Claim Nos. 1402629/2019
& 1402630/2019

EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT	**AND**	**RESPONDENT**
(1) Miss N. Bond **(2) Miss H. Brown**		**Sky In-Home Service Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held via Cloud Video Platform on the following dates:

Monday, the 7th December 2020;
Tuesday, the 8th December 2020;
Wednesday, the 9th December 2020

Employment Judge: **Mr D. Harris (sitting alone)**

Representation:

For the Claimants: **Mr Passman (Solicitor)**
For the Respondent: **Miss Irvine (Solicitor)**

JUDGMENT

1. **There shall be judgment for the First Claimant in her claim of unfair dismissal against the Respondent.**

2. **There shall be judgment for the First Claimant in her claim of wrongful dismissal against the Respondent.**

3. **The Second Claimant's claim of unfair dismissal shall be dismissed.**

4. **There shall be judgment for the Second Claimant in her claim of wrongful dismissal against the Respondent.**

5. **The case shall be listed for a remedies hearing via Cloud Video Platform at 10:00 am on the 21st January 2021 with a time estimate of 1 day.**

6. **By 4pm on the 16th December 2020, the Respondent shall file and service Counter-Schedules of Loss in respect of the First Claimant's claims of unfair dismissal and wrongful dismissal and the Second Claimant's claim of wrongful dismissal.**

REASONS

The claims

1. By a Claim Form presented to the Tribunal on the 16th May 2019, Miss Bond and Miss Brown, as First and Second Claimants respectively, brought claims of unfair dismissal and wrongful dismissal against the Respondent arising from their dismissal on the 4th January 2019 (in the case of Miss Bond) and the 11th January 2019 (in the case of Miss Brown).

2. The correct name of the Respondent, for the purposes of these proceedings, is Sky In-Home Service Limited. To the extent that it is necessary for me to do so, I amend the proceedings accordingly.

Evidence

3. Over the course of 2 days, on the 7th and 8th December 2020, I heard evidence from the following witnesses:

   (a) for the Respondent:
   Simon Duggan;
   Raudy Lockhart;
   Marc Hall;
   Jason Smith;
   Sean Algar.

   (b) for the Claimants, I heard evidence from Nina Bond and Hannah Brown.

4. The witnesses, including the Claimants, gave evidence from written witness statements that stood as their evidence-in-chief. They were subject to cross-examination, re-examination, where appropriate and, in the case of Nina Bond, questions from the Tribunal.

5. I also read and considered an agreed hearing bundle that ran to 319 pages. References to page numbers in these reasons are references to the page number in the agreed bundle of documents.

Findings of fact

6. At the time of her dismissal on the 4th January 2019, Miss Bond was employed by the Respondent as a Field Ambassador Manager. Her employment had commenced on the 1st December 2014. The role of Field Ambassador Manager was a leadership role. She was responsible for managing a team of employees who had been selected as high performers to participate in the Respondent's Ambassador scheme in which the "Ambassador" is given an internal secondment opportunity to develop their leadership skills. Miss Bond's role was to manage a team of Ambassadors.

7. One of the Ambassadors in the team managed by Miss Bond was Miss Brown. She was employed by the Respondent as a Field Engineer and had been promoted to Home Service Ambassador on a year's secondment on the 11th September 2018.

8. I find that both Miss Bond and Miss Brown had unblemished records of employment with the Respondent. From the fact that they had both been appointed to Ambassador roles, it can be, and is, inferred that they had exemplary records and were valued employees.

9. On Thursday, the 6th December 2018, Miss Bond arranged for her team of Ambassadors to have a team meeting and a site tour at Unipart Logistics in Nuneaton. She also made arrangements for the team to have its Christmas get-together that evening in Birmingham. She booked accommodation for the team at the Edgbaston Palace Hotel and booked a festive dinner and drinks package at an establishment called the Beirkellar. The Respondent provided a budget of £25 per head towards this Christmas event and no stipulations were laid down as to how the money could be spent.

10. During the meeting that took place on the 6th December 2018, Miss Bond spoke to the team and gave them instructions on how she expected them to behave during the night out.

11. Miss Bond's line manager, Simon Duggan, had been informed about the event in advance. Through his role as her line manager, Mr Duggan knew Miss Bond. He did not, however, know Miss Brown though they had met face-to-face at a meeting about a month or so before the Christmas night out.

12. The team arrived at the hotel in different vehicles in the late afternoon – around 4.30pm. Some of them were driving Sky branded vehicles. Most, if not all, were wearing their Sky uniforms when they arrived at the hotel. It was obvious to the staff at the hotel that a group of Sky employees were staying at the hotel.

13. Having arrived at the hotel, the members of the team changed into their clothes for the evening, which included festive jumpers. They set off into town at about 6.30pm. They headed to a Christmas Market where they spent some time before making their way to the Beirkeller – arriving there at about 8pm. Whilst at the Christmas Market, some alcohol had been consumed by the group in glasses that they purchased and kept on their person. Apart from one member of the group who abstained, alcohol was consumed by the group at the Beirkeller with their meal and after their meal. They left the Beirkeller at approximately 1am. It was at that stage that the member of the team who had not consumed alcohol called it a night and went home. Everyone else went on to a bar on Broad Street where they remained until the early hours of the morning. They eventually got taxis to take them back to the hotel – arriving there at about 4am.

14. The first to arrive at the hotel was a group that contained Adam Senior, Scott Cooper and Tom Tubbs. Miss Bond and Miss Brown were not in that group.

15. The taxi containing Miss Bond, Miss Brown and others arrived shortly after the first taxi. When they entered the hotel, the staff on duty in the hotel were asked if the group could sit down in a lounge area and

they were told that they could so long as they kept the noise down so as not to disturb other guests.

16. In the meantime, Adam Senior, Scott Cooper and Tom Tubbs, all members of the team on the night-out, had found their way into the lounge area next to the hotel's bar. The bar, at that time of day, was, not surprisingly, closed.

17. I have not been provided with a plan of the lounge area and bar and apart from two photographs (at pages 88 and 89 in the hearing bundle), which were of limited assistance in showing the layout of the lounge and bar, I have been reliant on witnesses' account of the layout of the rooms. I find that the lounge and bar were formerly two rooms that had, at some stage in the past, been converted into one larger room. The lounge occupied one of the former rooms and the bar occupied the other – with a large opening between the two.

18. The subsequent events that occurred in the lounge and bar area were captured on the hotel's CCTV system. I was not provided with any evidence as to how many cameras were located in the lounge/bar area or where they were located. For reasons that will be clear later on in these reasons, I was not provided with any CCTV footage to view. The evidence as to what the CCTV captured came from Mr Duggan and Mr Smith. I shall say more about that later on.

19. The group stayed in the lounge and bar area for just over an hour before going to bed. I find that Miss Bond sat in a seat with the bar to her right. The bar was not in her direct line of sight. She had to turn her head to the right to be able to see the bar. During their time in the lounge/bar area, the team chatted and ordered some pizzas from a nearby takeaway outlet, which they consumed in the lounge area. Though alcohol had been consumed during the course of the evening, I find that none of the group was so intoxicated that they were incoherent. I find that at no stage did the hotel staff come into the lounge area to ask the group to keep the noise down. I find that the group respected the instruction that they had received from the hotel staff when they entered the hotel to keep the noise down.

20. Having gone to bed just after 5am, it was not many hours later that the individuals who had been on the night-out were getting up. They wandered into the breakfast area at different times where they could have a self-service continental breakfast. Miss Bond settled up with the hotel and at no stage was she made aware by the hotel staff that there were any complaints arising from the group's behaviour in the lounge/bar area. Before leaving the hotel and going their separate ways, Miss Bond held a meeting with the team, with the permission of the hotel staff, in the same lounge area in which they had chatted on their return from their night-out.

21. At the time that they left the hotel on the morning of the 7th December 2018, there had been no complaint by the hotel about the group's behaviour.

22. It was not until the following week that Miss Bond became aware that a complaint had been made by the hotel in an email that had been sent to the Respondent's Business Team. That email was forwarded to Miss Bond and upon reading its contents she called the hotel manager to discuss his concerns further. It is my understanding that that email is not in the hearing bundle. What is in the hearing bundle is an email that the hotel sent to the Respondent's CEO on the 11th December 2018. That email is to be found at page 85 in the bundle.

23. On the 12th December 2018, the day after the hotel had sent its email to the Respondent's CEO, Miss Bond and Mr Duggan spoke to each other on the phone. During that conversation, Miss Bond informed Mr Duggan that she had received a complaint from the hotel. The complaint was of noise levels, taking drinks from a closed bar and tampering with a fire alarm. Mr Duggan asked Miss Bond what had happened and she gave some brief details. That conversation was not recorded in any way and it is not possible for the Tribunal to find, based on Mr Duggan's memory alone, that Miss Bond said the remarks attributed to her that are set out in paragraph 14 of Mr Duggan's witness statement. I find that a discussion did take place between Mr Duggan and Miss Bond and that the gist of Miss Bond's comments was that she had not seen any drinks being taken from behind the bar though she had seen Mr Senior in that area and had asked him to stop what he was doing at the bar.

24. At that stage, Mr Duggan was content for Miss Bond to investigate the complaint and to liaise with the company's employee relations team to discuss any disciplinary action that might be needed.

25. The Respondent's approach to the hotel's complaint changed when the message came from the CEO that the complaint that he had personally received was to be investigated. The complaint was passed to Mr Duggan and he then took over the investigation.

26. He attended the hotel on the 14th December 2018 and had a discussion with the owners of the hotel. They were angry at what had happened and, in particular, that drinks had been taken from the closed bar. They were also Sky customers, which made matters worse.

27. Mr Duggan was shown the CCTV footage whilst he was at the hotel and he took a note of what he saw on the footage. He was not permitted by the hotel owners to take a copy of the footage for what were described as data protections reasons. His note of his conversation with the owners of the hotel and what he saw on the CCTV footage is at pages 85 to 86 in the hearing bundle. The CCTV footage did not have any audio.

28. Mr Duggan's note of the CCTV footage contains the following:

    (a) at 4.00am Adam Senior went behind the bar and poured some beer into a glass;

    (b) at 4.02am, Adam Senior returned to the bar and poured some more beer into his glass;

    (c) the remainder of the group, including Miss Bond and Miss Brown, then arrived;

    (d) Adam Senior returned to the bar at 4.13am and 4.16am and poured some more beer into his glass; it was noted that the whole group had visibility of Adam Senior taking a drink from the bar. Mr Duggan noted that it did not appear to be an action that

was encouraged and he noted that members of the group did not appear to notice what Adam Senior was up to at the bar.

(e) at 4.21am, Miss Brown went behind the bar, took a glass and poured some beer into it, and returned to the group's table;

(f) Adam Senior returned to the bar at 4.34am and again at 4.41am and took some more beer from a pump. He was also seen trying to open locked fridge doors and the locked shutter in front of the spirits.

(g) on what is described as Adam Senior's final attempt to get some beer, he is caught by a member of staff and some of the group can be seen talking to the member of staff. The member of staff then stays at the bar and there are no further incidents.

29. Miss Bond is not mentioned at all in Mr Duggan's note of the CCTV footage that he made on the 14th December 2018 other than to say she was seen leaving at 5.11am to go to bed.

30. Mr Duggan then conducted some interviews with those who had been present at the hotel. He interviewed Miss Bond on the 17th December 2018. The notes of the interview are at pages 153 to 155 in the hearing bundle.

31. Miss Bond said that she had seen Adam Senior go up to the bar and that she and Miss Brown had called him back. With the benefit of hindsight, Miss Bond stated that she should have paid more attention to the whole group but she could not have done that all of the time and that, as they were adults, she would not have expected any of them to behave as Adam Senior had behaved.

32. Though it is recorded in the note of the interview (which I find is a broadly accurate account of the interview) that the interview may be followed by a formal process, I find as a fact that after the meeting Mr Duggan informed Miss Bond that she was not to worry that the complaint would damage her reputation within the company. Miss Bond felt re-assured by that and she did not expect matters to go

further in respect of her involvement in the events that had occurred at the hotel.

33. Notwithstanding the re-assurance that he gave Miss Bond, Mr Duggan subsequently prepared an investigation summary on the 28th December 2018 (at page 159 in the hearing bundle).

34. Mr Duggan interviewed Miss Brown on the 20th December 2018 (the note is at pages 94 to 96 in the hearing bundle). I find that the note is broadly accurate. It was put to Miss Brown that the CCTV showed her going behind the bar and pouring herself a drink. Her response was that she had no recollection of the events that had occurred in the lounge/bar area because she had drunk too much on the night-out. She stated that it had been a massive mistake to have had so much to drink.

35. On the 28th December 2018, Mr Duggan prepared an investigation summary in relation to Miss Brown (at page 99 in the hearing bundle).

36. In addition to the interviews of Miss Bond and Miss Brown that were conducted by Mr Duggan, another manager, John Butcher, interviewed others who had been present at the hotel:

    (a) on the 20th December 2018 he interviewed Aaron Nichols (at page 156 in the hearing bundle);
    (b) on the 20th December 2018 he interviewed Glen Parry (at page 157 in the hearing bundle);
    (c) on the 20th December 2018 he interviewed Adam Spear (at page 158 in the hearing bundle).

    If others were interviewed, copies of the transcripts of those interviews were never provided to the Claimants – and nor to the Tribunal.

37. Aaron Nichols said that Miss Bond and Adam Spear definitely tried to stop Adam Senior – but stop him from doing what is not made clear in the redacted interview at page 156 in the hearing bundle. He said that Miss Bond's tone was to stop immediately.

38. Glen Parry, in the redacted note of his interview, said that “others” had tried to stop them from doing it” – but because of the redaction, the context is missing entirely.

39. Adam Spear, in the redacted note of his interview, said he could not remember anyone challenging Adam Senior to stop – but they were all in little groups.

40. On the 3rd January 2019, Mr Duggan, accompanied by Mr Smith, returned to the hotel. Both men watched the CCTV footage and Mr Duggan made a second note of its contents – at pages 113 to 117 in the hearing bundle. He noted seven bar-related incidents:

    (a) Incident 3 – he noted that Miss Bond and Miss Brown, at 4.13am, look over to the bar where Adam Senior is leaning over. He noted that Miss Bond and Miss Brown had a clear view of him walking away with a glass and sitting at the table. He noted that there does not appear to be any challenge from the group.

    (b) Incident 5 – he noted that Miss Brown went behind the bar, took a glass and tried a pump. Then tried a different pump and poured a small amount of beer into the glass.

    (c) Incident 7 is when a member of staff arrives at the scene. Mr Duggan noted that Adam Senior talked to the member of staff and the member of staff can be seen gesturing, indicating that the bar is closed. A second member of staff then arrived on the scene and, at that point, Miss Bond and Miss Brown look towards the conversation. It is noted that Miss Brown joined in the conversation from her seat and moments later she approached the bar and continued to be involved in the conversation.

    (d) It is noteworthy that Mr Duggan does not record that either Adam Senior or Miss Brown were seen drinking at the table or tables at which the group were seated. He notes that Adam Senior (noted as “incidents 1, 2 and 6”) drank from a glass – but he did not note either Adam Senior or Miss Brown to have been seen drinking from a glass when they were seated with others at the table or tables. He also notes, in relation to Incident 6, that Adam Senior had left his glass at the bar.

41. I pause there to single out Mr Duggan for comment. The reason I do so is because it is a central part of Mr Passman's submissions that the evidence from Mr Duggan should be treated as unreliable and inaccurate. It was submitted that Mr Duggan had pre-determined the outcome of the investigation and had lied in the course of his investigation and in meetings with others. It was submitted that his evidence regarding the content of the CCTV footage was riddled with inconsistencies and could not have formed part of a reasonable basis for concluding that either Miss Bond or Miss Brown were guilty of gross misconduct. It was further submitted that Mr Duggan had sought to manipulate the disciplinary process by appointing the disciplinary officers and there was an implied submission that he had misled the claimants as to whether the CCTV could be made available to be viewed by them.

42. Having had the opportunity of hearing Mr Duggan's oral evidence and measuring that evidence up against the contemporaneous documentation in the case, I reject the claimants' submission that Mr Duggan was dishonest and unreliable. I found him to be a straightforward witness who did his best to manage the investigatory stage in the internal proceedings against the Claimants in a competent fashion. I find as a fact that his first note of the CCTV footage was not taken in the best of circumstances in that he had to take the note in the presence of the hotel owners who were plainly angry about what had occurred. Nevertheless, I find that Mr Duggan's note of the CCTV was taken in good faith and objectively. I reject the submission that he misled the claimants as to the status of the CCTV footage. It was not footage that was in the control or possession of the Respondent. The hotel owners, as I find, had refused to disclose the footage, and by implication, any stills from the footage, because of the data protection regime that applied to the footage. That was an understandable position for the hotel to adopt. I find that Mr Duggan informed the Claimants that the footage was not available because of the stance taken by the hotel and that there was no attempt by him to mislead the Claimants about the footage. I find as a fact that when informed that the hotel was refusing to disclose the footage, neither Claimant pressed the Respondent to take up the issue further with the hotel – save for Miss Brown at a much later stage, following her conduct meeting. When it became clear to the appeal officer, Mr Hall, that Miss Brown wanted to see the footage, arrangements were made promptly for the footage to be viewed at the hotel. Unfortunately, through no fault of the Respondent, the hotel had lost or destroyed

the footage when Miss Brown and Mr Hall arrived at the hotel to view the footage.

43. As to the allegation that Mr Duggan's evidence was so riddled with inconsistencies as to render his evidence unreliable, I find that not to be the case. Where there were differences between the first and second note of the contents of the footage, those differences are understandable in light of the different circumstances in which the notes were taken. Where there are differences or inconsistencies between Mr Duggan's notes of the CCTV footage, his oral account of the footage to the claimants or his account in his investigation summaries, I find those differences of account to be immaterial to the issues I have to decide. They do not indicate, as Mr Passman submitted, that Mr Duggan was trying to manipulate evidence or mislead anyone about the contents of the CCTV footage. I find that Mr Duggan took the view, quite rightly, that the CCTV footage was important and I find that he made notes of the footage in good faith. I have no reason to find that Mr Duggan's notes of the footage should be disregarded or otherwise treated as unreliable. I find that it is evidence of Mr Duggan's recognition of the importance of the CCTV footage, and the importance of obtaining a fair account of what the CCTV footage showed, that he returned to the hotel on the 3rd January 2019 and took a more detailed note.

44. Returning to the chronology of events, on a date unknown to the Tribunal, Miss Bond was summoned to a conduct meeting. It was intended that the invite letter should be at page 161 of the bundle, but page 161 was the dismissal letter dated the 7th January 2019. The fact that I was not provided with a copy of that letter has not, in my judgment, caused prejudice to any of the parties. It is clear from what I have heard and read that Miss Bond was invited to a conduct meeting to address the issues raised by Mr Duggan in his investigatory summary.

45. The conduct meeting was conducted by Mr Smith. The notes are at pages 162-183 of the bundle. I find that the copy of the notes as annotated by Miss Bond is an accurate note of what was discussed. Miss Bond stated that she had seen Adam Senior at the bar only once – when she saw him pushing a tap and said to him "what are you doing" and told him to stop. He then came and down sat down. She

thought he had a glass but could not say if there was anything in it. She told him that he did not need any more drinks. She said that she did not keep her eyes on him specifically after that. She didn't feel that she needed to as he was sat with them. If she had seen him go to the bar again, she'd have told him to stop. When the hotel staff arrived, Miss Bond said it was not a confrontation. She felt that the situation with Adam Senior was under control. With the benefit of hindsight, she said that maybe she should have kept a closer eye on him and that there was probably more she could have done. She was questioned about the Respondent's brand and she told Mr Smith that she did care about the brand. As to events the following day, she said that she did not feel that any action needed to be taken. She had a planned meeting with Adam Senior in about a week or so's time and she intended to discuss the entire events of the evening with him then – as she felt he had been quiet and reserved, particularly in the early parts of the night out.

46. After a short adjournment of the conduct meeting, Mr Smith returned with his decision. He had decided to dismiss Miss Bond and the note of his reasons is at pages 178-179 of the hearing bundle. A formal letter of dismissal was sent out on the 7th January 2019. The reasons for dismissal, which was without notice, were to be found at page 184 in the hearing bundle.

47. Miss Brown was called in for a conduct meeting by way of an invite letter dated the 28th December 2018 (at page 100 in the hearing bundle). The conduct meeting took place on the 4th January 2019 and it was conducted by Raudy Lockhart. The notes of the meeting are at pages 104 to 112 in the hearing bundle. I find that the notes are broadly accurate. It was put to Miss Brown that she had gone behind the bar and poured herself a drink and she replied that she had no recollection of doing that and it would have been out of character for her to have done so. The meeting was adjourned and was resumed on the 11th January 2019. On that date, Miss Brown was informed that she was dismissed. The dismissal letter was dated the 14th January 2019 (at page 118 in the hearing bundle). The reasons for dismissal, which was without notice, were set out in the dismissal letter.

48. Both Miss Bond and Miss Brown appealed against the decisions to dismiss. Miss Bond's appeal was heard by Sean Algar on the 19th February 2019 (the notes of the appeal are at 237-241 in the hearing bundle).

49. Following the appeal meeting, Mr Algar interviewed Jason Smith on the 7th March 2019 (at pages 243-245 in the hearing bundle), Adam Smith on the 7th March 2019 (at pages 247-248 in the hearing bundle), Simon Duggan on the 7th March 2019 (at pages 252-253 in the hearing bundle) and Thomas Tubb on the 13th March 2019 (at pages 249-250 in the hearing bundle).

50. On the 1st April 2019, Mr Algar wrote to Miss Bond saying that her appeal had been dismissed for reasons that could be found at pages 258 to 263 in the hearing bundle.

51. Miss Brown's appeal was heard by Mr Marc Hall on the 25th February 2019 (at pages 127-137 in the hearing bundle). I find the notes are broadly accurate. The appeal was adjourned to allow Mr Hall and Miss Brown to visit the hotel but when they arrived at the hotel on the 11th March 2019 they were informed that the footage could not be viewed because it had been lost or destroyed. On the 1st April 2019, Mr Hall wrote to Miss Brown to inform her that her appeal had been dismissed (at pages 138-143 in the hearing bundle).

Directions of law

Unfair dismissal

52. Pursuant to section 94 of the Employment Rights Act 1996 ("ERA"), an employee has the right not to be unfairly dismissed. It is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to section 98(2)(b) of ERA, a reason which relates to the conduct of the employee.

53. Where the employer establishes a potentially fair reason for dismissal, the Tribunal will go on to consider, with a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This 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. This is to be determined in accordance with equity and the substantial merits of the case.

54. In considering dismissal for misconduct, the Tribunal is guided by the principles set out in **British Home Stores v. Burchell [1978] IRLR 379**, taking into account the neutral burden of proof that now applies in considering the fairness of the dismissal. The Tribunal considers whether at the time of the dismissal the respondent had a genuine belief in the misconduct alleged, whether the respondent had reasonable grounds for believing the claimant was guilty of that misconduct and, at the time it held the belief, whether the respondent had carried out as much investigation as was reasonable in all the circumstances.

55. The Tribunal will go on to consider whether the dismissal fell within the band of reasonable responses (**Iceland Frozen Foods v. Jones [1982] IRLR 439**).

56. It is not for the Tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer (**Foley v. Post Office; Midland Bank plc v. Madden [2000] IRLR 827**).

57. The band of reasonable responses test applies to the decision to dismiss and the investigation that took place (**Sainsbury's Supermarket Limited v. Hitt [2003] IRLR 23**).

58. In respect of procedure, the Tribunal must consider whether the investigation was reasonable, not whether it, itself, would have chosen some alternative reasonable process to that adopted by the respondent.

59. The more serious the allegations and more far reaching the effect on the employee of dismissal, the more rigour will be expected of the employer (**A v. B [2003] IRLR 405**). It is particularly important that employers take their responsibility seriously where dismissal is likely to have a serious effect on the employee's reputation or ability to work in his or her chosen field (**Crawford & another v. Suffolk Mental Health Partnerships NHS Trust [2012] IRLR 402**).

60. When considering fairness of procedures, the Tribunal must consider the overall process including any appeal (**Taylor v. OCS Group Limited [2006] ICR 1602**).

