EMPLOYMENT TRIBUNALS

Claimant: Miss T Dolan **v** **Respondent**: Mitchells & Butlers Retail Ltd

Heard at: London Central **On**: 09, 10, 11, 12, 13 January & 13 April+05 June 2023 (in chambers)

Before: Employment Judge B Beyzade

Representation

For the Claimant: Mr S Liberadzki, Counsel
For the Respondent: Mr A Kay, Solicitor

JUDGMENT

The judgment of the tribunal is:

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. The complaint of breach of contract and wrongful dismissal (notice pay) is not well founded and is dismissed.

3. The complaint of unauthorised deductions from wages in respect of Company sick pay (December 2020) is not well-founded and is dismissed.

4. The complaint of unauthorised deductions from wages in respect of Company sick pay (3 January 2021 – 27 April 2021) is not well-founded and is dismissed.

5. The complaint of unauthorised deductions from wages in relation to the respondent deducting a sum of money from the claimant's salary due to stock loss is well-founded and the respondent is ordered to pay the claimant the sum of £731.72 from which the respondent may deduct any tax and national insurance that requires to be deducted, provided that the respondent intimates any such deductions in writing to the claimant and remits the sum deducted to His Majesty's Revenue and Customs.

6. The claimant is awarded the sum of £1580.00 in respect of her complaint of unauthorised deductions from wages (holiday pay) from which tax and national insurance requires to be deducted, provided that the respondent intimates any such deductions in writing to the claimant and remits the sum deducted to His Majesty's Revenue and Customs. The remainder of the complaint of unauthorised deductions from wages (holiday pay) is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant presented complaints of unfair dismissal, breach of contract and wrongful dismissal (notice pay), unauthorised deductions from wages (holiday pay, Company sick pay and unauthorised deductions in respect of stock loss), on 29 September 2021, which the respondent denied.

2. A final hearing was held between 09 – 13 January 2023. This was a hearing held by Cloud Video Platform ("CVP") pursuant to Rule 46 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules"). The Tribunal was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings. The Tribunal scheduled further hearing dates in chambers (in private) for deliberations and preparation of the Tribunal's reserved judgment.

3. The parties prepared and filed a Joint Index and Bundle of Documents in advance of the hearing in nine parts consisting of 740 pages.

4. The Tribunal were also provided with a Bundle of Witness Statements consisting of 93 pages.

5. On the morning of 09 January 2023, the claimant's representative applied to include the documents at pages 733-737 and the respondent's representative made an application to include pages 738-740 of the Bundle, which were supplied to the Tribunal (and copied to the other party) after the expiry of the deadline for exchange of documents. Upon the claimant and the respondent's representatives applying respectively for permission for the documents at pages 733-740 of the agreed Hearing Bundle to be included in the Hearing Bundle and (in each case) upon the other party not objecting, the Tribunal gave permission for the parties to include those documents in the Hearing Bundle and accordingly parties were able to refer to those documents in evidence. The Tribunal indicated that parties' representatives may also make submissions in relation to those documents at the summing up stage of the proceedings if they wished to do so.

6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

(i) *Unfair dismissal*

5. Was the reason for the claimant's dismissal conduct?

6. Did the respondent genuinely believe the claimant was guilty of gross misconduct? The respondent relies on the following three areas of conduct:

6.1 It is alleged that the claimant breached the Alcohol at Work policy, the Health Protection Act 2020, the respondent's Security and Licencing policy, and put the Premises Licence at risk (namely by serving and consuming alcohol after 10pm). In this regard did the claimant fulfil in her position as General Manager to ensure all the disciplines in this regard were correctly followed?

6.2 It is alleged that the claimant incorrectly accounted for company stock and cash (serving drinks without them being transactionally accounted for) and breached the 'Dine with us' 33% employee discount terms (by unreasonably allowing food items to be added to a bill to reduce payment for drinks). In this regard did the claimant fulfil in her position as General Manager to ensure all the disciplines in this regard were correctly followed?

6.3 It is alleged that the claimant failed to protect the company's stock resulting in a loss of £36.91 per day and in this regard, as the claimant had overall responsibility as a General Manager, did that the claimant fail to ensure that all policies and procedures were implemented operationally in the business she was responsible for (regarding stock)?

7. Did they have in their minds reasonable grounds on which to justify their belief?

8. At the stage that that belief was formed on those grounds, had the respondent carried out as much investigation as was reasonable in the circumstances?

As to this, the Claimant contends:-

8.1. Were all relevant witnesses interviewed?

8.2 Was all relevant CCTV footage considered?

8.3 Did the respondent investigate and consider what was common practice within the business?

8.4 Did the respondent consider the extent of the claimant's responsibilities during times when she was on site but not the Duty Manager?

8.5 Whether the respondent considered properly the relevant obligations under its policies, the premises license and COVID-19 legislation and guidance?

8.6 Did the respondent act fairly by deciding to hold the disciplinary hearing in the claimant's absence?

9. Did the decision to dismiss fall within the range of reasonable responses ? In other words was dismissal a fair sanction?

(ii) *Remedy for unfair dismissal*

10.If the claimant succeeds:

11. What compensation, if any, is owed to the claimant?

11.1. What financial losses has the dismissal caused the claimant?

11.2. Has the claimant mitigated her loss by taking taken reasonable steps to replace her lost earnings? If not, for what period of loss should the claimant be compensated?
11.3. Should any compensation be reduced to reflect contributory conduct on behalf of the claimant?
11.4. Is there a chance, and if so what percentage chance, that the claimant would have been fairly dismissed anyway if a fair procedure had been followed?
11.5. Should an uplift be applied to any compensatory award to reflect the respondent's unreasonable failure to comply with the ACAS Code of Conduct on Disciplinary and Grievance Procedures? The claimant says that the respondent breached the following aspects of the ACAS Code of Practice:
11.5.1 Paragraph 5 to carry out necessary investigations of potential disciplinary matters including interviewing relevant witnesses (including Shane O'Reilly, Liam O'Reilly, Chloe Fancourt, Maria Villeneuve, Stephen O'Brien, Anna Carvaial, Jamie Moheeput, and Vilija Kisielieute), and obtaining relevant CCTV footage (in relation to allegation that 2 of the claimant's friends were on the respondent's premises after 10pm on 8 October 2020; on 1 October 2020 to show whether claimant and her staff were drinking up to the point that they left the premises; CCTV of morning 11.10.2020 where the door for the respondent's premises was left unlocked; CCTV of evening of 10.10.2020 to show what staff were doing at closing time; CCTV of earlier on 1 October 2020 around 5pm or 6pm to show 2 drinks where they were dispensed and where they were taken to; CCTV of 30 August 2020 when the claimant had a meal with her family).
11.5.2 Paragraph 9 that the disciplinary information should contain sufficient information about the alleged misconduct to enable the employee to answer the case.
11.5.3 Para 25 that the respondent made a decision at first instance even though the claimant had good cause for not attending.

(iii) *Unlawful deductions from wages*
12. Did the respondent unlawfully deduct wages from final pay on 21 May 2021 (£4,716.26 gross) in respect of company sick pay for December 2020?
13. Did the respondent unlawfully withhold company sick pay from 3 January 2021 – 27 April 2021 in the amount of £19,547.74 net? That is the difference between the SSP she received, and company sick pay she should have received, and it is net of estimated tax.
13. Did the respondent unlawfully deduct the sum of £731.32 net on the claimant's final pay on 21 May 2021 in respect of stock loss?
14. Did the respondent unlawfully deduct the sum of £4740.00 gross in respect of the claimant's holiday entitlement for the 2020 holiday year (1 January 2020 – 31 December 2020)? Was the claimant paid the correct level of holiday pay in her final pay (£5,042.08 gross) in respect of holiday that was untaken in the 2020 holiday year that was not carried over into the 2021 but it should have been [The claimant was paid £5,042.08 for 8 days accrued in 2021 holiday year and 3 days in lieu of bank holidays and 5 days carried over from 2020 but the

claimant says she should have received payment for a further 15 days in the amount of £4740.00 gross (paragraph 51 of the claimant's witness statement]?

(iv) breach of contract (wrongful dismissal-notice pay)
15. Was the respondent entitled to dismiss the claimant summarily or was the claimant entitled to six weeks' notice pay? The respondent agrees that the relevant notice period would have been six weeks if the claimant had not been dismissed due to gross misconduct (clause 22 of claimant's contract at page 88 of the Hearing Bundle). The claimant claims the sum of £6498.54 net by way of compensation which relates to her six weeks notice period and a sum of £151.52 for employer's pension contributions (R to confirm if this agreed).

7. Parties agreed that the Tribunal will be required to investigate and determine any issues relating to both liability and remedy at this hearing.

8. The claimant gave evidence at the hearing on her own behalf along with Ms V Kisieliute (Deputy Manager), Mr S O'Brien (Duty Manager), and Mr J Moheeput (Assistant Manager), and they all produced written witness statements. Mr P Hughes (Retail Control Auditor), Ms J McKenna (Retail Business Manager), Mr M Baddeley (Area Manager/Retail Business Manager), and Mr P Thomas (Operations Manager) gave evidence on behalf of the respondent, all of whom had produced a written statement.

9. Having discussed the timetable with the parties' representatives and how much time was required in respect of evidence and submissions, a timetable was followed. This was to ensure that the hearing could be completed (in terms of the evidence and submissions) within the time allocated for the hearing.

10. The claimant and the respondent were represented by counsel and both parties' representatives made oral closing submissions. Both parties' representatives also sent written representations to the Tribunal. In addition, the claimant's representative provided to the Tribunal and the respondent's representative on the fifth day of the hearing a copy of decisions from the Employment Appeal Tribunal ("EAT") and the Court of Appeal referred to in his written representations.

11. I explained to the parties' representatives the importance of the overriding objective, of the need to ensure that all decisions are just and fair and that the parties work together. The parties' representatives worked together to achieve the overriding objective.

Findings of Fact

12. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

Background

13. The claimant was employed by the respondent between 09 March 2015 and 27 April 2021. The claimant was employed as a General Manager prior to her dismissal.

14. The respondent is Mitchells and Butlers Retail Ltd of 27 Fleet Street, Birmingham, B3 1JP. The respondent has approximately 1700 public houses and restaurants in its estate, and it employed 38,000 retail staff.

15. The respondent owned and operated a number of public houses under the name 'O'Neill's' which served both food and drinks (including alcoholic drinks). The respondent's flagship O'Neill's site was located on Wardour Street in Central London. The premises is (and was) licensed to serve alcohol and that licence was granted subject to the conditions contained on its premises licence.

16. The claimant's role included managing the O'Neill's Wardour Street site, which consisted of three trading floors (each with bars) and five levels that included a roof terrace and basement (which did not have bars). The Wardour Street site operated seven nights a week and it had a turnover of approximately £6.5 Million. It also operated as a live music venue.

17. The venue traded in accordance with its licence, normally until 2am on Mondays and Tuesdays and on Wednesdays to Saturdays nights (normally trading until 3am).

18. The claimant managed approximately 70 members of staff working within the Wardour Street site, and she managed other matters such as security, and also live bands who performed at the venue (including sound engineers and similar).

19. The claimant's employment was subject to her ability to hold a Personal Licence. In addition to being a Personal Licence holder, the claimant was a Designated Premises Supervisor.

20. The claimant's contract of employment provided that
"*16. Deductions from wages*
On termination of employment for whatever reason, any losses sustained to the stock or monies of the company caused through the manager's negligence, carelessness, recklessness, dishonesty or through breach of the companies rules or procedures, will be made good by the manager. By entering into this agreement, the employee authorises the company to accomplish this by deductions from wages or any other method acceptable to the company."

21. Under clause 16 the Company were entitled to make deductions from wages "*d. to make good any overpayment of remuneration or any other payments made by mistake or through any misrepresentation or otherwise*."

22. Ms V Kisielieute, Deputy Manager was responsible for overseeing Assistant Managers. Mr J Moheeput, Assistant Manager was responsible for overseeing Senior Supervisors, and his duties included stock management and comps and discounts. Mr L O'Reilly, Assistant Manager would oversee Senior Supervisors and his duties included security. Mr S

O'Reilly was also responsible for overseeing Senior Supervisors including security.

Impact of COVID-19

23. The COVID-19 pandemic had a significant effect on the hospitality industry. The operational changes as a result of the pandemic included the following:
    (i) The respondent's business had shut down entirely during the initial closure period as the first lockdowns were introduced. The claimant and other senior members of the management team conducted security checks on the venue during this time (2 personnel were required on site each day).
    (ii) When the respondent's business reopened the three floors of the premises had to be set up in order to allow customers to be seated (restaurant style) with appropriate gaps between tables to comply with social distancing requirements. All customers had to be seated.
    (iii) The staff were divided into teams in order to allow them to work in 'bubbles'.
    (iv) The respondent's staffing levels were significantly reduced at this time and were spread very thinly to cover all the trading floors in the manner described. Due to this, managers had to be on the floor more often tending to customers and undertaking hands on duties, whilst ensuring that the rules introduced during the pandemic were adhered to.
    (v) The respondent's hours of operation had changed. It was announced on 22 September 2020 that from 27 September 2020 all pubs, bars and restaurants in England had to close no later than 10.00pm. This included a requirement that staff were to serve alcohol until 10-15 minutes before 10.00pm.

Claimant's salary

24. By an email dated 22 June 2020 the claimant agreed to take a 20% reduction in pay due to the exceptional circumstances. This was agreed on a temporary basis for the pay period of July 2020 provided that the

claimant's wider terms and conditions of employment remained unchanged.

25. A meeting took place and thereafter the claimant was sent a letter from Ms J McKenna, Retail Business Manager dated 07 October 2020 proposing a permanent pay reduction from £82,160.00 to £55,650.00 with effect from 06 November 2020 due to the downturn in the respondent's business and external economic factors because of the COVID-19 pandemic. It was stated that by reducing salaries the respondent was hoping to avoid making redundancies or dismissing and reengaging employees on new terms, and that any reduced salary (if accepted) would be reviewed annually and in the event of a substantial change in sales and profitability. The claimant sent an email dated 14 October 2020 agreeing to an extended temporary reduction for a fixed period to be reviewed thereafter. Ms McKenna replied on 16 October 2020 confirming that she will arrange a meeting the following week to enable a further discussion to take place.

26. Ms McKenna then sent a letter dated 21 October 2020 advising that the claimant's offer could not be accepted, and she suggested a compromise proposal of £55,650.00 with a six-monthly salary review process.

27. The claimant was sent a letter dated 26 October 2020 from the HR Support Adviser (Lifecycle) advising her that her annual salary will revert to £82,160.00 with effect from 03 October 2020.

Policy documents and contract of employment

28. There were also a number of policy and related documents.

29. Clause 22b.iii) of the claimant's contract of employment dated 09 March 2015 sets out the circumstances in which the respondent may dismiss an employee summarily which include any serious breach of the contract of employment, any act of gross misconduct, refusing or neglecting to observe the respondent's (or the Retail Business Manager's) reasonable instructions, doing anything or omitting to do anything which may endanger

the Licence or the trade, business or good reputation of the respondent is jeopardised.

30. The ‘Managers Disciplinary Procedure’ was included at Appendix B of the claimant’s contract of employment dated 09 March 2015. This provided that no disciplinary action will be taken until full investigation of all the facts had taken place, the manager has had an opportunity to fully state her case after being informed of the complaints and any related information, that the manager may be suspended on full pay during an investigation, and also made other provisions relating to the process.

31. Paragraph 6 of Appendix B states:

“*6.1 the Retail Business Manager has authority to dismiss following prior consultation with his/her Retail Operations Director or Deputy. This stage will be used for cases of gross misconduct or failure to comply with a final written warning*.”

“6.4 Employment will be terminated without notice or previous warnings for gross misconduct. The Company reserves the right to decide what is considered gross misconduct. Generally this includes any breach of duty or conduct which brings the Company into disrepute or action that is inconsistent with the relationship of trust required between employer and employee. Examples of misconduct in granting summary dismissal includes, but are not limited to:

- *adulteration of goods whether intended for sale or otherwise*
- *serious insubordination*
- *serious or persistent breach of safety rules*
- *theft*
- *fraud, including misuse of e-learning*
- *Acts of discrimination*
- *being under the influence of drink or drugs during working hours*
- *deliberate damage to company property or to that of employees, visitors or customers*
- *disorderly or indecent conduct*
- *unjustified, threatening or actual physical violence at work*
- *breach of statutory duty*
- *gross dereliction of duties including absence without leave*
- *any act or omission likely to jeopardise the premises or personal licence*

- *any serious incorrect cash or accounting procedures"*

32. The respondent operated an Alcohol at Work Policy, which is contained within the Retail Managers Handbook updated in January 2019 (see page 463 and 464 of the Hearing Bundle). The policy stated:
"*For premises in England and Wales, where a manager chooses to provide employees with a drink after closing at night, this must be purchased at the manager's expense and both paid for and dispensed, prior to the end of permitted hours. Otherwise this would be an unlicensed sale of alcohol. It is preferable to offer a soft drink, and under no circumstances should an employee aged under 18 be offered an alcoholic drink. Employees are not allowed to help themselves to a drink as this would amount to theft, and they are also not allowed to dispense a drink after the end of permitted hours and leave the money to pay the next day, as this would be a sale outside the permitted hours. In any event any employee drinks must be concluded within one hour of closing."*

33. The respondent operated a 'Dine with Us' discount scheme, and a copy of the terms and conditions relating to this are provided at page 463 of the Hearing Bundle. The discount was applied by one daily QR code which an employee could use by displaying the code on their mobile telephone. Each time that the discount was used, the same terms and conditions were displayed.

Retail Control Audit

34. In October 2020 reports were run across the whole of the respondent's estate which highlighted that there were some sites that appeared to be processing transactions after 10pm and displayed disproportionate usage of the respondent's Dine with Us discount scheme.

35. Mr P Hughes, Retail Control Auditor was provided with two reports relating to Wardour Street in relation to large disproportionate discounts applied concerning the Dine with Us scheme over the summer of 2020, and also for transactions that were occurring after 10.00pm.

36. There were five employees identified who were potentially misusing the discount, four of whom were employed at the respondent's Wardour Street site (namely Mr R Horvath [Shift Supervisor], Ms C Fancourt [Shift supervisor], Mr L O'Reilly and Mr S O'Reilly). It was the responsibility of the management team (which included the claimant and the four individuals identified in the report prepared by Mr Hughes) to monitor the use of the discount scheme.

37. He produced examples of transactions for each employee (see pages 478 to 560 of the Hearing Bundle). These showed that accounts were being merged with other accounts and then being closed late at night. On 24 September 2020 there was an account for Mr S O'Reilly (with the customer name "BBY Shane") which shows a bill in the amount of £283.15, with a single breakfast at a cost of £5.95 (with white toast cost £0.00 and two hash browns £1.00) being applied, and the remainder of the bill consisted of drinks containing alcohol. Ms Fancourt applied the Dine with Us discount which meant that £93.44 was deducted from the total bill.

38. Mr Horvath merged a number of accounts from colleagues to one large account which totalled £508.20, where one Pizza Margherita was applied at a cost of £9.75. This provided a discount of £167.71. This was opened on 05 September 2020 at 10.36pm and closed on 06 September 2020 at 03.15am.

39. Mr S O'Reilly appeared as the account owner on a transaction opened on 25 July 2020 at 7.54pm and closed on 26 July 2020 at 03.16am and the customer is named as "Taras Friend". This contained a single food item of a Kids Pizza at a cost of £2.99, the bill total was £52.74 (the remainder of the bill consisted of drinks containing alcohol), and a discount of £17.41 was applied.

40. On 30 August 2020 an account was opened at 6.26pm for a customer named "Taras Family" and this was closed on 31 August 2020 at 01.58am.

An employee called Ms H Malnardi was the account owner on the bill which amounted to £60.35 before the 33% discount was applied and the bill contained numerous food items. A number of transactions relating to that customer were processed by Ms Fancourt including the addition of a 33% Dine with Us discount voucher on 31 August 2020 at 01.58am.

Visit to Wardour Street site and interviews

41. Mr Hughes visited the respondent's Wardour Street site on Saturday 17 October 2020. The claimant was working at the time, he did not provide details of his investigation to her (which was standard practice at that stage of the investigation), and the claimant found a room for him to use when conducting his interviews.

42. He interviewed Ms Fancourt, Mr L O'Reilly, Mr S O'Reilly, and Mr Horvarth. By and large they admitted to the transactions, but Mr L O'Reilly, Mr S O'Reilly, and Ms C Fancourt could not recall the transactions relating to the claimant. When asked whether the claimant was aware of their usage, there was either no response, or it was said that the claimant was not involved.

43. All four individuals were suspended by Mr Hughes after he had discussed the case file with them. Mr Horvarth was angry after he was suspended by Mr Hughes, and he had to be asked by the claimant to leave the site.

CCTV Footage

44. Mr Hughes also sought to look at the CCTV footage to ensure that the relevant employee was using the till and processing the transactions using their till key and/or discount voucher. He also wanted to view CCTV footage relating to some transactions that had taken place after 10.00pm, which had been highlighted on the second report. However, the claimant stated that he could not look at the CCTV from the office (which was only accessible from there) as it was a Saturday night. Mr Hughes updated Ms McKenna about the progress of his investigation.

45. He re-visited the O'Neill's Wardour Street site on 21 October 2020 to continue his investigation relating to the use of the Dine with Us scheme discount and transactions being made after 10.00pm. While he was viewing CCTV footage, Ms McKenna was sitting next to him undertaking work on her laptop and mobile telephone.

46. While Mr Hughes was reviewing a transaction on 01 October 2020 at 10.38pm, Ms McKenna had said words to the effect of "*that's Tara*." The CCTV footage showed the claimant at the till with Mr O'Reilly and Mr S O'Brien (part of the management team). The claimant was at the till for a period of five minutes with the other two employees and she had been looking at the till, changing the PDQ paper and paying for the tab in question.

47. He also noted that there was other CCTV footage on the same evening showing that there was no social distancing, and seven people remaining in the business (who were not working) who were at times dancing, not wearing masks and sitting around a table. At 10.12pm Ms Fancourt who appeared visibly drunk had climbed over the claimant and appeared to climb over the banister of the first floor of the mezzanine. The claimant and others took her off from there.

48. Mr Hughes could find no transactional data supporting the drinks poured at 10.44pm. There was an account set up at 8.54pm and the claimant paid her invoice at 10.38pm. Six drinks were dispensed shortly after 10.44pm and then taken to the relevant table. Ms M Villaneuva (member of the claimant's team) used her Dine with Us code at 10.12pm on which she added kid's nuggets (at 10.10pm). He noted that the sambuca's on the claimant's account which had been dispensed were then voided from the merged bill.

49. He further noted from the CCTV footage that those present on that occasion did not leave the premises until 12.47am on 02 October 2020,

and the exit door to the premises was held open for a period of five minutes.

50. The transactional data evidenced that on 08 October 2020 an account was closed at 10.08pm by Mr S O'Reilly and a Dine with Us discount had been applied at 10.05pm (and a kid's Nuggets meal was added). The claimant passed her bank card to Mr S O'Reilly to make payment for her tab.

51. He further noted that on 10 October 2020 at 11.17pm, the claimant was on site with four colleagues. There were four pints of Guinness poured by her colleagues. It appeared that they were poured after 10.00pm when all the tills were closed. The claimant and her colleagues did not leave the premises until 12.10am.

52. Mr Hughes conducted a meeting with the claimant on 21 October 2020 (the notes from that meeting appear at pages 116 to 123 of the Hearing Bundle). The claimant confirmed during the meeting that she allowed employees to stay on the premises after work and to consume alcohol. She later clarified that she had allowed staff to remain at work who are normally on site (this included staff who were not working at the time the business was required to close).

53. Mr Hughes put to the claimant the tab relating to 25/07 stating "Tara's Friends" where Mr L O'Reilly placed a pizza at the end in order to obtain a discount, and the claimant indicated that she did not know about this. She also said she did not recall a tab from 30 August 2020 stating "Tara's Family" when a number of food items were purchased with the Dine with Us discount. She clarified that her family came in when she was at work, and she may sit with them before starting her shift or they will not consume alcohol. In relation to whether she asked her colleagues to use their discount code to discount bills for her friends and family, she stated that she would not do this unless she could not get her own code to come up.

54. He suggested to the claimant that when a kid's pizza was put through at 3.00am, this was just to obtain a discount on some drinks. The claimant asked whether he saw the rest of the CCTV footage to see whether the pizza was cooked at that time.

55. The claimant confirmed that it was her understanding that she could stay after work and have drinks "as long as is reasonable…". When asked what was reasonable in her opinion the claimant said *"I dunno, you can sit through one pint in an hour if you are chatting over something, I don't know. It's pretty not mice times at the moment I dunno, depends on the individual as well. As long as it's done reasonable, you know. If it doesn't put the business at risk, I guess."*

56. In response to a question about not having knowledge of the Alcohol at Work Policy, the claimant simply replied "Ok". The claimant queried whether drinks after work were permitted from when the 10pm curfew was introduced. Mr Hughes said the position was the same (and that one drink after work was allowed), to which the claimant replied, "*oh right, ok*" and she further stated, "I have a feeling I will be rereading a lot of policies."

57. The claimant was asked about what had happened on 01 October 2020, but she did not have any recollection and requested to view the CCTV footage. Mr Hughes displayed the relevant CCTV footage. The claimant stated that not all drinks were dispensed (and the sambucas and the espresso martinis were not dispensed). She said she was happy for her colleagues to consume drinks after 10pm that they had already paid for.

58. He mentioned the four pints of Guinness that were dispensed after 10pm. The claimant indicated that these were not for her, and they were for Mr S O'Reilly, Mr L O'Reilly and a couple of the other employees who were working. She did not dispute that they remained on the premises until 1am (and she said they were just talking). She accepted that she tried to pay her bill, and this was at about 10.38pm. She did not know whether payment was made for the 4 pints of Guinness, and she said this was a

matter for the manager on duty that day. She acknowledged that herself and some of her colleagues were not working and had stayed in the business until 1am.

59. The claimant confirmed that she did not look at the bill on which some kid's meals were included after 10.05pm to activate the discount and she simply paid the bill (without reviewing it). She also said, "*Maybe I should have looked at the bill*."

60. It was also mentioned to her that on 08 October 2020 she finished work and had 4 bottles of Peroni beer with some colleagues and Mr S O'Reilly had applied a kid's chicken nuggets and 33% discount. She stated she believed that she consumed a soft drink that day, but she acknowledged that the beers were part of the party. She said she had no idea that Mr S O'Reilly had applied the discount. She indicated it would not surprise her if the pizza had in fact been made. The claimant told Mr Hughes that the kitchen took their last orders normally between 9.15pm and 09.30pm depending on what the dish was.

61. The claimant also said they normally took last orders at the bar at 09.30pm and then they kept dispensing, that drinks would be ordered before close down, and that customers knew when they needed to be out.

62. Mr Hughes reiterated that the account in question had been discounted with a kid's meal which was not the intention of the Dine with Us discount. He said it was to enable the claimant to dine and have a meal or a drink, and not for staff members to put on a kid's meal so that they get their drinks cheaper, to which the claimant replied *"Right*."

63. The claimant said she handed Mr S O'Reilly her payment card to pay the bill (which she said she remembered doing because she had received bad news that day and her two colleagues had been consoling her).

64. The claimant was given the opportunity to add anything further and she stated that she did not wish to make any closing remarks. The recording was then turned off.

Claimant's suspension

65. The claimant was suspended from duty following the investigation meeting on 21 October 2020. She was informed that the allegations against her broadly related to breach of the Alcohol at Work policy and COVID-19 related rules, incorrect accounting of stock and cash relating to the Dine with Us discount scheme and breach of all her accountabilities as a manager in that regard.

66. She was sent a letter from Mr Hughes dated 23 October 2020 confirming that she was suspended from duty as General Manager following their meeting on 21 October 2020, and he confirmed that this was due to the allegations against her which were summarised in the letter numbered points 1 to 3.

67. The letter stated that the allegations may be changed, or additions may be made in light of their investigation, and that her suspension will be kept under review. She was to be paid as normal during her suspension and it was stated that the purpose of the suspension was to allow the respondent to carry out further investigations.

Investigation by Mr N Apps (Operational Practice Manager)

68. Mr Apps visited the O'Neill's public house in Wardour Street on 26 October 2021 in order to conduct a Practices Support Audit. This was unannounced. He undertook a full cash reconciliation, full drink stocktake, and full food stocktake. He reported that there was a drinks stock deficit of £3,137.00 between 02 August 2020 and 26 October 2020 (over 85 days). Additionally large amounts of wastage were put on the system on 30 September 2020, which were claimed to have been line cleaning (no cleaning had been recorded since July 2020). The business was losing £36.00 wet stock per day and the tolerance was £0 per day (this was

because of the head in a pour of drought product which meant the bar should always be in surplus in terms of beer stock).

69. Mr Apps conducted a meeting with the claimant on 04 November 2021 to discuss the stock loss that was occurring. The claimant was also asked whether the team stayed behind to have after work drinks at the time of the 10pm curfew and she admitted that they had done so (but not seven days a week). She explained that she had been off duty, she paid her bill and then stayed and consumed her drinks. She said she was aware that the business was closed in terms of guests at 10pm, but that this did not apply to staff that went home together in groups.

70. She acknowledged that Mr Moheeput puts the line cleaning wastage through, but that he missed some and she told him to get it on for stock accuracy. She could not recall the normal amount of line cleaning wastage put through, and she said that the wastage processed the day after the OPM emailed to schedule a visit "…*looks horrendous*…", but she maintained that it was not intentional (and not linked). She mentioned that some of the practices and controls had been pushed further down the line due to the COVID-19 pandemic.

71. Ms McKenna interviewed Mr J Moheeput on 09 November 2020 and Mr Moheeput was invited to sign the notes of that meeting electronically. He stated, "*Without having the full report in front of me, I think there where about 6 kegs of hop house some open OOD, Guinness 4 one or two may have been part kegs I cant remember off the top of my head. If im correct last time we ordered hop house was September 11th. I believe the main stock loss was those kegs. That accounted for about £1500. I would have needed the full report in front of me. I am not sure if the company where aware but Diageo were sending in short shelf lives, I believe they were extended similar to peroni. That was before the curfew and we would have sold.*" He also indicated that he discussed the position relating to stopping using all lines on all bars with the claimant on 20 October 2020.

72. He also confirmed that from a company perspective he believed everyone is accountable for stock in the business, and the General Manager is accountable in addition to the Deputy, Assistants and the team who were all responsible. It was put to him that "*During Tara invstigation she has said that you are responsible, with help from Vilija*." He replied that he would not say that the claimant had given away accountability and although he accepted responsibility, he said she was still involved.

Concluding the investigation

73. Mr Hughes prepared a set of documents relating to the investigation (please see pages 461 to 477 of the Hearing Bundle).

74. Mrs Stack, Mr Spong and Ms McKenna reviewed and amended the allegations against the claimant over and above Mr Hughes's involvement.

75. In late November 2020, Mr S O'Leary and Mr L O'Leary were dismissed and Ms Fancourt was given a final written warning. Mr Horvarth had already resigned.

Disciplinary hearing

76. The allegations against the claimant progressed to a disciplinary hearing and Mr M Baddeley, was appointed as disciplinary officer. On or around 25 November 2020 he received a copy of a file of documents. Mr Baddeley worked outwith Mr Hughes's geographical area.

77. An invitation was sent to the claimant dated 01 December 2020 to attend a disciplinary hearing on 04 December 2020.

78. The claimant was provided with a copy of documents relating to the investigation and she was informed she could view the CCTV footage before the hearing if she wanted to do so.

79. Arrangements were made by Mr Baddeley for the claimant to view the CCTV footage on 04 December 2020. The claimant was unable to attend

the disciplinary hearing due to a family bereavement and issues with her Trade Union representative.

80. The disciplinary hearing was rearranged, and the claimant was advised on 07 December 2020 that this would now be taking place on 11 December 2020. On 08 December 2020 the claimant provided a fit note stating she would be absent from work until 18 December 2020.

81. On 14 December 2020 a further lockdown was announced by the Government due to the COVID-19 pandemic from 16 December 2020, which meant that the respondent's public houses and restaurants had to be closed. The respondent's retail employees were placed on furlough leave and Mr Baddeley was on flexible furlough leave.

82. The claimant provided a fit note on 24 December 2020 which was due to expire on 07 January 2020. The claimant supplied a further fit note thereafter.

83. An Occupational Health report had been prepared dated 04 January 2021 and a further email was received from the Occupational Health provider. Following receipt of these a subsequent invitation letter dated 21 January 2021 was sent to the claimant to attend a disciplinary hearing. The claimant was advised she could have breaks during the meeting. It was stated that if the claimant failed to attend, the disciplinary hearing may proceed in her absence. The claimant did not contact Mr Baddeley.

84. Mr Baddeley sent a further letter to the claimant dated 28 January 2021 inviting her to attend a disciplinary hearing on 04 February 2021. The claimant provided a fit note on 03 February 2021 advising that she would be absent from work until 29 February 2021.The claimant also advised she was seeking medical support.

85. On 22 February 2021 an Occupational Health report was produced advising that any disciplinary or investigation should proceed as quickly as

possible, and that the claimant was fit to attend procedural meetings with adjustments that ensured she avoided using a screen (she could provide written responses or attend the meeting remotely by telephone). On 16 March 2021 Mr Baddeley sent a letter to the claimant offering to hold the disciplinary meeting by Microsoft Teams and pointing out that this gave her the ability to use audio only (she could turn off her visual equipment). He also suggested allowing additional time for the meeting to enable regular breaks to be provided. and Mr Baddeley advised her on 16 March 2021 to keep in touch. The claimant replied by email dated 18 March 2021 advising she was on certified sick leave, she could not commit to a date at the moment, she will consult her doctors and provide an update.

86. The claimant was sent a hard copy of the documents relating to the disciplinary investigation on 22 March 2021 (to reduce screen time). The claimant provided a further fit note on 26 March 2021. A further letter was sent from Mr Baddeley to the clamant dated 30 March 2021.

87. The claimant advised on 07 April 2021 that she was not well enough to defend herself sufficiently and she felt this had been ignored previously. She provided dates she was available to attend the disciplinary hearing along with her trade union representative.

88. The claimant was sent an invitation on 21 April 2021 to attend the disciplinary hearing on 27 April 2021 by Microsoft Teams (with adjustments being made). The claimant was advised that if she did not attend, the meeting will proceed in her absence and one possible outcome of the meeting was her dismissal. The claimant had not accepted the invitation, but her trade union representative, Mr Gilligan had accepted.

89. In preparation for the hearing, Mr Baddeley reviewed the investigation material provided to the claimant and the relevant CCTV footage.

90. The disciplinary hearing took place on 27 April 2021. The claimant did not attend. Mr Gilligan attended the Microsoft Teams meeting along with Mrs

Stack and Mr Hughes. Mr Gilligan advised that the claimant's sister telephoned him to advise that she was unwell and would not be able to attend the meeting. Mr Baddeley made the decision to proceed with the hearing in the claimant's absence. The notes from that meeting are available at pages 250 to 261 of the Hearing Bundle.

91. Mr Baddeley's outcome letter was sent to the claimant dated 27 April 2021. The claimant was dismissed from her employment for gross misconduct in relation to allegations 1-3 with effect from the date of the disciplinary hearing (no further action was taken with respect to allegation 4). She was advised that she would not receive any notice pay. The reasons for her dismissal are detailed in this letter.

92. He states that he reviewed the evidence that was provided to the claimant which included CCTV footage, Retail Control Audit report, zonal transactions, rotas, operational practice manager reports, Company policies, training records and so on.

93. In relation to allegation 1 he states:

"*You have not accepted overall responsibility for the business or ensured that the 'appropriate disciplines are in place at all times'. You have also failed to be accountable for implementing the various processes and disciplines as outlined in the current company policies and standards documentation*'.

From a licensing perspective you are required to ensure that the 'conditions of the licence are adhered to at all times and that through acts of omissions', you, 'will not allow any conduct inconsistent with the licensing objectives that may put the licence at risk'. Your conduct in relation to allegation 1 demonstrates that you have also failed in this key area.

Having considered all the evidence presented to me and the facts I have taken the decision that your conduct and performance in relation to allegation 1 amounts to Gross Misconduct."

94. In respect of allegation 2 he states:

"During the course of your investigation meeting with Paul Hughes, retail control auditor on 21 October 2021 you stated that you were not aware of the terms and conditions of the, 'dine with us', staff discount scheme in as much detail as you apparently should be. I refer to the evidence provided to you which is a business task from May 2019 in which you are required to print off a new cash & stock document, read and understand and sign the document. This document includes all the terms & conditions of the scheme which are not in any way ambiguous.

I cannot accept that you were not aware of these and therefore you failed in your position as General Manager to ensure all the disciplines in allegation number 2 were correctly followed. Having taken into consideration all the evidence provided and your response in your interview with Paul Hughes I conclude that your conduct amounts to Gross Misconduct in relation to allegation number 2."

95. When considering allegation three, he states:

"I accept that O'Neills, Wardour Street is an extremely large business with multiple members of management, but you have overall responsibility for the business. To delegate tasks to members of your management team is expected. However, to abdicate responsibility is not. Despite being present in the business for the 14 wet stock counts since the business reopened you had taken no action to 'effectively minimise the risk of loss, theft or waste and all preventative actions' that 'must be taken to avoid stock losses'. I have a reasonable belief that you failed in your responsibility in this key area of management not only in relation to breach of stock responsibility, but this allegation also links very clearly to allegation number 2.

Having considered all the evidence presented to me and the facts I have taken the decision that your conduct and performance in relation to allegation 3 amounts to Gross Misconduct."

96. He does not provide any further reasons in respect of his findings relating to allegation three.

97. He decided not to take any further action in respect of allegation four on the basis that her team may have continued to apply the service charge more of habit than an unintentional decision not to follow a reasonable management instruction.

98. The letter provided that the claimant had a right of appeal to Mr C Brewer, Operations Director which must be sent within 7 days of receipt.

Claimant's Appeal

99. The claimant sent an appeal by email dated 07 May 2021 to Mr C Brewer.

100. Mr P Thomas, Operations Director, Pub Division, for Ember Inns was appointed by Mr Brewer to chair the appeal and the claimant was notified about this by email dated 12 May 2021.

101. Mrs Stack sent an email to the claimant dated 13 May 2021 inviting her to indicate whether she preferred to meet face to face, if possible, via an online meeting, or if she wished her appeal to be addressed in writing.

Stock Loss and overpayment of sick pay

102. On 15 May 2021 Mr Hughes sent an email to Ms McKenna providing details of figures for recovery of stock loss. Mr Spong replied by email dated 17 May 2021 advising that as no admission has been made, the respondent should only take what is attributable to the General Manager through carelessness, recklessness, dishonesty, or failure to follow procedures. Ms McKenna replied by email of the same date advising that she was happy that this was in line with the claimant's contract. The claimant was sent a letter from Ms McKenna dated 19 May 2021 advising that due to overpayment of Company sick pay amounting to £4716.26 (the email dated 14 January 2021 from Ms J Allies to Ms K Wood explains that if the claimant had been recorded as sick from 5th December 2020 she would have been paid 17 days SSP £325.89 and she was in fact paid £5042.26 which was 80% of her salary for the whole period so she was overpaid by £4716.26) and RCA/OPM cash and stock loss of £4056.10,

those amounts will be deducted from the claimant's pay in accordance with her contract of employment.

Further details relating to claimant's appeal

103. The claimant sent a letter relating to her appeal dated 15 June 2021. She referred to Mrs Stack's email dated 01 June 2021 requesting her to set out in writing a response to allegations within 14 days and to the letter of dismissal. She set out in bullet point form a number of complaints about the decision taken by the respondent being based on inaccuracies, without her response being taken into account due to her inability to attend the hearing on 27 April 2021.

104. She noted that her job was readvertised on 05 May 2021. This was the respondent's standard practice to ensure recruitment could be undertaken as soon as possible and if the claimant had not been dismissed there would have been a discussion with any new manager and the claimant as to whether they stayed or moved to another site. She then detailed her response in respect of each allegation. She said it is apparent that the company disregarded her wellbeing, despite her unblemished performance prior to these allegations being made. She said that whilst she recognised her role as General Manager (during working hours) there is also individual responsibility and accountability of others that has not been considered and those that were empowered to undertake key duties as part of their own role. She also referred to the difficulties faced during the COVID-19 pandemic.

105. A statement was prepared by Ms S Taylor, Solicitor dated 22 June 2021 relating to licencing matters.

106. Mrs Stack sent an email to the claimant dated 24 June 2021 advising her that arrangements could be made for her to meet a company representative to view the CCTV footage at a mutually agreed time and location (and having received no response she followed this up by email

dated 09 July 2021). It was agreed by emails dated 28 and 29 July 2021 that the claimant would view the CCTV footage on 12 August 2021.

107. After the claimant viewed the CCTV footage on 12 August 2021, the claimant sent an email to Mrs Stack on 23 August 2021 advising that her aunt passed away on 13 August 2021 and that her union representative was on annual leave during that week. The claimant sent a further letter dated 31 August 2021 providing additional responses to the allegations after having viewed the CCTV footage.

Claimant's request for appeal to be conducted in writing

108. The claimant requested in her response to Mrs Stack that she wished the appeal to be conducted in writing. Mr Thomas agreed to her request to conduct the claimant's appeal in writing.

Appeal outcome

109. The appeal outcome was communicated to the claimant in writing by letter dated 14 September 2021. Mr Thomas stated that an appeal against dismissal involved conducting a complete rehearing of the facts of the case and he considered each allegation individually. He did not consider allegation four as Mr Baddeley had decided to take no further action on that particular allegation. The claimant's appeal was rejected, and the letter provided the reasons for this.

110. In the concluding paragraphs the letter stated as follows:
"*Following a detailed review of the evidence and your letter of appeal I have considered the facts, I am satisfied that there had been misconduct and that the decision to dismiss you on the grounds of Gross Misconduct, for your conduct relating to allegations 1-3 was appropriate in the circumstances.*"

111. He found in respect of the claimant's conduct in relation to allegation 1 (under allegation g):

"*Again, I agree with Matt that from a licensing perspective you are required to ensure that the 'conditions of the licence are adhered to at all times and that through acts of omissions', you, 'will not allow any conduct inconsistent with the licensing objectives that may put the licence at risk'. Your conduct in relation to allegation 1 demonstrates that you have also failed in this key area."*

112. In respect of allegation 2 he states (after allegation j):
 "Having reviewed the evidence and considered the points in your appeal I do conclude that overall, as the General Manager you are contractually responsible for the correct disciplines and policies being in place. It is clear that the, 'Dine With Us', scheme is being abused i.e. Drinks being discounted by a meal being placed on the bill, the premises licence has been put at risk because items are being dispensed/consumed after the permitted trading times, and there are drinks being dispensed/consumed with no fiscal transaction therefore breaching the permitted unit price of alcohol. I see no evidence that you have put controls into place to stop these things happening, such as monitoring discount usage, identifying fraud, and ensuring policies are followed."

113. When considering allegation three, he refers to an extract from the disciplinary outcome letter and he states:
 "…I have a reasonable belief that you failed in your responsibility in this key area of management not only in relation to breach of stock responsibility, but this allegation also links very clearly to allegation number 2.
 Having considered all the evidence presented to me and the facts I have taken the decision that your conduct and performance in relation to allegation 3 amounts to Gross Misconduct.
 I agree with Matt Baddeley's conclusion in relation to allegation 3."
 He does not seek to analyse or proffer any further reasons in respect of his findings relating to allegation 3.

Deductions from final salary

114. Although the Company sick pay of £4716.26 were deducted from the claimant’s final pay in May 2021, the cash and stock loss sum deducted by the respondent was £731.72.

Company sick pay

115. Clause 7a. of the claimant’s contract of employment dated 09 March 2015 stated that “*The Company’s Sick Pay Scheme is described in the Manager’s Handbook*.” The Retail Management Handbook updated in January 2019 states under the heading Sick Pay Provision, “*If the manager is either suspended or notified (either verbally or in writing) of any potential investigation/disciplinary action or impending/potential disciplinary action, and subsequently reports unfit for work; the company reserves the right to suspend Company Sick Pay until the matter is resolved, SSP will continue to be paid*.”

116. The letter from Ms McKenna to the claimant dated 10 December 2020 stated that she had arranged to withhold payment of Company sick pay for this period of illness as this was discretionary and she referred to the Sickness Absence Policy of the Retail Managers Handbook. The claimant was advised that she would continue to receive any Statutory Sick Pay that she was entitled to.

117. The claimant was sent a letter dated 12 January 2021 from Ms McKenna advising she was paid Company sick pay in error in the pay period paid on 31 December 2020. She stated that she had decided to withhold company sick pay for her period of illness as this was discretionary and she referred to the Sickness Absence Policy in the Retail Managers Handbook.

Holiday pay

118. Further, clause 8 of the claimant’s contract of employment dated 09 March 2015 stated that “*Annual holiday entitlement and the rules governing the taking of paid holiday are set out in Appendix A of this Contract*.”

119. Appendix A of the claimant's contract of employment provides that the holiday year runs from 1 January until 31 December and that the basic holiday entitlement is 5 weeks (25 working days). Public holidays are deemed to be a normal working day although where such days are worked a manager is entitled to a day off in lieu. Employees are required to agree their holiday arrangements with the Retail Business Manager, and it is stated that this should be on the basis of a minimum of 4 weeks' notice being provided by the employee prior to the commencement of the period of holiday leave. Paragraph 6 provides:

"*All holidays should be completed within the calendar year. No holidays can be carried over into the following year without written approval of the Retail Business Manager, in this case they should be taken by the end of January. Payment in lieu of holidays will not be allowed*."

120. Due to the exceptional circumstances in 2020, the respondent allowed a maximum of 5 days' holiday from the year 2020 to be carried over into the year 2021. A further five days' holiday could be carried into January 2022. Except for this special arrangement, employees were required to take their holidays as normal including whilst they were on furlough leave and this was communicated to employees via a standard letter from the respondent's HR team.

121. The claimant states that she was owed approximately 8 days of holiday from the 2021 holiday year (which was not disputed, albeit the claimant stated that this did not take account of the bank holidays which she normally worked). She acknowledges that her last payslip computed a payment in respect of 16 days holiday.

Tribunal process

122. The claimant contacted ACAS to start Early Conciliation on 21 July 2021 and her ACAS Early Conciliation Certificate was issued on 26 August 2021.

123. The claimant presented her Tribunal claim on 29 September 2021.

Mitigation

124. Since her employment came to an end, the claimant has made several efforts to find alternative employment. She has included documentary evidence of her search for employment in the Hearing Bundle.

Observations

125. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

126. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

127. The Tribunal took into account the claimant's evidence about her employment history, the background, the responses she presented to Mr Hughes, and the written representations she made in terms of the allegations made against her (including in her detailed grounds of appeal).

128. The Tribunal considered the investigation material prepared by Mr Hughes with numerous appendices. The claimant had access to this information, and she was given an opportunity to view the CCTV footage.

129. Although four allegations were put forward to Mr Baddeley to consider, he took no further action in respect of one allegation and found the remaining three allegations set out above to be proven. This, along with the process followed during the disciplinary hearing and the invitation to the claimant to provide comments after the hearing, were an indication that he actively considered the allegations and the need for him to conduct a fair and

reasonable process and to be satisfied that the allegations were well-founded on the balance of probabilities.

130. The Tribunal noted that although Mr Thomas accepted in relation to allegation 1 that the pandemic caused the claimant's team strain, he concluded that avoidable breaches of policy and legislation were not acceptable, and that her team members were not all from the same bubble. Additionally, he concluded that the Dine with Us Scheme were being abused, and the premises licence was placed at risk. He saw no evidence that the claimant had put into place controls to stop these matters from occurring. Furthermore, there was no evidence of any or any sufficient insight from the claimant in relation to her conduct in terms of any of the allegations that were found to be proven, in the claimant's evidence.

131. The claimant asserted that other premises were operated in the same manner and breaches of the Dine with Us discount scheme occurred. The Tribunal was not taken to any evidence in the Hearing Bundle to show that there was inconsistency in treatment. In any event there was no evidence before the Tribunal as to the circumstances of any individuals concerned and their employment situation with the respondent. There was evidence in relation to disciplinary action taken against other members of the claimant's team who had been found to have breached the respondent's policies and procedures including in terms of the Dine with Us scheme.

132. Both Mr Thomas and Mr Baddeley said that they considered that the claimant could have been dismissed in respect of her conduct that was found proven in respect of allegation one alone and that they considered her actions in relation to that allegation amounted to gross misconduct. Additionally, both individuals confirmed that they also considered that the claimant's conduct in relation to allegation two alone amounted to gross misconduct and that allegation on its own would have led to a decision to dismiss the claimant. I considered their evidence in respect of this issue to be credible and consistent.

133. The Tribunal noted the paucity of the investigation in relation to the respondent's decision to uphold allegation 3. Whilst there were some issues with stock, the interviews conducted with the claimant and Mr Moheeput, and the documentary evidence did not show how and why (and to what extent) it was said that the claimant was responsible in respect of stock loss. There was no clear or sufficiently clear or detailed explanation in relation to the finding relating to allegation 3 in Mr Baddeley's and Mr Thomas's outcome letters. It appeared that reliance was placed on their experience in the trade relating to public houses (although this was not documented or put to the claimant at the relevant time). It is also not clear to what extent the matters contained in Mr Moheeput's investigation interview were investigated and taken into account.

134. In respect of holiday pay, I rejected the claimant's evidence that she was owed 20 days' holiday from the 2020 holiday year. This was not only inconsistent with the respondent's written requirements in respect of the 2020 holiday year, but there was no or no sufficient documentary evidence showing any agreement on the part of the respondent for the claimant to carry over 20 days holiday entitlement from 2020, nor was there any or any sufficient evidence to show that the claimant had been unable to take her leave during the 2020 leave year. I also accepted Ms McKenna's evidence in relation to the claimant's holiday entitlement (except that there were five days the claimant could have carried into 2022) and the reasons for withholding company sick pay which was clear and consistent. I accepted her evidence that company sick pay was normally withheld in the circumstances and that this policy was applied consistently. The claimant's evidence that she was owed 8 days holiday in respect of 2021 and that she was paid 16 days holiday pay on her last payslip was not challenged.

<u>Relevant law</u>

135. To those facts, the Tribunal applied the law –

Unfair dismissal

136. Section 94 of the Employment Rights Act 1996 ("ERA 1996") provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA 1996). That the employee committed misconduct is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA 1996). Where dismissal is asserted to be for misconduct the employer must show that what is being asserted is true i.e., that the employee has in fact committed misconduct.

137. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in *British Home Stores v Burchell [1980] ICR 303* the employer must show:
(i) It believed the employee was guilty of misconduct;
(ii) It had in mind reasonable grounds upon which to sustain that belief; and
(iii) At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

138. In *Ilea v Gravett [1988] IRLR 487* the EAT considered the Burchell principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a

reasonable employer could have reached the conclusion on the available relevant evidence.

139. In that case the EAT upheld the Tribunal's decision which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

140. The amount of investigation needed will vary from case to case. In *RSPB v Croucher [1984] IRLR 425* the EAT held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

141. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason, but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity, and the substantial merits of the case.

142. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

143. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; *Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] ICR 1283*. It should be recognised that different employers may reasonably react in different

ways, and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

144. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

145. Mr Justice Browne-Wilkinson in his judgement in *Iceland Frozen Foods Ltd v Jones [1983] ICR 17*, in the EAT, summarised the law. The approach the Tribunal must adopt is as follows:

"The starting out should always be the words of section 98(4) themselves. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair

In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt

In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

146. In terms of procedural fairness, the (then) House of Lords in *Polkey v AE Dayton Services Ltd [1988] ICR 142* firmly established that procedural fairness is highly relevant to the reasonableness test under section 98(4).

147. Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing:" in *the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation*."

148. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In *Ulsterbus v Henderson [1989] IRLR 251* the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "*most meticulous review of all the evidence*" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

149. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The EAT emphasised in *Fuller v Lloyds Bank [1991] IRLR 336* that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result

of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see *Sainsburys v Hitt [2003] IRLR 23*).

150. The Court in *Babapulle v Ealing [2013] IRLR 854* emphasised that a finding of gross misconduct does not automatically justify dismissal since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (*Strouthous v London Underground [2004] IRLR 636*).

151. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter, and allowing an appeal.

152. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (*West Midland v Tipton [1986] ICR 192*). This was confirmed in *Taylor v OCS [2006] IRLR 613* where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

153. The Tribunal also considered the EAT's decision in *Khan v Stripestar Ltd UKEATS/0022/15/SM*. The Honourable Lady Wise held in that case that there are no limitations on the nature and extent of the deficiencies in a first stage disciplinary procedure that can be cured by a thorough and effective appeal. It was confirmed that the Employment Judge was correct in concluding that a lack of credibility on the part of a witness who had

conducted a disciplinary hearing that was disregarded as procedurally and substantively unfair did not inevitably render the whole dismissal unfair.

Breach of contract/wrongful dismissal

154. Under Section 86 of the ERA 1996 an employee is entitled to one week's notice of termination of employment for each year of continuous employment up to a maximum of 12 weeks' notice. A contract of employment may provide for a longer period of notice.

155. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more). An employer does not however have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice).

156. A contract of employment may be terminated without notice where the employee is in repudiatory breach. Satisfaction of the *Burchell* test (that there is a reasonable belief held on reasonable grounds) is insufficient - the respondent must prove actual repudiation on balance of probabilities (*Enable Care & Home Support Ltd v Mrs J A Pearson UKEAT/0366/09/SM*).

157. The Tribunal must come to its own view about the claimant's conduct for the purposes of a wrongful dismissal claim but must take care not to take those findings into account in deciding whether the dismissal was unfair.

Unlawful deductions from wages

158. There is a right not to suffer unlawful deduction from wages created by section 13 of the ERA 1996, "*unless the deduction is required or authorised to be made by …..a relevant provision of the worker's contract*." There is a provision as to excepted deductions in section 14(1) of the Act "*where the purpose of the deduction is the reimbursement of the employer in respect of – (a) an overpayment of wages….made (for any reason) by*

the employer to the worker." Wages are defined in section 27 of the Act, and include "*any sums payable to the worker in connection with his employment…*"

159. The ERA 1996 can be used to challenge deductions from (or non-payment of) amounts which are not strictly payable under the contract, but which are in the reasonable contemplation of the parties as being payable: *Kent Management Services Ltd v Butterfield [1992] ICR 272*. There must however be some legal right to the payment in question, even if not contractual as s 13(3) refers to a deduction from the wages 'properly payable': *New Century Cleaning Co Ltd v Church [2000] IRLR 27*.

160. There are provisions under section 23(2) of the ERA 1996, by which the claim must be commenced within three months of the date of payment of wages, amongst other provisions.

Working Time Regulations 1998

161. The *Working Time Regulations 1998* ("WTR") make provisions in respect of annual leave. Pursuant to section 13 of the WTR a worker is entitled to 4 weeks' leave in each leave year and that:

"(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a)it may only be taken in the leave year in respect of which it is due, and

(b)it may not be replaced by a payment in lieu except where the worker's employment is terminated."

162. The *Working Time (Amendment) Regulations 2007* state:

"*Entitlement to additional annual leave*

13A.—(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

…

(e)in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—

(a)the worker's employment is terminated; or

(b)the leave is an entitlement that arises under paragraph (2)(a), (b) or (c); or

(c)the leave is an entitlement to 0.8 weeks that arises under paragraph (2)(d) in respect of that part of the leave year which would have elapsed before 1st April 2009.

(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due."

163. *The Working Time (Coronavirus) (Amendment) Regulations 2020* state:

"2. The Working Time Regulations 1998 are amended as follows.

3. In regulation 13—

(a)at the beginning of paragraph (9)(a) insert "subject to the exception in paragraphs (10) and (11),";

(b)after paragraph (9) insert—

"(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).".

Submissions

164. The parties' representatives made submissions upon conclusion of the Hearing which were fully considered in reaching my decision. They are referred to, where relevant.

165. The claimant's representative refers to the following additional authorities:

165.1 Equity requires that an employee should not be dismissed for conduct which the employer has, either expressly or by knowingly tolerating it, indicated that it will treat leniently: *Hadjioannou v Coral Casinos* [1981] IRLR 352 (EAT).

165.2 The opportunity for an employee to put her case is an essential part of a reasonable investigation and natural justice. An exception to this general rule should only be made if the employee is medically fit to attend but has unreasonably declined to do so: *William Hicks and Partners (A Firm) v Nadal* (EAT 0164/05). The ACAS Code similarly allows a decision in the employee's absence only if they are persistently unable or unwilling to attend without good cause (paragraph 25).

165.3 Although the entitlement to sick pay is discretionary under the contract of employment and associated handbook, the exercise of any management discretion is constrained by the implied term of mutual trust and confidence. This gives rise to an obligation that the employer will not treat employees arbitrarily, capriciously, or inequitably in matters of remuneration (*FC Gardner Ltd v Beresford* [1978] IRLR 63 (EAT)) and that a discretion whether to grant a payment such as a bonus must be exercised rationally and in good faith (*Hills v Niksun Inc* [2016] IRLR 715 (CA)).

166. The respondent's representative cites the *Burchell* principles (referred to above) and suggests that if procedural errors were made there should be a 100% *Polkey* reduction.

Discussion and decision

167. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

5. Was the reason for the claimant's dismissal conduct?

168. The reason for the claimant's dismissal, the set of facts or beliefs in the employer's "mind" that caused it to dismiss was the claimant's conduct. The respondent relied on misconduct as the reason for dismissal. This was established in both Mr Baddeley's and Mr Thomas's evidence. There was no evidence of any other reason for dismissal before the Tribunal. The Tribunal accepted that they formed a genuine belief as to the claimant having committed misconduct.

169. This is a potentially fair reason for dismissal in accordance with section 98(2) of the ERA 1996.

170. The claimant's representative submitted in oral submissions that whilst he did not take any point that Mr Baddeley had any ulterior motive other than conduct for dismissal, the way in which the investigation was conducted particularly by Ms McKenna was influenced by a desire to get rid of the claimant because her salary was considered to be too high. I did not accept that contention. I have considered the claimant's points relating to the investigation (below).

6. Did the respondent genuinely believe the claimant was guilty of gross misconduct?
7. Did they have in their minds reasonable grounds on which to justify their belief?

171. I was satisfied that the reason for the claimant's dismissal was her conduct and that the respondent genuinely believed in the claimant's guilt. The evidence from the disciplinary and appeal officers were clear. They each carefully considered the evidence and genuinely believed that the claimant

had failed to follow the respondent's policies including their Disciplinary Policy, Alcohol at Work Policy (including relevant provisions in the claimant's Contract of Employment and changes introduced as a result of the COVID-19 pandemic), Dine with Us Scheme rules, and the claimant's duty to manage stock, all of which were very serious matters. That was a genuine belief which was held honestly.

172. Mr Baddeley's grounds for forming his belief are set out in his outcome letter of 27 April 2021 (pages 262 – 269 of the Hearing Bundle) and Mr Thomas's rationale is set out in his appeal outcome letter dated 14 September 2021 (pages 362-373). Having considered the content of those letters, their witness statements and oral evidence, and the totality of the evidence that were before me, I concluded that they had in their minds reasonable grounds on which to justify their beliefs.

8. At the stage that that belief was formed on those grounds, had the respondent carried out as much investigation as was reasonable in the circumstances?

173. I then examined whether at the stage their beliefs were formed on those grounds, whether there was as much investigation carried out as was reasonable in all the circumstances.

174. The claimant's representative submits that the band of reasonable responses test will apply to the Tribunal's assessment of the respondent's decision, but this is not unlimited, and an objective standard of fairness must be applied at all times and that equity requires that an employee should not be dismissed for conduct which the employer has, either expressly or by knowingly tolerating it, indicated that it will treat leniently: *Hadjioannou v Coral Casinos [1981] IRLR 352 (EAT)*.

175. In relation to allegations one and two I was satisfied that the respondent carried out a full and thorough investigation in this case in terms of sustaining the genuine and honest belief in the claimant's guilt. The underlying facts of the investigation were established, and they were not challenged or effectively challenged by the claimant.

Allegation one

176. The claimant sought to explain the common practice at the public house she worked at in relation to staff staying for drinks one hour after they finished their shifts, and that this was the only sensible interpretation of the respondent's policies (and that closing down frequently took over an hour after the customers left) and that drinks for staff had to be paid before closing time but drinks could be dispensed after closing. Additionally, the claimant said there was no requirement that staff had to work up to closing time to participate in after work drinks.

177. Mr Baddeley notes in rejecting the claimant's position that he could not reasonably believe that the claimant was not aware of the company policy in relation to after work drinks and he refers to page 31 of the Retail Manager's Handbook setting this out. All employees were required to comply with this policy, and he notes the claimant received training regarding this during an Employee Relations course on 13 August 2015 and there have been a series of quarterly security newsletters reminding the claimant and her team to '*cash up, lock up and don't remain on site any longer than necessary*'. The claimant was questioned about the Alcohol at Work policy during her interview with Mr Hughes on 21 October 2020 and did not appear to show awareness of the detail relating to the policy (including any time limits). He considered that under the company's policy drinks must be paid and dispensed before closing time, and that drinks must be consumed within one hour of closing time. There was no evidence before him to suggest that there was any common practice (which was in itself a breach of the Alcohol at Work Policy) that negated the requirement to comply with the respondent's policy.

178. Mr Thomas also states that the business was required to close their premises with all guests having vacated by 10.00pm due to the COVID-19 related restrictions. He notes that although Wardour Street is a large business and closing down may take longer, the team remained on site until 1.00am, 3 hours after closing time. He checked the clock out time for the last employee to finish work on 01 October 2020, which was 11.00pm (an hour after closing time), and that staying on the premises until 1.00am

in normal circumstances would be unacceptable and a breach of the policy. He considered it was clearly stated in the policy that any team drinks should be concluded within 1 hour of closing time.

179. He also analysed the claimant's allegation regarding government legislation relating to COVID-19 restrictions being ambiguous. He notes that *The Health Protection (Coronavirus, Restrictions) (no 2) (England) (Amendment) (No. 5) Regulations 2020* were brought into effect on 24 September 2020 requiring that a person responsible for carrying on a restricted business (O'Neill's Wardour Street was a restricted business) must not carry on that business between 10.00pm and 05.00am. He considered, therefore, that to dispense and to consume products and services was in breach of the law, the claimant's role as DPS, and that this could have led to a review of the premises licence.

180. The claimant had also said she was not the Duty Manager on 01 October 2020, and she did not dispense or authorise dispensing of drinks after the business was closed. The claimant did not dispute that she was on site at the time, and she was present at the time according to the CCTV footage that was available. It was concluded that the claimant was aware of what was happening, and she could have prevented any breaches of company policy and legislation.

181. Mr Thomas considered the claimant's point that the investigation was incomplete, and it did not include the duty managers. Mr Thomas disagreed that the investigation was not complete. He points out that the claimant was clearly visible on site, and she could have prevented the situation as shown by CCTV footage. He finds that as General Manager and DPS, the claimant was required to ensure that 'conditions of the licence are adhered to at all times and that through acts or omissions' she 'will not allow any conduct inconsistent with the licencing objectives that may put the licence at risk.'

182. He also considered the claimant's contention that the policy did not stipulate whether employees needed to have worked to be included in team drinks. He felt that it was sufficiently clear that drinks after closure of the business should be concluded within 1 hour. He finds that they were not concluded within that timeframe and that as the claimant was in attendance and as DPS, she could have prevented any breach.

183. The claimant disagreed with the respondent's interpretation of Ms C Fancourt's behaviour. Mr Thomas reviewed the CCTV footage, and he did not accept the claimant's contention. He formed the view that whilst the employee may not have intended to climb over the Mezzanine, it looked as though she did at least try to mount to Mezzanine which itself was incredibly dangerous. He describes the employee's actions in considerable detail. As the employee was clearly intoxicated, she was therefore at risk. He notes that the claimant's overall responsibility and her position as DPS, to uphold the licencing objectives which include public safety.

184. He viewed the CCTV footage for 02 October 2020 at 00.45 and noted that the premises door was left unlocked for a period of around 7 minutes. The individual attending to the door, he says, was placed at significant risk of injury or attack from anyone who may be seeking to carry out a robbery on the premises. The footage for 11 October 2020 was not viewable, so the allegation relating to security concerns on that date was not pursued.

185. Two individuals who were guests remained on site after 10.00pm on 08 October 2020 (the claimant did not dispute this although she states they were not served alcohol) which was in breach of the COVID-19 legislation, (and this had been established having viewed the CCTV footage). Mr Thomas considered this was in breach of the Security and Licencing Policy. Mr Baddeley said there was no ambiguity in the company communication and all businesses had to ensure that guests left the premises by 10.00pm. Mr Thomas accounted for the fact the claimant was experiencing distress and the two individuals were the claimant's friends.

186. In relation to the claimant remaining on site until 00.10am on 10 October 2020 with employees some of whom were drinking, the claimant complained she did not view the CCTV footage. Mr Thomas noted she could have viewed that footage once she received the evidence pack in December 2020, but this was now not possible.

187. The claimant does not provide any examples of any alleged inconsistent treatment of other individuals with respect to any of the matters in allegation one in her letter of appeal. Furthermore, it is evident that any mitigation and information relating to the claimant's personal circumstances were considered by the respondent.

Allegation 2

188. In respect of allegation 2, the claimant said she did not dispense the drinks on 01 October 2020 and that they were not intended for her. However, the claimant was present at the time both in relation to the allegations relating to 01 and 10 October 2020. Additionally, it was concluded that the claimant was responsible as General Manager for the incorrect accounting of company cash and stock.

189. It is noted from the evidence before Mr Thomas that on 01 October 2020 the claimant paid for a bill in full at 10.38pm, and that transaction took place after the 10.00pm closure time. Although the claimant said she was not on duty, the CCTV footage he viewed showed that she touched the till and operated the EFT machine (including carrying it around and changing the receipt roll).He then reviews the CCTV footage and the transactional data showing that the tab is processed for the claimant and other staff containing drinks and a kids meal (£2.99 cost), the 33% Dine with Us discount added at 10.10pm (the discount was £92.72). The final bill was £196.72. He observes that both the till screen which the claimant looked at and the printed bill would clearly display that the discount had been applied. Although the claimant did not apply the discount, he clearly formed a reasonable belief that she was aware that this had been applied (which she should have challenged and had removed).

190. Mr Hughes had stated at the disciplinary hearing that the whole process had started because Wardour Street had been one of the most serious offenders of the Dine with Us scheme misuse. Mt Hughes notes that when reports were run in October 2020 only a handful of sites (out of 1700 sites) appeared to be processing transactions after 10pm and showed a disproportionate usage of the Dine with Us scheme. Any sites that were flagged were handed out to the RCA team.

191. The claimant's contention that use of the discount in this way occurred at other sites and the training manager at the time showed it could be done in this way was considered by the respondent. The claimant did not cite any specific examples of alleged misuse by others in her letter of appeal. The handful of sites in question were identified by Mr Hughes and information relating to those sites were forwarded to the RCA team. There was no evidence before the respondent during the disciplinary or appeal process that showed that there was inconsistent treatment of any other individuals working in the same or similar role to the claimant.

192. Furthermore, Mr Thomas notes in this respect that the discount process and terms and conditions have been re communicated to staff on a number of occasions over the last few years and he was confident that reasonable steps were taken by the company to communicate what was acceptable (including in April 2019). He says it is the responsibility of the manager to uphold the scheme's terms and conditions. He also responds to the claimant's contention that this was not raised in previous OPM audits in terms that it is not the role of the OPM to identify misuse of discount codes, and he noted the purpose of the Retail Control Audit. It was also noted that the CCTV footage showed on that date that alcoholic drinks were dispensed to employees and there were drinks that were not paid for. The claimant paid a bill to split between the parties. Given the claimant challenged and disputed that bill, the claimant had responsibility to ensure the items were paid for.

193. Having reviewed the evidence and transactional data, it was noted by him that on 08 October 2020 there was a tab that totalled 6 bottles of Peroni beer for two individuals, that a kid's meal was applied at 10.05pm and a 33% Dine with Us discount of another employee was processed, followed by a payment made using the claimant's payment card. This was considered to be another instance in which the discount was misused.

194. Another tab from the transactions data named "Taras family" on 30 August 2020 had a different employee's discount code applied to the tab at 01.58am. The claimant was on shift at that time according to the Team Plan. The terms and conditions stated that employees must not share vouchers. The employee also had to be dining and not on shift when the discount was processed.

195. Additionally, the transaction data showed that on 25 July 2020 a tab called "Taras friend" contained three pints of Guinness, a pint of Camden, two gin and tonics, vodka and Pepsi being added, followed by a kid's pizza entered by another employee, then another employee's discount code was used. The claimant said this was labelled incorrectly although Mr Thomas was unsure how this occurred given two Assistant Managers were involved.

196. In relation to drinks supplied and consumed on 01 October 2020 with no supporting transactional data, consideration was given to the claimant's position that she may have delegated to Duty Managers in her absence. However ultimately the claimant remained accountable as General Manager and DPS, and she was on site on the occasion in question.

197. In relation to a similar incident on 10 October 2020, it was established that the claimant was the manager on duty on that occasion.

198. Allegation 2j is a general allegation that the claimant failed in her position as General Manager to ensure the above disciplines were followed including monitoring in respect of discount use. The claimant's contractual position was considered in that she was responsible for the correct

disciplines and policies being followed. The claimant acknowledged at the meeting on 21 October 2021 that she was not aware of the detail of the Dine with Us scheme as much as she should have been. There was a business task from May 2019 in which the claimant was required to print a new Cash and Stock document, read, and understand, and sign the document (which included the terms and conditions of the Dine with Us scheme).

199. It was clear that the Dine with Us discount scheme was being misused by a number of drinks being discounted by a single meal being placed on the bill, which the respondent considered was a risk in terms of their licence, and I considered that this belief was genuinely held and based on reasonable grounds (following a detailed investigation). The terms stated that, "*The proportion of alcohol purchased to food must be sensible*." Items were being discounted where the proportions of food and drink purchased were not sensible or proportionate. There was no evidence before Mr Thomas that the claimant had put controls into place to stop the breaches incurring, including any monitoring in respect of discount usage, and ensuring that company policies were followed.

200. The claimant said there were similar instances of breaches of policy across the respondent's other sites but as I observed above, there was no evidence of the circumstances of these and the employment situation of those individuals. Moreover, Mr Hughes's evidence indicated that other individuals who had breached the respondent's policy will be investigated by the relevant team, and I accepted his evidence in respect thereof.

Investigation generally

201. A detailed investigation report was produced by Mr Hughes with several appendices. The claimant was sent this in paper and electronic form in advance of or prior to the disciplinary hearing on 27 April 2021, and she had the opportunity to comment on the report at the disciplinary hearing (which she did not attend) and also after the disciplinary hearing (and she challenged a number of points in her letter of appeal).

202. A full investigation had taken place and the claimant was given a number of opportunities to set out her response to the allegations, which she understood (as set out in Mr Hughes's evidence). Reasonable steps were taken to interview relevant witnesses including the claimant and a meeting was arranged with members of the claimant's team who were subsequently suspended (I accepted Mr Hughes's evidence in relation to the content of the meeting). The claimant did not seek to adduce any additional evidence during the respondent's disciplinary process.

203. Any relevant CCTV footage that was available at the time of the disciplinary hearing and the appeal hearing respectively was reviewed by Mr Baddeley and Mr Thomas. The claimant was also given the opportunity to view CCTV footage which was arranged by mutual agreement on 12 August 2021 at the Swan, Hammersmith.

204. The three allegations found proven following the disciplinary hearing were:
Allegation 1 Breaches of the Alcohol at Work Policy/Legislation
Allegation 2 Incorrect accounting of company cash and stock and breach of Dine with Us 33% employee discount terms
Allegation 3 Breach of stock responsibility

205. No further action was taken with respect to allegation 4.

Allegation 3

206. In relation to the third of these, allegation (breach of stock responsibility), the Tribunal did not accept that the respondent carried out a reasonable investigation to sustain a belief that the claimant had breached her responsibilities in respect of company stock. No reasonable employer would have reached this conclusion based on the investigation material before Mr Baddeley and Mr Thomas. Mr N Apps investigated the stock issues at Wardour Street and Ms McKenna had interviewed Mr Moheeput.

207. The respondent failed to investigate the explanation offered by Mr Moheeput that out-of-date stock (which Mr Apps observed in the cellar on his visit) had been given an extended shelf life by the suppliers and that the company may not have been aware of this. Mr Moheeput’s witness evidence confirmed that this practice was occurring in the industry during the Covid-19 pandemic. Mr Baddeley concluded that the claimant and Mr Moheeput had attempted to cover up the alleged loss by fraudulently recording an excessive volume of line cleaning wastage that had not actually occurred. That finding was based simply on Mr Baddeley’s opinion as to what was “normal” in sites that he managed, without considering Mr Moheeput’s detailed calculation, the size and height of the premises (which he had never visited) or the weekly figures posted after 30 September 2020 (or prior to any lockdown period).

208. It was not clear specifically how and why (and the extent to which) fault was attributable to the claimant in respect of breach of stock responsibility (and to other staff), and to what extent the claimed stock losses in monetary terms were attributable to the claimant. The claimant may well have had a degree of responsibility, but the full circumstances were not established.

209. The disciplinary and appeal outcome letters dealt with this allegation in very brief terms.

Conclusions on investigation generally

210. However, the Tribunal accepted that in relation to allegations one and two which were found to be proven by both Mr Baddeley and Mr Thomas the investigation carried out was within the bands of reasonable responses. The respondent had carried out as much investigation as was reasonable in the circumstances of this case in relation to those allegations. These allegations which were found proven were in themselves a very serious and significant concern.

211. Both Mr Baddeley and Mr Thomas agreed that the claimant's actions were in breach of the relevant policies and could risk the premises licence. I accepted their evidence in relation to this matter which was clear and consistent, and I accepted that it was within the band of reasonable responses to conclude that the claimant's actions shows that she failed to ensure that the 'conditions of the licence are adhered to at all times and that through acts or omissions', you, ' will not allow conduct inconsistent with the licencing objectives that may put the licence at risk'.

212. In relation to allegation two, the Tribunal also accepted that the respondent had carried out as much investigation as was reasonable in the circumstances of the case in relation to that allegation. There was no evidence before Mr Baddeley or Mr Thomas to support any contention that the claimant's (or her teams') actions were common practice within the business, and it was not open to the claimant and her team to disregard the terms of the Dine with Us discount scheme in the circumstances.

213. In relation to allegations one and two which were proven, the Tribunal found that the process followed as a whole was fair and reasonable in all the circumstances. This revealed that the terms of the Dine with Us discount scheme were not adhered to, the premises licence being put at risk as items were dispensed or consumed after the permitted trading times, and drinks were supplied with no supporting transactional data.

214. Mr Baddeley also provided the claimant with an opportunity to comment on the investigation report before the disciplinary hearing took place.

215. The claimant was originally suspended on 21 October 2020. The claimant was provided with sufficient information about the alleged misconduct to enable her to answer the case including at the time of her suspension and in the disciplinary invitation letters from Mr Baddeley (and she was sent copies of the investigation material in advance of the disciplinary meeting). She was not able to attend the first disciplinary hearing scheduled for 04 December 2020 due to personal circumstances. Although the claimant did

not confirm whether she was able to attend the disciplinary hearing on the new date, 28 January 2021, this was rearranged for 04 February 2021. An Occupational Health report was prepared on 04 January 2021 advising that the claimant was fit to be involved in disciplinary hearing but due to her migraines it might be helpful to start proceedings in writing (including written contact to encourage updates regarding her condition and ability to attend a meeting) and she was keen to attend procedural meetings face to face when she was able to do so. There were suggestions made in relation to the conduct of the meeting including providing advance information.

216. Additionally following an Occupational Health assessment on 17 February 2021 Mr Baddeley was advised "*It is regarded as good practice in Occupational Medicine to advise that any investigation, disciplinary action or grievance should proceed as quickly as possible for the good of the employee as well as the organisation*." He was further advised that the claimant was fit to attend procedural meetings with adjustments that ensured she avoided using a screen. It was also confirmed that a remote meeting could be arranged with similar adjustments (due to COVID-19 restrictions Mr Baddeley was unable to organise a face-to-face meeting).

217. The disciplinary hearing was arranged on 27 April 2021 by Microsoft Teams and that date was requested as both the claimant and her Trade Union representative would be available. Investigation material was supplied in paper and electronic form in advance of the disciplinary meeting, to reduce screen time and the claimant was advised that as the meeting had been rearranged previously (and due to the time that elapsed), if she did not attend, the meeting would proceed in her absence. The claimant's trade union representative attended the meeting advising that the claimant's family member contacted him to state that the claimant was unwell and unable to attend. The claimant's union representative did not request a postponement, there was no indication as to when the claimant may be able to attend any disciplinary meeting on a future date, and no medical evidence was submitted on behalf of the claimant. The meeting proceeded in the claimant's absence and Mr Baddeley considered

the available material. In those circumstances, it was within the range of reasonable responses for Mr Baddeley to proceed with the disciplinary meeting, to consider the available evidence, and to make a decision in the claimant's absence.

218. Mr Baddeley upheld three of four allegations that had been brought against the claimant (allegations one to three).

219. The claimant submitted her appeal on 07 May 2021. Having been provided with the options of a face-to-face meeting or conducting the appeal in writing, the claimant asked for her appeal to be conducted in writing. She provided details of her appeal on 15 June 2021 and further details on 31 August 2021 (after having viewed the CCTV footage). Mr Thomas approached the claimant's appeal as a complete rehearing. He considered each allegation including the evidence presented and any mitigation.

220. Mr Thomas agreed with Mr Baddeley's decision, and he made additional findings in response to the claimant's grounds of appeal (including making appropriate decisions where CCTV evidence was no longer available), albeit he upheld the decision to dismiss the claimant for gross misconduct. The analysis that was carried out following the appeal hearing was detailed and thorough. The process was reasonable.

221. Given the detailed analysis of Mr Thomas and the thoroughness of the appeal, even if Mr Baddeley was wrong to proceed with the disciplinary hearing in the claimant's absence (which I do not accept), considering the procedure as a whole, the procedure was fair and reasonable in all the circumstances and the claimant had an opportunity to voice her concerns fully during the appeal including attending an appeal meeting (which she did not attend).

222. The disciplinary process was carried out with an open mind and the claimant's position was fully taken into account and considered in detail. Mr Thomas considered the point that the claimant's role of General

Manager had been advertised and he advised that the claimant's final day of work was on 04 May 2021, and he would expect a Retail Business Manager to advertise the role the following day to support the recruitment process, which can take time. He further advised that where an employee was reinstated following an appeal they would usually return to the business or other agreed arrangements would be made.

223. The claimant commented on the CCTV footage and the disciplinary outcome letter within her grounds of appeal, and her comments were taken into account. Having viewed the CCTV footage, the claimant provided detailed grounds of appeal thereafter.

224. I have found that the investigation and conclusion reached with respect to allegation three was not within the band of reasonable responses. However, I also considered that allegations one and two were proven, and that a reasonable, detailed, and thorough investigation was carried out in respect of those allegations.

225. In respect of allegations 1 and 2 there was no point the claimant had raised which had not been considered. The respondent had acted fairly and reasonably with regard to the procedure (including the investigation and disciplinary hearings) in this case. I was satisfied that the respondent had not breached the ACAS Code of Practice on Disciplinary and Grievance Procedures in terms of the investigation and disciplinary hearings it carried out.

Decision to dismiss

226. The claimant understood the importance of complying with the respondent's policies. The conduct in question was reasonably considered to amount to gross misconduct. The claimant had failed to follow the respondent's policies with regards to Security and Licencing, Alcohol at Work, the premises licence, and requirements relating to COVID-19 legislation and guidance. The claimant's conduct was contrary to the respondent's requirements relating to cash and stock which required a

clear audit trail to be recorded and the claimant also failed to take any or any adequate steps to ensure compliance with the Dine with Us discount scheme.

227. The claimant's conduct was very serious given the risks arising. The claimant's actions were within the ambit of the general definition of gross misconduct, "*any breach of duty or conduct which brings the Company into disrepute or action that is inconsistent with the relationship of trust required between employer and employee".* It also fell within the examples provided of gross misconduct in the respondent's Disciplinary Policy including breach of statutory duty, gross dereliction of duties, any act or omission likely to jeopardise the premises or personal licence, and any serious incorrect cash or accounting procedures. Mr Baddeley and Mr Thomas reasonably concluded that her actions in terms of allegation 1, could have put the licence at risk. They also both reasonably concluded that in relation to allegation 2 the Dine with Us discount scheme was being misused (drinks being discounted by a single meal being placed on the bill) and drinks were being supplied and consumed with no supporting transaction data therefore breaching the permitted unit price of alcohol. Mr Thomas concluded that the claimant had failed to put controls into place including monitoring discount usage, identifying fraud, and ensuring policies were followed.

228. In all the circumstances it was reasonable for the respondent on the facts of this case to conclude that the claimant was guilty of gross misconduct and that she had been responsible for the acts in question at the relevant time.

229. Both Mr Baddeley and Mr Thomas confirmed during oral evidence that on the basis of their findings relating to allegation one alone, the claimant's conduct amounted to gross misconduct, and they would have dismissed her on the basis of allegation one alone.

230. Similarly, both Mr Baddeley and Mr Thomas confirmed during oral evidence that on the basis of their findings relating to allegation two alone, the claimant’s conduct amounted to gross misconduct, and they would have dismissed her on the basis of allegation two alone.

231. I accepted their conclusions and their rationale which was clear and consistent. I therefore conclude that allegations one and two which were proven, amounted to gross misconduct. In any event, if either allegation one or allegation two had been proven (and not the other), each allegation would have led to a finding a gross misconduct individually.

9. Did the decision to dismiss fall within the range of reasonable responses? In other words, was dismissal a fair sanction?

232. A finding of gross misconduct does not of itself mean that dismissal is inevitable. A reasonable employer would consider the full context in deciding upon penalty. In this case the decision to dismiss the claimant on the facts before the respondent was a decision that a reasonable employer could make. The respondent acted fairly and reasonably in dismissing the claimant by reason of her conduct.

233. The claimant had made powerful points including within her disciplinary appeal process. Those points were fully considered by the respondent. While a reasonable employer could have decided not to dismiss the claimant and imposed a lesser penalty, I am satisfied that an equally reasonable employer could decide to dismiss the claimant on the facts before them. The full background and mitigation presented by the claimant was considered prior to dismissing the claimant and the respondent acted fairly and reasonably in their approach.

234. The claimant had known about the importance attached to the policies relied on by the respondent including the Security and Licencing, Alcohol at Work Policy and requirements relating to COVID-19 legislation. The claimant also should have been aware of the respondent’s requirements

relating to cash and stock and the need to ensure compliance with the Dine with Us discount scheme.

235. She failed to appreciate the risks to which this gave rise, which was precisely the issue with regard to her failure to follow the respondent's processes and which led to the conclusion that dismissal was the most appropriate sanction in the circumstances. The risks arising were serious, and the policies were put into place to protect the claimant and others. There was no evidence of any inconsistency of treatment.

236. The respondent had concluded that the claimant was guilty of gross misconduct and there was no confidence the claimant would follow policies going forward. Mr Baddeley and Mr Thomas were clearly not satisfied that the claimant had shown insight in relation to her conduct. The respondent's actions in dismissing the claimant were reasonable on the facts before the respondent.

237. The respondent took account of the facts of this case and the full factual matrix. The decision to dismiss the claimant on account of her conduct was fair and reasonable. It was a decision that fell within the range of reasonable responses open to the employer in this case taking account of the size and resources of the respondent, equity, and the substantial merits of this case.

238. In reaching my conclusion, I took into account that I must not substitute my own view for that of the employer.

239. In view of those circumstances and my findings, I find that the respondent's decision to dismiss the claimant was within the band of reasonable responses that was open to a reasonable employer.

240. If I am wrong, and the claimant's dismissal was unfair, I would have made a *Polkey* deduction of 100% of any compensatory award on the basis of my estimate of the probability that the dismissal would have occurred

anyway, even had a fair process been followed having assessed all the facts and circumstances (including having heard evidence from the claimant's and respondent's witnesses).

Breach of contract/wrongful dismissal

241. Having dismissed the unfair dismissal head of complaint, the Tribunal has turned its attention to the wrongful dismissal claim against the respondent. As identified above, the first question for the Tribunal is whether the respondent is entitled to summarily dismiss the claimant.

242. In considering whether the claimant was wrongfully dismissed, the question for the Tribunal is whether she was dismissed in breach of her contract of employment. In terms of her contract of employment, the respondent could have lawfully dismissed the claimant with six weeks' notice and the question for the Tribunal then is whether the respondent wrongfully (unlawfully) dismissed the claimant by dismissing her summarily and giving her no notice of dismissal.

243. The respondent disputes that they were required to give the claimant notice of termination of employment, on the basis that by her conduct, she was in default of her obligations, and they were entitled to summarily dismiss the claimant.

244. For their part, the respondent says that she committed misconduct in respect of allegations 1a to g, 2a-j and 3 as set out in the dismissal letter dated 27 April 2021 and in the appeal outcome letter dated 14 September 2021, and that as those acts are gross misconduct, they were entitled to dismiss her summarily, and thus without payment of notice. It is agreed between the parties that no notice was paid, so the onus falls upon the respondent to convince the Tribunal, on the balance of probabilities, that the claimant did, in fact, commit those acts as alleged.

245. In order to amount to a repudiatory breach of contract, the employee's behaviour must disclose a deliberate intention to disregard the essential

requirements of the contract. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal.

246. I considered clause 22biii) of the claimant's contract of employment which provided that the claimant may be summarily dismissed and set out the circumstances of this (which includes the claimant committing a serious breach of the provisions of her contract of employment or any act of gross misconduct).

247. The Tribunal's approach is not the same as in a complaint of unfair dismissal. It is not sufficient for the employer to demonstrate a reasonable belief that the employee was guilty of gross misconduct. They must establish that the claimant did the act of misconduct alleged.

248. In considering this, the Tribunal considered whether the conduct complained of was such that it undermined the trust and confidence which is inherent in the contract of employment, so that the employer should no longer be required to retain the employee in that employment.

249. In this case the respondent cites as the conduct:

(i) Allegations 1a to 1g

The respondent's representative says the claimant was in breach of clauses 1 and 2 of her contract of employment, the Retail Manager's Handbook (Alcohol at Work Policy), Security and Licencing Policy and clause 23 (licencing put the licence at risk).

(ii) Allegations 2a to 2j

The respondent's representative states the claimant breached clause 15 of her contract of employment and the Dine with Us Scheme at page 27 of the Manager's Handbook.

(iii) Allegation 3

Additionally, the respondent's representative submits that the claimant breached clauses 1 and 2 of her contract of employment and the Operational Policy (page 44 Stock Management) in relation to allegation 3.

250. The claimant's representative points out that in relation to allegation 3 there was no actual stock loss, no attempt to cover up loss through false line cleaning wastage, and no culpable negligence on the claimant's part amounting to a breach of contract. The claimant's representative submits that the issue was not put to the claimant in her evidence. I did not accept that the respondent has shown sufficient evidence to demonstrate that the claimant was in fundamental breach of her obligations under clause 15 of her contract of employment or the respondent has called sufficient evidence to satisfy me that there was negligence on the claimant's part or that any alleged negligence had in fact caused stock loss. For that reason, the Tribunal was not satisfied that the claimant had committed gross misconduct in relation to allegation 3.

251. However, the Tribunal was satisfied in this case that the claimant had committed misconduct in respect of allegations 1a to 1g and allegations 2a to 2j, and that such behaviour on her part, judged objectively, was gross misconduct. The respondent has demonstrated that the claimant's conduct in relation to allegation 1 alone (or, indeed, allegation 2 alone) amounted to gross misconduct, and that as both allegations 1 and 2 were proven, the claimant had committed gross misconduct. The Tribunal was also satisfied applying this objective element that the claimant must have realised that her actions were gross misconduct by that standard. This is reinforced, in that the claimant had the respondents disciplinary and other policies (including but not limited to the Manager's Handbook and the claimant's Contract of Employment). The disciplinary policy provided that "*any breach of duty or conduct which brings the Company into disrepute or action that is inconsistent with the relationship of trust required between employer and employee" (including but not limited to "any act or omission likely to jeopardise the premises or personal licence")* had the potential to be regarded as gross misconduct and the respondent's Alcohol at Work Policy stated that any breach of the policy or the related law resulting from the consumption of alcohol may lead to serious disciplinary action including dismissal. This must be read together with clause 22biii) of the claimant's contract of employment. Additionally, the Dine with Us terms

and conditions provided that fraudulent use or abuse of Dine with Us discount vouchers will be considered to be misconduct and will result in summary dismissal.

252. The Tribunal notes the claimant's submission that the claimant was acting in accordance with longstanding common practice as to after work drinks, that the claimant was not told that the COVID-19 curfew meant that the practice was no longer permitted, and that she was not responsible for the premises management or the conduct of others on 01 October 2020. I was not satisfied that there was a long-standing common practice which displaced the provisions of the claimant's responsibilities with respect to the Alcohol at Work Policy. Furthermore, I do not accept that the claimant was entitled (or that it was reasonable for her) to assume that during the COVID-19 pandemic employees were not required to follow the respondent's Alcohol at Work policy. It is difficult to decipher on what basis the claimant says she is not responsible in terms of the events that occurred on 01 October 2020 given her management position and the fact she was a personal licence holder, which I find as a fact, were relevant considerations (in terms of her conduct).

253. The claimant's representative also submitted that the Dine with Us discount was used in the claimant's premises in the same way it was used across the respondent's business, and that all staff drinks dispensed on 01 and 10 October 2020 had been paid for. I did not accept that the relevant discounts were used in the same way as they were used across the respondent's businesses, nor did I accept that there were circumstances which meant that the claimant and her team were entitled to disregard the terms of the Dine with Us scheme. Even if all staff drinks dispensed on 01 and 10 October 2020 had been paid (the respondent's witnesses described issues relating to this), this did not detract from the claimant's failures in respect of the respondent's requirements and policies including the Alcohol at Work policy and Dine with Us scheme terms.

254. The Tribunal was satisfied (and the respondent have proven to the Tribunal's satisfaction) that the claimant's conduct in respect of allegations 1a to g and 2a to j (allegations 1 and 2 either taken together or considered individually), amounted to conduct which was a fundamental breach of contract on her part, which justified the respondent summarily dismissing her, without notice and therefore the claim for breach of contract is dismissed. The respondent has produced sufficient evidence before this Tribunal to show that the claimant acted in breach of her contract of employment, and, in particular, that she committed a repudiatory breach of contract entitling them, as her then employer, to summarily dismiss her from their employment.

Unlawful deductions from wages – company sick pay

255. The Tribunal considered the relevant statutory provisions under section 13 of the ERA 1996.

256. The claimant's representative points out that the respondent made a deduction of £19,547.74 (net of statutory sick pay and tax) from the claimant's salary during the pay dates of 29 January, 26 February, 26 March and 23 April 2021; and the other part was deducted from her final pay in May 2021**.** The claimant was sent a letter dated 12 January 2021 advising she had been paid in respect of the pay period on 31 December 2020 in error.

257. The claimant's salary for April 2021 was reduced to reflect payment made to her during her sickness absence that she commenced in December 2020. The claimant had been paid her salary in full for her sickness absence in December 2020 which occurred from the date she went off sick in December 2020, as the respondent were unable to notify payroll of the decision not to pay the claimant until after the cut-off date for the pay adjustment period. The claimant did not receive her full pay from January 2021.

258. Any reductions from the claimant's January 2021 – April 2021 salary (and the respondent deducting the claimant's December 2020 salary to recover any overpayment) reflected a recovery of wages paid during a period of sickness absence (when the claimant was only entitled to SSP) from December 2020 – April 2021. The total amount of pay deducted from the claimant's salary for sickness absence which occurred in the claimant's April 2021 pay was £4,716.26.

259. The Tribunal was satisfied that clauses 7a and 16d of the claimant's contract of employment (together with the Company's Sick Pay Scheme described in the Manager's Handbook at pages 655-656) provided the respondent with a contractual right to make deductions of overpayment of wages, and that this had been intimated to the claimant in her written contractual documents. Further, I accept Ms McKenna's evidence that the policy with respect to being suspended, thereafter being absent, and the removal of company sick pay is generally enforced. The claimant did not provide any examples in terms of that policy not being enforced. The effect of that conclusion is that the deduction of wages paid during a period when the claimant was only entitled to receive SSP and had no contractual entitlement to the wages which she had received for her period of sickness absence, fell within the category of deductions permissible under Section 13 of the ERA.

260. Clause 16 of the Contract is a deduction from wages clause; "*By entering into this Agreement, the Manager is also authorising the Company during employment, to make deductions from his/her wages in the following circumstances…d) to make good any overpayment of remuneration*."

261. The Company sick pay policy is at pages 651-656 of the Bundle in the Retail Manager's Handbook. Sick pay is discretionary. The policy states:
"*The Company operates a sick pay scheme which is not contractual, entirely discretionary, and the Manager's entitlement to payment is dependent on length of service*."

262. The respondent's company sick pay is therefore discretionary. There is no contractual entitlement to the same. The claimant's representative accepts that payment of company sick pay is discretionary under the claimant's contract of employment.

263. It is submitted on behalf of the claimant that the exercise of any discretion is subject to the implied term of mutual trust and confidence and this gives rise to an obligation that the employer will not treat employees arbitrarily, capriciously or inequitably in matters of remuneration (*FC Gardner Ltd v Beresford* [1978] IRLR 63 (EAT)) and that a discretion whether to grant a payment such as a bonus must be exercised rationally and in good faith (*Hills v Niksun Inc* [2016] IRLR 715 (CA)).

264. The claimant's position was that Ms McKenna automatically suspended sick pay on receipt of the claimant's sick note, that there was no need to encourage the claimant to return to work as she was already suspended and then furloughed, and that, if the purpose was to encourage her to attend a disciplinary meeting this decision was made without Occupational Health advice (and maintained after the first Occupational Health report), and there were no grounds to suspect that the claimant was malingering or using her sickness absence to avoid attending a meeting.

265. The respondent's representative points out that on or around 10 December 2020, the respondent received a fit note and that on 12 December 2020, the respondent sent correspondence relating to this to the claimant, and that sick pay was discretionary as a matter of contract. The claimant was not entitled to company sick pay, and she was informed of this at the relevant time. The claimant never challenged the respondent's position before her dismissal. The respondent's representative avers that under the respondent's policy, the respondent does not have to take into account whether the employee is genuinely ill or not. It is asserted that the claimant was well enough to attend a meeting in any event that that the policy was generally enforced. The ethos was to encourage the employee to attend a disciplinary meeting so long as they are fit to do so.

266. However, due to an error, the respondent made an overpayment to the claimant of £4,716.26 in December 2019 with respect to company sick pay. The respondent wrote to the claimant to inform her of the overpayment, which noted that she was not entitled to company sick pay. The claimant did not respond. The respondent wrote to the claimant to inform her of the deduction with respect to overpayment of sick pay of £4,716.26 by letter dated 19 May 2021.

267. Whilst I accept that the claimant has long service with the respondent, and that there is a need to exercise one's discretion in making such a payment reasonably (and not in an arbitrary, capricious, or inequitable manner), I do not find that the respondent failed to exercise that discretion properly on this occasion.

268. The claimant was on sickness absence leave from December 2020. The respondent's witnesses' evidence was that the respondent generally enforces its policy not to pay sick pay where an employee is suspended in relation to a disciplinary process. Ms McKenna stated that this was not the first time the policy was enforced (and it will not be the last). I accept the starting point is not to pay sick pay. The respondent arranged an Occupational Health report in December 2021 and an updated report was provided in February 2021.

269. On the application of the policy the letter dated 10 December 2020 said, "*In the meantime, I have arranged to withhold payment of company sick pay for this period of illness as this is discretionary – Sickness Absence Policy of the Retail Managers Handbook*." A copy of the relevant extract from the Retail Managers Handbook was provided. The claimant was informed she will continue to receive Statutory Sick Pay. This was also confirmed in Ms McKenna's letter dated 12 January 2021.

270. The claimant's contractual entitlement when absent was accordingly to Statutory Sick Pay only. There was no evidence that discretion had been exercised to pay full pay for any absences in the past (in the same or in

similar circumstances), the Tribunal did not accept that there was any practice which established an entitlement, through custom and practice (or otherwise), to full pay for the duration of a long-term absence, or for the claimant's period of absence from December 2020 until April 2021.

271. The respondent made a lawful deduction of wages of £4,716.26 from her final payment on 21 May 2021 as authorised under a relevant provision of the claimant's contract of employment (section 13(1)(a) and (2)(a), ERA 1996).

272. The Tribunal was satisfied that the respondent was permitted in terms of the claimant's contract to make deductions from her salary in respect of overpayment of sick pay. In this instance that reflected payment of wages in December 2020 when she had been absent on sick leave. The claimant was not paid company sick pay during her sick leave up to and including April 2021 and she had no entitlement to be paid company sick pay during those dates. It was not disputed that the claimant had not been absent on those dates.

273. It therefore follows that as a result of the above, I do not find that the Company sick pay claimed by the claimant was properly payable.

274. Given my conclusions about whether the sick pay is properly payable, I do not need to go onto consider the other issues under this heading. The Tribunal was not satisfied that there had been unauthorised deductions from the claimant's wages in December 2020 or between January and April 2021 in respect of any sick pay.

275. For these reasons the claimant's claim that there was an unauthorised deduction from her wages in relation to sick pay is not successful.

Unlawful deductions from wages – holiday pay

276. I approached this complaint by considering firstly the contractual position. The claimant's contract of employment specified an entitlement of 25 days

per year plus lieu days for working on a public holiday. The employment contract states that the holiday year was the calendar year from 1 January to 31 December. It expressly provides that all holidays should be completed within the calendar year and no holidays can be carried over into the following year without written approval from the Retail Business Manager (in this case they can be taken by the end of January).

277. According to paragraph 51 of the claimant's witness statement, the claimant is claiming 12 days holiday comprising approximately 20 days holiday from 2020 and 8 days from 2021 less 16 days paid on her final payslip. I assume that the list of issues refers to the claimant claiming 15 days' holiday which includes payment in respect of three bank holidays (the claimant did not specify these in her witness statement, but it is assumed she is referring to 01 January, 02 April, and 05 April 2021). The claimant has not evidenced how much holiday she is owed and had taken in 2020.

278. Under the claimant's employment contract at Appendix A clause 6 it states that no holidays can be carried over into the following year without written approval of the Retail Business Manager (the relevant Retail Business Manager was Ms J McKenna). The claimant had not provided any evidence to show that Ms McKenna (or any other Retail Business Manager) authorised her to carry over any holidays from 2020, and there is no such written confirmation contained in the Hearing Bundle.

279. As a general rule, the four weeks' leave provided under Regulation 13(1) of the Working Time Regulations 1998 may only be taken in the leave year in respect of which it is due (regulation 13(9)(a)). *The Working Time (Coronavirus) (Amendment) Regulations 2020 (SI 2020/365)* amend the Working Time Regulations 1998 to add Regulation 13(10) so as to permit leave under Regulation 13 to be carried over "*Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the*

effects of coronavirus (including on the worker, the employer or the wider economy or society)."

280. The respondent's representative avers that the Claimant was not prevented from taking all of her leave. The only time she was prevented, arguably, from taking leave was when she was off sick in December 2020. The claimant was provided with 5 days carry over leave from 2020 into 2021.

281. Further, it is argued on behalf of the claimant that she was in any event entitled to carry over the full balance of 20 days under Regulation 13(10) of the Working Time Regulations 1998.

282. The claimant's representative avers that it was not reasonably practicable for the claimant to take any further leave after March 2020 on the following grounds:

- *Nobody could go on holiday in the first lockdown from March to June 2020;*
- *After reopening in July 2020 the claimant has described how she was operating on a skeleton staff and leaving the business to go on holiday was simply not an option;*
- *From November 2020 she was furloughed because of further Covid-19 restrictions, during which it was again all but impossible to take holiday.*

283. I do not accept that it was not reasonably practicable for the claimant to take any annual leave after March 2020 on those grounds on the basis of the evidence that I heard. There is no evidence that the claimant made any holiday requests between March 2020 to June 2020 or after reopening in July 2020 which were denied by the respondent. There is no evidence or no sufficient evidence to suggest that leaving the business from July 2020 to go on holiday "was simply not an option". Even if there were reduced staffing, the respondent's evidence (which I accepted) was that there were significantly reduced numbers of customers and sales. Furthermore, I do not accept that the claimant requested or attempted to take any further

holiday entitlement when she was placed on furlough leave from November 2020 and, on the evidence, I do not accept it were impossible for the claimant to take holiday leave during that time. The claimant was on sick leave from December 2020, but she had a number of months prior to her sick leave during which she could have taken holiday. I also did not accept on the evidence that it was not reasonably practicable for the claimant to take any leave as a result of the effects of coronavirus. She was also permitted by the respondent to carry over 5 days' leave (and I have found that she is entitled to payment in respect of a further 5 days).

284. Except in relation to the 5 days additional leave that is due to the claimant (see below), I found that the details of the claimant's holidays provided by the respondent at pages 317 of the Hearing Bundle were credible. I was satisfied that they were based on records kept by the respondent.

285. I noted from material which is publicly available that – (a) There was a national lockdown from 23 March 2020. (b) Lockdown restrictions began to be lifted on 19 June 2020 and the lifting of restrictions continued into July 2020. (c) There was a further lockdown announced on 26 December 2020 with stay at home reintroduced as from 5 January 2021. (d) Lockdown restrictions began to be lifted on 2 April 2021.

286. The right to carry forward holiday entitlement under Regulation 13(10) arises where it was not reasonably practicable for a worker to take some or 10 all of his/her leave as a result of the effects of coronavirus. Regulation 13(10) does not provide that any holiday dates falling within a period of lockdown can automatically be carried forward. The leave to which Regulation 13(10) applies is the 4 weeks referred to in Regulation 13(1) but not the 1.6 weeks referred to in Regulation 13A.

287. I accepted the respondent's evidence that they processed 5 days of holiday pay in 2020 and she was permitted to carry over a further 5 days into 2021. It followed that, even if the claimant "lost" 15 days of holiday during some period of time in 2020, she had opportunity to make these up

over the rest of the calendar year. For the avoidance of doubt, I was not persuaded that it had not been reasonably practicable for her to take those days within the relevant holiday year.

288. For completeness, I also decided that in respect of the days of holiday which the claimant claimed during the holiday year in 2021 there was no evidence that it was not reasonably practicable for the claimant to take her holidays during that year or that any alleged inability to do so was as a result of the effects of coronavirus. I do not find that the claimant is entitled to any additional holiday pay in respect of her 2021 holiday entitlement.

289. The claimant's representative says that it is stated in the respondent's email of 13 July 2022 that 5 days holiday was used to recover an alleged overpayment for 1-7 November 2020, when she should have been paid at furlough rates and that deductions from holiday allowance cannot be made retrospectively in this way. The respondent's representative pointed out that the respondent can claim an overpayment from the claimant's holiday pay or any other payments due to the claimant.

290. He further states that of the 20 unused days, the respondent agreed to carry over 10 days from 2020 and refers to the Retail Management Employees Holiday Balances 2020 document. This permitted the claimant to carry over up to 5 days into 2021 and up to a further 5 days into 2022. He argues that on that basis she should have been paid for 10 days' holiday, not just 5 days on termination of her employment and that the leave was accrued, just not taken. He avers that the fact that respondent would not have allowed her to take the additional 5 days until 2022 did not change her entitlement to payment in lieu on termination of her employment. I find that the Retail Management Employees Holiday Balances 2020 document represented a variation to the claimant's terms of employment, and I accept that the claimant was entitled to a further 5 days holiday pay in respect of accrued annual leave from 2020 which she would have been entitled to take in 2022, but as she was dismissed prior to being able to take that leave, she is entitled to a payment in lieu in

respect thereof. The claimant is therefore owed the sum of £1580.00 gross subject to any required tax and national insurance deductions comprising a daily rate of £316.00 (the daily rate taken from the claimant's witness statement which the respondent did not challenge) multiplied by five days.

291. Accordingly, except in relation to the sum awarded relating to the additional 5 days' leave, I do not find that the claimant's accrued entitlement to holidays on termination of her employment was greater than the respondent reflected in the holiday pay given to the claimant upon termination and I find that no further sums are owing in respect of the claimant's accrued holiday entitlement.

Unlawful deductions from wages - Stock loss

292. Clause 16 of the claimant's contract is a deduction from wages clause. First, that clause notes "*On termination of employment for whatever reason, any losses sustained to the stock or monies from the company caused through the Manager's negligence, carelessness, recklessness, dishonesty or through breach of the Company's rules or procedures will be made good by the Manager. By entering into this agreement, the employee authorises the company to establish this by deductions from wages.*"

293. The respondent contends that it was entitled to make the deduction from the claimant's wages because of the deductions clause set out at clause 16 of the claimant's Employment Contract.

294. The respondent relies on the information set out under allegation 3, in the dismissal letter 27 April 2021 and appeal letter dated 14 September 2020. The respondent sent a letter to the claimant dated 19 May 2021 to inform her of the stock loss amounting to £4056.10 and the deductions that will be made from her final pay. There was no breakdown provided in that letter in respect of that figure and what it related to. On 21 May 2021 a deduction of £731.72 was made. The respondent's representative avers that the

respondent has demonstrated that the event justifying the deduction had occurred.

295. I can see some force in an argument that clause 16 of the claimant's contract amounts to "*a relevant provision of the worker's contract*" as provided by section 13 (1) (a) of the ERA 1996. However, I conclude that this is too much of a stretch of interpretation of the contract and applying the contra preferentem rule – the well-established rule in contract law that any ambiguity will be resolved against the party who seeks to rely on it - I do not find that the clause is sufficiently clear to authorise the deduction.

296. Although clause 16 of the claimant's employment contract states that any losses sustained to the stock or monies of the Company "*caused through the Manager's negligence, carelessness, recklessness, dishonesty or through breach of the Company's rules or procedures"* may be deducted from pay, it does not state upon what basis any such deductions will be made. It is therefore too ambiguous for the respondent to rely on in order to make specific and substantial deductions from the claimant's wages.

297. Therefore, I do not find that the provisions of the contract of employment, amount to a "*relevant provision of the worker's contract*" within the meaning of section 13 (1) (a) ERA 1996 which would authorise the making of such deductions from the claimant's wages. The respondent has therefore made an unauthorised deduction.

298. If I am wrong, in the event that clause 16 enabled the respond to claim stock loss from the claimant's salary by way of a deduction, the claimant's representative argues that the respondent was only entitled to make a deduction on termination for stock loss if the loss was actually sustained to the respondent's stock or monies, and the loss was caused by her negligence, carelessness, recklessness, dishonesty or breach of the respondent's rules or procedures. It is submitted that there was no actual loss because the kegs in question were given extended shelf lives, and

nothing had to be wasted or disposed of (reference is made to the witness evidence of the claimant and Mr Moheeput).

299. So far as clause 16 of the contract is concerned then, whether or not any sums may be claimed by the respondent as that contract provides, will depend on construction of clause 16 as to whether there has in fact been any breach of the Company rules or procedures or any actual failure in by her negligence, carelessness, recklessness, or dishonesty. On construction of that clause, absent one or more of those necessary pre-conditions, the respondent is not in fact authorised to make a deduction. This is not an unfettered discretion on the Company where it finds that there has been a stock deficit for it unilaterally to determine how that is calculated and to make the deduction irrespective of any enquiry as required under any finding following that enquiry that there has been a breach as specified. The respondent alleges that it must be a breach of the contract or a breach of company rules by virtue of the fact that substantial drink stock deficit has occurred, or that substantial wastage was put through the day before an audit visit. I consider that to be a wholly unsatisfactory argument. The respondent is seeking to say that because there was a drink stock deficit of £3,137.00 (-£36.91 per day) that must be evidence of a breach of how it construes clause 16 to apply to properly safeguarding the stock and therefore that entitles the deduction. Or alternatively if clause 15 is construed as a “Company rule”, where for the most part it is a simply a statement of expectation, it says that because the claimant has breached that purported rule of not maintaining stock levels therefore she is in breach of the rules and the respondent is entitled to claim the deficit, again that is the full amount of any loss it has found to be sustained (from the claimant) or to the extent it can make any recovery from her wages. As I have said I consider those arguments to be unsatisfactory. The only possible ground which they could rely therefore is a failure in good management (i.e., negligence, carelessness, recklessness, or dishonesty), and absent any attempt to undertake any reasonable enquiry I consider they have not established that.

300. Mr Apps who carried out the audit did not provide a copy of the report or make the claimant aware of the result of his audit visit prior to his meeting with her on 04 November 2020. He did not put to the claimant that she had been negligent, careless, reckless, dishonest, or any alleged breaches in respect of the Company rules or procedures, nor did he provide any particulars of the same. Although Mr Moheeput was interviewed on 09 November 2020, the claimant was not re-interviewed in relation to any matters he raised (and there was no attempt to reinterview her once she had sight of any audit report). A breakdown of any alleged losses was not put to the claimant or included in the letter giving notice of deductions.

301. I further note that Mr Hughes in his witness statement seeks to lay the blame for not rotating stock, over ordering and/or not processing stock through the till at the door of the "*management team*". It is not clear to what extent he or indeed Mr Apps who conducted the audit (Mr Apps was not called to give evidence before the Tribunal) apportioned any blame to the claimant and the grounds for apportioning any blame on her.

302. For those reasons I conclude that on a proper construction of the relevant clause in the claimant's employment contract, and in particular also noting that there is nothing whatsoever in the contract to identify the time frame over which losses are to be ascertained, that the respondent is not entitled to make these deductions. In terms of any argument that because the clause refers to the right to make deduction of sums owing at any time, they are entitled arbitrarily to pick any time frame for stock check and if there happens to be a short fall within that period to make the deduction irrespective of whether there has been deficit on any other stock taking period. Again, I do not accept that. Any reference to at any time would not help to ascertain whether sums are in fact owing by the claimant by reason of a failure in terms of her obligations to the Company, and whether they are so owing depends on the appropriate time frame for assessment. There were in fact only evidence of one period during the whole of the claimant's employment where an audit was conducted in respect of which there was a drinks stock deficit.

303. Accordingly, I award the claimant the gross sum of £731.72 subject to any required deductions in respect of tax and national insurance which I find that the respondent had unlawfully deducted from her May 2021 salary.

Conclusion

304. The Tribunal was satisfied that there was a fair reason for the claimant's dismissal, namely misconduct.

305. The Tribunal considered whether the dismissal was fair and reasonable in accordance with section 98(4) of the ERA 1996 including the size and administrative resources of the employer and found that the dismissal was fair and reasonable in all the circumstances. The claimant was not unfairly dismissed.

306. The claimant's claim for unlawful deductions from wages relating to stock loss succeeds and holiday pay succeeds in part (in the gross sums of £731.72 and £1580.00 respectively subject to any required deductions in respect of tax and national insurance).

307. The claimant's remaining claims are dismissed.

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Employment Judge Beyzade

Dated: ……06 June 2023……………..

Sent to the parties on:

06/06/2023

For the Tribunal Office