continue running the operations to the same standard, that he would come to the restaurant each week, make himself available for advice at any time, and stay in regular contact with the acting head chef (Tom Booton) and the management of the restaurant (Chris Bakowski). Mr Cola agreed that the claimant would continue to be paid his full salary.

30. The claimant continued to be involved in the restaurant matters during his time at the Wild Rabbit, which he joined in May 2018. For personal reasons in October 2018 he reduced his time at the Wild Rabbit to two days a week, spending three days a week at the Hotel's restaurant, and eventually left the Wild Rabbit at the end of January 2019 and returned to the restaurant on a full time basis.

Management Changes at the Hotel

31. When the claimant joined the respondent in January 2011, Mr Stasevic was the General Manager, to whom the claimant reported. Mr Stasevic left the Hotel in January 2016 for another job at the Cola Hotels Group. Mr Ashley Cole, who until then was Mr Stasevic' deputy, became the General Manager. He left the Hotel in October 2017 and Mr Stasevic returned to the Hotel as the General Manager for a short period until the new General Manager, Mr Andrew Henning, was appointed in January 2018.

32. In 2017 the Hotel became part of the Starwood Luxury Collection as a franchisee of Marriott Internationals. Mr Henning had previously worked within the Marriott and Starwood groups. After Mr Henning's arrival further management changes took place at the Hotel, including the appointment in

March 2018 of Mr Heinrich Dominici as the Hotel Manager and a deputy of Mr Henning and Ms Lilliana Gutierrez as the Human Resources director. Both previously worked in the Starwood group.

33. Mr Dominici told the tribunal that he had been hired because of his previous work in the Starwood Luxury Collection group with the task to bring the running of the Hotel to the standard expected of a member of the Starwood Luxury Collection. Mr. Dominici admitted that the changes that had been taking place at the Hotel had resulted in most of senior personnel leaving or being dismissed. He also confirmed that the decisions concerning recruiting and dismissing senior personnel at the respondent were not taken without Mr Cola's approval.

34. On 14 November 2018, Mr Henning called the claimant and asked him to assume wider responsibilities in the Hotel food and beverage operations because Mr Henning thought that the claimant had to do more to justify his salary, and that Mr Booton was largely fulfilling the claimant's role as the Head Chef. The claimant refused. He said that he wanted to concentrate on further improving the restaurant with the aim of achieving second Michelin stars.

Lunch on 28 July 2019

35. On Sunday, 28 July 2019, the claimant used the restaurant to host a private lunch for his friends and family, including his children. He brought his food and drinks and used the restaurant kitchen to cook a meal.

36. Before staring at the kitchen, the claimant set up in the main area of the restaurant an improvised football goals, using two restaurant's armchairs and a small net he had brought with him. Two young boys started to play with a small soft ball kicking it into the improvised goals. Their play involved the following activities:

    (i) jumping over the net,
    (ii) kicking and throwing the ball against the walls and the ceiling,
    (iii) fighting for the ball and chasing each other around the restaurant,
    (iv) diving onto the sofa-bench to catch the ball, which stood next to the tables laid for breakfast,
    (v) taking a running jump onto the sofa-bench,
    (vi) wrestling with each other on the sofa-bench,
    (vii) doing a headstand on the sofa-bench.

37. One of the boys took from the bar a small bottle of tabasco sauce and drank some sauce by dipping it from the bottle into his mouth. The other boy on 14 separate occasions took, using his hand, and ate sugar cubes from the sugar bowls on the tables laid for breakfast. On one of those occasions he took a sugar cube after wiping his nose and on another occasion after scratching his groin through trousers.

38. The claimant's guests were allowed into the kitchen to watch the claimant cooking. They did not take part in the cooking of the meal.

39. One of the guests came into the main area of the restaurant and went through several drawers and the cupboard of the service station, searching for

something. She did not take anything from the drawers or the cupboard and returned to the kitchen. A few minutes later the claimant came to the service station and searched the drawers and the cupboard. He did not take anything from the drawers or the cupboard.

40. The events in the restaurant were captured on CCTV and used as evidence against the claimant in the disciplinary proceedings.

41. No damage was done to the restaurant's fixtures and fittings by the children or the claimant or his guests.

42. The lunch on 28 July 2019 was not the first occasion when the claimant used the restaurant to host a private event. I accept the claimant's evidence that since joining the respondent and before the lunch on 28 July 2019 he had done so on 61 previous occasions. I also accept his evidence that the private use of the restaurant was agreed between the claimant and the former Hotel's management (Mr. Stasevic and Mr Shaw) on the condition that after the use the claimant must clean the kitchen and the dining area and everything must be put in the same condition, all rubbish removed, all equipment cleaned and polished, and that there was no need for the claimant to ask permission from the General Manager to use the restaurant for a private event on each such occasion, so long as those conditions were respected.

43. After each such use the claimant put everything in order and thoroughly cleaned the kitchen and the dining room and all kitchen equipment he used. I accept the claimant's evidence on this, as further corroborated by the evidence of Mr Booton.

44. I also accept the claimant's evidence that he did not know that under the new management such use was no longer permitted or that he had to seek permission of the General Manager on each such occasion, and that had he been told to stop using the restaurant for private events he would have immediately done so.

45. Mr Henning and Mr Dominici were aware that the claimant had been using the restaurant for private events. The respondent's evidence is that on 11 March 2019 Mr Rodriguez, the Hotel Security manager, told them that the claimant had been seen by a security officer on patrol having a private dinner in the restaurant on 10 March 2019.

46. The claimant says he was not in the restaurant on that date. The restaurant's access log does not show that the claimant entered the restaurant on that date. However, the claimant admits using the restaurant for a private dinner on 3 March 2019.

47. On the balance of probabilities, I find that the correct date is 3 March 2019 and Mr Rodriquez told Mr Henning and Mr Dominici of the use the following Monday, 4 March 2019, and the 10th March date in the security report was incorrect. I find this because the security report is not a contemporaneous document, it was prepared on request of Ms. Gutierrez more than five months later, on 19 August 2019.

48. In any event the difference of seven days is not material. Both Mr Henning and Mr Dominici accepted that, as early as March 2019, they knew that the claimant had been using the restaurant for hosting private events and neither

of them had told the claimant that such use was unacceptable and must be stopped.

49. Mr Rodriguez told Mr Henning and Mr Dominici that the reason the security officer had not reported the matter as a security incident in March was because he had seen such events happening in the past and there was no clear guidance as to whether such use was allowed. Mr Rodriquez sought guidance from Mr Henning and Mr Dominici and was told that they would deal with the issue and speak with the claimant.

50. Neither of them had spoken with the claimant about this until the disciplinary process, which was initiated after the events on 28 July 2019. Mr Dominici said that Mr Henning told him that he would speak with the claimant. Mr Henning said that he had expected Mr Dominici to do that, and because of that confusion neither of them had spoken with the claimant.

51. I do not accept their explanation. They both said that they had responsibility to deal with important staff matters. They both accepted that they regarded the matter as serious (Mr Henning in his witness statement calls them “incidents”) and that it needed to be investigated and dealt with promptly. They were in regular contact with each other. I find that if each of them thought the other person was investigating the “incident”, that person would have asked the other about it, considering the seriousness they claimed they both had attached to it.

52. Furthermore, the claimant used the restaurant to host a private dinner on 17 March 2019 and that was again reported by Mr Rodriguez to Mr Dominici immediately by sending a text message. Mr Rodriguez told Mr Dominici that there had been a complaint of noise coming from children playing in the restaurant and asked what actions should be taken. Mr Dominici told Mr Rodriguez to ask children to keep the noise down but to take no further actions, and that further actions would be taken the next day.

53. The following day Mr Dominici spoke with Mr Henning about the matter and Mr Henning told him that he would raise it with Mr. Cola to clarify whether the private use of the restaurant by the claimant was allowed. Mr Henning admits that he never raised the matter with Mr Cola despite having several opportunities to do so. When he was asked by Ms Tutin why he had not done that, he answered that he could not give any “practical reason”.

54. Mr Dominici said in his evidence that the reason the claimant had not been spoken about was because at that stage no decision had been taken as to whether such use was allowed. Mr Dominici and Mr Henning both admitted that unless the claimant had been told to stop using the restaurant for hosting private events, it was reasonable for the claimant to assume that he could continue to use the restaurant in that way.

55. Before the lunch on 28 July 2019 the claimant hosted another private event on 7 April 2019. The disclosed materials do not provide any details as to that event and the witnesses were not questioned about it.

56. The lunch on 28 July 2019 was not reported by the security to Mr Dominici or Mr Henning. That was done on instructions from Goran, a personal security guard of Mr Cola. Goran had direct access to the Hotel’s CCTV system and was able to see what was happening in the restaurant. Goran is not an employee of the respondent. Mr Dominici said that he thought that the reason him and Mr Henning had not been informed by the security was because Mr

Cola wanted to "*test*" them to see if they were aware of the same. Mr Henning admitted that it was possible and said that based on his experience it was not normal that the Hotel's CCTV system was accessible by someone, who was not an employee of the Hotel.

Mr Dominici's suspension and Mr Henning's meeting with Mr Cola

57. On 15 August 2019, Mr Dominici was informed by Mr Bakowski, the restaurant manager, that Mr Cocking, property director at Cola Hotels, had instructed Mr Bakowski to remove a cable to the sound equipment system because the cable was taped to the floor and Mr Cocking considered that to be a health & safety hazard. Removing the cable meant that no music could be played at the restaurant. Mr Dominici told Mr Bakowski to reinstall the cable.

58. Mr Cocking complained to Mr Cola that Mr Dominici and Mr Bakowski had reinstalled the cable. Mr Cola called Mr Dominici. Mr Dominici said that he could not recall what Mr Cola had told him as the call was only 10-20 seconds long but recalls that Mr Cola was very upset with him about the cable matter and that he had not taken proper actions in relation to the claimant and his family "playing football" in the restaurant on 28 July 2019.

59. Following that call from Mr Cola, Mr Dominici deleted all his text messages on his work telephone. He explained that he had done that because he thought he would be leaving the respondent and would have to return the telephone and did not wish his private messages to be read by the respondent.

60. On 16 August 2019, Mr Dominici was suspended by the respondent until further notice pending investigation into an allegation of breaching Health and Safety Regulations. Mr. Bakowski was suspended, a day earlier and appealed his suspension, the appeal was denied.

61. Mr Henning was on holiday at that time. He recalls Ms Gutierrez calling him about the matter and telling him that Mr Dominici would be suspended. Mr Henning agreed with the suspension. He admitted that he had thought that the issue had been made bigger than what he had anticipated, but the suspension was a "*sensible thing to do*" due to there being "*a lot of tension*".

62. On 18 August 2019, Mr Dominici wrote a letter to Mr Henning and Ms Gutierrez protesting his innocence and explaining why he had told Mr Bakowski to reinstall the cable. In that letter Mr Dominici writes [**my emphasis**]:

Randomly I met Mr Antonazzo and Mr Rodriquez together in front of the HR office and Mr Rodriquez told us that he has been instructed to suspend the person who plugged in the cable in Alyn Williams restaurant. While having this conversation, I made Mr Henning aware of the situation and shortly afterwards ***I witnessed from the distance that Mr Antonazzo has been contact by Mr Cola directly****. I therefore decided to keep myself out of any investigation by the Human Resources department,* ***reinsuring only that the instructions I have been given by Mr Cola, are fully executed****.*

[…]

Coming back to the second allegation that I have not taken proper action on Mr Williams and his family playing football in the restaurant on a Monday or Sunday in July. It is very difficult being accused of something, I haven't been informed of it at all. I just learned about this in pits (sic) and pieces firstly from Mr Cola, and afterwards from Mr Rodriquez and Mr Antonazzo. As far as I heard of, there is some video footage available, showing two kids playing soccer in the restaurant while it is closed. Until this Thursday, I have had now (sic) information that this happened in July. There was no report from security, nothing is tracked on diligence and if it happened on a weekend, I even haven't received any comment via Front Office from the Duty Managers. In short, it opens up a series of questions why this has not been noticed by security, respectively, why this has not been reported to the Hotel Management and the Human Resources department. All signs

***recommend that proper procedures have not been followed in this case and additional investigations deems necessary**.*

It is beyond my knowledge why this information has not been shared with me and I can only assure you that I would have reported it immediately. […]

Mr Rodriquez asked me several times this week about the cameras in the restaurant – as this CCTV system is obviously not connected to the main CCTV system. It might be that his question has a connection with this issue – however, I can only guess, as I still haven't seen the video footage, or any other evidence until today. […]

In conclusion, I sincerely hope that above explanatory notes in connection with the allegations against me, support your investigation and help to explain my movements in those two cases. It is my great pleasure to work for this company and I will be certainly at your disposal for any further questions in this regard.

63. After the suspension of Mr Dominici, Mr Henning had a telephone conversation with Mr Cola. Mr Henning said he could not recall the exact date of that conversation, however shortly thereafter he went to meet Mr Cola in Monaco, where he lives. Mr Henning said that he could not recall what exactly Mr Cola had said to him but admitted that the restaurant "*misuse*" was mentioned by Mr Cola and that he was very "*concerned*" about that matter. Mr Henning did not inform Mr Cola that he knew that the claimant had been using the restaurant for private events. He also admitted that Mr Cola would not have known of the arrangements to use the restaurant the claimant had had with the previous management. Mr Henning did not inform Mr Cola that he had been planning to seek his guidance on the claimant using the restaurant. Following the telephone conversation with Mr Cola he did not speak with the claimant.

64. Mr Henning met with Mr Azad and Mr Bakir Cola on 20 August 2020 in Monaco. Mr Henning admits that the issue of the claimant's use of the restaurant was discussed, and that Mr Cola and his father were "*clearly upset*". He says he cannot recall the exact words spoken by them, but he accepts that their expectations were that he would deal with the matter "*robustly*". He denies that Mr Cola instructed him to dismiss the claimant. He says he reassured Mr Cola that he would deal with the matter appropriately.

65. Upon returning to London, on 22 August 2019, Mr Henning, Ms Gutierrez met with Mr Dominici. There is a note of the meeting, which I reproduce in full, as I find it an important document in understanding the factual background against which the decision to dismiss the claimant was taken [**my emphasis**].

Meeting with Heinrich Dominici

Thursday 22nd August @ 2 pm

Present: -

Andrew Henning – (General Manager) AH

Liliana Gutierrez (Director of HR) LG

Heinrich Dominici (Hotel manager) HD

……

***AH:** Welcomed Mr. Dominici to the meeting explaining the points below following his meeting with Mr. Cola on Tuesday 20th August.*

***To set the context**:*

*We as a Management team come from a corporate world into a franchise environment and we want to continue with this corporate approach which is right but at the end of the day **we can't forget***

that we do work for a family, this is the reality and that influence how things are done and how the decisions are made, we have seen this over the time we have been here*.*

Also, what affects all this is prior to Starwood and Marriott taken the Franchise the family has been managing the hotel and having the control over it. ***For the last couple of years, they have been on remote, they are sitting abroad so it is understandable that they want to make sure that their business is run with integrity and with a very strict follow up.***

We are aware that they have been let down by the previous management team, so TRUST is not the automatic instinct. Some of it also adds up with the conversations around what the future of the AW restaurant and the impact on the business*.*

The information that filters directly to them of what is going on or not at the hotel ***that made them feel uncomfortable regarding how much trust they can have in their Management team****.*

Important to strength that the events that happened at the AW restaurant (the use of the restaurant for his personal used) made the owner very uncomfortable as he perceived this as a lack of care from the Management so once more the element of trust is threaten*.*

It is important and very clear from our side that we clarify exactly the duties and responsibilities of our Property Director, Alex Cocking. Who does what, we need to define his role and to emphasise that we are all working together as a team

Following these incidents, the owners lost trust in me, lost lot of trust in you, rightly or wrongly and Mr Cola Senior was exceptionally angry at me and I got the sense that this was also a warning for me*.*

Consequently, they don't want you dismissed but hey do want you to get a warning which will be on the form of a First Written Warning*.*

I reassured him that moving forward I want to be aligned with his expectations and goals, and I want to be immediately aware of all the information that circulates so we can act on it*.*

I want the Hotel to be successful and that our goals as a team are align.

Also, this was also a wake-up call for me to act on some of these things with a different approach and set some action points and deal with them with immediate effect*.*

AH: *This is my part; do you have any comments?*

HD*: Not, I don't have any comments. I have not acted against any direction, I was not aware*

where Alex Cocking responsibilities ends but in the same time, we all work for an environment

where we all know that there are some high H&S priorities.

I am perfectly aware that I don't work for Marriott, but I am working for the Cola Family*.*

I have the most transparent intentions as all I want is the success of the business and if this means for me to put in place stricter policies and make our teams comply, I am happy to put all my efforts on this and action this as from tomorrow if necessary.

In the same time, I understand perfectly Mr Cola and I know that he was let down in the past by the previous Management team and this cost him probably a lot of money, reason why he is so sceptical about this and every piece of information.

Everything we do have a reason behind, and my understanding of the AW event and this was around that period where we were questioning the future of the restaurant, of the Head Chef, Tom Bottom, and his potential departure and the role of Alyn William moving forward*.*

I am actually happy to know that we get information and support so we can try and run the business to Mr. Cola's expectations, and I do understand the context and agreed*.*

My actions have always been with the good intention and only for the benefit of the company

AH: *I made the point to Mr Cola that we have still some things outstanding that are important and have a greater risks to the business in terms of H&S priorities than came out of that particular meeting and I said also that I will make sure that Mr Cocking will inform you of all the points and what has been done about and I shall be doing that with Alex next week.*

Some Actions points*:*

Roles and responsibilities of the Executive Management team, Organisational Structure who is who, company culture values about integrity, doing the right thing and play as a team.

Thank you

End of meeting

66. On 23 August 2019 Mr Dominici was given a formal written warning "*regarding the hotel's ownership concerns around control and Health and Safety of the hotel*". The letter said that the warning would be placed on his personnel file for 12 months and that in the event of any future misconduct whilst the warning remained live, Mr Dominici "*may be subject to further disciplinary action, which might result in a final written warning or dismissal*".

67. The letter said that Mr Dominici could appeal the decision. He chose not to. At the hearing Mr Dominici maintained that he had done nothing wrong and the warning was unjustified, but he had decided there was no point in appealing it. Mr Henning said that he had thought that Mr Dominici had done wrong only to "a small level".

68. These episodes are clearly relevant to the case, however none of the respondent's witness mention them in their witness statements and the documents referred to above were not disclosed by the respondent. The tribunal only became aware of these matters during Mr Dominici's cross-examination when he was questioned about his reasons for suspending the claimant and mentioned his own suspension. That led to further enquiries and disclosure of these documents.

Disciplinary investigation

69. On 2 September 2019, the claimant received a letter from Mr Dominici inviting him to an investigation meeting on 3 September 2019. That was the first day that the restaurant was open after a summer break. The letter stated that the respondent wished to discuss concerns that the claimant had used the restaurant as a private dining room for personal guests and allowed children to play in the restaurant. In addition, the respondent alleged that he allowed non-members of staff into the kitchen area and non-members of staff to explore company property and for the children to touch, in an unhygienic manner, company goods. A copy of the letter was also sent by Ms Gutierrez to the claimant by email. The decision to initiate a disciplinary investigation was taken by Mr Henning, which was confirmed by him in his evidence.

70. Mr Dominici's letter said that the claimant would be able to watch CCTV footage and "*the enclosed report from the hotel security*". In his witness statement Mr Dominici says that he enclosed the security incident report with the invitation letter. The claimant says that he did not see the report until it was disclosed in these proceedings.

71. I find that the report was not sent to the claimant because:

    (i) Ms Gutierrez's covering email to the claimant in which she attached the invitation letter did not appear to also attach the security incident report.

    (ii) The report contains important reference to the previous use by the claimant of the restaurant on 10 and 17 March 2010 and the management knowledge of that and yet there are no reference to

the report or those events being discussed in the investigation or the subsequent disciplinary and appeal meetings.

(iii) The report says that the incident on 28 July 2019 was not reported neither to the General Manager nor the Hotel Manager "*as per Goran request"*. The claimant did not know who Goran was and yet there are no discussions at any of the meetings about who Goran was and his role in the matter.

(iv) On cross-examination Mr Dominici said that he did not know whether the report had been enclosed or not.

72. The claimant attended the investigation meeting with Mr Dominici the next day. Mr Dominici said that it was an investigation meeting, and that his role was to find out what happened and that he had a total of 51 questions he wanted to ask of the respondent. He explained that the respondent was investigating that the claimant had hosted a lunch on 28 July 2019 without asking permission. The claimant tried to explain that historically he had been allowed to use the restaurant without needing to ask permission. Mr Dominici stopped him by saying that he was going through the questions and any additional questions or comments would have to be made at the end. The claimant said that if he knew he was required to ask permission to use the restaurant for private purposes, he would have done so. Mr Dominici did not enquire further into the claimant's assertion about him having the permission.

73. Mr Dominici showed CCTV footage of the claimant and his guests using the restaurant on 28 July 2019. He was asked questions regarding guests in the kitchen and children playing in the restaurant.

74. At the end of the meeting, Mr Dominici instructed the claimant not to attend work. The claimant explained that the restaurant was due to open the next day, following the summer break, and that he needed to be there for the final preparations. Mr Dominici told him that this was non-negotiable. Mr Dominici did not explain to the claimant reasons for the suspension and did not provide him with a letter of suspension. Mr Dominici said in oral evidence that he was advised to suspend the claimant by the respondent's solicitors.

75. Mr Dominici said that the reason he had not given the claimant a letter of suspension was because it was not a suspension but instructions not to attend work, however he could not explain the difference between suspension and instructing the claimant not to attend work. He said that he had been told to "*go in that direction*".

76. Following the meeting Mr Dominici did not interview anyone nor did he take any other investigatory steps. He did not produce an investigatory report. He sent his notes of the meeting to the respondent's solicitors and had an "*informal*" conversation with Ms Gutierrez. He did not take a decision whether there was a disciplinary case to answer.

