EMPLOYMENT TRIBUNALS

Claimant: **Miss J Rayner**

Respondent: **W M Morrison Supermarkets Plc**

Heard by CVP in Sheffield **On: 2 August 2021**
1 October 2021

Before: **Employment Judge Brain**

Representation

Claimant: **Miss J Linford, Counsel**
Respondent: **Mrs A Stroud, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was constructively dismissed from her employment by the respondent.
2. The complaint of constructive wrongful dismissal succeeds.
3. By way of remedy upon the wrongful dismissal complaint, the respondent shall pay to the claimant damages in the sum of £3855.55 (calculated in accordance with paragraph 171 of the reasons).
4. The complaint of constructive unfair dismissal succeeds.
5. By way of remedy upon the unfair dismissal complaint:
    5.1. The respondent shall pay to the claimant a basic award in the sum of £1632.
    5.2. The respondent shall pay to the claimant a compensatory award in the sum of £3956.35 (calculated in accordance with paragraph 193 of these reasons).
6. It is not just and equitable to make any reduction to the basic or the compensatory award by reason of the claimant's conduct.

7. The claimant's complaint of breach of contract outstanding upon determination succeeds in part. The respondent shall pay to the claimant the sum of £15 by way of damages.

REASONS

1. The second day of the hearing of this case concluded late in the afternoon of 1 October 2021. Given the lateness of the hour, I reserved my judgment. I now give reasons for the judgment that I have reached.
2. The claimant pursues the following complaints:
   (1) Unfair dismissal contrary to the relevant provisions of the Employment Rights Act 1996.
   (2) Wrongful dismissal.
   (3) Breach of contract.
3. The statutory unfair dismissal and the wrongful dismissal claims are brought upon alternative bases: that the respondent dismissed the claimant or in the alternative constructively dismissed her. The breach of contract claim is founded upon matters which arose during the claimant's contract of employment with the respondent and which remained outstanding upon its termination.
4. The Tribunal heard evidence from the claimant. On behalf of the respondent, evidence was called from:
   (1) Tracy McTurk. She has been employed by the respondent since April 1988 as a facilities manager. She was the claimant's line manager throughout the claimant's employment.
   (2) Kyle Shah. He has been employed by the respondent for 16 years in a variety of roles. His current role is as a contact centre operations manager which is a role which he has held for a period of 10 years.
5. I shall make my findings of fact and set out the relevant law before going on to arrive at a determination of the issues by application of the relevant law to the issues in the case.
6. I should say at the outset that the events of 15 December 2020 are pivotal to the determination of the case. The respondent says that the claimant resigned from her position that day. The claimant says that she did not do so, and that the respondent dismissed her subsequently. In her closing submissions, Miss Linford submitted that the respondent dismissed the claimant either on 16 December 2020 at the earliest or if not then on 21 December 2020.
7. It is, I think, worth setting out at least some of the relevant law which applies to this case now.
8. A contract of employment may be terminated in a variety of ways at common law. The parties may reach agreement to end the contract. The contract may end because it has been frustrated where, without the fault of either party, a supervening event occurs which was not reasonably foreseeable at the time that the contract was made. The contract may be brought to an

end by the dismissal by the employer of the employee. This is known as an *"express"* dismissal. The claimant says she was expressly dismissed by the respondent in mid-December 2020.

9. An express dismissal of the employee by an employer (where there is an open-ended contract of employment) will in the normal course be wrongful if the employer brings the contract of employment to an end on short notice or without notice. The exception to this is where the employer dismisses the employee because they have committed a serious (repudiatory) breach of the contract entitling the employee to terminate the contract summarily.

10. Another of the ways in which the employment contract can be brought to an end is by the resignation by the employee from their employment. Similarly, this must be done with the service of proper contractual notice. The exception to this is where the employee resigns in response to a serious (repudiatory) breach of contract by the employer. In such circumstance, the employee may accept the repudiatory breach and bring the contract to an end there and then. This is often referred to as a *"constructive dismissal".* Although it is the employee who has brought the contract to an end in such circumstances, the act of resignation is construed as a dismissal where it is done in response to a fundamental breach of contract upon the part of the employer.

11. In this case, there is a dispute between the parties as to how and when the employment relationship ended. The claimant's case is that the respondent expressly dismissed her at some point between 16 and 21 December 2020 without proper notice. She says that this is a wrongful dismissal. In the alternative, she says that she resigned on 15 December 2020 but did so in response to repudiatory breaches upon the part of the respondent. She says that those repudiatory breaches entitled her to resign summarily. She therefore claims to have been constructively dismissed as an alternative to her complaint that she was expressly dismissed.

12. The respondent's case is that the employee resigned on 15 December 2020 and that she did so without notice. The respondent's case is that they were entitled to accept the claimant's repudiatory breach in resigning without notice and treat the contract of employment as at an end with effect from that day. The respondent says that the claimant simply resigned and was not constructively dismissed as they were not in fundamental breach of the contract.

13. It is for the claimant to show that she was dismissed either expressly or constructively. She must show this upon the balance of probability.

14. The common law concepts of express and constructive dismissal are incorporated into the statutory law of unfair dismissal in the 1996 Act. In order to pursue her complaint of unfair dismissal, the claimant needs to show that she was dismissed (either expressly or constructively). By section 95(1)(a) of the 1996 Act, an employee is dismissed where the employment contract is terminated by the employer. By section 95(1)(c), an employee is constructively dismissed where they resign, terminating the contract with or without notice, in circumstances such that they would be entitled to resign without notice because of the employer's repudiatory breach of contract.

15. In many cases of unfair dismissal and wrongful dismissal that come before the Tribunals, there is no dispute that the employee has been dismissed. Problems may arise where words or actions give rise to ambiguity. The test as to whether ostensibly ambiguous words amount to a dismissal or a resignation is an objective one. The Tribunal must take into account all of the surrounding circumstances and consider how a reasonable employer or employee would have understood the words used in the circumstances. Occasionally, there may be no direct words at all on either side, but it is nonetheless argued that a dismissal or resignation can be inferred from the actions of the parties.

16. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances. In her written submissions, Miss Linford referred to the case of **Sothern v Franks Charlesly Co** [1981] IRLR 278, CA. Here, the employee said (at a partnership meeting of the firm of solicitors for whom she worked), *"I am resigning".* The firm took her at her word, accepted the oral statement of resignation and recruited a replacement the next day. The Court of Appeal held that, on the facts, these were unambiguous words of resignation and were understood as such by the employer. That concluded the matter. There was no room to consider what the employee actually intended or what a reasonable employer might have assumed she intended.

17. That said, the courts have recognised that there will be some situations where the employee has unambiguously resigned (or the employer has unambiguously dismissed the employee) but these acts have been done in such circumstances that it is appropriate to investigate the context in which the words were spoken in order to ascertain what was really intended and understood.

18. Miss Linford and Miss Stroud both referred me to **Sovereign House Security Services Limited v Savage** [1989] IRLR 115, CA. In this case, May LJ stated that:

    "In my opinion, general speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view Tribunals should not be astute to find otherwise".

19. However, the Court of Appeal in **Savage** went on to hold that while unambiguous words of resignation should normally be taken at their face value, in special circumstances the Tribunal would be entitled to decide that there was no resignation, despite appearances to the contrary. In **Savage**, unambiguous words of resignation spoken in the heat of the moment did not amount to a resignation. As was recognised in **Sothern**, the Court of Appeal in **Savage** held that if the case concerned decisions taken in the heat of the moment or involved an immature employee, then what otherwise might appear to be a clear resignation should not be so construed. The words uttered by the employee in **Savage** were used in the heat of the moment and should not have been accepted at full face value by the employer.

20. Both counsel also referred me to **Kwik-Fit (GB) Ltd v Lineham** [1992] IRLR 156. Here, the Employment Appeal Tribunal followed the Court of Appeal's decision in **Savage** but drew back from saying that where special circumstances exist the employer is under a duty to reconsider events so that failure to satisfy that duty will necessarily lead to a finding that a dismissal occurred. Rather, where special circumstances arise (such as where words were spoken in the heat of the moment or under extreme pressure or given the intellectual make-up of the employee) apparently unambiguous words can be considered in the light of the surrounding circumstances so that it may be risky for an employer simply to accept what seems to be a resignation. A prudent employer will allow a reasonable period of time to elapse before accepting a supposed resignation. If, during this period, facts arise which require further investigation, an employer who does not investigate will risk the Tribunal drawing an inference of dismissal from the evidence. The length of time that it is reasonable for a prudent employer to wait before accepting a supposed resignation is a question of fact for the Tribunal.

21. The facts of the case in **Lineham** are, I think, worth briefly reciting as they have some resonance (as we shall see) to the facts of this case. The employee was a depot manager employed by Kwik Fit. One night, on his way home from a pub, he entered the premises to use the lavatory, deactivating and then reactivating the alarm. There then followed an investigation. A senior manager considered Mr Lineham's actions to be sufficiently serious to merit a written warning. An argument ensued and Mr Lineham threw his keys on the counter and left. The next day, he telephoned the respondent asking for payment of his wages and saying that he would take them to a tribunal for unfair dismissal. The respondent employer protested that he had not been dismissed.

22. The Employment Tribunal held that in the circumstances the employer had dismissed the employee. The Employment Appeal Tribunal held that the Employment Tribunal had not directed itself properly but nonetheless held that Mr Lineham had been unfairly dismissed in that the employer was not entitled to assume in all the circumstances that what occurred was in fact a resignation. They held that words spoken, or actions expressed in temper or in the heat of the moment or undue extreme pressure, or the intellectual make up of an employee may be such special circumstances. Accordingly, an employer should in that circumstance allow a reasonable period of time to elapse before accepting a resignation at its face value. To not do so runs the risk of a Tribunal holding that in the special circumstances an intention to resign was not the correct interpretation when the facts are judged objectively. A reasonable period of time is likely to be relatively short, such as a day or two.

23. Miss Stroud, in paragraph 1 of her submissions, said that the respondent relies on the basic rule that a notice of resignation takes effect in the ordinary way and once it has been given it cannot be withdrawn except by consent. She referred me to the case of **Willoughby v CF Capital Plc** [2011] IRLR 985. This was, in fact, a case not about a disputed resignation but rather was about a disputed dismissal of the employee by the employer. In paragraph 30(1) of the report of that case, the EAT held (HHJ Richardson) that, "*As a general rule, an employer who uses unambiguous*

words of dismissal, so understood by the employee, will thereby dismiss the employee and terminate the contract of employment. Conversely, as a general rule, an employee who uses unambiguous words of resignation, so understood by the employer, will thereby resign and terminate the contract of employment." Citing **Savage**, the EAT went on to hold that this is a general rule of wide application and tribunals should not be astute to find exceptions. Where there are special circumstances, the fundamental question for the Tribunal is whether the person to whom the words were addressed was entitled to assume that the decision expressed by the other was a conscious rational decision. HHJ Richardson went on to say (in paragraph 38) that:

"Without doubt the main practical problem which the law has sought to address in these cases has been the problem of words spoken in anger or in the heat of the moment. In ordinary human experience we generally take people to mean what they say; but we often make allowances for words spoken in anger, recognising that they may soon be retracted and may reflect no more than a momentary, flawed intention on the part of the speaker. The law caters for this eventuality; but the law will not serve the wider interests of justice unless employers and employees are usually taken to mean what they say".

24. The Employment Appeal Tribunal's decision in **Willoughby** was confirmed when the case reached the Court of Appeal (2012) ICR 1038. Rymer LJ said (in paragraph 38) that:

*"The essence of the "special circumstances" exception is therefore that in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a "cooling off" period before acting upon it. Kilner Brown J, in paragraph 15 of his judgment in [**Martin v Yeoman Aggregates Ltd** [1983] IRLR 49 EAT] understandably referred to such a period as an opportunity for the giver of the notice to recant, or to withdraw his words; and this in practice is what is likely to happen. I would however be reluctant to characterise the exception as an opportunity for a unilateral retraction of withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn. In my judgment, the true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place – that, in effect, his mind was not in tune with his words".*

25. Against the background of these legal principles, the Tribunal must therefore decide:

    (1) Whether the claimant's words on 15 December 2020 constituted an unambiguous resignation?

    (2) If so, did she do so in the heat of the moment or under special circumstances?

    (3) In the event that the Tribunal decides that the claimant did resign but did so in special circumstances, then did the respondent allow a reasonable period of time to elapse before accepting her resignation at its face value and did facts arise which cast doubt upon whether the resignation was really intended and could properly be assumed?

(4) If there were special circumstances but the respondent did not allow sufficient time for the claimant to reconsider her decision or carry out such investigation as was appropriate, then did the respondent expressly dismiss her at some point after 15 December 2020?

26. The respondent is a very well-known supermarket. The claimant worked for the respondent as facilities service manager at the respondent's head office in Bradford.

27. As confirmed within the contract of employment (which is copied into the bundle at pages 42 to 52) the claimant started work for the respondent on 24 September 2018. The respondent's disciplinary policy (dated 3 July 2019 and therefore in force at the material time) is in the bundle at pages 117 to 120. Paragraph 3.9 of the contract provides that the disciplinary procedure is non-contractual.

28. The contract refers, at paragraph 3.1, to the respondent's *"colleague handbook".* The contract provides (at page 42) that the colleague handbook applies to the claimant and that those sections within it marked (with a green leaf) as contractual form part of her terms and conditions of employment.

29. Clause 1.8 of the contract provides that the employment shall continue unless terminated by either party giving to the other the period of written notice set out in the table within that clause. Where service is in excess of 26 weeks then the respondent was obliged to give 12 weeks' notice of termination. This is supplemented by provisions in the handbook (at page 98). The first paragraph of page 98 (marked as contractual with the green leaf) says:

"While we know that Morrison's is a great place to work, we also know that, at some point, you may want to move on. We'd be sorry to see you go – but to get the ball rolling, we need a letter of resignation from you which you should give to your people manager. The amount of notice that you need to work depends on your job level and role. The tables below set out the notice periods you need to give if you decide to leave as well as the notice period the company has to give you." [I note that the table at page 99 gives a shorter notice period but provides that such may be altered by agreement. I proceed upon the basis that the claimant's entitlement is as set out in clause 1.8 of her contract].

The second paragraph of page 98 (which is not marked as contractual) says, *"Please be aware that if you have resigned in writing or told us verbally you are resigning (and this has been confirmed in writing) your resignation will be automatically accepted unless your manager allows it to be retracted following a request from you".* As I have said Mrs McTurk was the claimant's line manager throughout her employment with the respondent. (I presume that Mrs McTurk is the claimant's *"people manager*" for the purposes of the contractual provision set out within the handbook at page 98 of the bundle. I was not told otherwise).

30. The claimant's gross annual salary when the employment relationship was ended was in the sum of £33,350 per annum. In addition, the claimant claims that she was entitled to a bonus of 10% of her gross salary. At page 65 of her bundle (being the relevant extract from the colleague handbook) reference is made to a *"colleague bonus".* This is not marked with the green

leaf as being a contractual entitlement. This says that details of the colleague bonus scheme are available on the notice board. It goes on to say that the "*colleague bonus scheme is open to all colleagues in work level 1 to 3 roles who are employed by the group since the beginning of the group's financial year (this date moves each year but is generally the first week in February). Colleagues must also still be employed by the group (and not be in their notice period) at the time any bonus is paid after the financial year has ended."* [The emphasis has been added].

31. Mrs McTurk said in evidence that a bonus was payable for the financial year ended February 2021 and that the claimant would have qualified for it had she been in employment at the end of January of that year.

32. In her capacity as facilities manager, Mrs Mc Turk's role (per paragraph 1 of her witness statement) was to "*manage the facilities team in head office and maintain and manage the head office building including the front of house team, reception and kiosk, catering and sample shop, warehouse, mail room and goods in, housekeeping and maintenance. I also oversee all the uniform requirements for the business".* The claimant says in paragraph 8 of her witness statement that, *"in my role as facilities service manager at head office I was responsible for the overall running of the staff canteen, the coffee shops and the sample shop …"*

33. The evidence is that the sample shop was one open to members of staff only and not to members of the public. Sale samples left by salespersons are available to purchase by members of staff at a significant discount when compared to retail prices.

34. The colleague handbook makes reference to the staff shopping procedure. This is not marked as contractual. The salient extract reads:

"Need to get a few bits and pieces from the store for home? Well, good then – you can shop with us before work, during your breaks and after you finish your shift (don't forget your staff discount and More card!). This applies to all colleagues visiting or working in a store. While you are shopping though, we need you to remember a few simple rules. During the working day you can only shop in your own time. Don't put goods aside for yourself or have goods put aside for a colleague to buy later. Keep your till receipt with your shopping while you are in store. Keep your till receipt for any goods purchased from the shop, floor or canteen that aren't eaten in the canteen or at the time of buying them. And if your shopping is left in store, it must be kept with your receipt. Finally, you should never ever consume goods without first making payment."

35. This extract is to be found within the bundle at page 68. There is no reference within this passage to a need or requirement for the receipt to be signed by the employee's line manager.

36. In paragraph 5 of her witness statement, Mrs McTurk gave evidence that, *"… [in] November 2020 an employee was dismissed by the respondent, having been found to have stolen from the staff sample shop. Following this incident, the claimant had been involved in recommunicating the correct process for the staff sample shop, which employees in the facilities team must follow when purchasing items. Following a meeting with the claimant about the process, she sent an email to the wider team, confirming the*

process. I responded to the claimant adding some additional detail which I asked her to include in the staff briefing. A copy of the email exchange is at page 121 of the bundle. The claimant was therefore very familiar with the correct process to be followed when purchasing items from the staff shop."

37. The claimant gave the following evidence in her witness statement:

(21) … [Mrs McTurk] and I had formatted a new procedure to be followed by the junior members of the team when making purchases from the sample shop [page 121 of the bundle]. It is my understanding that a more strict process of pricing and purchasing of items from the sample shop has been implicated due to the dismissal of a colleague for alleged theft.

(22) On 4 November 2020 I had issued a form to my team for signing, updating them with the new ways of working in the sample shop. I then had a face to face briefing with my team, which included the contents of this form and the further points put forward by [Mrs McTurk] by email on 11 November 2020 (see pages 121 to 122 of the bundle).

38. The email of 4 November 2020 which the claimant says that she issued to her team reads as follows:

"Hi all

New ways of working in the sample shop with immediate effect

Only management to price the goods brought into the sample shop. All goods must be priced up before putting on any shelves. One staff member on a weekly basis to look after the shop through trading times. This will be on a rota basis so everybody (if wanted) gets a chance to work there. Any staff purchasing any stock from the shop must buy it and take home the same day and get the receipt signed off by a member of the management team. No stock to be put away to pay for at a later date. Staff working in the shop must get it signed on their training cards that they understand the new ways of working. No staff members (ours as well) allowed in the shop before opening at 11.30."

39. I have emphasised by way of underlining the parts of the new procedure for making purchases from the sample shop pertinent in this matter. Mrs McTurk appeared to approve of the claimant's briefing set out in the email of 4 November 2020 within her email of 11 November 2020. She made a number of additional observations but did not indicate any disagreement with the claimant's brief that any staff purchases from the sample shop were to be taken home upon the same day and that the receipt for the purchase must be signed by a member of the management team.

40. In paragraph 23 of her witness statement the claimant says, "*As stated in our email chain [this being a reference to page 121] the new system required a member of the management team to sign off all item receipts to verify their validity against the goods purchased before attempting to leave the store. As I am a member of the management team, I was under no understanding that I was to follow this guidance, believing I have the ability to verify my own purchases, as did the other members of the facilities management team".*

41. In the course of her cross-examination, Mrs McTurk was taken to the passage from the staff handbook at page 68. It was put to her that there is here no requirement for the till receipt to be countersigned by a member of the management team. Mrs McTurk's evidence was that an additional separate process was always in operation for the sample shop but that the procedure had slipped. This had led to the dismissal of the junior employee for theft from the sample shop and the need to re-emphasise what Mrs McTurk claimed was the long-established procedure of requiring sample shop till receipts to be countersigned by management.

42. There was no evidence within the bundle of any relevant processes applicable only to the sample shop prior to November 2020. The only documented evidence before the Tribunal of any sort of staff purchasing process is that within the bundle at page 68 which does not mandate the obtaining by staff of a signature from a member of the management team. It was suggested to Mrs McTurk by Miss Linford that neither the claimant's email of 4 November 2020 nor her email of 11 November 2020 made it clear that members of management themselves had to obtain a signature from their own line manager. Although Mrs McTurk maintained this to be the case, upon a fair reading, there is no such provision or requirement (even within Mrs McTurk's email of 11 November 2020 at page 121).

43. When she gave evidence under cross-examination, the claimant maintained that the new policy or process introduced in November 2020 did not apply to her. The claimant said the new policy had not been relayed to senior members of the team. The claimant fairly accepted that she should have ensured that such a process was undertaken.

44. The respondent's evidence upon this issue is unsatisfactory. There was simply no satisfactory evidence of any procedure unique to the sample shop prior to November 2020. The only evidence of any policy in existence prior to that date was that within the colleague handbook at page 68 which does not mandate the obtaining of a signature from a member of the management team. The new policy with effect from November 2020 does not expressly stipulate that members of management themselves are required to obtain a signature from their own line manager. Had this been the intention, the Tribunal would have expected Mrs McTurk to make it clear when she replied on 11 November 2020 to the claimant's draft policy of 4 November 2020. In the circumstances, I prefer the claimant's account upon this issue.

45. Before now turning to the events which commenced on 30 November 2020, it is necessary for the Tribunal to make some findings of fact of circumstances impacting upon the claimant at around this time. These are set out in paragraphs 4 to 7 of the claimant's witness statement. It is not necessary to recite these passages in full. It suffices to say that the claimant gives an account, which I accept, of suffering a great deal of stress and mental strain exacerbated by the pandemic, in particular:

    (1) The claimant's concern for her 83-year-old mother who is residing in a nursing home.

    (2) The welfare of the claimant's two daughters both of whom work in the healthcare sector.

(3) A provisional diagnosis of a heart complaint made by the claimant's general practitioner in October/November 2020. This has necessitated her taking medication for the remainder of her life.

46. In paragraph 5 of her witness statement, the claimant says that she was in *"poor mental health"* in or around November 2020. She says that she made Mrs McTurk aware of these issues. She says that Mrs McTurk *"was supportive and sympathetic towards my feelings and reassured me that my mother was in the best place to be safe, I should be proud of my daughters and that medical science is fabulous nowadays and it is better to know of my underlying health issues."*

47. In addition, of some significance in this case is the claimant's interest in a public house. In paragraph 7 of her witness statement the claimant says, *"on the lead up to the following incidents, my partner and I had committed to taking on a public house [The Junction at Queensbury in Bradford] just as the country went into lockdown at the end of March 2020. On 24 August 2020 I approached [Mrs McTurk] and requested a meeting. We later met in the coffee shop within the building whereupon her I informed [her] that we had taken the pub and I suggested submitting my resignation during this discussion to pursue this opportunity. [Mrs McTurk] told me that I was on three months' notice and that I could not leave until I had found my replacement. [Mrs McTurk] made it clear that she did not want me to resign and suggested that I should think about it over the weekend. After the weekend, I approached [Mrs McTurk] with an idea that I could perhaps fulfil my duties at Morrison's on a part time basis. [Mrs McTurk] was agreeable to this idea in principle and after having spoken with one of my subordinates, [Mrs McTurk] said she liked the idea as long as I worked five days, Monday to Friday. We then discussed that I could work 7am to 13.00pm each day as this would suit the needs of the business and the needs of the pub. It was then agreed that the change from full time to part time should take place in three months ie the end of November. However, in our meeting, I made it clear that when the new arrangements started, both parties should be honest and open about the situation and if the part time arrangement did not work out for any reason for either party, I would submit my formal resignation. None of this agreement/arrangement was ever formally put in writing by [Mrs McTurk]. My partner, Graeme Sunter and I eventually opened the pub in September 2020. During the period from opening until 4 November 2020 when we went into the second lockdown, Graeme ran the pub as I was working full time at Morrison's (please see pages 125 to 126 of the bundle)."*

48. In evidence given under cross-examination, the claimant said that Mrs McTurk had been very friendly towards her over the issue of the acquisition of the public house. She confirmed that at the discussion with Mrs McTurk in the coffee shop, she told her of her intention to resign at some point. Mrs McTurk urged the claimant to think about matters, in particular because of the impact of the pandemic upon the hospitality sector. For her part, Mrs McTurk confirmed the discussion about the claimant working part time and that she was very flexible as to when she was going to put her notice in. Mrs McTurk confirmed that the claimant reassured her that she was not going to leave the respondent's employment (at least at that stage).

49. Mrs McTurk says that she received (from someone else) a copy of an article published in a local newspaper. The article is dated 25 November 2020 and is in the bundle at pages 124 to 126. The subject of the article was the claimant's decision to launch a petition to the Prime Minister urging him to allow the hospitality sector to open over the Christmas period.

50. A passage in the article reads that, *"like many, when [the claimant] picked up the keys at the start of the first lockdown she assumed it would be over in a couple of weeks and had expected to leave her job working for a supermarket".*

51. Mrs McTurk said that she was getting mixed messages from the claimant towards the end of 2020. It was suggested to Mrs McTurk by Miss Linford that the relevant passage which I have cited in paragraph 50 was not attributed to the claimant (by the use of quotation marks). Indeed, when she was asked about this, the claimant said that the reporter from the newspaper had put words into her mouth. Mrs McTurk's evidence was that she had discussed the newspaper article with the claimant who had told her that she had been misquoted by the newspaper. The claimant said that she told Mrs McTurk that if the pub *"took off"* then she probably would resign.

52. I accept Mrs McTurk's evidence that she was picking up mixed messages from the claimant from around the end of August to the end of November 2020. The claimant was making no secret of the fact that she and her partner had acquired the public house and that, naturally, she wanted it to be a success. The claimant was pondering her options and was contemplating working part time or resigning from the respondent. However, the fact of the matter is that at the end of November 2020, when the events with which the Tribunal's primarily concerns took place, the claimant remained in full time employment. Further, as we know, the country was in lockdown from early November 2020.

53. Before moving on to the events of December 2020, it is convenient, I think, to mention other issues, some which arose out of the claimant's interest in the public house. Mrs McTurk says in paragraph 20 of her witness statement that, *"Following the claimant's resignation a number of issues came to light about the claimant's activities whilst engaged by the respondent which included; using her work email address to contact the authorities about the public house; using the respondent's printing facilities to print leaflets/flyers; emailing a budget sheet which belonged to the respondent to her home email address, which contained commercial figures/sales/costs for the department; and using her work email to send a reference for a dismissed employee, all of these were outside the respondent's policy. None of these issues were investigated as they came to light after the claimant's resignation however would have been investigated and may have led to disciplinary proceedings had the claimant remained employed".*

[I interpose here to say that the issue about the budget sheet and the reference were unconnected with the public house].

54. The claimant was asked about these issues during cross-examination. She accepted that on 15 December 2020 she had asked the print room to print 120 leaflets for a *'Santa Claus breakfast'* being hosted at the pub over the Christmas period. Although the arrangements were not entirely clear from

the evidence, it appears that the print room was operated by Xerox and not by the respondent themselves. The claimant said that she *"had a bit of an agreement with Neil from Xerox"* that he would print off flyers for the pub over his lunchbreak. Secondly, the claimant accepted that she had prepared a reference for a former employee of the respondent. Thirdly, she had emailed a budget sheet to her home address in order to do work at home.

55. The claimant said that she was not aware that she had breached any of the respondent's policies upon any of these issues, particularly the use by her of the respondent's resources to pursue her own business interests. She said that she was not aware that policy prohibited her from providing a reference and she thought she was doing nothing wrong in furnishing a reference for somebody whom she (the claimant) had line managed.

56. Mrs McTurk was asked by Miss Linford whether there was any evidence in the bundle to demonstrate that the claimant had been told by her (or any other senior manager within the respondent) that she was not allowed to furnish a reference for an employee under her line management. Mrs McTurk had to concede that there was nothing "*specifically"* to show this in the bundle. She said that there was an IT policy which prohibited the use of the respondent's resources (by way of printing or emailing) for the promotion of another's business. Again, Mrs McTurk had to accept that there is nothing in the bundle about this but said that it was covered by *"a policy".*

57. Miss Linford took Mrs McTurk to the disciplinary policy (in particular at page 117). There listed were a number of acts cited as examples of gross misconduct. Mrs McTurk accepted that there was nothing specifically to the effect that the use of the respondent's resources for the promotion of another business would constitute an act of gross misconduct but said that the claimant's acts in printing off a significant number of flyers for the pub may come within the first such example, that being "*an act of misconduct so serious we no longer have enough trust or confidence that a working relationship can be maintained".*

58. I now turn to the events leading up to 15 December 2020. It is not in dispute that on 30 November 2020 the claimant purchased some Christmas decorations from the sample shop. It is, I think, worth setting out the salient parts of the claimant's witness statement against this background:

"(10) As I am part of the management team, I never like to look like I'm taking advantage of the discounts available at the sample shop. For this reason, I often pay more than is required. The management team are responsible for pricing up these goods and so I have a habit of paying in what I see is appropriate for that item. Upon this occasion, I paid a total of £15.

(11) On that day a colleague called Yvonne had been working on the till in the sample shop. At the time of my purchase, there was an issue with the card machine in the sample shop so I paid at the till in the canteen and later (after becoming distracted by work issues) returned to the sample shop and rang the purchase through the till there.

(12) After purchase, I left my items in the store area at the rear of the sample shop at work as I couldn't carry everything and didn't have the space in my car as it was full of balloons for my granddaughter's party, so I intended to take everything home with me the following day.

(13) When leaving at the end of my shift at 16:00 on 1 December 2020 through the main exit I was stopped by security for a procedural search. A guard called Steve questioned the items I had bought the previous day and asked me to show proof of purchase. This is part of standard practice with staff to verify the goods they are leaving with and is regularly something I have complied with.

(14) On this occasion I found one receipt in my pocket but could not find the other. I realised the other receipt must be in my purse but I could not find my purse anywhere in my bag, as this is where I usually store my receipts.

(15) On realising this, I went to my office to see if I'd left it there. To my surprise I could not see it. Due to being in a hurry as I was driving a colleague home as well as myself, I said to the security team that I would find the receipt and bring it in later. In following procedure, security would hold on to my goods until I could provide the itemised receipt.

(16) At around 18:15 the same day, I arrived back at work, having not found my purse. I went to the office where I had been working that day and found my purse under the cabinets in my office, enclosing my receipts from my earlier purchase. It must have fallen from my bag and I have been too distracted by my concerns with going home, not noticing where my purse had gone.

(17) As not to unnecessarily disturb the security team, I immediately took my receipts to [Mrs McTurk] and explained the events. She advised me she would review the receipts and I could pick up my goods the following day when cleared by security".

59. In evidence given under cross-examination, the claimant's account was:

    (1) That goods purchased from the sample shop had to be individually itemised upon a receipt.

    (2) She was not able to present the itemised receipt when the routine bag search was carried out on 1 December 2020. She was able to produce only the card receipt for the payment, but this did not itemise the products purchased.

    (3) Upon her return to the store that evening, she handed the itemised receipt to Mrs McTurk who said that the goods would be released to the claimant when the items retained by security were matched to the receipt.

60. The claimant had not taken the items that she had purchased on 30 November 2020 home with her the same day. The claimant accepted this to be a breach of the procedure set out at page 68 of the handbook (and of the new procedure introduced in November 2020). The claimant's explanation for this was that the sample good items could not fit in her car because of the presence of the balloons for her granddaughter's birthday.

61. The claimant did not get the itemised receipt signed by Mrs McTurk.

62. Mrs McTurk's evidence, in paragraph 6 of her witness statement, is that, *"In early December 2020 I became aware that the process may not be being correctly followed by employees, including by the claimant. The claimant had been stopped as she was leaving the office one day, as part of a standard bag check. During the bag check there were found to be some issues with the claimant's receipt. The security team made me aware of the issues and Kyle Shah (contact centre operations manager) was asked to carry out an investigation."*

63. In evidence given under cross-examination by her, Mrs McTurk confirmed that the claimant was only able to produce the card receipt on 1 December 2020 when she was first challenged. She did not have the itemised receipt with her and that in any case that receipt was unsigned. Mrs McTurk said that the claimant had gone home to look for her purse, could not find it but then eventually found it in her office. Mrs McTurk alleged that the claimant was impolite to the security guard when he did not let her take the goods away with her on 1 December 2020. She said that the claimant had said words to the effect "*I'm not standing for this".*

64. The Tribunal finds as a fact that the claimant purchased goods from the sample shop on 30 November 2020 but did not take them away with her that day contrary to the respondent's recognised procedures. The Tribunal has found that the new procedure with effect from November 2020 had not been properly communicated by the respondent but at all events page 68 of the colleague handbook makes it clear that items purchased at a staff discount must be taken away the same day. The claimant conceded that she was aware of this.

65. The Tribunal also finds that the claimant was unable to produce the itemised receipt as well as the card receipt when challenged by security on 1 December but eventually managed to find the itemised receipt upon her return to the office. The Tribunal finds as a fact that the claimant did not get Mrs McTurk to sign the itemised receipt as required by the new policy but holds that because of the ineffective communication by the respondent the claimant was not aware that this was required. (There is no suggestion in this case of any dishonesty upon the part of the claimant. In fact, on the contrary, she paid more for the goods than was required).

66. The Tribunal's conclusion upon the issue of the need for the till receipt to be signed by Mrs McTurk is reinforced by the fact that there was no satisfactory evidence that Mrs McTurk challenged the claimant about this at any point. When Miss Linford put Mrs McTurk that she had not challenged the claimant about the absence of a signature upon either of the receipts, Mrs McTurk said rather unconvincingly that, *"it was late. I don't recall".* Mrs McTurk accepted that she had only escalated the matter because there was an issue with the time of the transactions. It was suggested to Mrs McTurk that the absence of a signature upon the receipts was not a concern to her. Mrs McTurk replied, *"it was all a worry".*

67. The goods in question were in fact given to Mrs McTurk. They have not been released to the claimant. Mrs McTurk said that the respondent has offered to reimburse the claimant the sum of £15. (This in fact forms the basis one of the claimant's breach of contract claims).

68. There is some confusion with the chronology of events after 1 December 2020. In her printed statement the claimant says that she next went in to work on 3 December 2020. In cross-examination, Mrs McTurk was asked about events which occurred on 2 December 2020. The claimant's counsel appeared to be putting to Mrs McTurk the events ascribed by the claimant as happening on 3 December 2020. It was put to Mrs McTurk that the claimant had planned annual leave on 3 December 2020. It appears therefore that the claimant's printed witness statement is mistaken and that the reference to the events of 3 December should in fact be a reference to what happened on 2 December, the claimant taking annual leave on 3 December.

69. The claimant's account is that on 2 December 2020 (as I find the case to be) she arrived at work and was told that Mrs McTurk had not released her goods. Later the same day, the claimant says (in paragraph 20 of her witness statement) that Mrs McTurk *"came to my office and said that there would have to be an investigation regarding my recent purchase but that "it's nothing". I immediately became very worried after hearing I would be investigated and asked whether I should resign to save them the trouble but [Mrs McTurk] said that I should not worry as it would "all be over tomorrow". She also assured me that she had selected the person to do the interview and that once I saw who it was, I would realise there was nothing to worry about."*

70. For her part, Mrs McTurk says in paragraph 7 of her witness statement that, *"Shortly before the claimant was asked to attend the first investigation meeting, before this meeting, I sat down with the claimant in the canteen and explained that there was going to be an investigation into the process that she had followed when purchasing items from the staff shop. In response she said that she would "just leave". I went on to say that she should simply answer the questions factually and I reassured her that the investigators knew what they were doing and would carry out the investigation in accordance with normal policy*.

71. Mrs McTurk said, in evidence given under cross-examination, that the claimant had to be calmed down during the course of the meeting of 2 December 2020 and the claimant had invited Mrs McTurk to give her a final written warning. Mrs McTurk accepted that the claimant was upset albeit that she was *"not crying".* Mrs McTurk said that she was anxious to ensure that, as she put it, she got the claimant into the *"right head space"* to face the investigation meeting.

72. In her evidence under cross-examination, the claimant gave an account largely corroborative of that given by Mrs McTurk. She accepted that she had intimated to Mrs McTurk that she would "*just leave"* and invited her to issue a warning against her. The claimant attributed her remarks to being under a lot of stress at the time. She said that Mrs McTurk was aware of the various stresses in her life (which Mrs McTurk herself accepted and which corroborates my finding that the claimant was under stress at this time).

73. Mrs McTurk was challenged by Miss Linford as to why she did not seek to avail herself of the respondent's occupational health facilities (as referred to within the colleague handbook in particular at pages 89 and 91).

Mrs McTurk said that it was "*not particularly unusual"* for the claimant to have such issues. She did not consider it necessary to pursue *"this angle."*

74. The claimant had planned leave of absence on 3 December 2020. She returned to work early in the day on 4 December 2020. She says that she was approached by Mrs McTurk who informed her *"there was nothing to be concerned about, I've been placed under investigation and that I would be invited to attend a meeting later that day".* Mrs McTurk accepts that there was a discussion between her and the claimant on 4 December 2020.

75. The claimant complains that Mrs McTurk did not tell her what the investigation was about in advance. Mrs McTurk agrees that she did not do so and that she sought to reassure the claimant that she should not be unduly concerned. Mrs McTurk accepted that she said to the claimant words to the effect that nothing serious was amiss and that had it been a serious matter she would have been suspended from work.

76. It was suggested to Mrs McTurk by Miss Linford that the matter could have been resolved through training coupled with an informal warning at best or a formal warning *"of some sort"* at worst from the claimant's point of view. Mrs McTurk agreed that the issue was a simple one of the claimant simply not having got the itemised receipt signed by her. She did not consider it to be a training issue as such.

77. The claimant says that she spent an anxious few hours at work before being approached by Mr Shah. In paragraph 26 of her witness statement she says that upon entering the interview room she, *"could see that an interview style scenario had been set up, with one round desk for two to sit on one side and me on the other. In attendance was myself, Kyle Shah who I had met before and a lady called Dawn who I was introduced [to] as working in the respondent's human resources team. I was advised that Dawn was present purely as a note taker."*

78. The notes of the meeting are at pages 127 to 129 of the bundle. The claimant complains with some justification that she was not given a copy of the meeting notes. The copy in the bundle is not signed by her. That being said, she does not, in her printed statement, take issue with what is recorded within the notes.

79. Mr Shah is recorded as having asked the claimant to talk him through the process when he purchases items from the staff shop. The meeting notes record the claimant as responding, *"what I'm supposed to do is purchase then go to Tracy [McTurk] and get her to sign the receipt which I did not do. I said to all my staff if you buy it you take it the same day and I should do the exact same as the other staff and should always get the receipts signed".*

80. I have already found as a fact that the claimant was unclear as to the process prior to 30 November 2020. It follows therefore that the claimant's acknowledgement of the correct procedure was following her realisation (after her discussions with Mrs McTurk) as to what she needed to do henceforth.

81. The claimant saw her general practitioner on 8 December 2020. This was for a check-up concerning her ongoing heart concerns. Her general practitioner signed the claimant off as unfit to work due to work related

stress for two weeks with effect from 8 December 2020. A copy of the sick note is in the bundle at page 133. The claimant was certified as unfit for work until 21 December 2020.

82. The claimant took annual leave between 9 and 11 December 2020 and (contrary to medical advice) returned to work on 12 December 2020. She says in paragraph 30 of her witness statement that, *"over the next few days I had no contact from other members of the management team and was not informed of the outcome of my previous investigatory meeting. This only worsened my mental state".*

83. The claimant says in paragraph 31 of her witness statement that, *"On 15 December 2020 I started my day at work as normal. I was due to be working only the morning shift, finishing at 14:00 for a hair appointment later that date. When talking to Tom Wood (chef) I found that [Mrs McTurk] had organised a Christmas lunch for the management team to wish them a happy Christmas and thank them for their service in the last 12 months. As a member of this team I found it unusual that I had not also been invited, and through my conversation with Tom it did not sound like I was going to be invited. This made me feel more concerned as to the outcome of the investigation, and that I had purposely been excluded".*

84. She goes on to say in paragraph 32 that, *"At around 13:40 later that day I was approached by [Mr Shah] who had been the manager in the first investigation meeting. Without prior warning, I was asked to immediately attend a second meeting. At the time I was with several colleagues and felt like I was being made an example of, which was embarrassing and stressful. I was not given my right to have a representative attend with me, not given the opportunity to prepare myself in any way and was rushed into the meeting room."*

85. Mrs McTurk denied that the claimant had been excluded from the Christmas lunch. She said that effectively there was an open offer for members of staff to attend the Christmas lunch. Mr Shah denied that he had sought to *"make an example"* of the claimant by asking her to attend an investigatory meeting in front of colleagues. Mr Shah said that the claimant was approached by him near to the canteen. He says that she was not sitting in the canteen nor was she engaged in conversation with anyone when he made his approach.

86. Upon this issue, the Tribunal prefers the evidence of the respondent. Given that the claimant and Mrs McTurk have spoken highly of one another about their relationship prior to 15 December 2020 it seems against the probabilities that Mrs McTurk would seek to deliberately exclude the claimant from the Christmas function. Mrs McTurk had been sympathetic with the claimant about her health issues and had made constructive suggestions and offered wise counsel to the claimant about the wisdom of purchasing or acquiring a public house in the current climate. She had also, as the claimant fairly accepted, offered reassurance to the claimant that there was nothing to be concerned about around the incident of 30 November 2020. In addition, the impression given in evidence to the Tribunal was that the Christmas function was not by way of formal invite but was one open to all staff to attend if they should so choose.

87. After interviewing the claimant on 4 December 2020, Mr Shah interviewed Yvonne Stone, facilities co-ordinator-catering. His notes of interview with her are at pages 130 to 132. Mr Shah interviewed Yvonne Stone on 4 December 2020.

88. Mrs Stone told Mr Shah, upon the sample shop procedure, that the *"customer will come to the till with items, we then process them through the till and give the customer an itemised receipt. They then need to go over to the salad bar to pay at the moment due to our card machine being broken".* This corroborates the claimant's account in paragraph 11 of her witness statement that there was an issue with the card machine in the sample shop. Mrs Stone said that she remembered the claimant purchasing the items on 30 November 2020. She said that she was not sure who had processed the claimant's transaction. She said the claimant had put the items in a bag but had not put them through the till before Mrs Stone had finished her shift at 3 o'clock pm that day. Mrs Stone said that the claimant had collected the items at about 1.20 that afternoon. As I have said already, the timings of the transaction prompted Mr Shah to conduct a further investigation interview with the claimant.

89. Mr Shah says in paragraph 9 of his witness statement that in *"the second meeting on 15 December 2020 [matters] began normally and the claimant appeared relaxed, although the term was slightly less conversational than the first meeting. The claimant did not appear stressed, anxious or upset in any way. During the meeting I continued to ask the claimant questions about the process she had followed to purchase items from the staff shop. The claimant was then shown CCTV relevant to the incident. The claimant was shown some further CCTV of an interaction between the claimant and a security guard, Graham Dewhurst, in an attempt to establish the timeline in respect of the alleged incident. It was at this stage, when I showed the claimant the CCTV with Graham, that I felt that the claimant's attitude and demeanour changed. The change in the claimant's attitude and demeanour appeared to me to be a response to being shown the CCTV evidence. It was a sudden change; the claimant was defensive in her responses and appeared angry. The claimant stated, "I am resigning". I was stunned by the claimant's resignation as it appeared to be in response to being shown the CCTV evidence and it was not what I was expecting to happen. However, the claimant was very clear in her language ie that she was resigning and left the room immediately after stating she was resigning. The notes of the investigatory meeting are at pages 134 to 136 of the bundle of documents".*

90. The claimant's account from her printed witness statement is as follows:

"(33) The second investigation meeting began at approximately 13:45. In the meeting room was [Mr Shah] and Dawn. The minutes of the meeting are in pages 134 to 137 of the bundle.

(34) Similarly to the first investigation meeting, I was asked to explain what had happened on and leading up to 1 December 2020. As I had given a full, detailed description of what had happened to [Mr Shah] previously, I did not understand the purpose of answering this again, yet continued to explain how I had purchased the goods at an earlier date, processed them and printed the receipt.

(35) I was shown several CCTV clips which [Mr Shah] expected me to be able to recall to the minute. As I became more flustered this only worsened my memory. Despite explaining to [Mr Shah] that I was having trouble remembering the exact chronology of events, he continued pushing for answers.

(36) Due to the intimidating interview layout I felt like I was on trial and being accused from stealing from the company. I knew I had done nothing wrong, and I felt humiliated, confused and irate with the situation I had been placed in.

(37) On being pressured to answer further questions, I stated that I was unwilling to continue answering as I was simply being publicly shamed for something I was not guilty of. I had been called in and put to trial in front of my colleagues, which only increased my stress and upset from my personal struggles outside of work.

(38) I became emotional during the meeting and decided that was enough. On standing up to leave, I explained that I was going to talk to my line manager and hand in my resignation should the allegations continue. I felt anxious and totally humiliated as the whole process had been utterly unfair. I also felt ashamed that the management team had likely got what they wanted out of the meeting, but I honestly did not feel safe enough and stable enough to stay and the whole situation had made me very upset.

(39) From the meeting notes recorded I do not deny stating that I tried to resign three weeks' prior. At the start of the process when I mislaid my receipt and was told there would be an investigation, I asked [Tracy McTurk] whether I should resign as previously stated. As before, I was not shown nor given the opportunity to verify the accuracy of these notes (page 136 of the bundle)."

91. I observe that the reference to *"three weeks ago"* must be mistaken. Three weeks prior to 15 December 2020 was, of course, 24 November 2020. The incident in question which gave rise to these events did not take place until 30 November 2020. At all events, this does not detract from my finding that on or around 1 December 2020 the claimant had offered to tender her resignation but had been dissuaded from doing so by Mrs McTurk. The passage in paragraph 39 of the claimant's witness statement corroborates my findings that Mrs McTurk would not have shunned the claimant by refusing to invite her to the Christmas dinner. Such would have been out of character as she was supportive of the claimant.

92. The claimant then says in paragraph 41 of her witness statement that she clocked out at 14:10. Her shift had finished at 14:00 as she had a hair appointment in Halifax.

93. At page 134, Mr Shah made a record of the *"additional information needed"* prior to the second investigation interview. This appears to have what caused him to make further enquiries into the matter. This was all about the timings of the transaction and not about the failure to have the itemised receipt signed by Mrs McTurk or any issue about the claimant having paid for the items. He observed that the claimant had said that she had purchased the items in the presence of Mrs Stone. However, Mr Shah noted that the itemised receipt had a later time than did the till receipt and

that the itemised receipt was timed just after an hour after Mrs Stone had left the store. During the course of the interview, Mr Shah put it to the claimant that when the claimant processed the itemised receipt, Mrs Stone was not present contrary to what the claimant had said earlier. Mr Shah sought to demonstrate that the claimant was not with Mrs Stone when she paid for the items.

94. I asked Mr Shah to explain why he had thought it necessary to show the claimant CCTV footage of the incident in circumstances where there was no issue that she had paid for the goods (and indeed had overpaid). Mr Shah said, *"I wanted to fully establish what had happened. I wasn't doubting they were paid for".*

95. The following evidence emerged during the cross-examination of Mr Shah:

(1) He had not shown the claimant the notes of the interview which he had had with Mrs Stone.

(2) Prior to interviewing the claimant for the second time, he had not conducted an interview with Mrs McTurk to explore the process to be followed when making purchases from the sample shop.

(3) Mr Shah acknowledged that he had been told by Mrs McTurk that the claimant could at times be something of a fiery character and was also prone to getting upset due to a number of stresses in her life. (The claimant fairly accepted that at times she could be fiery).

(4) Mr Shah accepted that towards the end of the meeting held on 15 December 2020, the claimant had appeared to be angry and upset.

(5) Mr Shah was taken to the closing substantive passage of the notes at page 136 in which the claimant is recorded as having said, *"I really can't do this anymore. I tried to resign three weeks ago. People are getting dragged into this that don't need to be. You don't have to do it anymore. I am resigning. I don't want you to do any more and am not answering any more questions. I feel like a common thief. No more questions. Do not ask me I am just being bullied".*

(6) Mr Shah accepted that these were consistent with the language of an individual distressed and acting in the heat of the moment.

(7) Mr Shah denied that the claimant had said words to the effect that she was going to see Mrs McTurk in order to hand in her resignation. Mr Shah stood by his account in the printed witness statement that the claimant had said that she was resigning.

96. The following evidence emerged upon this matter from the account given by the claimant in cross-examination:

(1) She accepted that she had been wrong to tell Mr Shah at the first meeting that Yvonne Stone had been alongside her when she made the purchases.

(2) The claimant maintained that she said to Mr Shah that she was going to see Mrs McTurk in order to resign. The claimant placed some reliance upon the provisions within the staff handbook which are referred earlier

to the effect that a resignation must be given to the employee's line manager. (She says as much in paragraph 61 of her witness statement).

(3) Mrs Stroud put it to the claimant that paragraph 61 of her witness statement (which reads that the claimant said that *"I was resigning in the heat of the moment while being angry and upset …"*) was inconsistent with the passage in paragraph 38 of her witness statement (of going to see Mrs McTurk in order to resign). There was no mention of Mrs McTurk in paragraph 61.

97. The claimant then says the following about the subsequent events immediately after 14:10 on 15 December:

"(40) I evidently looked shook up by the situation, with both the receptionist, Jane, and the security guard, asking if I was ok and what was wrong, concerned for my well-being.

(41) In response to Jane, I stated I was leaving and was thinking of handing in my resignation, handing in my security pass. When asked minutes later by the security guard I stated I did not know what I had done wrong, handing him my car park pass. I did not go into any detail with either of them with the events that had caused my upset. I did not feel this would work in my favour, nor be beneficial to my mental health at this point. At no point did I speak to [Mrs McTurk] to submit my resignation before leaving the building."

98. In paragraph 14 of her grounds of claim, the claimant pleaded that as she was *"leaving the building in a visible emotional state, the receptionist asked her what was wrong. The claimant handed her pass in at reception and said that she was leaving and was resigning. At the gatehouse, one of the guards also noticed the claimant was distraught and asked her if she was ok. The claimant responded that she did not know what she had done and handed in her car park pass".*

99. I found compelling Mrs Stroud's submissions that the claimant has given inconsistent accounts about what happened on the afternoon of 15 December 2020. It is frankly difficult if not impossible to reconcile paragraphs 38 and 61 of her witness statement and her pleaded case. I take the point that contractually employees are required to resign upon written notice addressed to their line manager. However, Miss Linford fairly accepted that in law there was nothing to prevent a different manager (such as Mr Shah) from being the recipient of a resignation from an employee. In any case, of course, it is open to the parties to vary the requirement for written notice in order to permit oral notice to be given.

100. Given the inconsistencies in the claimant's account, I prefer the evidence of Mr Shah to the effect that the claimant resigned at the conclusion of the meeting held on 15 December 2020. Further, Mr Shah's account is corroborated by the contemporaneous note.

101. However, I find that the claimant resigned in circumstances of extreme pressure. Indeed, Mr Shah very fairly accepted this to be the case. Without prior notice, Mr Shah showed the claimant CCTV footage. The claimant was upset by her (wrong) perception that she had been excluded from the Christmas party. She was under some time pressure because she had to get to Halifax for her hair appointment that afternoon. She was in work notwithstanding that she was certified as unfit to work by her general

practitioner. She was therefore going against medical advice by working. All of this was on top of the claimant's own medical concerns, her concerns for her mother and daughters and the stresses around the financial viability of the public house (as the country was in lockdown at this stage).

102. My findings that she resigned are corroborated by the fact that the claimant handed in her passes to the receptionist and the security guard. It is rare for there to be an inference of resignation by conduct. However, this is not a case of assessing whether or not the claimant resigned by conduct alone. Her conduct coupled with her words persuade me that she did resign (albeit within the parameters of special circumstances as articulated in the case law). Handing in her security pass and her car park has an air of finality about it. Coupled with what I have found to be her use of the words *"I'm resigning"* or words to that effect to Mr Shah and the receptionist persuades me that the claimant did indeed resign on 15 December 2020.

103. Mr Shah informed Mrs McTurk of what had happened following the meeting. His only other involvement was his interview with the security guard who dealt with the claimant following the sample shop purchase on 30 November 2020. The interview note is at page 137. This is in fact was the same security guard to whom the claimant handed in her parking pass on 15 December. Mr Shah did not ask the security guard about the latter incident when interviewing him on 30 December.

104. Mrs McTurk says that she was informed by Denise Rook, assistant catering manager, that the claimant had resigned. Denise Rook informed Mrs McTurk of this on 15 December 2020. Mrs McTurk says that the claimant had told her [Mrs Rook] that the claimant was resigning before she left the building. This is further corroboration of my finding that the claimant resigned that day.

105. Mrs Rook was in fact retiring from the business on 17 December 2020 after over 40 years of service. This appears to be the justification given by Mrs McTurk for not obtaining a statement from Mrs Rook about what the claimant had said to her. Nonetheless, I have no reason to disbelieve Mrs McTurk's account that Denise Rook told her that the claimant had said to her that she was resigning. Indeed, this is consistent with what the claimant herself said in paragraph 61 of her witness statement and is consistent with the claimant's conduct in handing in her passes to the receptionist and the security guard. Thus, the claimant told four individuals that she was resigning (those being Mr Shah, Denise Rook, the receptionist and the security guard).

106. Mrs McTurk says that she immediately attempted to telephone the claimant. She says in paragraph 12 of her witness statement that, *"given the nature of the claimant's resignation I wanted to be sure that her decision was final".* She goes on to say in paragraph 13 that she was not wholly surprised that the claimant had resigned. She says that, *"I was aware from earlier conversations that she had intended to leave because her and her partner had purchased the public house which they were to run. It was the abrupt nature of the resignation and her failure to contact me after the resignation that surprised me, rather than the resignation itself. The claimant was the manager of a department that was responsible for approximately 30 people before she resigned. She was therefore well aware of the normal*

termination policies and procedures. This, couple with her having walked out of the meeting is why I subsequently made various attempts to contact her."

107. Mrs McTurk says that she sent the claimant a text about the resignation and also to ask her about a leaving gift being organised for Denise Rook. The text is not in fact in the bundle. It was sent to the Tribunal during the course of the first day of the hearing. The text is dated 16 December 2020 (timed at 9:44 in the morning). The text from Mrs McTurk reads, *"I will write to you with regards yesterday and invite you in to meet me. In the meantime please can you confirm where the monies/gifts are for Denise and what the total amount is please? If with you can you arrange to leave with gatehouse today or do you want someone to collect it/them?"*

108. The claimant replied. Her text was also copied to the Tribunal. The claimant gave details to Mrs McTurk about the amount of money collected for Mrs Rook and the gifts that had been arranged for her. The claimant did not make any mention of the resignation.

109. Mrs McTurk wrote to the claimant on 16 December 2020. The letter is at page 138 of the bundle. Mrs McTurk invited the claimant to attend a meeting on 21 December 2020. The salient part of the letter says that, *"I understand you left work early on Tuesday 15 December following an investigation meeting and handed your pass in at reception saying you would not be returning. As you have not come in to work today or contacted me or anyone else directly, I would like to discuss these events with you and formally agree to the next steps."*

110. Mrs McTurk acknowledged that she mistakenly referred in her letter to the claimant having left work early on 15 December. The claimant had planned annual leave for that afternoon in any case and in fact left after her designated finish time. (This does not detract in any case from my finding that the claimant did resign, albeit that she did so in the heat of the moment).

111. The claimant wrote to Mrs McTurk. The letter is at page 141. The copy of the letter in the bundle is undated but is endorsed *"original sent by email 16/12/20".* The letter attaches a copy of the sick note certifying the claimant as unfit to work from 8 December 2020. The letter purportedly sent by email on 16 December was copied again to Mrs McTurk on 17 December (page 140) along with a covering letter declining Mrs McTurk's offer to meet on 21 December. The claimant said, *"I feel totally alienated by the way I have been so unfairly treated that I cannot face any meetings with you at the current time and will be seeking further medical assistance on 22 December 2020".*

112. Mrs McTurk said that her letter to the claimant of 16 December and the claimant's letter to her emailed on 16 December crossed in the post. Mrs McTurk said that she did receive a copy of the sick note on 16 December but apparently not the letter at page 141 until 17 December. Whatever confusion there may be about the order of events, there is no issue that Mrs McTurk received both of the claimant's letters at pages 140 and 141 no later than 17 December.

113. In the letter at page 141, the claimant said that the events of the previous day (15 December) were "*so stressful that I felt I had no alternative than to*

leave the premises". She said that she had found the whole process surrounding the investigation into the sample shop purchase so stressful that she had sought medical advice and been certified as unfit for work from 8 December 2020 for a period of two weeks. She complained about the circumstances in which Mr Shah approached her prior to the second investigation meeting held on 15 December. She said that, *"I feel the company has not shown any compassion towards my mental health or well-being and has completely blown out of all proportion the original situation which arose where I had simply misplaced my receipt for items I had properly purchased on 30 November 2020. I subsequently produced the receipt the following day and it is my understanding that the security department at Morrison's was then satisfied with the outcome and that it is you that has pressed for further and deeper investigations into this and other matters".* The claimant went on to say that she was unable to face a return to work and that she reserved the right to seek further medical help upon the expiry of her current sick note. She concluded that, *"at the moment I feel as if I have been treated so unfairly that I may have to consider submitting my formal resignation".*

114. In paragraph 55 of her witness statement, the claimant says that in the letter at page 141 she conveyed the message that she had *"been hasty and did not have true intent to resign".* This in fact reinforces my earlier finding that the claimant did utter unequivocal words of resignation on 15 December otherwise why say that that was not her true intention?

115. It was suggested by Miss Stroud that the wording of paragraph 55 of the claimant's witness statement is not reflective of what she said in the letter at page 141. I have to agree. Nowhere does the claimant say in the letter that she acted hastily on 15 December and did not truly intend to resign. The nearest one gets to a sentiment along these lines is where the claimant says that she *"may have to consider submitting my formal resignation".* It was put to Miss Stroud that the claimant did not in the letter at page 151 retract the resignation. The claimant replied that she "*did not resign to Tracy McTurk".*

116. The claimant was signed off by her general practitioner as unfit to work for a further two weeks on 23 December 2020. The sick note is at page 143 of the bundle. This was sent to Mrs McTurk on 24 December 2020 (page 144).

117. The claimant's letter of 24 December 2020 also addressed that from Mrs McTurk of 21 December 2020 (page 142). In her latter at page 142, Mrs McTurk reiterated her belief that the claimant had verbally resigned on 15 December and mentioned the three colleagues to whom the claimant notified of her resignation. Mrs McTurk invited the claimant to meet with her on 29 December 2020. She went on to say that should the claimant not attend then Mrs McTurk would proceed to process her resignation effective from 15 December.

118. In her letter of 24 December 2020 (page 144) the claimant complained of Mrs McTurk's ultimatum as *"another example of what I consider to be your bullying behaviour that contributed to my breakdown in the first instance and shows a total lack of sensitivity which is not what I would have expected from a respectable employer. I requested in my letter of 16 December 2020 that we should have no further contact at this time as I needed time and*

space to recover and you have blatantly disregarded my request". The claimant also noted that her access to the respondent's IT system *'My Morri'* had been withdrawn.

119. The claimant also declined to communicate further with Mrs McTurk. Again, it is noteworthy of the claimant does not say that she did not resign, nor did she take issue with Mrs McTurk's assertion (in her letter of 21 December) that the claimant had told three colleagues of her resignation.

120. On 24 December 2020 the claimant wrote to Claire Grainger of the respondent's human resources department to the effect that she wished there to be no further communication with Mrs McTurk (page 145).

121. Ms Grainger passed the matter on to Neil Dunn who holds the title of 'head of people – central' within the respondent. Mr Dunn wrote to the claimant on 30 December 2020 (page 147). He observed, pertinently in my judgment, that the claimant had not acknowledged or asked to rescind her resignation. He then made reference to the claimant's use of the respondent's resources for the promotion of the public house business and the issue around the reference. He said that those matters would have been investigated had the claimant not resigned. He concluded that, *"as you resigned and have been unwilling to provide an explanation for this, we will process your resignation effective from 15 December 2020".* The claimant's access to some parts of the *My Morri* IT system were restored.

122. On 5 January 2021 the claimant sent a detailed letter to Mr Dunn. This is at pages 148 to 151. The claimant said in this letter that on 15 December she announced an intention to leave and go and see Tracy McTurk in order to submit her resignation. I have already found as a fact that the claimant announced her resignation in unambiguous terms to Mr Shah at the meeting of 15 December and then to the three other colleagues (by words and actions) shortly afterwards.

123. I cannot therefore accept the claimant's case (as set out in the letter of 5 January 2021) that there was no resignation for her to rescind. On the facts, the claimant is mistaken about this which inexorably leads to the conclusion that she did not retract or rescind the resignation notwithstanding opportunities given to her so to do by the respondent.

124. The respondent investigated the claimant's several complaints and wrote to her on 20 January 2021 (pages 155 and 156). The respondent found that an investigation was required as there appeared to be a breach of the staff shopping procedure. The claimant's case that she was mismanaged by Mrs McTurk over this period was rejected upon the basis that Mrs McTurk was supportive of the claimant and sought to reassure her. The respondent stood by their position that the claimant had resigned on 15 December 2020. The respondent also sought the claimant's bank details in order that she could be reimbursed the £15 that she had spent on 30 November 2020. The claimant appears not to have furnished these and the amount remains outstanding. The claimant was paid for her work up to and including 15 December 2020.

125. From the correspondence, it appears that there was a dispute about whether she had been paid correctly for that day. However, the matter

appears to have been resolved (or at any rate there is no claim before the Tribunal of an unauthorised deduction from wages).

126. In paragraph 73 of her witness statement the claimant says that, *"following the termination of my employment, I continued to be unwell suffering from stress and anxiety. In May 2021, I started helping my partner Graham with the running of the pub of which I am also a director. I do not have an employment contract and my pay is £210 gross per week as can be seen from my payslips".*

127. There is no medical evidence within the bundle of the claimant being unfit to work after the date of expiry of the second sick note which she produced in December 2020. The claimant fairly accepted there to be no medical evidence supportive of her case that she was too ill to work.

128. In or around March 2021, the claimant undertook four days of work (being 24 hours in total at £9.30 per hour). This was work doing postal deliveries sourced through the Manpower Employment Agency.

129. The claimant said that she was working as a cleaner in the pub after it reopened following the end of lockdown on 12 April 2021.

130. There are two payslips within the bundle. These are dated 1 May and 17 July 2021 and show the claimant working 21 hours per week (that is three hours per day, seven days a week) for which she is paid £210 per week gross. The claimant was not in receipt of any state benefits.

131. I have already determined that the claimant used unambiguous words of resignation on 15 December 2020. There is nothing in the claimant's point that an oral resignation is ineffective because of the provisions of the contractual documentation requiring a written resignation or written confirmation of a verbal resignation to be given to the line manager. I accept Miss Linford's point that words of resignation uttered to the receptionist or the security guard would be ineffective to constitute a resignation. However, the claimant also uttered words of resignation to Mr Shah who is in a managerial position. Accordingly, an oral resignation conveyed to him is effective notwithstanding that he was not the claimant's line manager. Miss Linford did not seek to persuade the Tribunal that such is anything other than a correct legal analysis of the position.

132. In the normal course, accordingly, the claimant's words uttered on 15 December 2020 would be binding upon her. She would then only be able to claim that she was wrongfully constructively dismissed and constructively unfairly dismissed were she able to point to a fundamental breach of contract upon the part of the respondent.

133. However, the claimant seeks to argue that the words of resignation were uttered in the heat of the moment or in special circumstances such that an intention to resign was not the correct interpretation of her conduct when the facts are judged objectively. As I have said, I agree with the claimant that special circumstances prevailed given the extreme pressure that she felt at the time due to work and other issues and her *'intellectual make-up.'*

134. In my judgment, the respondent did allow a reasonable period of time to elapse before accepting the resignation at face value. The respondent made efforts to meet with the claimant. She was offered two meetings. She

declined to attend these. I do accept that she had good medical reason so to do. However, the difficulty for the claimant is that she wrote very well-constructed letters between 16 December and 30 December 2020. She maintained, incorrectly as I have found, that she had not resigned in the heat of the moment on 15 December 2020. She did not seek to rescind her resignation. She did not take the opportunity (per **Willoughby**) to demonstrate that she did not intend to give notice or show that her mind was not in tune with her words.

135. In my judgment, therefore, the respondent was entitled to form the view that it was the claimant's intention to resign on 15 December and the respondent was entitled to proceed accordingly. The respondent sought to investigate the matter. The claimant did not retract her resignation. It follows therefore that the claimant did resign from her employment on 15 December 2020.

136. That being the case, the Tribunal now turns to the remaining issues in the case. Pivotal now to her claim is a question of whether the claimant resigned in circumstances in which she was entitled to terminate the contract without notice by reason of the respondent's contract. Did the respondent act in fundamental breach of the contract?

137. The relevant term with which the Tribunal is concerned is that which is implied into every employment contract that the parties shall not conduct themselves, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage trust and confidence.

138. I accept that the respondent's conduct in investigating the circumstances of the claimant's purchase of goods from the sample shop was not calculated at any stage to destroy or serious damage mutual trust and confidence. However, I accept that such conduct seriously damaged the trust and confidence which the claimant had in the respondent.

139. I accept that the respondent had reasonable and proper cause to investigate the circumstances of the purchase when the claimant was unable to produce her itemised receipt when confronted by the security guard on 1 December 2020. I see nothing improper in the respondent asking the claimant to account for her actions at an investigation meeting. Certainly, asking her to attend investigation meetings without prior notice was very unwelcome and seriously damaging of the claimant's trust and confidence in the respondent. That said, the respondent did have reasonable and proper cause to investigate. There is no obligation upon the respondent to give advance notice of an investigation to an employee (or at any rate I was not taken to anything which suggested that there was). There was reasonable and proper cause to look into the matter at the first investigation meeting. That was not a breach of the implied term.

140. I do find however that the conduct of the second investigatory meeting by Mr Shah was unnecessarily oppressive, heavy handed and without reasonable and proper cause. It is difficult to see, frankly, why Mr Shah embarked upon such an investigation and what he was seeking to achieve by it. In the final analysis, the claimant had produced both the cash till receipt and the itemised receipt. There was no suggestion that she had not paid for the goods or that the receipts did not match the goods which she had purchased from the sample shop.

141. There was a flaw in the claimant's account in that she said that she had processed the transactions in the presence of Yvonne Stone. The CCTV footage appeared to show this not to be the case. The claimant's mistaken recollection about the time of the transaction and who she was with when the transaction was processed cannot detract from the fact that at the end of the day she had paid for the goods. (In fact, she had overpaid for them). Mr Shah struggled to justify the need for the second investigation. He said that he did not doubt that the claimant had paid for the goods but was just trying to establish *"fully what had happened".* In my judgment, subjecting an employee to what amounted to an interrogation with the use of CCTV footage in such circumstances (in order, it seems, only to satisfy Mr Shah's curiosity) was conduct which was, objectively, disproportionate and oppressive. Subjecting the claimant to such an investigation was without reasonable and proper cause.

142. This is all the more so in circumstances where Mrs McTurk, who is the claimant's line manager, accepted there to be only the simple issue of the claimant's failure to get the receipts signed by her [Mrs McTurk]. That Mrs McTurk was constant in her reassurance of the claimant that there was nothing about which to be concerned reinforces my judgment that objectively Mr Shah's decision to subject the claimant to additional questioning was oppressive. To put it in colloquial terms, objectively the respondent made a mountain out of a molehill.

143. It follows, therefore, that in my judgment the claimant resigned from her position, but she did so in circumstances where she was entitled so to do without notice by reason of the respondent's conduct. At common law therefore she was wrongfully constructively dismissed. This is because the respondent processed her resignation as effective from 15 December 2020. The correct legal analysis is that the claimant accepted the respondent's repudiatory breach in subjecting her to an oppressive investigation. She was therefore entitled to her contractual notice to bring the contract of employment to an end. She did not receive her contractual notice to bring the contract to an end.

144. The respondent would be entitled to summarily terminate the claimant's contract of employment were she to have been in repudiatory breach of contract. At common law, the respondent is entitled so to do even where the employer only finds out after the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal. Authority for this proposition may be found in the case of **Boston Deep Sea Fishing and Ice Co v Ansell** [1888] 39 ChD 339 CA. (This position can be contrasted with that in unfair dismissal law whereby an employer can only rely on facts known or honestly believed at the time of the dismissal. Authority for the latter proposition may be found in the case of **W Devis & Sons Limited v Atkins** [1977] ICR 662, HL).

145. There is some controversy as to whether, where a party is in repudiatory breach which is accepted by the other party and which leads to the termination of the contract, the defaulting party may still accept an earlier repudiatory breach so as to secure a release from that party's contractual obligations. In other words, on the facts of this case, were it to be the case that the claimant was in repudiatory breach (unknown to the respondent until after the resignation) does that release the respondent from the

obligation not to terminate the claimant's contract of employment without notice?

146. I was not actually addressed upon this during the course of the hearing. (In any case, I find as a fact that the claimant was not in repudiatory breach and thus do not consider it necessary to seek further submissions upon this point). Upon my assessment of the authorities, the position is that an anterior breach may be accepted by the defaulting party to secure a release from that party's obligations. I refer to **Tullett Prebon Plc v BGC Brokers LP** [2010] EWHC 484 (QB), **Atkinson v Community Gateway Association** [2014] IRLR 834, EAT and **McNeill v Aberdeen City Council (No 2)** [2013] CSIH, 102.

147. In any case, I find as a fact that the claimant was not in repudiatory breach such that the respondent may not take advantage of the anterior breach point and was therefore bound to bring her contract of employment to and end upon twelve weeks' notice pursuant to the contractual terms.

148. I accept that the examples of gross misconduct set out in the disciplinary code (at page 117) is a non-exhaustive list. Mrs McTurk said that the claimant's conduct in using the respondent's email account to promote the public house business and to print off flyers was an act of misconduct so serious that the respondent may not have trust and confidence in her. The use of the word *"may"* by Mrs McTurk was quite telling. By way of reminder, the first such example is "*an act of misconduct so serious we no longer have enough trust or confidence that a working relationship can be maintained".*

149. She appeared to be by no means convinced that the claimant's conduct was repudiatory (in the sense that the claimant was showing an intention not to be bound by the terms of her contract). She accepted that the claimant had had no training about references (in particular, to whom she may furnish a reference). She said that the claimant's conduct in printing off flyers and using the respondent's email was in breach of policies but these were not before the Tribunal. There was no evidence that the claimant had been trained upon the policies, much less that she had been told that there was a zero-tolerance approach to breach of them. There was no evidence before the Tribunal as to the frequency of her use of the email account.

150. In the circumstances, I do not judge the claimant's conduct discovered by the respondent after 15 December 2020 to be repudiatory upon an objective assessment. Her conduct fell way short of being such that a working relationship could not be maintained. There was nothing to suggest a deliberate flouting of essential contractual conditions by the claimant or conduct inimical to trust and confidence. It is hard to see how the claimant's conduct in procuring 120 leaflets from a third-party supplier and using her email account on a modest number of occasions was sufficiently serious and injurious to the relationship such as to justify summary dismissal. These were not, in my judgment, acts of disobedience of such a grave and serious character as to justify a dismissal of her. If the respondent had an issue with her printing flyers every now and again, then the claimant could have been told to desist. This conduct did not in any way affect her performance at work. A similar conclusion is reached about the reference. There was nothing wrong with the claimant working from home upon the

balance sheet in any event (or at any rate, no one from the respondent suggested that she had done anything wrong by so doing).

151. I am satisfied that the claimant was motivated to resign from her position wholly or at least to a material degree by the respondent's conduct. I accept that the claimant was giving mixed messages about her future employment with the respondent. In the summer of 2020, she was seriously contemplating resigning to devote her attentions to the public house business. She was dissuaded from so doing at least in part due to Mrs McTurk's wise counsel. I take judicial notice of the fact that the country was in lockdown from 4 November 2020 to April 2021. This has had a significant impact upon the hospitality centre.

152. I cannot accept that the claimant resigned from her employment in December 2020 in order to devote her time and attention to the public house. The pub could not open in December 2020. There would have been very little for the claimant to do. It would have been foolhardy for her to give up a well remunerated position with such a well-known and reputable employer as the respondent at that time. At all events, it is clear that Mr Shah's conduct of the investigation meeting on 15 December 2020 was a very material reason for her resignation (even if it was not the only reason).

153. No question can arise in this case that the claimant affirmed the contract and waived her right to resign in response to a repudiatory breach by delaying her resignation for too long. The claimant resigned there and then during the course of the oppressive second investigation (as I have found it to be).

154. In conclusion, therefore, I find that the claimant was constructively wrongfully dismissed by reason of the respondent's repudiatory breach. The claimant was not herself in repudiatory breach of the contract. Accordingly, the wrongful dismissal complaint succeeds, the respondent having constructively wrongfully dismissed her without contractual notice.

155. It also follows that for the purposes of the unfair dismissal complaint the claimant was constructively dismissed. The next issue that arises upon the unfair dismissal complaint therefore is whether the respondent can show a potentially fair reason for the constructive dismissal. In any unfair dismissal complaint, it is for the respondent to establish (where the dismissal has been admitted or has been established (as in this case) upon the evidence) to show a potentially fair reason for the dismissal. In a constructive dismissal complaint, this essentially gives rise to the question as to whether the respondent had a potentially fair reason for breaching the contract of employment. In this case, I find that the respondent did not have such a reason. There was no breach of contract upon the first investigation meeting as the respondent had reasonable and proper cause to investigate. However, there was a breach upon the second investigation as upon my findings this was without reasonable and proper cause and was oppressive. It follows therefore that the respondent has not established a potentially fair reason for the constructive dismissal of the claimant because of her conduct. The unfair dismissal claim therefore succeeds.

156. If I am wrong upon this, and there was a fair reason for constructively dismissing the claimant, the next issue that arises (and the burden upon this is neutral) is whether in all of the circumstances the respondent acted

reasonably in treating the claimant's conduct as a sufficient reason for constructively dismissing her taking into account the respondent's size and administrative resources and having regard to equity and the substantial merits of the case.

157. It is well established that in a case where an employee is dismissed because the employer suspects or believes that they have committed an act of misconduct, in determining whether that dismissal is unfair a Tribunal has to decide whether the employer who discharged the employee on the grounds of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. Therefore, there must be established by the employer the fact of that belief. I have determined that the employer has not satisfied the burden upon this issue.

158. Secondly, it must be shown that the employer had in mind reasonable grounds upon which to sustain that belief and that at the stage at which the employer formed that belief on those grounds, the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Then, the Tribunal must address the question as to whether the dismissal of the employee was within the range of reasonable responses of the reasonable employer in the circumstances.

159. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably may take another. The function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal falls outside the band it is unfair. The range of reasonable responses test applies as much to the question of whether any investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason.

160. For the same reasons as I have found the claimant to have been wrongfully dismissed and constructively dismissed, I determine that the respondent in this case acted outside the range of reasonable responses in constructively dismissing the claimant. I have determined that the procedure on or around 15 December 2020 was oppressive. In my judgment, it fell outside the reasonable range of managerial prerogative for the respondent to have subjected the claimant to a second investigation meeting of an interrogative nature in circumstances where there was no issue that the claimant had proven that she had purchased the goods from the sample shop. Her only mistake from the respondent's perspective, in the final analysis, was that the itemised receipt had not been signed by Tracy McTurk.

161. I find it difficult to see how in such circumstances it fell within reasonable managerial prerogative to subject the claimant to oppressive questioning simply to establish timelines which were not germane to the claimant's purported failure to follow the sample shop purchasing procedure in any

case. A managerial decision to subject a well-thought-of employee to such a process is outside the range of reasonable responses (and particularly an employee known to management as having particular stresses in her life at the material time). There was also no reasonable basis upon which to conclude that the claimant had committed any act of misconduct warranting dismissal.

162. It follows therefore that the dismissal of the claimant (constructively) on account of the alleged misconduct also falls outside the range of reasonable managerial prerogative. Mrs McTurk herself said that the matter did not even raise a training issue and could have been resolved effectively with words of advice. There was ambiguity as to whether or not the new process applied to management. The claimant recognised at the first investigation meeting with Mr Shah that she was subject to it but that was of course with hindsight. The situation was unclear on 30 November 2020. Dismissal of the claimant for this fell beyond the parameters of reasonable managerial prerogative in the circumstances.

163. Therefore, the claimant has been constructively unfairly dismissed as well as constructively wrongfully dismissed. I now turn to remedy issues.

164. Upon the wrongful dismissal complaint, the remedy is to put the claimant into the position that she would have been in had the contract been performed. Upon the wrongful dismissal complaint, there is no room for an argument from the respondent that the claimant's employment would have come to an end within the notice period in any case (this being the so called **'Polkey'** principle named after the well-known case of **Polkey v A E Dayton Services Limited** [1987] IRLR 503 HL). There is also no room for the respondent to seek a reduction upon the wrongful dismissal damages on account of any conduct upon the part of the claimant.

165. There is of course an obligation upon the claimant to mitigate her losses. The duty to mitigate is not onerous. The dismissed employee must merely take reasonable steps to mitigate their loss. The employee must act in mitigation of loss as a reasonable employee unaffected by the hope of compensation from their former employer. The onus is upon the employer to show a positive case that the employer has failed to mitigate their loss.

166. The employer will be assumed in an assessment of damages for wrongful dismissal to perform the contract in the way least burdensome to them. This principle was established in the well-known case of **Lavarack v Woods of Colchester Limited** [1997] 1 QB 278. A dismissed employee cannot seek compensation in a wrongful dismissal case for loss of benefits to which they were not contractually entitled (such as an expectation of a salary increase or an expectation of loss of a non-contractual bonus).

167. However, the court or tribunal will make an assessment, on reasonable assumptions, as to what level of bonus would have been awarded (where such is non-contractual) upon the basis of the employer complying with their duty to act in good faith. An apparently unfettered discretion to award a bonus is subject to limitations that the discretion will be exercised in good faith and not irrationally. This principle is of relevance because, of course, the claimant lost out on the bonus as pleaded in paragraph 5 of the schedule of loss.

168. The difficulty for the claimant is that the non-contractual provisions around colleague bonuses set out in the staff handbook (in particular at page 65) refers to a requirement that to qualify for bonus employees must be employed by the respondent and not be in their notice period at the time the bonus is paid. Mrs McTurk's evidence was that the bonus would be paid in February 2021. Had the contract been performed by the respondent and brought to an end upon 12 weeks' notice given on 15 December 2020, plainly the claimant would still have been in the respondent's employment at that time. However, she would be serving out her notice period and therefore on the face of it disqualified from bonus entitlement. It cannot be said that it would be outside the ambit of the reasonable range of decision making in good faith for the respondent to refuse a bonus to the claimant given the express terms of the (non-contractual) guidelines upon bonus eligibility.

169. I accept the claimant's point that she would have had a contractual entitlement (were she not under notice) to payment of the bonus. Although couched in non-contractual terms, it would have been an exercise of bad faith by the respondent to exclude her from it. This is because although it is discretionary Mrs McTurk's account was that she would have been entitled to it had she been in post. There is therefore no basis for finding anything other than that acting in good faith and rationally a bonus would have been declared by the respondent to which the claimant would have had an entitlement. However, unfortunately for the claimant, the terms of the handbook are against her upon this point and she is disqualified from bonus entitlement because had the contract been performed by the respondent, she would have been serving out her notice period and a good faith exercise of discretion would include the exclusion of her from bonus entitlement in the circumstances.

170. The sick pay provisions within the handbook show that an employee with between three and five years of service such as the claimant would qualify for five weeks of full sick pay before going on to statutory sick pay. I do not find that the claimant failed to mitigate her loss over the 12 weeks' notional notice period. No positive case was advanced by the respondent of failure to mitigate. The burden is upon the respondent to show failure to mitigate. The respondent called no evidence upon this point and produced no documentary evidence of other suitable vacancies which the claimant may have applied for. I am satisfied that given her health concerns the claimant acted reasonably in electing not to work.

171. It follows therefore that I award the claimant the sum of £3855.55 by way of damages for her constructive wrongful dismissal. This is calculated by taking five weeks gross pay of £636.92 per week (being her contractual sick pay entitlement) and adding to that seven weeks' statutory sick pay in the sum of £95.85 per week (being the prevailing SSP rate at the material time). As the award is fully taxable pursuant to the Income Tax (Earnings and Pensions) Act 2003 it is appropriate to make the award gross.

172. The claimant's contractual notice entitlement is more than a week greater than her statutory notice entitlement in Part IX of the 1996 Act. It follows therefore that she has no entitlement to be paid her normal weekly wage during that part of the notional notice period where she was incapable of work through sickness by virtue of section 87(4) of the 1996 Act.

173. I now turn to her successful constructive unfair dismissal claim. There was some discussion towards the end of the hearing on 1 October 2021 of the claimant's interest in re-employment. However, this is not being pursued. Accordingly, the Tribunal will focus is upon the monetary awards which arise. These are the basic award and the compensatory award.

174. The basic award is calculated in accordance with the statutory formula to be found in section 119 of the 1996 Act. I understand this to be in an agreed sum of £1632. By section 122 of the 1996 Act, reductions may be made to the basic award.

175. The only relevant reduction which arises here is whether the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent. In such a case, the Tribunal shall reduce or further reduce that amount accordingly. In contrast to the compensatory award to which I will come, a reduction to the basic award may be made where the employer only discovers the impugned conduct after the dismissal and accordingly which has no influence on the decision to dismiss at all.

176. The impugned conduct prior to the constructive dismissal was the claimant's failure to comply with the samples shop procedure. The question that arises is whether the claimant was guilty of culpable or blameworthy conduct such that it is just and equitable to reduce the basic award. The concept of culpable or blameworthy conduct is the same upon a consideration both a reduction to the basic and compensatory awards. It encompasses conduct amounting to a breach of contract or a tort. However, it also includes perverse, foolish or bloody-minded behaviour.

177. A finding of constructive dismissal is not inconsistent with a finding that the employee has by their own conduct contributed to that dismissal. In a case such as this involving a breach of the implied term of trust and confidence a finding that it is just and equitable to reduce the basic or compensatory award upon account of conduct may be considered to be unusual given that there must be no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the employer's conduct which has the effect of destroying or seriously damaging mutual trust and confidence, then there is no such breach of contract at all.

178. In my judgment, the claimant's conduct was not such that it is just and equitable to make a reduction from the basic award. I have found that there was nothing prior to November 2020 which mandated purchases from the sales shop being countersigned by the employee's line manager. I refer to page 68 of the handbook. There was no satisfactory evidence that a different process was in force in the sales shop prior to November 2020.

179. The dismissal of an employee around that time had led to Mrs McTurk's instruction to the claimant to formulate a sample shop sales procedure. The claimant did as she was asked. Mrs McTurk refined it. Nowhere is it expressly stated that members of the management team such as the claimant must have their sales shop purchases countersigned by their own line manager. There was no evidence that Mrs McTurk had briefed the

claimant properly until after 30 November 2020 at which point the claimant knew of the requirement (as she said to Mr Shah on 4 December 2020).

180. It may be considered that the claimant ought to have clarified whether or not the process applied to her before she went ahead on 30 November 2020 and purchased her items. It was perhaps unwise of the claimant to proceed without checking. In a final analysis however, the onus is upon the senior management of the respondent to make the position clear to employees particularly in circumstances where one employee had lost their job arising out of the sales sample process.

181. The Tribunal accepts there to be a sensitivity around the sample shop because of the significant retail discounts available to employees. That is all the more reason, in my judgment for finding that the onus is upon the employer to make it clear to all employees precisely where they stand. A lack of caution upon the part of the claimant in proceeding with her purchases without getting Mrs McTurk to countersign the itemised receipt on 30 November 2020 cannot in my judgment be properly characterised as perverse, foolish or bloody minded. These pejorative epithets arise from the well-known dicta in the case of **Nelson v BBC (No 2)** [1979] IRLR 346 CA. These are strong words going beyond inadvertence or carelessness. There shall therefore be no reduction to the basic award in the circumstances.

182. I now turn to the compensatory award. By section 123(1) of the 1996 Act, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The first task for the Tribunal therefore is to determine the loss.

183. Plainly, there are a number of potential circumstances which affect the calculation of loss. It may well be that employment would have continued and the loss is open ended. It may be that the employment would have ceased anyway at some point (whether because notwithstanding a procedural failing the employee's employment would have terminated or for some other reason the employment would have ended at some point in any event). The latter is a **Polkey** point.

184. In my judgment, the claimant would not have left her employment with the respondent during the period of the second lockdown. As I have said, such would have been a foolhardy step given that plainly during lockdown the pub would have been earning no money for the claimant and her partner. However, in my judgment the evidence is that the claimant's heart was set upon making a go of the public house. She was giving serious contemplation to resigning in order to embark upon this venture in August 2020.

185. The Tribunal takes judicial notice of the fact that the Prime Minister confirmed on 22 February 2021 that pubs would be permitted to re-open with effect from 12 April 2021. No submissions were made to the effect that the claimant would have continued her employment with the respondent on a part time basis after the release of restrictions as was contemplated during the discussions between the claimant and Mrs McTurk the previous summer.

186. The claimant plainly felt very passionately about the pub. This is evidenced from the newspaper article whereby she got up a petition to the Prime Minister and aired her concerns within the locality. It is my judgment that when the Prime Minister announced on 22 February 2021 that public houses would be allowed to re-open with effect from 12 April the claimant would have given serious consideration straightaway to resigning from her position. Given other stresses within her life (particularly around her family and her own health (for which the respondent has no responsibility)) it is my judgment that the claimant would have taken little persuading that the right thing for her was to resign from her demanding position with the respondent and focus upon her new venture with her partner. This decision would have been made all the more easier by the fact that her general practitioner certified her as unfit for work after the first investigation meeting of 4 December 2020 (which I have found to have been one damaging of trust and confidence but done with reasonable and proper cause).

187. I am not suggesting that the claimant would have resigned from her position with the respondent on 22 February 2021 itself. In my judgment, there is a high chance that the claimant would in fact have given the requisite 12 weeks' notice to bring her contract of employment to an end on 7 March 2021 which would give an effective termination date of 31 May 2021. This allows the claimant a couple of weeks of thinking time following the Prime Minister's announcement. However, the evidence is clear that the claimant saw her career in the direction of the pub and not with Morrison's. This is all the more so given that the claimant and her partner had acquired the pub by this point so were committed to it.

188. The period covered by the compensatory award is therefore 24 weeks from 15 December 2020 to 31 May 2021. For the same reasons as upon the common law claim, I find that the claimant did not fail to mitigate her loss.

189. For the reasons already given, I find that the respondent could not (acting within the range of reasonable responses) have fairly dismissed the claimant on account of the conduct which came to light after the date of termination on 15 December 2020. Upon the common law claim, I held the claimant's conduct not to be repudiatory. That is of course not determinative of the question of whether the claimant could have been fairly dismissed nonetheless for the purposes of unfair dismissal law. However, on any view, whatever fault lay upon the claimant for taking it upon herself to give a reference and avail herself of the respondent's resources to promote the public house business the respondent bears a significant share of responsibility on account of a lack of training as to the parameters to be observed. Given the relatively small scale of the resources utilised by the claimant, it would in my view be harsh indeed for the respondent to have dismissed the claimant upon account of these matters following her return to work (had such occurred) after December 2020. There shall therefore be no reduction to the compensatory award upon account another **Devis v Atkins** principle that evidence of misconduct in employment acquired after the dismissal may be used by an employer not to justify the dismissal itself but to argue that the employment would have been short-lived anyway.

190. For the same reasons as with the basic award, I find that it is not just and equitable to make a reduction to the claimant's compensatory award upon account of her conduct. I accept that her conduct in failing to procure

Mrs McTurk's signature was directly causative of her dismissal. In principle therefore it is conduct amenable to be considered upon the question of a reduction to the compensatory award. However, for the reasons already given, I do not find the conduct to be such that it can be properly categorised as foolish, bloody-minded or blameworthy and in my judgment it is in any case not just and equitable to make a reduction to the compensatory award in the circumstances. In particular, as was known to Mrs McTurk and (to some degree) to Mr Shah the claimant was having a stressful time of it towards the end of last year. She had a number of stresses in her life. In essence, the claimant needed careful handling. It was in my judgment manifestly inappropriate to handle the matter as did the respondent by subjecting her to oppressive questioning accompanied by CCTV footage. As I have said, words of advice may have sufficed as Mrs McTurk fairly acknowledged.

191. Although I find the claimant not to have failed to mitigate her loss, I also find that she would not have been fit to return to work at any point before the end of May 2021. Indeed, her evidence (when she was recalled upon the second day of the hearing) was very much to this effect. There was no positive medical evidence that she would have been fit to return to work. She said in evidence given under cross-examination that she *"still suffers from stress and anxiety now and did not plan on doing any work".* She had not applied for any other jobs over this period. (It is because of her ill health that I find that she acted reasonably in failing so to do. However this is double edged from the claimant's perspective as it forms the basis of my finding that the claimant would not have been fit to return to work for the respondent before the end of the notional period of employment at the end of May 2021).

192. As with her common law complaint of wrongful dismissal, the claimant is not entitled to remuneration at the full rate during her notional notice period in circumstances where she was unable to work through sickness. This is because, by section 87(4), the provisions of sections 88 to 91 (entitling an employee to normal pay where (amongst other things) they are unable to work through ill-heath) are excluded where the notice to be given by the employer is more than a week more than the statutory notice requirement. In this case, the claimant's statutory notice entitlement was three weeks only which was some nine weeks less than her contractual notice entitlement from the respondent.

193. I therefore make a compensatory award of five weeks' pay at £471.78 per week net to cover the contractual sick pay period (15 December 2020 to 19 January 2021), followed by ten weeks' pay at the statutory sick pay rate then prevailing of £95.85 (20 January 2021 to 31 March 2021) and then a further nine weeks' net pay for the notional notice period from 1 April 2021 until 31 May 2021 in the sum of £96.35 per week. (The SSP rate increased with effect from 1 April 2021). The claimant shall give credit for the sum of £223.20 earned from her work at Manpower which gives a compensatory award of £3,956.35. These figures should be awarded net as they are not taxable as they are under £30,000.

194. I now turn to the complaints for breach of contract during employment. The Tribunal has jurisdiction to consider these as the employment relationship has ended and the claims were outstanding upon termination. Jurisdiction

is vested in the Tribunal to consider the complaints therefore pursuant to the 1994 Extension of Jurisdiction Order.

195. The respondent shall pay to the claimant the sum of £15 by way of reimbursement of the items purchased by the claimant in the sample shop which have not been handed over. She has therefore paid money to the respondent for a consideration which has wholly failed and is entitled to a refund of her money.

196. I refuse the claimant's breach of contract claim in respect of the bonus for the reasons already given above.

197. In conclusion therefore the following sums are awarded in the claimant's favour:

    (1) Upon the constructive wrongful dismissal complaint – the sum of £3855.55.

    (2) Upon the claimant's breach of contract complaint – the sum of £15.

    (3) Upon the claimant's unfair dismissal complaint:

        a. A basic award in the sum of £16432;

        b. A compensatory award in the sum of £3,956.35.

198. The parties will doubtless be alive to the need to avoid a double recovery in respect of the wrongful dismissal award and that part of the compensatory award which relates to the notional notice period between 15 December 2020 and 9 March 2021. As the parties may be aware, in **Shifferaw v Hudson Music Co Limited** (UK EAT/0294/15) HHJ Eady observed that there were two ways of guarding against double recovery. The Tribunal may award wrongful dismissal damages for the notional notice period and then make a compensatory award for the period after the expiry of that period or may order the deduction of the wrongful dismissal damages from the compensatory award. It is a matter for the Tribunal's discretion as to which method to adopt.

199. I did not receive any submissions upon this issue. That is to make no criticism of the excellent counsel instructed by each party. However, I would hope that this issue could be resolved between the parties by negotiation.

If not, it is open to the parties to make additional written submissions upon this point. I shall proceed upon the basis that no determination of this issue is required by me should the Tribunal not be notified of a requirement for determination within 28 days of the date of promulgation of this Judgment.

Employment Judge Brain

Date 5 November 2021