



# EMPLOYMENT TRIBUNALS

**Claimant** Peter Yassin

**Respondent** Aston Court Derby LLP

**Heard at** Nottingham (full CVP) **On:** 23 May 2022

**Before** Employment Judge N Wilson (sitting alone)

## Representation

Claimant Peter Yassin

Respondent Matthew Sutton (counsel)

## RESERVED JUDGMENT

1. The Tribunal substitutes the name of Aston Court Derby LLP as the correct name of the respondent.
2. The claimant's holiday pay claim is dismissed upon withdrawal by the claimant.
3. The claimant's complaint of unfair dismissal is not well founded and is dismissed.

# REASONS

## Introduction

4. The claimant Mr. Yassin was employed by the respondent as a barman from 4 December 2018 until his dismissal with an effective date of termination (EDT) of 12 October 2021.
5. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.
6. The respondent operates a hotel. On 2 October 2021 the respondent was hosting a party for a customer in one of their function rooms. The claimant was working that night on the bar. At the end of the night the claimant states he was told to help himself to the buffet that was left behind and he took two bottles of alcohol and some food. He learnt the following day the customer had only meant the food could be taken and he therefore brought the bottles back but was subsequently suspended then dismissed. He denies having stolen the two bottles of alcohol.
7. The claimant states he did not receive the correspondence from the respondent inviting him to attend any of the disciplinary hearings he was invited to attend during his suspension either by email (due to his phone having broken) or the letter sent by recorded delivery inviting him to the final disciplinary hearing as the claimant had gone to stay with his mother immediately following his suspension due to his mother's health condition of dementia. The claimant accepts he received the notice of termination and appeal letter on 25 October 2021 but did not appeal the decision until 25 November 2021.
8. The respondent contests the claim. The respondent says the claimant was fairly dismissed for gross misconduct for the theft of 2 gift bags following a customer event at their premises and it was entitled to terminate his employment without notice because of his gross misconduct. Further the respondent states the claimant was invited to three disciplinary hearings with the respondent following an initial suspension to allow them to investigate the matter, but the Claimant failed to attend any of them without notification or some other good reason. He was advised failure to attend would be treated as a subsequent act of misconduct.
9. The claimant represented himself and gave sworn evidence. The respondent was represented by Mr Sutton, counsel, who called sworn evidence from Chris Palmer, General Manager for the respondent. I considered the documents from an agreed 76-page bundle of documents and the witness statements of the claimant and respondent's witness which the parties introduced in evidence.

## Preliminary matters

10. At the beginning of the hearing, before I heard any evidence, I had to deal with several preliminary issues.

### **Witness statements**

11. Mr. Sutton advised me the claimant has served 3 witness statements. One by agreed extension between the parties on 4 May 2022, the second on 6 May 2022 (after having the benefit of seeing the respondent's statement) and the third on 10 May 2022 but dated the 1 May 2022. After some questioning the claimant agreed the unsigned statement which commences 'to whom it may concern' was the one he served on the date agreed for exchange of witness evidence between the parties on 4 May 2022. That statement is very different to the subsequent statements of 6 May 2022 and 1 May 2022 (served on 10 May 2022).
12. Mr. Sutton stated the claimant seeks to make a number of additional points in the latter statements which were not previously raised and these points clearly result from the witness statement of the respondent and to permit the claimant to rely on these later statements would be prejudicial to the respondent.
13. Mr. Yassin gave an explanation that the reason the statement was amended was to do with a formatting issue and issues with 'typos' and referred to the second statement dated the 6 May 2022 as being the 'second half' of his first statement. I do not agree that it is the second half of his original statement served on 4 May 2022 and nor is it a supplemental statement. He raises additional points in the subsequent two statements which deal with issues raised in the respondent's witness statement.
14. I agree the balance of prejudice would be greater to the respondent should the subsequent statements served by Mr. Yassin be admitted as his evidence. Whilst Mr. Yassin says he did not redraft the statement to respond to issues raised in the respondent's statement he accepts he had opened and had sight of the respondent's statement on 4 May 2022 and it follows therefore he had the benefit of seeing the respondent's evidence before revising his statement. For that reason I will not admit the claimant's statements dated 6 May 2022 and 1 May 2022 in evidence and in making this decision I rely on the overriding objective to ensure the parties are on an equal footing and have a fair hearing. Further the claimant is able to deal with matters arising from the respondent's statement and evidence through cross examination.

