EMPLOYMENT TRIBUNALS

Claimants:	Mr M Mehmet	[3301208/2021	"Claim 1"]
	Mrs Y Mehmet	[3302603/2021	"Claim 2"]
	Mr A Cakmaktas	[3302371/2021	"Claim 3"]
	Mrs Y Alican	[3306458/2021	"Claim 4"]

Respondent: Medsun Food Ltd

Heard at: Watford Employment Tribunal (In Public; In Person)

On: **12, 15, 16, 17 May 2023**

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: Mr P Gorlov, family friend

For the respondent: Mr L Wilson, counsel

Interpreter: Ms Vesime Cambaz

RESERVED JUDGMENT

1. All and any claims for a redundancy payment are dismissed upon withdrawal of any such claims by the Claimants.

2. All and any claims for holiday pay, or for pay in lieu of holiday entitlement, are dismissed upon withdrawal of any such claims by the Claimants.

3. The effective dates of termination are as follows:

   3.1. Mr M Mehmet: 23 December 2020

   3.2. Mrs Y Mehemet: 4 January 2021

   3.3. Mr A Cakmaktas: 23 December 2020

   3.4. Mrs Y Alican: 19 February 2021

4. For every claimant, the claims for arrears of entitlement to salary accruing up to and including the termination dates (whether brought as claims of breach of contract and/or as claims for unauthorised deductions from wages) fail and are dismissed.

5. For the complaints of unfair dismissal:

   5.1. Mr M Mehmet's complaint is not well-founded and is dismissed.

   5.2. Mrs Y Mehmet's complaint is not well-founded and is dismissed.

   5.3. Mr A Cakmaktas's complaint is not well-founded and is dismissed.

   5.4. Mrs Y Yelican's complaint is well-founded.

6. Mrs Yelican has expressed the wish that, if her complaint succeeds, she would like an order made (under section 113 of the Employment Rights Act 1996) for reinstatement or re-engagement.

   6.1. That will be dealt with at a remedy hearing.

   6.2. If I make awards of compensation for unfair dismissal to Mrs Yelican, then:

      6.2.1. There is a 50% chance that Mrs Yelican would have been fairly dismissed had the procedure been a fair one. There will be a "Polkey" deduction of 50% to any compensatory award.

      6.2.2. There was conduct by Mrs Yelican such that (in accordance with section 122(2) of the Employment Rights Act 1996), I will reduce any basic award by 100%.

      6.2.3. There was contributory conduct by Mrs Yelican such that (in accordance with section 123(6) of the Employment Rights Act 1996), I will reduce any compensatory award by 100%.

7. For the complaints seeking damages for failure to give notice of dismissal:

   7.1. Mr Mehmet's complaint is not well-founded and is dismissed. His conduct was such that he was not entitled to notice.

   7.2. Mrs Mehmet's complaint is not well-founded and is dismissed. Her conduct was such that she was not entitled to notice.

   7.3. Mr Cakmaktas's complaint is not well-founded and is dismissed. His conduct was such that he was not entitled to notice.

   7.4. Mrs Yelican's complaint is well-founded. She was entitled to receive 12 weeks' notice of dismissal. The Respondent is ordered to pay £6000.

REASONS

Introduction

1. I have retained the same numbering for the claims that was used at the preliminary hearing on 7 February 2022 which was based on the claim numbers (from earliest to latest).

2. I will refer to the Claimants as:

Abbreviation	**Full Name**	**Claim Number**
C1 - Mr Mehmet	Mehmet Djemal Mehmet	3301208/2021 “Claim 1”
C2 - Mrs Mehmet	Yeliz Mehmet (nee Alican)	3302603/2021 “Claim 2”
C3 - Mr Cakmaktas	Alican Cakmaktas	3302371/2021 “Claim 3”
C4 - Mrs Alican	Yesim Alican	3306458/2021 “Claim 4”

3. C1 and C2 are married to each other. C3 and C4 are married to each other.

4. C2 is the daughter of C3 and C4; C1 is the son-in-law of C3 and C4.

5. The Respondent is Medsun Ltd. From around November 2020, Mr Mehmet Halim was a director of the Respondent.

6. Mr Mehmet Halim is the brother of C4 and the uncle of C2.

7. The father of Mrs Yesim Alican (C4) and of Mr Mehmet Halim was Mr Mestan Yasar Halim. Sadly, he died on 28 January 2020.

8. In these reasons, where I refer to “Mr Halim”, that is a reference to Mr Mehmet Halim. I will use the word “Senior” to refer to Mr Mestan Yasar Halim.

9. Where I refer to page numbers in brackets below:

   9.1. [RXXX] is to page XXX of the Respondent’s bundle

   9.2. [CYYY] is referring to page YYY of the Claimants’ bundle.

   9.3. [SZZZ] is referring to page ZZZ of the Supplementary bundle.

The Claims and The Issues

10. The issues were discussed at the preliminary hearing on 7 February 2022. Coincidentally, I was the judge at that hearing too.

11. A brief outline of the dispute was in the summary [R167] and the issues were set out at [R168-169] as follows (keeping same numbering):

Time limits / limitation issues

8.1. Were all of the claimant's complaints presented within the time limits set out in
8.1.1. section 23 of the Employment Rights Act 1996 ("ERA")?
8.1.2. section 111 of the Employment Rights Act 1996 ("ERA")?

Unfair dismissal

8.2. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?
The respondent asserts that it was a reason relating to the claimant's conduct.

8.3. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

8.4. If the claimant was unfairly dismissed and the remedy is compensation:
8.4.1. if the dismissal was unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant might still have been dismissed had a fair and reasonable procedure been followed and/or would have left the employment in time anyway?
8.4.2. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
8.4.3. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Unpaid annual leave – Working Time Regulations

8.5. On termination of employment, was the Claimant paid all of the compensation as per the entitlement under regulation 14 of the Working Time Regulations 1998?

8.6. What was the claimant's leave year?

8.7. How much of the leave year had elapsed at the effective date of termination?

8.8. In consequence, how much leave had accrued for the year under regulations 13 and 13A?

8.9. How much paid leave had the claimant taken in the year?

8.10. How many days remain unpaid?

8.11. What is the relevant net daily rate of pay?

8.12. How much pay is outstanding to be paid to the claimant?

8.13. Was the Claimant prevented from using paid time off in previous years and, if so, are they entitled to carry forward any leave entitlement from any previous year?

Unauthorised deductions

8.14. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13.

8.15. If so, what was the aggregate of those deductions.

Breach of contract

8.16. To how much notice was the claimant entitled?

8.17. Did the claimant fundamentally breach the contract of employment (by an act of so-called gross misconduct, or otherwise), such that they lost that entitlement to a notice period?

Redundancy Payment

8.18. For the purposes of Part XI of the Employment Rights Act 1996, was the Claimant dismissed by reason of redundancy? (Taking into account section 163(2), has it been proved that the Claimant was not dismissed by reason of redundancy?)

8.19. If so, was the Claimant entitled to a statutory redundancy payment, and what was the amount?

Remedy

8.20. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

12. At that preliminary hearing, I had not considered that there was enough information in the claim forms. The Claimants were ordered to supply following further information by 14 March 2022. Following the same numbering.

4.1 The following further information was ordered from **the Claimant**. By no later than 4pm on **14 March 2022**, each Claimant must write to the Respondent with the required information. The required information is:

4.1.1 Full details of unfair dismissal allegations, including:

4.1.1.1. What communications were received from the Respondent about dismissal

4.1.1.2. Whether there were any invitations to meetings/hearings. If so, on what date(s)

4.1.1.3. Did the Claimant attend any meetings/hearings. If not, why not.

4.1.1.4. Did the Claimant submit any evidence or statements to the Respondent prior to dismissal?

4.1.1.5. Did the Claimant appeal after any dismissal?

4.1.1.6. When did the Claimant know they were dismissed and how did they find out?

4.1.1.7. Was the dismissal decision in writing, if so, when did the Claimant receive the letter / email / message / document about the dismissal?

4.1.2 Full details of any claim for notice pay, including what notice period the Claimant says they were entitled to, and why?

4.1.3 Full details of any claim for shortfall in wages, including what sums of money the Claimant says they were entitled to AND ON WHICH DATES, and AND full details of what the alleged shortfalls in payments are for each of those dates.

4.1.4 Full details of any facts that the Claimant intends to rely on to say that the reason for their dismissal was redundancy.

13. According to what Mr Gorlov told me on Day 1 of this hearing, the Claimant's first attempt to comply with this order were the attachments ("the 10 May document") to his email purportedly supplying the information to the Tribunal and the Respondent late evening on 10 May 2023. In other words, given the time of day, it was effectively supplied the day before the start of this hearing and about 14 months late.

14. Some, though not all the information, was supplied on 17 August 2022. [R229-257]. The 10 May document (a 4 page letter and 5 page table) does not supply the further information required by 4.1.3. For that, it cross-referred to another document. That other document was a purported witness statement of Mr Gorlov.

15. In relation to paragraph 4.1.4 seeking the facts behind any redundancy payment claim, the 10 May document stated: "Not applicable. There was no question of redundancy." On Day 2, Mr Gorlov confirmed, on behalf of all the Claimants, that the redundancy pay claims were withdrawn, and agreed that that was the position during closing submissions on Day 4.

16. In relation to the holiday pay claims, immediately before closing submissions on Day 4, Mr Gorlov confirmed, on behalf of all the Claimants, that the holiday pay claims were also withdrawn and (therefore) neither party made any submissions about it.

17. In relation to claims for notice pay, C4 - Mrs Alican had not specifically identified such a complaint in her claim form. There was no objection from the Respondent to an amendment being granted to add that claim, and I did so.

Summary of Dismissal Issues

18. Based on the discussions on Day 1, and based on the claim forms, and the 10 May document, the disputes about the dismissal are as follows. In each case:

18.1. The Respondent alleges the dismissal decision was made on its behalf by Davenport HR by the person named in column "author".

18.2. The Respondent alleges the dismissal took effect on the date stated in the letter (which was immediate effect).

18.3. The Respondent alleges the dismissal was because of conduct and there was no notice entitlement.

18.4. The Claimants dispute the genuineness of the purported reason, and the dismissal date, and the fairness of the dismissal, and assert entitlement to notice. They make no concessions about the rights of Mr Halim and/or Davenport HR to effect the dismissal. They say they received the item on the date in the column "receipt".

Claimant	Page	Author	Contents	Receipt
C1 Mr Mehmet	R301	Mrs Bal	Not on headed paper. Not Dated. Signed by Ms Elic. Dismissal Date: 23.12.20	23.12.20 (According to the 10 May document)
C2 Mrs Mehmet	R307	Mrs Bal	Headed Paper Dated 04.01.21 Addressee: "Yeliz Alican" Signed by Ms Elic Dismissal Date: 04.01.21	15.01.21 (According to letter to the Respondent. R311)
C3 Mr Cakmaktas	R303	Mrs Bal	Headed Paper Dated 23.12.20 Unsigned. Dismissal Date: 23.12.20	09.01.21 (According to ET1. R27)
C4 Mrs Alican	R323	Ms Winsor	Headed Paper Dated 19.02.21 Addressed "by email" Signed by Ms Winsor Dismissal Date: 19.02.21	19.02.21 (According to the 10 May document)

Summary of Start Date, Hours and Pay Issues

19. Based on the claim forms, the Claimant's allegations about start dates and hours and pay are as below, with the Respondent's position also stated.

20. It is common ground that there were no written employment contracts. The Respondent alleges that, in late 2020, it sent each Claimant a written document which was intended to reflect the contract already in existence. It is the Claimants position that these documents represented an attempt to vary their contracts, and that they did not agree, and there was (therefore) no variation.

21. In the written document, in each case, the Respondent said the employee's hours were 39 per week. Based on the information in the claim forms, and the written contracts drawn up by the Respondent, the respective positions were:

Claimant	ET1 hours	ET1 Pay	Respondent's Contract
C1 Mr Mehmet	20	£320 gross £300 net	£8.72 per hour (So £340.08 per week based on 39 hours)

C2 Mrs Mehmet	20	£300 gross £300 net £50 in groceries	£8.72 per hour (So £340.08 per week based on 39 hours)
C3 Mr Cakmaktas	50	£600 gross £600 net	£15.39 per hour (So £600.21 per week based on 39 hours)
C4 Mrs Alican	20	£400 gross £400 net £50 in groceries	£12.83 per hour (So 500.37 per week based on 39 hours)

22. However, during the litigation, the Claimant's produced documents which they each signed around November 2022 (so more than 18 months after the claim forms) and sent to the Respondent's representative (R543-549). I have considered those as also being documents that set out the Claimant's arguments for what their contract terms were. None of those documents refer to there having been any agreement about amount of pay. They simply say that they were paid cash.

Payslip Issues

23. In addition, there is a dispute between the parties about the fact that there are two sets of payslips. I will call these "old payslips" and "new payslips".

23.1. The parties agree that the wages were always paid in cash, rather than by cheque or bank transfer. There is a dispute about how much cash was paid/received.

23.2. **Old payslips**. The parties agree that these were supplied contemporaneously. On the Claimants' case, they got paid in cash for the net amount as shown in each of the old payslips and got no additional cash in excess of that figure. (As per the table above C2 and C4 each refer to groceries as well as cash).

23.3. **New payslips**. The parties agree that these were NOT supplied contemporaneously and that the Claimants did not get them until they were disclosed during this litigation, and after the end of employment. The Respondent's case is that these are factually accurate and show what each the Claimant did, in fact, receive in cash in the relevant week. That is, on the Respondent's case, the old payslips stated a false amount for the payment made, and (therefore) were inaccurate about what PAYE deductions should have been. On the Respondent's case, each week, the Claimants received a cash sum which was in excess of the net figure shown on the old payslips. The Respondent's case is that the new payslips show accurate PAYE deductions and that it has accounted to HMRC for the difference between the (allegedly inaccurate) old payslips and the (allegedly accurate) new payslips.

The Hearing and the Evidence

Documents

24. There was a bundle from the Respondent of about 556 pages plus index. I had it electronically, and there was a paper copy for witness table.

25. There was a bundle from the Claimant of about 675 pages. I and the witness table had a paper copy.

26. The Claimant supplied me and the Respondent with the 10 May document mentioned above.

27. The Claimant's representative had produced a skeleton argument which was about 15 pages, and had various exhibits, some of which were not in the bundles.

27.1. Two of these were versions of R301: one of which, unlike that document (i) was on headed paper and (ii) was unsigned; the other, unlike that in the bundle was on headed paper, but like R301 was signed by Ms Alic (and was not signed by Ms Bal). Both these versions differed from R301 in that they did not have additional text headed "*My record of the event allegedly behind this hearing is*" at the foot of the document.

27.2. Four of these were letters (one to each claimant) inviting the claimants to a meeting. These were also added to what was on witness table, and were numbered 587 to 590 (as additions to the Respondent's bundle).

28. The Respondent had produced a chronology and cast list, which were not necessarily agreed by the Claimants.

29. I had been supplied with one video with file name VID_20201208_194211, which I viewed during my pre-reading. Extracts were also played to the witnesses during the hearing.

30. The respondent's bundle also referred to a video called "CCTV Yeliz Alican". On Day 1, I did not have my own copy, but it was played during the hearing during Mr Halim's cross examination. I was subsequently supplied with access to a copy which I have been able to view as often as I wish. (My order for a downloadable version to be supplied to the Tribunal was not complied with).

31. There was also a video from the Claimants which was said to show the events on the roof on 16 November 2020. I did not have my own copy on Day 1, but it was played during the hearing during Mr Halim's and Ms Alic's cross examination. I was subsequently supplied with a copy which I have downloaded and been able to view as often as I wish.

32. On Day 2, I was supplied with an audio file of a telephone conversation in around April 2020 between C4 - Mrs Alican and her brother, Mr Halim. (A transcript was exhibited to C2 - Mrs Mehmet's witness statement).

33. On Day 2, I was supplied with 2 still images of the roofs.

34. There was another video, filmed by C2 - Mrs Mehmet on her phone. She filmed monitors which were playing CCTV of an incident in around April 2020. I did not have a copy and the witnesses were not asked questions about it. It is referred to in paragraph 34.5 of C2 - Mrs Mehmet witness statement, and it was played to me during closing submissions on Day 4.

35. On Day 2, I received a hard copy of a document labelled as "witness statement" from Mr Peter Gorlov, who has been acting as the Claimant's representative from an early stage, including at the final hearing. It had been mentioned on Day 1, and I had asked for an electronic copy. The document was 94 pages, with pages 1 to 15 being the "witness statement" part and pages 16 to 94 being exhibits. For the reasons which I gave orally, I was content for it to be used as further information and/or submissions, but (a) I would not allow Mr Gorlov to give oral evidence, and (b) I would not treat his opinions stated in the document, or his relaying of things he says the claimants told him, as evidence.

36. At the start of Day 3, before any witness evidence was heard, I went through, with the parties, each one of the 13 emails that had been supplied to me by HMCTS staff since the end of Day 2: 5 were from Mr Gorlov and 8 were from the Respondent's solicitor.

    36.1. One of Mr Gorlov's supplied copies of correspondence with the Respondent's solicitors about certain items in the bundle (R543 to R549). I was grateful for the additional information and there was no need for the correspondence itself to be added to the bundle, as the parties were in agreement (that the first time R543 to R549 was sent to the Respondent was November 2022).

    36.2. Two of Mr Gorlov's (10:56pm on Day 2, and 6:37am on Day 3) commented on the evidence, and on the cross-examination of C2 - Mrs Mehmet. A document already in the bundle (R545) was supplied, as well as a document that was not relevant (a companies house printout said to show the connections between those controlling Davenport HR and Davenport solicitors) and a case report that Mr Gorlov intended to (and did) refer to in closing submissions.

    36.3. Two of Mr Gorlov's were effectively the same as each other and had not been sent to the Respondent. He told me that this was because they were for my attention. I told him I would not read the attachments, unless and until they were sent to the Respondent.

    36.4. For each of the remaining emails, from the Respondent's solicitor, I read out (a) the time of her email to the Tribunal and the Claimant and summarised the contents of the (allegedly) contemporaneous email chain that was being forwarded, and the attachments to each of the emails. As I pointed out at the time, it was not self-evident, which of the attachments were (a) being added now by the Respondent's representative or (b) had been part of the original trail being forwarded and, in the latter case, which of the emails in the trail had included these items.

36.5. In any event, for each of the Respondent's representative's emails, Mr Gorlov confirmed that he did wish to have the items added to the bundle. Mr Wilson had sufficient printouts of what he believed to me (a) all of the emails and (b) none of the attachments. We numbered those pages.

36.6. Mr Wilson pointed out that one item that he was aware of (an email from the Respondent's representative at 21:05 on Day 2) had not been read out by me. I confirmed that I did not have it. After checking again with the clerk, I still did not have it. As far as I know, it was not re-sent. Thus I did not receive the (8) attachments to that email, though a printed copy of the covering email itself was one of the pages we numbered.

37. During the course of these discussions (which lasted until around 11.50am), Mr Wilson made me and Mr Gorlov aware that the Respondent's solicitor was sending further emails, which seemed to be attempts to put the things that had been sent already into better order. I asked if they were new documents, or just what we had discussed already. He said, quite understandably, that since they were arriving during the course of the hearing, he could not be sure, but had not yet noticed anything new. I asked for him to check during the break (which was until 12:15pm) because I would wish to deal with any new items before the oral evidence from the next two witnesses (who were the witnesses to whom the documents we had discussed that morning related). After the break, he told me that the position remained the same. Namely, he had not had time to check in detail, but had not come across anything that he knew to be new.

38. Versions of payslips had been brought to the hearing in paper form by Mr Gorlov. On the morning of Day 3, I was told that the Respondent's had arranged for summaries of old and new payslips to be produced. It was suggested by Mr Wilson, and Mr Gorlov and I agreed, that the Respondent would put these documents into a numbered electronic document, and supply it.

39. At the outset of the afternoon session on Day 3 (circa 2.15pm), I mentioned to the parties that I had now received (via the clerk) further emails, which had been sent since we started Day 3 at 10am. There were 8 from Mr Gorlov and 8 from the Respondent's solicitor. I said to the parties that they seemed to just be duplicating/re-sending the items that we had already discussed, and there was nothing new to discuss. Both sides agreed with that, and so there was no decision then to admit any new items (my understanding being that there was nothing new, taking into account that I had asked at 11.50am, 12.15pm and 2.15pm if there was anything new, and had not been told that there was anything new).

40. On Day 4, I was supplied with a supplementary bundle (and index) which was intended to be R600 to R900. I was concerned that R600 to R673 (some of which were duplicates), if they were to be admitted as evidence at all, should have been tendered before the Respondent's witnesses (and especially Ms Crosby and Ms Winsor) were cross-examined. The Respondent's representative withdrew the application for those pages to be admitted. The Claimant's representative stated that he was not asking to have them included either.

Witnesses and witness statements

41. There were the following witness statements. In each case, I had the document electronically, and there was a paper copy for witness table.

41.1. C1 - Mr Mehmet

41.2. C2 - Mrs Mehmet

41.3. C3 - Mr Cakmaktas

41.4. C4 - Mrs Alican

41.5. Mr Halim

41.6. Ms Ebru Alic

41.7. Ms Nikki Winsor

41.8. Ms Sarah Crosby

42. Each of the respondent's witnesses attended the hearing in person, and swore to the accuracy of their statement and answered questions from the other side and from me.

43. C2 - Mrs Mehmet did the same thing.

44. The intention had been for all the witnesses apart from C3 - Mr Cakmaktas to give their evidence in English. Mr Cakmatas was to give his evidence via interpreter. An interpreter was arranged and was present throughout almost all of the hearing. (The interpreter was delayed one morning. By agreement, we carried on with the hearing, dealing with procedural matters, and the other claimants interpreted for C3 - Mr Cakmaktas.)

45. A notable feature of the written evidence produced by the Claimant was that only Yeliz Mehmet (C2) made any substantive comments. The other 3 Claimants each simply wrote that they knew what was in C2's statement and that they agreed C2's statement was true. C2 sets out the reasons for this in paragraphs 2 to 6 of her witness statement.

46. In the event, the other 3 claimants all decided that they would not give oral evidence. They would not swear to the accuracy of their written statements and would not be cross-examined. It was suggested on their behalf that this was because they believed that Mr Wilson's cross-examination of C2 - Mrs Mehmet had been unfair. I explained the consequences of this potential decision when I was told about it, in the presence of Mr Gorlov and all the claimants. After thinking it over, they confirmed their decision.

47. In C2's statement:

47.1. She refers to her uncle as "Mehmet". I am referring to him as Mr Halim.

47.2. She refers to her grandfather as "Mestan". I am calling him Senior.

47.3. She refers to her mother as "Yesim". I am calling her C4 - Mrs Alican.

47.4. She refers to her father as "Alican". I am calling him C3 - Mr Cakmaktas.

47.5. She refers to her husband as "Djemal". I am calling him C1 - Mr Mehmet.

48. C2's statement also had a number of appendices, including a letter dated 29 May 2020 from Mr Halim's solicitors to C4 - Mrs Alican's solicitors.

The Findings of Fact

Inferences from late disclosure and failure to give evidence

49. This case was not properly prepared for the final hearing. Neither side is free from blame, and I am not proposing to seek to decide, in these reasons, what proportion of the blame should be attributed to each side.

50. In terms of the extremely late disclosure of correspondence from the investigators and hearing officers (working for Davenport HR) to the Claimants, there is absolutely no excuse for this whatsoever, that I can see. There is a close connection between the organisation which handled HR advice for the Respondent during the Claimants employment, and the organisation which conducted the litigation for the Respondent. Based on the correspondence which I have read, there seems to have been a lot of bad feeling between the respective representatives (Mr Gorlov for the Claimants, and Davenport for the Respondent). Each representative (I infer from the correspondence) regards their own conduct as acceptable, and the other representative's as being at fault. Even if I thought this background was an adequate explanation for why the Respondent's disclosure was so late (and I do not) it would not be an excuse.

51. All that being said, the correspondence from the investigators and hearing officers was plainly relevant, the claimants did not dispute (in the main) that they had received it, and there was no objection to its admission to the bundle. The correspondence is generally more helpful to the Respondent than harmful. For the items that were eventually disclosed, I draw no adverse inferences from the lateness.

52. I will mention below that seemingly some items were still missing.

53. As I explained to the three claimants who did not give evidence, the fact that their own statements did not include information other than saying they agreed with the contents of C2 - Mrs Mehmet's statement did not mean that the Respondent should not have the right to cross-examine them. They still chose not to be cross-examined. In those circumstances, I give little weight to their written assertions that they corroborate what C2 - Mrs Mehmet has said. This was particularly significant in relation to the parts of C2's statement which simply related what her parents had told her, and which she had not seen first hand.

Family Dispute early 2020

54. Following Senior's death, Mr Halim began running the Respondent's business in anticipation of being appointed as executor of Senior's will.

55. There were claims on the estate by third parties which I do not need to describe in full detail, save to say that some of the documents disclosed were produced in connection with that other litigation.

56. Mr Halim and his sister, C4 - Mrs Alican, did not necessarily agree about how the Respondent's business should be operated. In some of the documents, there are allegations by C4 that her brother physically assaulted her in around April 2020. She has not given evidence in these proceedings, and, for the purpose of this employment tribunal litigation, I have not been satisfied that there was any such assault. In any event, the alleged incident is not directly relevant.

57. However, regardless of the exact circumstances of what happened in April 2020, from that point onwards, neither C4 - Mrs Alican, or her daughter, C2 - Mrs Mehmet, attended work for the Respondent. They continued to be paid.

58. On 29 May 2020, solicitors acting for Mr Halim wrote to solicitors acting for his sister, C4 - Mrs Alican. In each case, these were not the same representatives used in this employment tribunal litigation. Given that the document is, of course, setting out Mr Halim's position in circumstances in which (I infer) the possibility of a legal dispute was already contemplated by both sides, I am extremely cautious about treating it as reliable contemporaneous evidence where it makes assertions in Mr Halim's favour.

59. That being said, Mr Halim has given evidence on oath, and my finding is that, as stated in his evidence to me, and in his solicitors' letter, soon after Senior's death, he had decided that the Respondent's business was not being well-managed, and that changes needed to be implemented. C3 - Mr Cakmaktas had been doing a lot of the day to day running of the operation in recent years, and Mr Halim's had concerns about his abilities to modernise the business in the way that Mr Halim believed was necessary. Based on the evidence as a whole, I am satisfied that no-one, including Senior, and including Mr Halim had any concerns over C3's willingness to work very hard and to the best of his abilities.

60. In due course, Mr Halim assessed the Respondent's financial situation and decided that he, rather than C3 - Mr Cakmaktas must take charge of seeking to improve that situation, He decided to take a close involvement, but also to appoint a manager from his other business, Osman Yildizev, to take charge.

61. The solicitors' letter asserts that C3 - Mr Cakmaktas had, without the agreement of Mr Halim, increased the cash drawn from the business as wages paid to all 4 claimants. This assertion is consistent with the witness evidence given in the Tribunal and I find it to be true.

62. The letter states:

> Your client and her family are regularly taking products from the shop floor without passing the products through the checkouts as was agreed. There are employees who have confirmed this and our client has 8 incidents recorded on CCTV. This has to stop as the accounts will never balance and it is theft.

63. And also:

> Payroll of family
>
> The old cash system paid employees on a Monday. Our client implemented a proper payroll system so that they could collate the working hours of each employee on a Monday, this is submitted to payroll and the payroll company comes back with the net pay either on a Tuesday or Wednesday.
>
> Ali and Yeliz payments have not been withheld over anyone else's. They just want to receive payment on Monday and do not understand that they have to wait for the payroll and receive their net rather than gross pay.

The business and the employment contracts

64. The Respondent is a company which was incorporated on 26 March 1991.

65. The Respondent operates what C2 - Mrs Mehmet refers to as "a successful Turkish Cypriot supermarket". It trades at the ground floor of the premises at 493 Green Lanes.

66. The supermarket did not begin operating in 1991. The business had started before then. It was started by Senior. In the absence of evidence of the contrary, my finding is that he operated the business prior to 26 March 1991 as a sole trader. My finding is that the existing employees of the business (whoever they were) transferred to the Respondent on some date which was on or after 26 March 1991, and which was long before the matters to which this dispute relates.

67. C3 - Mr Cakmaktas had a contract of employment which commenced around 1982, and later his employer became the Respondent, in circumstances such that there was no break of employment. This contract was not in writing. My finding is that there must have been a TUPE transfer to the Respondent, even if documents about it either (a) no longer exist or (b) were never produced.

67.1. C3 regarded his job title as "general manager" (see R547 and C2 witness statement paragraph 11) which matches what is in the claim form (R24).

67.2. Around 29 October 2020, for the first time during his employment, he was supplied with a written document which purported to represent his terms and conditions. (R343). That document referred to his post as shop assistant (Schedule at R359; and retail assistant (clause 1.1 at R345)

67.3. My finding on title and duties is that he had no formal job title or job description, as such, but was relied on by Senior to carry out duties which could reasonably be described as general manager.

68. My reasons for deciding he has continuity of employment since 1982, rather than 2004, as claimed by the Respondent are that it was the Respondent's responsibility to keep accurate employment records and it has failed to do so. Although the evidence given on behalf of C3 on this point is weak (including his choice to decline to testify) the totality is sufficient to persuade me that he did not (for example) leave and come back. He did commence employment in the early 1980s.

69. C4 - Mrs Alican had a contract of employment with the Respondent which commenced on or after 26 March 1991. This is the date that she states in her claim form. I am not persuaded, on the basis of the evidence produced, that she had a contract of employment prior to then.

69.1. Her evidence (given via paragraphs 10 and 11 of her daughter's written statement) was that she worked in the business before the Respondent was incorporated. I am not persuaded that there was any formal arrangement, with intention to create legal relations, such that she was an employee. Although she was old enough to be an employee, the fact that she did some work in the family's shop is consistent with her doing so simply because of her family relationship, and I have not been persuaded that there was a formal arrangement that if she worked particular hours, then she would receive particular sums. On her own account (not given by her, but via her daughter), there was no written contract, and any payments were made in cash.

69.2. My finding is that C4 only became an employee after the Respondent was incorporated.

69.3. Around 29 October 2020, for the first time during her employment, she was supplied with a written document which purported to represent her terms and conditions. (R361). That document referred to her start date as 7 April 1991. I will take that as an admission by the Respondent of the start date. It is not necessary for me to decide if the Claimant can prove the actual start date was a few days before that (26 March 1991) because it will not affect any statutory rights.

69.4. That document describes her post as shop assistant (Schedule at R377; and retail assistant (clause 1.1 at R363). She asserts it should be "manager".

69.5. My finding on title and duties is that C4 had no formal title or duties. She had no set hours. She worked in the business from time to time on an ad hoc basis. This included, from time to time, assisting with locking up.

70. C2 - Mrs Mehmet had a contract of employment with the Respondent. There is a dispute over start date, as she alleges it was in 2009. There is a dispute over job title, as she alleges it was "shop floor manager".

70.1. Around 29 October 2020, for the first time during her employment, she was supplied with a written document which purported to represent her terms and conditions. (379). That document referred to her start date as 11 November 2013. I will take that as an admission by the Respondent of the latest start date.

70.2. That document describes her post as shop assistant (Schedule at R395; and retail assistant (clause 1.1 at R381).

70.3. My finding about start date is that Senior sometimes asked C2 to work shifts in one or other of his businesses. This was not always working for the Respondent; it was sometimes next door. I do not regard her as being an employee of the Respondent during those periods, and my inference is that this was an informal arrangement between family members for which she was paid cash in hand, and the evidence does not demonstrate that she was necessarily paid directly from the Respondent's cash, as opposed to Senior's other cash. I am not persuaded that between 2009 and 2013 she was paid via the Respondent's payroll. I take the start date of her employment with the Respondent to be 11 November 2013. She had no formal job title or job description. She did the general duties of a retail store employee including cashier and putting items on display. Her position as a family member probably did give her some ostensible authority over other cashiers, but I am not persuaded that there was a formal agreement that she was a "manager". I am also not persuaded that she had fixed hours or was formally notified of shifts. She worked as and when required, and as directed by Senior and/or her father, C3 - Mr Cakmaktas. She also assisted with locking up from time to time. I accept her evidence that she was left in charge in early 2020 for a week or two while other family members remained in Cyprus. However, this was a one off decision.

71. C1 - Mr Mehmet had a contract of employment with the Respondent. There is a (slight) dispute over start date, as he alleges it was 17 September 2018 and the Respondent alleges it was 29 October 2018. There is a dispute over job title, as he alleges he was shelf stacker and security

71.1. Around 29 October 2020, for the first time during his employment, he was supplied with a written document which purported to represent his terms and conditions. (R325). That document referred to his start date as 29 October 2018. I will take that as an admission by the Respondent of the latest start date. C1 will have the same statutory rights regardless of start date.

71.2. That document describes his post as shop assistant (Schedule at R341; and retail assistant (clause 1.1 at R327).

71.3. My finding is that he had no formal job title or written job description. He did perform general duties such as stacking the shelves.

Dispute about pay

72. I have mentioned above in the issues the dispute relating to "old payslips" and "new payslips".

73. My finding is that, at all relevant times, Senior's practice for arranging salary payments was that he would send documents each week to his accountants and supplied the accountants with information about which employees had worked that week, and which hours they had done. The hours were just the aggregate number

(not broken down into specific shifts, or start finish times) and were effectively the same each week unless someone was absent. I rely on Ms Alic's evidence for this finding. She is an employee of a related business, Yasar's Foods Limited ("YFL"), but assisted with payroll for the Respondent as well as YFL. She was not able to give direct evidence about events prior to 2017, as she only started working in the business then. However, as far as the practice just mentioned is concerned: it is plausible; there is no evidence to contradict; my finding is that that is how the old payslips were produced. It is my finding that Senior and the Respondent had probably been following the same practice for a long time prior to 2017.

74. The prime responsibility for payroll was Senior's (prior to January 2020). He was assisted by Ms Birsen Tuna, and Ms Tuna performed the function without him sometimes (if he was absent for health, or other, reasons). Senior arranged for there to be sufficient cash available to cover the payroll on each respective payday (for each of the Respondent and YFL). Usually he (or, in his absence, Ms Tuna) would then count out an amount of cash for each employee and supply that amount of cash, together with the payslip, to each employee.

75. As I have described above, on Day 1 of the hearing, on behalf of all the Claimants, and acting on their instructions, Mr Gorlov put forward the factual allegation that the actual amount on these occasions was an amount which matched the net figure on the old payslips. My finding is that they actually received higher sums, as mentioned in their ET1s. The payslips showed the information which the Respondent wanted HMRC to have, not factually accurate information about what payments were made.

76. After Senior died, my finding is that the arrangement continued as before, except that Ms Tuna now performed the role that Senior had previously done, and Ms Alic performed the role which Ms Tuna had previously done. Neither side argues that there was a *change* in the arrangement at this time. They disagree what the actual arrangement was, but agree that the pre-existing arrangement continued immediately after Senior's death.

77. My finding is that Ms Alic is an honest and reliable witness who was doing her best to assist the Tribunal by giving evidence about what she genuinely recalled about the payroll arrangements. On her own account, she was not actively involved in counting out the cash prior to January 2020.

78. From around October 2020, Ms Tuna ceased performing the duties of counting out the cash for the pay. From then on, Ms Alic carried on with what she genuinely believed the pre-existing arrangement had been. That is, in the case of each of the Claimants she supplied them with a copy of that week's old payslip, and she made a cash payment to them which was higher than the actual amount shown as the net figure on the payslip.

79. She kept handwritten records of the genuine payments (as opposed to – on her evidence – the false records demonstrated by the payslips). She does not believe that these handwritten records have been disclosed to the Claimant during this litigation.

80. In his evidence, Mr Halim also referred to having seen documents which allegedly showed higher sums paid to the Claimants than the amounts as per the payslips. He admits that those documents were not disclosed to the Claimants during this litigation.

81. An argument raised by the Claimants is that potentially Ms Tuna and/or Ms Alic were actually stealing money from the business. One or both of them might have been creating false documents to purport to show the Respondent and/its directors that the Claimants had been paid extra cash (that is, more than the net figure on the old payslips) but were actually keeping that money themselves. I reject that argument:

81.1. Firstly, I believe Ms Alic's denials.

81.2. Secondly, there is no evidence from the Claimants that that was happening. (Though I do infer that, rather than making a positive assertion that it was true, they were doing no more than saying that it would be an explanation for whatever records Ms Tuna and Ms Alic showed to Mr Halim and that Mr Halim had no way of knowing.)

81.3. Thirdly, if Ms Tuna and Ms Alic claimed to Mr Halim that this was a new arrangement that they had introduced following Senior's death, then he would have known that they told him that. I accept his evidence that, in fact, what they told him was that this had been the arrangement for years.

81.4. Fourthly, had Ms Tuna or Ms Alic claimed to Mr Halim that they were carrying on with a longstanding arrangement but were, in fact, for the first time stealing some money and pretending it was cash paid out to the Claimants, then Mr Halim would have been able to detect an unexplained change in the profit. Furthermore, and in any event, I find it implausible that they would attempt such a high risk lie. Even if the family was not on the best of terms, it would have been extremely bold to assume that Mr Halim would never discuss with his sister, or his niece, or his in-laws that he had been told about the payments which the Respondent was keeping off the books.

81.5. Fifthly, I reject the possibility that Ms Tuna or Ms Alic claimed to Mr Halim that they were carrying on with a longstanding arrangement but were, in fact, continuing to steal as they had been for time already. I am fairly sure that Senior would have noticed. However, and in any event, there is no suggestion that Senior and his daughter and granddaughter (C4 and C2) were not on good terms. It is far-fetched to the point of being ridiculous that Ms Tuna or Ms Alic had been creating documents to represent to the Respondent and/or Senior that there were secret payments being made to the Claimants, but in the hope that Senior would never discuss it with any of the Claimants and thereby discover the crime that is being suggested (as a possibility, not a direct accusation) by Mr Gorlov.

81.6. Sixthly, there is no evidence to persuade me that Senior (either by himself, or in conspiracy with Ms Tuna) was keeping the money but keeping false records to show that the payments were being made to the Claimants.

82. My finding is that the Respondent was indeed creating false records, being the old payslips, which did not show the actual sums being paid to the Claimant. My finding is that there were other documents, being handwritten records, kept to show the actual sums of the Respondent's taking that were being taken from the till receipts in cash, kept in cash, until being paid to the Claimants in cash. However, those documents have not been disclosed to me or the Claimants.

Probate and Directorship: January to November 2020

83. In January 2020, Senior died. Prior to then Mr Halim had had no day to day involvement in the Respondent's business. I accept his evidence that he and his father had been on reasonably good terms and that they did discuss some business together. However, Mr Halim had his own separate business and was not a director, officer, employee or manager of the Respondent.

84. In relation to payments made by the Respondent to the Claimant, Mr Halim would not be able to have it both ways, of course. He would not be able to claim that, on the one hand, he knew exactly what was paid to the Claimants, and, on the other hand, that he was unaware of any discrepancy between the amounts paid to the Claimants and the amounts declared to HMRC. The Claimants (now) maintain, the actual amounts they received matched the old payslips; Mr Halim could not plausibly claim to know that they got more than that without asserting that his father actually told him that that HMRC was being misled.

85. In any event, given his lack of day to day involvement, I am satisfied that Mr Halim had no first hand knowledge of the precise sums being paid. Any knowledge he has comes second hand from information (if any) supplied to him by Senior before Senior's death, from Ms Tuna and Ms Alic, and from documents which he did not see until after Senior died.

86. It is common ground that Senior's shares in the Respondent were left to Mr Halim and his sister, C4 - Mrs Alican, with each acquiring half. Mr Halim was named as an executor of his father's will. In around September 2020, Mr Halim was granted probate. To the extent that there is any dispute over that appointment, it is not a matter about which I need comment.

87. In around November 2020, following a High Court hearing, Mr Halim was confirmed as a director of the Respondent. C4 - Mrs Alican was aware of the High Court hearing.

The property arrangements

88. C4 - Mrs Alican had been granted the freehold of 493 Green Lanes during her father's lifetime. That is, Senior had granted her the freehold of the building from which the Respondent operated as a supermarket on the ground floor.

89. In 2017, upon receiving the freehold, C4 had granted a lease to the Respondent over parts of 493 Green Lanes, including the shop area and some office space.

90. The four claimants all live in the residential space in 493 Green Lanes. Their address is “First Floor” at that building.

91. Another family company operates from the premises next door, at 495 Green Lanes. This is Yasers Food Ltd (YFL). This was also a business which Senior had commenced. According to Companies House records, Mr Halim had been a director and secretary for about 5 years (1995 to 2000), but then there was around a 20 year gap until he became director again in November 2020. In other words, around the same time he became director of the Respondent.

92. It is not alleged that the Claimants were employees of YFL or that YFL has any liability (in these employment tribunal complaints) to them. It is not alleged that any of the Claimants live inside 495 Green Lanes (“the YFL building”). It is not alleged that any of the Claimants are the landlords for YFL. C2 reports that her mother owns the freeholds of 489, 491 and 493, but does not know the basis on which YFL occupies 495. There is no dispute that all of the Claimants know that YFL occupies 495 and has done so for many years.

93. Ms Alic is an employee of YFL. I accept her evidence that YFL and the Respondent shared back office space and that, during Senior’s lifetime, there was co-operation between the companies, such as short term loans to assist with cash flow.

94. As will be discussed below, there was a relevant incident on 16 November 2020 which, on the Respondent’s case, (i) related to roof access from inside 495 Green Lanes (the YFL building) to the roof of that building and (ii) which is connected to the dismissal reasons for some of the Claimant and (iii) is connected to the Respondent’s position that the Claimant’s were not entitled to notice.

Engagement of Davenport HR and proposed new contracts

95. As discussed above, prior to 2020, Mr Halim had not been involved in the running of the Respondent. After his involvement started, he realised that none of the employees had written contracts. He was aware from his other companies and businesses that there was a legal requirement that employees should have written contracts.

96. The letter from Bolt Burdon (acting for Mr Halim) to the solicitors dated 29 May 2020 states:

> Please also note, at the date of death there were no employment contracts in place and many employees were operating ‘off the books'. Our client quite rightly had to rectify this and has had to implement the correct systems.
>
> Davenport Solicitors are assisting with the employment matters.

97. My finding is that it is true that Mr Halim did wish to regularise the employment situation. That desire does not, in itself, eliminate the possibility that he also wished to have the written contracts on terms which were more advantageous to the Respondent (and/or to him) than the arrangements under which the Claimants had been working. The letter also states:

> Prior to the death of the Deceased, our client was not involved with the running of Medsun Food Ltd.
>
> Our client understands the Deceased was in charge but the business was mainly managed by your client's husband Mr Ali Alican (Ali) over the last 2 years and as the Deceased's health deteriorated.

98. I treat this as an admission by Mr Halim that he knew that C3 - Mr Cakmaktas had been acting more in the role of manager, rather than simply a shop assistant. Furthermore, the rest of the letter makes clear that Mr Halim was not relying solely on what C4 - Mrs Alican might have said, but that Mr Halim had interacted with C3 about running the shop from February 2020 onwards.

99. The letter made a suggestion that "your client and her family do not enter "Medsun Food Ltd" pending further discussions between respective solicitors. I take this to be a reference to all 4 claimants. It is clear from the letter that enter "Medsun Food Ltd" refers to the shop premises at 493 Green Lanes.

100. Mr Halim appointed Davenport HR and/or Davenport Solicitors to advise the Respondent in relation to this matter, and to prepare draft contracts. Davenport Solicitors have acted for the Respondent in connection with this litigation.

101. Mr Halim had discussions with Ms Alic about what the basic factual arrangements were with employees (in terms of duties, hours and pay). He instructed Ms Alic to liaise with Davenport HR.

102. Ms Oma Anaragu of Davenport HR prepared draft contracts based on the instructions from Mr Halim and Ms Alic.

103. Around 23 October 2020, Ms Anargu sent a letter or email to C1 - Mr Mehmet about the proposed written contract. This led Mr Gorlov to send his email of 23 October 2020 [R274] which referred to C1 - Mr Mehmet as his client. This reply shows that C1 had been told that he was invited to a "mandatory" meeting with Ms Angaru and that Ms Alic would be present. It shows C1 knew that the meeting would be about employment contract, but that he had not, as yet, been sent a draft. Apparently Ms Anargu's letter had been incorrectly dated 29 October 2020.

104. On 25 October 2020, Mr Gorlov sent a follow up email which, amongst other things, asked for a copy of his client's current contract. That was, in context, seemingly a reference to C1 - Mr Mehmet specifically. However, none of the 4 claimants had written contracts at that date, as each of them knew. The letter also sought a copy of Ms Anargu's / Davenports letter(s) of instruction and details of her conversations.

105. On 1 November 2020, Mr Gorlov wrote again. This email seemed to be regarding his main client as C4 - Mrs Alican. There had seemingly been some intervening discussions as he said: "*contrary to your assertion that all questions have been answered, you continue to refuse to provide all the information reasonably requested in my emails*".

106. In any event, this document, R271 and R273 (272 being a blank page), contains responses from Davenports. Based on how they have answered other emails, their

responses were probably in red. However, the email from Davenports to Mr Gorlov is not in this bundle, and so the date of the responses is uncertain, though obviously cannot be earlier than 1 November 2020. The responses included that:

106.1. The reason that the meeting was said to be mandatory was section 1 of the Employment Rights Act 1996

106.2. The purpose of the meeting to "*answer any questions she has in relation to the proposed terms of written statement of particulars and let her know why the company needs to provide her with the same*." I accept that was an accurate summary of Davenport's reasons for holding the meeting. In context "she" refers to C4 - Mrs Alican.

106.3. The response said that the written contract had been supplied and added: "*Your client does not have terms of written statement of particulars of employment, hence this needs to be provided*".

106.4. The responses said that if Mr Gorlov's client(s) did not want Ms Alic to be present at the meeting, then that would be acceptable to Davenports and proposed that Osman (Yildizev) attend instead.

107. As per C2 - Mrs Mehmet's statement (paragraph 35 and 36)

> Each Claimant got an identical letter from Medsun dated 29 October 2020 informing us that Medsun was "in the process of implementing formal procedures in line with employment law and HMRC regulations". We had not had any previous indication that this might happen. The letter invited us to attend what was called a consultation meeting "to ensure that you have full knowledge of your employment terms". The letter offered explanations of the new contract and an opportunity for us to ask questions, However, as it also said that attendance was mandatory and that at the end of the meeting the new employment contract would be issued for signature, it was at the end of the day a requirement to sign the contract Medsun had prepared, not consultation. The Claimants therefore did not attend this meeting so as to prevent any suggestion that we were endorsing Medsun's actions or accepting the proposed contract terms.
>
> Medsun then sent the Claimants letters dated 30th (sic) November 2020 enclosing a copy of the new contract, and inviting us to a meeting on 3rd November to explain it. As with the previous letter, we were told we would be given the draft contract to sign and return, now requested by 30 November 2020. If we agreed the terms we were invited to sign and return it, apparently straight away without the meeting. For the same reasons as before, we did not attend the meeting and did not accept the draft as advised by ACAS at the telephone.

108. I accept that is an accurate summary of the Claimants' perceptions of the correspondence, and of their reasons for not meeting Ms Anargu / Davenports. However, my finding is that Davenports did seek to engage with the Claimants, by writing to them directly, and by writing to Mr Gorlov, and by offering meetings. The fact that the Claimants did not comment on the specific content of the draft contracts is neutral.

108.1. The fact that they did not sign the contracts is not evidence that they regarded the proposed written terms as different to their existing contracts, because their objection was to the process itself, irrespective of the contents of the drafts.

108.2. By the same token, the fact that they did not expressly reply to state which proposed written terms were "wrong" (ie which did not match their existing actual contract) does not imply that they accepted the accuracy of the document.

108.3. The Claimants simply refused to engage in the process without addressing their minds (at the time) to what specifically should be included in a written contract about (for example) job title, duties, hours, pay.

109. My finding is that draft contacts were issued to all employees, including the Claimants around the end of October or start of November 2020. Ms Anaragu met some the Respondent's employees one by one to discuss. Ms Alic attended some or all of those meetings. The Claimants were each offered a meeting with Davenport HR but none of them attended. None of the Claimants signed the proposed written contracts, and none of them necessarily accepted that the contents accurately reflected the employment contracts which they already had with the Respondent.

110. This was not a sham exercise by Mr Halim (or the Respondent) to try to trick the Claimants. The Claimants had the opportunity, if they wished to do so, to say that the terms of the written contract should be different. Eg in relation to hours, hourly rate, weekly pay, duties, etc. Whether the Respondent would ultimately have agreed to suggestions put forward by the Claimants is hypothetical in the sense that the Claimants made no suggestions, and the agreement, if any, would have depended on what the suggested changes were. However, I am satisfied that, in principle, the Respondent was potentially willing to make alterations to the drafts, subject to discussion and (if necessary) provision of evidence.

111. Based on my findings, set out above:

111.1. The draft contract was potentially more beneficial to C3 - Mr Cakmaktas as it would have kept his weekly pay the same, but reduced his hours to 39. He had been doing a lot more than that prior to Senior's death, and prior to Mr Halim taking charge of the business.

111.2. The same is not necessarily true of the other claimants. Their salary was not being reduced, but the contract was stating an obligation to work 39 hours per week, rather than the ad hoc arrangements in which they had worked far fewer hours than that.

112. However, in any event, the Claimants did not actually attend work or perform duties after these draft contracts were issued. Other than continuing to accept their wages, they did nothing to suggest that they agreed to the terms. On the contrary, they made clear that they did not agree.

Roof Incident – 16 November 2020

113. This section is the findings of fact for the notice pay claims. I will make the findings of fact for the unfair dismissal complaints when I discuss the

114. Huseyin Salici is a maintenance worrker for YFL. He did not appear in the Tribunal proceedings. A statement he provided for internal proceedings is at [R405]. He was instructed by Mr Halim to carry out an inspection on the roof of the YFL building for some extractor fans and other equipment. There is a demarcation, by means of a low fence, between the roof of that building and the next door premises where the Claimants lived, but walking onto the roof of 493 (where the Claimants lived) was not difficult. Indeed it was likely that Mr Salici would have to do that to carry out his inspection.

115. There is more than one means of accessing the roof of the YFL building. He found both doors locked. He attempted to access through one particular door which led to a part of the roof of that building which the Claimants had used for many years. When both C4's parents were alive, they had lived in the YFL building, and so one way of travelling between their flat and the Claimants' residences was by means of the roof.

116. After the alteration between Mr Halim and C4 - Mrs Alican in April 2020, C2 - Mrs Mehmet had placed a lock on the outside of the door on the YFL building (that is, on the roof side of the door). Therefore, on 16 November 2020, Mr Salici was unable to immediately gain access to the roof through that door.

117. With YFL's authorisation, Mr Salici used tools to attempt get through the door. When C2 - Mrs Mehmet became aware he was trying to get through the door, she expected there to be some sort of argument or confrontation. She did not offer to let him through. She started filming on her phone and told her husband (C1) to gather the cats and to lock them away safely.

118. I do not accept C2's account that one of the reasons for locking the door was because of Covid. She did it because she did not want Mr Halim or any YFL employees to use that door to access the roof area. I do not doubt that part of her motivation was so that people would not be able to come out that way, onto the roof of 495, and then access the roof of 493 by that route. However, 495 did not belong to her or her mother, and C2 knew that her lock was preventing access from inside 495, by that door, to that part of 495's roof.

119. She knew that Mr Halim had not agreed to that. She knew that he was the executor of Senior's estate and that 495 was part of that estate. She knew that the roof included extractor fans and other equipment used by YFL. Despite knowing these things, she was not intending to unlock the door.

120. Each of C1, C2, C3 were involved in preventing Mr Salici coming out, and in arguing with him, and, when they arrived, arguing with Mr Yildizev and Ms Alic too. Those three claimants were all on the roof of 495 during this. That is they were not on the roof of 493 (the building owned by C4 and in which all the Claimants lived). C4 was

in the vicinity too. She may or may not have been on the 495 roof, but I am not persuaded that she shouted any threats, or was carrying any weapon.

120.1. C2 shouted that she might kill somebody if there were continued attempts to come through.

120.2. C3 slammed the window (a window belonging to the YFL building shut, nearly catching Mr Salici's hands).

120.3. C1 was carrying a crowbar and used words and actions which were intended to imply that he might use it on Mr Salici if he continued to try to come through.

121. C2's written statement says C1 was doing DIY immediately before the incident and that is why he had a crowbar. In cross-examination, she sought to deny that he had had a crowbar at all and said that that was one of the lies the Respondent and its witnesses were telling. My finding is that C1 had been instructed by C2 to collect the cats, and had done so, and it is implausible that he would have done that without putting down any tools he had been using for DIY. Furthermore, I do not believe he was doing DIY immediately beforehand. I am satisfied that he picked up the crowbar after his wife had let him know that he should prepare for a confrontation about the locked door. In the document which was attached to his ET1 [R301], he starts by saying that he was sitting speaking to C3 in the kitchen and smoking a cigarette when he first heard drilling. He says that he drew it to his wife's attention. Thus that was what immediately preceded C2 starting to film on her phone and telling C1 to get the cats. Even if he had been doing DIY work, and taking a quick cigarette break (which I do not think is true), it is totally implausible that he would have gone back to that knowing that his wife was about to have an argument about roof access.

122. I am satisfied that C2 was not seeking to give a truthful account of the incident, but was seeking to give an account which she thought was helpful to the Claimants, forgetting that she had already admitted, in her witness statement, that C1 had been holding a crowbar.

123. C2 also denied that the statement at R541 was prepared by her, or with her agreement. In fact, as I pointed out during the hearing, that document was attached to her ET1 when it was submitted to the tribunal. I therefore treat that document as an admission that (even on C2's own admission) "*The event then escalated. My mum and dad came out. Ebru and Osman came up and could be seen behind the man and lot of words were exchanged*."

124. I do accept that the conversations were in Turkish. However, that is less significant than the fact that Mr Salici did not attend the Tribunal in any event. I accept that Ms Alic made an accurate note of what he told her about the incident, and that his written account is consistent with what Ms Alic saw and heard herself.

<u>Assault Incident – 17 November 2020</u>

125. These are the findings of fact for the notice pay claim. I will set out the findings for the unfair dismissal later in these reasons.

126. This the incident was in a back office and there is video. I also have Ms Alic's evidence and that of C2. I also have documents from the criminal case, including Z's statement to police as translated into English. R539 was an item which had been prepared on the Claimant's instructions and submitted with the ET1.

127. YFL had a female employee whom I will refer to as Z. C2 was on the Respondent's premises talking to her father, C4. Z was there too and left. C2 formed the opinion that Z was going to look for Mr Yildizev and pass on to him what C2 and C4 had been saying to each other.

128. She followed Z to YFL's back office. The video shows Mr Yildizev and Ms Alic in the back office and then Z enters. C2 comes in, and her husband, C1, followed too and stood in the doorway meaning (whether he intended it or not) that it would not have been possible for Z to retreat that way.

129. The situation escalated quickly and C2 made violent contact with Z. C2 was seeking to grab Z. I saw no evidence that Z provoked the violence by spitting at C2.

130. C2 was convicted of common assault after a hearing at which Z gave evidence.

131. To the extent that C2 implies that her legal advisers might have let her down in some way, that does not change the fact of the conviction. To the extent that she narrates part of what the judge said, and implies that it suggests anything that Z or Ms Alic might have said has been dishonest, I do not agree. The judge did, of course, have to set out what had been proven by evidence as part of her sentencing remarks.

C4 shopping

132. These findings are for the purpose of the notice pay claim.

133. While Senior was alive, he would occasionally tell C2 to go and get an item (some milk, for example) from the Respondent's premises. That is not relevant to anything that I have to decide.

134. While Senior was alive, C2 and C4 each had Senior's approval to take items from the Respondent's stock without making payment. It was put through the tills, and the Respondent's copy of the till receipt was marked to show that C2 or C4 had taken the item. When Senior was cashing up, he would account for that by making sure that there was a corresponding amount of cash accounted for in the Respondent's records.

135. There were a lot of points raised by Mr Gorlov about the video of C4 taking items from the shelves in the store, and how it failed to show her leaving the store with the items. This was somewhat irrelevant given that C2's statement said:

> Yesim does not deny that she was shopping on 4 December 2020 as shown on the CCTV footage. She did not pay. She was not stealing. As explained above, she was entitled to free shopping. This was familiar to the staff who assisted her.

136. I am satisfied on the evidence that she did take the items, and she did not pay for them. She did not do this secretively. She was open about it and it was her opinion that she entitled to take these items and that she did not need to pay for them.

137. On the balance of probabilities, I am satisfied that she did not (always) put items through the till. She could easily have given evidence on oath to that effect if that was her position. C2, who was not there, merely says:

> Yesim never hid what she was doing. She would generally have put the goods through the till (see above). She cannot remember whether she did that on 4 December 2020, but as Medsun has a list of the goods she assumes she must have done.

138. I accept Ms Alic's evidence that she produced the list of items from observing the CCTV footage, rather than the till roll. It is not essential to my decisions whether Ms Alic made any mistakes in what specific items were taken. Items were taken, and not paid for, and they were not rung through the till (meaning that there was no record of which specific items were taken, other than what Ms Alic noted).

Investigation

139. Mr Halim asked Ms Alic to produce a witness statement for the 16 and 17 November 2020 incidents. She also provided Mr Halim with a list of items which she believed C4 had taken during one particular visit to the Respondent's customer shopping area. Mr Halim asked Davenport HR to conduct investigations into the Roof Incident, the Assault Incident and C4 - Mrs Alican's shopping.

140. Sarah Crosby was appointed to do this. She is an experienced HR professional and is CIPD qualified.

140.1. She wrote to C1 - Mr Mehmet on 2 December 2020 to invite him to an investigation meeting on 4 December 2020. She received no response and wrote again on 4 December 2020 [R285] to invite him to an investigation meeting on 11 December 2020. He did not respond or attend the meeting. The investigation proceeded in his absence.

140.2. She wrote to C2 - Mrs Mehmet to invite her to an investigatory meeting on 4 December 2020. In response to C2's email of 3 December, the meeting was postponed to 11 December 2020. [R289]. The Claimant did not attend therefore, the investigation proceeded without her attendance.

140.3. She wrote to C3 - Mr Cakmaktas to invite him to attend an investigation meeting on 4 December 2020. This was postponed until 11 December 2020, at his request. A reminder was sent on 10 December. He not attend the investigation meeting or contact the Respondent or Ms Crosby. The investigation proceeded in his absence.

140.4. On 4 December 2020, she wrote to C4 - Mrs Alican inviting her to an investigatory meeting on 11 December 2020. [R287]. On 10 December 2020, she wrote to C4 to remind her of the meeting the following day. C4 did not attend and the investigation in her absence.

141. As part of her investigation Ms Crosby requested witness statements from Huseyin Salici, Ebru Alic and Osman Yildizev. She did not interview them personally, but reviewed their statements on receipt from the Respondent.

142. On 3 December 2020, the Claimant's representative in this hearing, Peter Gorlov, wrote to Ms Crosby stating:

> Yeliz Mehmet has passed your email dated 2 December to me for attention.
>
> Will you please pass full details of all documents, videos and witness statements you hold in connection with this matter with your legitimate permission to pass them to the Metropolitan Police.
>
> We will not be attending any meetings of any kind until that has taken place.

143. On the same day, 3 December, C2 - Mrs Mehmet wrote back to Ms Crosby.

> Thank you for your email, which I have only just located. Your email was sent to me via an email, from a previously unknown email address and hence it went into my junk. The invite to an investigation meeting is therefore very short notice and I will not be able to attend as I will need to ensure that a colleague accompanies me. It would have been no issue for you to have made me aware of this by means of hard copy letter, thereby avoiding the delay. I suggest that the meeting is moved to a later date next week. However, prior to this meeting it is essential that you specify what it is you are investigating. Your letter is vague and opaque stating:
>
> The purpose of the meeting is to consider an allegation of misconduct that has recently been brought to our attention. The alleged misconduct relates to verbal abuse towards other employees on Monday 16th November and Tuesday 17th November 2020.
>
> I cannot recall any such exchanges with employees. Please provide further details. In addition, please confirm by whom you have been appointed to carry out this investigation and how did these issues come to <u>your</u> attention. Your letter is silent on the provenance of these issues.
>
> My agreement to attending a meeting is without prejudice to your properly responding to my queries as set out above. In making this request I refer you to clause 1.5 of the Disciplinary Policy which concerns fairness (which by inference also means transparency) and also clause 2.1 concerning the purpose of any such meeting being to 'fact find'. It is inconceivable that a proper, fair, appropriate and transparent fact finding meeting could be undertake, without you properly setting out what it is you are seeking to 'fact find' about.
>
> I await hearing from you. My rights are fully reserved.

144. On 4 December, Ms Crosby's reply included:

> I write further to your email dated 03-12-2020, I have agreed to postpone the investigation meeting from 4 December 2020 to 11 December 2020 at 1:30pm via Microsoft Teams. I have been instructed by Medsun Ltd to carry out this investigation. The purpose of the meeting is to consider an allegation of misconduct that has recently been brought to our attention. The alleged misconduct relates to verbal abuse towards other employees on Monday 16th November and Tuesday 17 November 2020.

145. A letter was also sent to C2's email address on 10 December. The text of the letter asked if the recipient was attending the meeting the next day. The letter was addressed to "Mrs Yelican" and so was the covering email. The file name of the attachment, did contain C2's first name "Yeliz".

146. On 10 December, Mr Gorlov replied to Ms Crosby

> These New Rules do not apply. On my advice Yeliz, Yesim, Ali and Mehmet have not signed up to them.
>
> Please forward a copy of the old Rules which were in place.
>
> I suggest your actions are incorrect, unprofessional and biased.
>
> Please advise me of your regulator by midday today otherwise I will lodge a complaint with all of them until we find the right one.

147. Later the same day, he wrote to Ms Crosby (after her intervening emails to the Claimants). He copied in several people including C2 and C4.

> Dear Sarah
>
> Despite the request in my email earlier today you have not provided particulars of your regulator.
>
> What follows is written in the context of my clients' being unable to establish your proper connection with this matter and your qualifications, which you have told me you have but have not divulged.
>
> It is also relevant that Medsun's proposed disciplinary proceedings appear to be instituted under contracts to which none of my clients is a party.
>
> Even if one ignores the application of procedures in non-existent contracts, my doubts are further strengthened following a helpful conversation today with ACASS. ACASS advised me that as there are ongoing Police investigations in relation to the subject matter of the proposed disciplinary proceedings, such proceedings by an employer would be inappropriate without first getting written police clearance that the employer's proceedings will not obstruct the police investigations.
>
> In these circumstances, I am advising my clients to have nothing to do with you or any purported disciplinary proceedings that Medsun chooses to initiate.
>
> Regards,
>
> Peter Gorlov

148. On 16 December 2020, Ms Crosby informed three of the Claimants, (C1, C3, C4) that their respective matters would proceed to a disciplinary hearing as she had decided that there was a case to answer. The letters highlighted the alleged breach of contract, the next steps and potential consequences. Those Claimants were also provided with witness statements and Respondent's disciplinary procedure. [R295 to R300]

149. The disciplinary procedure in question was part of the policies that the Respondent had purported to implement for all employees in around October as part of the attempt to introduce written terms and conditions. The Claimants do not acknowledge that it applies to them. They do not argue that a different procedure (either written, or accepted by custom and practice over the years) does apply.

150. The letters informed the Claimants of their right to be accompanied to the disciplinary hearing, the right to submit evidence in advance of the hearing, and asked if any reasonable adjustments were needed. They said dismissal was a possible outcome. They said that postponement requests should be made promptly and warned that

failing to attend without reasonable excuse might result in the hearing proceeding in the employee's absence. Each of the letters, while showing Ms Crosby as the author, were on the Respondent's headed paper.

151. The letters did not specify time and date of hearing, but suggested it was likely that it would be via Teams and with one of her colleagues.

152. For C1, the allegation was said to be:

> On the 16th November 2020, you allegedly shouted verbal abuse and displayed intimidating abusive behaviour which was perceived to be physically threatening by other employees. Specifically that you would punch the other employees in the mouth and threatening words such as 'I wouldn't keep drilling if I were you'. It is also alleged that you were carrying a crowbar which could be perceived as an offensive weapon.

153. For C3, the allegation was said to be:

> On the 16th November 2020, you allegedly shouted verbal abuse and allegedly displayed intimidating abusive behaviour which was perceived to be threatening by other employees. Specifically 'don't make me smash through the window' and 'watch what I do to you'.

154. For C4, the allegation was said to be:

> On the 16th November 2020, you allegedly shouted verbal abuse and allegedly displayed intimidating abusive behaviour which was perceived to be threatening by other employees.

155. No copy of any corresponding letter to C2 is supplied by the Respondent. It is described in the Claimant's witness statement, paragraph 80, Table 5, Row 24. Thus C2 also got a similar letter dated 16 December. My finding is that the allegations mentioned in the letter were:

155.1. That, on 16.11.20 C2 "allegedly made threats to kill people and allegedly displayed intimidating abusive behaviour, which was perceived to be threatening by other employees"

155.2. That, on 17.11.20 C2 "allegedly attacked [Z] and allegedly displayed intimidating abusive behaviour, which was perceived to be threatening by other employees".

156. The letters sent to C2 - Mrs Mehmet used different names for her when addressed. When they referred to her as Ms/Mrs "Yeliz Alican", that was no cause for confusion. Whereas simply referring to her as Ms/Mrs "Y Alican"/"Alican" potentially risked ambiguity between her and her mother. However, the Claimant knew the letters sent to her own email address were for her, because a different email address was being used to communicate with her mother. For example, on 2 December 2020, the emails about investigation meeting were sent to C2's email address, addressing her as "Ms Alican", and referred to incidents on 16 and 17 November 2020. Mr Gorlov wrote to Ms Crosby on 3 December (as quoted above), stating "Yeliz Mehmet" had passed the email to him.

157. All 4 claimants received a letter from Mrs Bal on 18 December 2020. The letter invited each of them to a hearing on 23 December 2020, and referred back to Ms Crosby's respective 16 December 2020 letter.

158. C2 - Mrs Mehmet replied, but none of the other claimants did so. According to C2's statement, the reason that her mother (C4) did not reply was as follows, and she says that her husband and father (C1 and C3) had the same reasons for their own lack of replies.

> Yesim did not answer the letters to her about these proceedings and did not attend the investigation meetings and disciplinary hearings. She knew they were untrue. She saw them as part of Medsun's and Mehmet's continuing harassment of her as explained in this Statement. She could not cope with this. She knew she would not be able to deal with the meetings and hearings. She also knew that if she played any part in the proceedings, Medsun would take it as implying that she accepted there was something to the complaints against her and that she accepted the new contract applied to her. This was on telephone advice from ACAS.

159. I do not accept that ACAS advised any of C1, C3 or C4 that they should not attend a disciplinary hearing. I do not accept that ACAS advised any of them that attending a disciplinary hearing was an admission that there was something to the allegation, and the correct response, if denying the allegation, was to ignore the invitation to a disciplinary hearing. In any event, on their own admission (supplied via C2) they did not contact Ms Bal.

160. C2 did know Ms Bal's letter was intended for her and the email commenced "Dear Yeliz". C2 - Mrs Mehmet's reply to Ms Bal was as follows.

> Thank you for your letter. In the first instance, please confirm how you say I was sent a letter on 14 December which contained all the evidence in relation to this matter. I have received no such letter, and have not had sight of any such evidence. This appears an attempt to intimidate me into attending a short notice meeting, absent any prior knowledge or context of the same, in which there is a risk (you say) that I will lose my job. Please send me a copy of the letter, and provide details of when you say this was sent to me and by what means. I will then require some time to consider this material and will likely need to take legal advice on the same. A failure to afford me that time will be wholly unreasonable and unfair. In turn, I will not be able to attend a meeting on 23 December, given the short notice and the upcoming festive period, which will make my obtaining of legal advice difficult if not impossible, at least until the New Year.
>
> Furthermore, please confirm that the investigation has been sanctioned by the officers and shareholders of Medsun Limited and that such a resolution has been passed by the company pursuant to the requirements of the Companies Act 2006. Also, please let me have a copy of my signed contract with Medsun along with a copy of the company handbook and disciplinary procedure which I agreed to at the commencement of my employment.
>
> My rights remain fully reserved. I await hearing from you.

161. In terms of the mention of 14 December, I am not aware of such a letter. C2 had received a 16 December item which otherwise met the description. While not unreasonable to query whether there was a 14 December letter, she had, in fact, received the evidence. In terms of seeking a copy of a "signed contract", C2 knew that none existed. She knew that correspondence had been sent to her in late

October seeking her agreement to a proposed written contract, and that she had objected to that, and had not signed anything. In terms of disciplinary procedure, the only one which existed had already been sent to her by Ms Crosby. Whether or not that particular procedure applied to her (it was one of the policies which the Respondent was suggesting were brought in in October 2020) is a different point, but there was no earlier written procedure which did apply to her. That is, the purported policy sent to her was proposing to introduce a new written procedure where none had existed previously; it was not purporting to replace an existing written procedure with a new, different one. C2 had quoted from what the Respondent alleged was the procedure in her 3 December email to Ms Crosby.

162. C2's witness statement confirms there was a response from Ms Bal. As C2 correctly comments, it is not in the bundle. The Respondent undoubtedly had an obligation to disclose the item if they, or its agent(s), Davenport HR (and/or Ms Bal) still had a copy. So did C2 - Mrs Mehmet. C2 acknowledges that Ms Bal wrote on 23 December 2020, and the letter:

162.1. Re-scheduled the disciplinary hearing to 4 January 2021

162.2. Supplied (a second time, according to Ms Bal) the evidence intended to be used at the hearing

162.3. Still failed to use the correct name of "Mrs Yeliz Mehmet".

<u>C1 - Mr Mehmet's dismissal</u>

163. On 23 December 2020, Ms Bal decided that C1 - Mr Mehmet would be summarily dismissed from his employment contract with the Respondent. There are two versions of the letter which she sent, each of which is copied multiple times in different places of the bundles and other documents supplied. There is what I will call a "clean copy" and what I will call an "annotated copy". The annotated copy was attached to the ET1 when it was submitted on behalf of C1. My findings are:

163.1. The clean copy is the version which C1 admits (via C2's statement) was received on 23 December 2020.

163.2. The annotated version was annotated by him, or by someone acting on his behalf, and the annotations are the Claimant's version of events, written by him (or by someone writing down what he said orally) later than 23 December 2020 but no later than 16 February 2021.

163.3. The suggestion that the Respondent created the annotated version, and/or that the Respondent has falsely sought to represent the annotations as being evidence which Ms Bal had before her is false.

164. The dismissal letter (clean copy) said the reason for the dismissal was:

> The decision made at the hearing was based on the witness statements provided. In summary your actions on 16th November 2020 where you shouted verbally abuse and displayed intimidating behaviour which was perceived to be physically threatening by

> other employees. Specifically that you would punch the other employees in the mouth and threatening words such as 'I wouldn't keep drilling if I were you'. It is believed that you were carrying a crowbar which could be perceived as an offensive weapon.

165. The statements mentioned were not from the Claimant (or any of the other claimants) but were from Ms Alic [Bundle 400-401], Mr Yildizev [Bundle 402-403], Mr Salici [Bundle 405]. That is, they were the evidence sent by Ms Crosby to C1.

166. The letter goes on to say:

> I have considered the matter fully with all the evidence available to me and with the lack of any evidence to support or explain your actions I can confirm that the Company has established to its reasonable satisfaction that you have committed gross misconduct and your employment will be terminated with immediate effect and without notice.

167. Ms Bal has not given evidence, and I do not think the Respondent has a satisfactory explanation for failing to call her. However, based on the totality of the evidence as a whole, on the balance of probabilities, the evidence did satisfy her that C1 had acted in the way that was alleged in the 3 written statements. My reasons for that finding of fact are as follows.

167.1. Although it is – of course – an entirely separate matter, and although I have evidence/information that was not before Ms Bal, I have decided that C1 acted as alleged. I do not think it is not implausible that, on 23 December 2020, Ms Bal formed the opinion that, on balance of probabilities, he had behaved in the way which she referred to in her letter.

167.2. The Claimants' submission to the contrary are based on:

167.2.1. Firstly, the combined assertions that Mr Halim wanted to get rid of C1 (and all 4 claimants) and that Davenport HR was doing his bidding. Even if both things were true, that would not necessarily mean that Ms Bal did not genuinely believe that the Claimant's conduct was as stated in the letter.

167.2.2. Secondly, the assertion made in this litigation that he did not act in the manner alleged. However, he did not attend the hearing before Ms Bal (or send any written submissions. It would not necessarily have been reasonable for Ms Bal or the Respondent to treat his non-attendance as an admission of guilt. However, the reasonableness or otherwise of her belief (or of the process she followed before she formed a belief) is a different point. Even if, as C1 claims, he did not actually act in the manner alleged, that would not necessarily mean that Ms Bal did not genuinely believe that the Claimant's conduct was as stated in the letter.

168. The letter informed C1 of a right to appeal. He did not do so.

<u>C2 - Mrs Mehmet' dismissal</u>

169. On 4 January 2021, C2 did not attend the meeting with Ms Bal. Ms Bal decided that C2 would be summarily dismissed from her employment contract with the Respondent. The letter, sent by email said:

- The decision made at the hearing was based on the witness statements provided and the CCTV recording evidence.
- On 16th November 2020, you made threats to kill people and displayed intimidating abusive behaviour, which was perceived to be threatening by other employees.
- On 17th November 2020, you physically attacked [Z] and displayed intimidating abusive behaviour, which was perceived to be threatening by other employees.

170. The CCTV is the same (or similar) to the one which I have seen. In addition to the statements which she took into account for C1, there was also Z's statement [Bundle 407-408]

> I have considered the matter fully with all the evidence available to me and with the lack of any evidence to support or explain your actions I can confirm that the Company has established to its reasonable satisfaction that you have committed gross misconduct and your employment will be terminated with immediate effect and without notice.

171. In relation to 16 November, for reasons similar to those which I mentioned in relation to C1, I am satisfied, on balance of probabilities, that Ms Bal did form the professed belief that C2 had acted as alleged.

172. In relation to 17 November, I have no doubt that Ms Bal formed the genuine belief that C2 physically attacked Z and displayed intimidating and abusive behaviour. It is implausible that someone who viewed the CCTV would have reached a different conclusion.

173. The letter informed C2 of the right to appeal by "writing within five working days of being informed of the termination of employment".

174. The letter - apart from any other communication method – was sent by email at 22:07 on 4 January, with a covering email which said:

> Dear Yeliz,
>
> Please find attached outcome to the rescheduled disciplinary hearing held earlier today. Please note you have been dismissed on grounds of gross misconduct and your termination of employment is with immediate effect.

175. On 18 January 2021, the Claimant sent a letter [Bundle 311] which said she "rejected" the contents of the 4 January 2021 letter. The deadline to appeal, as stated in the 4 January letter, was five working days, which is ambiguous in the case of a supermarket open every day, and given the Claimant had no set hours. Since 4 January 2021 was a Monday, an appeal received by Monday 11 January 2021 may well have been inside the deadline. The 18 January 2021 letter was well outside, and the assertion that a hard copy of the letter was not received until 15 January is not relevant. I am satisfied that the Claimant was waiting for the communication from Ms Bal, and read it on Monday 4 January. (Even if I am wrong about that, I am sure she read it no later than the following day.)

176. There are 12 numbered paragraphs which I will discuss in more detail in the analysis. For now, suffice it to say that all the demands for evidence mentioned in the dismissal

letter are in relation to items which had been supplied to the Claimant prior to the 4 January hearing.

177. The Respondent wrote on 28 January 2021 (a letter signed by Ms Alic) to say that no further action would be taken on the 18 January letter because, the Respondent asserted, the internal process had been exhausted.

C3 - Mr Cakmaktas's dismissal

178. On 23 December 2020, Ms Bal decided that C3 - Mr Cakmaktas would be summarily dismissed from his employment contract with the Respondent. Her letter stated:

> The decision made at the hearing was based on the witness statements provided. In summary your actions on 16th November 2020 where you shouted verbally abuse and displayed intimidating behaviour which was perceived to be threatening by other employees. Specifically "don't make me smash through the window" and "watch what I do to you." You also angrily closed a window nearly trapping an employee's fingers.
>
> I have considered the matter fully with all the evidence available to me and with the lack of any evidence to support or explain your actions. Taking into account Section 17.4 (b) of your contract of employment which states that behaviour such as the following is not deemed acceptable by the Company
>
> > *'any act of violent or abusive behaviour towards people or property including causing deliberate damage to the Company's or any Group Company's property'*
>
> I can confirm that the Company has established to its reasonable satisfaction that you have committed gross misconduct and your employment will be terminated with immediate effect and without notice.

179. For reasons similar to those mentioned above when discussing C1, I am satisfied that, on the balance of probabilities, Ms Bal did form the opinion that C3 had acted in the way described in her letter.

180. The letter notified C3 of his right to appeal. He did not do so.

9 January 2021 communication from Mr Gorlov

181. After the dismissal letters for C1, C2 and C3, albeit not in direct response to them, Mr Gorlov sent an email to each of the 4 claimants, and to Mr Halim and to Ms Crosby and to Ms Bal. My finding is that this was after he and each of C1, C2, C3 had read the dismissal letters (albeit, in C3's case, another family member might have had to translate it for him). It was also after he had received a copy of the warning letter issued to C4, which C4 had read. On 9 January 2021, Mr Gorlov wrote:

> Dear All
>
> Please ignore all these nuisance letters. They are just a waste of paper. You never signed up to the bogus contract of employment and therefore you cannot be subject to it
>
> The letters are all unsigned and the so called HR Consultants appear to be completely ignorant of the regulations. Mehmet Halim knows you are still employees and this is just part of his illegal intimidation scheme. Using pseudo HR people is just one more thing he will have to explain to the Tribunal
>
> Regards,

C4 - Mrs Alican's dismissal

182. Ms Bal wrote to C4 following the 23 December hearing which went ahead in C4's absence. The letter stated that C4 had committed misconduct on 16 November 2020 ("shouted verbally abuse and displayed intimidating behaviour which was perceived to be threatening by other employees") and that, on behalf of the Respondent, Ms Bal had decided that the conduct "justifies a final written warning". This was stated to last for 12 months. She was offered the right to appeal, and did not do so. After this letter was received by C4, C2 forwarded it to Mr Gorlov (around 8 December 2021), and he wrote the 9 January 2021 email just mentioned.

183. On 15 January 2021, Ms Crosby wrote to C4 [Bundle 309] inviting her to an investigation meeting on 19 January 2021 (via video). This was said to relate to "items that have allegedly been taken from Medsun supermarket without payment or permission on 4 December 2020."

184. The Claimant sent a reply in a letter dated 19 January which said that she could not attend because she was shielding. My finding is that this was not a genuine reason. Firstly, she had not been constantly shielding, but had gone to the supermarket, for example. Secondly, the meeting was to be by video.

185. In any event, Ms Crosby did not receive the letter by the start time of the hearing, but, of her own initiative, gave a new meeting time by video (22 January 2021 at 3pm) when the Claimant did not attend on 19 January. She sent this 20 January letter by email and C4 received it.

186. On 2 February, Ms Crosby wrote to C4 setting a third time and date for the investigation meeting. She had by now received the letter from the Claimant about shielding. Amongst other things, the letter said:

> If, following the initial investigation meeting, we identify further questions that we would like to ask you, we may need to speak with you again. We will let you know if this happens. We expect you to keep all matters relating to the investigation confidential. If you are unsure of your obligations regarding confidentiality, please let me know. The meeting will be conducted by myself, HR Consultant who has been appointed to investigate the allegation on behalf of Medsun Food Ltd. At the start of the meeting, I will explain the scope of the investigation and my role. I will also explain how any information collected during the meeting may be used. You will be given an opportunity to ask any questions that you may have.

187. On 10 February, after C4 had failed to attend the meeting, Ms Crosby wrote:

> I am writing to confirm the outcome of this investigation which related to the alleged theft of goods on the 4 December 2020.
>
> My investigation into these allegations included the following;
>
> - Reviewing CCTV on the 4 December of you walking around Medsun supermarket, picking up items
> - Reviewing a list of items that was provided to me by Ebru Alic and are alleged to have not been purchased

188. Nikki Winsor was appointed (via Davenport) by the Respondent to conduct the disciplinary hearing. On 15 February 2021, Ms Winsor wrote to the Claimant to arrange the disciplinary hearing (an item which I do not have, but accept Ms Winsor's evidence that it was sent) and also supplied her with a link to view the CCTV footage (an item which I do have).

189. On 16 February 2021, Mr Gorlov wrote, copying in C2, C4 and others, stating:

> I write as Yesim's accountant.
>
> Yesim has worked for Medsun since its inception
>
> Her contract with the Company includes £50 per week of groceries.
>
> Mehmet knows this.
>
> There is no disciplinary issue here. Mehmet is merely making mischief at his sisters expense.
>
> May we see your contract with Medsun please?
>
> Please also pass us the CCTV of Mehmet beating up Yesim?
>
> Until you do we will not respond to any further messages from you.

190. In further email exchanges that day, Ms Winsor told Mr Gorlov that the hearing would proceed in C4's absence if she did not attend, and Mr Gorlov said she would not be attending. I am confident that Ms Winsor's documents are genuine. They are consistent with what the Claimants and Mr Gorlov had repeatedly said up to this point, and with the opening paragraph of the dismissal letter. However, it was a serious breach of the orders that the documents were only disclosed when Ms Winsor, the Respondent's final witness, attended to give evidence.

191. By letter dated 19 February, Ms Winsor informed C4 that she was dismissed with effect from that day, 19 February. The letter stated:

> The matter of concern was that on 4 December 2020 it was alleged that you took items from Medsun Supermarket without payment or permission. Theft is an act of gross misconduct, thus a disciplinary investigation was undertaken in order to establish the facts. The results of the investigation were that there was a case to answer and this was confirmed to you in writing.
>
> During the disciplinary meeting, I reviewed CCTV footage dated 4 December 2020. The footage showed you walking around the supermarket collecting various items. A list of the times is attached however, the video shows that you also took some milk, which isn't on the list. You then left the shop without paying for the items. The CCTV footage provides undisputed evidence that you stole these items. The CCTV footage and list of items are attached for your reference.
>
> Theft is considered as an act of gross misconduct. This is stated in your contract of employment dated 29 October 2020 under clause 17.4 (a) and it explains that should you steal from the Company, your employment may be terminated by the Company without notice or payment in lieu of notice or compensation. The contract is attached for your reference. This is also stated in the disciplinary procedure under point 6 and is also attached for your reference.
>
> Having carefully reviewed the circumstances, including the fact that you were informed that the allegations against you would constitute gross misconduct according to the

Company's disciplinary rules and procedure, I have decided that summary dismissal is the appropriate sanction.

192. These were Ms Winsor's genuine opinions. She gave no weight to Mr Gorlov's assertion that C4 had a contractual entitlement to £50 worth of groceries per week, or to the passages in the 29 May 2020 solicitors' letter (of which she had a draft version only) which said that, while Senior had been alive, Senior had allowed C4 to put items through the till, without paying for them.

193. In Ms Winsor's opinion the fact (as she found it) that C4 had taken the items without payment was conclusive evidence that C4 had committed theft.

194. The letter informed the Claimant of the right to appeal, and she did not do so. There was some further correspondence between Mr Gorlov and Ms Winsor which I do not need to comment on for the purpose of making decisions as per the list of issues.

The Law

Unfair Dismissal

195. Section 98 of ERA 1996 says (in part)

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
…
(b) relates to the conduct of the employee,
…

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

196. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for conduct. If the Respondent fails to persuade the tribunal that it had a genuine belief that the Claimant committed the conduct and that it genuinely dismissed him for that reason, then the dismissal will be unfair.

197. "Conduct" can refer to the actions of employee - whether done in the course of employment or not – that potentially affect the employer/employee relationship. The fact that the "conduct" did not occur during working time and/or did not occur at the workplace does not take it outside the definition in section 98(2)(b), though those factors might well be relevant to the analysis under section 98(4). For example, in Eggleton v Kerry Foods Ltd [1996] UKEAT 938/95, the EAT rejected an argument that it was unfair to dismiss an employee for an incident outside work that was an altercation about a non-work issue

> The crucial finding of the Tribunal was that the incident, although it did not take place at the factory, clearly did affect the working arrangements. That finding of fact, was made after hearing evidence and seeing that evidence given by [witnesses including claimant]. That was a crucial finding of fact which, in our view, disposes of the argument that the Tribunal made an error of law because this was purely a domestic matter. The Tribunal said it was not a purely domestic matter. It affected working arrangements.

198. Provided the Respondent does persuade the tribunal that the Claimant was dismissed for conduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

199. In considering this general reasonableness, I must take into account the Respondent's size and administrative resources and I will decide whether the Respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal.

200. In doing so I have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303; Iceland Frozen Foods Ltd v Jones [1993] ICR 17; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82.

201. In British Home Stores v Burchell [1980] ICR 303, the EAT said:

> What the tribunal have to decide … is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.
>
> First of all, there must be established by the employer the fact of that belief; that the employer did believe it.
>
> Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief.
>
> And thirdly … that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
>
> It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant … that the tribunal would itself have shared that view in those circumstances".

202. In considering the question of reasonableness, I must analyse whether the Respondent had a reasonable basis to believe that the Claimant committed the misconduct in question. I should also consider whether or not the Respondent carried out a reasonable process prior to making its decisions.

203. In terms of the sanction of dismissal itself, I must consider whether or not this particular Respondent's decision to dismiss this particular Claimant fell within the band of reasonable responses in all the circumstances.

204. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. In A v B [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances which should be taken into account when considering the reasonableness of the procedure include the gravity of the disciplinary charges and the potential effect upon the employee if the charges are upheld.

205. When considering the adequacy of the investigation, and considering what evidence was available, the Tribunal is sometimes faced with a situation that one relevant individual (a line manager or senior employee, for example) had information that the person taking the decision to dismiss did not have. For example, in Orr v Milton Keynes Council [2011] EWCA Civ 62, the dismissal decision was reached after a disciplinary hearing which was not attended by the employee. The decision-maker decided that gross misconduct had been proven, having listened to the line manager, but was not made aware that the employee's reaction had been provoked by racial abuse by the line manager. The Court of Appeal noted:

> In my judgment, the Foley doctrine does not affect the narrow question put before us, which relates not to the fairness of what the employer has done but to what the employer knew when doing it. I would hold that a person to whom a corporate employer deputes a decision about dismissal not only decides but inquires on behalf of the employer. In so doing, he or she has to be taken to know not only those things which he or she ought to know but any other relevant facts the employer actually knows. Among such facts, it seems to me, are facts known to persons who in some realistic and identifiable way represent the employer in its relations with the employee concerned. If, as would seem inescapable, relevant things known to a chief executive must be taken to be known to both the corporation and its decision-maker, the same is likely to be the case as the chain of responsibility descends. It is equally likely not to be the case when one reaches the level of fellow employees or those in more senior but unrelated posts. The elements mentioned in s.98(4)(a) — the size and administrative resources of the employer's undertaking — may well have a bearing here.

206. It is not the role of this tribunal – when deciding the unfair dismissal claim - to assess the evidence and to decide whether the Claimant did or did not commit misconduct, and/or whether the Claimant should or should not be dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the Respondent. However, avoiding the "substitution mindset" does not mean that the Tribunal can never decide that the employer went too far when it dismissed the employee. In Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, the court of appeal noted:

> The 'band of reasonable responses' has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s.98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss 'in accordance with equity and the substantial merits of the case'. This provision … indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. … an employment tribunal is entitled to find that dismissal was outside the band of

reasonable responses without being accused of placing itself in the position of the employer

207. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process: that will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case. In any event, the presence or absence of an appeal stage is relevant to the overall assessment of whether there was a fair and reasonable process.

ACAS Code

208. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). The following paragraphs of the Code are relevant:

Establish the facts of each case

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

Inform the employee of the problem

9 If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct … and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10 The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

Hold a meeting with the employee to discuss the problem

11 The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12 Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

Decide on appropriate action

19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

Significance of warnings

209. A previous written warning is something that can potentially be taken into account by a reasonable employer when deciding whether to dismiss because of later misconduct.

210. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave a summary of the law on warnings in misconduct cases:

210.1. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. The focus must be on the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal.

210.2. If a Tribunal is satisfied that the first warning was manifestly inappropriate or was not issued in good faith then the Tribunal can potentially decide that the earlier warning cannot and should not be relied upon subsequently.

210.3. If a Tribunal is not satisfied that the first warning was manifestly inappropriate or was not issued in good faith (nor with prima facie grounds for making it), then the earlier warning will be valid. Where the earlier warning is valid, then:

210.3.1. The Tribunal should take into account the fact of that warning.

210.3.2. A Tribunal can also take into account any on-going/unresolved internal appeal against the warning. This is because a reasonable employer who was aware that the validity of the warning was being challenged may be expected to take account of that, and a Tribunal is entitled to consider that factor and give it such weight as it sees appropriate.

210.3.3. It is not appropriate for the Tribunal to substitute its own opinion as to whether the earlier finding of misconduct was wrong, or whether no warning at all (or something short of "final written warning") should have been given.

210.3.4. It is legitimate to take into account the type of conduct which led to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those which led to the dismissal decision. A degree of similarity will tend in favour of the reasonableness of the dismissal. Significant dissimilarity may, in appropriate circumstances, tend the other way.

210.3.5. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

210.3.6. It is not wrong for a Tribunal to take account of the employer's treatment of similar matters relating to different employees, including the approach to previous warnings when making dismissal decisions.

210.3.7. A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

211. In Bandara v BBC 2016 WL 06639476, the EAT confirmed (having considered both Wincanton and also the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374) that a tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of final written warning for a prior incident was a manifestly inappropriate sanction. A tribunal should only take that step if it there is something that is drawn to the tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed, and this requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses.

212. Subject to the comments above, where a final written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer to treat the conduct, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

Adjustments to award

213. S122(2) the Employment Rights Act 1996 states that where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be

> *just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

214. In relation to compensatory award, S123(6) states that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

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

215. For conduct to be the basis of a finding of contributory fault under S.123(6) ERA, it must have the characteristic of culpability or blameworthiness. This was established in Nelson v BBC (No.2) 1980 ICR 110. The conduct must also have a causal link to the dismissal.

216. In Hollier v Plysu Ltd 1983 IRLR 260, the EAT said that the contribution should be assessed broadly and should usually fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); employee slightly to blame (25 per cent). There would be a zero reduction where the Claimant has not contributed at all by blameworthy conduct.

Polkey

217. Section 123(1) provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

218. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

219. The Polkey assessment will usually be concerned with facts and matters known to the employer at the time of dismissal, but it is not necessarily limited to such facts. The tribunal may have to take into account facts which the employer might have found out if it had acted fairly, and/or future events which may have occurred if the employer had acted fairly. Polkey requires an assessment of the chances of different scenarios unfolding rather than to make decisions, on the balance of probabilities as to what would/would not have happened.

220. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

220.1. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.

220.2. In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).

220.3. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

221. There is no one single "one size fits all" method of carrying out the task. In Software 2000 Ltd v Andrews and ors 2007 ICR 825, the EAT, noted that the relevant principles included:

221.1. in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal

221.2. if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee

221.3. there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal

221.4. however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to make a deduction

221.5. a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

222. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the process

had been fair?", it is not asking itself "would a hypothetical reasonable employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair dismissal not taken place, and had the respondent acted fairly and reasonably instead.

223. As the EAT noted in Granchester Construction Ltd v Attrill UKEAT/0327/12. .

223.1. In paragraph 26, the EAT notes: *we accept that the Tribunal's approach in looking at a reasonable employer rather than at the actual employer was in error and was likely to understate the extent of the deduction that fell to be made*.

223.2. In paragraph 27, when considering the approach to adjustments for contributory fault and/or Polkey, the EAT suggested a tribunal should: *consider what facts and matters the employer would probably have accepted for itself, reasonably, having carried out the investigation that would have been carried out had a proper procedure been followed*.

224. More generally, Attrill considers the approach to making adjustments when deductions to reflect both contributory fault and Polkey might be appropriate. If a tribunal provisionally decides on a percentage reduction to reflect contributory fault, then it is not necessarily an error for the tribunal to decide that applying that full percentage reduction to the compensatory award might not be just and equitable if a Polkey reduction (which takes account of the same conduct by the employee) is also being made. In other words, the tribunal might decide to make a smaller reduction for contributory fault than it might otherwise have made.

225. However, in Attrill, the EAT noted that if the logic just described would not mean that the smaller reduction should be applied to both the basic award and the compensatory award if the Polkey reduction was applied only to the latter.

Breach of Contract

226. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the employment tribunal jurisdiction to consider (some) complaints of breach of contract. Amongst other requirements and exclusions, the claim must be one which arises or is outstanding on the termination of employment.

227. In accordance with the ordinary principles for breach of contract claims, this jurisdiction allows the tribunal to interpret the relevant contractual provisions and – for example – assess what the employee's contractual entitlement was to pay, notice, holiday and pay in lieu of holiday or notice.

228. When a tribunal is considering a wrongful dismissal claim (ie a claim that the dismissal was breach of contract) that requires an entirely separate, and different, analysis than the consideration of whether the dismissal was fair or unfair.

229. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant may have grounds to succeed in a claim for wrongful dismissal.

230. The amount of notice to which an employee is entitled is determined by the contract, subject to the statutory minimum. It is an objective question for the Tribunal to consider whether the Respondent did, in fact, have good cause to dismiss the Claimant for committing a repudiatory breach of contract. Where there is a dispute about whether the Claimant did, in fact, commit certain acts (or make certain omissions) then the tribunal is required to make findings of fact about the Claimant's relevant conduct. In so doing, the tribunal is not limited to considering only the evidence which had been available to the Respondent when it made its decision to terminate. Any relevant evidence presented at the hearing can be taken into account.

231. To assess the seriousness of any breach which is found to have occurred, it is necessary for the Tribunal to consider all of the relevant circumstances including the nature of the employment contract, the nature of the term which was breached, the nature and degree of the breach, and also the nature of the Respondent's business and of the Claimant's position within that business. Having assessed the seriousness, the tribunal will decide if the breach was such that the Claimant had no entitlement to be given notice of dismissal (and no entitlement to a payment in lieu of notice).

232. To amount to conduct which entitles the employer to dismiss without notice, the conduct must be such that it "*must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*" Neary v Dean of Westminster [1999] IRLR 288. So called "gross misconduct" may be established without proving dishonesty or wilful conduct and so called "gross negligence" that undermines trust and confidence may also suffice to justify summary dismissal. Whether it does so is a question of fact and judgment for the Tribunal, taking into account the damage that the acts/omissions caused to the employment relationship. Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22.

233. In defending itself against a claim that it is required to pay damages for failure to give notice when dismissing an employee, the employer is entitled to rely upon facts not known at the time. In other words, it is not only entitled to rely on the reasons that caused it to dismiss, but is entitled to rely on any other repudiatory breach that it later discovers.

234. In Hovis Ltd v Lowton, Case No: EA-2020-000973-LA, the EAT considered what type of evidence an employer might need to present at a Tribunal hearing, if seeking to persuade the Tribunal that the employee had, in fact, acted in the manner alleged (and thereby lost the entitlement to notice of dismissal). On the facts of that case, the Tribunal had not been obliged to accept the employee's denials (or decide that the employer had failed to prove that the misconduct had been committed) merely because the Respondent did not call a live witness to the (alleged) event who

disputed the Claimant's version. The Tribunal can, and must, take account of all the evidence presented to it, including contemporaneous documents and/or hearsay accounts. It was noted that:

> The fact that a hearsay statement has not been given under oath, or tested … at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, …. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.

Unauthorised Deduction from Wages

235. Part II of the Employment Rights Act 1996 deals with Protection of Wages. The right not to suffer unauthorised deductions is described in section 13. Wages are defined by section 27. Employees (and other workers) have the right to receive the wages properly payable on each pay date. Deciding what wages are actually properly payable may require the Tribunal to analyse the meaning of the contract, and to find facts.

236. The Employment Rights Act 1996 includes:

> **13. Right not to suffer unauthorised deductions:**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless -
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> **27. Meaning of "wages" etc**.
> (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,
>
> … but excluding any payments within subsection (2).
>
> 2) Those payments are—
>
> (e) any payment to the worker otherwise than in his capacity as a worker.
>
> (4) In this Part "gross amount", in relation to any wages payable to a worker, means the total amount of those wages before deductions of whatever nature.

Analysis and Conclusions

237. Each of the claims were in time. In each case, the alleged deductions continued up to and including their final payment of wages.

238. In each case, the dismissal reason was conduct. As stated in the findings of fact, Ms Bal and Ms Winsor each genuinely believed that the misconduct, as alleged in the respective dismissal letters, had actually occurred.

239. It might well be true that Mr Halim had other reasons (the family dispute and/or his desire to run the business without input from the claimants) for preferring termination of employment. However, I am satisfied that, on the Respondent's behalf, he delegated the decisions (via his instructions to Davenport) to Ms Bal and Ms Winsor respectively. I have not heard from Ms Bal, but I have heard from Mr Halim and Ms Winsor, and I am satisfied that he did not give some secret instruction that the outcome had to be dismissal, come what may. The fact that Ms Bal decided to give C4 a final written warning, rather than a dismissal, is consistent with Mr Halim's (and Ms Winsor's) evidence that he was content for the individuals appointed to deal with the disciplinary hearings to deal with the decisions on their own merits.

Issue 8.3 was the dismissal fair or unfair

240. Every claimant was offered the opportunity to attend investigation meetings and disciplinary meetings. Every claimant had the chance to be accompanied. Every claimant had the chance to appeal.

241. When requests for postponements were made in December (even in oblique terms), Ms Crosby and Ms Bal granted them.

242. Taking account of the Respondent's size, it was not unreasonable for the Respondent to appoint external consultants. On the contrary, had it not done so, it is likely to have faced accusations that (for example) Mr Halim was not impartial. Ms Alic was also the subject of criticism by the claimants. In any event, Ms Alic and Mr Yildizev both had the role of witnesses to the alleged events of 16 and 17 November 2020.

243. The fact that Mr Halim and/or the Respondent had any prior commercial relationship with Davenport HR and/or Davenport Solicitors is not relevant. The requirement for fairness is that the decision-maker be someone who has not prejudged matters, and will have an open mind both in relation to any factual arguments (whether the alleged conduct did or did not happen) and any arguments about sanction (if the conduct is found to have been proven). There is no requirement that it be someone who had had no prior dealings with the Respondent. On the contrary, the vast majority of disciplinary hearings are conducted by someone who is an employee of the organisation, and that close relationship does not mean that a dismissal (if that is the outcome) is necessarily unfair.

244. In each case, the process followed was fair. It complied with the requirements of the ACAS code. It does not really matter whether the Respondent can demonstrate that

the written disciplinary policy, introduced in October 2020 (on the Respondent's case) applied to these 4 employees or not. Even assuming it did not, the Respondent followed a fair and reasonable process. Even assuming that the new policy did apply, the Respondent complied with it.

C1

245. C1 did not attend his disciplinary hearing, despite knowing about it. Ms Bal had reasonable evidence before her to support the findings of fact that she made.

246. All of the claimants allege that, for the roof incident, the written evidence before Ms Bal was defective in that they think that Mr Yildizev and/or Mr Salici do not speak English well enough to have read over the statements and approved them. That is not a point that they made to Ms Bal. On the face of the documents themselves, it was not unreasonable for Ms Bal to conclude that the contents were truthful and accurate.

247. The roof incident was not in C1's working time, and not actually on the Respondent's premises. (On the Claimant's case, he was on the roof of his own residence, with the approval of the landlord, C4; on the Respondent's case, he was on YFL's roof. Either way, he was not on the Respondent's property.)

248. However, it seems to me, that the incident was very closely associated with his employment and his place of employment. More importantly, he had the opportunity to meet Ms Bal and seek to persuade her that it was an incident that was separate from his employment, and his obligations to the Respondent, and, for that reason, she should not take the decision to dismiss.

249. It was not outside the band of reasonable responses which a reasonable employer could adopt for Ms Bal to decide that using threatening words such as 'I wouldn't keep drilling if I were you' while carrying a crowbar was conduct which merited dismissal.

C2

250. C2 did not attend her disciplinary hearing, despite knowing about it. Ms Bal had reasonable evidence before her to support the findings of fact that she made.

251. The roof incident was not in C2's working time, and not actually on the Respondent's premises, for the same reasons mentioned in relation to her husband, C1.

252. However, it seems to me, that the incident was very closely associated with her employment and her place of employment. She had the opportunity to meet Ms Bal and seek to persuade her that it was an incident that was separate from her employment, and her obligations to the Respondent, and that, for that reason, Ms Bal should not take the decision to dismiss.

253. The assault incident followed on from (on C2's account) C3, C2 and Z all being on the Respondent's premises in a back office, and C2 forming an opinion that, while there, Z had received information that she was going to communicate to Mr Yildizev.

254. Even had the Claimant attended the disciplinary hearing and tried to argue that the assault incident was not work-related, my assessment is that most reasonable employers would have rejected that argument. However, the Claimant did not put it forward in any event.

255. In her 18 January letter, 11 of C2's numbered points are of no significance to the fairness of the dismissal, but she does say:

> How could you legitimately hold internal disciplinary proceedings in advance of the proceedings against me in court?

256. That is a valid observation. There is no absolute requirement to put internal disciplinary proceedings on hold pending the outcome of a criminal case. However, it can be argued – and sometimes is – that it would be unfair for an employee to have to give an account, that could potentially be used as evidence against them in a later criminal trial – in the circumstances of a disciplinary hearing. That being said, C2 asked for postponement of the 23 December hearing, and it was granted. She did not put this particular argument forward when seeking that postponement. Further, she did not request a postponement of the 4 January hearing.

257. I am not, therefore, faced with a decision about whether it was unfair for Ms Bal to refuse to wait until after the criminal trial, despite the Claimant requesting that. I am faced with a decision about whether it was unfair for Ms Bal to omit to wait until after the criminal trial, despite the Claimant not specifically requesting that (although a more general comment, about supposed police involvement being a reason that none of the procedures, for any of the Claimants, should continue had been made by Mr Gorlov). I do not think that, in the circumstances, it was outside the band of reasonable responses to proceed on 4 January 2021.

258. It was not outside the band of reasonable responses which a reasonable employer could adopt for Ms Bal to conclude that the Claimant's conduct on 16 and 17 November (as she found it to have occurred) was grounds for dismissal.

C3

259. C3 did not attend his disciplinary hearing, despite knowing about it. Ms Bal had reasonable evidence before her to support the findings of fact that she made.

260. As with C1 and C2, C3 did not seek to engage with the process, and seek to persuade Ms Bal that (a) he had not acted as alleged in the statements supplied to him or (b) that, in any case, the roof incident was not work-related.

261. Since C3 did not give evidence, I have not had the opportunity to explore with him the extent to which he was able to understand the evidence that was sent to him (all written in English). However, neither his daughter (nor his wife nor his son-in-law) nor Mr Gorlov, who wrote several times to Davenport HR, requested translation of any documents for C3, or requested an interpreter be arranged for any hearings. In the findings of fact, I accepted that C3 had worked in the supermarket (including before the Respondent was incorporated) for about 38 years. It seems likely that he is able to speak and understand spoken English to some extent. In any event, via

the other claimants (in particular C2 - Mrs Mehmet, who played the most active role in responding) he had the opportunity to request that the process take place in Turkish. He did not. Ms Bal refused no such request, because none was made.

262. There was a rational basis for Ms Bal to conclude that C3's conduct was intimidating behaviour, given her findings that the conduct was as described in the outcome letter. It was not outside the band of reasonable responses which a reasonable employer could adopt to dismiss an employee for that.

C4

263. C4 was warned, but not dismissed for the roof incident. There is no proper basis for me to go behind the warning. It was not a manifestly inappropriate sanction.

264. For the shopping accusation, Mr Gorlov submits that Ms Winsor misinterpreted the video evidence and/or that it does not show C4 leaving the supermarket with the items that she has taken from the shelves still in her possession. There was reasonable evidence before Ms Winsor that the Claimant had taken possession of the items, and left the shop without making payment. There was the list produced by Ms Alic too. In any event, C4 had never put forward the argument either (i) that she did not take the items or (ii) that she did pay for them. She had the opportunity to three times to attend an investigation meeting for this, and also the opportunity to attend the disciplinary hearing. (On the latter, it is not conceded by the Claimant that she had been given the actual date and time of the disciplinary hearing. Had the hearing actually taken place without her being notified, I am sure that would have been a point raised at the time. In any event, I am satisfied that, via Mr Gorlov, she let Ms Winsor know that she did not wish to attend a disciplinary hearing, even though she understood that meant it would go ahead without her.)

265. Mr Gorlov also submits that the video evidence does not show C4 leaving the supermarket (with the items that she has taken from the shelves) without having the items put through the till. This is a much more relevant observation about the evidence. However, on the narrow point, I would have been satisfied that Ms Winsor did have enough evidence to conclude that the items had been taken without being put through the till. She had a list of items [Bundle 551] which "Yesim allegedly took". She was not informed by C4 or anyone on C4's behalf that C4 was claiming to have put those items through the till on the day in question.

266. However, my decision is that it was not reasonable to conclude that, just because the Claimant had taken the items and not paid them, that, in and of itself, proved the misconduct. Even without the Claimant attending the hearing, Ms Winsor was obliged to consider the argument that C4 either (i) did have a contractual entitlement to do this or else (ii) incorrectly but honestly believed that she did have a contractual entitlement to do this.

267. It was outside the band of reasonable responses which a reasonable employer could adopt to fail to address that. Ms Winsor had a copy of the 29 May 2020 solicitors letter (in draft) and she would have been able to see from that that Mr Halim accepted that, in the past, before Senior died, C4 had taken shopping from the store. Of

course, had Mr Halim given evidence to Ms Winsor, he was likely to make the same points that have been made before me in this hearing: (i) that was a private arrangement between Senior and his daughter, not between the company and its employee; (ii) the arrangement had not survived Senior's death; (iii) Mr Halim had made expressly clear that the Respondent was not giving permission to do this; (iv) that, in any event, if all the other 3 arguments failed, even in Senior's time, C4 had been obliged to put the items through the till, and the till roll would be signed, in order to let the company know that some stock had been removed and there was not (at the time of removal) any cash placed in the till for it. Had Ms Winsor consciously addressed the matter, it might have been open to her to decide that there was misconduct by C4, but she did not address the nuances. She simply decided that taking the items was theft.

268. Thus, the dismissal was unfair.

269. For Polkey purposes, I have to decide what this employer would have done, if acting fairly. So not what I would have done, and not what a hypothetical employer might have done. It seems to me that there is a fairly high chance that Ms Winsor would have decided that the Claimant did not actually have a contractual right to take the items, without payment; in other words, a fairly high chance that the Respondent's argument that C4 had had only a private arrangement with Senior would have been accepted. For one thing, there is no evidence that this (alleged) benefit in kind had been declared to HMRC, which is more consistent with its having been an informal agreement between father and daughter, not with the intention of creating legal obligations at all (and still less with the intention of creating legal obligations between the corporate employer and its employee). However, that is not the end of the story, because Ms Winsor might have been persuaded that C4 genuinely believed that she had the right to keep the arrangement going, and was not being dishonest, and that (another) final warning, coupled with an unambiguous formal instruction to cease and desist might have been appropriate. I do not ignore that this would have been a second final warning, concurrent with the first, but the conduct was different.

270. Doing the best I can, my assessment is that there is a 50% chance that Ms Winsor would still have decided that it was gross misconduct, with a summary dismissal on 19 February 2021, but also a 50% chance of a warning instead. There is probably a fairly high chance that – in the latter case – C4 would have ignored the warning and been dismissed in due course, but, in light of what I am about to say about contributory fault, I need say no more.

271. In accordance with section 122(2) ERA, there has been conduct by the Claimant before the dismissal such that it would be just and equitable to reduce the basic award. On balance of probabilities, I am satisfied that she was taking the items without putting them through the till. She has not given evidence to say she was putting them through the till, whereas each of Mr Halim and Ms Alic, who have given evidence, genuinely believe that she was not doing so. Furthermore, he attitude to the investigation and hearing was obstructive and unreasonable. As mentioned above, I do not necessarily accept that she was shielding on 19 January 2021, but, even assuming she was, she could have still attended video meetings, or requested

phone meetings. The 9 January communication by Mr Gorlov exemplifies the attitude that was displayed, namely that it was appropriate to "ignore" the Respondent's letters and treat them as a "nuisance".

272. In accordance with section 123(6) ERA, I find that the dismissal was to some extent caused or contributed to by actions of the Claimant. The actions of the Claimant just mentioned in the last paragraph apply here too. In addition, the finding in her favour was because I decided that Ms Winsor had not properly understood that the issue was not simply whether the Claimant had taken the items (without making payment) but why the Claimant had done so (or, more accurately, why the Claimant believed that this was allowed by her contract of employment). This is an argument that the Claimant could have put forward either in a detailed written submission, or by attending the hearing.

273. My decision is that the Claimant is wholly responsible for the dismissal, and that there should be a 100% reduction in the basic and compensatory awards respectively.

Breach of Contract

274. C1 seriously and fundamentally breached the contract of employment. Although the 3 people present on 16 November (Mr Salici, Mr Yildizev and Ms Alic) were not employed by the same company as he was, C1 knew that Mr Yildizev and Ms Alic were involved in the running of the Respondent (whether he liked that or not, he knew they were). Further, he knew (because it was obvious) that Mr Salici's actions were ultimately because of instructions given by Mr Halim, a director of the Respondent (albeit in connection with the operation of another business, not the Respondent's).

275. I am satisfied that he picked up the crowbar deliberately and consciously. I am satisfied that, by his words and actions, he intended Mr Salici, Mr Yildizev and Ms Alic to believe that violence might ensue if they sought to carry on with Mr Halim's instructions.

276. I am satisfied that that he was not on the roof of his own residence at the time, but was on 495's roof. Even if I am wrong about that, he was certainly seeking to prevent the lawful owner and occupier of 495 (YFL) from gaining access to its own roof, and doing so by using threats while holding a crow bar.

277. His actions repudiated his contract of employment with the Respondent.

278. For the roof incident, similar comments apply to C2 as to C1, except that she was not carrying a weapon. C2 was, in some ways, the main instigator of the incident. It was she who had placed the locks on the roof side of 495's roof access doors, and it was she who decided that she was not going to permit people to come out that way from 495. (Not without permission from her, at least, and she did give that permission in due course to Mr Salici.) It was also she who began filming the door when she heard Mr Salici and who told her husband to get ready for a confrontation. (I am not suggesting that she encouraged him to get a crowbar, or that she anticipated that he would do so).

279. In any event, C2 was involved in a violent incident the following day in which she was the aggressor.

280. Either one of these incidents by itself repudiated her contract of employment with the Respondent.

281. For C3, had he been by himself on 16 November 2020, and done only the things that I described above in the findings of fact, then that might not have been enough for me to treat that as a repudiation of his contract. However, he was not by himself. The context in which he used those aggressive words, threatened to break the window, and did, in fact, slam the window closed where that he was accompanied by two other people (C1 and C2) who were, between them, shouting about killing and carrying a weapon. His actions in forming part of that group, coupled with what he said and did personally, repudiated his contract of employment with the Respondent.

282. For C4, it is common ground (more or less) that what C4 did on 4 December 2020 (and any other dates) by taking goods without payment is something that she had done for a long time. By this particular action, regardless of whether she was putting the items through the till or not (and my finding is that she was not, at least not every time) she was not displaying an intention to refuse to be bound by the terms of her contract of employment. She was complying with the contract of employment as she interpreted it.

283. In my judgment, she had been given clear information that Mr Halim was asserting that she should not do this (by his solicitor writing to her solicitor) . However, barring the letters from Ms Crosby (which made clear that there was to be an investigation) there was a lack of a clear and formal instruction from her employer that she would be treated as breaching her employment contract, and summarily dismissed, if she continued.

284. In the circumstances, my decision is that her conduct was not such that she lost her entitlement to receive notice from the Respondent.

Wages Claims

285. The Claimants did receive the net pay that they were supposed to receive in accordance with their agreement with the Respondent.

286. At the time that they were receiving those net payments, the Respondent ought to have been providing them with payslips which showed that same net pay, but also showed a (higher) gross pay. Likewise, the Respondent should have been properly accounting to HMRC for its PAYE obligations, and showing, on the employee's payslips, that it had done so.

287. The Claimants' arguments that they ought to have received what is shown on the new payslips, and that they did not do so, and that therefore there has been an underpayment is misconceived for a number of reasons.

288. Firstly, the Claimants did not have (until Mr Halim sought to regularise matters starting in around 2020) any express agreement with the Respondent about gross pay. The arrangement was that they would be paid their net pay in cash. They were always paid the agreed amount. The amounts that were shown on the old payslips did not reflect reality.

289. Secondly, the new payslips were created to bring about a correction. They were to show the actual gross pay attributable to the net pay which the Claimants had already received. No adjustments to what the Respondent had to pay to the Claimants were necessary or appropriate. The only adjustments were that the Respondent had significantly underpaid PAYE historically, and the new payslips were part of a process for correcting that.

290. Put another way, the Claimants are right that the new payslips, not the old, represent reality, but factually incorrect with the assertion that they have not received already the net wages shown on the new payslips.

Next Steps

291. Unless the parties reach agreement, there will be a remedy hearing to decide whether C4 should be reinstated or re-engaged.

Employment Judge Quill

Date: 11 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

16/8/2023

N Gotecha

FOR EMPLOYMENT TRIBUNALS