EMPLOYMENT TRIBUNALS

Claimant: **KATHERINE AKTAS**

Respondent: **ORIGINAL SMOKE SHACK LIMITED**

HEARD AT: **BEDFORD EMPLOYMENT TRIBUNAL** **ON: 9/10 MAY 2017**

BEFORE: **Employment Judge Tynan**

MEMBERS: **Mrs Smith and Mr Vaghela**

REPRESENTATION

For the Claimant: **In Person**

For the Respondent: **Mr Darren Isaac**

JUDGMENT

1. The Tribunal declares that the Claimant's complaint that the Respondent made deductions from her wages of £140.01 and £40 in contravention of section 13 of the Employment Rights Act 1996 is well founded. Accordingly, the Tribunal orders the Respondent to pay the sum of £180.01 to the Claimant.

2. The Respondent dismissed the Claimant in breach of contract, namely it failed to give the Claimant two months' notice to terminate her employment in accordance with her contract of employment, alternatively it failed to pay her in lieu of such notice.

3. The Tribunal declares that the Respondent unlawfully discriminated against the Claimant contrary to section 39 of the Equality Act 2010 by subjecting her to detriment and by dismissing her.

REASONS

1. The Claimant commenced employment with Original Smoke Shack Limited on 24 September 2014. The company is now the subject of a shareholders' voluntary liquidation. One of the issues which the Tribunal has to determine is the effective date upon which the Claimant's employment terminated. At Tribunal it was common ground between the parties that the Claimant's employment had ended on 15 January 2016. However, this issue is dealt with further below.

2. On 8 April 2016 the Claimant filed a claim with the Employment Tribunals in which she named both Original Smoke Shack Limited and Mr Isaac as Respondents. Mr Isaac was a director and shareholder of the company. In her Tribunal Claim Form the Claimant gave the ACAS early conciliation certificate number as R121609/16/76. However, that certificate only identified Original Smoke Shack Limited as a prospective respondent. This omission was highlighted by Employment Judge Adamson at a preliminary hearing on 6 October 2016 when he expressed the view that the claim against Mr Isaac may be outside the Employment Tribunal's jurisdiction. He suggested the Claimant seek further advice on the matter.

3. On the first day of the hearing before us, the Claimant was accompanied by a representative from the Citizens Advice Bureau. When the Tribunal adjourned to read the various witness statements the Claimant had a further opportunity to confer with the Citizens Advice Bureau. Following the adjournment she informed the Tribunal that she wished to withdraw her claim against Mr Isaac. In correspondence with the Tribunal prior to the hearing she had indicated her intention to do so. On the basis that the Claimant had had an opportunity to reflect on the matter and to take further advice, the Tribunal was satisfied that the claim against Mr Isaac should be dismissed on withdrawal by the Claimant.

4. In her Claim Form the Claimant claims that she is owed notice pay, holiday pay and other payments by Original Smoke Shack Limited (referred to throughout this Judgment as the "Respondent"). In the alternative to her claim for notice pay, the Claimant claims that she was wrongfully dismissed by the Respondent. She

originally also claimed that she had been discriminated against on grounds of sex and disability, though the disability discrimination claim was withdrawn at a case management discussion on 23 June 2016 before Employment Judge Moore.

5. Following further discussion between the parties on the morning of 9 May the issues in dispute narrowed slightly. Specifically, it was accepted by Mr Isaac on behalf of the Respondent that expenses of £140.01 were due to the Claimant on the termination of her employment and that a further sum of £40 had accrued due to the Claimant on termination in respect of accrued but untaken holiday entitlement. However, it was not accepted by the Respondent that any sums were in fact owing to the Claimant as it was the Respondent's case that the Claimant had been paid salary in excess of that to which she was entitled and that the Respondent was entitled to offset the holiday and expenses against this claimed overpayment of salary.

6. Finally, it was common ground between the parties that the Claimant was entitled to two months' notice from the Respondent terminating her employment unless the Respondent could establish in the circumstances (on the balance of probabilities) that it was entitled to, and did, terminate her employment summarily, that is to say without notice or payment in lieu of notice.

7. The issues in the claim were identified by Employment Judge Adamson on 6 October 2016. We refer in this regard to paragraph 10 of Employment Judge Adamson's record of the preliminary hearing. One issue, recorded at paragraph 10.1(iii), was whether the comparators identified by the Claimant are relevant comparators, having regard to section 23 of the Equality Act 2010. When she originally presented her claim the Claimant did not identify any comparators, but by the time of the preliminary hearing before Employment Judge Adamson she was comparing her treatment with that of two employees referred to as "Stew" and "Mendes". In the course of the hearing before us the Claimant also sought to contrast her treatment with that of a third employee, Luke Sandall. We return to this.

8. Both the Claimant and Mr Isaac gave evidence. We also heard evidence from Mrs Gillian Kler and Ms Zoe Oakes on behalf of the Respondent.

9. There was some confusion or lack of communication between the parties regarding the hearing bundle. In the event the Tribunal proceeded using a bundle prepared by the Claimant. The bundle was essentially in two parts and comprised 81 documents or sections. The first part of the bundle comprised documents relating to the Claimant's terms of employment and which evidenced events in the days leading up to and in the weeks following the Claimant's dismissal. The second part of the bundle, starting at document number 44, evidences slightly more historic matters including evidence as to the treatment of the Claimant's claimed comparators.

Findings

10. The Respondent operated a BBQ Grill and Smokehouse restaurant in Stony Stratford, near Milton Keynes (referred to hereafter as the Stony restaurant). The company's founders and directors were Mr Isaac and Mr Terry Pritchard, who was also the Head Chef.

11. In the course of her employment with the Respondent the Claimant was issued with two contracts of employment. The first contract was dated 10 December 2014 (pages 2.1 to 2.13 of the hearing bundle). This contract was prepared by Mr Isaac. Although dated 10 December 2014, the effective date of employment was incorrectly stated to be 1 October 2014. Somewhat confusingly, the date of commencement of continuous employment was stated to be 1 November 2014.

12. The Claimant's job title in the first contract was Administrator, "with the main job requirements being to ensure the smooth running of the paperwork and financial side of the business". Clause 3 of the contract went on to state:

> *"In the main this will include bookkeeping and some accounting (in partnership with our accountants), handling general administrative duties, reconciling and filing of all paperwork, dealing with supplier accounts and supporting the company owners with day to day organisation and management of business operations. You will be expected to perform all such acts and duties as may be required of you and to comply with all reasonable directions given to you by any superior and to observe all the policies, procedures and rules from time to time laid down by the*

company. The company operates a policy of job flexibility and the company may, at its discretion, require you to perform additional or other duties, not within the scope of your normal duties (however, these will be within the scope of your role and/or skill set, and not to a degree that could be deemed largely unreasonable)."

The role was documented to report to Mr Isaac.

13. The Tribunal notes that any accounting responsibilities were stated to be in partnership with the company's accountants. In this respect, the company's accountants were Kler Associates Limited. The Tribunal heard evidence from Mrs Gillian Kler, a qualified accountant, who made a two page statement on behalf of the Respondent.

14. Clause 4 of the contract provided that the Claimant would be subject to a trial period of three months, during which period the company's disciplinary procedure was stated not to apply. The Tribunal notes therefore that the Respondent intended that its disciplinary procedure would apply following completion of the probationary period notwithstanding that an employee may not have accrued two years' continuous service and protection against unfair dismissal. The position in this regard was repeated at clause 11.2 of the contract. If there was a documented disciplinary procedure, the Tribunal was not provided with a copy.

15. The Claimant's stated place of employment was her home. This was documented at clause 5 of the contract in the following terms:

"Until required otherwise, in the future, you can work from home provided you make your best endeavours to be accountable with how you spend your time, and ensure your duties are met each month. You are required to attend all onsite management meetings of which there is currently one per week."

It was further documented in clause 5 that the Respondent could require the Claimant to relocate to alternative premises within the UK, albeit it was documented that this would be within a geographical radius of 20 miles.

16. There was provision at clause 6.1 of the contract for the Respondent to deduct from the Claimant's pay any sums due from her to the company, including any overpayment of salary.

17. Clause 14.2 of the contract provided that the Claimant would use her best endeavours to promote and protect the interests of the Respondent, and would not take any step (whether deliberate, negligent, or otherwise) which might harm the interests of the Respondent. The clause reflects what is implied in any event.

18. The notice provisions are at clause 17 of the contract. Notice was to be given in writing and, once she had successfully completed her three months probationary period, the Claimant was entitled to two months' notice from the company to terminate her employment. For her part the Claimant was obliged to give the company one month's notice once she had completed a year's service.

