EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104925/2022

Held in Glasgow on 13, 14, and 15 February 2023

Employment Judge R King

Miss M Carrington	**Claimant** **In Person**
Scotsman Group Plc	**Respondent** **Represented by:** **Ms S Harkins -** **Employment** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

Introduction

1. The claimant claims that she was unfairly dismissed when her employment was terminated on 16 June 2022. She also claims that she is owed unpaid wages for the period between the end of her furlough and her dismissal. The respondent maintains that it dismissed her fairly for gross misconduct and that she was not entitled to any wages between the end of her furlough and her dismissal.

2. The claimant gave evidence on her own behalf. Adam Cosgrove (the former general manager of the Corinthian) and Justine Conway (the respondent's operations manager) gave evidence on behalf of the respondent. A joint bundle of documents was produced.

Relevant law

Unfair Dismissal

3. Section 94 of the Employment Rights Act 1996 (ERA 1996) provides the claimant with the right not to be unfairly dismissed by the respondent.

4. It is for the respondent to prove the reason for dismissal and that it is a potentially fair reason in terms of section 98 (ERA 1996). At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal; merely that it was capable of doing so.

5. If the reason for dismissal is potentially fair, the Tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 94 (ERA 1996). This depends on whether in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry, the onus on proof is neutral.

6. If the reason for the claimant's dismissal relates to the conduct of the employee, the Tribunal must determine whether at the time of the dismissal, the respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation – ***British Home Stores v Burchell 1978 IRLR 379.***

7. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range.

8. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss – ***Iceland Frozen Foods Limited v Jones 1983 ICR 17 EAT***.

9. Any provision of a relevant Acas Code of Practice, which appears to the Tribunal may be relevant to any question arising in the proceedings, shall be considered in determining that question (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).

10. The Acas Code of Practice on disciplinary and grievance procedures provides that:

    a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of these decisions;

    b. Employers and employees should act consistently;

    c. Employers should carry out any necessary investigations to establish the facts in the case;

    d. Employers should inform employees of the basis of the problem and give them an opportunity to put their case and response before any decisions are made;

    e. Employers should allow employees to be accompanied to any formal disciplinary or grievance meeting; and

    f. An employer should allow an employee to appeal against any formal decision made.

11. The code also provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

Unpaid wages

12. Sections 13 to 27 of the Employment Right Act 1996 (ERA 1996) sets out the provisions that protect workers from unauthorised deductions made from their wages. It is unlawful for an employer to make a deduction from a worker's wages unless:

    a. the deduction is required or authorised by statute or a provision in the worker's contract; or

b. the worker has given their prior written consent to the deduction.

13. Where the total wages paid on any occasion by an employer to workers is less than the net amount of the wages properly payable on that occasion, the deficit counts as the deduction.

14. The issue of what is "properly payable" is the essential question to answer because there cannot be a deduction unless the wages claimed are properly payable in the first place. An Employment Tribunal will therefore need to consider all the relevant circumstances when determining whether a sum is properly payable. As a rule, if employees are ready and willing to work if they are able then they are entitled to be paid – ***Miles v Wakefield Metropolitan District Council 1987 IRLR 193, (HL)***

Issues

15. The Tribunal had to determine the following issues:

a. What was the reason for the claimant's dismissal?

b. Was the reason for dismissal a potentially fair reason within the meaning of section 98(1) and 98(2) of the Employment Rights Act 1996?

c. If, as asserted by the respondent, the reason for the dismissal was related to the claimant's conduct and thus potentially fair, was the dismissal actually fair having regard to section 98 (4) of the Employment Rights Act 1996 and in particular the following:-

i. Did the respondent have a reasonable belief that the claimant had been guilty of misconduct?

ii. Did the respondent have reasonable grounds for that belief?

iii. By the time it held that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

iv. Was the decision to dismiss fair having regard to section 98 (4) of the Employment Rights Act 1996, including whether in the circumstances the respondent acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee?

v. Did the decision to dismiss and the procedure adopted fall within the *"range of reasonable responses open to a reasonable employer*"? ***(Iceland Frozen Foods Limited v Jones 1983 ICR 17)***

vi. If the respondent did not adopt a fair and reasonable procedure, was there a chance the claimant would have been dismissed in any ***event (Polkey v AE Dayton Services Limited 1987 All ER 974).***

vii. Did either party unreasonably fail to comply with the Acas Code of Practice and, if so, should the Tribunal reduce or increase any compensatory award due to the claimant (and if so by what factor not exceeding 25%)?

viii. By her conduct, did the claimant contribute to her dismissal and should any compensatory award be adjusted accordingly (and, if so, by what factor?)

ix. Did the claimant engage in conduct that was culpable of blameworthy and, if so, should the Tribunal make a reduction to any basic award to which the claimant would be entitled (and, if so, by what factor) to reflect this?

x. Did the claimant's conduct amount to a repudiatory breach of contract entitling the respondent to dismiss her without notice?

xi. What financial loss has the claimant suffered in consequence of her dismissal and has she taken reasonable steps to mitigate her loss?

xii. Did the respondent fail to pay the claimant wages that were properly payable and if so by what amount?