Meeting with Mr Cola

77. On 5 September 2019, the claimant was asked to meet with Mr Azad Cola. Mr Cola was angry and told the claimant that the claimant was disrespectful of the company property, that the claimant acted as if he owned the restaurant and that it was not his restaurant, and that he [Mr Cola] did not ever want to eat the claimant's food again. He said he would leave it to the Hotel's HR to decide the

outcome. The claimant understood Mr Cola's words to mean that he was unlikely to work again for the respondent.

Disciplinary meeting

78. On 26 September 2019, the claimant was invited to attend a disciplinary meeting on 1 October 2019 to respond to six allegations that the claimant:

1. used the Alyn Williams Restaurant to host a private event, with no prior authorisation;

2. used the Alyn Williams Restaurant and kitchen facilities for personal use without authorisation;

3. allowed children to play in the restaurant or failed to prevent this;

4. allowed children to touch and consume company goods, or failed to prevent this;

5. allowed non-members of staff access to the restaurant kitchens or failed to prevent this; and

6. allowed non-members of staff to access company property unsupervised, including drawers and cupboards, or failed to prevent this.

79. With the letter the respondent sent to the claimant a copy of the notes of his meeting with Mr Dominici and a copy of the CCTV footage, which the claimant could not open to play on his computer. The respondent did not to provide the claimant with a copy of its disciplinary policy until after the meeting.

80. The disciplinary meeting was conducted by Ms Gutierrez. The claimant was accompanied by Mr. Bakowski.

81. During the disciplinary meeting, the claimant denied any wrongdoing and explained that if he had known permission was required to use the restaurant for private purposes, he would have done so. The claimant also explained that he was supervising his guests for the duration of their visit and that no damage had been done to the restaurant.

82. Ms Gutierrez asked the claimant for "anything tangible" to show that he did not need to seek permission. She took the claimant through the CCTV footage. She asked him about the fire procedure suggesting that since no one knew of the claimant's presence in the restaurant that would be a breach of the fire procedure. The claimant explained that the chance of a fire was very low because the kitchen had an induction stove and that he knew the fire alarm procedure and would have gathered people and took them to the fire point as he had done during the fire drills.

83. Ms Gutierrez referred the claimant to his comment at the investigation meeting that he had thought that the old management was "wild west" and asked the claimant why he had not asked permission of the new management if he had thought that. The claimant first replied with "No answer to that", but then corrected himself saying that he had not realised that he needed authority from management as he was a manager himself.

84. On 3 October 2019 Ms Gutierrez sent to the claimant a copy of the respondent's disciplinary procedure, however the last page listing the examples of gross misconduct was missing.

Dismissal

85. On 11 October 2019, the claimant was informed by Ms Gutierrez of the decision to dismiss him on the grounds of gross misconduct. He was summarily

dismissed without notice or payment in lieu of notice. He was dismissed for gross misconduct on the allegations that the use of the restaurant and kitchen was unauthorised, he allowed children to play in the restaurant and touch company goods, and non-members of staff to access the kitchen and to use the company property.

86. The letter said that each of the six allegations was "well-founded" and that Mr Gutierrez' decision was that a disciplinary sanction was appropriate and having considered the appropriate disciplinary sanction she decided that summary dismissal by reason of gross misconduct was the appropriate sanction.

87. The respondent did not inform the restaurant staff, or the public about the dismissal of the claimant until late November 2019.

88. On 7 October 2019, the Michelin guide had their annual awards. The restaurant retained its one Michelin star. The claimant says that the reason there was five weeks' delay between his suspension and dismissal was because if he had been dismissed before the Michelin guide was published the restaurant would have lost its star, as it is the standard practice for a restaurant to lose its status if the chefs leaves. If, however, the chef leaves after the guide was published, Michelin would not get it re-printed, however the restaurant would be removed by Michelin from its website. Mr Dominici confirmed that Michelin guide is very "*chefie*" and the departure of the chef leads to the loss of the restaurant's status.

Appeal

89. By way of letter dated 18 October 2019, the claimant appealed against his dismissal on several grounds, including:

    (1) There were numerous flaws in the investigation and the disciplinary process which indicated that the respondent had no real desire to properly deal with his disciplinary:

        (a) The respondent at the start of the matter did not properly explain the process that would be followed or the implications of his suspension. The claimant was not provided with a copy of the respondent's disciplinary procedure until after he had attended the disciplinary hearing;

        (b) The investigation was limited to CCTV footage of the restaurant and was lacking in substance and evidence;

        (c) There was no investigation report provided despite the claimant being instructed to remain away from work for 6 weeks whilst the investigation was taking place;

        (d) There was unreasonable delay in investigating the matter and pursuing the disciplinary considering the only evidence used was the CCTV footage in the respondent's possession;

        (e) The respondent did not speak with the old management to verify the claimant's explanation that he had used the restaurant in the same way previously without being challenged or criticised by the respondent.

(2) His suspension was unlawful as there was no reasonable basis to suspend the claimant, and the suspension was a very heavy-handed treatment done without the respondent following ACAS guidance.

(3) Ms Gutierrez was not an appropriate person to hear the disciplinary and take the decision, as she was involved in the investigation, and thus was not independent. Further, she had been unduly influenced by the owner of the respondent, Mr Cola, after he left the claimant with the impression prior to the disciplinary hearing that he was unlikely to return to the Hotel. She did not follow a fair or reasonable procedure, which the claimant says shows that her decision was predetermined.

(3) Summary dismissal was not justified in circumstances where the respondent's own disciplinary procedure gave no examples of gross misconduct (the claimant did not see the examples in the respondent's policy because a copy that the respondent had sent to the claimant after the disciplinary hearing had the last page, where such examples are listed, missing) and the claimant had not been notified of any apparent change in policy regarding the private use of the restaurant and kitchen.

He noted that: staff members used the kitchen for personal use regularly; children regularly attended the restaurant and it was not uncommon for them to consume company goods; and non-members of staff also visited the kitchen on a daily basis as part of the kitchen tours offered by the respondent. All those were daily instances in the restaurant, for which no one would be criticised, and which were found Ms Gutierrez as amounting to gross misconduct.

Even if the claimant had done something wrong, as it was his first "misdemeanour" it was unreasonable to dismiss him summarily.

(4) The respondent had an ulterior motive for dismissing the claimant, namely that it wished to bring in new staff since the change of management following the franchise agreement with the Marriott International, cut cost and run the restaurant in the claimant' name without paying him a salary.

90. On 25 October 2019 Mr. Henning heard the appeal.

91. Following the appeal, Mr Henning spoke to Ms Gutierrez, Mr Cola and Mr Rodrigues. Ms Gutierrez confirmed that she had been involved at the investigation stage with support of the respondent's solicitors, she said that she did not have any pre-determined idea as to the outcome. Mr Rodrigues confirmed the claimant had used the restaurant for private purposes with children present in the past and playing "hide & seek" but not football. Mr Cola accepted that he had told the claimant that he was shocked at his behaviour, which he considered disrespectful and that he had lost confidence in him. He also said that he had told the claimant that the matter would be dealt with by HR and they would come to their own conclusion.

92. The claimant's appeal was rejected by Mr Henning on 15 November 2019. In rejecting the appeal Mr Henning found that all the points made by the claimant were "unfounded". He found that the investigation was not flawed, the claimant's suspension was not unlawful, Ms Gutierrez's role was correct, gross misconduct was a reasonable response in the circumstances and that there was no ulterior motive for the dismissal.

