



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000005/2023

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Held in Glasgow on 9, 10 and 11 May 2023

Employment Judge S MacLean

10 **Ms S Kane**

**Claimant
In Person**

15 **Coffeepots Ltd t/a Costa Coffee**

**Respondent
Represented by:
Mr P Dunese -
Director**

20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claims are dismissed.

REASONS

Background

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1. The respondent is a limited company carrying on business as a franchisee of Costa Coffee.
 2. The claimant was employed by the respondent as an area manager. Her employment was terminated on 3 November 2022. The claimant's period of continuous employment commenced on 17 July 2007.
 3. Early conciliation started on 3 November 2022 and ended on 5 December 30 2022. The claim form was sent to the Tribunal on 5 January 2023. The claim is about the events on 6 October 2022 when the claimant believes that a decision had been taken to dismiss her notwithstanding that she was not suspended until 11 October 2022; and was subsequently dismissed following a disciplinary hearing on 31 October 2022. The claimant was offered an

appeal but did not exercise that right as she considered that the appeal would not be impartial. Alternatively, the claimant seeks payment of 12 weeks' notice on the grounds of breach of contract as she did not receive notice or pay in lieu when she was summarily dismissed.

- 5 4. The respondent's defence is that it dismissed the claimant for a potentially fair reason: conduct. The respondent says that it carried out a fair and reasonable process and dismissed the claimant following a disciplinary hearing. The respondent asserts that the claimant was offered a right of appeal which she did not pursue. The respondent maintains that the conduct amounted to gross misconduct and accordingly the respondent was entitled to dismiss the claimant without notice.
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5. Mark Lepick, investigating officer, and Andrew McNeil, dismissing officer, gave evidence for the respondent. The claimant gave evidence on her own account. The parties provided a file containing documents to which I was referred. Neither party gave legal submissions but summarised their respective cases.
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Relevant law

6. Section 98 of the Employment Rights Act 1996 (the ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and that it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal is fair or unfair under section 98(4).
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7. The case of *British Home Stores Limited v Burchell* [1978] IRLR 379 established that a dismissal on the grounds of conduct will be fair in the following circumstances:
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- (a) At the time of dismissal, the employer believed the employee to be guilty of misconduct;
 - (b) At the time of the dismissal, the employer had reasonable grounds for believing that the employee was guilty of misconduct;
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- (c) At the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
8. A claim in respect of contract may be pursued in the Tribunal under the Employment Tribunal's Extension of Jurisdiction (Scotland) Order 1994 provided that it is outstanding on termination of employment.
9. An employer may be entitled to dismiss an employee without notice where the contract includes a pay in lieu of notice clause or where the employee has committed a repudiatory breach of their employment contract. The question of what level of misconduct is required for an employee's behaviour to amount to repudiatory breach is a question of fact for the Tribunal.
10. *British Bakery's Limited v O'Brien* UKEAT/1479/00 held that in determining whether something is gross misconduct justifying summary dismissal, all the circumstances of the case will be relevant, including whether that type of conduct is listed in the employer's disciplinary policy or a company handbook as amounting to misconduct. However just because the conduct is listed as being gross misconduct in the contract or a contractual disciplinary procedure does not mean that summary dismissal will automatically be justified if the employee conducts himself in that way. The Tribunal must also consider whether the conduct is sufficiently serious to be repudiatory.
11. In respect of a wrongful dismissal claim, the Tribunal must consider whether the breach of contract occurred. In an unfair dismissal claim, the Tribunal must consider the fairness of the dismissal.

The issues

12. The Tribunal had to consider the following issues:

Unfair dismissal

- (a) What was the reason or principal reason for the dismissal? The respondent asserts that the reason was conduct. This is disputed by the claimant who asserts that there was a conspiracy to terminate her

employment. The Tribunal will need to decide whether the respondent genuinely believed that the claimant had committed misconduct.

5 (b) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal had to decide whether:

(i) there was reasonable grounds for that belief;

(ii) at the time the belief was formed, the respondent had carried out a reasonable investigation;

10 (iii) the respondent otherwise acted in a procedurally fair manner; and

(iv) dismissal was in the range of reasonable responses.

(c) The claimant does not wish to be reinstated or reengaged. She seeks a compensatory award. If successful, the Tribunal will require to decide how much should be awarded.

15 *Breach of contract*

(a) What was the claimant's notice period?

(b) Was the claimant paid for that notice?

(c) If not, was the claimant in repudiatory breach of contract (guilty of gross misconduct)?

20 **Findings in fact**

13. The Tribunal makes the following findings in fact.

Background

14. The respondent is a limited company having its head office in Kirkintilloch. The respondent is a franchisee of Costa Coffee operating 16 stores in
25 Scotland. Patrick Dunese and Colin Wilson are two of the directors of the respondent company.