Findings in fact

16. Having heard evidence, the Tribunal makes the following findings in fact.

Background

17. The claimant was employed by the respondent from 16 November 2018 until her dismissal on 16 June 2022. The respondent owns and operates eight hospitality venues within Central Scotland. These include the Corinthian Club, 191 Ingram Street, Glasgow, G1 1DA ("the Corinthian") where the claimant was previously employed as a pastry commis chef.

18. Although her contract of employment dated 16 November 2018 provided that her normal place of work was the Corinthian, her contract also provided that:

"***Transfer/mobility***

You may be required to transfer on a temporary or permanent basis to a different unit or place of work depending on the needs of the Company. When possible, reasonable notice will be provided prior to any transfer.

If your place of work is closed during normal hours for any reason (e.g. for refurbishment), the Company may require you to work at another location."

19. The claimant's contract also provided that –

*"**Hours of Work***

Your normal working hours will be 24 hours per week

Your actual hours and days of work will be arranged to suit the needs of the Company and will be confirmed by your manager. Your schedule will be dependent upon the operating hours at the location at which you work. These operating hours are subject to change at the Company's discretion''

20. Her rate of pay at the time of her dismissal was £9.75 per hour, an increase from £9.10 per hour which had taken place in April 2022.

Lockdown/reopening

21. As a result of the Covid pandemic, in common with other hospitality venues the Corinthian was forced to close its doors to customers in or around March 2020. Prior to lockdown, the claimant had worked her 24 hours over Friday, Saturday, and Sunday, always working within the pastry kitchen.

22. When Covid restrictions had been lifted sufficiently to allow it to do so, the respondent decided to open again on 3 June 2021. In readiness for that it organised a series of refresher training days for its employees on 26 and 27 April 2021, which the claimant attended.

23. Following that training the claimant sent an email to the Corinthian general manager Mr Cosgrove on 6 May 2021 in the following terms:

"I have yet to receive confirmation of shifts/rota details but I have been advised and I feel it prudent to inform you that, although it was already stated when I commenced employment, as a carer, my responsibilities for two family members is extensive, and has increased as of late. Due to this I can confirm that I am absolutely still able to commit to my part time hours. However, the days I can be available are Mondays, Tuesdays and Wednesdays. I will require to stick to the originally agreed twenty-four part time hours. I would ideally be open to a start time of 10 am to 6 pm … however I would absolutely have to finish at this time as I will have transport in place at this exact time to get me back to my caring responsibilities."

24. On 10 May 2021, the claimant met with Adam Cosgrove by Zoom call. During that meeting, Mr Cosgrove explained to the claimant that the Corinthian was reopening on 3 June but would only be opening between Thursday and Sunday at first and that an increase in opening times would be dependent on business picking up. In the circumstances and considering the claimant's limited availability he informed her that the respondent would keep her on furlough for the time being. She was content with that arrangement.

25. On 25 May 2021, the claimant emailed Mr Cosgrove setting out a list of concerns, principally about the staffing and conditions within the pastry

kitchen, that she wished to discuss with him. Mr Cosgrove replied to her on 25 May and invited her to a Zoom meeting to discuss her concerns, which took place on 22 June 2021. At the end of that meeting, Mr Cosgrove assured the claimant that he valued her input in relation to the conditions within the kitchen and explained that that the respondent would do everything it could to make sure the kitchen was in the best possible condition for her and for her colleagues to return to work. Mr Cosgrove also confirmed that as matters stood the Corinthian would still open from Thursday to Sunday for the time being, but that he would contact her if that changed. In the meantime, she would remain on furlough.

The end of furlough

26. On 30 September 2021, the government's furlough scheme ended. Therefore, on 9 October 2021, the head chef at the Corinthian, Matthew Mills, telephoned the claimant to discuss her return to work. As the venue was still not yet open on Monday or Tuesday, he proposed that she would return to work between Wednesday and Friday each week and that she would work in one of the general kitchens within the club instead of the pastry kitchen where she had normally worked in the past. That proposal was permissible in terms of her employment contract. However, the claimant was unwilling to return on that basis.

27. Subsequently, the claimant e-mailed Mr Cosgrove on 7 December 2021 in the following terms:

"Hello Adam,

I was recently contacted by the new head chef about returning to work, but in a different kitchen and on different hours and days to what I had already agreed with yourself.

So I am just emailing to confirm and let you know that I prefer and am happy to wait for the shifts to come up in the pastry kitchen as we discussed and agreed."