61. In respect of an allegation of disparity of treatment, I am reminded by Miss Irvine of the case of **Hadjioannou v. Coral Casinos [1981] IRLR 352** where the EAT gave guidance on the issue. The EAT set out three possible ways where decisions made by an employer in truly parallel circumstances in relation to different employees may be relevant:

    (a) employees may be led by an employer to believe that certain categories of conduct will be overlooked or will be more mercifully treated in the light of the way that other employees have been dealt with in the past;

    (b) it may show that the dismissal in the instant case is not for the reason put forward i.e. that the asserted reason for dismissal is not the real or genuine reason;

    (c) evidence as to decisions made by an employer in two truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.

> ***"it is only in the limited circumstances that we have indicated that the argument (i.e. the disparity argument) is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or***

sufficiently similar to afford an adequate basis for the argument."

Polkey

62. I remind myself of what has become known as the Polkey principle, derived from the House of Lords decision in the case of **Polkey v. AE Dayton Services Ltd [1988] ICR 142**. Prior to that decision, Tribunals applied what was known as the "no difference rule", which meant that where there was a proven procedural irregularity in an otherwise fair dismissal, but it could be shown that carrying out the proper procedure would have made "no difference", then the dismissal would be fair. The House of Lords in Polkey overturned that rule in all cases except those where it would be utterly useless or futile to carry out the proper procedure. Following the decision in Polkey, Tribunals are entitled, when assessing the compensatory award payable in respect of an unfair dismissal, to consider whether a reduction should be made to the compensatory award on the ground that the lack of a fair procedure or a substantive defect in the employer's decision-making made any practical difference to the decision to dismiss. Essentially, the duty that falls on the Tribunal is to construct a "working hypothesis" as to what could or would have occurred: i.e. whether the dismissal would or would not have occurred as a matter of probability expressed in percentage terms.

Contributory fault

63. As to contributory conduct, I direct myself as follows. Section 123(6) of ERA provides 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 … compensatory award by such proportion as it considers just and equitable having regard to that finding. There is an equivalent, though broader, provision for reduction in section 122(2) of the ERA that applies to the basic award.

64. In **Nelson v. BBC (No. 2) [1980] ICR 110**, the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:

    (a) the relevant action must be culpable or blameworthy;

(b) it must have actually caused or contributed to the dismissal;

(c) it must be just and equitable to reduce the award by the proportion specified.

Wrongful dismissal

65. I turn now to directions of law on wrongful dismissal: i.e. dismissal without notice. The general principle is that where there has been a repudiatory breach of the contract of employment by an employee, the employer may summarily dismiss without notice.

66. In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract (**Laws v. London Chronicle (Indicator Newspapers) Limited (1959) 1 WLR 698**).

67. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal. In **Briscoe v. Lubrizol Ltd [2002] IRLR,** the Court of Appeal approved the test set out in **Neary and anor v. Dean of Westminster [1999] IRLR 288**, where the Special Commissioner asserted that the conduct "*must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment*". There are, however, no hard-and-fast rules. The courts have been reluctant to lay down any comprehensive guidelines as to what amounts to conduct justifying summary dismissal. What is clear is that many factors may be relevant: for example, the nature of the employment and the employee's past conduct.

68. For completeness – Miss Irvine draws my attention to the following cases in this area:

(a) **Malik v. Bank of Credit and Commerce International (BCCI); Mahmud v. Bank of Credit and Commerce International [1997] IRLR 462** – in which it was held that it is an implied term

of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. On the facts of the case, the employer had operated its business corruptly and dishonestly, in breach of the implied term, and employees could, in principle, recover damages for their losses caused by the stigma resulting from their associated with respondent.

(b) **Neary & Neary v. Dean of Westminster [1999] IRLR 288** – in which it was held that financial wrong-doing, short of dishonesty, can be a basis for summary dismissal. Gross misconduct sufficient to justify dismissal must, in the particular circumstances, so undermine the trust and confidence of an employer that he should no longer be required to continue the employment. There is no rule of law that gross misconduct justifying summary dismissal must always have an element of dishonesty. Summary dismissal would be justified if the employee had behaved in a manner so inconsistent with the employment as to undermine the fundamental duty of trust and confidence.

(c) An example of gross misconduct that had the effect of undermining the trust and confidence in the employment relationship is to be found in the case of **Adesokan v. Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22.** The appellant was a Regional Operations Manager, responsible for 20 stores. He was summarily dismissed after the respondent found that he had undermined what the respondent called its "Talkback Procedure" – the philosophy behind which was the desire to ensure that staff should be engaged, motivated and take pride in their work. An HR official had communicated to stores by email in a way that deliberately set out to manipulate the Talkback scores in the appellant's region. The allegation against the appellant was that he had failed to take any adequate steps to rectify this serious situation. The respondent regarded this as gross negligence, which was tantamount to gross misconduct. The appellant's claim of wrongful dismissal was unsuccessful. He appealed on the basis that his conduct was not capable, as a matter of law, of amounting to gross misconduct. His appeal was dismissed. It was held that given the significance placed by the respondent on the Talkback Procedure, the judge

was entitled to find that this was a serious dereliction of the claimant's duty. He found that this failing constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship.

Analysis & decision

Miss Brown – unfair dismissal

69. I repeat that it is not for the Tribunal to decide whether Miss Brown did or did not attempt to steal beer. That question is not relevant to the determination of Miss Brown's unfair dismissal claim. The questions for the Tribunal are focused on whether the Respondent reasonably believed she had stolen or attempted to steal beer (not whether she actually did), whether there were reasonable grounds for that belief, whether there had been a reasonable investigation and whether dismissal was within the band of reasonableness (i.e. did dismissal fall within the range of sanctions that a reasonable employer would have considered). It is not for the Tribunal to consider what sanction, if any, it would have applied to Miss Brown.

70. Having found as a fact that Mr Duggan's notes of the CCTV footage are accurate and reliable, I am driven to the conclusion that Miss Brown was fairly dismissed. There was a genuine belief on the part of the Respondent that she had committed misconduct, there were reasonable grounds for that belief (based on the notes of the CCTV footage) and, in my judgment, there had been a reasonable and proportionate investigation. I am further satisfied that dismissal fell within the band of reasonable responses.

71. It has been said by Miss Brown and argued on her behalf, that the investigation was fundamentally flawed because she was not given an opportunity to see the CCTV footage. I disagree with that analysis. Had the issue before me been the question whether Miss Brown did or did not go behind the bar and pour a drink, there might have been some force in the submissions. But I am concerned with the reasonableness of the Respondent's conduct in relation to its investigation and its decision-making process. I am satisfied that the Respondent had a good reason for being unable to show Miss Brown

the CCTV footage – because of the hotel's stance about disclosing the footage. I am satisfied that Mr Duggan made reasonable efforts to obtain an accurate description of what the CCTV footage showed. I am satisfied that Miss Brown did not press for the CCTV footage to be disclosed to her until a later stage, when, it transpired, the CCTV footage had been lost or destroyed. I am satisfied that the Respondent's genuine belief that Miss Brown was guilty of misconduct was based upon reasonable grounds following a reasonable investigation. In reaching that decision, I have born in mind that Miss Brown did not have any recollection of the events that had occurred in the lounge/bar area after 4am in the morning. She was, therefore, not directly challenging Mr Duggan's account of what the CCTV footage showed. She speculated that she might have been doing other things and that Mr Duggan had misinterpreted events when he watched the CCTV on two separate occasions – but that was mere speculation on her part. The fact remained, as I find, that Mr Duggan had viewed the CCTV footage on two separate occasions, with the intention of obtaining an accurate note of its contents and his account was clear. It showed that Miss Brown had gone behind the bar and attempted to pour a drink. In my judgment, the Respondent acted reasonably in treating that conduct as gross misconduct, involving as it did, trespassing into an area not open to customers and attempting to steal some beer. What made matters worse for the Respondent, and understandably so in my judgment, was that this was a works' night-out and the Respondent's reputation was harmed, or potentially harmed, by Miss Brown's conduct.

72. In respect of the disparity argument raised by Miss Brown in her evidence, I find that there is no evidence that a truly parallel set of facts existed in relation to which the R had taken a different course of action or indicated that a less serious sanction than dismissal might apply.

Miss Brown – wrongful dismissal

73. I find that Miss Brown's summary dismissal was in breach of contract. There was no justifiable basis for dismissal without notice, taking into account her contrition, her good character and the mitigation that she presented to the Respondent.

Miss Bond

74. Applying the Burchell test, I find that the Respondent had a genuine belief that Miss Bond was guilty of misconduct. Mr Smith said in his evidence that his view of Miss Bond's conduct was not confined to what was shown on the CCTV. He said it was bigger than that. It involved the whole evening. Who booked it, organised it, who was responsible and who, after the event, took action. It was not just about Miss Bond saying stop to Adam Senior. Mr Smith went on to say that he believed that Miss Bond had seen the theft of beer taking place in the hotel lounge. I find, however, that there were no reasonable grounds for that belief for the following reasons:

    (a) The evidence, primarily in the form of the CCTV footage as documented by Mr Duggan, did not show that Miss Bond had seen Adam Senior repeatedly go to the bar.

    (b) There was no audio on the CCTV footage, which would have assisted in understanding what had occurred.

    (c) From a viewing of the CCTV footage, it would be difficult to assess what a person had seen. The CCTV clearly showed people's actions (e.g. Adam Senior's actions and Miss Brown's actions) but determining what a particular person had seen at any given moment from watching CCTV footage was fraught with difficulty.

    (d) The CCTV footage, as documented by Mr Duggan, did not support Mr Smith's belief that Miss Bond had seen the theft of beer taking place.

    (e) The CCTV footage corroborated Miss Bond's account that she had seen Adam Senior at the bar only once.

    (f) Miss Bond's account that she had told Adam Senior to stop what he was doing was corroborated by other witnesses.