### **Application to amend the name of the Respondent**

15. Amended by agreement of the parties and the Tribunal substitutes the name of Aston Court Derby LLP as the correct name of the respondent.

### **Holiday pay claim**

16. Dismissed upon withdrawal by the claimant (due to the amounts being agreed and paid by the respondent to the claimant ahead of today's hearing).

## Issues for the Tribunal to decide

### 17. Unfair dismissal

- 17.1. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's gross misconduct.
- 17.2. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated the dismissal was unfair because the respondent terminated his employment in his absence when he ought to have had the opportunity to attend a disciplinary hearing. The claimant states he did not receive any notice of the disciplinary hearings and further there is no time limit within the company policy for appealing the decision to dismiss and therefore the respondent acted unreasonably and unfairly in failing to hear his appeal even if it was submitted outside the 7day time limit given to him by the respondent in his dismissal letter. He did not see that dismissal letter within the 7 days given to him to appeal the decision in any event. He states there were exceptional circumstances (his broken phone and his having gone to live with his mother due to her ill health) which the respondent failed to take proper account of when making the decision not to allow him to appeal the dismissal. He also argues he had a previous good record and he denies any theft. For the claimant's claim of unfair dismissal, the focus under section 98(4) is on the reasonableness of the respondent's decisions, and it is immaterial what decision I would myself have made about the claimant's conduct.
- 17.3. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *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. The respondent states that the claimant would have been dismissed in any event therefore any award should be reduced by 100%.
- 17.4. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?
- 17.5. Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6) of the 1996 Act?

18. Having dealt with these preliminary matters I agreed with the parties the following issues for me to decide.
- 18.1. Did the Claimant steal items belonging to a customer of the respondent on the night of 02 October 2021?
- 18.2. If so, did the respondent act appropriately in treating this as gross misconduct and dismissing the Claimant?
- 18.3. Did the respondent conduct a full, proper and fair investigation and disciplinary procedure in line with the ACAS Code of Practice?
- 18.4. In doing so, did the respondent take all reasonable steps to contact the claimant and, upon the claimant not engaging, act appropriately in holding the disciplinary hearing in the claimant's absence?

### **Findings of fact**

19. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents. The claimant's and Mr Larmer's witness statements were not within the 76 page bundle but were before the parties and the Tribunal.
20. The claimant, Mr. Yassin, was employed by the respondent as a barman for just under 3 years from 4 December 2018 until his dismissal on 12 October 2021. The respondent operates a 55 room hotel in Derby city centre.
21. The claimant's line manager at the time of his dismissal was the respondent's general manager Mr. Chris Larmer who has been in this position since October 2020. Mr Larmer refers to two incidents of prior misconduct involving the claimant before he became his line manager but on cross examination admitted he had not taken those incidents into consideration when making the decision to dismiss the claimant and he had. Nor were there any documents or details before the Tribunal about these incidents save for what is referred to in Mr. Larmer's witness statement dated 1 May 2022. Mr. Larmer in evidence described the claimant as being an 'efficient' worker and admitted he had no knowledge of the claimant having been accused of theft prior to this occasion.
22. On 2 October 2021 the respondent hosted a birthday party for a customer for approximately 100 guests. The customer asked the respondent's night porter George Golding if they could leave some of the gifts and cards at the hotel and collect them the next morning. Mr. Golding agreed they could be left on a separate table away from the buffet in what was called the Yorke Suite which would be locked overnight once the customers and staff had left. The claimant was aware that the customer had left gifts; some in gift bags.
23. It is accepted by the parties that at some point during the event the customer of the respondent approached the claimant and invited him and other staff members to help themselves to the buffet. The respondent states this meant

buffet food only. Mr Larmer gave unchallenged evidence that the customer also confirmed to him during his investigation that this meant buffet food only. The claimant in his witness evidence states cake and presents should be left on the table by the door, that the duty manager should make it clear that this is at the customers own risk and that any bottles full or empty left anywhere will be disposed of.