28. On 10 February 2022, Mr Cosgrove telephoned the claimant. He explained to her that as furlough had ended but the venue was still closed on Mondays and Tuesdays with no plans to change in the foreseeable future, she would have to return on different days to those she had been holding out for before furlough ended. In common with Mr Mills, he proposed that she return to work on Wednesdays, Thursdays, and Fridays in the main kitchen in the Corinthian. The claimant explained to Mr Cosgrove that because of her caring responsibilities at home she was only prepared to return on Mondays, Tuesdays, and Wednesdays. She also made it plain that she would only work in the pastry kitchen at the Corinthian.

29. The claimant asked Mr Cosgrove if redundancy was available, but he explained that this was not his decision, and she would need to speak to human resources. When the claimant mentioned the possibility of resigning instead, Mr Cosgrove explained that would be a decision for her to make if she believed it was in her own best interests.

30. Following their call, the claimant e-mailed Mr Cosgrove on 12 February 2022 in the following terms:

"Dear Adam,

Further to your recent telephone call, I have spoken with my family who have advised me to initially ask for clarification on whether you are asking me to resign (effectively sacking myself) or whether redundancy is an option?

Once this is clear, I should be in a better position to consider/respond.

Thank you.

Mel"

31. On 17 February 2022, the respondent's Head of HR and Reward, Fiona Armour, emailed the claimant in the following terms:

"Dear Mellissa,

I am writing to you following your recent conversation with Adam Cosgrove, general manager, and his attempts to speak to you personally regarding your availability to work as you have not been at work since September 2021.

When you last spoke to him you advised him that the hours you would be available to work were 10am until 6pm and the days of work Monday, Tuesday and Wednesday but as he explained to you due to the current trading patterns the venue is closed on a Monday and Tuesday.

In addition, I believe he also discussed the duties that were required and he made you aware that due to the current workload you may be required to work in the main kitchen but when you spoke to him you made him aware that you only wanted to work in the Pastry Kitchen but at this time we don't have the hours available at the time when you can work.

Adam would like to meet with you on Monday 21st February 2022 at 10.00 a.m. at Hamilton House, 70 Hamilton Drive, Glasgow, G12 8DR so that he can discuss the current situation and work with you to facilitate your return to work.

We look forward to seeing you on Monday."

32. The claimant replied on 20 February 2022 by e-mail explaining that she was unavailable to meet on 21 February and seeking an alternative date, so Miss Armour emailed her on 21 February asking for her availability. On 28 February, the claimant emailed Miss Armour and Mr Cosgrove as follows:

"Sorry for not being in touch sooner regarding rearranging this meeting.

We have been really busy these past couple of weeks with some urgent issues that needed sorting.

As of yet I am unsure as to when we would be free for a meeting, but will be in touch before the end of the week with a date."

33. By 14 March 2022 the claimant had not yet been in touch so Miss Armour emailed her in the following terms:

"Good Morning Melissa,

I am reaching out to you as we have not heard from you since your email dated 28th February 2022 when you advised you would contact with your availability to meet with Adam and myself.

You have not attended work since September 2021 and when you last spoke to Adam you made him aware that you were only able to work Monday to Wednesday during the day but at this time the venue is closed on a Monday and Tuesday.

Please contact me by 12 noon on Wednesday 16th March with your availability to meet with myself and Adam Cosgrove, General Manager.

I look forward to hearing from you and make the necessary arrangements to meet."

34. As the claimant did not respond by that deadline Miss Armour emailed her again on 16 March 2022 in the following terms:

"The Company has yet to receive any communication from you following my email which was sent to you Monday 14th March 2022 requesting that you contact us to arrange the meeting regarding your continued absence from work.

You are now required to make contact Adam Cosgrove, General Manager, on 24 hours of receipt of this letter, failing which a disciplinary hearing will be convened in respect of your continued unauthorised absence."

35. The claimant emailed Miss Armour on 17 March 2022 in the following terms:

"Good Morning Fiona and Adam,

I have every intention on getting back to you regarding our previous correspondence.

As I have stated before, I have had a lot to deal with these past few weeks.

I will be emailing you both again before 5pm today.

Thank you for your patience, sorry about the inconvenience."

36. On 18 March 2022, Jennie Dodd, HR business partner, emailed the claimant in the following terms:

"Good morning Melissa,

I am contacting you as Fiona is now on holiday until the 28th March. I had tried to contact you by phone this morning but was unable to reach you.

In your email yesterday to Fiona and Adam you had said that you would make contact by 5pm yesterday to give your availability for a meeting to discuss your returning to work however you have not made any contact with either of them. Can you please contact myself or Adam by no later than 12pm on Monday 21st March with your availability for a meeting. If you do not provide your availability by Monday then a disciplinary hearing will be arranged in respect of your continued unauthorised absence from work.

We do understand that you have had urgent issues to deal with however we really do need to speak to you to discuss your future employment."

37. On 18 March 2022, the claimant replied in the following terms:

"Firstly, I send sincere apologies for delays in arranging a date for a meeting. Partly due to my availability due to my carer responsibilities and partly due to my understanding that Fiona was also unavailable due to annual leave.

Also, apologies for unfortunately missing your unexpected telephone call Jennie as I was outside in a busy environment to be able to answer. Further, I had been awaiting clarification with answers to my last reply to you Adam and Fiona with respect to my question in regards of voluntary resignation Vs redundancy.

Hence, I reply to all three of you now.

To be as clear as I possibly can from my stance I would like to clarify that I am absolutely happy to await a time post-covid to return to work once the

hours and conditions are available as discussed and agreed with Adam during our video call and subsequent follow-up confirmation emails in May 2021.

I trust this makes things clearer for everyone and look forward to hearing from you with dates for my return to work once things get back to normal post-covid."

38. Jennie Dodd replied immediately to the claimant's 18 March e-mail, asking for her availability for a meeting to discuss that email and her return to work. The claimant did not reply until 5 April 2022 when she offered to attend a Zoom meeting on Tuesday 12 April 2022. Eventually a Zoom meeting was arranged for Monday 11 April, in advance of which the claimant e-mailed the respondent on 9 April in the following terms:

"Before this meeting on Monday I would like to address a couple of issues.

I have contracted COVID-19. I am currently quite ill with it but hope to improve over the weekend so I am still going to be there for this meeting.

I would also like to address the tone of the letters I have received and make it clear that I have not been "absent from work" nor failed to reply, contact or attend meetings… Rather, I have been awaiting hours as agreed with Adam on 22.6.21. I have cooperated by replying to each telephone call and email received."

39. A Zoom meeting between the claimant, Mr Cosgrove and Miss Dodd took place on 11 April 2022. The respondent's notes of that meeting record the following exchange:

"AC As you are aware the Corinthian is still operating Wednesday to Sunday, it is not open on a Monday and Tuesday due to lack of business. You stated that you want to work a Monday and Tuesday as opposed to the shifts you used to work in Corinthian however Corinthian cannot accommodate at this time due to being closed. However, there may be other venues in Glasgow that you can work. For clarity what days and times would work best for you?

MC *Just what we agreed when we last spoke, Monday to Wednesday.*

AC *To be clear, it was not an agreement. If the venue had opened up on a Monday and Tuesday, it could have accommodated but the venue is not open on a Monday and Tuesday. Would you be able to work in another venue?*

MC *I am not sure, where?*

AC *I am not sure at this stage, we would try and make sure City Centre but just want to speak openly to see if you can work elsewhere. Melissa – what is your desired outcome to this?*

MC *I am not sure, would have to think about it, best to see what is on offer and get back to you.*

AC *So just to clarify what times on a Monday, Tuesday and Wednesday are you available to work?*

MC *Monday, Tuesday and Wednesday 9 - 5*

AC *Is there anything else you want me to take into consideration or just to see what options are out there?*

MC *To see what options there are.*

JD *To confirm which locations would suit you – City Centre and West End?*

MC *Yes, local Glasgow."*

40. Shortly thereafter, the respondent arranged a further Zoom call with the claimant to take place on 3 May 2022 for the purpose of informing her of a suitable opportunity it had identified at another of its Glasgow venues. Although the claimant had accepted the meeting invite, as a result of a breakdown in communication, the meeting did not go ahead as planned.

41. On 4 May Jennie Dodd emailed the claimant in the following terms:

"I am getting in contact as you did not attend the meeting arranged with Adam Cosgrove yesterday and did not let him know that you would not be attending. The purpose of the meeting was to discuss the opportunity to work your requested weekly hours (Monday to Wed 9am to 5pm) in Social in Royal Exchange Square as that is a venue that can accommodate this request. If this is something you would like to do, can you please advise when you are available early next week so that we can arrange a meeting with the Head Chef in Social to discuss your return to work.

If you do not wish to transfer to Social can you then advise if you will be returning to work at Corinthian on the days that they are open and the shifts that you used to work, and if not what your intentions towards your employment at Scotsman Group. We have already notified you that it is not feasible that an employee does not complete work unless there is an authorised reason for a long term absence, and the company does have work available for you."

42. As the claimant did not respond to that e-mail, Jennie Dodd e-mailed her on 13 May in the following terms:

"Can you please come back to myself and Adam by Monday 16th on our email below and confirm what you intend to do in regards to returning to work at Corinthian on the shifts that you used to work, or if you wish to transfer to Social in order to accommodate the shifts that you have informed Adam that you can now work.

As you are currently absent from work, with work available for you, we do require you to let the company know when you will be returning to work."

43. The claimant replied by e-mail on 21 May 2022 in the following terms:

"Sorry for the delay in getting back to you both, I am currently dealing with a lot. I am in the process of writing a more in-depth reply to both of you regarding the current situation and my options.

I intend to get back to you both no later than Tuesday next week with my full reply."

The disciplinary hearing

44. On 23 May 2022, Jennie Dodd emailed the claimant in the following terms:

"Dear Melissa,

DISCIPLINARY HEARING INVITE

Thank you for your email dated 21st May 2022, and I am sorry to hear that you are dealing with a lot. Melissa, in regards to your response that you are writing, I would like to again clarify the company's position on this matter. At the end of lockdown around May 2021 you informed Adam you could no longer work your normal working pattern in the Corinthian and that you were now only available Monday to Wednesday. At that stage, the Corinthian was not open at the start of the week therefore it was agreed by Adam that you would remain on furlough. Since furlough ended in September 2021, the company has tried to engage with you to discuss your returning to work as it is simply not feasible that an employee does not work but remains employed but you have been difficult to contact, taking time to reply to emails and cancelling or not attending meetings. It has been discussed with you that the Corinthian remains closed at the start of the week, and therefore on the shifts that you have requested to work, and there are no plans for this to change.

Therefore, as previously detailed to you in my email of 4th May, your options in regards to employment are that you return to Corinthian on your previous working pattern of weekend shifts, or you transfer to Social (as per the mobility clause in your contract of employment) as that is the only venue that can currently accommodate the shifts that you have requested to work. It has been made clear that the company has work available for you and as per my emails of 17th and 20th May 2022, your absence remains unauthorised.

You failed to attend a total of three meetings without reasonable explanation and your intention to revert to us on Tuesday this week lacks both credibility and substance. Your repeated failure to confirm your return to work is unacceptable and will no longer be condoned.

Accordingly, you are invited to attend a disciplinary hearing on 26th May 2022 for unauthorised absence and failure to reasonably follow absence reporting procedures. The invite to the disciplinary is attached to this email and a link for a Zoom video meeting for this hearing is below."

45. The disciplinary letter attached to Miss Dodd's email of 23 May 2022 was in the following terms:

"Dear Melissa,

The Company has yet to receive any communication from you regarding when you intend to return to work. Since you failed to attend the pre-arranged meeting on 3rd May 2022, the company has contacted you on 4th, 13th, 17th and 20th May and you have still failed to engage in the matter of you returning to work.

This is now a serious matter and as you have failed to enter into discussions about your return to work and in respect of your continued unauthorised absence, we would like to invite you to a disciplinary meeting, details as follows:

Date: Thursday 26th May 2022

Time: 11:00am

Location: Via Zoom Call (details in the email that this letter was attached to)

The meeting will be held by Adam Cosgrove, General Manager, with myself in attendance as company witness and notetaker.

Please note that a potential outcome of this meeting could be your dismissal from the Company.

You have the right to be accompanied by a work colleague or an appropriate trade union representative at this hearing.

…

if you fail to attend without good reason or prior notification, the hearing will be dealt with in your absence and a decision will be made based on the evidence. As this meeting may result in dismissal, I urge you to attend.

46. The claimant did not initially respond, so Miss Dodds sent her a further email on 26 May 2022 resending the disciplinary hearing invite and a link to a Zoom meeting. In response, the claimant e-mailed Miss Dodds and Mr Cosgrove on 26 May as follows:

"Further to your May emails which I have recently discovered.

You have been advised and aware that throughout May I have been recovering from covid as well as having my caring duties and responsibilities.

At no point have I been unavailable for work.

Rather you have chosen not to offer hours."

47. Miss Dodd responded on 26 May to that e-mail as follows –

''To confirm, your position is not accepted that you are ''not unavailable for work rather than us failing to offer you hours". It has been made clear that your request to change your working hours and days could not be accommodated at Corinthian as a result of the pandemic. To clarify, you have attended one meeting to allow us to consider alternatives in an attempt to grant your request and you have been made fully aware since that meeting that there are shifts available for you (e-mails of the 4th and 13th May attached). In addition, there have been no medical certificates provided to support your absence and significant effort has been made in order to get you to return to work and you have declined every opportunity therefore, your absence remains unauthorised''

48. The disciplinary meeting eventually went ahead on 6 June 2022 by Zoom call. At the outset, the claimant read from a prepared written statement as follows:

"You have ignored, disrespected and disregarded any responses I have made, making it impossible for me to liaise nor negotiate with you. Therefore, you must now put anything formally in writing to me in order that I may

consider it and take further as necessary. I have attended this meeting as demanded. I expect to be paid for my time in this and any future occasion I have to connect with you. I repeat… I have been available for work (to attend a job I love) since furlough ended."

49. Having read her statement, the claimant disconnected from the call and did not attempt to reconnect. During the short time the claimant had joined the call there had been no technical issues. However, for the next 30 minutes Mr Cosgrove attempted to telephone the claimant to see if there was a technical problem. He also texted her asking her to get in touch. However, she did not answer or return his call and she did not reply to his text.

The decision to dismiss

50. In the circumstances, Mr Cosgrove concluded that the claimant had voluntarily absented herself from the disciplinary hearing. He therefore proceeded to make a decision in her absence, as the disciplinary letter had confirmed would happen.

51. Mr Cosgrove's decision was that the claimant should be dismissed without notice. In his written rationale, Mr Cosgrove noted the following key factors that he had relied on:

"

- *Failure to engage with the company to facilitate a return to work, including a refusal to attend meetings and multiple email correspondence that was not responded to.*
- *The company looked at options that would accommodate the working pattern that Melissa had requested but Melissa failed to respond to communication around this.*
- *Melissa was unwilling to discuss any options around returning to work and had not put forward any valid reasons as to why she could not return other than that she wanted to wait until hours in the pastry*

kitchen at Corinthian were available on the days that she wanted to work.

- *It was made clear to Melissa via email that it was not feasible that an employee remained employed without attending work although she was unwilling to accept this. Furthermore, Melissa did not give us the opportunity to discuss the options or explain to her in person why she could not remain absent from work."*

52. His rationale document also stated that:

"The reasons for my decision are:

As Melissa is not attending work and is being evasive in all attempts to discuss options with her around facilitating her return to work, I have no option than to dismiss Melissa as this situation has now been ongoing for several months and are no further forwards to resolving and Melissa remains unwilling to engage with us on the subject."

53. Mr Cosgrove wrote to the claimant on 16 June 2022 confirming that his decision she would be dismissed without notice and explaining in that letter his detailed reasons which he summarised as follows:

"To conclude, I have reviewed all the current evidence before me, including the content of your statement as read and I am entirely satisfied that you have displayed an unreasonable and unacceptable unwillingness to return to work since furlough and that you have been reluctant to discuss your request to change your working days. I believe that the communication between you and various managers including the HR department unequivocally show that the company were more than willing and able to accommodate your request and that it was clear that your absence was considered as unauthorised from October 2021. Most importantly, I made clear that there was work available for you in order for you to return to work. In addition, your lack of communication and overall attitude throughout your absence has been unsatisfactory and your ongoing absence is not sustainable. Your actions

demonstrate that your assertions are superficial and the reality of the situation is quite simply that you have no intention of returning to work.

I wish to make it abundantly clear that had you returned to work when you requested in October 2021 and attended any of the meetings set to discuss your requests then this entire situation could have been avoided.

Your actions amount to a serious breach of your obligations such as to warrant dismissal without notice and without any further warnings. It is therefore reasonable for me to dismiss you.

You have the right to appeal against your dismissal. If you wish to appeal then you must do so in writing to Fiona Armour, Head of HR and Reward, within five working days of the date of this letter, stating your grounds of appeal."

The appeal against dismissal

54. The claimant sent an email to Fiona Armour dated 21 June 2022 setting out her reasons for her appeal, which were as follows:

"I am writing to formally appeal against the disciplinary penalty of ''dismissal due to gross misconduct'' imposed on me on Monday the 6th of June 2022.

I disagree with the disciplinary action even being taken against me.

I feel the outcome was not a fair one.

I would be grateful to hear from you regarding what will happen next with the appeal process."

55. The claimant's appeal hearing took place before Justine Conway, operations manager, on 27 June 2022 by Zoom meeting. The claimant was offered every opportunity to make representations to Miss Conway.

56. The claimant submitted to Miss Conway that she had not received any offers of alternative work between Monday and Wednesday, which were the days she was willing and able to work because of her caring responsibilities. In the circumstances she maintained that her absence had not been unauthorised

because she had never been given any shifts. Had she been given shifts she would have come to work. When Miss Conway asked the claimant whether she recalled having been offered shifts between Monday to Wednesday at the Social, she replied that she did not remember such an offer being made.

57. Following the appeal hearing, Miss Conway retired to consider her decision. Having done so, she wrote to the claimant on 4 July 2022 rejecting her appeal. In respect of the first ground of appeal, that disciplinary action was taken unfairly, Miss Conway concluded:

"To conclude, based on the evidence I have reviewed including the correspondence between yourself and the company, I am satisfied that it was made clear to you and that you were fully aware that your absence was unauthorised throughout your entire absence. In addition, at the appeal hearing, you provided no substantial evidence that supported your viewpoint that your absence was not considered unauthorised by us due to you allegedly not being offered shifts. It is my decision therefore not to uphold this point of your appeal."

In respect of the claimant's second ground of appeal, that dismissal was unfair, she stated

"In conclusion, based on the information available to me, I am entirely satisfied that the company have made every effort to accommodate your request for a change to your terms and conditions to support your caring responsibilities but also to facilitate a return to work for you. Equally, communications show that your responses were not timeous or satisfactory and you displayed a complete lack of communication and cooperation throughout your entire period of absence which made it extremely difficult for the company to get you back to work or even meet with you.

Accordingly, I find that the decision made from the disciplining offer to terminate your employment was fair. Therefore, it is my decision not to uphold this point of your appeal.

In summary, based on all the evidence above me, your lack of engagement with the business' many attempts to contact you, it is my decision to uphold the original decision to terminate your employment due to gross misconduct."

58. Following the claimant's dismissal, she has not applied for any other paid work, having chosen instead to remain as a full-time carer for her family for which she received a Carer's Allowance. She also receives payment of Universal Credit each month. In addition, she trains guide dog puppies at home for which she receives no pay.

59. The Corinthian remains closed on Mondays and Tuesdays.

Submissions

Respondent submissions

60. On behalf of the respondent, Miss Harkins submitted that the claimant had been dismissed for a reason related to her conduct which was a potentially fair reason. Referring to ***Chubb Fire Security Limited v Harper 1983 WL 216016***, she submitted that the fairness of the respondent's decision could only be assessed on the basis of the facts known to it at the time of dismissal.

61. The respondent's witnesses had been credible and reliable. Mr Cosgrove had been "*up front*" with his evidence and had accepted that he could not remember every detail of the case. However, overall, he had been clear and honest. Similarly, Miss Conway had given her evidence clearly and honestly.

62. She expressed sympathy for the claimant who was unfamiliar with the Tribunal process and may have introduced in evidence certain matters that were not before the respondents when it took its decision to dismiss. However, the claimant's evidence generally was less reliable than that given by the respondent's witnesses and if there was any dispute in relation to material facts, the Tribunal should prefer the evidence of the respondent's witnesses.

63. The dismissal had been procedurally fair. The claimant had been invited to a disciplinary hearing, the allegations had been made known to her, she had

been informed that dismissal was a possibility and she had been offered the right to be accompanied. Thereafter, a disciplinary hearing and appeal hearing had taken place. There had been no procedural unfairness and the respondent had always acted in accordance with the Acas Code.

64. Regarding the disciplinary hearing that took place on 6 June 2022, Miss Harkins submitted that the respondent had acted reasonably in continuing with the hearing when the claimant had disconnected from it and had not responded to attempts to contact her. She was well aware, because she had been told so, that a decision would likely have been made in her absence if she did not attend.

65. The claimant had given evidence to the Tribunal in relation to her mental health and her family responsibilities at the material time, which was acknowledged would have been relevant at the time of dismissal had they been advanced at that time. However, these were never brought to the respondent's attention at any time during the dismissal process or prior.

66. The alternative reasons for dismissal suggested by the claimant; namely that she had raised concerns about the workplace in an email to Mr Cosgrove or because the respondent had taken on a younger worker, were without foundation. The true reason for dismissal was the reason relied upon by the respondent.

67. It had been the respondent's genuine belief that the claimant's position was that she could only work on Monday and Wednesday between 9am and 5pm. It had been reasonable for the respondent to proceed on the basis that the claimant's stated position of wishing to work three eight-hour shifts Monday to Wednesday in the pastry kitchen in the Corinthian was a 'red line' and not simply a preference.

68. The respondent's email to the claimant on 4 May 2022 was a clear offer to discuss an alternative arrangement at the Social, to which the claimant did not respond. This offer was permitted by the claimant's mobility clause as the Social venue is only a short walk from the Corinthian. This was a genuine attempt to consult with the claimant about a new working arrangement in

circumstances where her wish to work Monday to Wednesday, 9am to 5pm, in the Corinthian was not achievable because the club was not open on those days.

69. The claimant's communication with the respondent had been poor. She had been generally slow to reply and evasive and she had not responded when she was offered a suitable alternative shift pattern at the Social.

70. In all the circumstances dismissal without notice had been within the range of reasonable responses available to the respondent.

71. So far as the claimant's claim for unpaid wages was concerned, Miss Harkins submitted that in circumstances where the working pattern insisted on by the claimant had not existed and, as a result, she had not worked any hours after furlough, she had no claim whatsoever for unpaid wages. Offers of Monday to Wednesday 9am to 5pm at the Social and a different regime of hours at the Corinthian Hotel had both been rejected. The claimant simply could not complain about unpaid wages when she had rejected those offers and insisted that she would only return to work on days when the club was not open for business.

72. In relation to mitigation, the claimant had not mitigated her loss. There was no evidence that she had applied for any work at all following her dismissal other than enquiring informally with her sister's employer about some seasonal part time work, which had not come to anything. Instead of applying for other paid work she had chosen to continue in her caring role at home and to look after guide dog puppies, which she also did from home. In the circumstances she had chosen not to mitigate her loss and therefore she should not be entitled to any compensation for loss of earnings even if her dismissal was unfair.

73. On the matter of contribution, Miss Harkins submitted that the claimant's contributory conduct was such that any compensatory award should be reduced by 75% because her failures to engage with the respondent had entitled them to take disciplinary action.

74. Miss Harkins also invited the Tribunal to consider that even if the claimant was successful, the Corinthian was still not open on a Monday or a Tuesday and therefore even if she had not been dismissed, she would still not be working if she maintained the same position she had maintained all along.

Claimant's submissions

75. While she admitted that there had been gaps in her communication with the respondent over the year, she was waiting for the respondent to instruct her to return to work at a date, place, and location of its choosing. Had it done so, she would have returned regardless of whether that instruction had been her first choice. She would have felt obliged to return and having returned she would have negotiated or sought to negotiate a different arrangement. In those circumstances, she had not been absent without leave. She had never "*withdrawn her labour*" and the respondent had misunderstood her position.

76. She explained that during the period in question, she had encountered difficulties in her role as a carer and had been struggling with her own health. It had been harsh and unempathetic to move straight to dismissal without consideration of a warning. In that regard, she felt that the process had been unfair and unreasonable.

77. In all the circumstances, the respondent's decision to dismiss her had been unfair. She had never lied, stolen, cheated or behaved wrongly towards any other member of staff. Her conduct had always been commendable. She rejected any notion that her conduct had been unacceptable.

78. So far as mitigation was concerned, she had been a full-time carer since her dismissal but she would have remained open to fulfil any hours offered by the respondent.

Discussion and decision

Unfair dismissal

79. While the respondent had initially been prepared to wait and see if a Monday to Wednesday shift arrangement at the Corinthian became available, that was

no longer sustainable when furlough ended, and the venue was still closed on those days. The respondent had therefore acted reasonably when it sought to engage with the claimant to facilitate her return to work on different arrangements, which were permitted by the terms of her contract of employment.

80. It appeared to the Tribunal that the claimant's failure to engage with the respondent's reasonable attempts to find a suitable alternative working arrangement was wilful and clearly a source of great frustration for the respondent over a period of several months. She failed to provide a proper explanation for her unacceptably erratic contact and on those occasions when she did make contact, she failed to engage meaningfully with the respondent's reasonable attempts to discuss her return. That lack of engagement continued even after a Monday to Wednesday shift arrangement at the Social, which fitted in with her stated caring arrangements, was offered.

81. In the circumstances the respondent was entitled to conclude that the claimant had no intention of returning to work other than to the Corinthian on days that were acceptable to her. It was therefore entitled to conclude that she was absent without leave after October 2021 when Mr Mills told her that she would need to return to work on days and times when the Corinthian was open, and she could no longer hold out for a Monday to Wednesday shift pattern.

82. At no time during her absence did the claimant submit a sick line or otherwise inform the respondent that she was too ill to return to work at any time. Nor did she make a flexible working request in order that her caring responsibilities might be better accommodated.

83. In all the circumstances, the respondent was entitled to consider the claimant's lack of engagement about her return to work to be wilful and motivated by an insistence that she would not return other than to the pastry kitchen at the Corinthian between Monday and Wednesday. It was also entitled to treat her continued absence as unauthorised and therefore a

serious disciplinary matter. The Tribunal therefore accepted that the reason for the claimant's dismissal was a reason related to her conduct.

84. The Tribunal finds that the respondent carried out a fair and thorough investigation into the claimant's alleged conduct, which was reasonable in the circumstances, and that at each stage of the disciplinary process it engaged as fully with her as she allowed it to and considered her explanations for her actions.

85. The respondent was also entitled to conclude that the claimant had no intention of participating in the disciplinary hearing when she disconnected from it, having read a preprepared statement, and neither attempted to re-join or responded to the respondent's attempts to contact her. The respondent therefore acted reasonably when it concluded she had absented herself voluntarily from the disciplinary hearing on 6 June and it was entitled to make a decision in her absence.

86. In all the circumstances the Tribunal finds that the respondent had a genuine belief on reasonable grounds that the claimant absented herself from work without authority in circumstances where reasonable offers of shift arrangements permitted by her contract had been made to her and she had failed to engage with them. The respondent was entitled to find that the claimant's request for Monday to Wednesday at the Corinthian was not simply a "preference" but "a red line" that she would not cross, even when it must have been plain to her that it was impossible for the respondent to meet her demand.

87. This was a serious matter for the respondent, which was disruptive to its business, which was trying to recover after the Covid lockdown. The Tribunal therefore concludes that the claimant's dismissal was within the band of reasonable responses available to the respondent and was not unfair.

88. It was also evident that the respondent adopted a fair procedure throughout and that it complied fully with the Acas code.

Wages claim

89. So far as the claimant's claim for unpaid wages is concerned, the Tribunal was in no doubt that the claimant was not ready, willing, or available to return to work after furlough ended. She made this abundantly clear by virtue of her unwillingness to engage meaningfully and timeously with the respondent despite its many reasonable efforts to consult with her about a return to work after the end of furlough on terms that were permitted by her contract of employment.

90. In the circumstances, the Tribunal finds that the claimant had no intention to return to work between the end of her furlough and her dismissal and her claim for unpaid wages for that period must therefore fail.

Employment Judge: **R King**
Date of Judgment: **16 March 2023**
Entered in register: **20 March 2023**
and copied to parties