    (g) This was a group of Ambassadors and Miss Bond reasonably expected high standards of behaviour from them.

    (h) Though she was the leader of the team, it was not reasonably practicable for Miss Bond to have kept each member of the

group under close observation, ready to intervene if they misbehaved.

(i) There was no reasonable basis for believing that Miss Bond was responsible for the behaviour of Adam Senior when not being observed by her.

(j) On the basis of the CCTV footage and the other contemporaneous accounts, there was no reasonable basis to conclude that it was a failure to supervise the group that led members of the group to attempt to steal drinks.

(k) There was no reasonable basis to conclude that it was a failure to supervise the team that had led members of the team to drink excessively. The difficulty with that reason for dismissal is that there had been no investigation into the circumstances concerning the level of intoxication of the team at the time when they arrived at the hotel. It is clear that if there was excessive intoxication, that did not occur as a result of what was consumed in the bar after 4am. The intoxication must have occurred earlier – but there had been no investigation by the Respondent into the circumstances in which that intoxication had occurred. In the absence of such an investigation, it was unreasonable for the Respondent to have concluded that the level of intoxication was due to a failure on the part of Miss Bond to supervise the team adequately. The only direct evidence of excessive drinking related to Miss Brown (who had accepted that she had drunk too much) and there was no evidential basis for a finding that the level of Miss Brown's intoxication was causally related to a failure on the part of Miss Bond to supervise her. Apart from that, the Respondent seems to have relied on an inference that the level of intoxication must have been something for which Miss Bond was responsible – but it seems to me that that is not a reasonable inference to have drawn when the opportunity to investigate the circumstances in which the intoxication occurred was before the Respondent but was not taken.

(l) There was no evidential basis for concluding that Miss Bond had failed to represent the Respondent in a manner that protected their brand and reputation. It is right to say that the conduct of Adam Senior and Miss Brown was potentially harmful to the Respondent's brand and reputation – but the evidence indicated that Miss Bond had responded appropriately (and in a way

consistent with protection of the brand) on the single occasion that she had seen Adam Senior at the bar. There was no suggestion that Miss Bond had seen Miss Brown at the bar and so there was no basis for thinking that Miss Bond's conduct towards Miss Brown was potentially harmful of the brand. As to the allegation that Miss Bond had not protected the brand by taking action the following morning – that did not stand up to scrutiny. At the time that she went to bed, Miss Bond was aware that Adam Senior had been to the bar once and that she had stopped him from doing what he was doing. She was also aware that members of staff had entered the lounge/bar area and spoken to Adam Senior and Miss Brown but there was no evidence that that had been an argumentative confrontation. In the circumstances, when Miss Bond went to bed and when she awoke, there was no basis for her to think that action needed to be taken in respect of the events that had occurred the night before. The first time that she became aware that events had occurred that she had plainly not seen and that required investigation was the following week. At that point she took appropriate action by phoning the hotel and commencing an investigation.

(m) As to Mr Smith's point that the matter went beyond a forensic analysis of the CCTV footage and that the booking, planning and organisation of the event involved misconduct on the part of Miss Bond, the difficulty for Mr Smith in that regard is that the focus of the investigation had plainly been on the CCTV footage (which lay at the heart of the decision to dismiss Miss Bond) and the limited redacted interviews of 3 other people when asked about events shown on the CCTV footage. There was no meaningful investigation into the bigger picture that Mr Smith described in his evidence as influencing his decision to dismiss Miss Bond. It follows that there was no reasonable basis for his belief that Miss Bond's misconduct extended beyond a failure to stop Adam Senior from doing what he was seen to have been doing on the CCTV footage.

75. Having found that there were no reasonable grounds for the Respondent's belief that Miss Bond was guilty of gross misconduct, I find that her dismissal was unfair.

76. As to the Polkey principle, I find that without entering a sea of speculation, it is impossible to determine whether it is likely or even possible that Miss Bond would have been dismissed had the Respondent gone about its investigation and decision-making in a different way. I therefore conclude that there is no basis for a Polkey reduction.

77. As to contributory fault, on the basis of my findings of fact and my decision on the unfairness of Miss Bond's dismissal, I am unable to find that there was any blameworthy conduct on her part that caused or contributed to her dismissal or that should otherwise operate so as to result in a reduction of her compensation. I am, of course, aware that Miss Bond in her conduct meeting indicated that there were things she might have done differently that evening – but those indications were plainly made with the benefit of hindsight. Knowing what she now knows about the events that occurred, it is natural for her to reflect that if she had done things differently, the events may not have occurred. My analysis, however, is centred on whether there is evidence of blameworthy conduct on her part at the time of the events and in my judgment there was not.

78. I also find that Miss Bond has succeeded in her claim of wrongful dismissal though the compensation for that claim is likely to be subsumed within the compensation awarded in respect of the claim of unfair dismissal.

Employment Judge David Harris

Date: 07 August 2021

Reasons sent to parties: 01 September 2021

For the Tribunal Office

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