15. The claimant has been continuously employed by the respondent since July 2007. Since October 2017, she held the position of area manager reporting to the operations manager.
16. Around 2022, the claimant was responsible for five stores in Kirkintilloch, Baillieston and Cumbernauld. The store managers reported directly to the claimant. She had responsibility for approximately 30 employees.
17. The operations manager was based at Kirkintilloch. There were three area managers, including the claimant who reported to him. The other area managers were Mark Lepick and Andrew McNeil. The operations manager also had responsibility for “human resources”. He had an HR administrator assisting him who was also based at Kirkintilloch. The HR administrator had previously worked at the Cumbernauld drive through.
18. The management team included the operations manager, the area managers and a new stores manager. The new stores manager reported to Mr McNeil and covered for the claimant when she was on annual leave in October 2022.

Contract of employment and policies

19. The claimant was issued with a statement of main terms of employment dated 28 October 2017. The terms and conditions state that employment may be terminated on giving the appropriate notice in writing. After successful completion of the probationary period, the respondent requires to give notice of one week for each completed year of service up to a maximum of 12 weeks. The respondent is entitled to terminate employment without notice or pay in lieu of notice “in the event of a serious breach by you of the terms of your employment or in the event of any act or acts of gross misconduct by you”.
20. The terms and conditions make reference to the employee handbook. Some of the procedures in the handbook do not have contractual effect such as procedures dealing with capability issue and grievance procedures.
21. The disciplinary procedure is contractual. The disciplinary policy sets out examples of types of misconduct which normally lead to disciplinary action being taken. It also included examples of misconduct including:

“Harassment, bullying or discrimination of any nature (including on the grounds of gender, race, ethnic origin, religion and sexual orientation or disability (against other employees, guests and/or suppliers).

Falsification of documents.

5 Being under the influence of alcohol whilst at work.

Rude or abusive behaviour towards guests employees or suppliers.”

22. The disciplinary procedure provides that before any disciplinary action is taken, the line manager or an HR representative will hold an investigatory meeting to consider whether there is any reasonable evidence surrounding the alleged conduct/behaviour issues. There is no right to be accompanied at this informal stage or receive a formal notification to attend the meeting.

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23. If there is a case to answer, the employee will be informed of the nature of the complaints and given an opportunity to state their case before any decision is made at the disciplinary interview.

15 24. The disciplinary procedure advises that as a precautionary measure either before or after an investigatory meeting, the employee may be suspended. This does not constitute disciplinary action and disciplinary action may not necessarily follow. During the suspension, the employee must not attend company premises or contact other employees about the investigation without authority. If the employee requires any information or wishes to access certain employees, the employee must seek the authority of the investigating officer.

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25. At the disciplinary interview, an employee has a right to be accompanied. There is a right of appeal against any disciplinary action taken up to and including dismissal. An appeal is a rehearing of the case and the employee is not limited to the grounds stated in the appeal letter.

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26. The disciplinary procedure states that dismissal without notice can take place if the employee commits acts including:

“Guilty of misconduct in the disciplinary procedures which warrants dismissal without notice;

Committing any act of negligence, negligent of duties which is serious or any act which causes the company to lose trust and confidence and which justifies dismissal without notice;

Serious or repudiatory breach of the employment agreement.”

Early 2022

27. The leases for stores in Cumbernauld were due for renewal. The claimant understood that there was uncertainty about whether these stores would close. She believed that there was a restriction on hiring new staff until there was clarity about the stores.
28. The claimant had an erratic working relationship with the operations manager. She considered that he wanted to be friends with everyone and not cause any friction. The claimant felt that the operations manager was reluctant to deal with concerns raised about the operational development coach who was a close relative of one of the directors and had previously worked in the Baillieston store. She considered that the operations manager was unsupportive of her and the store managers.
29. The claimant tried unsuccessfully to address her concerns with Mr Wilson, director. The claimant reluctantly concluded that she should look for alternative employment as she did not consider that the situation would change.
30. Around September 2022, the Kirkintilloch store manager tendered her resignation.
31. Matters came to a head when the stores were busier than expected on 19 September 2022. They were understaffed and some of the stores ran out of food. The Kirkintilloch and Baillieston store managers were spoken to by the operations manager and the operations development coach.

32. The claimant texted the operations manager. He asked her to discuss the situation in person. The claimant mentioned going for four weeks' notice. The operations manager advised that it was her decision but he was not accepting her resignation as he considered that it was impulsive. If the claimant still felt that way in a few weeks after he tried to fixed matters then that was fine but they needed to talk first.

6 October 2022

33. The claimant was on annual leave 3, 4 ,5 ,6 and 7 October 2022. Her absence was being cover by the new stores manager. The claimant's scheduled days off were 8 and 9 October 2022.

34. Notwithstanding her leave, the claimant planned to work on the evening of 6 October 2022 to completing the appropriate timesheets for her stores for the following week and preparing information for payroll.

35. On 6 October 2022 the claimant attempted unsuccessfully to contact her managers about timesheets. She contacted the operations manager who responded by text advising that he had told the store managers to send their timesheets directly to the HR administrator. The claimant was on holiday. There was no need for her to do anything.

36. The claimant also texted concerns to the operations manager about not being able to access time Wizard. The claimant texted that she would meet the operations manager the following day if he "sacking" her. The operations manager asked the claimant to stop texting. He would speak to her on Saturday (8 October 2022).

37. The claimant and the operations manager met at the Cumbernauld store on 8 October 2022 and spoke for approximately five minutes. When the claimant raised her inability to access time Wizard, the claimant was advised that it was being updated. In relation to other apps, the operations manager was unable to provide any explanation as to why she should be unable to access matters.

Grievance

38. On 11 October 2022, the Kirkintilloch store manager sent by email to HR a grievance against the claimant (the Grievance). The Kirkintilloch store manager said that she felt “used in the past year” in a game to discredit the operations manager. She said that the claimant had been drunk on numerous occasions and was drunk on a public team Zoom meeting. The claimant had demoted a member of staff in front of everyone as they were not doing the job properly. The claimant had completed weekly KPIs and coffee pot checks without doing them properly. The claimant had told a store manager not to trust other senior managers. The claimant had brought an HR administrator into issues and belittled him. Other members of staff from the Baillieston store had complained about the claimant’s negativity and how she demoted and stressed members of staff in particular one employee who said she could not work with the claimant again.

Investigation

39. The Grievance was passed to Mr Wilson. He contacted Mr Lepick and asked him to carry out an investigation into the claimant’s actions.
40. Mr Wilson wrote to the claimant on 11 October 2022 advising that she was suspended pending disciplinary investigation (the Suspension Letter). Mr Lepick would be in charge of the investigation which was expected to be completed by 25 October 2202.
41. The Suspension Letter stated that there would be an investigation into:
- a. Bullying behaviour towards other employees.
 - b. Undermining competent employees with undue and relentless criticism causing emotional harm.
 - c. Isolating employees from colleagues.

- d. Acts of aggression and public belittling causing emotional harm and to the detriment of employee's mental health.
- e. Acting in a deceitful nature towards other employees at the detriment of their mental health.
- 5 f. Being under the influence of alcohol while performing work duties.
- g. Falsification of company records.
- h. Creating a hostile working environment.
- i. Blocking career advancement unfairly.

42. The Suspension Letter also stated that claimant should not contact any
10 employees or customers unless authorised by Mr Lepick and that she should not attend any of the respondent's premises unless invited by him to do so. Once the investigation was completed, the claimant would be informed of its outcome. If there is a case to answer, the claimant would be invited to attend a formal disciplinary meeting.

15 43. The claimant was not informed that a grievance had been raised against her nor was she provided with a copy the Grievance at that stage.

44. Mr Lepick handed the Suspension Letter to the claimant on 11 October 2022.

Investigation

45. Mr Lepick read the Grievance. He spoke to ACAS about how he should
20 approach the investigation.

46. Mr Lepick met and obtained a statement from the Kirkintilloch store manager (11 October 2022). Mr Lepick then spoke to the operations manager (13 October 2022), the HR administrator (17 October 2022), the Baillieston store manager (18 October 2022), the new store manager (21 October 2022), the
25 drive through manager (22 October 2022); the trainee manager (23 October 2022), a drive through employee (23 October 2022); and a Baillieston store employee (24 October 2022). Handwritten notes were taken by Mr Lepick and were initialled by the various witnesses.

47. Not all the witnesses were in agreement. Mr Lepick did not speak to the claimant or another witness who had already left the respondent's employment.

48. When the investigation concluded, Mr Lepick contacted head office and advised that there was a case to answer.

Disciplinary invitation

49. Mr Wilson asked Mr McNeil to carry out the disciplinary hearing. Mr McNeil liaised with "HR" to prepare a letter dated 27 October 2022, signed by Mr Wilson, inviting the claimant to the disciplinary hearing (the Disciplinary Invitation).

50. The Disciplinary Invitation confirmed that the disciplinary hearing would be conducted by Mr McNeil and Molly Nock would attend as a witness and note taker. The question of disciplinary action would be considered with regard to:

- a. Bullying behaviour towards employees.
- b. Rude or abusive behaviour towards employees.
- c. Undermining competent employees with undue and relentless criticism creating a toxic environment and causing emotional harm.
- d. Acts of aggression and public belittling causing emotional harm and to the detriment of employee's mental health.
- e. Being under the influence of drink while performing work duties.
- f. Falsifying company records (coffee pot checks).
- g. Discouraging career advancement by creating a hostile working environment.

51. Enclosed with the Disciplinary Invitation were copies of the Grievance; Mr Lepick's investigation transcripts; screenshots of texts with the operations manager; and a copy of the disciplinary policy.

52. The claimant was advised of the consequences of the disciplinary hearing may be dismissal, final written warning or demotion. The claimant was informed of the right to be accompanied at the disciplinary hearing and that she would remain on suspension until the outcome was determined and communicated to her.

Disciplinary hearing

53. In preparation for the disciplinary hearing, Mr McNeil reviewed the investigation notes and made a listed of the allegations on which he wanted to hear the claimant's comments.

54. The claimant was accompanied at the disciplinary hearing which at the claimant's request was recorded. Handwritten notes were also taken.

55. Mr McNeil referred to the Grievance. He explained that the purpose of the disciplinary hearing was for the claimant to respond so that he could hear her side of the story. The claimant confirmed that she had received all the documentation that had been sent to her.

56. Mr McNeil then referred to the following allegations: bullying, rude and abusive toxic environments; being under the influence of alcohol; and falsifying records and creating a hostile environment.

57. The claimant denied that she tried to build an army against the operations manager. She produced exchanges of messages between her and the Kirkintilloch store manager. The claimant's position was that the Kirkintilloch store manager had issues with the operations manager which the claimant had attempted to resolve. The claimant had received telephone calls from the Baillieston store manager who had been upset about employees at the Baillieston store being in tears after a visit by the operations manager following a Costa check.

58. When asked about the suggestion that an employee had left because of the claimant's behaviour, the claimant expressed shock about that as in her discussions with the employee, the employee had thanked the claimant for her support.

59. In relation to hiring staff, the claimant explained that a decision was being taken about the leases for the Cumbernauld stores which were coming to an end. The claimant understood that she was not to hire staff until the matter was resolved. The claimant considered that she was not supported by the operations manager. The claimant referred to issues with the operational development coach and the incident on 19 September 2022.
60. In relation to the claimant having reduced various employees to tears, the claimant accepted that she did not have a good relationship with the trainee manager because of performance issues. The claimant was unaware of any issues concerning one employee and was unaware of another employee being in tears. In relation to HR administrator, if the employee was in tears, it was because he was emotional and working a lot.
61. When asked about staff not wanting to work in her stores, the claimant expressed surprise given that she had little or no contact with some those employees. The claimant did not accept that employees had left because of her. The claimant asserted that there were other reasons for their departure.
62. The claimant was then shown text messages provided by the operations manager. The claimant accepted that at times their relationship was toxic. The claimant considered that the operations manager wanted to be everyone's friend and talked about area managers being their backs. The claimant denied withholding timesheets from the HR administrator. The claimant explained that she invited the store managers to her house so the timesheets could be completed together. The claimant suggested that emails should be checked as it would be apparent from the emails that the timesheets were presented on time. The claimant asked Mr McNeil to speak to an employee as the claimant could not understand the comments that had been made in relation to her. That was not the claimant's experience.
63. In relation to undermining the operations manager, the claimant explained that the Baillieston store manager was unhappy with comments made by the operations manager particularly following a Costa check. The claimant said that the operations manager had the new store opening manager in tears and

that the operations manager thought she was erratic and was fed up of her wanting to leave. The claimant advised everyone to keep diaries to right. keep themselves.

- 5 64. Turning to the alleged demotion, the claimant explained that the employee was a trainee manager and she was never demoted. Another employee was appointed as cluster manager of the two Cumbernauld stores. The claimant told the trainee manger that she was going to keep on training.
65. The claimant asked for a further investigation about the employee who had left. The claimant said that she was devastated when the employee left.
- 10 66. About the allegations of drinking on Zoom meetings, the claimant said that she had spoken to Mr Wilson and the operations manager regarding how she coped during COVID. She had felt unsupported. The claimant referred to having a beer and being on mediation. The claimant said that she would not drive the next day if she had been drinking. The claimant expressed concerns about the allegations made by the Kirkintilloch store manager. Given the connections between the Kirkintilloch and the Baillieston store managers, the claimant felt that this was a conspiracy.
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67. Turning to the coffee pot checks, the claimant was asked about sitting at the back of the store and saying that she had completed a coffee pots checks. The claimant said that the Baillieston store manager was relatively new and that she had sixteen and a half years' experience. She had never done a coffee pots check when the Baillieston store employee was on shift.
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68. The claimant again referred to the incident on 19 September 2022. The claimant's position was that the Kirkintilloch store manager was irate. The operations manager did not like being challenged and the store manager had an issue with Mr Wilson.
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69. The claimant questioned why a member of the public was aware of her suspension when it was supposed to be confidential. She also raised issues as to why serious allegations of gross misconduct at the Cumbernauld drive through had not been progressed in disciplinary meetings and yet she felt this
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was a conspiracy against her. The claimant also explained that she did not have access to stockade. She felt that if there had been issues, these had not been brought to her attention previously. The claimant also had mental health issues. There were no one to ones or appraisals.

5 *Decision making*

70. After the disciplinary hearing, Mr McNeil listened to the recording and summarised the claimant's responses to the various allegations.

71. Mr McNeil considered that in relation to most of the allegations about her behaviour, the claimant denied the allegations or deflected the question by referring that the operations manager who the claimant considered was responsible for upsetting other members of staff. Mr McNeil felt that the claimant used the operations manager as a "punchbag" and she failed to give relevant answers.

72. Mr McNeil considered that the investigation transcripts provided during the investigation pointed to the claimant bullying the operations manager, the Kirkintilloch store manager, the HR administrator and an employee who had left. He accepted these transcripts. By contrast he felt that the claimant denied a lot of the questions and blamed the operations manager or the company whenever she could. Mr McNeil concluded that there was bullying behaviour towards employees. He considered that this was an act of gross misconduct.

73. From the investigation transcripts, Mr McNeil also accepted there was evidence of the claimant being rude or abusive towards the operations manager, the Bailieston store manager, the Kirkintilloch store manager, the HR administrator, the trainee manager and the employee who had left. Again, the view Mr McNeil reached was that the claimant failed to give relevant answers and blamed the operations manager and the respondent whenever possible.

74. In terms of undermining competent employees with undue and relentless criticism, creating a toxic environment and causing emotional harm, Mr McNeil

concluded that there was evidence of this in relation to the operations manager, the Baillieston store manager, the HR administrator, the trainee manager and the employee who had left. Again, Mr McNeil believed the investigation transcripts because the claimant had failed to give any relevant answers and denied questions.

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75. Turning to the coffee pot checks, Mr McNeil concluded that the Baillieston and Kirkintilloch coffee pot checks were falsified. He formed this view because he accepted the investigation transcripts of the Kirkintilloch store manager, the Baillieston store manager and the HR administrator.
- 10 76. As regards acts of aggression and public belittling causing emotional harm and detriment to employees, Mr McNeil considered that there was evidence of the trainee manager believing that she was demoted during the policy meeting and that afterwards she was in tears. Mr McNeil considered that the claimant failed to accept responsibility.
- 15 77. Mr McNeil concluded that the claimant appeared to shift blame and not actually answer the questions. He felt that he needed to go back to the questions on many occasions as the claimant deflecting blame. Mr McNeil considered that the claimant had a big issue with the operations manager. Mr McNeil felt that this was “bullying” and that this had been affecting the operation manager’s mental health. Mr McNeil believed that an employee had left the company due to the claimant’s bullying behaviour.
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78. In relation to drinking alcohol at work, Mr McNeil concluded that there was insufficient evidence of this. While the claimant admitted that she may drink alcohol in the evening, she was not at work after 6.30pm. He also concluded that there was not enough evidence to suggest that the claimant discouraged advancement by creating a hostile environment.
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79. On 2 November 2022, Mr McNeil sent an email to Mr Wilson and Mr Dunese setting out his notes following the disciplinary hearing with the claimant. Mr McNeil advised:

“I have decided after reviewing the evidence and her response that Sharon has committed acts of gross misconduct (as classed by the company handbook) and therefore I have decided to terminate her contract with immediate effect (obviously with your agreeance after reading my notes).

5 I have attached my findings that I strongly believe that she has committed the following offences:

1 Bullying behaviour towards Coffee Pot employees.

2 Rude and abusive behaviour towards employees.

3 Undermining competent employees with undue and relentless
10 criticism creating a toxic environment and causing emotional harm;

4 Demonstrating acts of aggression and publicly belittling an employee to the detriment of their mental health.

5 Falsification of company records (Coffee Pot checks).

If you need further information – please let me know.”

15 80. On 3 November 2022, with the assistance of the operations manager, Mr McNeil prepared a letter in Mr Wilson’s name advising the claimant that her employment was being terminated with immediate effect without notice or pay in lieu of notice (the Dismissal Letter). Her dismissal was to take effect immediately and her final day of employment was 3 November 2022.

20 81. The reasons stated for the dismissal were as set out in the email sent to the directors. The Dismissal Letter also advised that the claimant had a right of appeal to Mr Dunese within seven days.

82. The claimant received the letter but decided not to appeal. The claimant contacted ACAS and expressed reservations about the impartiality of any
25 appeal as she considered that a decision had been predetermined and that she was unlikely to have a fair hearing. The claimant decided that it would be more appropriate to start early conciliation proceedings which she did on 3 November 2022.

83. At the date of termination, the claimant was 52 years of age. She had been continuously employed for 15 years. Her gross weekly wage was £246.52. This equated to a net weekly wage of £184.90.

84. The claimant found alternative employment on 16 November 2022. The claimant receives £225.69 gross per week.

Observations on witnesses and conflict of evidence

85. From the above findings, it may be taken that the Tribunal considered that Mr Lepick and Mr McNeil gave their evidence honestly based on their recollection of events which were consistent with the contemporaneous documents produced at the final hearing.

86. While they had previous experience of the disciplinary process, they candidly confirmed that they found their respective roles daunting and had little support from the respondent other than being referred to ACAS. Mr McNeil said that although he did not write the Dismissal Letter it was his decision to dismiss the claimant. He asked for the operations director for guidance on how it should be worded.

87. Mr Wilson was ostensibly the author of the Suspension Letter, the Disciplinary Invitation and the Dismissal Letter. He did not give evidence at the final hearing. The Tribunal thought it more likely than not that Mr Wilson did have some involvement in the preparation of the letters as it was he who asked Mr Lepick and Mr McNeil to be involved in the disciplinary process and they bore his name as the signatory. The Tribunal felt that his involvement beyond that was minimal as the impressions given by Mr Lepick and Mr McNeil were that they were unsupported during the process. While Mr McNeil sent an email to Mr Wilson and Mr Dunese advising of his decision to dismiss the claimant the Tribunal was persuaded by Mr McNeil's evidence that it was his decision and he was not influenced by the operations director, Mr Wilson or Mr Dunese. There was no evidence of either Mr Wilson or Mr Dunese responding to the email. Mr Dunese did not appear to have any involvement in the disciplinary process other than being sent the email from Mr McNeil and being nominated in the Dismissal Letter to conduct the appeal hearing.

88. The claimant was known to Mr Lepick and Mr McNeil. The Tribunal did not form the impression that either had any enmity towards her. The claimant and Mr McNeil had worked together for many years and there was no animosity. The Tribunal was mindful that he was line managed by the operations manager and Mr McNeil line managed the new store opening manager who became an area manager following the claimant's departure.
89. Turning to the claimant's evidence, the Tribunal had no doubt that the claimant was a committed and hardworking employee. She was proud of her longstanding service to the business. The Tribunal's impression was that for a variety of personal reasons the claimant found her work a positive distraction. At times it dominated her life. When she should perhaps have focused on other matters, the claimant became embroiled in work issues. An illustration of that was in relation to the claimant's belief that she required to complete timesheets on the evening of 6 October 2022 on her return from holiday albeit she was still on leave. The Tribunal did not doubt that the claimant felt that she had to do this. However, the evidence of Mr Lepick and Mr McNeil was that while the business expected a degree of commitment from area managers, neither of them would have felt the need or the expectation to undertake this work while on leave.
90. There was conflicting evidence about the procedure which should be followed in relation to coffee pot checks. This was a companywide procedure which was introduced in the summer of 2022. Mr Lepick and Mr McNeil referred to similar procedures of ordering either two or three coffees then completing various checks with a view to testing customer experience and ensuring procedures were followed in relation to allergens.
91. During the investigation, Mr Lepick did not speak to the claimant and therefore she was not asked about her understanding of the coffee pot check procedure and why she considered that it had been complied with. At the disciplinary hearing, Mr McNeil asked about the claimant being in the back office when completing the coffee pot checks but did not explore with the claimant her understanding as to what should or should not be done as part of a coffee pot check.

92. At the final hearing, the claimant referred to a procedure which she had understood was a procedure to be followed in relation to coffee post checks rather than Costa checks. It was put to the claimant in cross examination that this document had been fabricated which the claimant denied.

5 93. As the procedure was introduced in the summer of 2022 the Tribunal found it surprising that there was no written documentation setting out the procedure or details of how it was introduced to employees or training given to them. The Tribunal considered that if the procedure was as important as the respondent suggested and it was known particularly to the operations
10 manager that the claimant had not been complying with it, that he did not take steps to ensure that she was aware of the procedure, what was required of her and appropriate training or retraining provided. The Tribunal considered that it was unlikely that the claimant fabricated the document that she produced. It seemed more probable that the claimant did not fully understand
15 what was being alleged in relation to the coffee pot checks at the disciplinary hearing and that this was overlooked as the focus was on numerous other allegations.

94. The Tribunal considered that the difficulty in relation to a number of allegations was that from the investigation transcripts, several allegations had obviously
20 been discussed between the witnesses when the allegations took place, for example the allegations in respect of the Zoom meeting. Indeed, a number of the issues were raised at the time with the operations manager who appeared reluctant to address any issue unless there was a “formal complaint”. While the Tribunal appreciated that it can often be challenging for
25 managers to know when an employee is “venting” rather than raising a grievance, the operations manager seemed reluctant to grasp the nettle even when there appeared to be a failure to follow procedure.

Deliberations

95. The Tribunal referred to the issues to be determined and the relevant law.

Unfair dismissal

- 5 96. The Tribunal noted that in relation to the unfair dismissal claim, the critical question for the claimant was whether her dismissal was fair in terms of section 98 of the ERA. The respondent said that the reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the ERA. The claimant asserted that there was a conspiracy to get rid of her.
- 10 97. Mr McNeil confirmed in evidence that after the disciplinary hearing, he believed that the claimant's behaviour towards some colleagues amounted to bullying and was rude. She had made some colleagues cry. He also believed that she had not completed coffee pot checks. Mr McNeil said that the claimant's conduct was the reason why he dismissed her. The Tribunal did not understand the claimant to be suggesting that Mr McNeil was part of any
15 conspiracy but rather those who made the allegations were conspiring against her. Mr McNeil was not involved in the process until after the investigation. The Tribunal was satisfied that the respondent had shown the reason for dismissal was conduct. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair
20 reason.
98. The Tribunal then considered whether the dismissal was fair or unfair under section 98(4) and the guidance set out in *Burchell* (above). The claimant argued that the respondent did not have a genuine belief that she had committed gross misconduct.
- 25 99. Gross misconduct is a contractual concept. Unfair dismissal is a statutory concept which considers the reasonableness of the employer's belief.
100. The Tribunal therefore considered that the first issue to be determined, the burden of proof being neutral, was whether the respondent had reasonable grounds for the belief in the alleged misconduct at the time it formed that belief

and that the respondent carried out as much investigation as was reasonable in the circumstances.

- 5 101. The Tribunal was satisfied that when the claimant was dismissed, Mr McNeil believed that the claimant had acted in a bullying manner in that employees had been reduced to tears; one employee believed that she had been demoted during a virtual meeting; another employee had left because of the claimant's manner towards her. Mr McNeil also believed that the claimant had failed to carry out coffee pot checks.
- 10 102. The Tribunal was mindful that it could not substitute its own view as to whether a reasonable investigation was carried out or embark on an analysis of the equality of the evidence obtained so as to lead to its own view of the evidence resulting in its conclusion as to what a disciplinary manager ought to have found as opposed to applying a range of reasonable responses test to the investigation carried out by the respondent leading to its conclusions to
15 dismiss the claimant.
- 20 103. The Tribunal turned to consider the investigation. The initial investigation was carried out by Mr Lepick. The Tribunal did not understand the claimant to challenge his involvement in the investigation. In any event given the reference to the operations manager in the Grievance, it was in the Tribunal's view reasonable for Mr Lepick to undertake the investigation because he was
25 part of the management team and had no involvement in any of the alleged incidents.
- 30 104. The claimant was suspended. Mr Lepick did not take this decision. He understood it was taken by Mr Wilson who asked him to give the Suspension Letter to the claimant.
105. Mr Lepick started the investigation by speaking to the Kirkintilloch store manager. The Tribunal considered that to do so was reasonable given that she had raised the Grievance. He then spoke to any other members of staff who were mentioned in the subsequent investigation interviews. Not all the employees to whom Mr Lepick spoke were negative towards the claimant.

106. Mr Lepick did not speak to the employee who had already left the respondent's employment. Given the reliance that was placed on the reason for her departure the Tribunal considered that it might have been helpful to have made further enquiries in this regard either by attempting to make contact with the individual or ascertaining what explanation was provided in any exit interview or written resignation when the employee left the respondent's employment. That said, in the particular circumstances, the Tribunal did not consider that a failure to do so was fatal.
107. The Tribunal also felt that it would have been helpful if during the investigation, Mr Lepick had endeavoured to ascertain when various allegations were asserted to have taken place. The Tribunal considered that this would have been a relatively easy exercise and might have assisted the parties during the disciplinary hearing.
108. Mr Lepick did not interview the claimant as part of his investigation. This was unusual although the Tribunal noted that there was no requirement to do so in the disciplinary procedure. The Tribunal felt however that had he done so there would have been a better understanding of the claimant's position was particularly in relation to coffee pot checks.
109. The investigation continued during the disciplinary hearing. The claimant was provided with all the investigation transcripts and documentation available to Mr McNeil. The Tribunal felt that it might have been of assistance to understand which specific allegations related to which alleged misconduct. That said, the claimant did not suggest that she did not understand the allegations that were being made against her or that she did not have an opportunity to respond and state her case.
110. During the course of the disciplinary hearing, the claimant requested Mr McNeil speak to the employee who had left the respondent's employment and another employee who it was alleged that she bullied. Mr McNeil did not do so. As previously stated, the Tribunal considered that it might have been helpful for Mr McNeil to have made further enquiries about the employee who had left. Indeed, some employers may have done so, but it could not be said

that Mr McNeil's decision not to do so fell out with the band of reasonable responses. Nor did the Tribunal consider it was unreasonable for Mr McNeil not to speak to the employee who the claimant requested that he speak to. The employee concerned was mentioned in the context of the Baillieston store manager saying that the claimant talked terribly to that employee. The claimant denied this. Mr McNeil reached no conclusion in relation to the claimant's behaviour towards that employee.

111. The Tribunal considered that Mr McNeil carefully listened to the explanation provided by the claimant. As indicated, he did not have any animosity towards the claimant. He understood the challenges of her role as he held the same position in a different area and he also reported to the same line manager. Other than the new store opening manager, the Tribunal did not understand Mr McNeil to have any particular association with the store managers interviewed as part of the investigation. He acknowledged that some members of staff are emotional and that this was known but he considered that as a line manager, that this is a factor that has to be taken into consideration when appraising employees particularly when there is a need for constructive feedback.

112. While the claimant provided Mr McNeil with various text messages, the Tribunal did not understand Mr McNeil to disagree that the claimant did have good relationships with some employees but he was satisfied on the basis of the claimant's explanation that she knew that certain employees were upset following an interaction with her.

113. As previously mentioned the Tribunal considered that it would have been helpful to have investigated the claimant's understanding of the procedure for coffee pot checks. However the claimant was aware from the investigation transcripts of the Kirkintilloch store manager, the HR administrator, the operations manager, the Baillieston store manager and the Baillieston store employee what they considered the claimant had failed to do. The claimant did not suggest during the disciplinary hearing that she did not agree with the procedure being suggested. Her position was that it was a conspiracy. She

was more experienced than the Baillieston store manager and had not carried out a coffee pot check with the Baillieston store employee.

- 5 114. The Tribunal acknowledged that while other employers may have acted differently, it could not conclude that the investigation carried out by the respondent up to and including the disciplinary hearing did not fall within the range of reasonable responses that a reasonable employer might have adopted.
- 10 115. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.
- 15 116. As regards the investigation and the conduct of the disciplinary hearing, for the reasons previously indicated, the Tribunal was satisfied that there had been a reasonable investigation. The claimant was aware of the case against her. Mr Lepick had no involvement after his investigation. Mr McNeil was the claimant's peer and was not involved in any of the allegations. He listened to the claimant's explanation at the disciplinary hearing when she was given an opportunity to explain her position and comment on any mitigating circumstances. The claimant was accompanied at the disciplinary hearing.
- 20 117. The Disciplinary Invitation enclosed a copy of the disciplinary policy and warned that dismissal was a potential outcome.
- 25 118. Mr McNeil believed that the claimant had bullied employees. While Mr McNeil accepted that the claimant was unaware of the effect her management style was having on employees, she did not dispute she had been aware that employees had been in tears. The claimant appeared reluctant to accept that others may have perceived her manner as bullying. She did not display any remorse that that may have been their perception. Instead, the claimant deflected blame to the operations manager. The Tribunal considered that Mr McNeil had reasonable grounds for believing what he did and had carried out a reasonable investigation.

119. The claimant did not appeal the decision. While the Tribunal appreciated that the claimant's position was that the loyalties of Mr Wilson and Mr Dunese lay with the operations manager. That appeared to be based on what the operations manager said to her rather than her experience. The Tribunal could understand why the claimant may have had reservations about Mr Wilson given what appeared to be his involvement in the process. However the Tribunal had difficulty understanding why the claimant did not want Mr Dunese to conduct the appeal especially as in her evidence he did not know what was going on.
120. The Tribunal then considered the decision to dismiss the claimant. The Tribunal was mindful that the question was not whether the Tribunal would have dismissed the claimant but whether the respondent's decision to dismiss her fell within the range of reasonable responses that a reasonable employer in those circumstances and that business might have adopted. The claimant made reference to other misconduct which she and Mr McNeil had been involved in investigating which had not proceeded to disciplinary action. The Tribunal was unable to form any view of this as there was no evidence for the Tribunal as to why a decision was taken not to proceed with disciplinary action at that time. The Tribunal's impression was that in any event, the case did not involve a senior manager. If anything, the impression was that while the disciplinary policy set out in advance conduct that might be gross misconduct, the respondent did not shut its mind and deliver an automatic conclusion but took into account the facts of the case against the background of that policy.
121. The Tribunal observed that there was no history of misconduct by the claimant. The claimant was well regarded by the respondent and had no previous records of incidents. The claimant did not receive any appraisals or performance reviews by her the operations manager. While the Tribunal felt that the timing of the Grievance which was sent to the operations manager was contrived, the Tribunal did not consider that Mr McNeil's decision to dismiss the claimant was pre-determined or an automatic conclusion. The Tribunal had no doubt that Mr McNeil knew how important his decision was and that it was one that weighed heavily on him.

122. The claimant denied the misconduct. She did not conceive that her management of employees was in any way inappropriate or that in retrospect she would have acted differently. The Tribunal's impression was that the claimant appeared focused on blaming the operations manager rather than considering in what way she might work with him with a view to ensuring better communication and more effective management of employees within the business. The Tribunal concluded that the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.
123. The Tribunal concluded that the dismissal was fair and, having regard to this conclusion, the Tribunal did not consider it necessary to go on to consider the question of remedy. The unfair dismissal claim is dismissed.

Wrongful dismissal

124. The Tribunal then turned to consider the wrongful dismissal claim. This is a different complaint to that of unfair dismissal. The reasonableness or otherwise of the respondent's actions are irrelevant.
125. The claimant was continuously employed for 15 years. She was contractually entitled to 12 weeks' notice. She was summarily dismissed.
126. The question for the Tribunal was whether the claimant was guilty of conduct, so as to amount to repudiatory breach of employment entitling the respondent to summarily terminate the contract. The disciplinary policy includes examples of gross misconduct as being guilty of conduct set out in the disciplinary policy as warranting dismissal without notice. The list of examples include being rude or abusive behaviour towards guests, employees or suppliers.
127. From the disciplinary hearing, the claimant did not dispute that she announced at a policy meeting that a cluster manager would be appointed and that the trainee manager would continue in her existing post. The trainee manager believed (and as did others participating in the meeting) that the trainee

manager was being demoted. The trainee manager was upset by this and was in tears following the call.

5 128. During the claimant's appraisal of the then Cumbernauld drive through manager who was subsequently the HR administrator, he was reduced to tears.

129. The Tribunal considered that this conduct was serious enough to fall within the example of gross misconduct in the disciplinary policy.

10 130. The Tribunal therefore concluded that the claimant's conduct was so serious as to amount to repudiatory breach of contract entitling the respondent to summarily dismiss her. The wrongful dismissal claim is dismissed.

15 **Employment Judge: S MacLean**
Date of Judgment: 26 June 2023
Entered in register: 27 June 2023
and copied to parties