Case Number: 2401693/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr Kelvin Clayton**

Respondent: **J D Weatherspoon PLC**

Heard at: **Caernarfon** **On: 8, 9 and 10 January 2018**

Before: **Employment Judge Hargrove (sitting alone)**

Representation:

Claimant: Mr Waring (Counsel)

Respondent: Mr Siddall (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:-

(i) The Claimant was unfairly dismissed

(ii) Had a fair procedure had taken place the Claimant would have been fairly dismissed in any event, and the Claimant contributed to his dismissal by his own blameworthy conduct whereby it would not be just and equitable to make a basic or compensatory award.

(iii) The Claimant's claim of wrongful dismissal is not well founded.

REASONS

1. The Claimant's claims, made in the ET1 dated 21 April 2017 were of unfair dismissal and of wrongful dismissal from his post as Hotel Manager at the Castle Hotel, Ruthin on the 15 December 2016. The Respondent in its Response dated 19 May 2017 asserted that the Claimant had been fairly dismissed for gross misconduct. At the Tribunal hearing the Respondent began and called the following witnesses:-
   - (i) William Llewellyn (referred to in these reasons as WL), the Respondents former Pub Manager at the Market Cross in Holywell, Flint,
   - (ii) Ian Hughes (IH), the Dismisser, former Pub Manager at the Picture House Colwyn Bay, who then took over as Pub Manager at the Castle Hotel,
   - (iii) Phil Stephenson (PS), Area Manager North Wales, who conducted the appeal.

2. Background.

   2.1. The Claimant was appointed as Hotel Manager at the Castle Hotel Ruthin by letter of 22 December 2011 to start on 9 January 2012, with an induction at Watford Head Office, see page 79. A statement of terms and conditions was signed by the Claimant on 22 December 2011, page 83. That document identified the Claimant's then salary as £14,734.00 per annum for a 40 hour week plus 28 days holiday per annum, the holiday year being from 1 April to 30 March. It was silent as to the number of days per week the Claimant was to work. It provided that the Claimant should take instruction from the Pub Manager and Area Manager. At that time PS was the Area Manager. The Pub Manager from 2012 to July 2014 was Ellen Price-Devitt. She was replaced by Claire Barrett until August 2015 when she left on maternity leave. She was replaced at first on a temporary basis pending maternity leave by Fiona Roberts (FR) and then permanently from March 2016.

   2.2. On the 17 November 2016 PS went off on compassionate leave following the death of his mother and was off until 5 December. Shortly after the 17 November 2016 WL was contacted by Alan Kay, who was standing in as Area Manager for PS at the time, to conduct an investigation into the Claimant's conduct. Alan Kay had apparently been doing a "blue bag" with FR, the Pub Manager. A blue bag amounts to a review of weekly performance and figures. FR had apparently raised some concerns about whether the Claimant was working his contracted hours, and his time sheets; and about the Claimant's claim for 3 days compassionate leave at the end of

November to assist in his 96 year old mother's move to a specialist care home with dementia.

2.3. Alan Kay contacted WL to conduct an investigation into the Claimant's conduct. He also informed WL that the Claimant had contacted him (AK) by email on 22 November with a request that the Claimant's compassionate leave should be paid.

2.4. WL arranged a meeting with FR at the hotel on 29 November 2016. Claire Gill, another Pub Manager at a pub in Shotton, was in attendance and took notes (see pages 111 to 129). Each page of those notes was signed by FR. A day or so later FR delivered or sent to WL a document which she had apparently obtained from Personnel headed "Time Sheet Record" and dated 30 November 2016. This is an important document because it contains the background information which forms the basis for two of the subsequent allegations of gross misconduct made against the Claimant, those relating to his weekly hours worked and the rostering of his shifts and holidays between 28 December 2015 and 28 November 2016. See pages 127 to 135. WL conducted some further investigations including viewing some CCTV footage of the Claimant leaving the premises on 21 November 2016 at 8.10pm; and on 25 and 26 November when some alleged altercations had taken place between the Claimant and FR, which formed the basis of allegations 5 and 6, of insubordination.

2.5. At 5pm on 6 December 2016 the Claimant was called to an investigatory meeting with WL, again attended by Claire Gill. The Claimant was not notified in advance. He was unaccompanied but did not ask to be accompanied. Claire Gill's notes of that meeting are at pages 153 to 175 the notes are countersigned on each page by the Claimant who agrees that he had the opportunity to read them.

2.6. WL took time to consider his recommendations.

2.7. On 12 December 2016 LW wrote to the Claimant inviting him to attend a disciplinary hearing on 15 December at 12 noon with IH. The allegations of gross misconduct against the Claimant were detailed in the letter to the Claimant at pages 191 to 194. The allegations were bullet pointed and during the Tribunal hearing I directed they be numbered from 1 to 6 as follows:

"Allegation 1 – on 11 November 2016 you booked compassionate leave for yourself for the dates 28 November 2016 to 30 November 2016. On 22 November 2016 you forwarded an email thread to Alan Kay Area Manager requesting this time off be paid, which included instructions that this time should be booked off as unpaid dependency leave. As of 28 November 2016 you had not cancelled

the compassionate leave from the T and A system. This had to be done by the Pub Manager Fiona Roberts to prevent you being incorrectly paid for compassionate leave.

Allegation 2 – over the last 12 months there are seven occasions when you failed to enter enough holidays or work enough days to meet your contracted hours/days per week specifically weeks commencing

- 4 January 2016 worked 4 days
- 11 January 2016 worked 4 days
- 2 May 2016 worked 4 days
- 9 May 2016 booked 4 holidays over 7 days
- 20 June 2016 worked 1 day and booked 3 days holiday over 7 days
- 12 September 2016 worked 4 days
- 14 November 2016 worked 2 days and booked 2 days holiday over 7 days.

Allegation 3 – over the last 12 months there are seven occasions when you have worked 5 days in a week but your hours have amounted to less than your contracted 40 hours on the T and A system specifically weeks commencing

- 28 December 2015 36.63 hours
- 21 March 2016 36.96 hours
- 4 April 2016 35.93 hours
- 6 June 2016 35.68 hours
- 29 August 2016 36.81 hours
- 31 October 2016 32.65 hours
- 21 November 2016 36.48 hours.

Allegation 4 – on 21 November 2016 CCTV clearly shows you putting on your coat and leaving work at 20:05 and your rota finish time was 21:00. The T and A system shows a finish time was subsequently entered as 21:00.

Allegation 5 – on 25 November 2016 you were asked for assistance in covering breaks by Pub Manager Fiona Roberts but you remained on the hotel reception desk.

Allegation 6 – on 26 November 2016 you were asked for assistance in covering breaks by Pub Manager Fiona Roberts but you remained on the hotel reception desk. You told her "leave me alone and go away".

The letter continued to identify that the actions would amount to repeated and unreasonable insubordination or refusal to carry out a reasonable instruction; gross incompetence or gross negligence in carrying out duties; conduct resulting in a fundamental breakdown in trust and confidence; falsification of data held in information systems specifically the T and A system; falsification of company records or manipulation of data; intentional behaviour that involves a serious breach of company policies or procedures". These were a direct

quotation from the disciplinary and dismissals procedures set out in the company handbook. It is a non-exhaustive list of examples of conduct which could be considered as gross misconduct. See pages 183 to 185. The letter enclosed copies of the product of his investigation, including the investigation meeting notes with FR and the Claimant, the time sheet record for December 15 to November 16, the weekly timesheet for 21 November 2016 (relating to allegation 4), a series of rosters and a series of emails from November relating to the application for compassionate leave. It was notified that the relevant CCTV passages would be available to view on site. The Claimant was accompanied by a manager. It does not appear that the Claimant did in fact view the CCTV. Nor was it shown to the Tribunal during the hearing and I have had to consider a description of what it purports to show.

2.8. The notes of the disciplinary hearing on 15 December 2016 are at pages 198 to 253. The Claimant attended, again unaccompanied. IH chaired the meeting and Sam Taylor attended as notetaker. Again each page of the notes was countersigned by the Claimant, and by IH. There were three breaks in the disciplinary hearing which, according to the record, commenced at midday although the Claimant asserts that it commenced nearer to 12.30pm. After the final break IH announced to the Claimant that he was to be summarily dismissed. By letter dated 19 December 2016 at pages 255 to 257 he confirmed the summary dismissal without pay in lieu. It is clear from that letter that IH found all 6 of the allegations proved and that they amounted to gross misconduct. I will return to IH's reasoning later in this Judgment.

2.9. The Claimant appealed by letter dated 24 December 2016, see pages 261 to 262. This document is an important document because it sets out in summary form the nature of the case subsequently put forward also at this Tribunal hearing. It is also important because the Claimant subsequently chose not to attend the appeal. On Friday 20 January 2016 PS responded to the letter of appeal inviting the Claimant to attend an Appeal Hearing on 25 January which was to be chaired by PS with a notetaker. See pages 267 to 268. It then quotes the purpose of the Appeal Hearing is to

- Listen to your reasons for appealing against the decision that was taken on 15 December 2016
- Consider any new information that has become available since that date
- Review whether the decision reached was fair and reasonable in the circumstances

PS invited the Claimant to contact him on receipt to confirm his ability to attend.

> "Please note that failure to make contact or attend this meeting without good reason may be viewed that you no longer wish for this appeal to proceed. A decision will be taken by the Appeal Hearing Manager whether to hold the meeting in your absence and confirm to you in writing, or whether to consider the matter to be closed due to your non-attendance and failure to inform otherwise".

The Claimant responded to that letter by emailing HR on 23 January as follows:

> "However as I feel my Appeal letter is extremely comprehensive combined also with the minutes from the 3 hour disciplinary hearing on 15 December 2016, on reflection I do not think it would be appropriate for me to attend the Appeal Hearing in person, adding to the stress of the last 6 months in work, plus my personal stress that my mother's sudden illness has caused me.
> I am also concerned as to how fair and unbiased this hearing could be.
> I will await to be informed of said appeal in my absence".

The reference to concerns as to 'how fair and unbiased the hearing could be' was later, during the Tribunal Hearing, amplified to claim that PS had been actively involved in the background circumstances relating to in particular allegation 1, claim in relation to compassionate leave. I will consider this matter later in this Judgment, but I note that the Claimant did not expressly object to PS chairing the disciplinary appeal at the time.

2.10. PS decided to proceed with the appeal on 25 January in the Claimant's absence.

2.11. By letter dated 31 January 2017 sent by email PS dismissed the appeal. See pages 279 to 281. two particular points are to be noted about the contents of that letter. The first is that, based on the contents of the Claimant's appeal letter, PS only specifically made, and it therefore appears gave attention to, three of the six allegations, those being allegations 1, 2 and 3. Clearly he upheld the findings in relation to allegation 1, the compassionate leave issue; number 2, the allegation that holidays taken were missing from the roster, which he identified as being "either negligence in the extreme or manipulation for purposeful gain". However in relation to allegation 3, the weekly hours issue, PS acknowledged the Claimant's case that if one looked at the number of hours that the Claimant had recorded as rostered throughout the period from December 15 to November 16, and the number of hours worked, there were 22 occasions weeks where the Claimant had worked over a 37.5 minimum hours (40 hours less half an hour break on each of 5 days). In other words, there were 22 weeks in which he had worked over the required minimum as against

7 where he had worked less. On that basis he stated "I do feel this should have been taken into account." In effect, he had overturned the finding of misconduct in relation to allegation 3. However he upheld the decision to dismiss. The letter does not expressly identify what findings he made in relation to the other 3 allegations, including the allegation of leaving early and entering an inaccurate leaving time on the roster on 21 November 2016; and the two allegations of insubordination. The Tribunal will return to this later in these reasons.

3. The Issues

The legal issues are essentially not in dispute. In relation to **unfair dismissal,** the burden of proving the reason or principle reason for dismissal is on the Respondent. In this case it is the reason related to conduct or more appropriately belief in misconduct. There are some factual issues which have been raised by the Claimant namely that FR was out to get him; and that the Respondent was intending in any event to lose the job of Hotel Manager on grounds of costs and or efficiency savings, but Mr Waring does not contest that the principal reason was a belief in misconduct. Essentially the allegations that he raises on behalf of the Claimant related to the fairness of the dismissal not to the reason.

Next the Tribunal has to consider the Birchall test and its application under section 98(4) of the Act, which I do not set out expressly here because the parties are both professionally represented. There are 3 elements to the Birchall test. In this respect there is no legal burden on either party, either on the part of the Respondent to prove that the tests are satisfied or on the Claimant to dispute them. The burden is said to be neutral however, the Respondent is, by reason of the nature of the tests, likely to have all of the evidence relating to them and it was for this reason that I took the view that the Respondent should begin. The Tribunal has to consider though the Respondent essentially by WL carried out a reasonable investigation into the matters alleged in all the circumstances; whether the Respondent (the Dismisser and the Appeals Officer) entertained a reasonable belief that the Claimant was guilty of the misconduct based on the investigation; and whether dismissal of the employee was a reasonable response to that misconduct. Each of these elements are subject to the test of the band of reasonable responses, namely whether the employer has actions in relation to the investigation, the Dismisser's beliefs and the decision to dismiss acted within a range that any reasonable employer could have held, sometimes summarised as the actions of a hypothetically reasonable employer. In that respect the Tribunal is to be cautioned against substituting its own view for what is or was reasonable for that of the hypothetically reasonable employer see e.g. ***London Ambulance Trust -v- Small*** **[2009] IRLR page 123**.

Next, if the Tribunal finds that the dismissal was to any extent, procedurally or otherwise, unfair the Tribunal has to decide whether, absent that unfairness, what were the chances, ranging from 0% to 100%,

that the Claimant would have been dismissed by this employer in any event and when. This is compendiously known as the Polkey test – see also ***Software 2000 Limited -v- Andrews* [2007] IRLR page 568**. A further remedies issue arises here under section 122(2) in relation to the basic award and, and 123(1) and 123(6) in relation to the compensatory award. The basic award test requires the Tribunal to consider if there is any conduct of the Claimant before dismissal which would make it just and equitable to reduce the amount of that award. The latter test requires the Tribunal to consider such award as is just and equitable and whether there was any conduct which caused or contributed to the dismissal which would make it just and equitable to reduce the compensatory award having regard to that contribution. See ***Nelson -v- BBC2* [1980] ICR page 110**.

Wrongful dismissal. Here the burden remains throughout on the Respondent to prove that the Claimant was in fact guilty of such misconduct as would justify summary dismissal. The Respondent's belief therein is not a necessary part of the relevant test. The Tribunal is required in this case to descend into the primary fact finding arena. Furthermore, the Respondent (and the Claimant) is entitled to rely upon evidence which comes to light at any time after the original dismissal, including at the Tribunal hearing.

4. The individual issues

4.1. **Allegation 1.** The compassionate leave issue. On the 11 November 16 it was not in dispute that the Claimant booked "compassionate leave" from 28 to 30 November 2016 on the basis that his elderly mother was to be admitted to the new care home with dementia; and that she was a dependant of his. He did this by email to PS his Area Manager see page 105:

> "Can I ask you to authorise compassionate leave for 3 days for me 28, 29, 30 November relocating my mother to a care home and it is all rather stressful to say the least my brother also leaves for 2 months in Aussie that week and I am on 24 hours call for the home for the first week".

PS copied it to a personnel co-ordinator the same day:

> 'Just for advice whilst the below will be traumatic do we authorise compassionate leave for this, or is it for bereavement only. I could authorise absence but unpaid.'

The personnel co-ordinator responded at 11:09 on the 11 November to PS:

> "This would not be compassionate, that is only when someone has passed away. It's more of a dependant's leave which is unpaid and just needs to be entered on T and A as that. I will add a note on R/L and ensure managers pay are aware, but please can you send me the full name of the employee and employee number so I can action."