93. After the claimant had been dismissed the respondent continued to use the claimant's name in the name of the restaurant for several months. That was challenged several times by the claimant's solicitors. Eventually the respondent agreed to rename the restaurant from January 2020 from "Alyn Williams at the Westbury" to "AW Restaurant".

94. After the claimant's departure became public knowledge, Michelin removed the restaurant from its online guide and website and the AA removed all rosettes from the restaurant. The restaurant website continues to promise "Michelin-Starred Fine Dinning".

95. The restaurant closed to the public on 23 March 2020 due to COVID-19.

The law

96. The law relating to unfair dismissal is set out in S.98 of the **Employment Rights Act 1996 (ERA)**.

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or, if more than one, the principal reason) for the dismissal; and

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

(2) A reason falls within this subsection if it –

…….

(b) Relates to the conduct of the employee;

97. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

> *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

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

99. This requires the tribunal to consider the mental process of the person, who made the decision to dismiss and to identify the relevant decision maker was. The tribunal must consider "*only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss"* (***Orr v Milton Keynes Council 2011 ICR 704, CA***).

100. If the decision is made for more than one reason the tribunal must identify the principal reason. In deciding what was the real reason for the dismissal the tribunal is not restricted in choosing between alternative reasons advanced by the parties. "*As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side" (**Kuzel v Roche Products Ltd 2008 ICR 799, CA**).*

101. Just because there is misconduct which could justify a dismissal does not mean that the tribunal is bound to find that this is indeed the true reason for the employer's decision to dismiss. If the employee adduces some evidence casting doubt on the employer's advanced reason, the employer will have to satisfy the tribunal that its advanced reason was in fact the genuine reason relied on at the time of dismissal (***Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT***).

102. The burden of showing, on the balance of probabilities, a potentially fair reason is on the employer, and it fails to do show that, the dismissal will be unfair. If the tribunal rejects an employer's asserted potentially fair reason, finding that the reason could not have been the one operating on the employer's mind at the relevant time, the tribunal is not obliged to go on and ascertain the true reason for dismissal if there is insufficient evidence to do so (***Hertz (UK) Ltd v Ferrao EAT 0570/05***).

103. The tribunals cannot find a dismissal fair for a reason that the employer could have relied on but expressly decided against (***Devonshire v Trico-Folberth Ltd 1989 ICR 747, CA***).

104. In a misconduct case, where it has been established that the reason for dismissal was the employee's conduct, the principles in ***British Home Stores v Burchell [1978] IRLR 379*** apply. The three elements of the test are:

(i) Did the employer have a genuine belief that the employee was guilty of misconduct?
(ii) Did the employer have reasonable grounds for that belief?
(iii) Did the employer carry out a reasonable investigation in all the circumstances?

105. The Tribunal must then determine whether the employer's decision was within the range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses, rather than to decide what decision it would have come to in the circumstances of the case.

106. If the dismissal falls within the range the dismissal is fair: if the dismissal falls outside the range it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances.

107. Where there are problems with the disciplinary hearing itself, those can in some circumstances be remedied by the appeal, even if the appeal is not a complete rehearing, however the procedure must be fair overall (***Taylor v OCS Group Limited [2006] IRLR 613***).

108. **Section 123(6) of ERA** states that: "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding"*

109. If an employer fails to establish a potentially fair reason for dismissal, this does not preclude the tribunal to find that there was contributory conduct by the claimant (***Chauhan and anor v Man Truck and Bus UK Ltd EAT 931/94*)**. However, in finding contributory conduct the tribunal must focus only on matters, which are "*causally connected or related*" to the dismissal (***Nejjary v Aramark Ltd EAT 0054/12***), and evaluate the employee's conduct itself and not by reference to how the employer viewed that conduct (***Steen v ASP Packaging Ltd [2104] I.C.R. 56***).

Discussion and conclusions

1) What was the reason for the dismissal?

110. The respondent says that it dismissed the claimant for a reason related to his conduct, which is a potentially fair reason under section 98(2) ERA. It relies on the decision of Ms. Gutierrez set out in her dismissal letter to the claimant. It argues that the evidence of the claimant's misconduct is on CCTV and therefore as a matter of fact is unimpeachable, and that his dismissal was solely connected to his conduct at the lunch on 28 July 2019. It says both of its witnesses dismissed the claimant's contention that the dismissal was due to costs savings or instructions from Mr Cola.

111. The claimant asserts that his conduct was not the real reason for the dismissal. He argues that the decision to dismiss was pre-determined and/or had nothing to do with any purported misconduct. He claims that the true reason was either due to instructions by Mr Cola to dismiss the claimant (or at any rate the decision was influenced to a very significant factor by the Colas), or because the respondent was looking to cuts costs and decided that it could operate as normal without the claimant.

112. Having considered all the evidence and heard the parties' submissions I find that the respondent failed to show that the decision to dismiss the claimant was for a reason related to his conduct. On the balance of probabilities, I find

that the true reason for the claimant's dismissal was because the respondent's management (that is Mr Henning and/or Ms Gutierrez) was either directly instructed by Mr Cola to dismiss the claimant or they had understood that Mr Cola wished the claimant to be dismissed and felt obliged to do that to meet Mr Cola's expectations and regain his trust and fearing repercussions for themselves if they failed to carry out his wishes. I conclude this for the following reasons.

113. The dismissing officer of the respondent was Ms Gutierrez. It is her mental process that led to the decision to dismiss that I need to examine to determine what was the reason she took that decision. Mr Mitchel in his closing skeleton argument expressly states that "*[t]he Respondent relies on the decision of LG [Ms Gutierrez], which is set out in her decision letter that followed her disciplinary hearing with C [the claimant]*". I also considered the mental process of Mr Henning as the appeal manager, who decided to uphold the decision to dismiss.

114. The respondent chose not to call Ms Gutierrez to give evidence. Instead, it presented her witness statement as a written statement to the tribunal. Ms Gutierrez signed her witness statement on 13 November 2020, the last working day before the first day of the hearing. The respondent did not provide any explanations as to why Ms Gutierrez was not giving evidence in person and did not seek postponement or witness order. I do not know whether Ms Gutierrez's non-attendance was due to a sudden change of heart on her part or due to the respondent's decision not to call her because of concerns what evidence she might give when cross-examined. In any event, without hearing from Ms. Gutierrez directly I must decide what was the true reason in her mind when she took the decision to dismiss the claimant by looking at other available evidence and drawing permissible inferences from those.

115. The respondent submits that Ms Gutierrez statement is factual and is based on what is recorded in the notes of the disciplinary hearing, the accuracy of which was not challenged by the claimant and therefore there is no basis to impugn her statement. This, however, does not help me to determine why she decided to dismiss the claimant. Her statement is very brief on the question of her decision to dismiss and does not explain in any detail why she thought dismissal was the appropriate sanction and what factors she considered in arriving at that decision. The statement does not contain any evidence concerning internal management discussions related to this matter. It completely omits to mention Mr Dominici's suspension and the meeting between Mr Dominici, Mr Henning and Ms Gutierrez on 22 August 2019. It does not explain why Ms. Gutierrez requested Mr Rodriguez to provide the security incident report of 19 August 2019. All these questions are very relevant in the enquiry as to the reason why she decided to dismiss the claimant, and she could have been asked those questions if she had appeared as a witness.

116. Her letter of dismissal is equally devoid of any such detail. It goes through the six allegations finding each of those well-founded. It does not explain why those findings turn the allegations into gross misconduct and why she decided

that summary dismissal was the appropriate sanction. It does not appear that she has given any consideration to any alternatives to dismissal. She also failed to refer to the relevant background, including whether the respondent had been aware of the claimant' private use of the restaurant and kitchen and had permitted the same, or the claimant' length of service, his clean disciplinary record and exemplary performance.

117. Mr Mitchell argues that the reasons recorded in the dismissal letter should not be ignored, just because Ms. Gutierrez is not giving evidence, but on the contrary they should be taken by the tribunal as the reasons for her decision and the tribunal should be cautious to dismiss those. This, however, overlooks the fact that it is for the respondent to show, on the balance of probabilities, that the reason as asserted by the respondent is the true reason, and simply recording it in the dismissal letter is not sufficient to discharge that burden when the asserted reason is disputed by the claimant, and he provides evidence casting doubt on the genuineness of it.

118. The respondent argues that the claimant until the appeal hearing never questioned Ms Gutierrez' ability to determine the issue and that his criticism of her came after she had made her decision. I do not see how that proves that she decided to dismiss the claimant for the reason related to his conduct. In any event the claimant never accepted that he had done anything wrong, at least to the extent that would justify him being summarily dismissal.

119. Turning to the respondent's argument that the evidence of the claimant's misconduct is on CCTV and therefore as a matter of fact is unimpeachable. Even if the evidence show that the claimant was guilty of misconduct, this does not prove that the respondent dismissed him for that reason. The issue of wrongful dismissal is not part of the claimant's case in these proceedings. Therefore, and for the purposes of the first issue I need to determine, the question is not whether I consider the claimant's conduct in question to be misconduct, but whether the respondent considered it to be such, and most importantly, whether it dismissed the claimant for that reason. Therefore, I reject the respondent's contention that the CCTV evidence should be taken on a "*res ipsa loquitur*" basis, and from which I must necessarily infer that he was dismissed for a reason related to his conduct as captured in that footage.

120. With respect to the respondent's argument that the claimant's dismissal was solely connected to his conduct on 28 July 2019. Even if it was so connected, being connected or even solely connected and being the principal reason for which the dismissing officer, Ms Gutierrez, dismissed the claimant are two different things, and the latter cannot be substituted by the former. The issue of the conduct being connected to the dismissal is a relevant consideration, and it also arises in the context of section 123 (6) of ERA (see below), but it is not the determinative factor for the purposes of showing the reason for the dismissal under section 98(2) of ERA. I accept that it has evidential value in determining the first issue, and I did take it into account in arriving at my conclusion.

121. In these circumstances, I must seek to determine the reason for the dismissal from other available evidence.

122. Mr Dominici and Mr Henning accepted in their evidence that all significant staff decisions were taken with approval of Mr Cola. Mr Dominici said that Mr Cola had suspended and dismissed "a few" people. Mr Dominici himself was suspended on direct instructions of Mr Cola. The decision to give Mr Dominici a written warning was made by Mr Cola and his father, as explained by Mr Henning at the meeting on 22 August 2019: "*Consequently, **they** don't want you dismissed but **hey (sic)** do want you to get a warning which will be on the form of a First Written Warning." (**my emphasis**)*

123. Mr. Henning accepted that if the disciplinary process resulted in an outcome, with which Mr Cola disagreed such situation would have been "uncomfortable". Mr Henning also accepted that the decision to continue to pay the claimant his full salary when he was working at the Wild Rabbit and spending only a day a week in the restaurant was the decision of Mr Cola, and whether or not he disagreed with it he had to accept it. Mr Henning's account of his meeting with the Colas is telling: *Following these incidents, the owners lost trust in me, lost lot of trust in you, rightly or wrongly and Mr Cola Senior was exceptionally angry at me and I got the sense that this was also a warning for me."* Therefore, I find that the respondent would not have dismissed the claimant if that, at the very least, were not what Mr Cola would have agreed with.

124. Mr Henning says that Mr Cola did not instruct him to dismiss the claimant and left it for the HR to decide on the outcome. In support of that assertion he refers to the conversation Mr Cola had with the claimant on 5 September 2019. I accept that in that conversation Mr. Cola told the claimant at the end of the meeting that the matter would be dealt with by HR and that they would decide the outcome. However, in the light of other evidence I do not accept that the statement about the matter being finally decided by HR represents the true position.

125. I say that because the meeting took place after the investigation meeting on 3 September 2019. Mr Dominici admitted that the questions for that meeting had been prepared for him by the respondent's solicitors. At the meeting he did not deviate from the script. He also admitted that he had been told to suspend the claimant by the solicitors, and those instruction had come to him before the investigation meeting. He admitted that he had sent his notes from the meeting to the solicitors and had not done any further investigation into the matter, and that is despite the obvious lines of further enquiry revealed by the discussion at that meeting, such as the claimant's assertion that he had been given permission to use the restaurant by the previous management.

126. Ms Gutierrez in her interview with Mr Henning on 4 November 2019 refers to her coordinating the process and giving legal guidance with advice from Nash (Nash & Co Solicitors LLP are the respondent's representatives in these proceedings).

127. The statement by Mr Cola that it will be left for HR to decide the outcome seems to be contradictory with the statements he made in the same conversation that he had lost confidence in the claimant and that did not ever

want to eat his food. I find that in such circumstances the position of the claimant as the Executive Head Chef and the "figurehead" at a Michelin-starred restaurant bearing his name, in the Hotel the Colas considered to be the "crown jewel" (according to witness evidence of Mr Henning and Mr Dominici) of their luxury hotels' portfolio in London, will not have been left by the Colas for the respondent's HR to decide upon.

128. I treat with caution Mr Henning's evidence. In his witness statement he only deals with the appeal and omits to mention such important events as Mr Dominici's suspension, his telephone conversation with Mr Cola following that, his trip to Monaco to meet the Colas, his meeting with Mr Dominici and Ms Gutierrez on 22 August 2019, the circumstances of the production of the security report of 19 August 2019, the fact that he was meant to clarify with Mr Cola whether the claimant was allowed to use the restaurant and has never done that, the fact that the Colas decided to give a formal warning to Mr Dominici and that Mr Henning felt that he had been given a warning by them to.

129. His selective memory on such important events is puzzling. On the one hand, he says that Mr Cola did not instruct him to dismiss the claimant, however, cannot recall what was said in that meeting. When asked about that conversation on cross-examination he said that Mr Cola was "*concerned*", however at the meeting on 22 August 2019 he said to Mr Dominici and Ms Gutierrez that "*Mr Cola Senior was exceptionally angry at [him]".* Given the circumstances of that meeting, I would have expected that conversation to have stuck in his memory much better than how it apparently did.

130. Mr Henning equally could not recall details of his telephone conversation with Mr Cola despite that conversation causing him to make an urgent trip to Monaco for a face-to-face meeting with the Colas. He, however, does remember how many times a year Mr Cola ate the claimant's food (see paragraph 16 of his witness statement). He was evasive and inconsistent in answering questions, often hiding behind "*I do not recall*".

131. As was Mr Dominici, who also claimed not to be able to recall details of his telephone conversation with Mr Cola, even though following that conversation he decided to delete all messages on his work telephone, as he was anticipating that he would shortly be parting company with the respondent. His "*not sure*" answers to straight questions did not score him many credibility points either, thus undermining the veracity of his evidence as a whole.

132. I also find their explanation for doing nothing about the "incidents" on 10th and 17th March 2019 (see paragraph 51) not plausible, which casts further shadow on their credibility as witnesses. Therefore, and despite Mr Mitchell's rescue attempt in his closing submission to convince me that both Mr Henning and Mr Dominici, having been let go by Mr Cola and having their personal reasons to be unhappy about the respondent, should be seen as very credible witnesses, I am not convinced. I find that it will be unsafe for me to find facts and come to my conclusions relying on their evidence alone or preferring them to those of the claimant and the inferences I can reasonably draw from contemporaneous documents.

133. Further, the respondent chose not to call Mr Cola to give evidence, there was no opportunity to question him on what he meant when he said that HR would decide on the outcome and whether he was told to say it.

134. I am equally sceptical about the genuineness of Ms Gutierrez' reply to Mr Henning at the meeting on 4 November 2019 that she did not have any pre-determined idea and that both of them wanted the investigation to be precise, factual and correct. I find it was anything but precise, factual or correct.

135. I find the disciplinary process from start to finish was superficial, no real investigation was done, the claimant's suspension was unjustified and mishandled (as Mr Mitchell put it himself – "*it was a mess*"), important documents, such as the security report of 19 August 2019, were not shared with the claimant, no investigatory report was ever produced, the claimant's repeated assertion that he had permission to use the restaurant were ignored at every stage of the process, and that is despite the management clearly being aware of that.

136. Mr Henning, as the appeal manager, could have corrected the mistakes made earlier. However, he did not do that. His investigation was equally superficial. Mr Henning did not address the claimant's question why no one from the previous management had been contacted to verify his assertion that he had been allowed to use the restaurant for private events. Mr Henning's line of questioning was aimed at making the claimant to admit that what he had done was wrong with emphasis on children playing football in the restaurant.

137. The extent of the enquiry by Mr Henning following the appeal meeting was very limited. He asked only three questions of Mr. Cola, two of Ms. Gutierrez and one of Mr. Rodriguez and did not follow up on the obvious lines of enquiry in the context of the claimant's appeal grounds. He did not ask Ms Gutierrez why she thought the claimant's actions amounted to gross misconduct, whether she verified the claimant's claim that he had been given permission to use the restaurant by the previous management, or why she thought that summary dismissal was the appropriate sanction. He did not ask Mr Cola to explain the purpose of his meeting with the claimant and whether he had had any discussions with Ms. Gutierrez before the meeting. He did not ask Mr. Rodriguez to explain why no actions were taken on previous occasions when the claimant used the restaurant for private events with children playing "hide & seek" and whether children playing "hide & seek" was them behaving in a similar way as was seen on CCTV of the incident on 28 July 2019.

138. He did not conduct the appeal by way of a re-hearing the disciplinary matter but chose to deal with the specific appeal grounds advanced by the claimant. While conducting an appeal by way of a re-hearing is not necessary in all disciplinary cases, where there were clear flaws in the early stages of the disciplinary process and considering the sanction applied by Ms Gutierrez, I find that a full re-hearing was necessary to make the process fair.

139. Having dismissed the claimant's arguments Mr Henning concluded that the appeal was "*unfounded*", and the dismissal decision must stand. He did not independently consider whether the claimant was guilty of misconduct and whether the decision to dismiss was the appropriate sanction in the circumstances. Therefore, the reason for the claimant's dismissal remained as it was in the head of Ms Gutierrez when she decided to dismiss him.

140. Moreover, I have also considered Mr Henning's reasons for dismissing the claimant's appeal and for confirming his dismissal. I find that this was not for a reason related to the claimant's conduct, but for the reasons set out in paragraph 112 above. To the extent I must attribute Mr Henning's knowledge to Ms. Gutierrez' decision to dismiss the claimant (Mr. Henning being her direct manager and the respondent's General Manager), I find that such attribution only reaffirms my conclusion that the respondent did not dismiss the claimant for a reason related to his conduct, but for the reasons set out in paragraph 112 above.

141. I find this for the reasons explained in paragraphs 119 to 138 and furthermore because Mr Henning admitted that he never informed Mr Cola that he knew of the claimant's use of the restaurant for private events and that he never told the claimant to stop it. He never asked Mr Cola if such use were to be permitted despite telling Mr Dominici that he would do that. He admitted that Mr Cola would not have known of the use.

142. The record of the meeting on 22 August 2019 clearly sets out the direction for the management that no action can be taken contrary to the Colas' wishes: "… *we can't forget that we do work for a family, this is the reality and that influence how things are done and how the decisions are made…. I reassured him that moving forward I want to be aligned with his expectations and goals, and I want to be immediately aware of all the information that circulates so we can act on it. … Also, this was also a wake-up call for me to act on some of these things with a different approach and set some action points and deal with them with immediate effect.*"

143. Mr Dominici agrees: "*I am perfectly aware that I don't work for Marriott, but I am working for the Cola Family."*

144. Therefore, I find that none of the three managers (Ms Gutierrez being the direct report of Mr Henning) had any independence in this matter and would not have taken any decision that was contrary to Mr Cola's wishes. The decisions they were taking were not as a result of them exercising an independent judgment on the matter but were dictated by what they considered necessary to arrive to the predetermined outcome.

145. For the same reasons I find that the decision to dismiss the claimant was not because the respondent thought they could operate without him and was looking to cut costs. While Mr Henning might not have been too concerned about the claimant's departure, given his apparent views as to the claimant's value to the business (see paragraph 3433), neither he nor Ms Gutierrez nor Mr Dominici were able to make an independent decision as to the claimant's

future with the respondent, and they would not have dismissed him for that reason, if that was contrary to Mr Cola's wishes.

146. I asked Mr Henning why the respondent, having decided that the claimant's conduct was so seriously wrong that the respondent did not want him to be part of their business with immediate effect, but was still happy to be associated with the claimant's name and continued to trade under it. Mr Henning replied that they had not looked at the matter "*in that way*", which I took as suggesting that Mr Henning and other senior managers at respondent never considered that the claimant conduct was so blameworthy that they needed to sever all associations with him.

147. The respondent's case is that the decision to dismiss the claimant was not made by Mr Cola and therefore, as Mr Mitchell accepted, I cannot attribute Mr Cola's reasons as to why the claimant should be dismissed to the respondent's reason for dismissing him.

148. However, if the correct legal position (on the authority of ***Royal Mail Group Ltd v Jhuti 2020 IRLR 129, SC.*** as applied in in ***Uddin v London Borough of Ealing EAT 0165/19***) is that Mr Cola's (him being the ultimate controlling mind of the respondent) reason for which he had decided and caused the respondent to dismiss the claimant should be attributed to the respondent's decision to dismiss, I find that the dismissal (albeit then it would have been for a reason related to the claimant's conduct) would still be unfair for the reasons set out below.

149. Given my findings as to the real reason for the claimant's dismissal, it follows that the respondent has failed to show that it dismissed the claimant for a reason related to his conduct and, therefore the dismissal was unfair.

150. Given my decision on the first issue, I do not need to deal with issues 2 to 6. However, since my decision that the true reason for the dismissal was not related to the claimant's conduct is based on inferences I had to draw in the absence of direct evidence from Ms Gutierrez, I shall deal with those issues on the basis as if the real reason was related to the claimant's conduct. On that basis I reach the following conclusions.

2) Did the Respondent conduct a reasonable investigation as was warranted in the circumstances?

151. For the reasons set out in paragraphs above I find the respondent did not conduct a reasonable investigation (see paragraphs 69 to 76 and 135).

3) Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?

152. For the reasons set out in paragraphs 42 to 56 and 135 to 146 above I find the respondent did not have reasonable grounds to believe that the claimant was guilty of the misconduct. It was known to the respondent that the claimant had been using the restaurant for private events and those events involved children playing in the restaurant. The respondent failed to

investigate the matter until Mr Cola decided that the claimant's conduct was unacceptable and should be punished.

4) Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct?

153. For the reasons set out in paragraphs 42 to 56 and 135 to 146 above and my conclusions in paragraph 112 I find the respondent did not have a genuine belief that the claimant was guilty of the misconduct.

5) Was the decision to dismiss within the range of reasonable responses open to a reasonable employer on the facts?

154. I find the decision to dismiss was not within the range of reasonable responses open to a reasonable employer. I am not satisfied that the respondent genuinely considered that the claimant's conduct was gross misconduct, it failed to conduct a reasonable and fair investigation to enable it to come to that conclusion, and it failed to consider alternative sanctions. It failed to take into account the claimant's clean disciplinary record and his exemplary service. I find that in the circumstances the decision to dismiss fell outside the range of reasonable responses open to a reasonable employer.

6) Did the Respondent adopt a fair procedure?

155. I find that the respondent did not adopt a fair procedure. The outcome was predetermined, and the entire disciplinary process was a "side show". The stark inconsistency between the treatment of the "incidents" of 10th and 17th March 2019 and the lunch of 28 July 2019 speaks for itself. Mr Dominici and Mr Henning "serving" their warnings, including for not dealing with the lunch matter as Mr Cola thought it should have been dealt with, demonstrates that they lacked independence and were under considerable pressure to achieve the result Mr Cola either expressly communicated to Mr Henning, or Mr Henning thought Mr Cola expected to see. Mr Henning admitted that no thought was given to have the matter investigated and the disciplinary process conducted by other independent individuals. In the circumstances I find that would have been necessary to achieve a fair procedure. In short, I find that after the meeting in Monaco between Mr Henning and the Colas, "the writing was on the wall" for the claimant, and there was nothing he could have said or done during the disciplinary process, which would have made the predetermined outcome any different.

7) If a fair procedure was not used would the Claimant have been fairly dismissed in any event and/or to what extent and when?

156. I find that the claimant would not have been fairly dismissed for a reason related to his conduct in any event. I say that because a fair procedure would have shown that the claimant had been given permission to use the restaurant for private events by the management (which the respondent knew anyhow but ignored) and that should have been taken into account in deciding on the appropriate sanction. Although by facilitating and allowing children to play with a football in the restaurant and leaving them unsupervised, his use

of the restaurant on that occasion went beyond what reasonably could have been understood to be allowed by the standing management's permission, nevertheless, considering the claimant's long and exemplary service and clean disciplinary record those "offences" were not serious enough for a reasonable employer to decide that the claimant was guilty of gross misconduct and that dismissal was the appropriate sanction.

157. The respondent did not plead in the alternative and did not argue that it would have dismissed the claimant in any event for some other substantial reason (for example, because it lost trust and confidence in the claimant or was put under pressure by Mr Cola to dismiss the claimant) and that such dismissal would have been fair. In the absence of any such submissions and supporting evidence it would be impermissibly speculative for me to find what would have happened if the respondent had sought to dismiss the claimant for such other reason. However, if in dismissing the claimant for such other reason the respondent would have adopted the same or substantially the same procedure as it did for dismissing him for the purported reason of his conduct, I find that such dismissal would still be unfair, because the procedural flaws in that process, which would have made such dismissal falling outside the range of reasonable responses.

158. I understand the respondent intends to argue at the remedy hearing that the claimant would have been either placed on furlough or dismissed for reason of redundancy in March 2020 or November 2020. This issue has not been argued at the hearing on liability and therefore I make no decision on it at this stage. This issue will now be explored at the remedy hearing.

8) If the dismissal was unfair, did the Claimant contribute to his dismissal by culpable conduct?

159. I find the claimant did contribute to his dismissal by culpable conduct. Under section 123(6) of ERA, states that the claimant's actions must cause or contribute to his dismissal "*to any extent*" and therefore the claimant's culpable or blameworthy conduct need not be the sole or even the main cause of the dismissal. I find that the claimant's conduct, in so far as it relates to him allowing children to play in the restaurant with a football and by facilitating it by setting up improvised goals and by not supervising them properly thus allowing them to engage in other activities which could reasonably be seen in that setting as being objectionable (taking sugar cubes with their hands from sugar bowls on the tables laid for breakfast, jumping wrestling and doing headstands on the sofa-bench) was culpable. I find it went beyond the scope of his permission to use the restaurant to host private events, it was disrespectful and caused offence to the owners of the restaurant. The claimant admits that it was "silly". He also admits that he did not see children drinking tabasco sauce or picking up sugar cubes and accepts that he would have stopped them if he had. This conduct triggered a chain of events that resulted in the claimant's dismissal. I do not find that there were any intervening events that broke that causation link. Therefore, I find the claimant's culpable conduct causally connected to his dismissal.

160. I find that Mr Cola did not know that the claimant had been allowed to by the previous management and had been using the restaurant for private events many times in the past. He also did not know that the current management knew of such use and never told the claimant to stop it. I assume that Mr Cola and his father are reasonable and fair-minded gentlemen. I, therefore, find that there is a strong possibility that their reaction to the claimant's conduct would have been less extreme if they knew all those facts. Nevertheless, I find that the claimant's conduct was culpable and contributed to his dismissal by 30%.

161. I wish to emphasise that this finding does not mean that I find the conduct of the two boys blameworthy or culpable. Firstly, I am not sitting in judgment on their conduct. Moreover, I find their behaviour in the restaurant was nothing out of the ordinary and would not have been seen unusual of two young boys at home being slightly bored while their parents entertain guests.

162. Finally, while strongly disapproving the Hotel's management decisions and actions with respect to the claimant in this case, my judgment should not be read as castigating all former and current employees and managers of the Hotel and the restaurant.

163. Having decided the liability issues, the matter shall now proceed to determine the four remaining issues on remedy.

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Employment Judge P Klimov
London Central Region

Dated :10 December 2020

Sent to the parties on:

10th Dec 2020

For the Tribunals Office

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Annex A

AGREED LIST OF ISSUES

Unfair Dismissal

1. What was the reason for the dismissal? The Respondent alleges that it was a reason related to conduct, which is a potentially fair reason under s.98(2) ERA 1996.

2. Did the Respondent conduct a reasonable investigation as was warranted in the circumstances?

3. Did the Respondent have reasonable grounds to believe that the Claimant was guilty of the misconduct?

4. Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct?

5. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer on the facts?

6. Did the Respondent adopt a fair procedure?

7. If a fair procedure was not used would the Claimant have been fairly dismissed in any event and/or to what extent and when?

8. If the dismissal was unfair, did the Claimant contribute to his dismissal by culpable conduct?

2) <u>Remedy</u>

9. Is the Claimant entitled to compensation?

10. If so, has the Claimant mitigated his loss?

11. What if any, reductions should be made in relation to contributory fault and *Polkey v AE Dayton Services Ltd* [1987] UKHL 8?

12. Is it just and equitable to increase the amount of compensation by up to 25% to reflect any unreasonable failure by the Respondent to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?