# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms Y Kisheva**

**Respondent:** **Secure Frontline Services Limited**

**Heard at:** London Central, via CVP

**On:** 26, 27 and 28 July 2023

**Before:** Employment Judge P Smith

**Appearances**

**For the Claimant:** Mr L Robert-Lennard, Consultant and Claimant's friend

**For the Respondent:** Mr A Sandulescu, Respondent's Risk and Compliance Manager

# JUDGMENT

1. The Claimant's claim of unfair dismissal is well-founded and succeeds.

2. The Claimant's basic award for unfair dismissal is reduced by 100% on account of her culpable conduct prior to dismissal.

3. The Claimant's compensatory award for unfair dismissal is reduced by 100% of account of her culpable and contributory conduct.

4. The Claimant's claim of wrongful dismissal is dismissed.

# REASONS

**Request for written reasons**

1. An oral judgment, together with reasons, was delivered on the third and final day of the full hearing, on 28 July 2023. Written reasons for the Tribunal's judgment were requested by Mr Robert-Lennard, the Claimant's representative. These fuller written reasons have been promulgated pursuant to that request and the parties' right to written reasons as stipulated by **r.62(3)** of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, **sch.1**.

## Introduction

2. By an ET1 claim form presented to the Tribunal office on 22 June 2022 the Claimant brought claims of unfair dismissal and wrongful dismissal (breach of contract, in respect of notice pay) to the Employment Tribunal.

3. At a case management Preliminary Hearing on 14 November 2022 Employment Judge Davidson summarised the claims and set out a list of issues to be determined at the full hearing. Those were restated at the beginning of the full hearing and agreed between the parties. The only material change was in relation to the wrongful dismissal claim, where it was further agreed by the parties that the central issue in that claim was whether the Respondent was entitled to dismiss the Claimant, as it did, without notice. It would be so entitled if the Claimant had engaged in conduct that amounted to a fundamental breach of contract. That was the essence of paragraph 4.3 of Employment Judge Davidson's list of issues but was set out in this longer form for clarity.

4. The Claimant was represented at the hearing by Mr Robert-Lennard, who described himself as a consultant but also as the Claimant's friend. The Respondent was represented by Mr Sandulescu. I noted that although Mr Sandulescu appeared on behalf of the Respondent in his capacity as its Risk and Compliance Manager, he is in fact a practising solicitor qualified in England and Wales and in possession of a valid practising certificate.

5. I was presented with a bundle of documents amounting to some 226 pages, some of which I was directed to by the parties in their witness statements and in the course of the evidence. Two additional documents were added, one through the permission of the Tribunal and the other by consent, during the course of the hearing. Any documents of relevance have been referred to in the reasons set out below.

6. The Claimant gave evidence on her own account and asked the Tribunal to accept as her evidence in chief only one of the witness statements she had prepared for the case. That document appeared at pages 13 to 23 of the witness statement bundle. Mr Robert-Lennard confirmed that she did not wish to rely on any of the other statements she had prepared despite the fact they appeared in the witness statement bundle. I did not, therefore, read or take into account those other statements. Mr Sandulescu gave evidence for the Respondent and asked the Tribunal to accept as his evidence in chief a witness statement that appeared at pages 149 to 152 of the witness statement bundle

7. In our preliminary discussion the Claimant expressly abandoned her wish to be reinstated or re-engaged by the Respondent, in the event that her unfair dismissal claim succeeded. It was confirmed by Mr Robert-Lennard that the only remedy sought was compensation.

8. The parties agreed that in addition to matters relating to liability, I would at the same time decide whether the Claimant had engaged in culpable or blameworthy conduct, whether such conduct contributed to her dismissal, whether there was a chance the Claimant would have been dismissed in any event (the well-known

rule in **Polkey v A E Dayton Services Ltd**), and whether there should be an uplift to any award of compensation in the event that a statutory Code of Practice applied and where the Respondent had unreasonably failed to comply with it.

9. In these reasons I have referred to the submissions of the parties on disputes of fact only where it has been necessary to do so. As to their submissions on the legal questions to be decided, I have also referred to them in my analysis in the closing paragraphs of these reasons insofar as it has been necessary to do so. Neither party's submissions have been rehearsed in full.

**Findings of fact**

10. My findings of fact have been made according to the applicable standard in the Employment Tribunals: the balance of probabilities.

11. In one form or another, the Claimant has been engaged by the Respondent as a Security Officer, otherwise known as a door supervisor, since 2009. It is agreed by all parties that at least from 6 April 2013, she was employed by the company. I defer at this stage any findings, if it is necessary for me to make them, in relation to the Claimant's employment status at any point prior to that date.

12. The Respondent has a code of conduct for employees, a copy of which I was shown (it starts at page 88). The provisions of that code that are material to this case include the following paragraphs:

> *4.2. When late or in impossibility to report for duty at a venue, SFS staff ARE REQUIRED to inform SFS Management on the Company Mobile Number as soon as possible to ensure that alternative arrangements can be made.*
>
> *5.7. Unless authorised by SFS Ltd Management, SFS staff may not leave the premises/ venue after starting their shift, until they have completed the shift, or until they have been relieved by a suitable replacement. In all cases, we will act with consideration to the situation, and will not make unreasonable requests. Leaving a venue without SFS Ltd management authorisation could possibly incur a fine and or disciplinary action.*

13. The Claimant was provided with training by the Respondent, including training provided by Mr Sandulescu himself. Mr Sandulescu stated that the provisions of the code of conduct, as mentioned above, are also given as instructions within the training provided. Mr Sandulescu contended that the Claimant knew that if she had to leave her shift part-way through, she was obliged to inform the company by telephoning its central mobile number as soon as possible. His reasoning was that a telephone call could be answered and a matter actioned much more quickly when the Respondent is informed by telephone; text messages and emails can only be reacted to once they are received, which may build in delay. I accepted that evidence and I further accepted Mr Sandulescu's contention that the Claimant knew of this obligation, given her training and experience of over ten years as a door supervisor.

14. The Claimant did not advance any evidence that she did not know of this requirement; instead, the submission was made by Mr Robert-Lennard that she was not in fact allowed to telephone the company as there was a ban on the use of mobile phones at work (she relied upon clause 6.1 of the code in that regard, which I have not reproduced). That submission appeared to me to lack common sense: if there was a genuine emergency situation meaning the Claimant (or any door supervisor) had to leave work urgently, the suggestion that they would be banned from letting the company know was absurd. I accepted Mr Sandulescu's evidence that the Claimant knew what her obligation was, and moreover, his evidence that if there was a genuine emergency situation obliging an employee to leave work immediately, this would not be treated as a disciplinary matter by the Respondent.

15. The evidence that was available showed, and I find, that the Claimant had at the material time a recent medical history that involved her having panic attacks and high blood pressure. An excerpt from her English GP records (page 147) demonstrated that she had cause to consult her doctor about such matters on 17 March 2021, around the time that her son had contracted Covid-19. A letter, this time from her Bulgarian GP (page 150, with an English translation at page 149), demonstrated that she had cause to visit that doctor on 24 June 2021, on account of her having experienced heart palpitations, anxiety and signs of a panic attack. The letter included the comment that her condition is provoked by stressful situations, during which she has strong palpitations and panic attacks.

16. A further letter from her English GP (page 151) indicated that the Claimant had had cause to consult him on 18 January 2022, during which the matter of her panic attacks and triggers for them was discussed. That same letter referred to the Claimant undergoing a review appointment with her doctor on 1 February 2022, of which the doctor remarked *"she was already feeling slightly better"*. I shall return to this comment in due course.

17. On 29 January 2022 the Claimant was working at Ice Wharf, a JD Wetherspoon ("JDW") establishment in Camden. The Respondent has a contract with JDW to provide security services at its establishments, of which Ice Wharf is one. I was shown a schedule to that contract (page 155 in the witness statement bundle) which includes two clauses of relevance: clause 1, which obliges the Respondent to carry out an assessment of each premises to determine how many door supervisors should be provided at the premises on particular days and times, and also obliges it to agree that with JDW as part of a plan for the premises. The second clause of relevance is clause 2, which provides that the Respondent *"shall ensure that an adequate number of door supervisors are at each of the premises at particular times and on particular days, and that shifts are properly covered, in accordance with each plan."*

18. At the time, the Respondent had a risk assessment in place for the Ice Wharf premises (page 131). Whilst the risk assessment assessed the overall level risk posed by the venue as low, the recommended number of door supervisors was set at six. That risk assessment was signed off by JDW's establishment manager at the time.

19. Mr Sandulescu contended in evidence that having fewer than six door supervisors would place R in breach of its contract with JDW and potentially put JDW's licence for the premises at risk, but also that the overall level of risk would necessarily increase (the risk being of harm to customers as well as the Claimant's colleagues). Mr Robert-Lennard submitted that having fewer door supervisors than the recommended six would in fact *reduce* the overall level of risk, from the low level it had already been assessed at. That submission appeared to me to be counter-intuitive because in that situation there would be fewer supervisors in place to manage a situation, should something go wrong, and I had no hesitation in rejecting it. I accepted Mr Sandulescu's common-sense contention that having fewer than the recommended number of door supervisors would inevitably increase the overall level of risk posed by the premises and the activities taking place there, and may well put JDW – by far the Respondent's biggest client – in breach of its legal obligations in terms of its licence for the premises.

20. Returning to 29 January 2022, the Claimant started her shift at Ice Wharf at around 7pm. Her version of events of what happened after that, as set out in her witness statement, was largely unchallenged in cross-examination, but that is not the only account. She provided an earlier account in a letter to the Respondent dated 12 February 2022 (page 140), drafted on her behalf and presumably upon her instruction by a person with some legal background, given its contents. Other written accounts appeared in the bundle at pages 135 (of Emine Zatrici, team leader at Ice Wharf on the evening in question, dated 31 January 2022), 137 (of Mohamed Kamara, another door supervisor who was on duty with the Claimant that evening, also dated 31 January 2022), and 136 (the version of the Claimant herself, sent at 21:50 on the evening in question).

21. Whilst I have treated the versions of Ms Zatrici and Mr Kamara with caution given that neither party called them to give evidence and thus their accounts were untested, I took them into account given that they were written shortly afterwards and are therefore relatively contemporaneous, and also – in the case of Ms Zatrici – because there was no suggestion that she may have had an axe to grind against the Claimant, in contrast to Mr Kamara of whom that might be said.

22. I was also shown some four minutes and 26 seconds of CCTV footage of the Claimant's workstation on the evening in question: the entrance door. This footage covered only the time the Claimant was physically at her workstation and did not cover the time after she left, and it includes no audio at all.

23. On the evidence before me, my findings as to what happened that evening are as follows. It is plain to me that this was a busy evening at Ice Wharf, even shortly after 7pm when the Claimant started work. The CCTV footage (of which I was not given the precise time, but all witnesses appear to describe it as being somewhere between 7 and 8pm) showed a very busy front door with what can only be described as a throng of customers queuing for admission into Ice Wharf. The Claimant was working that door as part of a pair of door supervisors, with Mr Kamara as the other half.

24. A dispute emerged between the Claimant and Mr Kamara, regarding the Claimant's decision to admit one customer into the premises without her having been in the queue: i.e. "queue-jumping". This dispute escalated into an argument, but although the CCTV footage does not help with what was actually said (as there is no audio), it was not apparent from that footage that the argument became, or looked likely to become, physical.

25. In her witness statement the Claimant said (at paras 27 and 28) that she began experiencing symptoms of a panic attack from around 10 minutes into her shift (7.10pm), which she attributed to triggering comments made by Mr Kamara. She then described an intervening period of ten minutes (7.13 to 7.23pm) before contending that there was a second phase of comments from Mr Kamara. At paragraph 31 she described the effect of this second phase in these terms: *"at this point my palpitations were excess leading to heart attack, recalling the advice of my doctors The hyped insult and argument caused palpitations to be severe."* At paragraph 32, describing 7.25pm, *"Mohammed Kamara continued heaping words on me in the presence of the customers and Emina. The insult persisted. I was sweating, feeling dizzy and about to fall, having symptoms of heart attack."* Finally, at paragraph 34 the Claimant stated that *"As I was experiencing the symptoms in me, I needed to leave the scene. My leaving was prevention than cure."* In her oral evidence to the Tribunal the Claimant stated that had it not been for the chair she was presumably sitting on, she would have collapsed.

26. The version of events sent by the Claimant in writing on 12 February 2022 describes what happened in relation to the queue-jumping incident in quite a lot of detail, but as to the argument between her and Mr Kamara the situation is described in far more grave terms. The letter records Mr Kamara allegedly saying that if the Claimant did not leave, he would fight her, and furthermore, that at the point at which the Claimant left her workstation he allegedly said that if she did not leave, he would attack her.

27. The Claimant's witness statement did not include any allegations that Mr Kamara had at any point made physical threats to her person of this nature, nor did her email of 29 January 2022 (later that same evening) at page 136. Furthermore, and as I have already found, the CCTV footage did not suggest that the argument was about to descend into a fight or that Mr Kamara might have been about to physically attack the Claimant.

28. Whilst admittedly the CCTV footage shows the Claimant from behind, it did not appear to me to be supportive of the Claimant's assertion (at paragraph 32 of her witness statement) that she was experiencing dizziness or about to fall, nor did anything within that footage suggest to me that the Claimant was experiencing any health difficulty at the time, either of the kind she describes (her imminent collapse) or otherwise. Whilst exercising caution over Mr Kamara's email (given his status as a participant in the argument), there was nothing within the body text of that email that suggested the Claimant was indeed experiencing the kinds of difficulties she described herself as experiencing in her witness statement.

29. That said, the argument was significant enough for Ms Zatrici, team leader, to intervene. Within less than a minute of Ms Zatrici's intervention, the Claimant left

her workstation. Whilst the CCTV footage ends there, the version of Ms Zatrici records that she followed the Claimant and a short discussion took place between them in which she tried unsuccessfully to persuade the Claimant to return to work. The Claimant's witness statement mentioned nothing of what was discussed between them, and her letter of 12 February 2022 did not mention such a discussion as having taken place at all.

30. However, the Claimant's oral evidence to the Tribunal was that there was indeed a brief discussion between her and Ms Zatrici. The Claimant told me that within it she told Ms Zatrici that she was experiencing heart palpitations, felt like she was having a heart attack, and furthermore, that she might need to call an ambulance. In my judgment this detail represented a significant addition to her evidence and one which was surprisingly omitted from her witness statement.

31. The credibility of this account was, however, fundamentally undermined by three main factors: firstly, the Claimant's assertion in evidence that the conversation itself barely lasted two seconds; secondly, by its complete absence from the account given my Ms Zatrici (who said nothing about the Claimant's appearance in the conversation, never mind what was actually said), and thirdly, by the almost complete absence of any reference to health difficulties being the reason for leaving work that evening. For these reasons, I rejected the Claimant's evidence about the discussion she had with Ms Zatrici after the latter had followed her. I found that in the very brief discussion that took place between them, the Claimant did not say to Ms Zatrici that she was experiencing health difficulties of the kind she described to me, or at all, and that she did not say to her that her reason for leaving had anything to do with her health.

32. Going further, and for the same reasons I have expressed in relation to her lack of credibility as a witness, I rejected the Claimant's assertion that the reason she left work was because of matters relating to her health. I was reinforced in this finding by her doctor's comment of 1 February 2022 (where it was recorded that *"she was already feeling slightly better"*) and by the complete absence from that record of what, if it had occurred, would have amounted a very serious health-related incident for the Claimant a couple of days beforehand. I also noted that an ambulance was not called, nor the Claimant admitted to hospital, on 29 January. The reality is that the Claimant had plainly been upset having had an argument with a colleague, but that in my judgment was in fact the reason for her leaving, consistent as it was with Ms Zatrici's independent written account and the emphasis placed on the argument by the Claimant herself, in her email later that evening. The Claimant did not leave work that night for a health reason.

33. It is an agreed fact that the Claimant did not call the Respondent's central telephone number to inform them that she had left the workplace, despite the fact, as I have found, that she knew she had to do this. This left the Respondent short-handed in terms of door supervisors at Ice Wharf, and on the face of things in breach of its obligations to JDW under clause 2 of the schedule. It also increased the level of risk in relation to Ice Wharf generally, on what was plainly peak time on a very busy Saturday evening. It was obvious even from the short amount of CCTV footage that a full complement of door supervisors was required to manage the amount of customers present that evening.

34. Instead of calling, the Claimant instructed her son to write an email to Respondent on a family mobile telephone kept at home. That email is the document at page 136, sent at 21:50 that evening, which was at least two hours after the Claimant had left the site.

35. The Respondent employs between 100 and 150 people. It has considerable resources, including HR and corporate support. Mr Sandulescu was himself familiar with the Acas Code of Practice in relation to disciplinary matters.

36. The Respondent also has a disciplinary procedure as part of the employee code of conduct, and I was shown a copy (pages 100-101). This provides for a five-stage process that is in fact six stages, as there is an additional provision for an appeal. Stage one of that process is called the investigation stage, where if a complaint is brought to the Respondent's attention it will be investigated *"to obtain as much information as possible."* The second stage involves consideration of informal action to resolve the problem. If that is not possible the matter moves to the third stage, the consideration of formal action. If formal action is appropriate a meeting will be called and the employee formally notified, including notification of the employee's right to be accompanied. The fourth stage involves a decision being made, for which there is a range of options available. Those range from no action being taken, through a first and a final written warning, to dismissal of some *"other sanction"*. If the decision is dismissal the fifth stage stipulates that the reasons for dismissal will be communicated to the employee, that the decision will be confirmed by the director of the Respondent, and that the employee shall have a right of appeal. The additional sixth stage is the appeal itself, the right to which an employee must exercise within five working days.

37. In the Claimant's case there was an investigation of a kind, as the Claimant herself provided a written version of what happened on 29 January 2022 in her email that evening, and Mr Kamara and Ms Zatrici also did, presumably after being asked. However, that was as much investigation as was done. There was no investigatory meeting as such, nor were any of the individuals mentioned above interviewed or their respective versions put to one another for comment. Nor, at the investigatory stage was an allegation of misconduct ever put to the Claimant. Whilst the Claimant's email had been used as part of the investigation, it was sent independently *of* the investigation. The investigatory stage basically involved no participation from C at all, save for that matter.

38. By way of an email sent to her on 1 February 2022, the Respondent summarily dismissed the Claimant (page 139). The reason for dismissal, I find, related to the Claimant's conduct and was, in summary, because she had absented herself from the workplace on 29 January 2022 without informing the Respondent via its central telephone number, as she was required to do. The email also mentioned the potential for reputational damage to have been caused to the Respondent by the Claimant's actions, but Mr Sandulascu confirmed in evidence that this was a potential problem only and one that did not, in fact, arise. The potential for reputational damage was not the reason, or part of it, for dismissal.

39. Whilst the letter went out in the name of Mr Tony Dushka (the Respondent's operations manager) the decision was, I find, taken by Mr Sandulescu. That was his consistent evidence, under considerable challenge from Mr Robert-Lennard, and it was corroborated by the fact that he drafted the dismissal email before sending it to Mr Dushka for onward transmission to the Claimant (I was shown the draft and it resembled the final version at page 139 in its content).

40. Mr Sandulescu's decision had been made following no meeting with the Claimant. It had also been made with no specification that there was in fact a disciplinary case against the Claimant or setting out what the allegation of misconduct against her was. She was completely denied the opportunity to answer the case against her and could not have known until receipt of this letter that there had in fact been a disciplinary case pursued against her by the Respondent.

41. I accepted that Mr Sandulescu made the decision to dismiss and that he did actually believe the Claimant was guilty of misconduct – and, given the written accounts of the Claimant, Ms Zatrici and Mr Kamara, which I find he had and read – he had reasonable grounds to believe in her guilt as a potentially valid reason for leaving was not advanced and it was agreed that the Claimant did not telephone in, as required. However, Mr Sandulescu's decision was reached because, in his evidence and in my judgment, he could not see any circumstances where her actions on the evening of 29 January 2022 could have been justified. The effect of that lack of thinking was to completely nullify any responsibility the Respondent had for investigating the matter, and it defeated the purpose of Respondent's own policy. It was, in short, a shockingly perfunctory way of dealing with an employee of otherwise good standing and of some 13 years' engagement with this employer.

42. The email of dismissal made no mention of the Claimant's right to appeal Mr Sandulescu's decision to dismiss her, even though that right was enshrined in the Respondent's own disciplinary procedure within its employee code of conduct. The Claimant did not appeal the decision, but instead wrote to the Respondent on 12 February 2022 (page 140) setting out, in summary, the grounds upon which she considered the decision to dismiss her to be wrong. The email also invited the Respondent to settle any employment claims she might have by way of a "compromise agreement". The language used in that email suggested it was written for the Claimant by someone with experience of employment law, but despite that it did not mention the possibility of an appeal or suggest that it should be taken by the Respondent as an appeal letter. Whilst it was not dealing with an appeal against dismissal, that email was responded to and each of the Claimant's points addressed, in a letter dated 23 February 2022 (page 143). This letter was authored by Mr Emanuel Prenga, director of the Respondent, who confirmed within it that he disagreed with each of the Claimant's points.

**The law**

*Unfair dismissal*

43. A claim of unfair dismissal is a statutory claim. **Section 94 Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their employer, subject to the qualification (under **s.108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two years' continuous service is not required, but the Claimant's case is not one of them. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (**s.98(2)(b)**). The burden of proof is on the employer to show a potentially fair reason for dismissal (**s.98(1)**).

44. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **s.98(4) Employment Rights Act 1996**. The burden of proof is neutral but the Tribunal must determine the fairness of the dismissal, having regard to the employer's reason, depending *"on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "in accordance with equity and the substantial merits of the case".*

45. In conduct cases the there is a considerable bank of settled authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **s.98(4)**. The leading case remains **British Home Stores Ltd v Burchell [1978] IRLR 3** (EAT), which sets out three principal points for the Tribunal to consider, namely:

    45.1 Did the employer genuinely believe in the employee's guilt? That is a factual matter which looks at the mind of the dismissing officer.

    45.2 If so, did the employer have reasonable grounds upon which to sustain that belief? That involves looking at the evidence that was available to the dismissing officer, and by extension the appeal officer (if applicable).

    45.3 If so, did the employer nevertheless carry out as much investigation as was reasonably required, in all the circumstances of the case? The assessment of what amounted to a reasonable investigation will differ from case to case but it would generally involve looking at the steps the employer actually took in addition to those it could reasonably have taken but did not. Generally, what is reasonable will to a significant degree depend on whether the conduct is admitted or not (**ILEA v Gravett [1988] IRLR 497**, EAT), and the question is to be determined from the outset of the employer's procedure through to its final conclusion (**Taylor v OCS Group Ltd [2006] IRLR 613**, Court of Appeal).

46. At all stages in a misconduct case the actions of the employer are to be objectively assessed according to the established standard of the reasonable employer acting reasonably or, as it is sometimes put, whether the employer

acted within a "band of reasonable responses" (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, EAT). The Tribunal is therefore not concerned with whether the employee actually did do the things the employer found that it did; in line with the objective tests set out above, the task for the Tribunal is to determine whether the employer, acting reasonably, could have concluded that he had done (**Devis (W) & Sons Ltd v Atkins [1977] AC 931**, House of Lords).

47. Equally, the Tribunal cannot substitute its own view as to what sanction it would have imposed had it been in the dismissing officer's position (**Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251**, EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test. The Tribunal is not a further avenue of appeal.

48. If I find that the Claimant's dismissal is unfair I may nevertheless reduce any basic award under **s.122(2) Employment Rights Act 1996** if I find that the Claimant engaged in culpable or blameworthy conduct prior to her dismissal.

49. Equally I may also reduce any compensatory award under **s.123(6) Employment Rights Act 1996** if I find that the Claimant's culpable or blameworthy conduct caused or contributed to her dismissal. Any reduction on this basis should be in a proportion the Tribunal considers just and equitable.

50. Also, if I find that the Claimant's dismissal is unfair it is necessary for me to consider whether there was a chance that she would have been dismissed in any event (the principle expressed in **Polkey v A E Dayton Services Ltd [1987] 3 All ER 974**, House of Lords). The task for the Tribunal has been explained by the EAT (in **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274**) in the following terms:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."*

51. **Polkey** deductions are not limited merely to procedural unfairness. They may be made in cases of substantive unfairness as well (**Gove v Propertycare Limited [2006] ICR 1073**, Court of Appeal)

52. At all times I am required to have regard to the Acas Code of Practice on Disciplinary and Grievance Procedures, which is informative about the standards of procedural fairness to be expected of employers when dealing with disciplinary matters in the workplace. If I find that the Respondent unreasonably failed to

comply with a provision of the Code, I may uplift any award of compensation by a factor of up to 25%. Equally, if I find that the Claimant unreasonably failed to comply, I may reduce compensation by a factor of up to 25%.

*Wrongful dismissal*

53. Wrongful dismissal is a common-law contractual claim, normally pursued in respect of notice pay. The Employment Tribunal has jurisdiction to consider complaints of wrongful dismissal by virtue of **arts.3** and **4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** as contractual claims arising or outstanding on the termination of employment.

54. If the claim is for notice pay it must first be proven that the employee had an entitlement to notice of the termination of their employment. The second stage concerns the dismissal itself: if the employee is dismissed without notice, a breach of contract is in principle established. At the third stage it is for the employer to prove that it was entitled to dismiss the employee without notice. Such an entitlement is created if the employee had acted in fundamental breach of the contract of employment. This is typically (though not always) said to have occurred if the employee has engaged in conduct which would objectively be viewed as being so serious so as to repudiate the contract (**Hutton v Ras Steam Shipping Co Ltd [1907] 1 KB 834**, Court of Appeal). In this case the Respondent contends that it was contractually entitled to dismiss the Claimant without notice because of the conduct of the Claimant in leaving the workplace without calling the Respondent to inform them.

55. If the Respondent was not so entitled, the Claimant would be entitled to an award of damages representing the pay she has been prevented from earning by the wrongful dismissal (**Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2005] 1 AC 503**, House of Lords). Typically, the amount of damages is assessed as reflecting the period of notice to which the employee was entitled to receive. In this case, notice pay is all that is claimed.

**Analysis and conclusions**

56. Applying the law to the facts I have found, my conclusions on all the matters to be decided are set out as follows. Where necessary, I have referred to the parties' submissions but it has not been necessary to fully rehearse them.

*Unfair dismissal*

57. As I have found (at paragraph 38), the reason for the Claimant's dismissal was the fact the Claimant absented herself from work during her shift on 29 January 2022 without informing the Respondent on its dedicated telephone number that she was doing so, as she was required to do. That was a reason relating to her conduct, and thus a potentially fair reason for dismissal (**s.98(2)(b) Employment Rights Act 1996**). Without prejudice to any other aspect of her case, and irrespective of my specific finding, the fact of the reason itself was expressly agreed by Mr Robert-Lennard at the commencement of the hearing as one relating to the Claimant's conduct and thus potentially fair. On the basis of my

finding, and the Claimant's concession, the Respondent has satisfied the legal burden of proving the reason for dismissal, as it must do under **s.98(1)**.

58. On the questions relating to the fairness of the Claimant's dismissal (under **s.98(4)**, and following the established guidance in **Burchell**), my conclusions are as follows. As *per* my findings at paragraph 41, in my judgment the dismissing officer was Mr Sandulescu and I have found that he genuinely believed that the Claimant was guilty of misconduct in relation to having absented herself from the workplace on 29 January 2022 without calling in as required (the Respondent's reason). That belief, I have also found, was based upon reasonable grounds. Those reasonable grounds were the fruits of the investigation that had been carried out, namely the written accounts of the Claimant, Ms Zatrici and Mr Kamara. The Kamara and Zutrici emails both suggested that the Claimant had simply left the workplace and neither of their versions said or even inferred that a medical emergency or health-related problem had been the reason she had done so. In my judgment, the Respondent has therefore satisfied the first and second elements of the **Burchell** test.

59. The third element of the **Burchell** test concerns the adequacy of the investigation carried out by the employer, viewed objectively and throughout the process it adopted. In this case the quality of the investigation adopted by this particular Respondent was so poor that I fail to see how that which took place could ever have been seen as the kind of investigation a reasonable employer acting reasonably could have adopted, particularly where the dismissing officer (Mr Sandulescu) had personal knowledge of the Acas Code of Practice, which applied in this situation. The Respondent is, as *per* my finding at paragraph 35, an employer of considerable size (100 to 150 employees approximately) and one with considerable resources (including HR and corporate support).

60. Whilst there was an investigation of a kind, as I have found (at paragraphs 37, 40 and 41) it lacked certain critical features required by the principles of natural justice and recommended in the Acas Code of Practice. Firstly, the Claimant was not informed of the problem (Acas Code, paragraph 4, bulletpoint 4, and paragraph 9), nor even of the fact she was being investigated in relation to a disciplinary case she may have to answer, with the potential for action to be taken against her (Acas Code, paragraph 9). Whilst I rejected Mr Robert-Lennard's submission that it is *always* necessary to hold an investigatory meeting with the employee concerned (the Acas Code makes it clear that this is not a concrete requirement: see paragraph 5), a reasonable employer acting reasonably would have at least informed its employee of a disciplinary allegation being made against her prior to any action being taken. In this case, the Respondent never actually set out a disciplinary allegation against the Claimant at all, never mind in sufficient terms so as to have enabled her to understand it. The Acas Code (paragraph 4, bulletpoint 4, and paragraph 9) explains why this is important: it is in order that an employee in the Claimant's situation can be in a position to prepare to answer the case against them. It is a principle this Tribunal fully endorses as a key aspect of fairness in a disciplinary case.

61. Secondly, even though statements from Ms Zatrici and Mr Kamara were procured (although there was no evidence as to whom it was at the Respondent that

procured them), nobody at any stage asked the critical question of either of these individuals as to the reason *why* the Claimant left work on the evening of 29 January 2022, or whether there was a reason (such as a health-related reason as was advanced before the Tribunal) that might have been apparent to either of them that evening, if it were not stated by the Claimant expressly. As Mr Sandulescu fairly accepted, if there had been a genuine emergency situation or health reason for the Claimant leaving work and not being able to call, the Respondent would not have treated this as a disciplinary matter. A reasonable employer would not have been in any doubt as to the *fact* the Claimant left work that evening, but in circumstances where a particular explanation might have changed the character of the matter from a disciplinary one to a non-disciplinary one, in order to act reasonably that employer would also have to take steps to ascertain *why* the Claimant left work on the evening in question. In not taking that essential investigatory step the Respondent fell below the standard required, of the reasonable employer acting reasonably.

62. It was also agreed that no disciplinary meeting was held by the Respondent. This is an express requirement of the Acas Code of Practice (at paragraphs 9 to 12). At such a meeting the Claimant may have been able to provide some explanation for what happened on 29 January 2022, beyond what she had already said in her email of that same evening. She would have been able to do so in the full knowledge and understanding that there was a disciplinary case against her and with sufficient information as to the specific allegation she would have been defending. She would also have been able to invoke her statutory right to be accompanied (an important legal right which is emphasised as a requirement in the Acas Code of Practice at paragraphs 13 to 17); this right was inevitably denied her. Save in the most exceptional circumstances, no reasonable employer would have acted reasonably in dismissing an employee without holding such a meeting and, by extension, affording them the opportunity to state a case. The Respondent, once again, fell short in meeting the standard expected of it. As I remarked at paragraph 41, this was a shockingly perfunctory way of dealing with an employee of otherwise good standing and of some 13 years' engagement with this employer.

63. The Acas Code (paragraphs 26 to 29) also emphasises that an employer should afford an employee in the Claimant's situation the right of appeal against a decision to dismiss. The Respondent's own procedure makes a similar provision. As I have found (at paragraph 42) the Claimant did not in the true sense appeal her decision, she did challenge that decision in writing. However, no reasonable employer would have acted reasonably in not informing an employee in the Claimant's situation of her right to do so, under the company's own procedure or otherwise. I rejected Mr Sandulescu's submission that it ought to have been plain to the Claimant from the employee code of conduct that she in fact had the right to appeal; in my judgment, the Respondent fell short of the standard required by the band of reasonable responses in not at least reminding the Claimant of her right of appeal at the material time.

64. Whilst in my judgment there is a long and quite disgraceful list of areas where the Respondent acted outside of the band of reasonable responses in the way it dealt with the Claimant, I turn now to the decision to dismiss her itself. Whilst a

reasonable employer *could* in principle have acted reasonably in dismissing an employee for the offence Mr Sandulescu believed the Claimant to be guilty of, given its seriousness, no reasonable employer would have gone about it the way this employer did and made that decision without taking those essential procedural steps. I am reinforced in this view by that fact that in the case, the Claimant was an individual who had been engaged by the Respondent for more than 12 years and who had an otherwise unblemished record. It was a paradigm case of an unfair dismissal.

65. It follows that the Claimant's claim of unfair dismissal is well-founded and succeeds.

*Wrongful dismissal*

66. The Claimant advanced a case that she had in fact been an employee of the Respondent from her first engagement with them in 2009 and not merely from 6 April 2013. Such length of service would have had an enhancing impact upon her statutory entitlement to notice of the termination of her employment by the Respondent. For the reasons that follow, it has not been necessary for me to determine whether the Claimant was an employee in that 2009-13 period. It is agreed, and I am in no doubt, that there was an entitlement to notice of some length and that the amount of it would depend on the Claimant's length of service.

67. What is also not in dispute is that by way of the email of 1 February 2022, the Claimant was dismissed summarily, without notice.

68. The key question in her wrongful dismissal claim is whether the Respondent, as a matter of contract, was entitled to dismiss the Claimant summarily because she had acted in fundamental breach of contract. This claim therefore stands or falls depending on my findings of fact as to what happened on the evening of 29 January 2022.

69. In my judgment, the Respondent was so entitled. On the evidence, I have rejected the Claimant's case that she had a valid reason for absenting herself from the workplace on the night in question (paragraphs 31 and 32) and for not complying with her known obligation to contact the Respondent via telephone as soon as possible (paragraphs 33 and 12 to 14). Her reason for leaving was her upset as a result of an argument; it was not a medical/health reason.

70. Putting the matter in its proper context, the Claimant leaving the workplace in that way left the Respondent short-handed, and likely in breach of contract with its biggest client, JDW. Also, given how busy I have found the Ice Wharf establishment to have been at the relevant time, the Claimant simply walking off without calling the Respondent was to put her colleagues and customers at a higher risk in terms of their own safety as well. Whilst I accept that the team leader Ms Zatrici did not herself call the Respondent to inform it that the Claimant had left, this of itself did not absolve the Claimant of her own important obligation to do so, nor would it have placed the Respondent in breach of contract with JDW. The increased safety risk to colleagues and members of the public was

caused by the Claimant's absenting herself. Ms Zatrici and the rest of the team would still, for a time, have been faced by the problem caused by the Claimant alone.

71. The Claimant's conduct was, in my judgment, an abandonment of the contract of employment and amounted to a fundamental breach of contract, entitling the Respondent to dismiss her summarily.

72. The Claimant's claim of wrongful dismissal is dismissed accordingly.

*Remedy for unfair dismissal*

73. Returning to the successful unfair dismissal claim, I turn to the initial remedy questions the parties agreed I should determine at the same time as deciding liability. My findings in relation to the wrongful dismissal claim are of relevance here and I am conscious that my findings must be consistent across the claims, hence my determination of these questions follows my determination of that claim.

74. In relation to the basic award for unfair dismissal, applying the test in **s.122(2) Employment Rights Act 1996**, I have found that the Claimant did engage in culpable or blameworthy conduct prior to her dismissal. Those findings of fact are set out at paragraphs 32 and 33, and I have assessed the seriousness of the Claimant's conduct within those findings but also in my analysis in the wrongful dismissal claim (see paragraphs 69 to 71). It is on account of the seriousness of the Claimant's conduct that, in my judgment, makes it just and equitable to reduce the Claimant's entitlement to a basic award by a full factor of 100%. There is therefore no basic award.

75. Turning to the compensatory award for unfair dismissal, I remind myself that the test to be applied (**s.123(6)**) is different: the culpable or blameworthy conduct must *cause or contribute* to the dismissal. If I find that this applied in this case, a reduction becomes mandatory under **s.123(6)**. I have found that there was culpable or blameworthy conduct on the Claimant's part, and in my judgment that conduct was the sole cause of the dismissal, consistent as it was with the Respondent's reason for dismissal. If she had absented herself on the evening of 29 January 2022 and called in to inform the Respondent, she would not have been dismissed. Equally, if she had a medical emergency or health reason for leaving and not contacting the Respondent, she would not have been dismissed. As I rejected the Claimant's case that she had a health reason for leaving that evening (see paragraph 32) it was, in my judgment, solely down to her own conduct that she was ultimately dismissed.

76. Consistently with my finding regarding the basic award, but recognising and applying the different test, I consider that the Claimant contributed to her downfall in its entirety. Her contribution to the dismissal was therefore 100%. There is therefore no compensatory award.

77. I turn now to the question of **Polkey**. My determination is hypothetical and entirely academic given my decisions in relation to conduct, but if I had had to

make a decision I would have reminded myself of the principle espoused in **Hill**: *"The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."*

78. I therefore would have to proceed on the assumption that the Respondent would have used its own procedure in an Acas Code-compliant way, and accordingly some time allowance would be needed for that process to be undertaken. Doing the best I can on the evidence before me, I think it would have taken three weeks for the Respondent to have investigated properly (i.e. to the standard demanded of a reasonable employer acting reasonably) and to have held a disciplinary meeting. Given the case she put before me I consider that there was a chance the Claimant might have run a health/medical reason for absenting herself *etc.* before Mr Sandulescu at such a disciplinary meeting.

79. Even though I rejected that contention on the evidence before me, I must accept that there was a chance that Mr Sandulescu could have accepted it if it had been run before him. Mr Sandulescu struck me as a plain-speaking witness who would not have dismissed such an argument out of hand but would likely have been predisposed against it given his inability to conceive of a possible reason why the Claimant behaved as she had (see paragraph 41). Again doing the best I can on the evidence before me, I think there was a 75% chance of the Claimant being dismissed at that three-week stage if she had run such an argument. Any reduction under **Polkey** would have been at that level only.

80. The final issue concerns the potential for an uplift to an award of compensation under **s.207A**, on account of an unreasonable failure to comply with an applicable statutory Code of Practice. I regret that my oral reasons did not address this question on the final day of the hearing and apologise to the parties for that omission, but given my determination of the conduct-related reductions it too would have been academic. Had there been an award of compensation to uplift I would have ordered a 20% uplift to reflect the seriousness of the Respondent's unreasonable failures to comply with the Acas Code of Practice with regard to disciplinary matters. Those failures have been set out in my conclusions in relation to the unfair dismissal claim at paragraphs 57 to 65, above.

Employment Judge P Smith

Date: 9 August 2023

JUDGMENT SENT TO THE PARTIES ON

10/08/2023

FOR THE TRIBUNAL OFFICE