24. The claimant accepted in evidence that he left with 2 bottles and did so openly stating he was seen by the duty manager who said nothing to him and that he was not hiding the bottles. There is no evidence before me from the duty manager as to whether he saw the claimant or indeed took notice of what he was carrying. It is accepted between the parties the CCTV footage showed the claimant walking through the lounge area of the premises with the gift bags.
25. The claimant referred me to the CCTV footage which was not before me and which I have not viewed. After some discussion regarding the relevance of the CCTV footage Mr. Yassin stated he wanted the Tribunal to view it to show the duty manager did not stop him when he walked past him with the gift bags stating the relevance was that he saw the claimant and did not challenge him. However the duty manager Richard Bennett is not here to give evidence as to what he did or did not observe and therefore Mr. Yassin accepted all the footage will show in those circumstances is that the claimant was seen taking the bottles and the claimant accepts he took them. Given it was accepted between the parties this is all the CCTV showed I considered it was unnecessary to view the footage which was not before the Tribunal in the bundle of documents in any event.
26. The respondent states that on 3 October 2021 the customer returned to collect the items they had left in the York Suite and on 4 October 2021 the customer called Mr. Larmer, the general manager, to inform him some of the items were missing. There were 3 missing gift bags; one containing a bottle of prosecco, one containing a bottle of gin and another containing a candle. Following this conversation with the customer Mr Larmer consulted the CCTV footage, and contacted each member of staff employed at the event to have an informal conversation with them.
27. Mr Larmer's investigation concluded the claimant took 2 gift bags; one containing a bottle of wine and another containing a bottle prosecco. Another employee Mr Jardin also took a gift bag containing the bottle of gin and a candle.
28. Mr. Larmer conducted an investigation meeting with the claimant and with Mr Jardin on 5 October 2021. The respondent's deputy manager Emma Walker was also present and took notes (p38)
29. At that meeting the notes record the claimant admitting 'yes' to the question posed to him '*did you take gifts*'. The handwritten record of the meeting records the claimant saying he knew '*guests saying we could take stuff, obvs didn't mean presents*'. That meeting record is signed by the claimant and he accepted in evidence he had signed that record as accurately reflecting what was discussed.

30. There is also a handwritten meeting record of the meeting with Mr Jardin (p39) which also took place on 5 October 2021. Mr Jardin has also signed that meeting record as being a *'true account to my knowledge of the night of the incident'*. In that meeting record Mr Jardin says *'Pete said they will not notice, I take 2 bottles you take 1 bottle'* This account was not challenged by the claimant save that the claimant stated in evidence that Mr Jardin had missed a part of what the claimant had said to him. Mr Jardin is not before the Tribunal to give evidence so all I have is the record of the meeting signed by him.
31. Mr. Larmer's evidence is that the claimant admitted to taking some gift items home but maintained he had done so as he had been given permission to by the customer. Indeed, the claimant's ET1 (page 10) states *'I was told to help myself to the buffet that was left behind.... I took 2 bottles of bubbly and food. The next day the party had meant that only food be taken so I brought back the 2 bottles of bubbly'*
32. Following the investigation meeting on 5 October 2021 the claimant was suspended on full pay by way of letter dated 5 October 2021 (p41). That letter refers to the claimant being suspended to allow an investigation to take place following allegations of theft of customer property. The same letters states *'during suspension you remain our employee and continue to be bound by your terms and conditions of employment. It may be necessary for me to contact you/or require you to attend any investigation meeting and you are required to make yourself available during normal working hours'*. It is accepted by the claimant this letter was received by him and signed by him on the 5 October 2021. The letter also states *'should the investigation indicate that there is some substance to the allegations you will be required to attend a disciplinary hearing'* and the letter notifies the claimant he will be provided with the date time and venue in writing.
33. The following day on 6 October 2021 the respondent sent the claimant a letter (p42) inviting him to attend a disciplinary hearing on 8 October 2021. Mr. Larmer's evidence is that this letter was posted and emailed to the claimant. This was not challenged by the claimant. The claimant's position being that he did not receive the letter. The letter states *'if these allegations are substantiated we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation your employment may be terminated without notice'*. The letter goes on to say *'if you do not attend the disciplinary hearing without giving advance notification or good reason we will treat your non-attendance as a separate issues of misconduct'*
34. It is accepted the claimant did not attend the meeting and nor did he contact the respondent's Mr Larmer to request the meeting be postponed or to explain he was unable to attend.
35. The respondent wrote again to the claimant by way of letter dated Saturday 9 October 2021 (p43) which the respondent's Mr Larmer also states he sent by post and email. This letter invited the claimant to attend a disciplinary hearing on Monday 11 October 2021, this time setting out the claimant *'should consider that you are now receiving a final warning and forewarning that if you fail to attend.....this will be treated as a second act of misconduct and your employment*

*will be terminated*'. This letter also states *'if you fail to attend the hearing again without reasonable excuse the hearing will be held in your absence'*.

36. It is accepted the claimant did not attend the meeting on 11 October 2021 and nor did he contact the respondent's Mr. Larmer to request any postponement or to provide an explanation for non attendance.
37. Mr. Larmer therefore decided to reschedule the meeting for 13 October 2021 and sent the claimant another letter (p45) dated 11 October 2021 this time sending it by recorded delivery and email. The respondent has provided proof of posting (p46) and there was no challenge by the claimant as to the postal address for any of the letters sent by the respondent. This letter states the claimant *'should consider that you are now receiving a final warning'* and that failure to attend the hearing without notification or good reason *'will be treated as a second act of misconduct and your employment will be terminated'*.
38. The respondent's witness Mr. Larmer points out the address for all letters posted was the same address as the address on the claimant's claim form. Mr. Larmer also gave evidence that he attempted to telephone the claimant on several occasions and left messages on his phone which was not challenged by the claimant in cross examination. I accept Mr Larmer's evidence that he made such attempts to make contact with the claimant.
39. The meeting on 12 October was therefore held in the claimant's absence by the respondent who subsequently dismissed the claimant for gross misconduct. Mr Larmer's witness statement states *'it was found that the claimant's actions in taking the property of a customer without consent amounted to a gross breach of trust and confidence and amounted to gross misconduct'*. He goes on to say *'the decision was made to dismiss the claimant as a result of this, together with his past disciplinary record and failure to engage in the disciplinary process (which he was informed amounted to misconduct). The combination was determined to amount to gross misconduct'*.
40. The respondent's Mr Larmer then sent the claimant a letter dated 14 October 2021 (p47) notifying the claimant he was dismissed with immediate effect on the grounds that *'your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship'*. The same letter notifies the claimant of his right to appeal against the decision advising him should he wish to do so he should write to Mr Larmer within 7 days giving the full reasons as to why he believes the action taken was either too severe or inappropriate.
41. On 25 November 2021 the claimant sent an email to the respondent stating he wished to appeal against his dismissal for the following reasons:
- 41.1. *'My phone was broken so I have now replaced it*
  - 41.2. *My mother is ill with dementia and I have been worried and chose to look after her*
  - 41.3. *I have not received any letters from you to invite me to a discipline hearing'*



42. Mr Yassin's email requesting the appeal did not set out reasons as to why he believed the disciplinary actions taken against him was too severe or inappropriate.
43. Mr Larmer refused that request for an appeal by way of letter dated 26 November 2021 (p50) on the basis that the request was well outside the 7 days provided for in the dismissal letter and some 7 weeks after the date of that dismissal letter.
44. Mr Yassin then presented his claim to the Tribunal for unfair dismissal.
45. Mr Larmer in evidence when cross examined stated that should a customer bring in what is referred to by the claimant as 'illegal alcohol' it would be confiscated until the end of the night and then returned to the customer. It would not be taken off the premises. I accept his evidence that customers were not permitted to bring their own alcohol to such events save for those being brought as gifts and they were not to be consumed by guests. I accept the policy would be to confiscate them and to return them at the end of the night as his evidence was not challenged on this point and the claimant gave evidence that any alcohol which customers brought onto the premises was referred to as 'illegal alcohol' therefore supporting Mr Larmer's evidence that this was not permitted by the respondent.
46. The claimant in evidence accepted he took gift bags containing bottles of alcohol but denies that he believed them to be gifts. He refers to the fact he openly walked past the duty manager without seeking to hide the gifts as being indicative of his lack of intent to steal them. In his evidence he stated that he would not take gifts although admits that some of the items were in gift bags. He accepted that the minutes of the meeting he had with Mr Larmer were signed by him as they were an accurate record of what was discussed (p38). His evidence was that he found them under the table and he believed them to be what he referred to as illegal alcohol. His evidence was that customers can hide illegal drink in gift bags too.
47. Mr Yassin denied that he admitted stealing any gifts in the meeting he had with Mr Larmer on 5 October 2021 however he accepted in evidence the record of that meeting was signed by him as accurate (p38) and that record minutes him saying 'yes' to the question '*did you take gifts*' and further the record minutes the claimant saying '*guests saying we could take stuff obvs didn't mean presents*' I find the claimant knew therefore he was not permitted to take gifts left behind by the customer.
48. Mr Yassin repeatedly denied that he considered the items he took to be gifts but rather he believed them to be illegal alcohol. However in his witness statement dated 4 May 2022 he stated '*any bottles full or empty left anywhere else are disposed of*'. When asked by me why he had therefore not disposed of them if he was aware of this policy he accepted in evidence that when he had in the past found illegal bottles full or empty he had taken them out of the venue and would normally take them home. When questioned if he would get permission to take them home he confirmed in evidence he would get permission from the duty manager before removing or taking any item of illegal drink off the premises. He also gave evidence that he had come across illegal drinks being brought on to the premises a dozen times prior to this event and on each and every occasion he had encountered illegal drinks he had sought permission to remove the items from the premises and take them home. He also admitted in evidence that on the night of 2 October 2021 he did

not seek permission from the duty manager to remove the bottles of alcohol which he admits to taking home following this event. He gave evidence that he did not ask for permission on this occasion because only certain managers would give permission which leads me to conclude Mr Yassin knew that on this occasion the duty manager would not have given him permission to remove the items which he took home.

49. Mr Yassin also when questioned accepted that whilst he did not know what the company policy was about illegal alcohol he knew the general rule was that you did not remove items without permission. Based on this evidence I therefore find the claimant knew he removed the items he took home without permission when he ought to have sought permission. I also find he did not seek permission on this occasion as he knew the duty manager on duty on this night would not have permitted him to take the items home.
50. The claimant when questioned why he thought the items he removed were illegal drinks as opposed to gifts gave evidence that this was because they were left under the table next to empty bottles. However he also confirmed in evidence the bottles were unopened and accepted if they were illegal drinks he would have expected the bottles to have been opened. He also accepted in evidence that he checked the gift bags and therefore knew the bottles were unopened inside the gift bags before he removed them from the premises.
51. The claimant in cross examination was also referred to the respondent's Anti Bribery Policy (p34) which sets out that no gift should be accepted without receiving prior written approval of the Manager. The claimant accepted in evidence he knew of this procedure, that Mr Larmer was his manager at the material time and that he did not obtain his permission to remove the items before taking them home.
52. I find the claimant's ET1 is inconsistent with the evidence he gave today. His ET1 (p4) sets out that he was told to help himself to the buffet so he helped himself to two bottles. He was then told the customer had meant only food could be taken so he brought back the 2 bottles of bubbly. However today he gave evidence that he thought he was removing illegal drink brought to the event by the customer. I find the claimant knew that he was not invited to or given permission to remove the two gift bags containing two bottles of alcohol in them from the premises because he accepted in evidence that even if they were illegal drinks the rule was that no items were to be removed from the premises without seeking the duty manager's permission and he admitted in evidence he did not seek such permission. I also find that he knew the items were not illegal drinks but rather gifts given he accepted in evidence he checked to see if they were open and they were not and this coupled with them being in gift bags would have made it obvious that the items were not illegal drinks but rather gifts. I find therefore that the claimant removed the gift items from the premises knowing that he did not have permission to do so from either the customer or the respondent.
53. I also accept the evidence of Mr Larmer that he concluded from his investigation the claimant had committed an act of theft which was reasonable to characterize as gross misconduct.
54. The respondent's disciplinary procedure (p30) sets out that dismissal will be the outcome of any first offence of gross misconduct. Alternatively the lesser offence of misconduct would result on the first occasion in a written warning being issued,

on the second occasion a final written warning being issued and on the third occasion of misconduct the result would be dismissal.