19. Clause 20 of the contract provided as follows:

> *"Termination of your employment shall not in any way prejudice or affect the operation of any of the clauses of this contract which contemplate or are capable of operation after termination of your employment and accordingly all such clauses shall continue in full force and effect after termination of this contract."*

20. The first contract was not signed by the parties. Although the dates of employment are incorrect, the Tribunal is satisfied that the contract was intended to and did govern the relationship between the Claimant and the Respondent.

21. Just a few weeks into her employment the Claimant highlighted to Mr Isaac that her ability to do her job was being impacted by not being provided with all relevant invoices (pages 46 to 48 of the hearing bundle).

22. In an email to Mr Isaac dated 12 December 2014 regarding her contract and working arrangements, the Claimant highlighted her childcare responsibilities and that work outside her contracted hours might impact her time with her son.

23. A revised contract of employment was subsequently agreed in April 2015, which correctly recorded the date of commencement of employment (and the date of commencement of continuous employment) as 24 September 2014 (pages 1 to 1.17 of the hearing bundle). The Claimant's evidence, which is accepted by the Tribunal, was that the revised contract of employment was negotiated by Mr Isaac but finalised by Mr Andy Layfield on behalf of the Respondent. For reasons we shall return to, we note here that although Mr Layfield had only then relatively recently joined the company as a manager he was already authorised to handle employment related matters on behalf of the Respondent, certainly in relation to the Claimant.

24. The Claimant's job title in the revised contract changed to "Financial Controller and Administrator (part-time)". However, the job description and the stated requirement for flexibility were unchanged. The Tribunal notes that at clause 3 of the revised contract there is reference to the Claimant reporting to her immediate managers, albeit only Mr Isaac was identified as her manager. The addition of a "/" after Mr Isaac's name indicates it was envisaged that a second name may be inserted.

25. The revised contract reflected that the Claimant's pay had increased to £10 per hour and that her hours were now expressed as being 80 hours per month as opposed to 16 hours per week in the original contract. Clause 6.1 of the revised contract stated that a minimum of 20 hours would be worked each week, though that assumes a four week month if the total hours per month were fixed at 80.

26. The Claimant's working hours were formalised in the revised contract on the basis that she would normally work 9.00am to 12:30pm Monday to Friday. There had been no specified normal working hours in the original contract of employment. The Tribunal notes that the Claimant was required to work additional hours as necessary or appropriate according to the needs of the business, but that she would not be entitled to receive any additional remuneration for work outside her normal hours. The Respondent also reserved the right to vary the Claimant's hours of work. It was documented that this might include a reduction in her total hours of work (subject to a minimum of

12.5 hours per week), an increase in her hours of work and/or a change in the times she was normally required to work.

27. There is evidence in the hearing bundle that during her employment the Claimant undertook various duties outside the ambit of the role of Financial Controller and Administrator. For example, in late 2014/early 2015 the Claimant took on responsibility for ensuring that the Stony Restaurant was compliant with fire safety regulations. In or around November 2014 the Respondent was served with an Enforcement Notice by Buckinghamshire Fire Authority. The company engaged Mr Tony Bennett of Bennett Associates Fire Safety Consultants to undertake a fire risk assessment. On 18 November 2014 he informed the Respondent that he would be withdrawing his services. Claiming that he had undertaken over 400 fire risk assessments over a period of three years, Mr Bennett stated that it was the first time he had withdrawn his services. In an email to Mr Isaac and Mr Pritchard he referred to having made numerous requests for information, both verbally and in writing "to all relevant and responsible persons" but that the information requested by him had not been forthcoming. He urged Mr Isaac and Mr Pritchard to comply not only with the Enforcement Notice but all other aspects of applicable legislation to ensure the safety of the Respondent's staff and customers, and any visitors to its premises. Mr Isaac forwarded Mr Bennett's email to Mr Sandall and another employee, Mr Ben Thompson. However, he clearly identified that Mr Sandall was responsible for the situation. In his email, which is at page 44 of the hearing bundle and is headed "Serious Issue", he wrote:

> *"Luke you were suppose[d] to take care of this and this email from Tony is downright shocking. It jeopardises the restaurant being able to remain open – that's how serious it is."*

The Tribunal does not accept Mr Isaac's attempts at Tribunal to downplay the seriousness of this episode and in particular does not accept Mr Isaac's description at Tribunal of Mr Sandall's neglect as merely "an oversight" on his part. Nor does the Tribunal accept Mr Isaac's attempts at Tribunal to suggest that he was "laying it on a bit thick" with Mr Sandall. Mr Sandall had been charged by the company with providing essential information required by Mr

Bennett to enable him to undertake a crucial fire risk assessment. The consequences of Mr Sandall's failure to do so were twofold. Firstly, Mr Bennett withdrew his services, apparently the first time he had had cause to do so in three years and notwithstanding he had undertaken over 400 such assessments. Secondly, by his neglect, Mr Sandall had jeopardised the restaurant's ability to remain open. The Tribunal is satisfied that there was a case for Mr Sandall to answer as to whether he had been grossly negligent and/or grossly incompetent in the performance of his duties. Mr Isaac's attempt at Tribunal to downplay the seriousness of this incident is at odds with his email to Mr Sandall at the time and sits uncomfortably with Mr Bennett's reference to having made numerous requests for information. Moreover, the documents at pages 44.2 to 44.16 of the hearing bundle demonstrate that the company in fact viewed the matter very seriously and prioritised resolving the situation. We were unpersuaded by Mr Isaac's reference at Tribunal to his email of 18 November 2014 as an over the top reaction to the situation. Mr Isaac confirmed at Tribunal that Mr Sandall was issued with a verbal warning over the matter.

28. Pages 44.2 to 44.16 of the hearing bundle, evidence the Claimant's work to rectify the situation and to address the concerns raised in the Enforcement Notice. For example, on 22 December 2014 the Claimant was in contact with Buckinghamshire Fire Authority to confirm that a fire risk assessment was being undertaken and to request that the restaurant should be granted an extension of time to address the issues which had been identified in the assessment. She followed the matter up early in the new year when she had still not heard from the Authority and sought urgent confirmation that an extension of time would be granted. It seems she then spoke with Mr Stefan Gardner-Potter and followed up with a further email to him on 7 January as she had not received anything in writing from him. She was seeking urgent confirmation that an agreed deadline of 10 March was indeed agreed. There is also evidence that the Claimant was in contact with Mr Bennett and subsequently with another fire safety consultant. By early March 2015 a detailed plan of action had been prepared and was submitted to Mr Gardner-Potter, including a fire risk assessment, fire safety policy and emergency plan. She also met with Mr Gardner-Potter on two occasions. The gravity and urgency of the matter is evident from the

documents we have referred to. The Claimant prepared a detailed list of works and actions (pages 44.2 and 44.3 of the hearing bundle) as well as a Fire Safety Regulations checklist to ensure that matters were actioned, completed and documented. They are thoughtful, professional, well drafted documents and they evidence that the Claimant was performing her duties and discharging her responsibilities in a focused, effective and timely manner. Having regard to the Claimant's documented job function and job description, the evidence is that she went significantly above and beyond her responsibilities to address a situation which was not of her making or within her area of responsibility, but which had put in jeopardy the Stony restaurant's ability to stay open. The Tribunal attaches weight to this episode in circumstances where the Respondent's various criticisms of the Claimant in terms of her performance are, by contrast, not evidenced or documented.

29. On 21 January 2015 Mr Isaac emailed the Claimant to inform her that following a discussion with Mr Pritchard they had decided that an employee called Stew should be dismissed. He instructed the Claimant to "get the ball rolling". It is not apparent to the Tribunal how this HR matter fell within the ambit of the Claimant's administrative duties. It suggests again to the Tribunal that the Claimant was taking on responsibilities outside the ambit of her job role. Mr Isaac's concern in relation to Stew was that he had failed to turn up to work, leaving the Respondent in difficulty during one of its busiest weekends. It was not the first time Stew had failed to turn up to work. It was also alleged that he had taken a bottle of Prosecco without permission. In his email to the Claimant of 21 January 2015 Mr Isaac observed, *"People would have been fired for much less"*. Mr Isaac's email was timed at 6:40 pm. The following morning the Claimant emailed Mr Isaac seeking clarification from him as to how he would like her to proceed. Mr Isaac said the matter should be handled "face to face", confirmed that he wished to be present and that "*a letter could be a bit cold and harsh*". It was not in dispute at Tribunal that Stew was dismissed following this face to face meeting. However, when cross-examined by the Claimant at Tribunal, Mr Isaac stated that it was "essential" to bring Stew in to understand why he had failed to attend work and whether he had taken the Prosecco. Mr

Isaac also confirmed that the cost of the bottle of Prosecco had not been stopped out of Stew's wages after he had been dismissed.

30. The evidence before the Tribunal indicates that the Stony restaurant was financially under strain within its first year of trading. Mr Isaac and Mr Pritchard went into business in January 2014. In an email to Mr Isaac dated 9 December 2014 the Claimant refers to the importance of cutting back *"if we are to survive the next few months"*. The Tribunal notes that in or around January 2015 Serco Limited secured a County Court Judgment against the Respondent.

31. At page 44.17 of the hearing bundle there is an email from Mr Isaac to the Claimant dated 9 April 2015 in which Mr Isaac requested that the Claimant help Mr Pritchard in respect of a personal matter. He wrote:

> *"Can you get someone out that does electric and gas etc. to fix Terry's shower urgently please. He can't live like this and it is an easy one to sort that will make a big difference to him."*

Mr Isaac expected the Claimant to assist Mr Pritchard when the shower in his flat was not working. The Tribunal cannot readily identify how this was properly part of the Claimant's duties as Financial Controller and Administrator and notes Mr Isaac's view at Tribunal that it would have been a simple matter for the Claimant to sort out. Had it been a simple matter to resolve, Mr Isaac or Mr Pritchard might have taken responsibility for it. The Tribunal does not accept Mr Isaac's evidence that the Claimant just needed to make a quick telephone call. Mr Isaac had not suggested the name of anyone who might fix the issue. Instead it was left to the Claimant to identify what work needed to be done and a suitable contractor to do the work, agree a price for the works and to liaise with the contractor regarding access to the premises. The flat in question was above a second restaurant in Bedford, which was operated by Bedford Smoke Shack Limited, a second company owned by Mr Isaac and Mr Pritchard.

32. The Tribunal notes that Mr Isaac's email of 9 April 2015 confirms that by that date, if not earlier, the Claimant was being asked to undertake tasks in relation to both businesses even though she was employed by the Respondent.

33. The range of matters that the Claimant was being asked to undertake are documented in an email at page 44.18 of the hearing bundle. In addition to setting up the Bedford Restaurant's finances in readiness for that restaurant opening, it seems the Claimant dealt with its telephone and internet accounts, the disposal of some old furniture, arranging waste collections from the restaurant, and setting up rates, water and insurance accounts. The email also evidences that the Claimant highlighted to Mr Isaac, Mr Pritchard and Mr Layfield that there was a need to address fire safety at the premises, particularly given their experience in relation to the Stony restaurant. In an email to the Claimant dated 15 May 2015 Mr Isaac wrote:

"This email is brilliant. Massively helpful so feel free to continue doing it."

Nine months into her employment therefore, the evidence is that Mr Isaac recognised the Claimant to be doing a really good job.

34. It was not just Mr Isaac who had a positive view of the Claimant. Three weeks earlier, on 23 April 2015, Mr Isaac emailed the Claimant (copying Mr Layfield) referring to a meeting which Mr Isaac had had with Mrs Kler that day. He wrote:

"She was singing your praises so that's great and nice work."

Mr Isaac then referred to the fact that the Claimant was *"… trying to do 'some tax stuff'"*. Mr Isaac acknowledged that this was beyond what the Claimant was required to do and stated that he preferred that Mrs Kler should handle any such matters (page 54 of the hearing bundle).

35. There is further evidence in the hearing bundle that the Respondent was continuing to struggle financially at this time. On 23 April 2015 the Claimant emailed Mr Isaac about a printer she had ordered. The cost was £23 more than had been agreed with Mr Isaac. The Claimant wrote that she would meet the additional cost herself if necessary. At this time she was paid £8 per hour and in receipt of working tax credit. In seeking Mr Isaac and Mr Pritchard's agreement to fund a printer the Claimant had said she would be happy to have a second hand printer. She also acknowledged the cash flow constraints that the business was operating under at this time. The Tribunal notes that the day after the Claimant referred to the company's cash flow constraints and offered

to pay £23 towards the cost of a printer Mr Isaac emailed the Claimant stating, *"I have had to make a tough decision today and part-pay £5K of the debt to TFA"* (page 56.1 of the hearing bundle). TFA is a reference to TFA Marketing Limited, a marketing company owned by Mr Isaac which was providing marketing services to the Respondent. Mr Isaac's email evidences that he unilaterally decided to prioritise the interests of his own business over the interests of the Respondent's other suppliers who were also owed money. He did not consult the Claimant, Mr Pritchard or Mr Layfield. Instead he simply announced what he had done. The Claimant replied, suggesting that in future any marketing work by TFA for the Respondent should be quoted and agreed in advance to ensure the Respondent had the necessary budget. She wrote:

> *"No work is done unless absolutely necessary as we cannot allow this debt to creep up because we have other important food suppliers to pay off as well."*

36. A few minutes later Mr Isaac emailed the Claimant, copying Mr Pritchard and Mr Layfield stating, "*That's fine by me*". On the face of it therefore he seemed to accept that the Respondent's relationship with TFA needed to be addressed. He went on to say, *"We have to make some changes and some (at times difficult) compromises if we want to grow and be successful"*.

37. A few days later, on 29 April 2015, the Claimant emailed Mr Isaac regarding a PAYE liability of £18,290.48. The Claimant had been in discussion with HMRC and had agreed an arrangement with it under which the liability would be settled by instalments of £500 per week over a six month period. The Claimant needed Mr Isaac to set up the necessary standing order; HMRC had also insisted that the Respondent's VAT was paid on time as a condition of any instalment arrangement in respect of the outstanding PAYE. The Claimant noted in her email to Mr Isaac that an initial payment needed to be made within the following two days, with standing orders to be put in place from the following week. On 1 May it was necessary for the Claimant to chase Mr Isaac about the payment to HMRC. In an email to Mr Isaac on 1 May (page 58 of the hearing bundle) she stressed how important the matter was. Mr Isaac's response was as follows:

"I am out on the road all day and I need more notice to do things. At least a couple of days."

38. The Claimant had given Mr Isaac a couple of days' notice in relation to this matter. Her email to him of 29 April 2015 was very clear as to what was required. When the Claimant politely pointed this out to Mr Isaac there was no acknowledgment or apology from him, instead he simply said that his diary changed every day.

39. On 6 May 2015 the Claimant advised Mr Isaac that she would like to book 28 and 29 May off as holiday. Subsequently, on Friday 22 May 2015 Mr Isaac emailed the Claimant after she had finished work for the week regarding a telephone court hearing in relation to the Serco judgment which was scheduled for the following Friday, 29 May. Mr Isaac requested various information and documents from the Claimant. She responded the following morning, notwithstanding it was a Saturday, with some basic initial information and confirming that she would follow the matter up and ensure that she pulled everything together by Tuesday, 26 May. She also emailed Mr Isaac separately to remind him that she would be on holiday on Thursday and Friday of the following week. Later that day Mr Isaac responded that they would need to talk about her holiday arrangements. He asked the Claimant when she had discussed the matter with him and with Mr Pritchard and observed that her holiday was not in the diary. He described the situation as *"quite a big problem for me"* and that he needed the Claimant to be available for a telephone hearing on 29 May. His email concluded *"We need to find a solution – please don't let me down"*. As with the payment that needed to be made to HMRC, it seems to the Tribunal that Mr Isaac was irritated with the Claimant in respect of his own failure to read or to remember arrangements which had been clearly communicated by the Claimant and documented in an email.

40. The Claimant followed up in relation to the Serco matter as promised on Tuesday, 26 May. She described the situation as a collective failure, though took full responsibility for any failure on her part to handle the matter as effectively as she might have done. An email at page 64 of the hearing bundle confirms that the Claimant went to TFA's offices on 29 May, notwithstanding

she was on holiday that day, in order to participate in the call scheduled for 10:30am. It provides further evidence in this case that the Claimant continued to go above and beyond what was required of her, on this occasion interrupting precious planned time away with her family to assist the business.

41. The financial arrangements between the Respondent and TFA came to the fore again in June 2015. The issues are documented at pages 66 to 72.5 of the hearing bundle. On 3 June 2015 TFA invoiced the Respondent for ongoing marketing services. There were two invoices totaling £4,000 in respect of "Facebook management" for May and June 2015. The Claimant forwarded the invoices to Mr Pritchard and Mr Layfield. She did not copy in Mr Isaac. She questioned why an invoice had been raised for June when it was only 3 June and questioned why Mr Isaac was allowing work to be undertaken *"when he knows how much we are struggling"*. She wrote

> *"I think it is clear that he is prepared to allow Smoke Shack to go down the pan to save TFA's arse but I am not and we need a very urgent discussion on this"*.

She noted that the work had not been quoted or agreed. Later that evening Mr Pritchard responded:

> *"Because he is massively in the shit. I am with him now and he has told me he can't even pay his own wages for TFA. I don't have the energy to argue with him right now today has been too stressful."*

42. In a further email to Mr Pritchard and Mr Layfield that evening the Claimant was clear that all marketing activity needed to stop. She called into question whether the business could be brought back on track and referred to the fact that Mrs Kler agreed with her. She wrote:

> *"… it is getting through to Darren and making him realise he cannot fund TFA with Smoke Shack anymore."*

43. Mr Layfield then responded:

"I couldn't agree more with all you have put there Katherine. Terry and I have both had a chat tonight and we can't broach this this week, Bedford opening and court case fri. I do believe we are at a breaking point of not surviving…"

44. The Tribunal accepts the Claimant's explanation that she did not include Mr Isaac in this exchange because she believed that he had a conflict of interest. The conflict of interest is obvious. The Tribunal further notes that the exchange of emails between the Claimant, Mr Layfield and Mr Pritchard took place over the course of the evening of 3 June outside the Claimant's contracted hours of work. It indicates to the Tribunal just how concerned she was about the situation.

45. Around this time it seems that Mr Isaac was in discussion with one or more potential investors in the Smoke Shack businesses. In an email to Mrs Kler dated 1 July 2015, copied to the Claimant, he requested a basic P&L and Balance Sheet for each of the restaurants. The Claimant responded in the first instance, prompting a further email from Mr Isaac questioning her and Mrs Kler as to the apparent lack of management accounts and asking them how the matter could be resolved and what needed to be done between them. He said the matter needed to be sorted urgently. Mrs Kler then responded. The fact that Mr Isaac initially emailed Mrs Kler and that she took responsibility for the matter suggests to the Tribunal that both Mr Isaac and Mrs Kler regarded the management accounts as primarily her responsibility. Mrs Kler explained to Mr Isaac that as the Bedford restaurant had only recently opened management accounts were not available for it. Referring to the Stony restaurant she said the profit and loss and balance sheet for the restaurant could be downloaded at any time as they were up to date. She went on to explain to Mr Isaac that full management accounts would take her about a week to prepare on the basis that other factors would come into play in preparing these. She said that she would need at least a week's notice to prepare them. The Tribunal notes that Mrs Kler attached the first year end of year accounts to her email and reminded Mr Isaac that she had first sent these to him in February that year but that she had not heard back from him as to whether or not they were approved or if he had any queries in relation to them. In so far as there is any evidence available

to the Tribunal of the Respondent's books and accounts not receiving attention, it seems to the Tribunal that it was Mr Isaac who was remiss in this regard. The Tribunal further notes that although he responded to Mrs Kler by thanking her for her email, he continued to fail to address the issue of the year-end accounts.

46. At 11:23 pm on 1 July the Claimant emailed Mr Isaac to request, amongst other things, that he suspend a standing order to TFA as she could not be certain that there would be sufficient funds in the Respondent's bank account to meet the standing order. She sought to reassure Mr Isaac by stating that if there was sufficient money in the account once other payments were accounted for she would make the necessary payment. Mr Isaac responded the following morning stating that he would *"take a view when I know more"*. The Claimant replied in more detail at 10:21 am on 2 July. She described the Stony Restaurant as having struggled financially from day one. She wrote:

> *"If I just sat back and did nothing and allowed things to bounce and spiral out of control then I would not be doing my job, the whole point of having me onboard is to deal with the day to day running of the finances (which at the moment is a major struggle and very stressful)."*

Her email concluded:

> *"We are suppose[d] to support each other in decisions we make for the business not fight all the time, I only make decisions that I feel are best for the business right now and if my hands are going to be tied then there is only so much I can do to help." (page 69.3 of the hearing bundle)*

47. In an email to the Claimant a few minutes later, Mr Isaac acknowledged that, *"Your motivations are all positive"*.

48. Further emails were exchanged and in an email timed at 11:09 am Mr Isaac wrote:

> *"We all agree we want what's best for the company. I have to be frank and say I need to feel in control – when I don't, or I feel an employee is dictating rather than advising, it gets my back up and causes divisive issues that can snowball.*

"If I listen to everything and say well that's what needs to happen, I don't expect a continued argument or debate. Granted sometimes I should get more detail or info first before doing that.

"… this business thrives on push and pull but just bear in mind my expectations in my position. I am not always right but I don't have to be!"

49. The Claimant responded and expressed the view, *"Let's move on from yesterday and make today a better day"*. However, the issue of payments to or for Mr Isaac's benefit arose again just a few days later. On 10 July 2015 Mr Isaac questioned when a loan by him to the company would be repaid. The Claimant reminded Mr Isaac that the issue needed to be agreed between Mr Isaac and Mr Pritchard but that if monies were payable by the Stony restaurant there were currently no monies available to pay them. Further emails ensued. Once again the Claimant was dealing with matters in the evening outside her contracted hours of work. She sent a detailed email to Mr Isaac at 10:05 pm on 10 July clarifying the position in relation to various sums which were owed personally to Mr Isaac, Mr Pritchard and Mr Layfield. Once again she highlighted that the Stony restaurant was struggling financially and noted that May and June's PAYE payments were behind. A few days later Mr Isaac responded *"What are the main reasons for Stoney continuing to struggle? Where do we need to cut costs?"* The Claimant responded the following day and gave her detailed professional opinion as to why the business was continuing to struggle (pages 70 to 70.2 of the hearing bundle). In a measured and carefully considered email she identified 10 main factors, including that TFA spend *"was out of control from day one"*. She observed that Mr Isaac should take some responsibility for this. She noted that since the beginning of the year over £26,000 had been paid to TFA and that with even half this amount she would have been in a position to ensure that all the company's suppliers were paid up to date. She observed that TFA had been prioritised over other suppliers, which in her opinion was wrong.

50. Mr Isaac sent a short email response a few minutes later. He said there was nothing in the Claimant's email that came as a shock to him. He then said that the situation could not be undone and that "*we just need to now work towards*

reducing its costs and debts as soon as we can". He did not identify how this might be achieved. His casual approach and lack of concrete proposals may be contrasted with the Claimant's considered assessment and recommendations. As she had done in relation to the fire safety issues, the Claimant had proposed a clear plan of action. Questioned by the Claimant at Tribunal Mr Isaac accepted that she was raising legitimate issues and described his email exchange with the Claimant on 10 July as an example of the Claimant "*doing a good job*".

51. One week later, on 23 July, Mr Isaac emailed the Claimant requesting a breakeven figure for the Stony and Bedford restaurants and asking that she provide this by the following day. He expressed frustration that the Stony restaurant did not seem to be making money and that he needed to understand, in the most basic terms, what turnover each restaurant needed to achieve each month to break even. Although the Claimant was due to be off on 24 July she committed to put some figures together for the Stony restaurant but that she would not have time to produce figures for Bedford. She committed to provide the figures for Bedford before the end of the following week. She politely asked for a little more notice in future and noted that she would need to work on the Stony figures that evening. Once again she was working outside her contracted hours at short notice and without payment.

52. There is evidence that by August 2015 the Respondent's spend with TFA was still not under control. On 19 August the Claimant emailed Mr Isaac at 4.03pm regarding TFA. This was outside her normal hours of work. She was very clear in her assessment that TFA's work for the two restaurant businesses needed to stop with immediate effect. In view of the fact that Mr Isaac had a conflict of interest she proposed that Mr Layfield should authorise any further work by TFA and that any work would need to be quoted and agreed in advance. She expressed the hope that she would not need to send another email in similar terms. It was, of course, an issue she had been raising with Mr Isaac since April that year. Notwithstanding that Mr Isaac had acknowledged more than once the need to regularise the position in relation to TFA and to work towards reducing costs and debts, in an email to the Claimant timed at 5:56 pm on 19

August, copied to Mr Pritchard and Mr Layfield, Mr Isaac made clear his displeasure with her email:

> *"… I am totally unhappy with how they have been dictated to me, especially after what was discussed this morning during our proper conversation. You can put forward what you feel needs to be done and I/management will then review it, take a view, and there will be a decision made.* ***Do not tell me how to run the business.*** *I am getting sick and tired of having a discussion and then, what feels behind my back and without discussion, stuff like this being copied in to everyone as if to circumnavigate my opinion like it has no value.*
>
> *If this continues I will make changes to fix what I see as a problem."*

It was an angry, unpleasant and threatening email. It concluded:

> *"FINALLY … don't ever insinuate I need to justify what I do for this company or what I have achieved for it. Never tell me how things are going to be in this business without giving me the opportunity to comment first and never arbitrarily disregard any of my input or involvement. It is the number one thing that will get my backup and end poorly when I do "pull* rank"."

53. In a text to Mr Layfield that evening the Claimant described herself as *"gob smacked"*. Mr Layfield responded that he and Mr Pritchard had exchanged emails with Mr Isaac supporting the Claimant's stance. The Tribunal was not provided with copies of those emails. The Tribunal can understand why the Claimant said that she was left shaking and feeling sick following receipt of Mr Isaac's email.

54. It his evidence at Tribunal Mr Isaac said that the working relationship with the Claimant first began to breakdown in July 2015. The Tribunal found this difficult to understand given his evidence was that on 10 July he considered that she was doing a really good job. Furthermore, he was not consistent in his evidence as to when he decided that the Claimant should be dismissed. Questioned about subsequent events in January 2016 he stated that he had personally decided the Claimant should be dismissed *"long ago"* and that Mr

Layfield was aware from at least October 2015 that the Claimant needed to go. However, he then contradicted himself by stating that cracks started to show in the relationship in August 2015 and that the situation really began to breakdown in October 2015. In his closing submissions to the Tribunal Mr Isaac suggested that his concerns in relation to the Claimant's performance first emerged in August 2014 and that she had failed to address these concerns over the following 13/14 month period such that there had been a breakdown in trust and confidence by October 2015. However, his submissions overlook that the Claimant did not commence employment with the Respondent until 24 September 2014. If Mr Isaac intended to say that there were concerns from the outset of the Claimant's employment, that would be at odds with his evidence to the Tribunal in relation to the emails of 10 July 2015 and his description in May 2015 of the Claimant's work ahead of the Bedford restaurant opening as "brilliant".

55. The Tribunal could not identify anything in July, August or October 2015 to indicate either an irretrievable breakdown in trust and confidence or that there were significant concerns in relation to the Claimant's performance. The Claimant made a minor error when processing a payment on 9 October 2015 but on 13 October Mr Isaac acknowledged that mistakes happen and in this case that it had been corrected. Indeed Mr Isaac commended the Claimant on identifying and rectifying the error quickly (page 73 of the hearing bundle).

56. The Tribunal notes that the profitability of the Stony restaurant arose once again in October 2015. The Claimant was, of course, the Financial Controller but she was not its accountant or business adviser. Some three months earlier in July 2015 the Claimant had offered her views as to why the restaurant was struggling and proposed a plan of action. She set out her thoughts again on 19 August, when she was met with significant hostility from Mr Isaac. It seems to the Tribunal that neither Mr Isaac nor Mr Pritchard had taken meaningful action to address the company's financial situation. It seems that they had not acted on the Claimant's recommendations or devised a plan of action of their own. In his evidence to the Tribunal Mr Isaac admitted that, *"Numbers are not my thing"*. That is apparent from the various email exchanges in the hearing bundle. The Tribunal concludes that Mr Isaac was financially naïve at times and seemed to

have limited financial acumen and insights. In an email dated 16 October 2015 to the Claimant, Mr Layfield and Mrs Kler he wrote:

> *"I think we need a meeting with [Mrs Kler] to understand how our gross can be so painfully low and what we are going to do about it.*
>
> *Something just cannot be right here – obviously. This is totally unsustainable and makes no sense whatsoever for such a successful, popular venue."*

It was effectively the same question he had asked on 23 July 2015. The various emails, particularly Mr Isaac's email of 19 August, evidence an individual who was either unwilling or, more likely, incapable of engaging when it came to the company's finances, but prone instead to angry outbursts when matters were not working out as he wanted them to.

57. Mr Isaac's emails at pages 74 to 74.3 of the hearing bundle indicate that he recognised that the question of the restaurants' profitability was a matter to address with Mrs Kler rather than ultimately a matter for the Claimant as his book keeper. In this regard the Tribunal notes that in an email dated 16 October sent at 4:25 pm Mrs Kler confirmed that she had reviewed both companies' books and noted that, *"there was only a couple of small things that needed changing."* The businesses may not have been making any money but Mrs Kler's email evidences that the Claimant was continuing to do her job competently. Whilst Mr Isaac complained of *"holes and errors"* in the figures which the Claimant had provided to Mrs Kler (his email to the Claimant dated 20 October 2015 at page 76.3 of the hearing bundle), Mrs Kler's email of 16 October is clear that these amounted to no more than *"a couple of small things".* The Claimant had been on the receiving end of Mr Isaac's displeasure in August 2015 and there was an aggressive tone to his email of 20 October. In an email to Mr Isaac that day the Claimant referred to being very stressed and that the lack of cash flow meant that she was juggling the company's finances on a daily basis. Those stresses were added to when it emerged that various information which had previously been posted had failed to backup and accordingly had to be re-entered. The Claimant dealt with this latest issue out of hours. The Tribunal notes that the various emails exchanged on 20 October

were mainly after the Claimant had finished work for the day (pages 76 to 78.4 of the hearing bundle).

58. There was no evidence before the Tribunal of any other concerns or issues during the remainder of 2015, though pages 7.2 to 7.4 of the hearing bundle suggest that Mr Layfield was late getting various invoices to the Claimant in December 2015 and that she had to chase him for these.

59. On 11 November 2015, Mendes Jose, who was employed as a waiter by Smoke Shack Bedford Limited, was issued with a formal written warning for failing to work his contracted hours of work on "many occasions" and for falsifying his time sheets, something which Mr Pritchard said could be classified as "stealing" from the company (page 42 of the hearing bundle).

60. On 4 January 2016 the Claimant and Mrs Kler were in contact following the Christmas holiday. Mrs Kler requested the paperwork for the Bedford Restaurant for December as soon as possible as she wished to process this before the January self-assessment influx of work. Mrs Kler's email gives no indication that she or the company had any concerns. Once again, the Claimant was awaiting invoices and receipts from Mr Layfield.

61. On 6 January 2016 the Claimant received an email from Mr Isaac in which he wrote:

> *"At the management meeting yesterday we agreed this year to move all paperwork to head office in Stony Stratford, rather than it going to each restaurant or sitting in your house. That process starts now.*
>
> *Can we make arrangements by end of this week for me or Andy to pick everything up please? What evening suits? We will then look at you having a desk at the office for your role. Obviously, if that is a logistical problem for you then it will need to be discussed, but either way, everything is moving to the office."*

Mr Isaac did not seek to discuss these new working arrangements with the Claimant. She responded the same day stating that she would be happy for all the paperwork to be at the office, but that it would not be possible for her to

travel to the office five days a week. She reminded Mr Isaac that she had been employed to work from home and that she needed these arrangements to continue at least until September when her son started school. She went on to say that if there was an issue then it would need to be discussed. She floated the possibility that she might be able to work one day a week in the office and offered her initial thoughts as to how this might be implemented. She received the following terse response from Mr Isaac:

"We will discuss the implications you mention but I will come back to you."

62. The Claimant was then contacted by Mr Layfield asking to know how much paperwork there was and indicating that he intended to collect the paperwork the following day, 7 January. The Claimant responded that there was various paperwork still to sort through and suggested that she bring it to the office the following Monday, 11 January. Mr Layfield responded very briefly on 6 January but did not indicate what he wanted the Claimant to do. On Tuesday, 12 January he emailed her again:

"Katherine, how are we at gathering the paperwork ready for the move to head office? I want to have this completed by Thursday ideally ..."

63. The Claimant responded that she was waiting on an answer as to what it would mean for her position and where she would be based. She pointed out that Mr Isaac had said these matters would be discussed. She wrote:

"I'm not entirely sure what is happening as everything is discussed without me so maybe someone could have a conversation with me about it".

She went on to refer to the financial impact upon her of having to move to the company's offices and also to the fact that her son would start school in September when she might be able to work longer hours. She reiterated that the matter needed to be discussed with her and a transition date agreed. She copied Mr Isaac on this email. Once again these emails were outside the Claimant's normal hours of work. The company's response came from Mr Isaac at 9:24 pm on 12 January. He wrote:

*"We are still considering **your position** and will give you an answer by the end of the week."* (Our emphasis added.)

64. On 13 January Mr Layfield arrived unannounced at the Claimant's home. The Tribunal accepts the Claimant's evidence that as she invited him into her home he said, *"It's not good news I'm afraid"* and that he then proceeded to tell her that she no longer had a job with the Respondent. He told the Claimant to stop working immediately. When asked by the Claimant why they were letting her go he said, *"We don't need one"*. He said the Claimant would be paid to the end of January and receive an additional one month's pay in lieu of notice as a gesture. The Claimant's evidence is that she became upset and asked Mr Layfield to arrange a meeting with Mr Isaac and Mr Pritchard to discuss the matter as she hoped to keep her job. She had a young child to provide for and her financial situation was precarious. Later that day Mr Isaac issued a meeting invitation to the Claimant by email. The meeting was scheduled for 18 January 2015 commencing at 09:30 am. The Tribunal was wholly unpersuaded by Mr Isaac's evidence at Tribunal that he did not issue this meeting invitation. He claimed that the invitation had emanated from an email address that was not his and not known to him. Yet he readily accepted in his evidence that he had cancelled the meeting. The meeting cancellation emanated from the same email address that he claimed to know nothing about. The Tribunal further notes in this regard that in the course of his evidence to the Tribunal Mr Isaac initially suggested that the revised contract of employment at pages 1 to 1.17 of the hearing bundle was a fabricated document. He made that assertion notwithstanding the evidence at pages 49 to 50.2 of the hearing bundle that Mr Isaac himself had negotiated the revisions to the contract with the Claimant.

65. It was also Mr Isaac's evidence at Tribunal that he had no knowledge of Mr Layfield's visit to the Claimant's home on 13 January and that Mr Layfield was acting without authority. The Tribunal rejects Mr Isaac's evidence in this regard. The Tribunal finds that Mr Isaac knew of Mr Layfield's planned visit and knew that he intended to speak to the Claimant about her leaving the company. Indeed, the Tribunal finds on balance that Mr Isaac tasked Mr Layfield with speaking to the Claimant. It notes in this regard that on 27 January Mr Isaac

wrote to the Claimant and stated that he was now dealing with the matter of her dismissal i.e, in place of Mr Layfield.

66. On 15 January 2016 the Claimant received an email from Mr Isaac in which he wrote:

> *"Apparently, despite numerous requests, we have still no[t] been given the login details for the Kashflow? This is obviously really disappointing, especially off the back of the huge delays and issues with the bookkeeping on there, so I can only wonder why you have still not provided them despite request after request. It is not helping the situation at all.*
>
> *I need you to send me these details by Monday morning or we will have to review our stance in relation to conduct and in turn, potentially pay a notice due to you."*

Kashflow was the Respondent's accounting software. The Tribunal pauses to observe that if, as Mr Isaac claims, he was unaware of Mr Layfield's visit to the Claimant's home on 13 January and his discussion with her about leaving the Respondent's employment, it begs the question why Mr Isaac referred in his email to the notice due to her.

67. The Tribunal finds no evidence to support Mr Isaac's allegation that numerous requests had been made for the login details for Kashflow. The Tribunal was able to review the emails and texts between the Claimant and Mr Layfield, but there is no mention of the Kashflow login details in their exchanges. Nor are they referred to in Mr Isaac's emails to the Claimant. The only evidence in relation to the login details is at pages 15.1 to 15.3 and 16 of the hearing bundle. These documents evidence that on 7 October 2014 Mr Isaac requested the user name and password for Kashflow and the Claimant provided these to him immediately. They further evidence that in early January 2015 the Claimant had assisted Mrs Kler in securing access to Kashflow. Accordingly, it is incorrect that Mr Isaac or others did not have the login details for Kashflow and the Tribunal does not accept Mr Isaac's evidence that numerous requests were made for these or that the details were withheld by the Claimant.

68. In an email to Mr Isaac at 12:28 pm on 15 January 2016 the Claimant challenged him regarding the suggestion that the login details for Kashflow were not being provided. She asked who had requested these and when. Mr Isaac responded stating that Mr Layfield had been asking for months. He then said:

> *"Provide the login by Monday or I am firing you on the spot for gross misconduct without any pay. End of discussion. I am done with the way you speak to us."* (page 13 of the hearing bundle)

It was another angry, unpleasant and threatening communication. Mr Isaac did not in fact wait until Monday. Some 26 minutes later he emailed the Claimant as follows:

> *"Having given this some thought, I am now making a decision as your response is insulting and yet again, you are deliberately withholding information for us to access company bookkeeping.*
>
> *Consider yourself fired for gross misconduct due to your continued insubordination. I will firm up things with Andy and the others.*
>
> *... I understand you are owed salary up to today, plus possibly some notice."*

He then threatened to involve the police if the Claimant did not return her laptop or paperwork. He continued:

> *"I have had enough of things being dictated by you and I am sick to death of your rudeness and bad attitude"*.

69. The only evidence of rudeness and bad attitude available to the Tribunal was in various of Mr Isaac's emails to the Claimant.

70. The Tribunal considers that Mr Isaac's email of 15 January 2016 was effective written notice terminating the Claimant's employment. Although Mr Isaac was purporting to dismiss the Claimant on grounds of gross misconduct, his email was somewhat ambiguous insofar as Mr Isaac referred to some possibility of notice. Be that as it may, the Claimant understood that she was being

dismissed with immediate effect. The Tribunal concludes on the balance of probabilities that this was also Mr Isaac's intention.

71. The Claimant was unable to sleep on 16 January and reviewed her messages with Mr Layfield. At 05:13am she emailed him noting that they had spoken on 1 September 2015 and that Mr Layfield had messaged at that time her stating, *"It is OK I have managed to log on to Kashflow now, have a good night"*. The message itself is at page 17 of the hearing bundle.

72. The Claimant subsequently spoke by telephone to Mr Layfield on 18 January 2016. She recorded their conversation though did not inform Mr Layfield that she intended to do so. Nothing much turns on their conversation, though the Tribunal notes that the Claimant said to Mr Layfield that the only reason she could think as to why she had been dismissed was that she was unable to work from the office instead of from home.

73. On 16 January 2016 Mr Isaac cancelled the meeting which had been arranged with the Claimant for 18 January. As noted already, the cancellation emanated from the same email address used to set up the meeting which Mr Isaac claimed to have no knowledge of.

74. On 27 January 2016 Mr Isaac emailed the Claimant stating that he was now dealing with the matter of her dismissal. He acknowledged that the company was due to pay the Claimant some outstanding money, which provides further confirmation, if such were needed, that Mr Layfield acted with the Respondent's knowledge and authority in proposing arrangements under which the Claimant would leave the company. In his email Mr Isaac set out the reasons as to why the Claimant had been dismissed in six numbered paragraphs. The email is at page 25 of the hearing bundle and the reasons may be summarised as follows:

    1. The Claimant was not meeting the requirements of her role and had dishonestly stated that certain work had been done or nearly completed.

    2. The Claimant was deliberately insubordinate in not providing the login details for Kashflow when these had been requested by Mr Layfield, Mrs Kler and Mr Isaac.

3. The Claimant's bookkeeping was incomplete and inaccurate and she had failed to produce management accounts.

4. The Claimant was insubordinate, had failed to work her contracted hours, rarely answered the telephone and had failed to complete the company's books for November and December 2015.

75. It will be apparent from the Tribunal's various findings above that it does not consider that the Respondent had grounds to dismiss the Claimant for the reasons given by Mr Isaac. The evidence is that the Claimant was meeting, and indeed exceeding, the requirements of her role. Throughout her employment the Claimant was honest and straightforward in her dealings with Mr Isaac and with others. Various emails in the hearing bundle evidence that she kept them informed as to what she was doing and was open with them when she was under pressure or slightly behind on a task. The limited errors and delays about which the tribunal heard were not material. She was not insubordinate in relation to Kashflow. Mr Layfield, Mrs Kler and Mr Isaac each had the login details, and the Tribunal is satisfied that had these been requested of her, the Claimant would have provided them again. The record of her employment demonstrates that she was highly responsive to whatever requests were made of her from time to time. The Tribunal does not accept that the Claimant's book-keeping was inaccurate or incomplete. In April 2016 Mrs Kler had praised the Claimant to Mr Isaac, and in October 2016 she reviewed the Claimant's work and concluded that only a couple of small matters needed addressing. As regards the management accounts these were a matter for Mrs Kler, as Mrs Kler herself acknowledged to Mr Isaac in October 2015. The Claimant did not fail to work her contracted hours, on the contrary there is extensive evidence that she worked significantly in excess of her contracted hours, including evenings, weekends and during planned leave. The Respondent adduced no evidence in support of its contention that the Claimant rarely answered the telephone. This allegation is not addressed in Mr Isaac's witness statement and it was only first mentioned on 27 January 2016 after the Claimant had been dismissed. The Tribunal considers the allegation to be unfounded. Regarding the allegation that the Claimant was behind with her book keeping for November and December 2015, there was limited evidence

available to the Tribunal in this regard. The Tribunal was told by Mrs Kler that between 50 and 100 book keeping entries were missing and that a reconciliation had not been undertaken by the Claimant, but her evidence in this regard was otherwise vague. Ms Oakes had filed a one page statement of evidence. Her allegations in relation to the Claimant were of an even more generalised nature than Mrs Kler's. There is no basis upon which the Tribunal can sensibly or properly conclude that the Claimant was materially behind in her work, let alone that the Respondent may have had grounds to dismiss her for gross misconduct or gross incompetence.

76. In his email (and letter) of 27 January 2016, Mr Isaac went on to state that the lack of trust and continuing issues with her conduct and honesty meant that the Respondent had no choice but to dismiss the Claimant for gross misconduct. He stated that there would be no payment in lieu of notice. He offered the Claimant three options:

    1. An immediate payment of £440 in respect of what she was owed up to 15 January in full and final settlement.

    2. Payment to the end of January in full and final settlement based upon a resignation date of 1 January. On this basis the company would provide the Claimant with a reference.

    3. The company would suspend any further payment in lieu of any pending dispute.

    This was all confirmed in a letter of the same date (pages 25.2 to 25.3 of the hearing bundle).

77. The Claimant responded by email on 28 January accepting option 2. She had taken some preliminary advice and understood that she could accept payment of salary to the end of January without in fact prejudicing her statutory employment rights as she was not being asked to enter into a settlement agreement. She also pointed out in her email that although she had been dismissed for gross misconduct she was entitled to any holiday outstanding and to be paid any outstanding expenses.

78. When the Claimant subsequently contacted Mrs Kler to request her P45, which she required in order to sign on for income support, she received an aggressive email from Mr Isaac instructing her not to contact Mrs Kler directly again.

79. On 29 January 2016 Mr Layfield wrote to Mr Jose stating that he was conducting an investigation into Mr Jose's alleged continued failure to attend work and to report his absence (page 43 of the hearing bundle). He invited Mr Jose to attend an investigation meeting and advised him that he may be accompanied by a trade union representative or a colleague. Mr Jose was warned that one possible outcome of the investigation was that there could be disciplinary proceedings.

80. The Claimant emailed Mr Isaac on 7 February 2016 regarding her outstanding holiday pay and expenses. Mr Isaac responded to say that he had not received her email of 28 January but that on receipt of a copy of it he would assess with Mr Layfield and Mrs Kler what, if anything was owing to her. The Claimant responded, and the Tribunal agrees, that it was odd that Mr Isaac should suggest he had not received her email given that he had authorised the payment to her of her wages through to the end of January in accordance with her stated election in her email of 28 January of option 2 in Mr Isaac's letter of 27 January.

81. There were further needlessly unpleasant emails from Mr Isaac to the Claimant during this period. They are in the hearing bundle and it is not necessary for the Tribunal to refer to them individually in this Judgment. The Tribunal simply notes in conclusion that these culminated in Mr Isaac texting the Claimant as follows on 26 February:

> *"Katherine. Just had a call from BT that you called yesterday to cancel a phone line for Bedford. I am now getting a copy of that call recording and involving the police. You have crossed a serious line and we will be suing you for any business losses as a result once I have all the evidence. A very silly thing to do. I am going to suggest to the police that we all meet and discuss this problem because that is harassment and also fraud. Before I take any of this as fact I will get the call recordings and go from there. If they are wrong then disregard this message but that is what I*

have just been advised, to inform you, and I am deeply concerned about it. You are to make no further contact with the company or any of its suppliers. I am ceasing contact at this point and any further contact will be from the police or our solicitors. I felt I should make you aware at the first available opportunity of the allegation that has been made by BT."

Law and Conclusions

82. Section 13(1) of the Equality Act 2010 provides:

> "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

83. An employee claiming direct discrimination must show that they have been treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably. In other words, what was the employer's conscious or subconscious reason for the treatment? It is important that the tribunal does not become too bogged down in determining the appropriate comparator and the question of whether there has been less favourable treatment. As Lord Nicholls made clear in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL***, the "comparator" issue should not be treated as a threshold to be crossed before the "reason why" issue is addressed. The focus must always be on the primary question of why the respondent treated the claimant as it did.

84. In considering whether a claimant has been treated less favourably than a comparator, a tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and the comparator (section 23(1) of the Equality Act 2010). However, a comparator need not be a 'clone' of the claimant.

85. Section 136 of the Act, which implements various EU Directives, provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

86. Tribunals must always have regard, first and foremost to the language of the statute when deciding whether there has been discrimination.

87. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across-the-board approach" when deciding if the burden of proof has shifted in respect of all the allegations (***Essex County Council v Jarrett UKEAT/0045/15***).

88. Prior to the Equality Act 2010, the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** set out guidance to tribunals on the burden of proof. The guidance was approved, with minor revisions, by the Court of Appeal in ***Igen Ltd and others v Wong and other cases [2005] IRLR 258***. The ***Barton*** guidance envisaged a two-stage approach to the burden of proof: at the first stage the question is whether the claimant can show a prima facie case and, if so, at the second stage the tribunal considers whether the respondent's explanation is sufficient to show that it did not discriminate. Tribunals will require more than merely a difference in treatment and a difference in sex (or other protected characteristic). This may only indicate the possibility of discrimination. A prima facie case requires that a reasonable tribunal can properly conclude from all the evidence that there has been discrimination

89. On a number of occasions the Courts have emphasised that the burden of proof provisions are not to be applied in an overly mechanistic way.

90. A number of reported cases have concerned claimants whose managers took a particularly hostile or confrontational attitude towards them, for example when dealing with performance management, disciplinary or grievance matters. ***Igen*** was one such case. The Court of Appeal cautioned tribunals against inferring

discrimination too readily in such cases. In ***Bahl v Law Society and others [2004] IRLR 799 (CA)*** the Court of Appeal observed that discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from the unreasonable treatment itself but from the absence of any explanation for it.

91. In considering this matter this Tribunal has been mindful throughout that it should not infer discrimination simply because Mr Isaac may have been hostile or confrontational in certain of his dealings with the Claimant or because, had the Claimant had two years' continuous service, we might have concluded that she had been unfairly dismissed. In his submissions to the Tribunal, Mr Isaac readily admitted that the Respondent's procedures were lacking. It is not for this Tribunal to uphold the Claim in order to afford a remedy to the Claimant simply because she may have been treated harshly or unfairly by the Respondent.

92. The Tribunal's first task is to consider whether each of Stew, Mendes Jose and Luke Sandall were relevant comparators in terms of the treatment complained of by the Claimant. The Claimant's complaint of less favourable treatment comprises two elements; firstly, that she was dismissed without any disciplinary procedure first being followed and secondly, that she was dismissed in respect of alleged misconduct when other employees were not.

93. As regards the alleged lack of process, the Tribunal is satisfied that Stew is an appropriate comparator in terms of his and the Claimant's respective circumstances. The allegation against Stew was that he had failed to turn up to work on three occasions and that he had effectively stolen a bottle of Prosecco. Whilst the underlying facts giving rise to concern differ from those in relation to the Claimant, their circumstances were not materially different. They were each accused of serious dishonesty and of failing to do their job, and that there had been a breakdown in trust and confidence. In each case Mr Isaac had in mind that he may dismiss them. Whilst the Tribunal notes that Stew was ultimately dismissed, the fact is that the Respondent followed a procedure before dismissing him. As Tribunal has noted already, Mr Isaac stated that it was "essential" to bring Stew in to understand why he had failed to attend work and

whether he had taken the Prosecco. By contrast, Mr Isaac was not concerned to hear from the Claimant. Instead he informed the Claimant by email that he was dismissing her for insubordination and then wrote to her two weeks later stating that she was being dismissed for dishonesty and failing to perform her duties, in each case without affording the Claimant any opportunity to state her case.

94. The Tribunal has to consider whether Mr Jose should also be regarded as a comparator. The Respondent's concern in relation to Mr Jose was in respect of his time-keeping. The issue was not simply that he was allegedly not working his contracted hours (one of Mr Isaac's stated concerns regarding the Claimant), but that he had also acted dishonestly by falsifying his time sheets to conceal this fact. In his letter to the Claimant dated 27 January 2016 Mr Isaac claimed that she too had been dishonest about what work she had been doing. It seems that the allegation in each case was essentially the same even if the facts differed. In Mr Jose's case a disciplinary process had been followed, including a written warning in November 2015, followed by a formal investigation in January 2016 during which Mr Jose had been invited to a investigation meeting and afforded a right to be accompanied. The Tribunal's reticence in relation to Mr Jose arises not in relation to the concerns themselves, but from the fact that he was employed by a different company to the Claimant, namely Smoke Shack Bedford Ltd, and whether in such circumstances it is permissible under section 23 of the 2010 Act for the Tribunal to treat him as a comparator. In his submissions Mr Isaac said he should not be. However, the Tribunal notes that the Respondent company and Smoke Shack Bedford Ltd were under common ownership, management and control, and further that the Claimant was effectively working for both companies, even if her legal employer was the Respondent. In the circumstances the Tribunal has concluded that Mr Jose is an appropriate comparator. In so far as the Respondent contends that Mr Jose (or indeed Stew) was not an appropriate comparator in terms of how the Claimant was treated, the Tribunal is satisfied in the alternative that he (and Stew) provide strong evidence as to how the Respondent would have treated others in the Claimant's situation in the absence of an actual comparator.

95. As regards her dismissal, the Tribunal is satisfied that Mr Sandall is an appropriate comparator in terms of their respective circumstances. Mr Sandall was alleged to have failed to perform his duties and, in so doing, to have jeopardised the restaurant business. The same allegation was levelled at the Claimant, namely that she had failed to meet the requirements of her role to a degree that had serious negative implications for the business. Mr Sandall received a verbal warning, whereas the Claimant was dismissed. In the alternative the Respondent's treatment of Mr Sandall evidences how the Respondent would have treated others in the Claimant's situation in the absence of an actual comparator.

96. The question which the Tribunal must next consider is what is the reason for this difference in treatment. Was it by reason of the Claimant's sex? In this case the Tribunal has concluded that the Claimant has established facts from which the Tribunal could conclude, in the absence of any other explanation from the Respondent, that the difference in treatment was because of her sex. The Tribunal has due regard to Mr Isaac's hostile and confrontational manner over an extended period of time and the wholly unreasonable manner in which he dismissed her. In and of themselves these aspects do not constitute prima facie facts from which discrimination should be inferred. However, given every opportunity at Tribunal to explain his attitude and approach over a period of months Mr Isaac could not do so. He had no apparent explanation for his arbitrary and unjustified conduct towards the Claimant. Regarding the manner of her dismissal, he said that the Respondent was a small start-up company. That does not explain the Claimant's treatment during her employment or why Stew, Mr Jose and Mr Sandall were treated differently to her.

97. Although Mr Isaac's claimed that he had resolved at some point during 2015 to dismiss the Claimant, there was no evidence to support this. On the contrary, Mr Isaac's email to the Claimant at 11.15am on 6 January 2016 refers to the Claimant having a desk at the office, which assumes she would be continuing in the Respondent's employment. For the reasons already set out, Mr Isaac's evidence that he had decided in the course of 2015 to end the Claimant's employment was unreliable and inconsistent. The Tribunal notes that the first indication that the Claimant's continued employment may be in issue was in fact

only after the Claimant emailed Mr Isaac on 6 January 2016 highlighting that her childcare responsibilities would preclude her from being office based on a full time basis. The Clamant noted this herself as early as 18 January 2016. Mr Isaac responded to the Claimant's email of 6 January 2016 by stating that the "implications" would be discussed. By 12 January he went on record that the Claimant's "position" was being considered, from which the Tribunal concludes that her continued employment was then in question. The context may have been that Mr Isaac harboured some resentment towards the Claimant because she had challenged the arrangements with TFA during 2015, but the trigger for the Claimant's dismissal was her statement in two separate emails in January 2016 that she was unable to be office based on account of her childcare responsibilities and asking for a discussion about this. Mr Isaac's refusal to countenance any discussion and his apparent insistence that the Claimant should be based at the office regardless of the actual needs of the business and regardless of the Claimant's circumstances carries the taint of discrimination.

98. There are other considerations that lead the tribunal to conclude that the Claimant has established facts from which discrimination may be inferred. The stated reason on 15 January 2016 as to why the Claimant was being dismissed was not the reason why she was dismissed. Mr Isaac said she was being dismissed for insubordination. At 12.27pm he had instructed her to provide the login details for Kashflow by the following Monday, 18 January. However, he then dismissed her 26 minutes later without allowing her an opportunity to comply with his instruction. She had not been insubordinate in terms of the instruction that had been given. (For the avoidance of doubt the Tribunal notes again here that Mr Isaac, Mrs Kler and My Layfield each had the Kashflow login details). Even after Mr Isaac had been able to reflect on matters for two weeks, his stated reasons on 27 January 2016 for dismissing the Claimant are not supported by the evidence and have not been accepted by the Tribunal. Contrary to that letter, the Tribunal has found that the Claimant was meeting the requirements of her job, that she was not dishonest, that she worked significantly in excess on her contracted hours, that any errors or delays in her work were not material and explicable in any event by reason that she was expected to undertake a range of tasks over and above her job duties, and that

she was not insubordinate (on the contrary that she conducted herself politely and professionally in the face of hostile, provocative and unprofessional behaviour from Mr Isaac over a period of many months). Other than the fact that her childcare responsibilities precluded the Claimant from agreeing to Mr Isaac's demand that she be office based, there is no other explanation for the her dismissal. Furthermore, Mr Isaac's attempts to rely upon the reasons given in his letter of 27 January 2016 were bedevilled by inconsistencies in his own evidence to the Tribunal. The Tribunal was not much assisted by Ms Oakes or Mrs Kler's evidence. Their evidence was in the most general terms.

99. Having concluded that the burden rests with the Respondent to show that section 13 of the Equality Act 2010 was not contravened, the tribunal has considered whether there is sufficient evidence on the Respondent's side to discharge the burden of proving that there has been no discrimination. The Respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based (***Glasgow City Council v Zafar [1998] IRLR 36 (HL)***). The Respondent's reasons for acting as it did do not have to be reasonable or sensible. In this case, other than denying that they are appropriate comparators, the Respondent did not put forward any explanation as to why the Claimant was treated less favourably than Stew and Luke Sandall. The Claimant had completed her probationary period by December 2014 and as such the Respondent's normal disciplinary procedure was stated to apply to her employment. There was no explanation whatever by the Respondent as to why no procedure was followed in her case. As regards her dismissal, the Tribunal has not accepted the reasons put forward by Mr Isaac for why the Claimant was dismissed. The only apparent explanation for her dismissal is that her childcare commitments precluded her being office based. As a woman with the primary responsibility for caring for a child that is evidently related to her sex. In the absence of any explanation by the Respondent for its treatment of the Claimant the Tribunal concludes that it has failed to discharge the burden of proof upon it in this matter. Further, or in the alternative, the Tribunal considers that the Claimant was treated less favourably than Stew, in terms of the Respondent's failure to follow any disciplinary

process in relation to her, and less favourably than Mr Sandall, in that she was dismissed, by reason of her sex.

100. The burden of proof is upon the Respondent to establish that the Claimant was in fundamental breach of the terms of her contract such that the Respondent was entitled to, and did, terminate her employment summarily by reason of such breach. For all the reasons set out above, the Tribunal has not accepted the Respondent's stated reasons for dismissing the Claimant. She was not guilty of gross misconduct or gross negligence in the performance of her duties, nor did she conduct herself in a manner calculated or likely to destroy the essential trust and confidence of the working relationship. In the circumstances the Tribunal concludes that the Respondent terminated the Claimant's employment in breach of contract by failing to give her two months' notice terminating her employment as required by clause 17.1 of her contract of employment and/or by failing to pay her in lieu of such notice. Instead the Respondent paid the Claimant her salary to 31 January 2016. She should have been paid up to and including 15 March 2016. It follows that the Respondent was not entitled to offset her expenses or holiday pay against the sums paid to her up to 31 January 2016.

101. A remedy hearing has been fixed for **1 September 2017** at which the Tribunal will consider compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest. The Tribunal has made a number of case management orders to ensure that remedy can be determined on 1 September.

102. The hearing has been listed at Cambridge Employment Tribunal, Cambridge Magistrates' Court, 12 St Andrews Street, Cambridge CB2 3AX - to start at 10am or so soon thereafter as possible on **1 September 2017**. The parties should note that the hearing venue has changed since the hearing in May as the Bedford Tribunal is due to close. The listing is intended to allow sufficient time for the Tribunal to determine the issues which it has to decide and reach its conclusions and, if possible, for the Tribunal to give judgment with reasons.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Disclosure of documents**

   a. The parties are ordered to give mutual disclosure of documents relevant to the issue of remedy by list and copy documents so as to arrive on or before **14 July 2017**.

   b. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment. If the Respondent alleges that the Claimant has failed to mitigate her losses it shall disclose any documents upon which it intends to rely in support of its contentions in that regard.

   c. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

2. **Updated statement of remedy/schedule of loss**

   a. The Claimant is ordered to provide to the Respondent and to the Tribunal, so as to arrive on or before **14 July 2017**, a properly itemised updated statement of the remedy sought (also called a schedule of loss).

   b. The Claimant is ordered to include information relevant to the receipt of any state benefits.

3. **Bundle of documents**

   a. It is ordered that the Claimant has primary responsibility for the creation of a single joint bundle of documents required for the remedy hearing.

   b. To this end, the Respondent is ordered to notify the Claimant on or before **28 July 2017** of the documents to be included in the bundle at their request. These must be documents to which they intend to refer, either by

evidence in chief or by cross-examining the Claimant, during the course of the remedy hearing.

c. The Claimant is ordered to provide to the Respondent a full, indexed, page numbered bundle to arrive on or before **4 August 2017**.

d. The Claimant is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the remedy hearing.

4. **Witness statements**

a. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

b. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issue of remedy only. They must not include generalisations, argument, hypothesis or irrelevant material.

c. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

d. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

e. It is ordered that witness statements are exchanged so as to arrive on or before **18 August 2017**.

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Employment Judge Tynan
Date: 30 June 2017

ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS