



# EMPLOYMENT TRIBUNALS

**Claimant :** Ms J Shirlaw  
**Respondent:** Ascendant Leisure Properties Limited  
**Heard at:** Watford Tribunal Hearing Centre (via CVP)  
**On:** 7<sup>th</sup> October 2022  
**Before:** Employment Judge S Iqbal

## Representation

**Claimant:** In Person  
**Respondent:** Mr Hammond (Director of Respondent Company)

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

# JUDGMENT (Reserved)

The judgment of the Tribunal is that:-

1. The Claimant's applications to amend her claim to include complaints of sex discrimination, equal pay and victimisation is refused.
2. The Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996.

## Background and claim

1. The Respondent is a business that trades as Stronghold Climbing Centre. They currently employ twenty-seven staff and operate two centres which are community focused climbing centres. The claimant was employed by the Respondent from the 19<sup>th</sup> March 2019 and she signed an employment contract [97] on the 20<sup>th</sup> March

2019, which set out her responsibilities included; front of house, training toward instruction and a trainee route setter. Her employment ended on the 9<sup>th</sup> August 2021.

2. The Claimant brought claims for unfair dismissal and for breach of contract on a claim form presented on 22<sup>nd</sup> November 2021 after ACAS conciliation between 23<sup>rd</sup> August 2021 and 4<sup>th</sup> October 2021. She claimed compensation only.
3. The Claimant's unfair dismissal claim was as follows [9].
4. On the 14<sup>th</sup> June 2021 the claimant met with the Managing Director, Patrick Hammond to discuss a pay rise on the basis that she had been a trainee for two years and had reached her skill level at which other colleagues had received a raise. She was told there was to be no raises for 6-months due to budgetary constraints and it was suggested she pursue free-lance elsewhere an allowance would be made.
5. Following this meeting, the claimant e-mailed Mr. Hammond to explain she would pursue free-lance as suggested and hoped to route set for them in the future, but for now she would only be undertaking team member shifts. Mr Hammond in response, emailed the claimant to highlight that her actions would amount to a resignation. There followed email correspondence in which she clarified she was not resigning simply seeking change to her role and schedule. On the 1<sup>st</sup> August 2021, she was emailed by Brian McAlinden, operations manager to invite her to a meeting to discuss her change of role. At a meeting fixed on the 4<sup>th</sup> August 2021, a number of matters were discussed and the claimant was offered a new role. On the 8<sup>th</sup> August 2021 she received an email, from Mr. Hammond informing her he had issued a P45 as he considered her email of the 20<sup>th</sup> June 2021 to have acted as a resignation. In her claim form the Claimant highlighted that she took his response as a form of intimidation and did not respond. Further that she was dismissed with no notice, holiday pay or redundancy pay.
6. The Respondent defended the claim [19] stating that the claimant resigned from her employment. Particularly that on the 20<sup>th</sup> June 2021 she stated she would no longer carry out her duties unless she had a role change. The Respondent informed her they did not accept the role change and as she wouldn't carry out the duties the company had trained her to do this would be seen as a resignation not gross misconduct. Various conversations were held to find the Claimant a new role during her notice period extended to 6 weeks due to being off sick

### **Procedure documents and evidence heard**

7. I was provided with an agreed bundle of documents consisting of [136] pages separately served were statements from all those giving their evidence.
8. The claimant appeared in person and gave evidence to support her claim having adopted her witness statement. In addition, on behalf of the claimant, Mr. Stoyan Nenov, who is a head route setter with the Respondent company, and also the

partner of the claimant attended to give evidence in support of her claim. On behalf of the Respondent, Mr. Patrick Hammond who is the founder, managing director and setting director for the Respondent and Mr. Jamie Lewin, who is the Setting Manager of the Respondent (who began his employment with the Respondent in June 2021), gave evidence on behalf of the Respondent.

### **Application to amend the claim**

9. At the outset of the hearing, the claimant raised a preliminary issue. She applied to amend her claim to add a complaint of sex discrimination, equal pay and victimisation. She stated that she only recently had the confidence to raise the fact that she felt she had been discriminated against. She further stated that she had been dismissed shortly after making she claimed for equal pay and further that she had been victimised and discriminated against as a female route setter.
10. Mr. Hammond, on behalf of the Respondent vigorously opposed the application. He contended that the injustice and hardship to the parties had to be balanced. The claimant's claim was for unfair dismissal only in her ET1 and she did not refer in her claim to discrimination. This would be an entirely new claim and the balance of hardship fell disproportionately on the Respondent.
11. After a short adjournment I made the following decision.
12. The claimant at the hearing sought to amend her particulars of claim to include a claim for sex discrimination (equal pay). The original ET1 complained of unfair dismissal at 8.1 of the form and at 9.1 ticked the 'compensation only' box, but also the box which sets out 'if claiming discrimination., a recommendation'. No further details were given in relation to this element.
13. In her statement of mitigating loss, which is undated she specifically stated that she had not claimed for discrimination as it was difficult to prove but she and another former employee felt they had been given fewer opportunities than their male counterparts.
14. In her witness statement, served for the purpose of the hearing, the claimant set out at §30 that:

*' I believe victimisation harassment and discrimination occurred and played a part in my dismissal, but I did not have time to amend my ET1, as well as being intimidated by my partner...'*
15. Against this background it appears to be accepted that the claimant puts forward a new head of claim. I considered the fact that to allow an amendment is a matter of discretion for the under schedule 1 of the Tribunal Rules of Procedure.

16. The leading authority is set out in **Selkent Bus Co Ltd v More 1996 IRLR 661 & IC 836** where Mummery J gave guidance as follows:

*“(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.”*

17. The relevant circumstances were to include consideration of :

- Nature of the amendments
- The applicability of time limits.
- The timing and manner of the application

18. I concluded having heard from both parties and applying the above principles to circumstances of this case that the amendment should not be allowed.

19. The proposed amendment to the claim was based on the fact that the claimant believes she was unfairly dismissed after raising the issue of equal pay, further that she was victimised and discriminated against as a female setter. I find these claims although connected to the factual nexus of the current claim, is substantively different from her original claim, which was that she was dismissed following a failure to follow proper procedures particularly, during negotiations about her role and pay, an accusation of gross misconduct and the termination of her contract with no notice.

20. The claimant in evidence before me stated that the reason for not previously bringing a claim under any of the heads identified above was because she did not have the confidence to do so. However, this is inconsistent with what she has previously set out in her statement mitigating loss that is particularly that she felt discrimination would be difficult to prove. I also note that she has had just under a year since bringing her claim and to have sought advice as to whether there were and other issues that arose, on which she could bring her claim. I consider this together with the fact that the claim is out of time, made on the morning of the hearing that is, nearly a year after she lodged her ET1 form on the 22<sup>nd</sup> November 2021, without advance notice to the Respondent. Further I note her ET1 is specific about the fact that she was only pursuing a claim for unfair dismissal based on a lack of proper procedures.

21. I find the timing and the manner of the application has the impact of ambushing the Respondent and am satisfied that they would be prejudiced in pursuing the claim today without being given the opportunity to properly respond to the claims made.. In these circumstances I would have to adjourn the matter and I have considered that if this hearing was postponed would lead to extensive delay in re-listing it for hearing which has already taken a year before it was listed before the Tribunal,

22. There would of course be prejudice to the Claimant if I refused the amendment however, I note even at this stage she has not particularised in any detail the

discrimination and/or victimisation and balancing this against the delay in raising these matters, together with the prejudice to the Respondent, in all the circumstances presented, I conclude allowing the amendment would outweigh the prejudice to the Claimant in not allowing it. I therefore refused the amendment, and the matter therefore proceeded as set out below.

### **The issues**

23. The issues can be summarised as follows:

24. In relation to unfair dismissal the following were relevant:

- 24.1. Was the claimant dismissed or did she resign?
- 24.2. The respondent does not seek to argue that the claimant was dismissed for a potentially fair reason so the Tribunal understands that the following issues do not arise:
  - 2.1. If the claimant was dismissed, what was the reason or principal reason for the dismissal?
  - 2.2. Was it a potentially fair reason?
  - 2.3. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

25. In relation to the remedy that was available for unfair dismissal, the following matters were relevant:

- 25.1. If the claimant succeeds what, if any, remedy is she entitled to? In particular:
  - 1.1. What basic award is payable to the claimant, if any?
  - 1.2. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent? 1.2.1 If there is a compensatory award, what are the claimant's financial losses including, but not limited to, any immediate loss of earnings, any future loss of earnings, expenses, any loss of benefits, loss of statutory rights and loss of pension rights?
  - 1.3. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?
  - 1.4. If not, for what period of loss should the claimant be compensated?
  - 1.5. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 1.6. If so, should the claimant's compensation be reduced? By how much?
  - 1.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 1.8. Did the respondent or the claimant unreasonably fail to comply with it?

- 1.9. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 1.10. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 1.11. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

26. In relation to a Breach of Contract / Notice Pay

- 1.1. What was the claimant's notice period?
- 1.2. Was the claimant paid for that notice period

27. At the start of the hearing, I confirmed the above issues with the parties.

**Findings of Fact**

28. There is no dispute that the Claimant was employed on the 19<sup>th</sup> March 2019, with her contract of employment signed on the 20<sup>th</sup> March 2019 [97] and further that although it was in her contract, she had not had an annual appraisal with the company. Further that she had never been formally disciplined whilst at the company.

29. The Claimant's employment with the Respondent began on the 19<sup>th</sup> March 2019. On the 17<sup>th</sup> March 2020 the Respondent closed its doors due to lockdown with staff being furloughed. On the 25<sup>th</sup> July 2020 the staff returned until the second lockdown on the 4<sup>th</sup> November 2020, and they finally returned on the 12<sup>th</sup> April 2021.

30. On the 14<sup>th</sup> June 2021, the claimant met with Mr. Hammond to discuss her progression with the company. Following the meeting, the parties entered into email correspondence, which I will consider in detail below.

31. On the 19<sup>th</sup> June 2021, the claimant was signed off sick with shingles and she remained on full sick pay until the 1<sup>st</sup> August 2021.

32. On the 8<sup>th</sup> August 2021, Mr. Hammond emailed the claimant to inform her that her employment with the Respondent was terminated.

**Meeting of the 14<sup>th</sup> June 2021**

33. I note the claimant in her ET1 at 8.2 [7] highlighted that she requested a meeting with the Managing Director, Patrick Hammond, in which she raised the topic of pay highlighting that she had reached her skill level at which her setting colleagues had also received a raise.

34. In her recent statement at §3 she states that she had messaged the Centre Manager, Ryan Reyes on the 13<sup>th</sup> June 2021, to have a meeting to discuss scheduling issues

but also intended to broach the topic of a possible pay rise. However, it was when she arrived at the meeting that Patrick Hammond intervened and stated the meeting would be with him. Whilst she has produced text message exchange with Mr. Reyes [61], these do not refer to any discussion about a pay rise but simply set out that she wished to speak about her schedule as new members of staff had had the same opportunity.

35. I find this to be inconsistent with her earlier account in her ET1 and although not much turns on this I find on balance that she requested the meeting with Mr. Hammond which, is consistent with the Respondent's record in their ET3.

36. There is a dispute about what took place at the meeting. The claimant's account is that she highlighted that two of her predecessors had progressed and received a raise after being with the company for less than two years of service. However, Mr. Hammond's response was that there were budgetary restrictions for the company and therefore there would be no raises for six months or so, and that he suggested that she ought to freelance elsewhere and that the company would make concessions in her schedule. She also highlights that he stated that she would struggle to find work elsewhere and it would not be paid well.

37. The claimant relies on the fact that her direct predecessor had been given a pay rise after less than two-year's service and provides both his contracts of employment. The first as a trainee [108-118], I note started on the 19th February 2018 and he was paid the rate of £10.15 per hour and the second contract [119-129] as a route setter started on the 1st September 2019 where he was paid £11 per hour. However, I find that the rise took place pre-pandemic and the lockdown which, caused many businesses including the Respondent to close its doors. This in turn meant that anyone working through this period, such as the claimant would have been subject to substantial time when they were not working. On the facts of this claim, I find undoubtedly there was some disruption to the claimant's role as a trainee setter and therefore on balance she may not have been at the same level reached by her predecessor in the same length of service, which would have been for an uninterrupted period. I consider this against other matters that I set out below, when reaching my conclusions.

38. On behalf of the respondent, Mr. Hammond's evidence is that he informed the claimant that he was unable to offer an immediate pay rise (not that there would be no pay rise for 6 months) but would discuss the request to progress from trainee setter to setter with her line managers, Jamie Lewin and Stoyan Nenov. Further, he sets out that it was the claimant who suggested she wished to do freelance work and he had agreed that it was open to her to get such work on her days off. I find on balance his approach was not unreasonable given the end of the national lockdown only two months prior in April 2021, a time at which all businesses suffered financially.

39. It is accepted by the parties that a meeting that took place on the 16<sup>th</sup> June 2021 with Mr. Hammond, Jamie Lewin, Stoyan Nenov and Brian McAlinden (Operations Manager) at which he discussed the claimant's progress particularly whether her skills as a setter were now such that she no longer needed to be of trainee status. Mr. Hammond further highlighted that there was no industry standard and that it would be very much down to an individual's line manager as to their progression. He therefore asked Mr. Lewin to produce a guideline.
40. I further find that the fact that a meeting took place is consistent with Mr. Hammond's account of having discussions with those who knew the claimant's work before considering the issue of a payrise. There is corroborative evidence from Mr. Lewin, both oral and an email from him to Mr. Hammond, dated the 20<sup>th</sup> June 2021 [52], in which he sets out a guideline for progression as apprentice to head setter.
41. I note, Mr. Nenov, who is in a relationship with the claimant but still employed by the Respondent, also gave evidence. He stated that he considered the claimant and another employee, Joe, were at a level to be signed as inhouse setters but Mr. Lewin disagreed and this is also therefore consistent with the position taken by Mr. Hammond in requesting guidelines for their progression.
42. Mr. Lewin in evidence did not engage with whether there had been discussions at the meeting about pay rise however, I find this is consistent with the general theme of the meeting being centered around discussions of career progression which may well have led to a pay rise.
43. Mr. Nenov's evidence more generally was that before the meeting, as the head route setter, he was aware of the burn out of his team and the dissatisfaction they had with their pay and work conditions, which he attempted to relay to the upper management. He states that the answer of upper management was that the new route setting manager beginning in June 2021, Mr. Lewin, would introduce improved working conditions and pay increase to be revised after autumn. The claimant in her statement or evidence does not in any way highlight the working conditions as per Mr. Nenov's evidence, but rather talks about a pay rise given she considered she had progressed from one level to another. Against this background I do not accept Mr. Nenov's evidence.
44. Mr. Nenov further state's it was his view at the meeting that he considered both the claimant and Joe as fully trained inhouse setters, but Mr. Lewin disagreed and both he and Mr. McAlinden supported the idea of both employees continuing their apprenticeship until further notice. This is consistent again with Mr. Hammond's evidence that the outcome of the meeting was to develop standards to help with career progression.
45. Mr. Nenov was quite definitive about the company confirming they were unable to agree to a pay rise but I find what he does not address is whether there was discussion about career progression being considered and whether he in turn



relayed that to the claimant. I found in this respect, Mr. Nenov's evidence to be less reliable especially given his undoubtedly split loyalties.

46. What I note from his evidence that amongst other matters, from the meeting, he also relayed back to the claimant comments made by Mr. Hammond about the claimant and Joe being humbler in their demands when they were inexperienced and came from affluent families. On balance, I find that the details of the meeting as relayed by Mr. Nenov to the claimant, particularly, the personal comments, are what triggered her email of the 20<sup>th</sup> June 2021.

#### **Email of the 20<sup>th</sup> June 2021**

47. Whilst all witnesses were consistent in evidence that the general position of the Respondent was that the claimant and Joe could free-lance for further experience, I do not accept the claimant's evidence that she was told by Mr. Hammond that he would make concessions in her schedule for such work.

48. Rather I have noted the challenging tone of the email dated the 20<sup>th</sup> June 2021, sent by the claimant, which, I find in response to what Mr. Nenov had relayed back to her, after the meeting of the managers on the 16<sup>th</sup> June 2021. The email was addressed to Brian McAlinden, Patrick Hammond and Ryan Reyes in which she set out the following:

*"Just wanted to address the status of my route setting apprenticeship. After a meeting with Patrick, I have thought a lot and spoken to my team about my progress. I have ultimately finished my apprenticeship at Stronghold. I missed a little bit of training with the angle grinder, but aside from that I feel I have a good grasp of setting at this point."*

*"Therefore, I don't feel I need to continue with the apprenticeship. I would like to continue as setter at Stronghold, but I understand there is no room in the company budget. I can fully understand that, so I think the best solution would be for me to continue on as a team member and pursue freelance setting at other walls, all the above I have already discussed with Patrick."*

*"I believe my contract will need some reviewing as I will need to reduce the number of days, I work per week to accommodate freelance work. I can also attend any training days if those pop up and if you see fit for me to attend them."*

49. I find her email conflates a pay rise with the issue of whether she had completed her apprenticeship. But the completion of training would normally be a matter for consultation with an employer. The claimant also goes on to unilaterally end her apprenticeship and attempt renegotiation of her contract. Unsurprisingly, Mr. Hammond's immediate response by email was that they would have to be a meeting in order to discuss the proposed changes and understand the position she was

proposing. In particular he set out that *“Initially though I am trying to understand if this means you won’t be setting at Stronghold with immediate effect? This is important for us to understand in order to rota accordingly. If so, it is important, you understand the contractual implications of that, it is essentially resigning where four weeks’ notice is required unless an agreement can be made with the company.”*

50. The claimant’s evidence as to her position is consistent with the e-mail, she subsequently sent on the 21<sup>st</sup> June 2021 in response clarifying that she did not intend to resign, and her e-mail did not at any point mention resignation. Rather that she understood that there would be a change to her employment which, in particular given that she had three different roles, may well nullify the existing contract and therefore a new contract would have to be discussed. She also highlighted that she had understood from the meeting that there was no budget to give her a pay rise on the days that she was setting, and that her decision was based on her overriding impression that she got from the meeting with Mr. Hammond. Further no follow up was discussed or arranged, so she felt it was necessary to act on what was best for herself as an individual and as an employee. However, as I have already highlighted, I find Mr. Hammond’s actions in setting a meeting and specifically discussing the claimant’s progression (as agreed by the claimant’s witness Mr. Nenov), does not support the fact that he had not agreed to a follow up after their first meeting.
51. The claimant sent a further e-mail on the same day stating that *“I realize I didn’t address the cessation of my setting work at Stronghold. Again, this is not a resignation but a change in role. I can continue setting for the next four weeks’ if it is on my contract if I need to do so. There is no written agreement about the number of days, so one or two days should suffice.”*
52. Having considered all the facts and email correspondence outlined above, I am satisfied that on balance that there was a clear indication by the claimant that she did not intend to resign from the company but rather that she sought to vary her role and that these emails amounted to permitted negotiations.
53. Unfortunately, before the resolution of those events or any further proposed meeting between Mr. Hammond and the claimant, she was taken ill with shingles and accordingly e-mailed Brian McAlinden on the 22<sup>nd</sup> June 2021 There is no dispute that she remained on full sick pay during this time and she was signed off until the 29<sup>th</sup> July 2021. She was also required to spend ten days in isolation from Covid exposure during this period.
54. On the 29<sup>th</sup> July 2021, Mr. Hammond e-mailed the claimant in an attempt to continue the conversations, and it appears that Mr. McAlinden e-mailed her on the same day offering a two-day role as a team member. Mr. Hammond states that the dual e-mails from him and Mr. McAlinden were due to poor communication, and at the time he was on holiday but mindful he needed to resolve the claimant’s position, especially as he considered her to have completed four weeks’ notice. He states that he had not sent her a P45 at this point, as they had been unable to have a discussion as to

whether an agreement could be reached on her proposal to vary her contract. However, I am satisfied on balance that the fact that a P45 was not sent is indicative of the fact that he did not see it as a resignation from the company either.

55. Indeed, Mr. McAllinden made clear in his e-mail of the 29<sup>th</sup> July 2021 that he had been asked to follow up a position and the four weeks' notice was up as a "*trainee route setter*" and that a new contract would be needed as they believed a two-working day contract as a team member/instructor would meet both party's needs.
56. In response to this, the claimant highlighted that she was happy to talk about these two days but could potentially do more and following this e-mail to Mr. McAlinden he offered her a meeting face to face to discuss the role that might work for her, which she agreed to. She clearly indicated that she preferred Mr. Hammond not to attend the meeting given the previous confusing correspondence with him.
57. The claimant also did respond to Mr. Hammond's e-mail as she stated it had ended up in spam and she confirmed she had already been e-mailed by Mr. McAlinden and informed of his offer.

#### **Meeting of the 4<sup>th</sup> August 2021**

58. At the meeting of the 4<sup>th</sup> August 2021, between the claimant, Tim Herdal (Senior Duty Manager) and Brian McAlinden (Operations Manager) with minutes taken by Tim Herdal [55-60]. At the meeting there was Mr. McAlinden asked the claimant what she would like to discuss and the subjects covered were the previous meeting between the claimant, the meeting that followed between Mr. Hammond and Brian McAlinden, Jamie Lewin and Stoyan Nenov, the setting apprenticeship itself and the e-mail chain between Patrick Hammond, Brian McAlinden and herself with an offer of a new role from Brian McAlinden, which included two days setting at the rate of £12 per hour in line with Joe Mitchinson and two days as a team member at £10.55 per hour, together with a clear pathway of progression.
59. There was also some discussion about competitor world wage rates which were higher, and further questions were raised by the claimant about the current offer made. The claimant expressed feeling uncomfortable insofar as her position at the company was concerned, however, confirmed that there was added stress of being a female setter, confirming that there had not been any discrimination towards her, however, she was afraid it could happen. It appears that the claimant asked at the end if it would be possible to set at Stronghold, plus freelance and Mr. McAlinden highlighted that outside of the set days this could be discussed further. The meeting ended with the claimant expressing general feeling of discomfort being recorded.
60. Mr. Hammond's evidence is that he was provided with the minutes to the meeting and to him it was clear that a new rate had been offered to the claimant, but that she

declined to accept it and he further highlighted in his statement that she said, *“It would be hard to U-turn on thoughts about no future at Stronghold.”*

61. He interpreted this as the claimant being unwilling to do the role she was being offered and/or unwilling to do any other role further that she had long gone past her four weeks' notice whilst still on pay. He accordingly e-mailed her on the 8<sup>th</sup> August 2021 [35] to inform her that her employment was terminated.
62. Whilst parts of the minutes refer to the claimant being uncomfortable and wondering about her future with the company, as well as questioning her pay rate, there is no unambiguous statement that she was not considering the offer made to her. To the contrary, I find she actively engaged with the offer Mr. McAlinden put forward by asking if she was permitted to free-lance in addition to her duties with the Respondent.
63. Mr. Hammond's email however set out *“As you are no longer an employee of Stronghold you will lose staff privileges.... you will need to return all staff clothing and remove any of your possessions from the staff lockers... I understand an offer of work has been made and has been considered, but until a way forward is decided on, I must follow company procedure on the termination of contract.”*
64. The claimant explained in response emailed him [36] that she would come in to return her uniform; however, however that she was under the impression that she was to meet with Mr. McAlinden to discuss the job offer, and that once she e-mailed him, they would speak about it during the week.
65. Accordingly, on the 9<sup>th</sup> August 2021[48-51], the claimant followed up with Mr. McAlinden meeting to discuss the new contract highlighting that she could move forward and accept the job offer but needed to work out how many days she would be doing. In response, Mr. McAlinden informed her that he would be away but when he was back things could be wrapped up and she could route set for 1-2 days and he also provided that she could return back at the start of September when she was fully fit again. I find on balance the email correspondence between the claimant and Mr. McAlinden is clearly demonstrative of ongoing negotiations on the variation of her working terms.
66. On the 10<sup>th</sup> August 2021, she confirmed to Mr. McAlinden in response that she had been back to climbing normally and was fit to work, and the nerve issue was a temporary side effect of her healing process. Further that the only contract she could accept was an amendment to the existing contract and not sign a contract that did state that she had been working at Stronghold for over two years. She further unequivocally set out:

*“I maintain I did not resign, and I have not stated at anywhere in my communication with Stronghold, I merely stated I would like a change in role. I have repeated that many times, I informed Stronghold I was uncomfortable with continuing as a setter, I would like to switch to front of house, you have written proof of that.... If Stronghold*

*would like to terminate my employment because of that it is fine. However, you will need to give me four weeks' notice. Issuing me a P45 taking me off payroll and asking me to collect my belongings if I have not formally resigned is not standard protocol. If you want to fire and re-hire me, you are also obligated to give me four weeks' notice."*

67. On the 11<sup>th</sup> August 2021, the claimant received an e-mail from Mr. McAlinden in which, he highlighted that he was referring back to Mr. Hammond's e-mail dated 9<sup>th</sup> August regarding her employment status at Stronghold.
68. The email from the claimant of the 10<sup>th</sup> August 2021, is different in its content to the previous e-mail she had sent to Mr. Hammond, and in it the claimant has attempted again to clarify her employment status within the company. I find simply because she agreed to take her staff uniform in, following her previous email and also highlighted she ought to be taken off the e-mail list, does not support Mr. Hammond's position that she had resigned, particularly, given that she highlighted at the end of the first e-mail, that she was still in discussions with Mr. McAlinden about the new contract and further confirmed if it was the case that she was to be fired and then re-hired she ought to be given 4 weeks' notice.
69. Mr. Hammond in his email of the 11<sup>th</sup> August 2021 [37] in response to the claimant's email of the 9<sup>th</sup> August 2021, set out that the claimant had in her email accepted the cessation of her contract of employment with four weeks' notice, which contradicted her e-mail on the 10<sup>th</sup> August and superseded it. He stated "*No employee by their self-decide to change their role. This has to be backed up by a formal offer, offer accepted then a contract is forth coming.*" He ended the e-mail "*If you still insist you haven't resigned and haven't had your four weeks' notice, then the next correspondence will be from our lawyers who will pursue closure on this...*"
70. Whilst the e-mail correspondence between the parties is at times confusing, I find that on balance Mr. Hammond has chosen to misinterpret the intentions of the claimant and I find this is because he was not pleased about the manner in which she sought to vary her contract from the outset and further that she chose to exclude him from the meeting of the 4<sup>th</sup> August 2021. In particular, it appears that having read the minutes of the meeting at which he was not present, he was not happy with the comments of the claimant which, has been reflected in his statement and in evidence before me.
71. However, despite the way in which the claimant had initially sought to vary her contract unilaterally, which I find was in reaction to Mr. Nenov, having relayed the discussions and personal comments about her from the meeting on the 21<sup>st</sup> June 2021, I find she has been clear throughout her correspondence and meetings that she simply wished to vary her contract. She was not terminating the contract in any way, and simply wanted to renegotiate her title, but also her pay rate.

72. Mr. Hammond seeks to rely on the claimant having worked of her notice whilst she was unwell, and that as a gesture of goodwill the company paid her for a further two weeks. However, I do not accept his evidence on this, if anything, I find paying six weeks' pay to someone when they were only entitled to four weeks is inconsistent with a belief that they had resigned. I find it is clear from all the circumstances presented therefore that he dismissed her by virtue of his email sent on the 8<sup>th</sup> August 2021.

## **Grievance**

73. I do not accept the Claimant's assertion that she raised a grievance, (having consulted Google) via e mail on the 10<sup>th</sup> August 2021 to Brian McAlinden rather, I am satisfied on balance it was part of ongoing correspondence and ongoing negotiations to vary her contract..

74. For the sake of completeness, I note that the claimant states that Mr. McAlinden in response to her email had referred her to Mr. Hammond's e-mail of the 9<sup>th</sup> August 2021 and that she further received one last correspondence from Mr. Hammond on the 11<sup>th</sup> August 2021, which she presumed was a response to her grievance in which he set out that an employee who refused to work was either resigning or to be removed for gross misconduct, and that he would refer the matter to the lawyers to pursue closure if she continued to insist that she had not resigned.

## **The Law**

75. Section 94 of the Employment Rights Act 1996 ("ERA 1996") sets out an employee's right not to be unfairly dismissed by their employer.

76. Section 98 of the ERA 1996 states as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial (2) reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,  
(b) relates to the conduct of the employee.

77. Where the employer has shown a fair reason for dismissal, the determination of whether the dismissal is fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

78. In this case, the first issue to determine is whether the Claimant had resigned or was dismissed. I have considered the following cases:

- **Kwikfit GB Limited v Lineham [1992] ICR 183 and Burton v Glycosynth Limited [2005] All ER (D) 272** (see below):
- **Martin v Glynwed Distribution [1983] ICR 511**: “who really ended the contract of employment?”
- **Walmsley v C&R Ferguson Limited [1989] IRLR 112**: No particular terms of art are required for resignations
- **East Kent Hospitals University NHS Foundation Trust v Mrs P Levy UKEAT/0232/17**: the Employment Appeal Tribunal upheld the decision of the Employment Tribunal that an employee had not resigned but was in fact dismissed by her employer given ambiguity arising when she gave notice to move to another department in the company.
- **Sothorn v Frank Charlesly & Co [1981] IRLR 278 and Burton v Glycosynth Limited [2005] All ER (D) 272**: Where words are ambiguous, a Court or Tribunal should ask how they would have been understood by a reasonable listener in the circumstances.

79. In **Willoughby v CF Capital Limited [2011] IRLR 985**, the legal position as summed up by Rimer LJ at paras 37 and 38 as follows:

*“The “rule” is that a notice of resignation or dismissal (whether oral or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The “special circumstances” exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in paragraph 31 of Kwik-Fit’s case ....*

*“The essence of the ‘special circumstances’ exception is therefore that, in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a ‘cooling off’ period before acting upon it.”*

80. **Sovereign House Security Services Limited v Savage [1989] IRLR 115 and Kwikfit**: A party who has used unambiguous words cannot normally be heard to say that he did not mean what he appeared to mean. There are “special circumstances”, however, in which the words used will not be treated as definitive. In those circumstances, the person purportedly giving notice should be given an opportunity to satisfy the recipient that he did not intend to bring the employment relationship to

an end. This includes where words are spoken in the heat of the moment as per **Kwikfit GB Limited v Lineham [1992] ICR 183**: Wood J in **Kwikfit** referred to as “the cooling off period” is “only likely to be relatively short, a day or two, and it will almost certainly be the conduct of the employee which becomes relevant, but not necessarily so.”

81. **Riodan v War Office [1959] All ER 552** and **Willoughby v CF Capital PLC [2011] IRLR 985**: Words of resignation or dismissal, once communicated to the other party and accepted by him, cannot generally be withdrawn unilaterally.
82. **BG Gale Ltd v Gilbert [1978] IRLR 453 EAT at paragraph 8, Chapman v Letheby & Christopher Ltd [1981] IRLR 440 EAT at paragraph 13, and J & J Stern v Simpson [1983] IRLR 52 EAT at paragraph 7**: The question whether or not there had been a dismissal or resignation must then be considered in the light of all the surrounding circumstances

## Conclusions

83. I have considered the legal principles as set out above and on the facts of this case, it is clear there is a series of correspondence and the theme of the claimant’s position throughout is that she was not seeking to resign even if Mr. Hammond was frustrated by her position insofar as her attempts to renegotiate her role was concerned. I find he could not possibly have construed that as a resignation. The last e-mail correspondence with her asking her to deliver her uniform etc, and her agreement to do so was not the claimant resigning; however, I find it was the claimant following what she thought was protocol in relation to the change of her role from one position to another which was close to being agreed in its terms. It has certainly been clear from the discussions in the minutes of the meeting and the e-mail correspondence between the claimant and Mr. McAlinden, that both in fact and in substance a new role had been agreed for her.
84. I find the sequence of events leads me to conclude on balance that there was no resignation by the claimant, it was a simply a request of the change of role which I find is corroborated by all the e-mails between Mr. McAlinden, Mr. Hammond and herself with the subject header as ‘change of role at Stronghold’ [38,40].
85. For the sake of completeness, I find that there was no potentially fair reason for the dismissal and having considered the ET3, the Respondent set out that they informed the claimant that they did not accept her proposal to change her role and that as she was not carrying out the duties the company had trained her to do, this was seen as a resignation not that as claimed by the claimant that she was being dismissed for gross misconduct.
86. Accordingly, I am satisfied that the claimant did not resign nor did she give notice of resignation. Accordingly, the claimant was dismissed by Mr Hammond via email on



the 8<sup>th</sup> August 2021 and her claim for unfair dismissal therefore succeeds. I am therefore satisfied that she was unfairly dismissed and entitled to a remedy.

### **Remedy**

87. I have considered the schedule of loss as set out in the bundle at pages 25-26 and the claimant's statement of mitigating loss. The claimant claims a basic award which I am satisfied that she would be entitled to in addition to an award for the notice period. In relation to a compensatory award, the claimant states she was not able to secure alternative employment until the 21<sup>st</sup> February 2022.
88. The Respondent did not agree with the period of loss being claimed of six months out of work. That is from the 9<sup>th</sup> August 2021 – 21<sup>st</sup> February 2022. They submitted that to the contrary to there were jobs being advertised in London on the 19<sup>th</sup> October 2021 at climbing centres and accordingly produced corroborative documentary evidence of the same.
89. The claimant in her statement set out that she waited a month after being fired with no notice and decided to take a month off to recover which was the month of August 2021, after this in September 2021 she decided to take some time to go outdoors and climb and it was only in October 2021 that she applied for many temporary jobs through multiple online websites, and felt some of the jobs were not suitable, such as care worker, house keeper, covid tester. She provided evidence of the applications made during that period. She also stated that during October, November 2021, she invested time and effort in completing a qualification as a climbing wall instructor (CWI), which she passed on the 12<sup>th</sup> December 2021, as well as taking an online course in physiotherapy during the same period. All the while she continued to keep an eye out on job roles in the climbing wall industry and in January 2022, saw three different roles arise for which she spent the month of January applying, interviewing and corresponding with finally being offered employment as instructor and duty manager on the 11<sup>th</sup> February 2022, starting on 14/2/2022.
90. However, having considered the totality of the evidence before me I am not satisfied on balance that the claimant is entitled to the entire six-month period for which she claims the compensatory award for loss of earnings. Whilst the circumstances of her dismissal may well have led her to take time out to re-evaluate her position, I find that the two month period between August – September 2021 and such time is reasonable.
91. Further that from the advert submitted by the Respondent dated 19<sup>th</sup> October 2021, I find there was certainly work available in the climbing field and on the claimant's own evidence she began applying for roles in other sectors whilst, she also took time to improve her qualifications. Therefore, in all the circumstances presented, I find that the claimant is only entitled to loss of earnings between 9<sup>th</sup> August 2021 – 19 October 2021.

92. With that in mind is open to the parties to reach a settlement and avoid a remedy hearing keeping all issues in respect of remedy open. Given my observations above, the claimant should understand that it does not automatically follow from the fact that she has succeeded in her claim that she will be awarded the sums in her schedule of loss.

93. In light of these observations both parties to write to the Tribunal if they require a remedy hearing.

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**Employment Judge Iqbal**

**Dated: 4<sup>th</sup> December 2022**

JUDGMENT SENT TO THE PARTIES ON

Date: 7 December 2022

FOR THE TRIBUNAL OFFICE

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