PS forwarded that email chain to the pub email (that of FR) at 7:43am on 15 November. FR responded giving the Claimant's name and employee details to personnel at 8:10am on that day. She also emailed the chain to the hotel email, that of the Claimant, 10:57 on that day. It is to be noted that the Claimant was responsible for entering information on such subjects as holiday and compassionate leave as well as rostering on the T and A system (time and attendance) on behalf of himself and of his staff in the hotel section. In relation to this compassionate leave the Claimant had done so on the 11 November at 1:08pm see pages 93 and 125. Meanwhile, on 17 November PS had himself gone off on compassionate leave, his mother having died until 5 December. At 11.16 on 22 November the Claimant emailed Alan Kay, PS's temporary replacement page 101 in an email headed "Dependancy/Compassionate Leave"

"Not sure if you can swing it if I get paid or not. Seems a bit mean after 5 years service but fully understand if you can't".

During the investigatory meeting with FR on 29 November, see pages 113 to 117, she gave further information to WL about this issue. She said that PS had spoken to her sometime during the week commencing 14 November told her that the Claimant would have to take the time off as unpaid dependency leave or work extra hours. She was to tell the Claimant about the decision. She says that she tried to arrange a meeting by leaving a message on his mobile and home phone but had not received a response. What is not is dispute is that there was a meeting between the Claimant and FR on 22 November. During that meeting an authorised absence form had been produced by FR, filled in and signed for the Claimant's absence between 28 and 30 November, both by the Claimant and by FR see page 109. It is also not in dispute that the Claimant had ticked the box for compassionate leave (unpaid), and that there were alternative boxes for compassionate leave (paid) and bereavement leave (paid) and bereavement leave (unpaid). It was at the time and remains, even after the Tribunal hearing, unclear what happened to that document after the meeting on 22 November. It is also unclear whether the meeting took place before or after the Claimant emailed Alan Kay on that day enquiring whether it could be paid. It is clear however that it found its way to the investigator WL because it is specifically mentioned as an exhibit for the disciplinary hearing in the letter of invitation to that hearing letter dated 12 December. The Claimant did not alter the entry on the T and A system to record that the nature of the leave was supposedly dependency leave according to the email chain of the 11 November which had been forwarded to him prior to the time that he went on the leave on 28 November. The Respondents essential case is that the Claimant was dishonestly misrepresenting the nature of the leave he was claiming from the 11 November onwards and going behind PS's back by requesting that it be paid by his temporary replacement. It was further claimed that having not corrected the T and A system by that date, the effect was that the Claimant would in fact have been paid had it not been for FR correcting

the system. The email chain which purports to record this is to be found commencing at page 140 where FR enquires who had logged the application and whether it was to be recorded as paid. Personnel had responded that compassionate leave was approved by Kelvin Clayton on 11 November 2016.

" This will be paid unless the pub remove it before time sheet closure on Sunday. "

At 19:21 on 8 November Alan Kay emailed personnel:

"This should not be paid as it's not approved by Phil or myself. Please confirm if it was coded for being paid"

The leave was in the event not in fact paid for.

That concludes a summary of the evidence available to the dismissers from the investigation. However, it is important also to cite the actual policies in the handbook concerning on the one hand bereavement and compassionate leave, and dependants leave on the other. These are set out at page 285 of the Bundle as to the former

"Employees may request from their Line Manager a maximum of 5 days (1 calendar week) paid special leave following the death of a parent partner sibling or child. The granting of all other cases of bereavement or compassionate leave would not normally exceed 1 day and whether it is paid or not will be at the sole discretion of your Line Manager who will take into account individual circumstances and company guidelines. Additional leave can be taken as holiday leave or special unpaid leave.

You will need to complete an authorised leave form and have it authorised by your Line Manager for any bereavement or compassionate leave. This must be emailed to the P and T personnel co-ordinators".

Dependants leave

"Employees are entitled to take a reasonable amount of unpaid time off during working hours to deal with an unexpected or sudden problem (an emergency) involving a dependant and to make any longer term arrangements. No qualifying period of service is necessary to acquire this right. However, the right is conditional upon you telling your Line Manager the reason for the absence as soon as reasonably practicable. Even in exceptional circumstances you should contact work prior to the start of your shift or working day and by no later than 30 minutes after your start time to be able to agree dependants leave... you will need to complete an authorised leave form and have it authorised by your Line Manager...."

4.2. In relation to **allegation 2**, the essential allegation is that the Claimant had only recorded himself as working or taking holiday on 4 days per week rather than 5. This occurred either because the Claimant failed to record paid holiday which he had in fact taken which appears to have occurred on at least five occasions, or because the Claimant elected to only work on 4 days. This allegation was found proved both by IH and PS on appeal.

4.3 Allegation 3 related to the occasions, 7 in number, when the Claimant is recorded as having worked less than the minimum 40 hours in a week. This allegation was found proved by IH but that was not upheld by PS on the basis of the number of occasions when the Claimant was recorded as working in excess of the minimum.

4.4 Allegation 4 was that the Claimant left early before the end of his shift on 21 November 2016, failed to log out, and, when that failure was red flagged on the system, 4 days later he recorded falsely that he had worked until the end of the shift at 9pm. The explanation which he gave during the disciplinary process was that he had in fact started work early on that day; that he had left before the end of his recorded shift because he was tired, having worked an extra shift overnight the night before, and that he had mistakenly later recorded on the T and A system that he had worked the full shift as a result of tiredness and stress concerning his mother's state of health. It is to be noted that at the Tribunal hearing for the first time he claimed that he had notified the Duty Manager before leaving on 21 November.

4.5 As to allegations 5 and 6, the Respondents case as reported by FR was that he had on 25 and 26 November refused her requests to cover him for breaks. This was said to be gross insubordination and a failure to comply with a reasonable request from his manager. During the investigatory process and the first disciplinary hearing the Claimant did not provide any explanation for his conduct on 25 November but he did so in his appeal letter to PS, when he said that he had been dealing with an urgent customer enquiry. As to the second occasion on 26 November, he explained that he had been dealing with a failed fire door which represented a risk to health and safety, and thus was urgent. There was some CCTV evidence of these incidents but the CCTV was silent and on the second occasion only showed the Claimant talking to FR and apparently putting his hand up in a blocking fashion.

5. Conclusions

5.1. **The reason or principal reason for dismissal**. As noted earlier in this Judgment it is not in dispute that the reason or at least the principal reasons for dismissal was belief in misconduct. The Claimant asserted however that the allegations against her were triggered solely by matters raised by FR, who had it in for the Claimant as was to be ascertained from certain remarks she had allegedly made constituting a threat to the Claimant's future continuing employment. Accepting for the sake of argument that remarks to this effect were made by FR, who has not been called to give evidence to the Tribunal, in fact, although FR had raised some of the allegations during the blue bag meeting with Alan Kay in mid to late November 2016, it was AK's decision that there should be an investigation and that WL should conduct it. This allegation may however be relevant to the second

issue; the fairness and reasonableness of the investigation which I deal with next.

5.2. The reasonableness of the investigation.

I reject the Claimant's claims that WL's investigation was so flawed as to be unreasonable either because of the intervention of FR or for any other reason. Separately from those allegations raised by FR in her interview on the 29 November, she backed them up by producing the time sheet record pages 127 to 135 which she handed over to RW a day or so later. This document was based on information provided independently by the Respondents wages record department and it is not alleged that any of the information within it is inaccurate so far as it concerns the Claimant. There were email records which he collected dealing with allegations 1 and 4 and, such as they were CCTV film relating to allegations 5 and 6. As to allegation 4 it was not in dispute that the Claimant had left early on 21 November as evidenced also by CCTV film; and had then recorded a later time for leaving at the supposed end of his shift, sometime later, having been alerted by a red flag. There are however two criticisms which can be levelled at the outcome of the investigation: WL failed to consider whether it were correct that the Claimant had worked hours in excess of 40 on at least 21 occasions which was capable of being relevant to the gravity of the Claimant's supposed underworking contained in allegation 3. In addition, he took at face value that on 11 November the Claimant ought to have booked his leave out for 28 to 30 November as dependency leave rather than compassionate leave. I will deal with these issues under the next heading.

5.3 **The reasonableness of the Dismissers' beliefs.** I have identified that PS differed from IH's conclusion on allegation 3. He set aside that conclusion. Mr Siddall concedes that that left for consideration the findings in relation to the other allegations, 1, 2, 4, 5 and 6 which IH found proved. The test I have to apply is whether the hypothetically reasonable employer could have found these individually or collectively as amounting to gross misconduct. As I indicated to the parties representatives prior to the closing submissions there is in my view a serious problem about allegation 1. It starts with the proposition that the type of leave which the Claimant was seeking in respect of his mother's move to a new care home on 28 to 30 November was properly to be classified as <u>dependency</u> leave and not <u>compassionate</u> leave as advised by the personnel department in an email timed at 11:09 on 11 November. The Dismissers both found that the Claimant could not possibly have honestly made a mistake and was dishonest from the start. Both IH and PS clearly took that advice at face value. Next, the personnel department responded to the enquiry from FR on 28 November to the effect that if leave continued to be classified as

compassionate leave it was to be paid. Both propositions are flawed on a careful reading of the policies and I find that no reasonable employer could have interpreted it in the manner relied upon by IH and PS. There are two separate components of bereavement and compassionate leave. For bereavement leave there must clearly have been the death of a parent, partner, sibling or child. In those circumstances employees are entitled to request from their Line Manager a maximum of 5 days paid special leave. The Claimant clearly was not claiming bereavement leave. That leaves, under the same policy, compassionate leave (and cases of bereavement leave presumably where the death was not that of a parent, partner, sibling or child). "Compassionate" is not further defined in the handbook. the OED defines it as "to regard or treat with compassion; to commiserate (a person or his distress etc.)". Further conditions that apply to compassionate leave are that it would not normally exceed one day (but clearly it could) and secondly, whether it is to be paid or not will be at the sole discretion of the Line Manager. Additional leave can be taken as holiday leave or special unpaid leave. Dependency leave is different and appears to derive from section 57A of the Employment Relations Act 1999 which added it by statutory amendment to Employment Rights Act 1996. The essence of it, as provided in the policy, was that the employee was entitled to a reasonable amount of unpaid time off to deal with an unexpected or sudden problem (an emergency) involving a dependent and to make any longer term arrangements. That does not comfortably fit with what the Claimant faced on 11 November. Non bereavement compassionate leave did fit and, as indicated in the policy, whether it was to be paid or not was at the sole discretion of the Line Manager, in this case FR. In these circumstances it was not within the band of reasonable responses to conclude that the Claimant was being dishonest from the start. Secondly, although the Claimant did not approach his Line Manager but went above her head to PS, he did at least refer it up. The decision was whatever the type of leave was appropriate it was to be unpaid. When the Claimant filled in the relevant form on 22 November he classified it as unpaid bereavement leave. That was endorsed by FR That was in compliance with the compassionate leave policy. It is true that the Claimant made a further attempt to see if he could get it paid and in that respect went behind PS's back to Alan Kay but I do not accept that that supports or is even capable of supporting a proposition there was a continuing course of dishonest conduct by the Claimant even if he did not change the classification to dependency leave. The Respondents finding on allegation 1 does not satisfy the Birchall test of fairness.

As far as allegations 5 and 6 are concerned, if they had stood on their own they would not independently have satisfied the Birchall test as a

finding or findings of gross misconduct. Clearly there was a background of ill feeling between the Claimant and FR IH considered this and found it to be a clash of personalities. It could form the basis of a finding of misconduct but not gross misconduct. It could also be relied upon as an additional factor to be taken into account by a reasonable employer if there were other findings of gross misconduct which stood. The Claimant did at least provide some explanation for his conduct at the time of the appeal hearing in respect of both incidents having fully provided an explanation at the first stage for the second incident. There is no clear evidence from PS as to what conclusion he reached about those two incidents.

Finally on this issue, I turn to the remaining two allegations, those being allegations 2 and 4. I find that the Dismissers did have reasonable grounds for concluding that the Claimant had been dishonest in relation to the failure to record the taking of holidays on the occasions identified. I also find the Dismissers had reasonable grounds for believing that the Claimant was acting dishonestly when, after leaving at 8:10pm on 21 November without clocking out using the finger identification systems, and in subsequently recording that he had worked until the end of the shift at 9pm. They were justified in rejecting the Claimant's explanations, which in relation to allegation 2 were that he always emailed his roster to the pub every week with his hours and holidays and for some reason they had failed to put the holidays on or look, see page 119. This is against the background that the Claimant accepts that, despite the absence of specification of 5 day working in the contract of employment, that he was responsible for rostering himself and his staff for 5 days per week, but in his own case he decided to take a holiday which was to be paid but not recorded. The fact is the Claimant did not provide a record of his holidays or all of his holidays which he had in fact taken as paid. It was only at the Tribunal hearing that he claimed on each occasion he had contacted FR to notify her that he was going to take a holiday and that she had responded that she couldn't care less. This was an explanation which he did not give at the investigatory phase of the process or at the disciplinary hearing or in his appeal letter. I accept Mr Siddall's submission to the effect that the failure to record his holidays had potentially serious consequences as there would be no record of how much of his holiday entitlement of 28 days paid had been taken and there was the potential for the Claimant to thereby take extra holidays over and above the 28 days. Secondly, that the reception would be unmanned and or the reception staff would be shorthanded and they would be unable to cover the extra work required in the pub in short. It was a reasonable conclusion that in the cases where he was only recorded as working or working and on holiday for 4 days in a week, that the Claimant's fifth day was taken on

an occasion when he had been provisionally rostered either to work or to be on holiday. The Respondent was clearly entitled to conclude that the explanation was not that the Claimant had made a series of innocent mistakes. Likewise, in relation to allegation 4, there was CCTV evidence showing that the Claimant had left early at 8:10pm and without clocking out. The latter is shown by an examination of the punch records for the Claimant's actions on 21 November and the 26 November which are shown at page 335. The Respondent was entitled to reject the Claimant's explanation that he had worked extra shift the night before, had left early because he was tired and stressed particularly in relation to his mother's predicament and that he had subsequently made an innocent mistake when he had sought to correct the record on 26 November by recording he had worked to 9pm. It is noteworthy that the Claimant said for the first time at the Tribunal hearing that when he had left on the 21 November at 8:10pm he had reported to the Duty Manager that he was leaving early. That was another explanation which he had never tendered during the course of the disciplinary process. Finally, I find that the Respondent was also entitled to conclude that the Claimant's supposed lack of training in procedures was factually incorrect and did not provide an explanation or excuse for his conduct in relation to the matters said to constitute gross misconduct.

5.4. **Was the dismissal within the band of reasonable responses?** There is a problem here because there were originally 6 separate allegations said to constitute gross misconduct for which dismissal was a reasonable response. Only allegations 2 and 4 remain as reasonably believed by the decision makers coupled with allegations 5 and 6 which as I have found were not in themselves sufficient to merit dismissal by the hypothetically reasonable employer, but could be relevantly taken into account in deciding whether dismissal was appropriate for the other matters. The difficulty is that PS has not given evidence as to how he regarded or would have regarded these allegations individually absent his findings on allegation 1 and his rejection of allegation 3. The reasons or principal reasons for the dismissal accordingly remain unclear. This was the situation which arose in ***Smith -v- Glasgow City Council*** **[1987] ICR page 796 House of Lords** on this basis and this basis alone I have concluded that the dismissal was in the event unfair. I do not regard PS's involvement in some of the back ground to the disciplinary issues to be such as to render the dismissal procedurally unfair. It will frequently be the case that a decision maker will have some knowledge of background. I do not accept that PS was biased against the claimant or minded to confirm the dismissal in order to support FR.

5.5. There remain three issues; the Polkey issue, the contributory fault issue. and whether or not the respondent has satisfied the Tribunal that the claimant was guilty of gross misconduct justifying dismissal. In reaching a decision on the issues I have to descend into the fact-finding arena. In essence I conclude that on the balance of probabilities the claimant was guilty of gross misconduct, in relation to allegations 2 and 4 taken in conjunction with 5 and 6, particularly as evidenced by the explanations which he gave to the Tribunal which he had not given before, which reflected upon his credibility generally.

Employment Judge Hargrove
Dated: 9 February 2018

JUDGMENT SENT TO THE PARTIES ON