55. The respondent's disciplinary procedures (p30) gives an example of one of the offences that would normally be deemed to constitute an act of gross misconduct as theft.
56. The respondent's disciplinary procedures (p29) also sets out an example of what constitutes unsatisfactory conduct and misconduct to include failure to follow the respondent's rules and procedures.
57. Mr. Sutton for the respondent seeks to persuade me the claimant was invited to three disciplinary hearings and on each time a failure to attend without good reasons would be an act of misconduct. The claimant accepted when asked that he knew he remained an employee and bound by the respondent's rules during his suspension yet he did not attend a single meeting and did not make contact with the respondent. The respondent therefore argues that in line with these letters this constitutes three further occasions of misconduct and the claimant was put under a final warning and therefore including the breach of the anti bribery policy (p34) the claimant had committed 4 acts of misconduct. Mr. Sutton for the respondent stated the respondent acted reasonably in dismissing the claimant for the three acts of misconduct and his failure to attend the meetings showed unwillingness to abide by company procedure. Mr Sutton for the respondent argues the combined acts of misconduct for the claimant's non-attendance at the disciplinary meetings were sufficient good reason for the respondent to have dismissed him.
58. I accept the claimant's evidence that he did not receive any notification of those meetings either by text or letter. I accept whilst the respondent sent the letters by both email and post the claimant had on 6 October 2021 following his suspension (before he would have received any postal letters) gone to stay with his mother due to her ill health. I found the claimant's evidence in this regard credible. It was not challenged by the respondent save to argue the claimant ought to have expected to have been contacted by the respondent following his suspension and any change of address ought to have been notified to them and/or in the alternative he ought to have remained in contact with the respondent. I accept the claimant had gone to reside with his mother on 6 October 2021 following his suspension and the letters inviting him to a disciplinary hearing dated 6 October 2021, 9 October 2021, 11 October 2021 together with the letter dated 14 October 2021 notifying him of his dismissal and the right to appeal were not received and read by him until 25 October 2021.
59. The claimant also accepted in evidence he did nothing with the letters even when he did receive them though he understood he had been dismissed and the 7 days he had been given to appeal the decision had passed. I also accept his evidence that he received no email communications due to his phone having broken so whilst accepting Mr Larmar's letters were emailed to him correctly he did not see any of the letters until 25 October 2021. Mr. Yassin has been consistent in his account of when he first received notification of his dismissal and the letters he did not receive inviting him to attend the disciplinary hearings. I also do not find it unusual that he did not think to contact the respondent in that time notwithstanding his suspension

as the first letter inviting him to a disciplinary hearing was only sent on 6 October 2021, the day after his suspension. The next letter was sent on Saturday 9 October and the third on 11 October 2021 arranging what turned out to be the final disciplinary hearing on 13 October 2021. The final letter notifying him of his dismissal was sent on 14 October 2021. The respondent therefore sent 3 letters and attempted to hold 3 disciplinary hearings during the course of a 7 day period including a weekend.

60. The claimant I accept would have had a reasonable expectation that it may take longer to conduct any investigation and to have been potentially contacted by the respondent. I do not therefore find that he deliberately avoided making contact with the respondent or had no intention to partake in any disciplinary procedure.
61. However the claimant by his own admission in evidence did not receive any communication from the respondent until 25 October 21 which was some 20 days after his suspension and it is unusual the claimant did not seek to make contact with his employer following his suspension in this time not least to ascertain the position with his employment and any investigation.
62. I also accept Mr. Larmar's evidence that given he had tried to telephone the claimant and left messages for him during this 7day period he had assumed the claimant had no intention of attending the disciplinary meetings and under advice from HR he held the meetings in the time frame he did believing it to be a reasonable time period to give.

#### **Relevant law and conclusions – unfair dismissal**

63. 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 he 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 1996 Act) on 14 October 2021.
64. Section 98 of the 1996 Act deals with the fairness of dismissals. 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.
65. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of gross misconduct. Misconduct is a potentially

fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

66. 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 equity and the substantial merits of the case.
67. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 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**).
68. Mr Sutton for the respondent provided me with submissions on fairness within section 98(4) which I have considered and refer to where necessary in reaching my conclusions. Mr Yassin in his submission stated the respondent did not have a policy regarding illegal alcohol. Mr Yassin also stated Mr Larmer when he dismissed him took into consideration his previous disciplinary record but that previous allegations made against him had been dropped.
69. I find that Mr. Larmer the respondent's general manager was the one who made the decision to dismiss the claimant and that the principal reason for that dismissal was Mr Larmer's belief that the claimant had taken without consent or permission gift bags containing bottles of alcohol which had been left behind by a customer following an event at the respondent's premises on 2 October 2021. I find that Mr. Larmer held a genuine belief that the claimant was guilty of misconduct.
70. I accept Mr Larmer's evidence that following the investigation meeting on 5 October 2021 because the claimant had admitted to taking the items and having viewed the CCTV footage, interviewed other employees, the customer and Mr Jardin who was similarly dismissed, Mr. Larmer held the belief that the claimant had committed an act of theft and this amounted to gross misconduct and he was therefore able to dismiss the claimant without notice.
71. I find that Mr. Larmer genuinely believed the claimant was guilty of gross misconduct and that on the information available to him at the time he had reasonable grounds to conclude this because the claimant admitted to him on 5 October 2021 that he took gifts (p38). I accept Mr Larmer's evidence that the customer had advised him

during his investigation they had not given permission to take any gifts or alcohol and I further accept Mr Larmer took into consideration what Mr Jardin advised him during his meeting with him on 5 October 2021 namely the claimant had said to Mr Jardin *'they will not notice I take 2 bottles you take 1'* (p39) and this evidence was not challenged by the claimant save that the claimant stated that he said to Mr Jardin that they would not notice because they were 'illegal alcohol'.

72. The claimant accepted in evidence that even when he received the letters on 25 October 2021 he made no attempt to contact the respondent and just accepted the dismissal. His evidence was that he was in shock and because his mother was ill he took no action until his request for an appeal made by email to the respondent on 25 November 2021 (p49). I accept the explanation he gave for the delay in seeking the appeal and his reasons as set out in the email dated 25 November 2021 to the respondent was consistent with his evidence before the tribunal today. The respondent produced no evidence to dispute the claimant had gone to stay with his mother during the period they were sending the letters inviting him to attend the disciplinary hearings and I found Mr Yassin's explanation to be credible and consistent.
73. Mr. Larmer admitted there was no time limit to appeal a dismissal pursuant to the company disciplinary appeal procedure policy (p32) but he made the decision not to permit the request for the appeal based on the fact that some 7 weeks had passed since the dismissal. Mr. Larmer also accepted when questioned by me that no further investigation was carried out to that which had been conducted between 5 October 2021 and the date the first disciplinary was due to take place on the 8 October 2021. Mr. Larmer's evidence was that the investigation consisted of him speaking to the customer, viewing the CCTV footage, and speaking with other employees working that evening as well as the meeting held with both the claimant and Mr. Jardin on 5 October 2021. The only other information which came to light after 5 October 2021 was the claimant returning the items he had taken on 6 October 2021.
74. Mr Sutton for the respondent seeks to persuade me the respondent conducted a full investigation upon hearing of the allegations and they had an investigatory meeting with the claimant on 5 October 2021 where the claimant was given the chance to put forward his version of events. The claimant's position was that he did not get the chance to be accompanied by a companion to that meeting. The respondent was unable to recall whether this was offered. However Mr Sutton refers me to the ACAS code of practice which states if there is an investigation meeting there is no obligation to offer a companion and even if the claimant was not offered or permitted to bring a companion to the meeting held on 5 October 2021 this was not in breach of the ACAS code of practice. I find the meeting held on 5 October 2021 was an investigatory meeting to establish the facts and as such there was no breach of the ACAS code of practice in the claimant not being accompanied to that meeting. Further the claimant admitted during the meeting to taking the items and therefore I find the resulting suspension was reasonable in the circumstances.
75. I find the respondent carried out a reasonable investigation and acted reasonably in coming to the conclusion that the claimant has stolen the gifts since it is accepted the CCTV footage shows him removing the items from the premises and the

claimant admitted to taking them during the meeting on 5 October 2021 and the respondent reasonably expected the claimant to be aware of the company policy that he was not permitted to do so without permission and no such permission had been given by either the customer or the respondent's duty manager.

76. I find the investigation carried out by Mr Larmer was a reasonable investigation in the circumstances taking into account the situation. There is no evidence before me that interview with anyone who ought to have been interviewed was not carried out. I accept the hospitality business is one where customers expect their property to be looked after and that theft has a serious reputational impact and as such the suspension was reasonable and further in accordance with the ACAS code of practice the suspension should not be unreasonably prolonged and for that reason I find the attempts made to hold 3 disciplinary meetings with the claimant between 8 October 2021 and 13 October 2021 was reasonable. I find the respondent's formal disciplinary process was followed.
77. Whilst the respondent's own disciplinary appeal procedure (p32) does not set out any time limit for making an appeal the respondent's letter dated 14 October 2021 (p47) dismissing the claimant did give him notice that the period he had to appeal the decision was 7 days from the date of the dismissal letter. In line with the ACAS code of practice I find this was a reasonable period. The code also states that appeals should be heard without unreasonable delay.
78. The claimant accepted in evidence he received all correspondence from the respondent including the letter dated 14 October 2021 on 25 October 2021. He also understood that this letter gave him 7 days to appeal the decision. Whilst I accept his explanation that he may have been in shock at the news of the dismissal and was dealing with his mother's ill health he accepted taking no steps to notify the respondent of this before his email to the respondent requesting the appeal on 25 November 2021. I accept, and the claimant did not make any assertion to the contrary, that the respondent was not aware of his mother's ill health until that email dated 25 November 2021. I find Mr. Larmer acted reasonably in refusing to hear the appeal due to the length of time which had elapsed since the dismissal and further notably no information was given by the claimant in his request for appeal as to why the decision to dismiss had been too severe or inappropriate.
79. I find the respondent acted reasonably in treating the claimant taking the gift bags with bottles of alcohol as sufficient reason to dismiss the claimant and that their decision to dismiss the claimant fell within the band of reasonable responses to his conduct. I find a formal disciplinary process was followed and it was not flawed.
80. I therefore find the claimant was fairly dismissed.

### Relevant law and conclusions - Polkey

81. In the alternative if I had agreed with the claimant that the dismissal was unfair I have considered if the claimant's appeal had been permitted by the respondent whether his dismissal would have been upheld. Mr Sutton refers me to the principles in **Polkey v AE Dayton Services Ltd [1987]** I find if the respondent had permitted the appeal and taken into consideration the claimant's length of service and explanation for his actions they would still have dismissed the claimant. I do not

regard it as inevitable that they would have still dismissed him but I find it very likely. In making this assessment I take into account the claimant accepted he took the gifts and had knowledge from prior instances of having taking alcohol from the premises that permission was needed from his manager and he did not obtain such permission on this occasion. I accept that the respondent's management would have taken such action seriously as is evidenced by their dismissal of Mr Jardin who also removed items from the premises following the event and the dismissal would have been within the range of reasonable responses. I consider there would have been a 100% chance the claimant would still have been dismissed even if the appeal had been permitted by the respondent.

### Relevant law and conclusions - Contributory Fault

82. If I had agreed with the claimant that he had been unfairly dismissed I would have addressed the issue of contributory fault which inevitably arises on the facts of this case.

83. 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.

84. 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.”*

85. 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.”*

86. I do find that the claimant's own conduct in taking the bottles of alcohol which he accepted were unopened in gift bags without getting permission when he knew that he ought to have got such permission was blameworthy and contributed to his dismissal. It would be justified and equitable in the circumstances of this case to reduce the basic and compensatory award (had such awards been made) by 100% to reflect the claimant's culpability.



**Public access to employment tribunal decisions**

87. All judgments and written reasons for the judgments (if provided) are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the parties in a case.

Employment Judge N Wilson  
13 July 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNALS