EMPLOYMENT TRIBUNALS

Claimant: **Mr D Lewis**

Respondent: **WM Morrison Supermarkets PLC**

Heard at: **Cardiff (via CVP)** **On:** 16 & 17 March 2022

Before: **Employment Judge G Cawthray**

Representation
Claimant: In person
Respondent: Ms. Ahmed, Counsel

RESERVED JUDGMENT

1. The Claimant was fairly dismissed. The Claimant's claim of unfair dismissal is dismissed.

2. The Respondent made an unlawful deduction from the Claimant's wages whilst he was suspended. A remedy hearing will be listed to determine the shortfall in the wages payable for the periods of suspension due to non-payment of night shift supplement between February and May 2021.

3. The Respondent has not made an unlawful deduction from wages claims in relation to holiday pay and for payment on 10 May 2021. These claims are dismissed.

4. The Claimant's complaint of breach of contract, in relation to notice pay and bonus pay, is not well founded and is dismissed.

5. The Respondent is ordered to pay the Claimant additional compensation of four weeks' pay pursuant to section 38 of the Employment Act 2002 for failure to provide the Claimant with a written statement of employment particulars. A remedy hearing will be listed to determine the sum payable.

REASONS

Issues

Unfair dismissal

1. Was the Claimant dismissed? Yes
2. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.
3. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:
   - there were reasonable grounds for that belief;
   - at the time the belief was formed the Respondent had carried out a reasonable investigation;
   - the Respondent otherwise acted in a procedurally fair manner;
   - the dismissal was within the range of reasonable responses.

Wrongful dismissal / Notice pay

4. What was the Claimant's notice period?
5. Was the Claimant paid for that notice period?
6. If not, was the Claimant guilty of gross misconduct? Did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Unauthorised deductions from wages

7. Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted? That involves considering the following: Were the wages paid to the Claimant less than the wages he should have been paid? The Claimant says he is owed the following: payment for 10 May 2021, payments for night shift premiums throughout his suspension and payment for holiday that was taken whilst he was suspended in March 2021.
8. Was any deduction required or authorised by statute?
9. Was any deduction required or authorised by a written term of the contract?
10. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
11. Did the Claimant agree in writing to the deduction before it was made?
12. How much is the Claimant owed?

Breach of Contract

13. Did this claim arise or was it outstanding when the Claimant's employment ended?
14. Did the Respondent do the following: Not pay the Claimant an annual bonus whilst he was suspended.
15. Was that a breach of contract?
16. How much should the Claimant be awarded as damages?

Failure to provide written statement of employment particulars

17. If the Claimant succeeds in another claim and it is found that he had not been provided with a written statement of particulars, should he be awarded additional compensation of 2 or 4 weeks' pay under section 38 of Employment Act 2002?

Evidence/Procedure

18. The Respondent prepared a Bundle of Documents that amounted to 449 pages. The Claimant was initially concerned that not all the documents he required were included within the Bundle, but after discussion it was clarified that they were, and the Respondent's solicitor had added them to the end of the Bundle. At the start of the hearing, I explained to the parties that I must be directed to the documents they wished me to read, and both parties provided a list of pages – which I read. I was also directed to documentation throughout the course of the hearing.
19. The Claimant submits that the policies within the Bundle are not the correct versions, and are out of date. At no point during the course of the hearing did either party provide any updated policies and the Respondent was of the view that the correct policies were included in the Bundle.
20. The Claimant had provided a written witness statement which appended a response to the Respondent's Document Submission and a response to Record of Formal Meeting. These documents together were taken as the Claimant's written evidence. The Claimant also gave oral evidence. The Claimant also provided a skeleton argument, but we clarified the issues in detail and at length during a discussion at the start of the hearing, as set out above.
21. Throughout the hearing the Claimant was supported by Diane Spence, and although she had provided a witness statement, she was not called as a witness and therefore I did not consider her witness statement.
22. The Respondent called two witnesses, Richard Thornton and Sarah Ford. Both witnesses provided witness statements and gave oral evidence.
23. Both parties provided oral submissions.

Findings of Fact

<u>General</u>

24. The Claimant started his most recent period of employment with the Respondent on 11 May 2018. The Claimant had previously worked at the Respondent. The Claimant was provided with a Statement of Terms and Conditions (the contract) on 11 May 2018. His job title was Market Street Baker. At this time, as per the contract, he was employed to work 36.75 hours per week. In relation to working hours the contract states:
    "Further details are set out in the Colleague Handbook. The Company retains the right to vary these days/hours according to the needs of the business."
25. The Claimant was employed on a permanent basis.
26. Clause 4 of the contract states: *"Rate of Pay: Your rate of pay is £8.70000 per hour plus any supplements to which you are eligible as set out in the Colleague Handbook. Your rest and lunch breaks are unpaid. You will be paid at 4 weekly intervals in arrears by bank credit transfer."*
27. The Colleague Handbook was not included within the Bundle.
28. Clause 14 of the contract sets out the entitlement to notice. As an employee with more than 2 years but less than 12 years' service, the Claimant was entitled to one weeks' notice per completed year of service.
29. In October 2018 the parties agreed to vary the Claimant's working hours, and he reduced his hours to approximately 22 hours per week. The evidence is not entirely clear or conclusive on the exact working hours and days, but the Claimant worked three shifts per week.

30. The Respondent's store bakeries generally do not work during the night. However, there are periods in which the bakery operates during the night to meet business demands, one example being the Christmas/festive period.
31. During the Christmas period of 2019 the Wrexham store (where the Claimant was based), operated the bakery overnight to meet customer demand.
32. At some time towards the end of January/early February 2020, Eddie Pritchard, Wrexham Store Manager, and Natalie Hamlet, discussed some potential changes to working hours with the Claimant, and another colleague and asked them to work night shifts at the bakery. Following discussions, the Claimant sent several emails on 11 February 2020, 3 March 2020 and 9 March 2020 in relation to night working arrangements. The Claimant asked for a revised contract of employment. The Respondent did not reply to the emails, and no revised contract of employment was provided. No contract variation letter was provided.
33. In March 2020 the pandemic meant the additional need for overnight bakery cover continued.
34. The Claimant worked Sunday, Monday and Tuesday nights in the Bakery from 15 March 2020. Initially the Claimant's night working hours were 10.00pm to 8.00am but from approximately September/October 2020, the Claimant had worked 9.00pm to 7.00am. Different documents within the Bundle refer to different night working start dates, however, I find that the Claimant worked the three nights shifts from15 March 2020, possibly a little earlier.
35. The Claimant has a clear and strong view that following his discussions with Mr. Pritchard he was employed under a permanent and fixed night baking contract. His belief is set out in various emails he sent throughout his employment.
36. In October 2020, the Claimant submitted a mortgage reference request. There was significant questioning during the hearing about the content of the mortgage reference. The Claimant is of the view that the mortgage reference is evidence that he was employed under a permanent and fixed night baking contract.
37. On 25 November 2020 the Claimant handed Richard Devlin, Market Street Manager, a document setting out his views on the hours that he was contracted to work.
38. On Monday 14 December 2020, Mr. Devlin discussed night working with the Claimant and Kate Mitchell. Mr. Devlin made a note of discussion. It had been determined, following a business review, that there was no longer a need for night cover in the bakery and COVID-19 staff absences had stabilised. Mr. Devlin outlined that the Bakery planned to move to a 3.00am start, and explained the benefits. The Claimant did not agree with the benefits as explained by Mr. Devlin. The Claimant stated: *"I will be challenging this legally and it wont be through Morrisons."* Mr. Devlin explained that the Claimant and Ms. Mitchell would be given four weeks' notice of the change in hours. There was no proposal at that stage that the Claimant would work elsewhere in the store, rather that he would remain in the bakery but would be working different hours, starting at 3.00am.
39. On 4 January 2021 the Claimant wrote to Mr. Devlin setting out his view of the basis of his employment and stated that he did not accept changes to contractual hours, and that he would continue to work shifts of 9.00pm to 7.00am Sunday, Monday and Tuesday. The Claimant referred to guidance from ACAS and an employment law professional.
40. The Claimant engaged in further email correspondence with the Respondent in relation to his mortgage reference in December and January 2021. Again, he set out his views in writing and on 6 January 2021 Jenny Savage emailed the Claimant and informed him that he was not recorded as being a night worker on the Respondent's system and the night worker was a trial which was due to end following a period of notice. The Claimant considered the mortgage reference request dated 6 January 2021, page 150 of the Bundle, was evidence and stated that he was a permanent night time baker. The form contains the following details, within various separate boxes:
    Job title – Market Street Baker

Status – Part-time Permanent
Weekly hours – 28.5 hours per week
Rate of pay - £9.20 basic hourly rate of pay, £1.20 per hour of skill supplement, £2.35 per hour night uplift
Basic pay - £299.00 per week
Night uplift/skill supplement - £374.87 per 4 weekly.

41. At no place does it state the Claimant was a permanent night worker, but it does record the sums paid to the Claimant. However, the calculations used are unclear, for example, 28.5 hours X £9.20 = £262.20, not £299.00, and £1.20 + £2.35 =£3.55 , £3.55 X 28.5 hours = £101.18. £101.18 X 4 weeks = £404.72, not £378.87.
42. If basic pay, recorded as being £299.00 per week, was actually calculated as including the basic rate of pay £9.20 plus the £1.20 skill supplement this would make a combined rate of £296.40. This is closer to the recorded rate of weekly basic pay being £299.00. However, if the night uplift/skill supplement only included the £2.35 x 28.5 hours x 4 weeks that would equal £267.90.
43. The mortgage reference is not helpful in clarifying pay rates.
44. On 13 January 2021 the Claimant emailed Clare Grainger setting out his concerns regarding the change to working hours and referring to his letter dated 6 January 2021 to Mr. Devlin. As set out above, and as at page 151 of the Bundle, the letter from the Claimant to Mr. Devlin was 4 January, not 6 January.
45. The Respondent considered the contents of the email amounted to a grievance, and on the same day, 13 January 2021 Laura Fry, People Manager, wrote to the Claimant to provide an update and provided a copy of the Grievance Policy. Also on 13 January 2021 Tom Shield, Operations Manager, wrote to the Claimant inviting him to attend a grievance hearing that had been scheduled for 20 January 2021.
46. On 19 January 2021 the Claimant emailed Mr. Shields and Ms. Fry stating that he had not raised a grievance, but rather an informal challenge to the proposed contractual changes, and stated he would not attend the grievance hearing but would discuss after he received a response to his letter on 6 January 2021.
47. On 19 January 2021 Rachel Edwards, Regional Manager, and Mr. Pritchard exchanged emails about the situation.
48. In January 2021 the Respondent tried to discuss the situation with the Claimant, the Claimant did not engage.
49. On 20 January 2021 Mr. Pritchard wrote to Claimant setting out his understanding of conversations between them and the Claimant's contracted hours. In particular, the letter stated:
"In March 2020, we required some additional baker/cake shop cover overnight to cover unplanned absences, which you agreed to support temporarily. Throughout this period your substantive contract of Baker (Customer Assistant) based on day shift remained unchanged however you would have received the night supplement throughout the period of temporary cover.
Following a review of requirements, we are now in a position to revert back to our usual day operation due to absences stabilising.
To support you reverting back to day shift, we wanted to provide you reasonable notice to this change, which will be 4 weeks effective from 20 January 2021. Therefore, you will be required to return to your substantive contractual hours effective from 17 February 2021."
50. The letter did not set out what the substantive contractual hours were considered to be.
51. On 16 February 2021, a law firm instructed by the Claimant wrote to Respondent. The letter closed by stating the Claimant would continue to work 9.00pm to 7.00am Sunday to Tuesday.
52. The Respondent wrote to the Claimant directly on 19 February 2021, explaining that it would liaise with the Claimant directly as it considered it to be an internal matter, reiterating the view that the move to night work was temporary and clarifying that the shift patterns the Claimant was expect to return to were 3.00am

to 12.00 pm on 23, 24 and 28 February 2021 (Tuesday, Wednesday and Sunday).

53. On 20 February 2021 the Claimant replied, disputing the events as outlined by the Respondent.
54. On 22 February 2021 the Claimant exchanged emails with Mr. Pritchard, and Mr. Pritchard stated the Claimant's next shift was due to commence at 3.00am on 23 February 2021. Mr. Pritchard explained the Claimant's concerns could be considered independently under the Respondent's grievance process. The Claimant responded and stated he would be working that night, 22 February, in accordance with his contract and that he did not expect to be approached unless about a direct work matter.
55. Mr. Pritchard forwarded the email correspondence to Leighton Griffiths and Ms. Edwards. Ms. Edwards stated *"Let's stick to the plan".* The Claimant suggested that there was a plan to remove him. The email also states *"1-1 to begin with of course".* Considering the latter conversation with the Claimant, as summarised in paragraph 58 below, I find that the plan referred to seeking to discuss the situation with the Claimant, should he arrive in work at 9.00pm on 22 February 2021, rather than at 3.00pm on 23 February has he had been asked to do.
56. The Claimant was listed on the rota to start work at 3.00am on 23 February 2021.
57. The Claimant arrived at work at 8.55 pm on 22 February 2021.
58. A conversation between the Claimant and Sam Genders was recorded by Graham Pryor. In short, Mr. Genders asked the Claimant why he had clocked on to work at 8.55pm when he was on the rota to start at 3.00am the next day. The Claimant said it was a legal matter and did not want to talk about it. Mr. Genders asked the Claimant to move to the office to have a conversation and the Claimant refused.
59. A brief conversation did take place between the Claimant and Mr. Genders, as recorded in the note, but no meaningful discussion about the situation took place as the Claimant did not agree to moving to an office to have a further conversation.
60. After the Claimant's refusal to engage in a meaningful discussion, Mr. Genders suspended the Claimant pending investigation.
61. The note says *"So you are refusing to come and have a talk reasonable request with us, Dan said yes!"* It is noted that the words "reasonable request" is in slightly smaller writing and go over the margins, but I am unable to make any findings of fact on whether the words were noted at the time, or later added. However, I do find that a manager asking an employee to move to an office to have a detailed conversation about working hours and the Claimant's attendance at work is a reasonable request.
62. At the close of the meeting the Claimant referred to the matter going to Tribunal.
63. The Claimant considered the Respondent had lay in wait for him, and had a pre-prepared plan. Based on the documentation, I find that the Respondent was expecting, given the Claimant's approach to that date, to arrive outside of the shift that they had allocated to him, and that they had prepared for this eventually, ensuring that staff were available and ready to try and discuss the situation with the Claimant. As there was a dispute about working hours, I find it reasonable for the Respondent to try and engage with the Claimant directly in both writing and orally about his working hours.
64. Mr. Pritchard wrote to the Claimant confirming the basis of his suspension on 23 February 2021. The letter states that during his suspension he would receive basic contractual pay. He was invited to an investigation meeting scheduled for 26 February 2021. The Claimant wrote on 25 February 2021 explaining that the investigation meeting would need to be re-scheduled to one of his working days
65. The Claimant submitted a grievance on 26 February 2021.
66. On 1 March 2021 a conversation took place between the Claimant and Ms. Edwards regarding the basis of the Claimant's working hours and role.
67. A grievance hearing was arranged for 9 March 2021, and the Claimant's grievance was heard by Richard Jones, Wrexham Store Manager. At the close of

the Grievance Meeting it was explained to the Claimant that the aim was to get him back working, that options would be looked at and compromise would be needed.

68. Disciplinary investigation meetings took place on 2 and 23 March 2021. The meeting was conducted by Richard Jones. During the meeting it was explained to the Claimant that within the Respondent's structure there was no role of Bakery Night Assistant, but rather the Claimant was a baker who had been working nights and received a supplement. The notes of the meeting at page 217 state the Claimant stated: *"I have a high success rate at a tribunal".* In response to questioning in cross examination, the Claimant stated he had not previously been to an Employment Tribunal. I have not made any findings of fact in this respect, but have set out where the Claimant has referenced recourse to the Tribunal and note that the Claimant's oral evidence at the hearing is inconsistent with what was recorded in the notes. The meeting was paused on 2 March to enable the grievance meeting to take place.

69. The investigation meeting was reconvened on 23 March 2021. It was acknowledged by Mr. Jones that he considered there to be communication issues, that he would have treated the situation differently. Mr Jones explained that the suspension was going to be lifted, and that the night shift would be honoured whilst the situation was resolved but that the Claimant would be working on the grocery department. The Claimant stated he was unhappy as it would mean a lose money, however it was explained to him that would not be the case. The Claimant again referred to moving the matter to Tribunal. The Claimant repeated he was not happy to move out of the bakery. Mr. Jones stated he would take away the Claimant's comments and confirm location but that there was not a night time position in the Bakery.

70. Mr. Jones attempted to call the Claimant, and emailed him on 26 March 2021 explaining that: *"As agreed at the meeting we went away and followed up with the department. As discussed the expectation is that you will work on Grocery. Nights and hours will remain the same, as will pay, while we continue to work towards a resolution and hear the grievance in full."*

71. The Claimant replied stating he would return to his current nights in the Bakery and that there was no alternative.

72. Ms. Fry replied on the same day explaining that the move to grocery was a reasonable adjustment whilst continuing to resolve the matter, and again explaining that there was no position on nights for a Baker.

73. At 13:37 on 28 March 2021, in advance of the shift commencing at 9.00pm, the Claimant emailed the Respondent and explained, in short, that he believed he still had a valid night baking contract and would not work in the Grocery and would be returning to the Bakery.

74. The Claimant chose not to email the managers on shift on 28 March 2021.

75. On 28 March 2021 the Claimant attended work at the agreed time of 9.00pm but he attended the Bakery. The lights in the Bakery were on. Wave baking was due to end at 10.00pm. The Claimant did not seek out a manager on shift. He had been instructed that he would be working on the Grocery. Shortly after 9.00pm Ms. Fry and Michael Weston, Night Manager, undertook a walk on the shop floor and discovered the Claimant in the Bakery. Ms. Fry explained to the Claimant that he was supposed to be working in the Grocery, and asked him several times to go and work on the shop floor. The Claimant refused. Ms. Fry explained that if he wouldn't work on the shop floor he would need to leave the building, on full pay. The Claimant refused, Ms. Fry explained to the Claimant that if he would not leave, she would need to call the police. Ms. Fry went and discussed the matter with Ms. Edwards on the telephone, and returned a short time after and asked the Claimant to discuss the matter in the office. Once in the office Ms. Fry asked the Claimant again if he would work on the shop floor, and if not, would he go home. The Claimant again refused to work on the shop floor and said he would not go home. Ms. Fry explained that she had no choice but to suspend the Claimant on full pay.

76. A note of the interaction was taken by Mr. Weston and is in the Bundle. The note records the Claimant stating he felt persecuted. The note does not record there to be any raised voices, or any physical signs of upset between the parties but rather notes generally the conversation was calm and controlled, earlier noting the Claimant had been agitated but resumed a calm demeanour.
77. I find, on the balance of probabilities, that although the meeting was calm and controlled the content of the discussion was difficult and challenging, evidenced by the Claimant's repeated refusal to move to the shop floor and leave the building, resulting in the People Manager, Ms. Fry, feeling the need to call management and comment with recourse to the police.
78. The Claimant was suspended, on basic contractual pay, on 28 March 2021.
79. The Claimant submitted a grievance on 29 March 2021. The grievance related to the actions of Ms. Fry and Ms. Edwards. Within the Claimant's grievance he states that Ms. Fry, after returning to meet with him following speaking to Ms. Edwards. Was *"visibly shaken, and her voice tremored when she spoke – somebody had clearly installed fear into her."* I find this was the Claimant's perception.
80. There is an unsigned letter in the Bundle at page 227. The letter is dated 28 March 2021 and sets out the basis of the Claimant's suspension and states that the Claimant will be invited to an investigation meeting, and that the date and time would be confirmed.
81. The Respondent's People Team collated the investigation documents relevant to the situation and sent them to Richard Thornton, Regional Manager. Mr. Thornton was asked to pick up the disciplinary. On receipt Mr. Thornton reviewed the documentation to ensure he had enough factual information to undertake a disciplinary hearing. Mr. Thornton concluded that he had enough factual information to move to a disciplinary hearing. Mr. Thornton was clear that in other cases, where he had felt that sufficient investigation had not been undertaken, he had referred the matter back to the investigating officers.
82. On 23 April 2021, Mr. Thornton. wrote to the Claimant inviting him to attend a disciplinary meeting. The letter set out Mr. Thornton's understanding of the background events and details of the documents he had reviewed. The letter invited the Claimant to attend a disciplinary meeting on 30 April 2021 and explained the allegation for consideration was: *"an allegation of gross misconduct specifically serious insubordination resulting in you working in breach of your contract and against the required ways of working in your role of Baker."*
83. The letter also explained that the Claimant's grievance would be heard before the disciplinary hearing and advised the Claimant that he could bring a work colleague or trade union representative to the meeting and that potential outcomes were dismissal for gross misconduct or formal warning.
84. The invitation letter sets out what documents were obtained as part of the investigation, and enclosed a copy of the documents. The documents listed as those obtained as part of the investigation are the documents Mr. Thornton considered when determining how to move forward.
85. At page 238 of the Bundle, the invitation letter states: *"As a result you are working in breach of your contract and have continually failed to follow a reasonable management request to return to your substantive role".*
86. The Claimant wrote to Mr. Thornton on 26 April 2021, setting out his response to points raised in Mr. Thornton's letter. The Claimant also expressed his view that an investigation meeting should take place before a disciplinary meeting, and asked Mr. Thornton to explain the approach.
87. On 29 April 2021 Mr. Thornton wrote to the Claimant, and in relation to the need to investigate, he explained that he considered that sufficient investigation had been carried out for him to determine that it was appropriate to move to a disciplinary hearing. The letter also explained that if Mr. Thornton felt it necessary, he could pause the disciplinary hearing to undertake any further investigation necessary. It also explained that due to the close link with the grievance and the disciplinary allegations, Mr. Thornton would also chair the

grievance meeting, which would take place at the start of the disciplinary hearing. The grievance meeting and disciplinary hearing were scheduled for 11 May 2021.

88. The Claimant wrote to Mr. Thornton again on 6 May 2021, repeating his views on process.
89. On 8 May 2021, Mr. Thornton wrote to the Claimant confirming that the position was that he would be proceeding to a disciplinary, and repeated that if he felt it necessary for any further investigation to be undertaken, the disciplinary would be paused.
90. The Claimant wrote further to Mr. Thornton on 9 May 2021, with his views on non-compliance with the Respondent's policies.
91. In advance of the disciplinary hearing, the Claimant prepared a written submission.
92. The disciplinary hearing was conducted by Mr. Thornton 11 May 2021. Tracey Phillips attended as a notetaker and the Claimant was accompanied by his trade union representative, Barry Roberts. The hearing commenced at 1.30pm and finished at 3.40pm.
93. At the outset of the hearing the Claimant's grievance was first discussed and considered. The Claimant explained that he considered Ms. Edwards was persecuting him and that Ms. Fry was terrified of her. At some stage a video call had taken place to discuss work arrangements and at the hearing the Claimant stated that Ms. Edwards had told him it was her decision to cease night baking operations.
94. During the grievance part of the hearing the Claimant repeated his view that Ms. Edwards had a goal to prevent the Claimant from returning to work in the Bakery. Mr. Thornton explained that the role of night baker did not exist in the Respondent's structure. A discussion took place, Mr Thornton asked the Claimant a number of questions and the Claimant put forward his views and comments. The Claimant repeated his view that the Respondent could not change his contract. The Claimant did not accept that a request to move to Grocery, on the same hours and pay, whilst the contract issue was discussed was a reasonable request by the Respondent.
95. The Claimant read out the statement he had prepared in advance of the hearing.
96. Mr. Thornton explained to the Claimant how he considered the grievance and the disciplinary matters were linked and that he would be moving into the disciplinary stage of the hearing.
97. The disciplinary part of the hearing commenced at 1.50pm.
98. The Claimant stated he was not clear on the allegation against him and that he had not had time to prepare. Mr. Thornton explained the allegation was in the letter dated 23 April 2021 and read out and reminded the Claimant of the allegation, explaining specifically that the issue was that he seemingly refused to go to grocery when asked to do so and failed to leave the store when asked to do so on 28 March 2021.
99. Mr. Thornton then adjourned the hearing for a short break at 1.58 and returned at 2.05pm. A detailed discussion about the allegations and key events took place in which Mr. Thornton asked the Claimant a number of questions to ascertain the Claimant's position on and account of events. Again, during the course of the disciplinary hearing the Claimant referenced a Tribunal. Before adjourning to consider the issue Mr. Thornton asked the Claimant if there was anything further he wished to add.
100. The hearing was adjourned at 2.42 and Mr. Thorton considered the matter. The hearing was reconvened at 3.32. Mr. Thornton explained the basis of his decision, as set out in the notes of the meeting. In short, Mr. Thornton determined that asking the Claimant to temporarily work on the Grocery whilst the contract issue was considered was a reasonable request and that although the Claimant had been clearly told about the request to work on Grocery he refused to agree to it, as set out in the Claimant's emails, which Mr. Thornton determined to be insubordination. Mr. Thornton further determined that the Claimant attending work on 28 March and refusing to move to the Grocery and

refusing to leave the store after Ms. Fry made several requests, resulting in Ms. Fry feeling the need to potentially call the police, amounted to a blatant disregard for a reasonable management request and was serious insubordination.

101. Mr. Thornton considered the Claimant's comments on mitigating factors and considered the Claimant's view on the basis of his contract but determined the Claimant should be summarily dismissed. Mr. Thornton explained he did not consider there to be any other possible outcomes as he did not believe the Claimant would listen to the Respondent's management or follow reasonable requests.

102. The disciplinary outcome was also set out in a letter from Mr. Thornton dated 17 May 2021, in short explaining that he had been summarily dismissed for gross misconduct, the misconduct being: *"serious insubordination resulting in you working in breach of your contract and against the required ways of working in your role of Baker."*

103. The letter goes on to explain clearly the basis of the finding of insubordination: . *"Laura Fry, People Manager then confirmed to you in her email on 26th March 2021 that we wanted you to return to Grocery on the same hours and pay whilst we find a resolution. Your email on 26th March and 28th March (26th March email by your own admission but not seen by myself) you stated that you would be returning to Bakery even though you acknowledged that you had been told that this role does not exist and we have asked you to work elsewhere. I believe this is to be serious insubordination and failure to follow a reasonable request made by management. Furthermore, when you returned to work on 28th March 2021 you admit that you were asked by Laura to work on the shop floor to which you refused. Laura then asked you to leave the building on full pay and again you refused. After at least four refusals Laura felt the need to potentially call the police. This blatant disregard for a reasonable management request in my mind is wholly unacceptable."*

104. It also states: *"In summary, I find your behaviour following a reasonable request to be serious insubordination, a deliberate and serious non compliance to the Morrisons ways of working, and is a breach of your contract."* The letter clearly explains the decision to dismiss and the basis for dismissal.

105. The Claimant appealed the decision to dismiss him in a letter dated 22 May 2021. The letter sets out the Claimant's grounds of appeal, which included: the decision to dismiss was unethical and unjust, that Mr Thornton was given a pre-determined outcome, that Mr Thornton was not impartial, that previously closed investigation was opened, that the Respondent's Disciplinary Policy had been breached. The appeal letter also refers to various sections of the Respondent's Flexibility Policy, Grievance Policy and Disciplinary Policy.

106. Mr. Thornton wrote to the Claimant in relation to his grievance on 1 June 2021.

107. The Claimant's appeal was acknowledged in a letter dated 5 June 2021 and under a letter dated 23 June 2021 he was invited to an appeal hearing scheduled for 2 July 2021.

108. Following a request by the Claimant, the appeal hearing was re-scheduled to 13 July 2021 to take place in the Wrexham store.

109. On 8 July 2021 the Claimant confirmed he was able to attend the appeal hearing scheduled for 13 July.

110. At 13:52 on 13 July the Claimant emailed the Respondent informing them that something had come up and he would not be attending the appeal hearing due to commence at 3.00pm. He set out comments that he wished to be considered and forwarded his letter dated 22 May 2021. Within this email the Claimant refers to Ms. Fry "throwing a tantrum". Given the other descriptions of the interactions between the Claimant and Ms. Fry on 28 March 2021 I do not find "throwing a tantrum" to be an accurate description. The email also referred to sums the Claimant considered were owed to him, namely, unpaid night premiums, unpaid wages, pay in lieu of notice and holidays.

111. Sarah Ford, Regional Manager – Manchester and Liverpool, considered the Claimant's appeal in his absence. She reviewed the documents provided to her, which included the Claimant's letters, his grievances and the grievance outcomes. Mrs Ford also spoke with Mr. Jones and Mr. Thornton. Mrs. Ford set out her decision in an appeal outcome letter dated 4 August 2021. The letter amounts to five pages, and Mrs. Ford set out considered comments in categories of grounds of appeal. Mrs. Ford did not uphold any grounds of the Claimant's appeal, and she set out the reasoning for her decisions. Mrs. Ford upheld Mr Thornton's decision to dismiss the Claimant.

112. Both Mrs. Ford and Mr. Thornton acknowledged that the earlier communications could have been better managed.

113. The Claimant states that his trade union representative, Barrie Roberts, stated the Claimant had been unfairly dismissed. The letter dated 21 January 2021 does not state the Claimant was unfairly dismissed but states he *"I concluded that Dan had been unfairly treated."*

Rate of Pay

114. To assist my findings of fact further in relation to pay rates, noting the confusion within the mortgage reference as set out above, I reviewed the payslips within the Bundle.

115. The first payslip at page 349 of the Bundle which relates to hours worked in December 2020 and January 2021. The pay reference period being 10 January 2021. The payslip categorises the pay elements into: Basic Hours, Fixed Public Holiday Unworked, Night Uplift, Skill Supplement. Other pay slips simply refer to Holiday. It is clear that for this period the Claimant worked 126.66 hours, and his Basic Hours was recorded as £1,165.26 (£9.20 x 126.66 hours = £1,165.26). The Claimant was paid Night Uplift of £297.67 (£2.35 x 126.66 hours) and a Skill Supplement of £151.99 (£1.20 x 126.66 hours).

116. The payslip at page 350 of the Bundle covers a pay period ending on 7 February 2021. In this period the Claimant is recorded as taking 27 hours holiday, and was paid the sum of £420.23. I have no detail on how the sum of 27 hours is arrived at. Including all possible pay, basic rate £9.20, night uplift £2.35 and skill uplift £1.20 this would give a combined rate of £12.75. £12.75 x 27 hours holiday - £344. 25. It is possible the holiday pay includes sums in relation to overtime but I am unable to making any clear findings of fact. Again, Basic Hours, Night Uplift and Skills Supplement are all listed separately on the pay slip.

117. The payslip at page 351 of the Bundle covers a pay period ending on 7 March 2021, in which the Claimant partly worked and was suspended. It clearly categorises the pay elements into: Suspension, Basic Hours, Colleague Bonus, Night Uplift, Skill Supplement, Basic Hours Adjust, Night Uplift Adjust, Skill Supplement Adjust. The Claimant was paid 57 hours for suspension pay, amounting to £592.80 (57 hours x £9.20 basic pay = £524.4, 52 hours x £1.20 skill supplement = £68.40. £524.40 + £68.40 = £592.80).

118. The payslip at page 352, ending pay period 4 April 2021, covers a period of suspension and annual leave. It categorises the pay elements into: Suspension, Holiday, Basic Hours, Skill Supplement. The Claimant was paid for 20.75 hours holiday, amounting to £315.13. Again, I do not have details of how the sum of £315.13 is calculated. Taking basic rate £9.20, night uplift £2.35 and skill uplift £1.20 this would give a combined rate of £12.75. £12.67 x 20.75 hours holiday = £264.56. It is possible the holiday pay includes sums in relation to overtime but I am unable to making any clear findings of fact.

119. This period covers when the Claimant was suspended for the second time on 28 March 2021. The 28 March 2021 was a Sunday. In week 3 of this pay period, week commencing 22 March 2021 the Claimant was paid for 22.5 hours Suspension Pay and 1.69 hours basic pay.

120. The payslip at page 353, ending pay period 2 May 2021 covers a period of suspension only. It categorises pay elements into: Suspension and

Suspension Adjustment. The Claimant was paid a sum of £114 listed as Suspension Adjustment. I It is not clear what the Suspension Adjustment payment is. Under the Deductions section, the sum of £94 is showing as Recovery of Advanced Pay. 9.5 hours.

121. The payslip at page 353, ending pay period 30 May 2021 is the last payslip in the Bundle. It categorises the pay elements into: Suspension, Outstanding Holiday and Basic Hours.

122. 10 May 2021 was a Monday. The Claimant's shifts were Sunday, Monday and Tuesday, 28.5 hours. I find, on the balance of probabilities, that the 28.5 hours per week, would be recorded, using the week commencing 3 May 2021 as an example, from the Monday in each working week. For example, Monday 3 May, Tuesday 4 May and Sunday 9 May. In the week commencing 10 May 2021, the Claimant was paid 9.5 hours of suspension pay, which I find would have been for Monday 10 May and 2.62 hours basic pay, which I find would have been for his attendance at the disciplinary hearing on 11 May 2021, at which he was dismissed. The next shift that would have been due for payment in that week, had the Claimant not been dismissed on 11 May 2021, would have been Sunday 16 May 2021.

123. On balance, taking into account the documentary evidence, in particular the payslips which clearly categorise the different types of pay and Mr. Thornton's oral evidence on payment of supplements, namely that the mortgage reference details the pay accessible, and the Claimant's evidence that as a Baker he had always received the skill supplement, I find that the Claimant, and indeed any other employee, would only be paid a night shift premium when night shifts were worked. Night shifts were not worked during suspension. The night shift does not form part of basic pay. I find that the suspension pay paid to the Claimant included basic pay of £9.20 and the skill supplement of £1.20.

124. The Claimant was recorded as being on holiday on 15 and 16 March 2021. When the Claimant was recorded as being on annual leave in the week commencing 15 March 2021, he was paid for holiday pay, not at the rate of suspension pay.

125. The Respondent clearly explained the basis of the payments made to him in the weeks commencing 3 and 10 May 2021 in an email dated 17 June 2021. It is notable that in the Claimant's email response dated 19 June 2021 the Claimant states he worked Monday, Tuesday and Wednesday. I do not consider this to be accurate, the Claimant himself in other documents, including his witness statement and his skeleton argument clearly states his working days, being the day when he starts his shift noting they run to the next morning, to be Sunday, Monday and Tuesday.

126. During cross examination of Mr. Thornton the Claimant stated that he notified Mr. Jones and Ms. Fry that he wished for holiday to be cancelled and this was not actioned. There was no mention of this in the Claimant's witness statement. Mr. Thornton made enquiries overnight, and having been recalled to the witness stand, explained that Mr. Jones and Ms. Fry recall that during a meeting, which I have found was likely to be the meeting on 2 March 2021, the Claimant asked for no meetings to be scheduled whilst he was on holiday but they had no recollection of the Claimant asking about cancelling his holiday. On the evidence available I find that no request for holidays to be cancelled was made.

<u>Bonus scheme</u>

127. The Respondent has an Annual Bonus Plan. Clause 2.2. sets out the discretion to award a bonus. Clause 3 deals with the payment of bonuses and termination of employment. Clauses 3.3 and 3.4 of the Annual Bonus Plan states:

"3.3 If, as at the date on which any bonus would otherwise be awarded, the Participant is subject to any disciplinary process (including, without limitation, where he/she is suspended from his/her duties to facilitate disciplinary investigations or is subject to an unexpired written warning), the Committee may decide, in its absolute discretion, to withhold any bonus which would otherwise be awarded to the Participant and section 3.4 shall apply.

3.4 If, as at the date on which any bonus would otherwise be awarded, the Participant is subject to any formal disciplinary process and after that date and as a result of that process: (a) no disciplinary action is taken against the Participant, any bonus withheld pursuant to section 3.3 will, unless the Committee determines otherwise, be awarded to the Participant as soon thereafter as is reasonably practicable; or (b) the Participant's employment with a Group Company is terminated, or a final written warning is issued to the Participant, he/she shall have no right to a bonus or a pro-rated bonus, unless the Committee determines otherwise."

Suspension and disciplinary process

128. The Claimant was initially suspended on 22 February 2021 until 23 March 2021. The Claimant was then suspended for a second time from 28 March 2021 until his dismissal on 11 May 2021. The Respondent's Disciplinary Policy sets out guidance on suspending employees. The Claimant submits that he was unlawfully suspended. I find that the Claimant was initially suspended for failing to follow a management request in relation to working hours, it was not for "not having a chat" as the Claimant believes. The second suspension was initiated due to the Claimant's refusal to move to the grocery and leave the store, again, non-compliance with a management request. I do not find the suspensions to be "unlawful".

129. The Respondent's Disciplinary Policy states the during suspension employees will continue to receive basic contractual pay. The Respondent considered the Claimant's basic pay to be his basic rate and the skill supplement.

130. The Disciplinary Policy sets out examples of gross misconduct, and includes refusal to carry out reasonable instructions: *"Refusal to carry out reasonable instructions from a manager/supervisor or other deliberate and serious non-compliance."*

131. The Disciplinary Policy also contains guidance on processes and contains a section on investigations. In particular, important elements to note are:

"Issues will be explained to allow a colleague the chance to respond; no disciplinary action will take place until a thorough investigation and hearing is completed."

"For serious matters, an investigation will be conducted as soon as possible to establish the facts and evidence and to confirm whether a there is a case to answer, and therefore if a disciplinary hearing is appropriate."

"It's crucial to establish the facts of the case and to ensure we make informed decisions. As an investigation manager you'll be e impartial, keeping an open mind and exploring all avenues, actively looking for evidence to support both sides of events. This may involve:
• Holding investigatory meetings (or if not possible, taking witness statements) with colleagues, customers or anyone involved with or who saw the incident, Collating and reviewing training records, schedules, swipe records, CCTV images and other such documentation."

132. On balance, taking into account the comments above, I find that holding an investigation meeting is not a requirement, but rather it may form part of the

investigation process, as indicated by the words "This may involve". The later detail about conduct of disciplinary investigations does not, in my view, mean an investigation meeting with the employee must always be undertaken.

133. The Disciplinary Policy does read as if the standard approach is for the investigation to be undertaken by someone other than the disciplinary manager.

134. The Disciplinary Policy also sets out guidance on how a disciplinary hearing should be conducted. A key element being: *"The disciplinary hearing. An independent manager will meet with the colleague to allow them respond to and challenge any evidence, whilst determining the level of misconduct committed and decide what action is to be taken..."*

135. The Disciplinary Policy states that it applies to all colleagues, but it does not specify that it is a contractual policy. There is note, at the foot of the policy which states: *"We have the right to review, change or replace the content of this guide to reflect the changing needs of the business and/or to comply with new legislation."* On balance, on the evidence available, I find that the Disciplinary Policy was a non-contractual policy.

Contract Flexibility Policy

136. The Respondent has a Contract Flexibility policy. The policy states: *"Any proposed changes will be reasonable and not have a financial impact on you. We will always give careful consideration to your personal circumstances."*. "If change is not possible we will agree not to amend your current working pattern." As set out in the above, following the meeting with Mr. Jones and Ms. Fry on 23 March 2021 the Respondent had sought to put in place a temporary measure, and not amend the Claimant's working pattern - only the department in store, whilst exploring the contract issue.

Relevant Law

Unfair dismissal

137. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the Employment Rights Act on 11 May 2021.

94.— The right.

> *(1) An employee has the right not to be unfairly dismissed by his employer.*
> *(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).*

138. Section 98 of the Employment Rights Act 1996 deals with the fairness of dismissal. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

139. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the

circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with the substantial merits of the case.

98.— General.

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

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) [Subsection (4)]4[is]5 subject to—

(a) [sections 98A to 107]6 of this Act, and

(b) [sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992]7 (dismissal on ground of trade union membership or activities or in connection with industrial action).

140. In misconduct dismissal there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions of *Burchell v British Home Stores Lrd IRLR 379 and Post Office v Foley 200 IRLR 827.* The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide

whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer *(Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

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

142. Where a decision is made for more than one reasons, the Tribunal is obliged to identify the principal reason. The Tribunal is not restricted to finding the reason is that relied upon by the employer, or that argued for the employee, the Tribunal can make its own determination on the reason for dismissal.

Polkey

143. I agreed with the parties at the start of the hearing that if I concluded that the Claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed.

144. Where a dismissal is unfair on procedural grounds, the Tribunal must also consider whether, by virtue of *Polkey v AE Dayton Services [1987] IRLR 503, HL*, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

145. The law in this respect is set down in the cases of *Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*.

Contributory Fault

146. I also agreed with the parties that if the Claimant had been unfairly dismissed, I would address the issue of contributory fault, which inevitably arises on the facts of this case.

147. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:

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

148. Section 123(6) then provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Breach of contract

Notice pay/wrongful dismissal

149. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provided, by a payment in lieu of notice.

150. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Bonus Pay

151. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 the Employment Tribunal was given power to deal with breach of contract claims brought by employees in relation to breaches of contract outstanding on the termination of employment.

Unlawful deduction of wages

152. Section 13(1) of the Employment Rights Act 1996 (ERA) provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

153. An employee has the right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.

154. A claim about an unauthorised deduction from wages must be presented to an Employment Tribunal within three months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

Failure to provide written particulars

155. In accordance with section 38 Employment Act 2002 where a Tribunal finds in favour of an employee in another complaint, and the Tribunal finds that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Conclusions

Unfair Dismissal

156. The context and background to the dismissal is important, and therefore I have made findings of fact as required. However, the issues for determination are clearly set out under the section headed Issues above.

157. As per my findings of fact, there is a dispute about the nature of the Claimant's employment. On the evidence available to me I have concluded that the Claimant was employed as a Baker, had only ever undertaken tasks associated with the role of a baker and for approximately a year he had consistently worked a night shift pattern, and was paid an uplift for working nights. The Respondent's structure does not contain a specific role of night baker. The Claimant strongly believes he was employed as a permanent night baker, and there had been a permanent variation of his contract of employment. I do not have to determine if the change in working days and hours was permanent in order to determine the Issues in this case.

158. However, even if the change to working a fixed night shift pattern was a permanent change, the Respondent, as is any employer, is entitled to review its operations and make structural changes and amend its operations. The starting point is that unless there is a flexibility clause within the contract of employment, any variation to any employee's contract of employment cannot be unilaterally imposed. The contract does refer to variation according to business needs. In this case, the Respondent, in the late of autumn of 2020 determined that it no longer required baking to take place through the night, and changed the system of baking. The Respondent sought to explain the rationale for the change in operation to the Claimant and gave notice of the change, noting that this was extended.

159. In my view, although the Claimant does not consider that consultation took place, the discussions and information given to the Claimant about the changes were attempts to consult and provide notice of the change in working patterns, however the conversations were not productive and the Claimant did not meaningfully engage in discussions with the Respondent's store management.

160. It is accepted the Claimant was dismissed without notice on 11 May 2021.

Reason for dismissal

161. The first issue for determination was: what was the reason for dismissal?

162. The Claimant suggests that there was a plan, a conspiracy, to dismiss him and remove him from the Respondent's employ. I do not consider there to be any evidence that this was the case.

163. Mr. Thornton was an independent decision maker. He had not been given any instructions on how to determine the allegations against the Claimant and he made his own decision. There was no evidence to suggest any conspiracy or plan to remove the Claimant. The email reference to *"let's stick to the plan"* was in relation to managing the Claimant's potential conduct and return to the workplace.

164. The Claimant submitted that the bakery ceasing to function at night was a redundancy situation and he should have been treated as redundant. As set out above, employers are entitled to organise their business operations as they wish.

165. In this case, based on the evidence available, I have concluded there was not a redundancy situation in accordance with section 139 of the Employment Rights Act 1996. On the evidence presented, I do not conclude there was a reduction for work of a particular kind, there was still a requirement for bakers working in the bakery, but rather, for business operational reasons, the Respondent decided that the bakery no longer needed to bake during the night, and that the operational times of the bakery would largely be during the day. However, even if I am wrong on this, for the reasons set out below, I do not consider that any redundancy situation or restructuring of baking operations was the reason for the Claimant's dismissal.

166. The Respondent sought to put a process in place to discuss and consider the Claimant's concerns and made a reasonable request that the Claimant work in the grocery department, on the same hours and pay, therefore at no financial detriment, whilst the matter was discussed. This was very clearly known to the Claimant, at the very latest by 26 March 2021. In all the circumstances, I consider this to be a reasonable management request.

167. The evidence given by Mr. Thornton was clear, the reason for the Claimant's dismissal was his conduct, which was considered to be insubordination. It was his behaviour and reaction to the reasonable request as explained in the dismissal letter and in Mr. Thornton's evidence. The Claimant was dismissed because of his insubordination, namely his refusal to move to the grocery whilst the dispute was considered and his refusal to leave the store when requested by Ms. Fry to do so on 28 March 2021.

168. I do not consider his dismissal to be for any other reason.

169. I conclude that the Claimant's conduct was the reason for dismissal, and this was a potentially fair reason under section 98(2)(b) of the Employment Rights Act 1996.

170. As the Respondent has shown a potentially fair reason for dismissing the Claimant, the next legal issue for consideration is that set out in section 98(4) of the Employment Rights Act 1996. This provision always bears repeating:

> *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depended on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
> *(b) shall be determined in accordance with the equity and the substantial merits of the case."*

171. The test of fairness is tied into the reason for dismissal, which I have found to be conduct. It also considers the size and resources of the Respondent, in this case the Respondent is a large national employer. A further key point is that the test looks at whether the employer acted reasonably or unreasonably. This effectively imports a "band of reasonable responses" test. The question is whether this employer acted reasonably given the reason for dismissal. It is not for me to substitute my view on what the Respondent should or should not have done.

172. When considering fairness in conduct dismissals the correct approach is set out in *British Homes Stores v Burchell [1980] ICR 3030* and *Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.* I must also have regard to the ACAS Code of Practice on Discipline and Grievance Procedures 2015 (the Code).

Did the Respondent have a genuine belief the Claimant had committed misconduct and were there reasonable grounds for that belief?

173. The next issue for determination is: did the Respondent have a genuine belief that the Claimant had committed misconduct and were there reasonable grounds for that belief?

174. I conclude that the Respondent did have a genuine belief based on reasonable grounds. Mr. Thornton considered the documentary evidence available, and heard directly from the Claimant and discussed his behaviour, and the Claimant's views with him. Mr. Thornton formed his belief that the Claimant refusing to move to the bakery and refusing to leave the store after several requests constituted misconduct.

175. At the time of both the dismissal and appeal hearings the decision makers had reviewed the documentary evidence available (including various correspondence from the Claimant), considered the Claimant's comments, both orally at the disciplinary hearing and in writing at the appeal hearing. The Claimant acknowledged he refused both to move to the bakery and leave the store. The decision makers took into account the context of the situation and the Claimant's behavior.

176. The oral evidence in particular from Mr. Thornton was clear on why he dismissed the Claimant, as explained in the outcome letter. Ms. Ford's evidence on why the appeal was not upheld was also clear.

177. I conclude that a finding of misconduct was within the band of reasonable responses and there were reasonable grounds for the belief.

Did the Respondent carry out a reasonable investigation?

178. Again, this issue, being whether at the time the belief of misconduct was formed had the Respondent had carried out a reasonable investigation is a question of the band of reasonable responses.

179. The Claimant contends that a reasonable investigation was not undertaken because no investigation meeting was held.

180. Mr. Thornton reviewed the investigation documents provided to him from the People Team. This included a written account from Mr. Weston the events on 28 March 2021.

181. Neither the People Team or Mr. Thornton arranged for an investigation meeting to take place. Mr. Thornton considered, based on the documents available, that he had enough factual information to move forward to a disciplinary hearing without an investigation meeting needing to take place.

182. Although the Claimant emphasised that he considered the situations on 23 February and 28 March 2022 to be very different and that the first issue was closed and therefore this impacted the investigation process it is important to note that the allegation being considered by Mr. Thornton was one of insubordination, based on events on 28 March 2022. The earlier conduct of the Claimant formed background and context.

183. The Respondent's Disciplinary Procedure, as per the findings of fact above, is non-contractual, and I conclude it sets out a sensible guide for managing disciplinary matters. I do not consider that undertaking Mr. Thornton determining to move to a disciplinary hearing without an investigation meeting being held with the Claimant amounted to a breach of contract.

184. The ACAS Code of Practice on Disciplinary and Grievance Procedures, at paragraph 5, under the heading "Establish the facts of each case" states:

"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."

185. The Code itself gives an employer flexibility in how to approach an investigation. The extent and form of an investigation will vary depending on the facts of a case. The holding of an investigation meeting is not a mandatory requirement, but in many cases will be required. In other cases, the investigation will only involve an employer collating relevant evidence.

186. I also note that at paragraph 6 the Code states: *"In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing."*

187. This provision is to ensure impartiality. In many cases a line manager may undertake the investigation. In this case, the People Team provided Mr. Thornton

with the documents that were considered to form the investigation material. Mr. Thornton had no prior knowledge of the Claimant and was impartial. Further, Mr. Thornton's evidence was very clear, had he considered any further investigation was required he knew he could pause the disciplinary hearing and process should such a need arise. Therefore, in the circumstances of this particular investigation, which in essence was paper based, and in particular taking into account the contained events and allegations against the Claimant, I conclude the Respondent did carry out a reasonable investigation.

188. However, even if I am wrong in this respect, I conclude that the fact that the Claimant was able to put forward his explanation for his actions both in writing prior to the disciplinary hearing and verbally during the disciplinary hearing, and further at the appeal stage in writing, meant that the Claimant had the opportunity to give an explanation and therefore this cured any potential unfairness in relation to him not being interviewed during the investigation stage.

189. The legal test is that an employer must hold such investigation as "is reasonable in the circumstances". I conclude the investigation in this case was.

Did Respondent otherwise act in a procedurally fair manner?

190. Again, both the ACAS Code and the Respondent's own Disciplinary Policy are relevant in considering this issue. The key points are:

- That an employer acting fairly will give sufficient details of the allegations and the evidence being considered in enough time before the disciplinary hearing;
- The employee is permitted to be accompanied by a fellow worker or trade union representative;
- The employer must consider whether or not disciplinary or any other action is justified and inform the employee in writing;
- The employee has a fair chance to set out their case at a disciplinary hearing; and
- That the employee is offered the right of appeal.

191. I conclude that on balance, the Respondent did act in a procedurally fair manner.

192. The Respondent investigated in a proportionate way. The Claimant was notified of the allegations against him. I note that the Claimant stated he was not clear of the allegation against him. Although the invitation letter could have specifically cited the events on 28 March 2021, at the outset of disciplinary hearing Mr. Thornton explained to the Claimant that the behaviour considered to be potential insubordination was that on 28 March 2021. The Claimant had a full chance at the disciplinary hearing to put forward any comments and representations he wished.

193. The invitation to the disciplinary hearing gave clear information about potential consequences and informed the Claimant of his right to be accompanied, indeed he was accompanied by this trade union representative.

194. A disciplinary hearing was held with an independent manager, and the Claimant had a full opportunity to present his position. Mr. Thornton considered the background context to the Claimant's conduct and considered mitigating factors. Mr. Thornton did not make any decision until after the disciplinary hearing.

195. The Claimant submits that the outcome was predetermined and Mr. Thornton was instructed to dismiss the Claimant. Mr. Thornton's evidence, which I accept, was very clear – he alone made the decision after the disciplinary hearing and after hearing from the Claimant. I do consider the invitation letter to be poorly drafted in parts. In seeking to give background detail it reads in parts as if potentially that a view has been formed by Mr. Thornton, and it does not state

that an outcome may be that there are no findings against the Claimant. However, again Mr. Thornton gave clear oral evidence that he was aware that a result of the hearing may be that no action would be taken against the Claimant, and the letter was aimed to set out and warn about the worst case scenario.

196. The Claimant was informed of the outcome both verbally and in writing. The outcome letter was clear and set out the decision.

197. The Claimant was offered the right to appeal, and did appeal. The Claimant did not attend the appeal hearing but his written submissions were taken into account and a full appeal process was undertaken. A full and detailed consideration took place at the appeal stage. This approach is consistent with the ACAS Code of Practice.

198. Finally, considering section 98(4) in totality, if all the above tests have been met, I must consider whether dismissal within the range of reasonable responses. It is important to restate that I must substitute my view, I must consider if dismissal was one of the options open to the Respondent.

199. Given the reasonable finding that the Claimant had committed an act of gross misconduct, in line with the defined examples of gross misconduct within the Disciplinary Policy, and noting the process in totality and that the Respondent had considered the Claimant's long service, good record and Respondent had considered these mitigating factors, and decided that an alternative sanction was not appropriate, I conclude the Respondent's decision to dismiss the Claimant fell within a range of reasonable responses.

200. The Claimant's complaint of unfair dismissal fails.

Polkey

201. However, if I am wrong, and the dismissal was unfair, I have set out my conclusions on Polkey below.

202. Ms. Ahmed invited me to make a finding that had a fair dismissal process been followed then the outcome would still have been dismissal.

203. In undertaking this exercise I am not assessing would I would have done, I am assessing what this employed would or might have done. I must assess the actions of the employer before me, on the assumption that this employer would have acted fairly if had not done so before.

204. I find that had a different process been undertaken, namely an investigation meeting been held with the Claimant in advance of a disciplinary hearing and the invitation letter had been drafted differently, the outcome would still have been the same, the Claimant would have been dismissed. Mr. Thornton considered the Claimant's conduct, the context for his behaviour and mitigating factors. There was nothing substantially new at the appeal stage, there was no different explanation for the Claimant's behaviour. I find the Respondent would still have concluded the Claimant's conduct in failing to agree to reasonable management requests amount to insubordination that was considered to be gross misconduct. I consider there was a 100% chance that the Claimant would still have been dismissed and the dismissal would have been within the range of reasonable responses.

Contributory fault

205. As per my conclusions in relation to Polkey above, if I am wrong, and the dismissal was unfair, I have set out my conclusions on contributory fault below.

206. The Tribunal may reduce the basic or compensatory awards for culpable conduct as set out in sections 122 and 123 of the Employment Rights Act 1996 as set out above. Ms. Ahmed did not make any specific submissions in this respect. However, I must ask firstly identify the conduct giving rise to possible

contributory fault, secondly decide whether the conduct was blameworthy and thirdly, whether the blameworthy conduct caused or contributed to the dismissal to any extent.

207. I conclude that the Claimant's conduct giving rise to contributory fault was his refusal to obey reasonable management requests, namely his refusal to work from the grocery department on the same hours and pay and the refusal to leave the store when requested to do so. In all the circumstances, I find that conduct was blameworthy. The Claimant had not engaged in direct discussions with the Respondent, was not willing to listen and take on board the Respondent's position and moving to a different location in the store would have been a sensible measure whilst the issues were sought to be resolved. I note the Claimant had a very clear view that he was employed only as a Baker, but even so, his response was unreasonable and blameworthy and I conclude it was this conduct that wholly led to the dismissal and taking all into account I find that the basic and compensatory awards should be reduced by 100%.

Breach of Contract

Notice pay

208. The Claimant was dismissed without notice and brings a claim in respect of his entitlement to 3 weeks' notice.

209. Dealing with the Breach of Contract claim, I must consider whether the Claimant fundamentally breached the contract of employment by an act of gross misconduct which entitled the Respondent to dismiss without notice.

210. In distinction to the claim of unfair dismissal, where the focus is on the reasonableness of managements decisions, and immaterial to what decision I would have reached I must decide whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.

211. I conclude that, on an objective assessment, on the balance of probabilities, the Claimant's actions were sufficiently serious to amount to a fundamental breach entitling the Respondent to dismiss the Claimant without notice.

212. Although I am sympathetic to the fact that the Claimant felt very strongly that the move to night time baking was a permanent and contractual change, and that communication from the Respondent in this respect could have been better, the Claimant chose to disregard the very clear and reasonable requests made by Ms. Fry on 28 March 2022. He refused several times to move to the grocery department and he then refused several times to leave the store.

213. Although the Claimant appeared to be calm during the interaction, noting there was no raised voices or aggressive language used, the Claimant was by his very refusal to move departments and leave acting in a defiant and unreasonable manner. I conclude that he consciously chose to act in this way, and although the Claimant submitted that he felt moving would put him in breach of contract, I conclude that no reasonable person could think that adhering to his employer's reasonable request to temporarily work on the grocery whilst the dispute was explored would render them to be in breach of their own terms of his employment

214. I conclude that the Claimant did commit and act of gross misconduct entitling the Respondent to dismiss without notice.

215. The Claimant's claim of breach of contract in relation to notice pay fails and is dismissed.

Bonus

216. The Claimant submits that he was paid a bonus every year that he was employed, and that not paying him an annual bonus whilst he was unlawfully suspended was a breach of contract. The Claimant submits that he is owed a bonus payment of £546.61. It is not entirely clear the date on which the Claimant's says such payment was due. In any event, the Respondent has an Annual Bonus Plan, which is discretionary, and clearly sets out when payment will not be made as summarised in the findings of fact above.
217. Accordingly, I conclude that the non-payment of a bonus to the Claimant, either during suspension or following his dismissal for gross misconduct was not a breach of contract.
218. The Claimant's claim of breach of contract in relation to bonus fails.
219. How much should the Claimant be awarded as damages?

Unlawful Deduction from Wages

10 May shift pay

220. The Claimant submits that he is owed for payment for 10 May 2021. I have made findings of fact on what the Claimant was paid above. As set in the findings of fact, I do not consider the Claimant is owed any payment for 10 May 2021. The Claimant was paid what was properly payable for week commencing 10 May 2021, noting the suspension pay for the shift that would start on 9 May 2021 was covered in the payment for the week commencing 3 May 2021.
221. Further, the Respondent clearly explained the basis of the payments made in an email dated 17 June 2021. The Claimant responded, in what I conclude to be a misleading way, stating that his working days were Monday, Tuesday and Wednesday, which was not the case.
222. Accordingly, the Respondent has not made an unlawful deduction from the Claimant's wages in this respect.

Night shift premium

223. The Claimant submits that he is owed night shift premiums throughout his period of suspension, he submits that during the two periods of suspension he was suspended for 332.5 hours. The night shift premium was £2.35. £2.35 per hour x 332.5 hours amounts to £781.38.

224. I need to determine what sum was properly payable as wages.

225. It is clear the Claimant was entitled to basic pay and his skill uplift. The more difficult issue is whether the Claimant was entitled to the night premium, in essence does the night premium form part of wages properly payable as defined under section 13(3) of the Employment Rights Act 1996.
226. The Claimant had been working nights for almost a year. A night shift premium is only paid when staff actually work nights. On the evidence available I have been unable to conclude precisely what the discussions about the nature of the shift to night working were at the commencement of the night working in February/March 2020. The night shift premium is not part of basic pay, it is listed and treated separately on the Respondent's pay systems. I do not find that the night shift premium had become part of the Claimant's basic pay, but I do conclude that the night shift premium of £2.35 per hour formed part of the wages properly payable to the Claimant for the reasons set out below.
227. As set out above, the Respondent's Disciplinary Policy sets out that during suspension employees are only entitled to contractual basic pay. I have determined the Disciplinary Policy to be non-contractual. I note also that the

Claimant was told in writing upon his suspension that he would only be paid his basic pay.

228. However, suspension should be a neutral act. Only paying the Claimant his basic rate and the skill uplift whilst he was suspended is an act the puts the Claimant at a financial disadvantage, it is not neutral. He should have been paid his usual pay throughout suspension.

229. Accordingly, the Respondent has made an unlawful deduction from the Claimant's wages and the Claimant is owed the £2.35 per each hour of suspension.

230. A separate remedy hearing and case management directions will be listed in this respect as it is not possible to determine the sum due.

Holiday owed

231. The Claimant submitted that he is owed a payment of £264.56 holiday pay as he was not able to take holiday whilst suspended.

232. As set out in the findings of fact above, there is no evidence to support a finding that the Claimant requested that his pre-booked holiday be cancelled during his period of suspension.

233. The Claimant was treated as being on holiday and was paid accordingly. This was not inappropriate or unlawful.

234. I conclude that there was no unlawful deduction from wages in this respect.

Failure to provide written particulars

235. The Claimant has succeeded in part of his unlawful deduction from wages claim. An award of additional pay under section 38 Employment Act 2002 for failure to provide a written statement of employment particulars is therefore possible.

236. As set out above, the Claimant was provided with a Statement of Terms and Particulars that was signed on 11 May 2018. While there is no general legal requirement that a contract of employment be in writing, employers are under a statutory obligation to provide workers with a written statement of the particulars of their main terms and conditions of employment (often referred to as 'written particulars' or a 'section 1 statement'). Employers must also notify workers in writing of any subsequent changes to those particulars. In this case, the Claimant was not notified in writing of the changes to his working hours and days, indeed, in this case had the change (whether that was actually agreed to be temporary or permanent) been set out in writing as required, the relationship between the parties would likely have been much improved.

237. The Respondent has not put forward any evidence of any exceptional circumstances that would make it unjust or inequitable to order them to pay the Claimant an additional two weeks' pay and I must therefore order the Respondent to pay an additional two weeks' pay. I may, if I consider it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay. As noted in the findings of fact above, the Claimant had written to the Respondent seeking written confirmation of the changes on several occasions, and the lack of clarity from provision of written changes that would likely have been achieved and could have been addressed sooner has caused difficulties. Accordingly, I do consider it just and equitable to order the Respondent to pay an additional four weeks' pay. A remedy hearing will be determined to assess a weeks' pay.

In accordance with section 38 Employment Act 2002 where a Tribunal finds in favour of an employee in a complaint of unlawful deduction from wages, and the Tribunal finds

that the employer has failed to provide the employee with a written statement of employment particulars, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, order the employer to pay an additional four weeks' pay.

Employment Judge G Cawthray

Date 15 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 17 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche