EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100043/2018, 4100045/2018, 4100046/2018
4100047/2018, 4100048/2018 & 4100049/2018

Held in Glasgow on 9, 10, 11, 12, 13, 16 and 17 July 2018
Members' Meeting 9 August 2018

Employment Judge: Shona MacLean
Members: Mr H P Boyd
Mrs A J Middleton

Ms Kate Coventry	First Claimant Represented by: Mr M Briggs Solicitor
Mr Kristian Petrov	Second Claimant Represented by: Mr M Briggs Solicitor
Mr Jordan Maxwell	Third Claimant Represented by: Mr M Briggs Solicitor
Mr David Baillie	Fourth Claimant Represented by: Mr M Briggs Solicitor

E.T. Z4 (WR)

Mr Michael Galbraith	Fifth Claimant Represented by: Mr M Briggs Solicitor
Ms Jennifer Dougal	Sixth Claimant Represented by: Mr M Briggs - Solicitor
G1 Group plc	Respondent Represented by: Mr D Hay Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that (1) the respondent breached the contracts of employment of the third, fourth and sixth claimants by failing to give notice or make a payment in lieu; (2) the first and second claimants were unfairly dismissed by the respondent in terms of Section 98 of the Employment Rights Act 1996; (3) the first claimant's complaint under Section 11 of the Employment Relations Act 1999 is well founded; (4) the wrongful dismissal complaints by the first, second and fifth claimants are dismissed; and (5) the complaints under Section 11 of the Employment Relations Act 1999 by the second and third claimants are dismissed.

REASONS

Introduction

1. At a case management preliminary hearing on 4 April 2018 these cases were combined as they all include claims of wrongful dismissal and claims under Section 10 of the Employment Relations Act 1999 (the Section 10 claims). The claims of the first and second claimants also include claims for unfair dismissal because they have the requisite service. It was also decided that this final hearing should only consider liability.

2. At the start of the final hearing Mr Briggs confirmed that agreements had been reached through ACAS in respect of the fourth, fifth and sixth claimants in relation to their Section 10 claims. On 13 July 2018, the respondent conceded the first claimant's Section 10 claim. The Section 10 claims of the second and third claimants remained live issues to be determined by the Tribunal.

3. The respondent led evidence from two witnesses: Jordanne Swan, Operations Manager (referred to throughout the productions as Jordanne Murphy) and Michael Thomas, Operations Director (Iona Pub Partnership) The first, second, third and fourth claimants gave evidence on their own account. The fifth and sixth claimants did not give evidence.

4. The issues to be determined by the Tribunal were:

   a. Wrongful dismissal claims: Has the claimant committed a material breach of contract entitling the respondent to summarily dismiss?

   b. Unfair dismissal claims: Given that that the reason for dismissal was uncontested: conduct and it was for a potentially fair, was it was reasonable for the respondent to have the belief in this conduct; was that belief after as much investigation as was reasonable; and did the decision to dismiss fall within the bands of reasonable responses?

   c. In relation to Section 10 claims: Had the respondent failed to comply with its obligation to permit the claimant to be accompanied by the companion chosen by them.

5. The Tribunal found the following essential facts to have been established or agreed.

Findings in Fact

6. The respondent is a public limited company specialising in the hospitality and leisure sector. It owns and manages over 50 venues throughout Scotland.

7. It has a complex in Ashton Lane, Glasgow comprising three linked but separate venues (the Complex): the Grosvenor Cinema, the Grosvenor Cafe and The Lane bar. Depending on the time of year the respondent employs between 40 and 68 people at the Complex.

8. The respondent's HR Policies and Procedures Manual includes the Disciplinary Policy and Procedure which states that where an employee is guilty of gross misconduct the employee will be dismissed without notice. It also states that theft which includes under-ringing of the till and giving or receiving company stock without payment being made is considered to amount to gross misconduct.

9. The G1 Employee Handbook includes provision of staff meals. It states that all retail staff working a minimum of six hours were entitled to free soup with a bread roll and 50 percent off any other menu item. All free soups must be rung through the till by the Duty Manager using the "free staff soup" button on the tills. All 50 percent off food must be rung through the till by the Duty Manager. The staff member must pay for their food at the time of ordering.

10. The respondent employed the first claimant from 11 February 2013 as a Project Supervisor. She worked in the Grosvenor Cinema.

11. Around 5 May 2014 the respondent issued the first claimant with a Statement of Terms and Conditions of Employment which she signed on 16 May 2014. It contained the following provisions:

"75 *The Company Disciplinary and Grievance Procedures, which apply to you, are outlined in the HR Policies and Procedures Manual.* "

...

I have read the above and understand and agree to the terms of this statement. I understand that my additional terms and conditions are contained within the G1 Employee Handbook and a copy of the policies relating to my employment are contained in the HR Policies and Procedures Manual, which

is available in every Unit in hard copy on the G1 Way and from HR at Head Office."

12. The respondent employed the second claimant from 19 December 2011. From around May 2017 he held the position of Team Manager and worked in the Grosvenor Cinema. The second claimant was issued with a Statement of Terms and Conditions of Employment which he signed on 29 May 2017. It contained the following provisions:

"There are many Company Policies, including Disciplinary and Grievance, which apply to your employment and are available for you to read either in the G1 Employee Handbook or the HR Policies and Procedures Manual. It is important that you read and understand these. By accepting this agreement of employment with the company you agreed to read through these policies within your first 4 weeks of employment. If you have any questions regarding any of these policies, including how to access them, please ask your manager or contact Human Resource Department."

And

"I have read the above and understand and agree to the terms of this Statement. I understand that my additional terms and conditions are contained within the G1 Employee Handbook and a copy of the policies relating to my employment are in the HR Policies and Procedures Manual, which is available in every Unit in hard copy, on the Company intranet and from HR at Central Office."

13. The respondent employed the third claimant from 12 April 2017 as bar staff in The Lane. The respondent issued the third claimant with a Statement of Terms and Conditions of Employment which he signed on 12 April 2017. It contains the following provisions:

"15 The Company Disciplinary and Grievance Procedures, which apply to you are outlined in the HR Policies and Procedures Manual.

...

I have read the above and understand and agree to the terms of this statement. I understand that my additional terms and conditions are contained within the G1 Employee Handbook and a copy of the policies relating to my employment are in the HR Policies and Procedures Manual which is available in every Unit in hard copy, on the G1 Way or from HR at Central Office"

14. The respondent employed the fourth claimant on 18 December 2015 as bar staff initially in the Grosvenor Cafe and latterly in The Lane. The fourth Claimant was issued with the Statement of Terms and Conditions of Employment which he signed on 16 December 2015. It contained the following provisions:

"15 The Company Disciplinary and Grievance Procedures, which apply to you are outlined in the HR Policies and Procedures Manual.

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I have read the above and understand and agree to the terms of this Statement. I understand that my additional terms and conditions are contained within the G1 Employee Handbook and a copy of all policies relating to my employment are in the HR Policies and Procedures Manual, which is available in every Unit on a hard copy on the G1 Way and from HR at Head Office."

15. The respondent employed the fifth claimant on 5 February 2017 as Cinema Floor Staff in the Grosvenor Cinema. He was issued with a Statement of Terms and Conditions of Employment which he signed on 7 February 2017. It contained the following provisions:

"There are many Company Policies, including disciplinary and grievance, which apply to your employment and are available to you to read, either in the G1 Employee Handbook or the HR Policies and Procedures Manual. It is important that you read and understand these. By accepting this agreement of employment with the Company you agree to read through these policies within the first 4 weeks of employment. If you have any questions regarding

any of these policies, including how to access them, please ask your manager or contact the Human Resources Department."

And

7 have read the above and understand and agree to the terms of this Statement. I understand that my additional terms and conditions are contained in the G1 Employee Handbook and a copy of the policies relating to my employment are contained in the HR Policies and Procedures Manual which are available in every Unit in hard copy on the Company intranet and from HR at Central Office"

16. The respondent employed the sixth claimant on 20 September 2016 as bar staff in the Grosvenor Cafe. She was issued with a Statement of Terms and Conditions of Employment which she signed on 21 September 2016. It contained the following provisions:

"*15 The company's Disciplinary and Grievance Procedures, which applied to you are outlined in the HR Policies and Procedures Manual.*

...

I have read the above and understand and agree to the terms of this statement. I understand that my additional terms and conditions are contained in the G1 Employee Handbook and a copy of the policies relating to my employment are in the HR Policies and Procedures Manual, which is available in every Unit in hard copy, on the G1 Way and from HR Central Office."

17. The Lane has a touch screen operated till which is used for clocking on and off and for carrying out transactions. Attached to the till is a fingerprint reader. All employees are registered centrally to use the till. A registered fingerprint is required to use the tiH both tn its docking and transacting capacities. Once registered on the till, employees are assigned privileges. The level of privileges determines which functions employees can carry out on the till.

Employees with "supervisor" privileges have the ability to use discount functions. Employees with privileges below supervisor do not.

18. At the start of each shift employees use the till to clock in. The centralised registration allows certain employees to log on to any till to carry out transactions. At the end of each shift employees require to log off and then clock out. Employees cannot log off while checks are open in their name. If an employee has a check open in their name at the end of a shift they require to transfer this check to the name of employee who still is working. This transfer is indicated on the check details sheets an entry reading "check transferred."

19. The transactional capabilities of the till involve communicating to the kitchen what food has been ordered and processing payment for items ordered. To initiate transactions an employee places their finger on the fingerprint reader. Once this has been done the till is operational. An employee will input the customer's order by pressing the appropriate buttons on the touch screen. Customer's orders are referred to informally as "checks". Once the employee has completed an order they may either "cash off' the check or alternatively "save" the check on to a table. Once the check has been either cashed or saved a message will be sent to the kitchen indicating what food has been ordered. The process of either cashing or saving will also end the current transaction and close the check. To perform a further transaction the employee requires to place their finger on the fingerprint reader again and follow the process. To return to a saved check the employee requires to place their finger on the fingerprint reader and then open up the check at the table number it was saved under.

20. Ordinarily only one member of bar staff is on shift at The Lane particularly on weekdays. Bar staff working in The Lane are assigned supervisor privileges so that they do not have to call on the Duty Manager based in the Grosvenor Cafe.

21. Employees in the Complex would regularly eat their meals in The Lane where it is quieter. The staff meal discount policy set out in the G1 Employee

Handbook was not followed in The Lane where was a practice of staff applying their own discounts. It was also the practice at the Complex for employees not to pay for their meals at the time of ordering. These practices were known by management and widely accepted. The Grosvenor Cinema staff of who had not been logged on to a till ordered staff meals used the fingerprint of a member of staff on working at The Lane.

22. There are two discount buttons on the till at The Lane: the 50 percent staff meal button (the 50 Button) and the 20 percent 5pm.com button (the 20 Button). These buttons could only be operated by employees with the supervisor privileges.

23. The 20 Button related to a website offering discounted rates at various restaurants. The 20 Button had been programmed on to the till to allow employees tendering orders from customers who had purchased the discount offer to apply a 20 percent discount. It was also used when customers presented their cinema tickets.

24. In early 2017 Jordanne Swan, Operations Manager was responsible for nine sites in the respondent's estate including the Complex. She reported to the Operations Director. Mhairi Furneaux was the Area General Manager which included the Complex. She reported to Mrs Swan and line managed Elizabeth Graham, General Manager of the Grosvenor Cinema and Robyn Reid, General Manager of the Grosvenor Cafe and The Lane.

25. Ms Graham set up a private Facebook group called the Grosvenor Cinema for employees working in the Grosvenor Cinema (the Facebook page). Approximately ten employees were members including Ms Graham, the first clamant, second and fifth claimants. Members would post details of shifts and forthcoming events.

26. In early July 2017, the second claimant was told by an employee working in The Lane (not the third, fourth or sixth claimants) that when ordering staff food on The Lane till it was possible to discount the order with the 50 Button and then apply a further discount with the 20 Button.

27. On 3 July 2017, the second claimant posted the following on the Facebook page (the Post):

"Just found a cool exploit on the till in the lane every time you order food and you discount it with 50% you can then discount that again with the 5pm 20% cinema button. Enjoy"

28. The Post stated that it was "Seen by everyone". There were six comments. The first, second and fifth claimants believed that the Post was seen by Ms Graham.

29. Ms Graham was on annual leave from 29 June 2017 to 10 July 2017. From the end of July 2017 until 1 October 2017 the second claimant was involved in an internship abroad.

30. It became common knowledge among employees working in the Lane and the Grosvenor Cinema that The Lane till allowed multiple discounting. They assume from the Post that Ms Graham is also aware.

31. In early August 2017 Chloe Magee, an employee of the respondent told Ms Reid that on The Lane till the 20 Button could be used in conjunction with the 50 Button allowing extra discount. Ms Reid was distracted and forgot about this. She did not take any immediate action.

32. On 14 August 2017 Ms Reid spoke to Ms Furneaux about her conversation with Ms Magee. Ms Furneaux obtained a report for the discounts applied during the previous two weeks. Her enquiries revealed that some checks had a 20 percent discount which had been used in addition to the 50 percent staff discount to further discount checks. Ms Reid and Ms Furneaux made a list of staff members whose names appeared on theses checks and noticed that a number related to employees working in Grosvenor Cinema. They looked at the Facebook page and noted the Post.

33. The fourth claimant understood that Ms Magee had spoken to management on two occasions about The Lane till. Around mid-August 2017 the third,

fourth and sixth claimants discussed no longer allowing the Grosvenor Cinema staff to use their fingerprints to order food.

34. On 15 August 2017 Ms Furneaux decided after taking advice to investigate and speak to each member of staff. Ms Furneaux told Ms Graham. They decided that Ms Furneaux would conduct the interviews with the relevant staff the following week and Ms Graham would take notes. Ms Furneaux showed Ms Graham the Post and checks where the 50 Button and 20 Button had been applied. No employees were suspended. No action was taken to the rectify The Lane till or inform colleagues that multiple discounting was unacceptable. The staff were not informed that an investigation was taking place.

35. On 21 August 2017 Ms Furneaux interviewed the first claimant, the third claimant and the fourth claimant consecutively. Ms Graham was present throughout.

36. The first claimant confirmed that she was aware of the till procedure. She knew about the "sneaky 20 percent" from the second claimant. The first claimant said that she knew it was wrong but everybody else was doing it. The first claimant was shown two checks in respect of food ordered by her on 8 August 2017 and 16 August 2017 where she had applied the 50 Button in conjunction with the 20 Button giving additional discount of £2.18 and £1.89 respectively. The first claimant apologised. Ms Furneaux said that it could be gross misconduct. The first claimant was not suspended.

37. Ms Furneaux then met the third claimant. Ms Graham took notes. The third confirmed that staff were entitled to the 50 percent meal discount. He was shown checks in his name where the 50 Button had been used in conjunction with the 20 Button. The third claimant denied that he ordered any of the food. He explained that Grosvenor Cinema employees could not order food through The Lane till. Accordingly, they used the fingerprints of The Lane bar staff to oFder ndpay dr food. With reference to the check¥with"his name he could not say who had ordered the food. He knew that some staff has been discounting but was not aware that they had been using his fingerprint to do so. About two weeks previously he said that he had spoken to the fourth and

sixth claimants and they were going to stop allowing the Grosvenor Cinema staff to use their fingerprints.

38. During Ms Furneaux's meeting with the fourth claimant, where Ms Graham took notes, he confirmed that he was aware that there was a 50 percent discount on food while on shift. He was shown checks in his name with multiple discounts. The fourth claimant acknowledged that additional discount had been added. He said that it could be anyone's food; he could not remember specifically to whom the checks related. The fourth claimant said that he did not order food on particular checks. He thought he might possibly have ordered food on one check for himself but could not remember. He was aware that other employees were using his fingerprint.

39. On 22 August 2017 Ms Furneaux met the fifth claimant. Ms Graham took notes. The fifth claimant confirmed that he was aware of the 50 percent discount. He said that 20 Button additional discount was common knowledge to employees in the Grosvenor Cinema and The Lane. He knew that he should not be using the 20 Button but did not really think about it. He understood that it was wrong and did not want to lose his job. The fifth claimant believed that everybody else knew about it. He would happily pay back any discount if he could keep his job.

40. On 25 August 2017, a disciplinary invite letter was sent to the first claimant advising that it was alleged that she had been responsible for the under ringing of company tills in order that company stock was received by her or colleagues without the appropriate payment being made. This was considered potential gross misconduct and if proven one of the outcomes may be dismissal. The first claimant was advised of her right to be accompanied at the disciplinary hearing on 29 August 2017.

41. Disciplinary invite letters in similar terms were also sent to the third, fourth and fifth claimants.

42. On 25 August 2017 Ms Furneaux met the sixth claimant. Ms Graham took notes. The sixth claimant confirmed that she was aware of the 50 percent

discount and also the 20 percent discount. She was shown checks in her name where the 20 Button was used in conjunction with the 50 Button. The sixth claimant said that she was aware that Grosvenor Cinema employees were ordering food on The Lane till. She allowed them to use her fingerprint but did not pay attention to what they did.

43. As the second claimant was abroad Ms Furneaux spoke to him via telephone on 26 August 2017. Blair McLaren, Bar Manager took notes. The second claimant was sent checks in his name by email. The second claimant confirmed he was aware of the 50 percent staff meal discount policy. He said that he had been told about the 20 Button by a member of The Lane staff and he had taken advantage of it. He admitted that he posted the Post. When asked why he had not informed a manager about the problem on the till system he said that there was a manager on the Facebook page. He said that he should not have encouraged people to use the 20 Button. Ms Furneaux said that if it proceeds to a disciplinary hearing which it may it can be considered gross misconduct.

44. On 26 August 2017, the sixth claimant was invited to a disciplinary hearing on 30 August 2017 in similar terms to the letter sent to the first claimant.

45. On 29 August 2017 Mrs Swan conducted three disciplinary hearings. Jennie Dodd, HR Business Partner attended to take notes.

46. The third claimant had his disciplinary hearing first. He was unaccompanied. The third claimant confirmed that he knew the 20 percent discounting by staff was a “thing” but he had not participated in it. He would allow Grosvenor Cinema staff to use his fingerprint as he understood that they were unable to order food using their own fingerprint. The third claimant felt that he had not done anything wrong and Mrs Swan was provoking him. Mrs Swan adjourned the disciplinary hearing. She then reconvened and told the third claimant that she had concluded that he had knowingly used discounts on multiple occasions but did not inform his line manager. The third claimant was informed that he was being dismissed for gross misconduct with immediate effect.

47. Mrs Swan wrote to the third claimant on 29 August 2017. However, the letter was sent to the wrong address. It was re-issued on 4 September 2017 advising him of the decision and the right to appeal.

48. Mrs Swan next held the fourth claimant's disciplinary hearing. Ms Dodd took notes. The fourth claimant declined to be accompanied. He said that employees not assigned to the till used his fingerprint so that they could order food and use the 50 percent discount. He did not watch what they did. He was aware that the 20 Button could also be used. The disciplinary hearing was adjourned and reconvened. Mrs Swan advised that she considered that the fourth claimant had knowingly used or was aware discounts were taking place. While there were handovers or change of shifts discounts were in his name. The fourth claimant knew about the 20 Button but failed to raise the matter with the manager. The fourth claimant was advised that there was a loss of trust and confidence he was responsible for the checks which is why individual fingerprints were used.

49. Mrs Swan wrote to the fourth claimant on 1 September 2017 confirming that the respondent considered that he had been guilty of gross misconduct and that he was dismissed summarily. He was informed of his right of appeal.

50. In the afternoon of 29 August 2017 Mrs Swan conducted the first claimant's disciplinary hearing. Ms Dodd took notes. The first claimant declined the right to be accompanied. The first claimant knew that the third and fourth claimants had attended disciplinary hearings earlier in the day and had been summarily dismissed.

51. The first claimant confirmed that she had seen the Post and had used the 20 Button on two occasions. She confirmed that she did not make managers aware of the situation but thought that Ms Graham knew about it as she had seen the Post. The first claimant accepted that Ms Graham had not mentioned the Post. The first claimant said she did not appreciate the gravity of the situation and the extent of it. The first claimant acknowledged that she had made the wrong decision and apologised for it. As she was known to Mrs

Swan the first claimant asked for this to be taken into consideration along with her service. There was an adjournment.

52. Mrs Swan spoke to Ms Graham who said that she had not seen the Post at the time. She had been on holiday and must have flicked it by mistake. The first claimant was asked when the disciplinary hearing re-convened why she had not asked Ms Graham about the Post. The first claimant indicated that she did not feel that she could.

53. Mrs Swan consulted the respondent's HR team and external solicitors. She was informed of the importance of consistency and decided that the first claimant should be dismissed summarily. The first claimant was informed of the decision and the reason for it: she had knowingly used the discount which was theft; she had previously been in a management role; and failed to bring it to the manager's attention. Mrs Swan said it was a breach of trust and confidence.

54. The first claimant was advised of the decision and right of appeal by a letter dated 5 September 2017.

55. On 30 August 2017 Mrs Swan conducted the fifth claimant's disciplinary hearing. Ms Dodd took notes. The fifth claimant declined to be accompanied.

56. The fifth claimant confirmed that he had been shown the Post. He admitted to using the 20 Button. The fifth claimant said it was an honest stupid mistake and acknowledged that owed £30. He thought the Grosvenor Cafd manager knew. He would not do it again. He had obtained free food when he worked in Subway. He questioned why he had been given supervisor access. The fifth claimant was informed at the disciplinary hearing that he was being dismissed for gross misconduct. This was confirmed by letter dated 5 September 2017 and the fifth claimant was told of his right of appeal.

57. On 1 September 2017 Mrs Swan conducted the sixth claimant's disciplinary hearing. Ms Dodd took notes. Bryan Simpson of Unite accompanied the sixth claimant.

58. The sixth claimant confirmed that she was aware of the 20 Button allowing for multiple discounting. She also confirmed that she allowed other employees to use her fingerprint without checking what transactions they were processing. She had known that the practice was going on and had spoken to a colleague. She did not bring it to a manager's attention. Mr Simpson said that Ms Furneaux and Ms Graham were aware of the abuse of the discount system and there was a culture within the business.

59. Mrs Swan advised the sixth claimant that she was being dismissed for gross misconduct for allowing staff to use her fingerprint without supervision and by not highlighting it to the appropriate management team she facilitated the use of under-ringing on the till through multiple discounting. Mrs Swan stated that Ms Furneaux and Ms Graham had provided statements to refute the allegation they were aware of the discounting. As soon as the matter was brought to Ms Furneaux's attention she investigated the matter. Ms Graham was on holiday at the time of the Post and said that she did not read it. The decision was confirmed by letter dated 12 September 2017 when the sixth claimant was told of her right of appeal. The sixth claimant appealed by letter dated 18 September 2017 requesting that she be accompanied by Mr Simpson.

60. The first, fourth and fifth claimants appealed their dismissals. They had consulted with Mr Simpson who they informed the respondent would accompany them at the appeal hearings. The third claimant had also consulted Mr Simpson but had only recently received the re-issued letter from Mrs Swan and had not yet appealed.

61. In the first claimant's appeal letter dated 7 September 2017 she indicated that grounds for appeal were: there were no breach of trust and confidence; there was inconsistent treatment; senior members of staff were aware of and instructed the use of the discount; and it was disproportionate to dismiss her for the loss of less than £4 considering the following mitigating circumstances.

"I have served four and a half years with the company, and I am a highly regarded employee. I have been a stabilising force in the cinema division

during times of structural upheaval, keeping the public programme running when many staff members were leaving. I was instrumental in fixing the relationship with Sony pictures which was so under threat that we nearly didn't get the screen trainspotting earlier this year; as you know this is our highest grossing title so far of 2017. I am well known and respected in the film community, I have been solely responsible for maintaining the company's relationship with BAFTA Scotland, the Glasgow Comedy Festival and Park Circus Films distribution. I have regularly come in and work without pay on days off to ensure that the show made it on to screen when any technical issues that nobody else could fix. I have been solely responsible for programming shows like Louis Theroux My Scientology movie, which outperformed other cinemas in the country at the Grosvenor. I have also been solely responsible for the return business of Sony television and Amazon Prime the premier screenings of Outlander year on year since 2014 making at least £10,000 for the company from that client alone. I have attended nationally recognised training programmes and audience development on my own initiative, funding the £600 fee myself through a self-source grant from Film Hub Scotland. Additionally I have a unique skill set that accompanies the selection of films playing at the cinema as well as the actual technical running of each screening. That skill set is essential to the running of the business."

62. Michael Thomas conducted all the appeal hearings. Mr Thomas is the Operations Manager of The Iona Partnership which is the lease side of the respondent's business.

63. In preparation for the appeals hearings Mr Thomas met with Fiona Armour, HR Manager who attended the appeal hearings and took notes.

64. On 8 September 2017 Mr Thomas wrote to the fourth and fifth claimants advising that Mr Simpson was not permitted on the respondent premises. A letter in similar terms was sent to the first claimant on 10 September 2017.

65. On 13 September 2017 the first claimant emailed Ms Armour advising that she was unable to attend the appeal hearing on 15 September 2017 as she was working. This along with the fact that she was not allowed to bring her

chosen representative to the appeal hearing led her to decide to withdraw the appeal. The first claimant said that she stood by the assertion that the dismissal was disproportionate given the level of the offence and that all she had brought to the company. However, she believed that the result of any appeal was a foregoing conclusion and therefore a waste of both her time and that of the company. The email concluded:

7 love my time working at the Grosvenor, and the cinema will always have a special place in my heart. I want nothing but the best for it and its future and I am grateful for the opportunity afforded to me during my 10 years. I know it will flourish on the back of all the work that everyone has put into to it. Please confirm the withdrawal of my appeal at your earliest convenience."

66. The fifth claimant also expressed concern about the proximity of the appeal hearing which was originally scheduled for 12 September 2017, the failure to allow his to be accompanied by Mr Simpson and the partiality of Mr Thomas. The appeal hearings for the fourth and fifth claimants were rescheduled for 15 September 2017 when they were accompanied by Sarah Collins of the GMB Union.

67. Mr Thomas conducted the appeal hearings for the fourth and fifth claimants on 15 September 2017. During the appeal hearings reference was made to the fact that senior managers were aware of the discounting.

68. On 19 September 2017 Mr Thomas advised the sixth claimant that Mr Simpson was not permitted on the respondents premises but she could be accompanied by another union official.

69. On 27 September 2017 Mr Thomas met Ms Reid. He asked if she could remember when the multiple discounting it first came to her attention as Ms Magee said that it was 3 August 2017 rather than 13 August 2017. Ms Reid said that she *"honestly can't but can't see why it would randomly pop back into my head a week later on Monday if it was the week before"* Mr Thomas asked what Ms Reid did about it at the time. She responded, *7 got distracted and forgot about it at the time".* When asked about the detail of what she was

told/shown Ms Reid said, "*I really don't knovf.* Ms Reid confirmed that all the staff working in The Lane had supervising fingerprints and that sometimes the staff paid at the end of their shift.

70. Mr Thomas also spoke to Ms Graham on 28 September 2017 who confirmed that she had been on holiday and did not remember seeing the Post. She was unaware of it until she was shown it. No one had mentioned it to her.

71. Mr Thomas also said that she spoke to Mr McLaren and Ms Magee. Neither of their statements were produced. Mr McLaren's statement was referred to in the appeal outcome letters. None of the statements were provided as part of the appeal process.

72. On 29 September 2017 the third claimant exercised his right of appeal. He had consulted Mr Simpson but considering the correspondence received by the other claimants he knew that Mr Simpson would not be permitted to accompany him. The third claimant advised the respondent that he wished to be accompanied by Ms Collins.

73. On 3 October 2017 Mr Thomas wrote to the fourth and fifth claimants advising their appeals had been unsuccessful.

74. On 4 October 2017 Mr Thomas conducted the appeal hearing for the sixth claimant who was accompanied by Ms Collins.

75. Mr Thomas conducted the appeal hearing for the third claimant on 9 October 2017. Ms Collins accompanied the third claimant.

76. Mr Thomas issued the appeal outcome letters to the third claimant and sixth claimant on 16 October 2017 confirming that their appeals had been unsuccessful.

77. On 17 October 2017 Mrs Swan conducted the second claimant's disciplinary hearing. The second claimant had consulted with Mr Simpson and was aware that the respondent had previously refused other colleagues to be accompanied by Mr Simpson. The second claimant advised the respondent that he would be accompanied by Ms Collins which she did.

78. During the second claimant's disciplinary hearing he confirmed that he was aware of the staff food policy. He admitted to discounting staff food bills to zero for himself and other staff members. He also admitted that he should not have done this.

79. As regards the Post the second claimant stated that this was done in a *"jokey"* way and that he wanted and expected managers to see the Post as he knew it would lead to it being fixed. The second claimant said that he knew that Ms Graham had seen the Post. Mrs Swan indicated that Ms Graham said that she had not been aware of the abuse of multiple discounting. The second claimant accepted that he did not specifically bring the matter to Ms Graham's attention as she found her to be unapproachable although he accepted he had a good relationship with another manager. Mrs Swan therefore did not accept the explanation that posting on Facebook was another way of reporting the matter.

80. The second claimant also referred to managers taking free food and drink in the Research Club. Mrs Swan considered she could not investigate this as the venue had been closed since May 2016 and did not fall under her remit. Nonetheless the second claimant confirmed that he was aware of the staff food policy and that he knew that discounting to zero was wrong. Mrs Swan considered that the second claimant encouraged other members of staff to exploit the discount and failed to report it to managers. She concluded that this was an act of gross misconduct and the second claimant was to be summarily dismissed. Mrs Swan did not accept as was suggested that the position had been pre-determined.

81. On 29 November 2017 Mr Thomas considered the first claimant's appeal which had been re-submitted by her following a discussion with Ms Armour. The first claimant declined to attend the appeal hearing and it was considered by Mr Thomas on paper.

82. Mr Thomas concluded that the first claimant had admitted to under-ringing the till and to receiving food for herself that was discounted beyond authorised 50 percent discount. He therefore concluded that there had breach of trust and

confidence. Mr Thomas did not accept that Ms Graham knew that the staff were using the 20 Button or that any of the Grosvenor Cafe management knew about it. He said that Ms Graham was on holiday at the time of the Post and he was satisfied that she had paid no attention to it and was unaware of the practice. Ms Graham had never spoken to the first claimant about the discount or authorised her to use it. Mr Thomas did not accept that the use of the 20 Button had become custom and practice. For these reasons he also considered there was no inconsistency of treatment as Ms Graham did not know of the practice. He also disagreed that the sanction was disproportionate. He considered that under-ringing the till led to gross misconduct and therefore the decision to dismiss was proportionate. In relation to overall mitigating circumstances Mr Thomas did not consider that it was relevant for him to take this into consideration given that the first claimant had dismissed for a conduct issue. He also considered that it was irrelevant that Ms Graham had been involved during the investigation and that he was the only decision maker involved in the appeal process. The first claimant's appeal was not upheld. She was advised of this by letter dated 29 November 201 7.

83. The second claimant was advised of the outcome of his disciplinary hearing by letter dated 1 December 201 7 which also informed him of his right of appeal which he exercised.

84. On 9 January 2018 Mr Thomas heard the second claimant's appeal. Mr Thomas stated that he could find no evidence that senior members of management knew about the use of the 20 Button and that the second claimant was not authorised to use it. Mr Thomas said that Ms Graham and Mr Reid gave statements at the time of the initial investigations and they and Mr McLaren had been subject to further investigation and that there was no evidence of any knowledge. Mr Thomas reiterated his view that Ms Graham

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claimant intentionally used his fingerprint to under-ring the till to receive meals and stock for himself or colleagues without making the appropriate and due payment. He considered this was a breakdown of trust. Mr Thomas did not

consider that the decision was disproportionate and considered that the original decision should not be overturned. This decision was communicated to the second claimant by letter dated 31 January 2018.

Observations on witnesses and evidence

85. The Tribunal considered that Mrs Swan was a credible and generally reliable witness. She listened carefully, answered the questions and made several appropriate concessions. The Tribunal's impression was that Mrs Swan felt constrained by the wording of the Disciplinary Policy and the clear instructions that she received from professional advisers to be consistent. The Tribunal considered that had Mrs Swan been given an opportunity to reach her own decision in each case she would not have reached the conclusion that she did in relation to the first claimant's claim. In the Tribunal's view Mrs Swan felt obliged to dismiss all employees if she believed them guilty of gross misconduct.

86. Mr Thomas was in the Tribunal's view an unimpressive witness who appeared uncomfortable throughout his evidence. The Tribunal's impression was that he went through the motions of an appeal and speaking to various witnesses. However, the Tribunal felt that he had a closed mind and sought information to validate the decision and ignored or disregarded any other information. The Tribunal's view was that nothing that was said by the claimants at the appeal hearings would have made any difference to Mr Thomas' decision. The Tribunal considered his investigation was half-hearted. For example, he said that he spoke to Ms Magee but there was no note of this nor was it referred to in the appeal outcome letters. This was surprising given that according to Ms Magee, Ms Reid had been aware of problem with the 20 Button on The Lane till from early August 2017. Mr Thomas said that Ms Graham and Mr Reid gave statements at the time of the initial investigations. While Mrs Swan referred to speaking to Ms Graham during an adjournment of the first claimant's interview and there was a typed note undated and unsigned there was no statement from Ms Reid written or otherwise. Mr Thomas also said that he spoke to Mr McLaren but his statement was not produced. None of

the statements were made available to the claimant. This might have been significant as the two checks relating to the first claimant post-dated when Ms Magee said that Ms Reid was aware of the situation.

87. The Tribunal considered that first claimant gave her evidence in a straightforward manner. Her position was entirely consistent with her position throughout the dismissal process. The Tribunal considered that she was credible and reliable.

88. The third claimant also gave his evidence in an honest and forthright manner. His position was entirely consistent with his position throughout the disciplinary process. He maintained that he had not discounted any of his own food. The Tribunal accepted that he had not applied the 20 Button to further discount his own food. The Tribunal considered that it was common knowledge that The Lane till allowed multiple discounts. The Tribunal also considered that the staff of The Lane and Grosvenor Cafe believed that management was aware of the issue. The Tribunal accepted that the third claimant was not aware that others were applying multiple discounts on his fingerprint.

89. The second claimant gave his evidence in a frank and candid manner. The Tribunal could understand that by the time he attended his disciplinary and appeal hearings he knew the other claimants had been summarily dismissed and therefore felt that he had nothing to lose. The Tribunal's impression was that the second claimant did not consider that Ms Graham was a particularly effective manager. The Tribunal felt that it was not unreasonable for him to assume that she was aware of the Post and that her management style was such that it was not unexpected that she did not raise the matter with him. That said the Tribunal felt that the wording of the Post deliberately encouraged his colleague to use the 20 Button for multiple discounts.

"90? The Tribunal considered that the fourth claimantgave bis ievidence hohesily. While the fourth claimant's comment during the disciplinary process about one of the checks was equivocal the Tribunal felt that he was asked compound questions and unlike the other checks which were for food that he definitely

would not eat he was candid and said that possibly one was his by the could not remember.

91. The fifth and sixth claimants did not attend the final hearing. The fifth claimant accepted that he rang through food for himself. The sixth claimant accepted that there was a conversation with colleagues in The Lane about Grosvenor Cinema staff using their fingerprints. The fourth claimant's recollection about the discussion was vague. He did say in cross-examination that Ms Magee had reported the matter to management on two occasions. Given the dates of the checks the Tribunal considered that it was more likely than not that the third, fourth and sixth claimants had a discussion around mid-August 2017 about no longer allowing other staff to use their fingerprints.

Submissions

92. The representatives kindly provided the Tribunal with a copy of the notes to which they referred during submissions. The following is a summary of their respective positions.

Breach of Contract Claims

The Respondent

93. Claims under contract law are to be determined by the law of contract which is distinct from the regular tests applied in the context of unfair dismissal (see *Blyth v Scottish Liberal Club per* LJ-C Wheatley).

94. The issue in the cases of wrongful dismissal is whether the employee has committed a material breach of contract that entitled the employer to summarily dismiss (that is, rescind the contract of employment). This corresponds with the position in contract law that rescission of a contract can take place where one party is in material breach. It is considered that this is trite law.

95. What then are material breaches of contract? One approach is to determine whether the term in question is one that can be said to go to the root of the contract, being a question of fact and degree (see *Blyth v Scottish Liberal*

Club per Lord Dunpark at 148, citing Wade v Waldon 1909 SC 571). The implied term of trust and confidence is often said to be such a clause.

96. There is however another route by which a clause might be said to be a material breach, and that is where the contract expressly provides for a clause to be considered of the essence of the contract (see *Charisma Properties Ltd v Grayling (1994) Ltd* 1996 SC 556 *per* Lord Sutherland at 560 1to 561 C, Lord Wylie 565B-C.

97. On the question of construing terms within a contract, it has been long recognised that documents can be incorporated within a contract of employment by reference, and if they are they are considered to form part of the contract. There is usually a two-stage approach to this. First considering whether a document has been identified as incorporated within the contract of employment, and then whether the specific terms relied upon by the party within that document are apt for incorporation as contractual terms, as opposed to, say, aspirational statements of policy (see *Keeley v Fosroc International Ltd [2006] IRLR 961* per Auld LJ at paras [31-35] (statement incorporating other docs narrated at para [5]).

98. In addition to terms expressly found within the contract, there are a number of implied obligations that arise as contractual terms. In issue in these cases are those of trust and confidence, and separately (albeit somewhat interlinked) the duty of fidelity, that is of the employee to serve his employer loyally and not to act contrary to his interests *(Malik v BCCI [1998] AC 20 at 46 per Lord Steyn).*

99. Where an express term is in place, it cannot be altered without variation. Variation can be achieved either by express agreement between the parties, or by custom and practice (see *Park Cakes Ltd v Shumba [2013] IRLR 800* per Underhill LJ at paras [34-36]).

100. The Tribunal was referred to the first claimant's contract of employment. The HR Policies and Procedures Manual expressly states several matters amounting to gross misconduct meriting summary dismissal. Those words

expressly say that those instances of misconduct are material breaches of contract. Included within those provisions are "Theft", a defined term said to include the "under-ringing of the till". Those provisions are incorporated into the contract by reference and are apt for incorporation. Examples of under-ringing were provided by Mrs Swan in evidence. The Staff Meals Policy was identified by Mrs Swan in unchallenged evidence as being present in either the G1 Employee Handbook or the HR Policies and Procedures Manual. It is incorporated by reference in to the contract of employment and is apt for incorporation. Every witness adduced also gave evidence to the fact they knew staff discount on shift was 50 percent (and all witnesses in their Investigatory interviews said the same thing). The contractual entitlement was to 50 percent. The first claimant admitted that on two occasions she rang through staff food with the increased discount of the additional 20 percent discount, to which she was not entitled. She under-rang the till on those two occasions and was in material breach of her contract of employment.

101. There has been no evidence evinced to the effect that staff were to be entitled of right to the benefit of the further 20 percent entitlement through custom and practice. What has been demonstrated is that custom and practice resulted in the deletion of the words "by a Duty Manager" when staff were working at the Lane Bar, or inserting the words "except when the member of staff is working in the Lane Bar", and deletion of the provision "The member of staff must pay fortheir order at the time of ordering". There has been nothing adduced in the nature, quality or quantity of evidence anticipated by Underhill LJ in Park Cakes to evince that the 50 percent discount was to be increased to include the 20 percent discount. No claimant was summarily dismissed for ringing through their own food at 50 percent discount, which would not have amounted to under-ringing.

102. The Tribunal was referred to the provisions of the second claimant's contract of employment. The respondent makes the same submissions in respect of incorporation by reference and aptness for incorporation of the Disciplinary Policy and the Staff Food Policy. Despite there being a suggestion to Mrs Swan in evidence that that second claimant had not admitted to applying the

further 20 percent in the tills, he accepted that check 5882 had been rung through by him for his own benefit describing that as being him having "succumbed to the temptation of having free food, I guess", n addition he accepted during his disciplinary procedures that he had applied discounts (all to zero) in respect of other employees. Both examples of behaviour involve the under-ringing of the till by the second claimant and all amount to material breaches of contract.

103. The Tribunal was referred to the third claimant's contract of employment. The respondent makes the same submissions in respect of incorporation by reference and aptness for incorporation of the Disciplinary Policy and the Staff Food Policy. The third claimant has always disputed that any of the items rung through on his name were for him and were for other members of staff. His position further was that he was not aware that discounts in addition to the 20 percent were being used. The Tribunal will require to determine whether that evidence is to be accepted in the context of Mr Maxwell having scanned in the other members of staff in question. This position was also mentioned by fourth claimant in his evidence and sixth claimant in her Investigatory interview notes, albeit she did not present herself to give evidence and be cross-examined on that point under oath or affirmation. If that position is factually correct, the Tribunal is invited to find that the third claimant was aware of application of the additional 20 percent as being "a thing" at the time of the checks in question, that his actions in providing other staff with access to the till with the functionality of discounts in such circumstances was a material breach of the implied duty of fidelity in, in effect, facilitating the under-ringing of the till by other, unnamed individuals.

104. The Tribunal was referred to the fourth claimant's contract of employment. The respondent makes the same submissions in respect of incorporation by reference and aptness for incorporation of the Disciplinary Policy and the Staff Food oTcy.nTi6 fourth craim ht app&ared ro accept that one check, DB3, was for his own food, it being first described as possibly his, to him then stating to "happily pay for the one I did", to confirming the question that he admitted to using the 20 Button once for himself. This is again confirmed by Ms Collins

in her closing statement. Both sets of notes were signed by him at the end of the meetings and Mr Thomas confirmed them as accurate and was not challenged in cross in respect of this matter. It is of particular weight that the position of one being for his own use was repeated by his trade union rep. The Tribunal should conclude that his evidence in that respect was simply not credible, if not misleading. Accordingly, the Tribunal should conclude that the fourth claimant committed a material breach of contract. Should that not be accepted by the Tribunal, and the Tribunal considers that fourth claimant did not ring through food with the additional 20 percent discount, the Tribunal is invited to find that the fourth claimant was aware of application of the additional 20 percent by certain staff as taking place at the time of the checks in question, that his actions in providing other staff with access to the till with the functionality of discounts in such circumstances was a material breach of the implied duty of fidelity in, in effect, facilitating the under-ringing of the till by other, unnamed individuals.

105. The Tribunal was referred to the fifth claimant's contract of employment. The respondent makes the same submissions in respect of incorporation by reference and aptness for incorporation of the Disciplinary Policy and the Staff Food Policy. The fifth claimant admitted to under-ringing his own staff meals on the eight occasions contained in the check and that he had "done it himself always". He was accordingly in material breach of contract.

106. The Tribunal was referred to the fifth claimant's contract of employment. The respondent makes the same submissions in respect of incorporation by reference and aptness for incorporation of the Disciplinary Policy and the Staff Food Policy. The sixth claimant disputed that any of the items rung through on her name were for her and were for other members of staff. She said that she was not aware that discounts in addition to the 20 percent were being used. The Tribunal will require to determine whether that evidence is to be accepted. It was however apparently accepted by Mrs Swan in her outcome letter. The Tribunal is invited to find that Ms Dougal's actions in providing other staff with access to the till with the functionality of discounts in such

circumstances was a material breach of the implied duty of fidelity in, in effect, facilitating the under-ringing of the till by other, unnamed individuals.

The Claimants

107. A contract of employment may only be terminated by an employer without notice where the employee has repudiated the contract. This is a matter of fact for the Tribunal to determine.

108. The document "G1 Group HR Policies & Procedures Manual, Issue 6, October 2014", purports to be amongst other things a disciplinary policy. Documents of this nature are not in and of themselves contractual. They regarded as collateral instructions to the employee as to how the contract should be carried out (see *Secretary of State for Employment v Association Society of Locomotive Engineers and Firemen (No 2),* [1972] 2 QB 455). It therefore does not follow that showing a mere breach of any term within the disciplinary policy will be sufficient to establish a breach of contract, much less a repudiation of it.

109. The common law does not, as a rule, create a relationship of *uberrimae fidei* between the parties to a contract of employment (see *Bell v Lever Bros Ltd,* [1932] AC 161). There may be circumstances where such a relationship is created however it is submitted that in the circumstances, this is not the case.

110. To determine whether or not a fiduciary relationship has arisen, "/t *is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer"* (see *Nottingham University v Fishel,* [2000] IRLR 471).

111. In the present context, the claimants were not under any fiduciary duty. The roles carried out by the claimants were those of a typical employment relationship rather than one of the exceptional cases that would create fiduciary obligations. The employees had limited power to bind the respondent with third parties, held no senior roles with *quasi* directorial roles within the respondent's organisation, were remunerated at a fixed rate independent of

the respondent's financial performance and had no responsibilities outwith the duties and functions expected of employees carrying out those particular roles on the respondent's behalf.

112. It is accepted that under some circumstances, an employee is under an implied duty to disclose misdeeds of colleagues to his employer (see *Swain v West (Butchers) Ltd,* [1936] 3 All ER 261). This duty however does not require the employees to go looking for evidence of wrongdoing and does not require them to undertake any form of investigation on its behalf where it expects wrongdoing.

113. It is accepted that implied into every contract of employment is the duty upon both parties not to act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence (see *Malik v Bank of Credit and Commerce International SA, [1997] IRLR 462).*

114. In the cases of the third, fourth and sixth claimants there was no direct evidence of them having inappropriately applied the 20 Button to staff meals. The only evidence linking these claimants to inappropriate use of the 20 Button was that the discount had been applied under each of these claimants* fingerprints. This is not however direct evidence: no one witnessed these individuals imputing the figures into the till. For the reasons set out above, it is likely that at least some of the checks presented by the respondent had been inputted by cinema staff using Lane staff fingerprints.

115. The third and fourth claimants gave evidence that they had not inappropriately discounted staff meals. They were credible and reliable, and the Tribunal should accept their evidence in these respects. Mrs Swan conceded in evidence that she did not suspect that sixth claimant had actually applied the 20 percent discount for herself, but in fact was merely aware that others did (when this position was put to Mrs Swan in cross, she accepted that *"there was more chance [the sixth claimant] was allowing other people"* to apply discount. There has been no breach of either the terms of the disciplinary policy or of the duty of trust and confidence.

116. If the Tribunal finds there was a breach of either the disciplinary policy or of the duty of trust and confidence, the breach was not material and therefore these claimants did not repudiate their contracts of employment. The respondent was not entitled to terminate their contracts without appropriate notice.

117. These cclaimants did not know and, without investigation, could not reasonably have been expected to know which of the cinema staff were inappropriately discounting their meals. As such, their duty to report has not been engaged.

118. If the Tribunal finds the duty to report was engaged and that the claimants were in breach of it, the breach is not material and therefore these claimants did not repudiate their contracts of employment. The respondent was not entitled to terminate their contracts without appropriate notice.

119. In the cases of the first, second and fifth claimants there was a concession that they had inappropriately applied the 20 percent discount to staff meals. While this may amount to both a breach of the disciplinary policy and of the implied duty of trust and confidence, it is submitted that neither of these breaches repudiated the contract and therefore that the respondent was not entitled to terminate the contracts of these individuals without notice.

120. In the cases of the first and second claimants the amounts discounted were small. According to his evidence, the second claimant only inappropriately applied the discount on one occasion. There was no evidence to the contrary (subject to the above discussion in respect of fingerprints appearing beside checks indicating discount was applied, and the lack of causal linkage thereupon). The first claimant apologised and it was clear that her employer had lost neither trust nor confidence with her. The breaches, if found, were not material. While the amount discounted by the fifth claimant was slightly larger, he did apologise it was clear that his employer had lost neither trust nor confidence with him.

Unfair Dismissal

The Respondent

121. The respondent referred the Tribunal to the following cases: *Foley v Post Office [2000] ICR 1283; Sainsbury's v Hitt [2003] ICR 111; Shrestha v Genesis Housing Association [2015] IRLR 399* paras 23-28 & 31; *Hadjioannou v Coral Casinos Ltd [1981] IRLR.*

122. The first and second claimants admitted to committing acts of under-ringing the till. In addition, the second claimant sent the Post and readily admitted to that, albeit for reasons that bear no relation to the words contained in that document. Mrs Swan gave evidence (as did Mr Thomas) that she was satisfied that both had under-rung the till on occasions. The grounds for that belief were the admissions of the claimants.

123. As regards the investigation, the first issue is in respect of the position of Ms Graham. It would now appear that the only basis upon which the claimants could assert that Ms Graham was aware of the practice of the application of the 20 percent discount is the “seen by everyone" comment on the Post. The second claimant accepted this was different from a read receipt attached to an email and Mr Thomas’ evidence that such a message can be displayed when person scrolls passed the message on a touchscreen device such as a phone or tablet. In any event that statement on its own does not give insight into what notice or appreciation was made by any of the readers of the message into its content. In any event, Ms Graham was spoken to, first by Mrs Swan during the disciplinary process, albeit she could not remember precisely when but it is referred to in the first claimant’s disciplinary hearing of. Ms Graham was re-interviewed by Mr Thomas and kept her position. There was nothing else pointing to contradict Ms Graham’s position and Mrs Swan’s evidence as to her views on what more investigation could have been done to explore that matter further should be accepted by the Tribunal. There is no “obvious line of further enquiry”, even though the phrase was used on more than one occasion in cross examination. Noticeably there was nothing specifically identified step of further enquiry that was to have been taken.

Every witness who was asked confirmed that Ms Graham had communicated nothing at all about the issue to lead employees to believe that it would be overlooked. The elapse of around about six weeks between posting and investigation is a short period of time and incapable of reasonably supporting such a conclusion.

124. The next issue in respect of Ms Graham is the question of her involvement as note-taker in the investigations. This matter does not appear to have been raised by any of the employees who had investigatory interviews with Ms Graham as note taker (the second claimant's being noted by Mr McLaren), none of the notes referred to Ms Graham having any speaking role at any of the meetings, and all notes were signed by the employees in question. By the time the matter appeared to be crystallising her involvement had ended. The second claimant had something of an axe to grind against Ms Graham and her capabilities as a manager during his disciplinary hearing and in his evidence before the Tribunal. Mrs Swan weighed the issue of whether Ms Graham had had an unfair advantage in hearing the cases of the claimants in deciding whether to believe her over the second claimant. That was within the band of reasonable responses open an employer. Further, Ms Graham was not involved in the disciplinary processes thereafter.

125. In respect of issues of 'culture', all that was provided by the respective claimants (and by no means all of them), was a collection of generalised, vague and sweeping, tit-for-tat assertions as to other people having consumed food and drink in ways which they did not know how they were accounted for. Whilst some first names were provided (the exception of John Papas is not apt as it appears to have been confirmed he was subject to suspension and then left his employment with the respondent. In the instances where names were given there was no sign at all of time or instances. The steps to investigate such vague allegations falls, beyond the band of reasonable responses. W Thomas unchanSh d SVIcfenceW STfist all examples of under-ringing of the 20 Button prosecuted to disciplinary, and various claimants stated that they had not been aware of the matter for very long, including both the first and second claimants.

126. One further matter raised in evidence was the absence of invitation letters to investigatory meetings. There is no provision in the ACAS Code in that regard, with invitation letters being referred to for disciplinary hearings. Whilst there is mention of invitations to investigatory meetings in the ACAS Guide, that is not part of the statutory Code.

127. It is accepted that issues of mitigation are relevant to the question of the reasonableness of the decision to dismiss. They require to be balanced with the relevant circumstances of the employee's case.

128. In respect of the first claimant Mrs Swan was candid and frank in the grappling she had with the case. The Tribunal is respectfully reminded that Mrs Swan's position was that under-ringing was a very serious charge *("stealing is stealing")* and the first claimant's recognition of it being the *"sneaky 20 percent',* albeit she did not consider that the first claimant was likely to commit a similar act again in the future (in contrast with the other claimants), and that the matter requires to be approached from the standpoint of the band of reasonable responses.

129. In respect of the second claimant the matter is not so balanced. Mrs Swan was clear in her evidence that she considered the second claimant to be the 'ring leader' of this escapade. This is consistent with his position as Team Manager and the terms of the Post. The second claimant's continued insistence that the purpose of the post was to highlight his concern of the matter to Ms Graham as opposed to bringing it to the attention of other staff and encouraging its use was entirely inconsistent with the terminology used and how the message was sent. It was not to his credit that an educated and intelligent man would maintain such a position under affirmation to the Tribunal and the Tribunal should have no hesitation in rejecting it or concluding that it was eminently within the gift of the reasonable employer to reject that contention. The decision to dismiss falls within the band of reasonable responses.

130. In respect of contribution the Tribunal was referred to *BBC v Nelson (No2) [1979] IRLR 346* - where the Tribunal considers there to have been culpable

or blameworthy conduct on the part of the claimant in connection with their unfair dismissal, including behaviour that is perverse, foolish or bloody-minded, or unreasonable. Both claimants satisfy the criteria of *Nelson* in respect of any finding of unfair dismissal that the Tribunal might make.

The Claimants

131. The Tribunal was reminded that the concept of "equity" imports a standard of natural justice into the section98(4) test. This includes the requirement for an employer to approach disciplinary hearings with an open mind and consider any matters advanced by the employee in mitigation (see *Sillifant v Powerll Duffryn Timber Ltd [1983] IRLR 91* per Browne-Wilkinson J at 97:

132. There is an overlap between the procedural requirement to consider matters advanced in mitigation and substantive issues of fairness. While Section 98(4) does not require the employer to investigate every line of an employee's defence the employer is still required to properly apply its mind to the question of the employee's guilt (see *W Wendell & Co Ltd v Tepper [1930] IRLR 96,* per Stephenson LJ at 101).

133. The investigation carried out by the respondent into the allegations was entirely insufficient to fall within even the broad parameters of reasonableness allowed by the *Burchell* test. In respect of all the claimants (including those with insufficient service to present claims of unfair dismissal) , guilt was simply presumed by the employer as being an automatic consequence of their fingerprints appearing beside a discount button on the checks. While the till does not allow for any further interrogation, it was clear from the evidence of all witnesses that it does not necessarily follow that because a person has signed onto the till for any transaction that they are the same person who carried out that transaction. Mrs Swan failed to explore even the possibility of there being any alternative explanation. That is enough to render the entire investigation (and consequently the dismissals following thereupon) unfair.

134. At least some of the cinema staff were improperly applying additional discount using Lane staff fingerprints. Given the presence of these checks at all three

stages of each dismissal (investigation, disciplinary and appeal) and the fact the "cinema staff" explanation was advanced by more than one employee, the failure to properly investigate or even give consideration to these alternative explanations renders the entire process of investigation wholly inadequate.

135. Further, the fact that it was so obvious that other members of staff had been inappropriately discounting their meals, yet only those whose fingerprints appeared on the checks had been investigated (let alone dismissed) is fundamentally unreasonable. To single out employees for dismissal to make an example of them is unfair. No reasonable employer could have dismissed under these circumstances.

136. It was further suggested by Mrs Swan that, even if it was cinema staff who had been improperly applying the further discount, the failure of the employees to either suggest who was responsible or prevent it from happening was sufficient to make their dismissals justified in any event. The logic of this position disintegrates under even the most summary of analysis. There are two main reasons for this. The first is that while the practice of cinema staff using Lane staff fingerprints to order food was both widespread and obvious, the practice of cinema staff applying the 20 percent discount was not: one member of cinema staff could have been improperly discounting his food, and the rest simply and honestly paying the correct amount; alternatively every member of cinema staff could all have been doing it. The second is that the Lane employees would have had no cause to observe their cinema staff colleagues inputting their food orders. There is neither any reason why they would have done this nor any duty of their employment which would have required them to have done so. Having allowed the practice of Lane staff providing fingerprints to cinema staff to develop, the respondent cannot then punish individuals who had not inappropriately applied discount (and who the employer did not reasonably suspect of having inappropriately applied discount) for simply doing what they had always done; that is, allow cinema staff to order food on their tills.

137. The statements taken from both Ms Graham and Ms Furneaux were entirely inadequate and simply served to provide a fig leaf for the respondent's decision to ignore any line of exculpatory inquiry.

138. During Mrs Swan's evidence in chief she stated that the *"ultimate"* factor in her decision to dismiss the first claimant was achieving *"consistency in the cases".* In cross examination, clarification was sought as to whether this desire for consistency was as to consistency of approach, consistency of outcome or both. It was accepted that it was both.

139. The first member of staff dismissed by Mrs Swan was the third claimant who had denied applying the 20 percent discount. Mrs Swan did not believe him and was *"satisfied"* that he had taken advantage of the discount for his own benefit. For these reasons, Mrs Swan felt that he *"didn't have any remorse [as…] he hadn't admitted it and would do it again".* Following his disciplinary hearing Mrs Swan took the decision to dismiss the third claimant.

140. On the contrary, the first claimant had admitted wrongdoing straight from the outset. She had apologised. Mrs Swan believed that the first claimant *"had made a mistake"* and accepted in cross that she believed had she not dismissed the first claimant, she would not have used the 20 Button again. The value of discount applied was small, £4.08. Cost price (that is, the amount actually lost to the business) would likely be smaller still.

141. Mrs Swan's desire to achieve consistency of outcome fatally undermined the fairness of her decision to dismiss the first claimant. She failed to give weight to any of the matters advanced in mitigation by the first claimant. Had she done so, she may not have taken the decision to dismiss the first claimant. The outcome of the first claimant's disciplinary hearing was predetermined before it started.

142. ~~The rights an~~ **employoo** ~~not to be unfairly dismissed~~ **creates a corresponding** duty upon an employer not to unfairly dismiss. This right exists as part of the bilateral employment relationship. It is not a collective right.

143. Mr Thomas failed to properly consider any of the matters advanced by the fist claimant. He did not consider any matters advanced in mitigation. In the words of his appeal outcome letter on [127] he found that *"mitigating circumstances [are] not relevant for me to take into consideration [as] you have been dismissed for a conduct issue".* This line not only reflects Ms Thomas' understanding of the relevance of mitigation to the decision to dismiss, but also that of Mrs Swan. This is also reflected in the respondent's disciplinary policy, which states that employees *"guilty of gross misconduct […] will be dismissed without notice".* There is no discretion provided for in the policy, Similarly, there was no flexibility granted in the approach to the level of sanction imposed on the first claimant by either Mrs Swan or Mr Thomas.

144. The decision of the respondent to prohibit first claimant from attending the appeal hearing with her preferred representative materially contributed to her decision not to attend. As such, her ability to appeal her dismissal was fundamentally compromised.

145. The second claimant conceded that he had used the discount for himself on one occasion, despite knowing it was wrong he *"succame to the temptation of free food".*

146. The reasons for the dismissal were both that he had used the 20 Button for himself and had allowed others to use it. For the reasons set out above, except for the one occasion the second claimant admitted having used the 20 Button, the respondent did not have an honest belief as to the second claimant's guilt.

147. Further, by the time the second claimant attended his disciplinary hearing, he was aware that every other employee had been dismissed. He considered that the outcome was forgone. As discussed above, given the dismissing officer's desire for consistency, it was. The second claimant knew that there was nothing he could have done to affect the outcome either way.

148. The case against the second claimant had the slight distinction of being augmented by an allegation of having been a *"ringleader"* (Mrs Swan). Her

basis for arriving at this conclusion is that the second claimant was a supervisor and had also made a flippant Facebook post about the till. This suspicion, however reasonable, was entirely unsubstantiated by evidence and without any further investigation. As such, it fails on the second and third limbs of the *Burchell* test. This again materially contributes to the unfairness of his dismissal.

149. The appeal hearing was entirely without substance. Mr Thomas made no substantive effort to either review the decision of Mrs Swan or to rehear matters for himself afresh.

Section 10 Claims

The Respondent

150. This is a question of construction. Both the third and second claimants chose Ms Collins. That was who they intimated they had chosen to the respondent. There can be no question that the respondent failed to comply with its obligation to permit the Claimants to be accompanied by the companion chosen by them. How is an employer to know the internal thought process by which an employee chooses a representative?

The Claimants

151. There was evidence of a standing policy of the respondent not to allow Mr Simpson to accompany employees to disciplinary hearings. The respondent prevented Mr Simpson from accompanying the four other claimants.

152. The second and third claimants gave evidence that they were aware of this policy. Although they eventually requested the attendance of Ms Collins at their appeal hearings, both indicated in evidence that Mr Simpson would have been their first choice, but for the existence of the respondent's policy. They were therefore discouraged from requesting Mr Simpson's attendance on this basis.

153. The policy operated by the respondent is sufficient to constitute a "threat" to comply with its obligations under section 10 of the Employment Relations Act

1999. This is a breach of the rights of the second and third claimants and their claims should be upheld.

Discussion and Deliberation

Breach of Contract

154. The Tribunal started its deliberations by considering the breach of contract claims. The Tribunal referred to the contractual terms of each of the claimants. While there were some minor differences the Tribunal was satisfied that each of the claimants' contracts of employment identify that the Disciplinary Policy (outlined in the HR Policies and Procedures Manual) is applicable to them as are the terms and conditions in the G1 Employee Handbook (which includes the staff meals discount policy). The Tribunal also considered that the terms of the Disciplinary Policy and the staff meals discount policy were apt for incorporation as contractual terms.

155. The Disciplinary Policy expressly indicates that conduct amounting to gross misconduct is a material breach in contract. Under ringing of the till is listed as an example of gross misconduct.

156. There was a contractual entitlement to 50 percent discount on staff meals. The Tribunal considered that between July and August 2017 numerous employees knew that The Lane till facilitated further discounts. While they believed that management were aware of this none of the witnesses thought that they were contractually entitled to a further 20 percent.

157. The first claimant admitted that on two occasion she rang through staff food with the increased discount of the additional 20 percent to which she was not entitled. The second claimant also admitted to under ringing for his own benefit and for the benefit of other employees. The fifth claimant admitted to under-ringing his own staff meals on several occasions. The Tribunal concluded that the first, second and fifth claimants were in material breach of contract and dismissed their claims for breach of contract.

158. The Tribunal accepted the evidence that the third, fourth and sixth claimants did not under-ring the till. The Tribunal turned to consider the respondent's submission that as they were aware of the 20 Button and by their actions in providing other staff members with access to the till with the functionality of discounts were in material breach of the implied duties trust and confidence and of fidelity.

159. In the Tribunal's view the respondent assigned supervisor's privileges to the bar staff in The Lane as a convenience for the Duty Manager in the Grosvenor Cafe. The bar staff in The Lane were not supervisors and usually worked on their own. They had no authority over the members of staff in the Grosvenor Cinema or Grosvenor Cafe. As employees the third, fourth and sixth claimant had access to the staff meal policy but this was of little practical assistance in understanding what was required of them in relation to applying their fingerprints when colleagues were ordering staff meals. They were given no specific instruction or training in this regard. In particular they were not instructed to supervise members of staff when they were ordering food. It was common knowledge that The Lane till allowed multiple discounts. The third, fourth and sixth claimants understood that managers were aware of this. Indeed, the Grosvenor Cafe management were certainly aware of it by 13 August 2017 at the latest but did not act upon it immediately. It appeared to the Tribunal that only when the extent of the discounting was realised did management escalate the matter. The Tribunal was not satisfied that there was a breach of implied duties trust and confidence and of fidelity by the third, fourth and sixth claimants. Accordingly, the Tribunal concluded that they were wrongfully dismissed.

Unfair Dismissal

160. The Tribunal then turned to consider the unfair dismissal claims by the first and second claimants.

161. There was no dispute that the reason for the dismissals of the first and second claimants was conduct which is a potentially fair reason for dismissal. Accordingly the Tribunal moved onto consider whether the dismissals were

fair or unfair, having regard to the reasons shown by the respondent, and bearing in mind that the answer depends upon whether, in the circumstances (including the size and administrative resources of the respondent's undertaking) it acted reasonably in treating the reason as a sufficient reason for dismissing the first and second claimants and this should be determined in accordance with equity and the substantial merits of the case.

162. The Tribunal noted that when considering the reasonableness of the respondent's conduct that it must not substitute its own decision as to what the right course to adopt for that with the respondent.

163. The Tribunal then considered, applying the range of reasonable responses approach, whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the first and second claimants had under rung the till.

164. The Tribunal turned to consider the investigation. Ms Furneaux was informed that The Lane till was allowing multiple discounting when used in conjunction with the 50 Button. She looked at till reports for the previous weeks and noted a number of Grosvenor Cinema staff who had done this which included the first and second claimants. She also read the Post. Given the number of staff involved and that it effected the Complex she sought advice. Following which she decided to interview each member of staff involved.

165. Despite Ms Graham being part of the Facebook page and ostensibly having seen the Post Ms Furneaux asked Ms Graham to take notes during the investigation interviews of the claimants except the second claimant whose investigation was conducted via telephone in the presence of Mr McLaren. While the Tribunal considered that it was reasonable for Ms Furneaux to ask Ms Graham to take notes it was surprising that Ms Furneaux did not seek clarification of Ms Graham's awareness of the Post before doing so or even after it was raised by the second claimant. It was also unfortunate that Ms Furneaux did not ask Ms Reid to provide a statement at about when and how the matter came to her attention given Ms Reid's subsequent difficulty in recollecting the details.

166. The first and second claimants admitted to committing acts of under-ringing the till at their investigatory interviews.

167. The investigation continued throughout their disciplinary hearings. Neither claimant denied under-ringing. The first claimant said that she thought the Ms Graham knew about the matter as the Post indicated that it was seen by everyone. Mrs Swan spoke to Ms Graham who said that she had been on holiday and did not remember seeing the Post. Mrs Swan accepted Ms Graham's position. While the Tribunal considered that other employers might have had doubts or even questions about this given the common knowledge and belief among staff the Tribunal could not say that it was not within the band of reasonable responses for Mrs Swan to have reached this conclusion.

168. Given the admissions made by the first and second claimants the Tribunal concluded that the investigation carried out by the respondent up to and including the disciplinary hearings fell within a reasonable band of responses to the situation.

169. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

170. As regards the investigation and the conduct of the disciplinary hearings for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation.

171. The Tribunal was satisfied that before the disciplinary hearings the first and second claimants were aware of the allegations against them and had been provided with the documentation. They were given an opportunity to respond. The first claimant chose not to be represented and the second claimant was accompanied by Ms Collins.

172. Mrs Swan believed that the first claimant has under rung the till. This was an act of gross misconduct. The Tribunal observed that the letter inviting the first claimant to the disciplinary hearing referred to the allegation of gross misconduct and the potential consequences.

173. The Disciplinary Policy gives under-ringing of the till as an example of gross misconduct and where an employee is found guilty of gross misconduct they "w*/// be dismissed without notice".*

174. The Tribunal considered that where an employer sets a policy in advance an employer may follow it provided the employer and the tribunal do not shut their minds and deliver an automatic conclusion but take into account the facts of the case against the background of that policy.

175. Before the first claimant's disciplinary hearing Mrs Swan had already dismissed summarily the third and fourth claimants.

176. The Tribunal observed that it was agreed that there was no history of any misconduct by the first claimant. She was a long serving employee with an exemplary record and highly regarded. It was also agreed that the first claimant had applied additional discounts on 8 and 16 August 2017 of £2.18 and £1.89 respectively. The respondent has a policy warning employees what to expect if any misconduct involved under-ringing of the till. The first claimant at once admitted the misconduct. She accepted that her behaviour was inappropriate, took responsibility and apologised.

177. Mrs Swan sought advice. Having already dismissed the third and fourth claimants the clear instructions that she received from professional advisers was to be consistent. The Tribunal considered that Mrs Swan felt constrained by the wording of the Disciplinary Policy and the advice to be consistent. Mrs Swan did not take into account the facts of the first claimant's case including mitigation and alternatives to dismissal but instead delivered an automatic conclusion of dismissal.

178. The Tribunal concluded that Mrs Swan's decision to dismiss the first claimant was predetermined and an automatic conclusion. She did not take into account the mitigating factors put forward by the first claimant.

179. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

180. As regards the investigation and the conduct of the disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation. The first claimant was aware of the case against her and at the disciplinary hearing he was given an opportunity to explain her position but the decision to dismiss was predetermined.

181. The Tribunal then considered the appeal process. It was satisfied that Mr Thomas had no previous involvement in the case. However, the Tribunal was not convinced that he approached the appeal hearing with an open mind and carefully considered the issues and the evidence before him. The Tribunal's impression was that he was going through the motions and had no intentions of over-turning Mrs Swan's decision. He did not consider any mitigating circumstances and appeared to be confused about the need to do so when there was gross misconduct.

182. The Tribunal considered that the respondent had not carried out a reasonable and proper procedure and the decision to dismiss the first claimant fell outwith the band of reasonable responses which a reasonable employer might have adopted.

183. The Tribunal concluded that the dismissal of the first claimant was unfair. The Tribunal did not consider remedy at this stage. However, in view of the first claimant's admission to using the *"sneaky 20 percent"* it did consider the issue of contributory fault. In the Tribunal's view while the first claimant believed that Ms Graham knew about the additional 20 percent discount the first claimant also knew she was not contractually entitled to it and she was foolish to have done what she did. The Tribunal considered that the first claimant knew that she had made an error in judgment and would not repeat it. The Tribunal concluded that the first claimant contributed to her dismissal to the extent of 30 percent.

184. Turning to the second claimant's unfair dismissal claim. Mrs Swan believed that the second claimant has under rung the till and had reasonable grounds for so doing. This was an act of gross misconduct. The letter inviting the

second claimant to the disciplinary hearing referred to gross misconduct and the potential consequences.

185. As indicated above the Disciplinary Policy gives under-ringing of the till as an example of gross misconduct and where an employee is found guilty of gross misconduct they *"will be dismissed without notice".* The Tribunal considered whether in relation to the second claimant the respondent shut its mind and deliver an automatic conclusion or considered the facts of the second claimant's case against the background of that policy.

186. Before the second claimant's disciplinary hearing on October 201 7 Mrs Swan had already dismissed summarily the other claimants and Mr Thomas had upheld the decisions in respect of the third, fourth, fifth and sixth claimants. The first claimant had withdrawn her appeal although it was considered on papers in November 2017.

187. There was no history of any misconduct by the second claimant. He was a long serving employee who had worked in various capacities and had recently been appointed Team Leader. The respondent had a policy warning employees what to expect if any misconduct involved under-ringing of the till. The second claimant admitted the misconduct and accepted that he should not have encouraged people to use the 20 Button. He expected managers to see the Post.

188. The Tribunal considered that Mrs Swan having dismissed the other claimants and in particular the first claimant delivered an automatic and pre-determined conclusion of dismissal of the second claimant.

189. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

190. As regards the investigation and the conduct of the disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation. The second claimant was aware of the case against him and at the disciplinary hearing he was given an opportunity to explain his

position but the decision to dismiss was predetermined. The Tribunal felt that the second claimant knew this which was why he raised concerns about the management and culture in the business.

191. The Tribunal then considered the appeal process. The Tribunal was not convinced that Mr Thomas approached the appeal with an open mind and carefully considered the issues and the evidence before him. The Tribunal's impression was that Mr Thomas had no intention of upholding the second claimant's appeal regardless of what was said at the appeal hearing.

192. The Tribunal concluded that the respondent had not carried out a reasonable and proper procedure and the decision to dismiss the second claimant fell outwith the band of reasonable responses which a reasonable employer might have adopted.

193. The Tribunal concluded that the dismissal of the second claimant was unfair. The Tribunal did not consider remedy but did consider the issue of contributory fault. In view of the second claimant's admission to posting the Post which encouraged others to use the 20 Button; using the 20 Button for himself and other colleagues to reduce the checks to zero; continuing to insist that the Post was intended to bring the issue to Ms Graham's attention; and failing to acknowledge that the Post was an inappropriate means of so doing the Tribunal concluded that the second claimant contributed to his dismissal to the extent of 100 percent.

Section 10 Claims

194. The Tribunal noted that the respondent conceded that the first claimant's claim under section 11 of the Employment Relations Act 1999 was well founded and made a declaration to that effect.

195. In relation to the second and third claimant the Tribunal accepted that they were invited to disciplinary hearings and wanted to be accompanied by Mr Simpson. However, in the absence of making the respondent aware of that choice and instead intimating that they wish to be accompanied by Ms Collins, meant that the respondent had not failed to comply with its obligation to permit

the second and third claimants to be accompanied by the companion chosen by them. Accordingly, their complaints under sectionll of the Employment Relations Act 1999 are not well founded.

5

Employment Judge: **S Maclean**
Date of Judgment: **14 August 2018**
Entered in register: **20 August 2018**
and copied to parties