IN THE EMPLOYMENT TRIBUNAL

Case No. 58 of 2022

BETWEEN:

ELIANA BELEN GUZMAN LOPEZ

Claimant

-and-

INTERBRAND VENTURES GIBRALTAR LIMITED

Respondent

DECISION

Claimant in person

Ms Irene Morales representing the Respondent

Introduction

1. The Claimant was employed as a retail shop assistant by the Respondent in its card selling business at 35 Main Street, Gibraltar known as Cardland from the 21st January 2019 until her employment dismissal on 21st November 2022.

2. The Termination of Employment form filed with the Department of Employment on 30th November 2022 (**DoE Notice of Termination**), and which both parties signed, stated that notice of termination had been given to the Claimant by the Respondent on 21st October 2022 terminating her employment on 21st November 2022, with a payment of £1,245.90 and the reasons for termination being given as:-

"*after various oral notices to change her attitude and not seeing any result, I feel compelled to dispense of she owing to the following reasons among others: misconduct, regularly turning up late for work; inappropriate and discourteous behaviour; poor job performance, she still needs constant supervision; unable to speak English properly; lack of interest to improve*."

Claims

3. The Claimant filed a claim with the Employment Tribunal claiming (a) unfair dismissal, and seeking reinstatement, compensation and an apology; (b) statutory redundancy compensation; and (c) a contractual claim for one month's notice.

The grounds on which the Claimant claimed that the dismissal was unfair

4. The Claimant's reasons for alleging that the dismissal was unfair were that (a) English was not requirement of her job and other members of staff who did not speak English still did their jobs well. She had received no formal or informal complaints about her level of English or what she was required to do and it made no sense for the Respondent to complain about this after she had been working for it for almost 4 years; (b) the complaints against her were concocted by the Respondent; (c) she never had any issues or any warnings, let alone any written warnings; (d) her manager ignored her grievances about working conditions and brought about her dismissal. When she pointed out workers' rights and the unlawfulness of staff being forced to come to work half an hour early without pay, and to stay behind unpaid after 19:00 closing times to clean and tidy up, her manager decided to terminate her employment unfairly; and (e) she was never given the opportunity to respond and always behaved and was only informed of the reasons for her dismissal at the handing to her of her termination.

The grounds on which the Claimant claimed that the dismissal was in breach of contract

6. The Claim Form included a claim for breach of contract on the grounds that the Claimant had not received her contractual entitlement to a month's notice of her dismissal.

The grounds on which the Claimant claimed that the reason for dismissal was redundancy

7. In light of the Claimant's assertions summarised in paragraph 4 of this Decision that she was not at fault for her dismissal, the Claimant claimed that she was entitled to a statutory redundancy payment/compensation on termination of her employment (**SRP**). Any such entitlement to SRP would be payable under the provisions of the Conditions of Employment (Retail Distributive Trade) Order (**RDTO**).

The grounds on which it is claimed that the dismissal was fair and lawful

8. The Respondent made no contractual claim against the Claimant in its Response. It defended the Claim for unfair dismissal on the grounds that (a) main reason for her dismissal was that she arrived late at work on many occasions, especially on two occasions during the last few months of her employment; (b) whilst every job vacancy advertised by the Respondent required the applicant to have retail experience and the ability to speak both English and Spanish, a good level of English was never demanded but only the necessary level to serve customers. Whilst the Claimant said she was studying to improve it, this was incorrect and after almost four years, she was unable to have a conversation with an English-speaking person and could not take a phone call if the caller was speaking to her in English. If this had been the sole issue with her continued employment, she would not have been dismissed; (c) she had an inappropriate, loud and discourteous manner of talking to the Respondent's Shop Manager, Ms Irene Morales (**Ms Morales**), shouting at her in front of customers and accusing Ms Morales of being unprofessional and leaving Ms Morales unable to answer her in front of customers; (d) her job performance was poor, she was insubordinate requiring constant supervision and whenever Ms Morales attempted to guide her to do something she never accepted her guidance, left the shop in a mess on many occasions and showed no inclination to improve her attitude or performance; (e) she was waiting to be dismissed by the Respondent so that she could receive unemployment benefit from the Spanish Government; and (f) after many conversations and unheeded warnings to improve her attitude she was dismissed because of her failure to improve her attitude and behaviour.

The issues to be determined

9. The issue of whether the dismissal was fair or unfair normally involves four questions, two of which, whether the Claimant qualified to claim for unfair dismissal and whether she was dismissed, can both be answered in the affirmative and are not live issues in this Claim. This leaves two other questions for the Employment Tribunal to determine:-

    a. Has the Respondent discharged the burden of proving under s.65(1) of the Employment Act 1932 (**EA 1932**) that the reason, or the principal reason, for

the dismissal was a reason falling within s.65 (2) EA 1932 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held under s.65(1)(b), so as to be a potentially fair reason for dismissal? If the Respondent cannot prove that, then the dismissal is automatically unfair; and

b. If the answer to this first question is in the affirmative then when determining whether the Respondent acted fairly or unfairly in dismissing the Claimant, the Tribunal needs to consider whether the Respondent acted reasonably or unreasonably in treating the reason, or the principal reason, as constituting a sufficient reason for dismissing the Claimant and which question is to be determined in accordance with equity and the substantial merits of the case: s.65(6) EA 1932.

Applicable Law

Reason for dismissal

10. S. 65(1) and (2) EA 1932 provide:-

> *"65.(1) In determining for the purposes of sections 59 and 70 whether the dismissal of an employee was fair or unfair, it shall be for the employer to show:-*
>
> > *(a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and*
> > *(b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.*
>
> *(2) In subsection (1)(b) the reference to a reason falling which this subsection is a reference to a reason which:-*
>
> > *(a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
> > *(b) related to the conduct of the employee;*
> > *(c) was that the employee was redundant;*
> > *(d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment."*

11. S.65(1) EA 1932 imposes the burden of proof on the Respondent to establish the reason, or if more than one, the principal reason for the dismissal (*Maund v Penrith*

District Council [1984] ICR 143). As Cairns LJ said in *Abernethy v Mott Hay and Anderson (1974) ICR 323*: " *The reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of the dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty proving the facts that actually led him to dismiss: or he may describe the reasons wrongfully through some mistake of language or of law*". As Underhill LJ observed in *Beatt v Croydon Health Services NHS Trust (2017) IRLR 748*, the "*reason*" for dismissal connotes the factor or factors operating on the mind of the decision-maker, the dismissing manager, which causes, or motivates him, to dismiss the employee.

12. Where the employer adduces evidence as to the reason, the employee only needs to provide sufficient evidence that there is a real issue as to whether that was the true reason and cast doubt on the employer's reasons. If it does, then the burden of proof remains with the employer. The task of the Employment Tribunal is to investigate the dismissing manager's overall genuine reasons for the dismissal.

13. The guidelines for tribunals to apply when dealing with cases of alleged misconduct in the case of *British Home Stores Ltd v Burchell (1980) ICR 303* at 304C (approved by the Court of Appeal in *W. Weddel & Co Ltd v Tepper (1980) ICR 286)* set out a three-limb test that needs to be answered:-

    a. Whether there was a genuine belief on the part of the employer that the employee had committed an act of misconduct;
    b. Whether there were reasonable grounds to sustain that belief;
    c. Whether the employer, at the stage it formed this belief, had carried out as much investigation as was reasonable in all the circumstances of the case.

14. If the Tribunal considers the three-limb test in *BHS v Burchell* to be satisfied by the Respondent it must still go on to consider whether the Respondent acted reasonably in treating the reason as sufficient to dismiss the Claimant for under s. 65(6) EA 1932.

Whether the Respondent acted reasonably in the circumstances in treating it as a sufficient reason to dismiss the Claimant – the band of reasonable responses

15. Once the Respondent has established a potentially fair reason, s.65(6) EA 1932 provides:

"Subject to subsections (4) and (5) the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case."

16. In determining this question, which is a neutral question on the facts and on which neither party bears the burden of proof as to whether the Respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss in all the circumstances, I must consider the test set out in (*Iceland Frozen Foods Limited v Jones* [1982] IRLR:-

a. The reasonableness of the Respondent's conduct, not simply whether I consider the dismissal to be fair;
b. In judging the reasonableness of the Respondent's conduct, I must not substitute my decision as to what is the right course to adopt for that of the Respondent. The standard is that of the hypothetical reasonable employer;
c. In many cases there is a band of reasonable responses whereby one employer might reasonably take one view, another quite reasonably another. A dismissal is only unfair if no reasonable employer would have dismissed;
d. The function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses, which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, if the dismissal falls outside the band, it is unfair;
e. To gather all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances whether the dismissal of the Claimant was such that a reasonable employer carrying on the Respondent's business would have regarded the dismissal as a reasonable response and whether, in all the circumstances of the case, the dismissal was carried out in a fair way.

Procedural fairness

17. Procedural unfairness, namely the manner in which the decision was made, is only relevant to the extent that it affects the fairness of the reason shown by the Respondent for the dismissal *Polkey v AE Dayton Services Limited (1988) AC 344, (HL)* at 357F where the House of Lords opted for the analysis of Browne-Wilkinson J (as he was then) in *Sillifant v Powell Duffryn Timber Limited (1983) IRLR 91 at p. 97*:-

"The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. A [tribunal]

is not bound to hold that any procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the [tribunal] in deciding whether or not the dismissal was reasonable within section 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal, not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, a [tribunal] would be likely to hold that the lack of 'equity' inherent in the failure would render the dismissal unfair. But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it would make no difference…"

18. Lord Bridge of Harwich at page 364C in Polkey summarises the essence of procedural fairness as follows:-

*"But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation…If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by s.[98(4)] (*s.65(6) in Gibraltar) *is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."*

Compensation

19. Where a dismissal is found to be unfair as a result of any procedural unfairness, a *Polkey* deduction can be applied by reducing the award of compensation to nil on the ground that the Respondent's failure did not affect the outcome: *Polkey*; *Fisher v California Cake & Cookie Limited* [1997] IRLR 212; *Parkinson v March Consulting Ltd* [1997] IRLR 308. If the Employment Tribunal is unwilling to award no compensation, it can limit the award to a nominal amount by the application of the *Polkey* deduction [*Constantine v Mcgregor Cory Limited* [2000] UKEAT/236/99]. There is no need for an all or nothing decision. If the Employment Tribunal considers

there is doubt whether or not the Claimant would have been dismissed, that element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the Claimant would still have lost her employment.

SRP

20. To be entitled to SRP under paragraph 9(1) of the RDTO, the Claimant's employment needed to have been terminated by reason of "*redundancy*" which under paragraph 9(2) of the RDTO has the meaning given to it in s74(1) EA 1932 (now s75(2)(a) EA 1932) namely:-

"*dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."*

Evidence

21. There were approximately three employees working for the Respondent when the Claimant started working for it in January 2019. She was paid monthly, and was entitled under her Notice of Terms of Engagement filed with the Department of Employment to one month's notice of termination of her employment which was also the minimum prescribed by s. 54(1)(b)(i) EA 1932 for a monthly paid employee with less than 8 years' service on the date of dismissal, as was the case for the Claimant.

Respondent's principal reason for dismissal- lack of punctuality

22. Ms Morales' evidence was that the main reason for the Claimant's dismissal was the Claimant being persistently late for work over a long period of time especially during the last months of her employment to the point that it became unacceptable, showed a lack of respect for her employer, made her unreliable, and having given her more than one chance to improve, she was dismissed. Evidence of this in the form of 24 WhatsApp exchanges of communication between her and the Claimant on 30th April, 6th May, 20th May, 17th June, 27th July, 13th September, 11th October, 15th October, 26th October, 26th November, 1st December 2021, 5th January, 15th January, 22nd March, 3rd May, 6th May, 22nd May, 30th May, 23rd June, 24th June, 29th June, 23rd July, 16th August and 31st August 2022 was provided. These included images sent by the Claimant showing photographs of herself stuck at the Gibraltar Airport Pedestrian Crossing as being the reason for her being late for work, coupled with excuses that she had slept in, or woken up and fallen asleep again. She also adduced screenshot CCTV images of the store remaining closed at 10.15am, at 9.10am and 10.13am as a consequence of the Claimant's failure to attend work on time.

23. Ms Morales cited two of what she described as the worst examples of such lack of punctuality. Firstly, on 22nd May 2022 when the Claimant informed her at 9.54am that she was stuck at the Gibraltar Airport Pedestrian Crossing and would not arrive by her start time of 10am. Ms Morales told the Claimant that it always seemed to be happening to her only, and that it was her responsibility to be on time for work. By 10.15am she had still not arrived at work. Secondly, on 23rd July 2022, when the Claimant was a key holder and responsible on that day for opening the store at 9am, Ms Morales was obliged on her annual leave to ask the Claimant where she was at 08:58 am as the shop's CCTV showed that the store was still closed two minutes before opening. The Claimant answered at 10.22 am, almost one and a half hours later, that she had woken up for work but then fallen asleep again. The shop remained closed on a busy Saturday until it was opened by Ms Morales at 9:45am once she had arranged for emergency childcare in Spain to allow her to cross the frontier to open the store herself. The Claimant finally arrived at work at 11.30 am, two and a half hours late.

24. Ms Morales' evidence was that the Claimant's repeated excuse for being late on many of these occasions was that the Gibraltar Airport Pedestrian Crossing was closed and she could not cross would be acceptable on a few limited occasions or for a new worker unfamiliar with this commuting issue, but not for someone who had been crossing the Gibraltar Airport Pedestrian Crossing regularly, knew that it would sometimes be temporarily closed and would factor this into their travel arrangements by getting up earlier to arrive at work on time. Because of this continuing lack of reliability and responsibility to arrive at work on time, Ms Morales had changed the Claimant's working times from the earlier shift to a later shift as an alternative to dismissing the Claimant.

25. The statement of Ms Miriam Velez (**Ms Velez**), a colleague of the Claimant during the period 7th August 2020 to 7th January 2022, was admitted as hearsay evidence given that she was not available to give evidence on the date of the hearing. She stated that the Claimant was consistently late for work, that Ms Morales had spoken to her regarding her lack of punctuality on several occasions but that the Claimant continued to arrive late and essentially ignored Ms Morales as she didn't take her seriously as Shop Manager. Ms Velez described her relationship with the Claimant during that period to be excellent, and that they could be considered friends. Consequently, she felt she should also inform the Claimant that her job was at risk as Ms Morales, despite her good rapport with the Claimant, was the shop manager, and part of her duties included supervising staff work and ensuring compliance with staff schedules, shifts, and meal breaks.

26. The statement of Ms Maria del Carmen Garcia's statement was also admitted as hearsay evidence for similar reasons. She had been employed by the Respondent from January 2022 and stated that the Claimant would regularly turn up late and ignored the several warnings from Ms Morales. She said she enjoyed a good relationship with both the Claimant and Ms Morales, finding the latter easy to deal with and constructive.

27. Ms Lucila Rodriguez Cabanelas (**Ms Rodriguez Cabanelas**), the Respondent's Operations Manager for over 10 years of both Cardlands and two other shops, gave evidence that the Claimant continually complained to her about Ms Morales becoming Shop Manager, and had a bad attitude towards Ms Morales as she did not believe she should have been promoted to that position. Ms Rodriguez Cabanelas had had no issues with the way the Claimant carried out her work especially during the Covid period, but was unaware of her lack of punctuality until informed of this by Ms Morales who had given the Claimant the benefit of the doubt on many occasions, could not put up with it any longer given its frequency, the fact that it was affecting other staff as she could not be relied on to open the shop on time and showed a lack of responsibility as someone else needed to cover for her whenever she was late. A delay of a few minutes would not be an issue, but her lack of punctuality was far greater than that on many occasions and it was important in a small business like Cardland, especially for the early morning shift opening the shop, that employees were punctual, according to Ms Rodriguez Cabanelas. On reviewing the shop CCTV footage showing this lack of punctuality, Ms Rodriguez Cabanelas instructed Ms Morales to explain to the Claimant that the business could not continue to accept such lack of punctuality, and that should it not improve it would "*possibly*" have to review her continued employment with the Respondent.

28. Ms Rodriguez Cabanelas' evidence is that the Claimant's time keeping did not improve with repeated excuses for her lateness and disrespect for her job and colleagues, and that as the Claimant had been given every opportunity to arrive on time and to help her to keep her job, Ms Morales wanted to dismiss the Claimant because of her lack of punctuality which decision Ms Rodriguez Cabanelas' felt the Respondent had to implement.

29. Ms Morales' evidence is that she had a six-minute telephone conversation with the Labour Inspector of the Department of Employment on the 21st October 2022 as to whether the Claimant's continued lack of punctuality and refusal to change her ways were sufficient grounds on which to dismiss the Claimant fairly and he confirmed it was if the requisite notice of termination of her employment was given to her. Ms

Rodriguez Cabanelas confirmed this reliance on lack of punctuality as the reason for dismissal on 21st October 2022: "*Finally after a period Irene (Ms Morales) called to the Gibraltar Labour Inspector who informed her that with what had been said regarding her time keeping the Respondent had the right to terminate her employment and which it proceeded to do"*. However, by the time the DoE Notice of Termination was completed, this ground had significantly widened to several other grounds, and not solely punctuality.

Respondent's other general reasons for dismissal - insubordination, misconduct, performance

30. Yet Ms Rodriguez Cabanelas' evidence is that following Ms Morales' report to her that she had instructed the Claimant to do certain tasks, that the Claimant had left a drawer open which Ms Morales then had to close as it posed a hazard to clients whilst the Claimant went out for her usual unauthorised smoke breaks, and had the wrong attitude generally, she reviewed the CCTV footage of the incident in the shop on 20th October 2022 (**20th October 2022 Incident**) with the Claimant shouting at, and being insubordinate to, Ms Morales in front of customers and accusing her of being unprofessional. Ms Rodriguez Cabanelas decided from that report and review of the CCTV footage that Ms Morales had her authority to dismiss the Claimant having been given several opportunities to improve her behaviour over time, and that speaking to Ms Morales in the manner she did in front of a customer was unacceptable when it should have been discussed at least in the privacy of the office. Ms Rodriguez Cabanelas emphasised that the decision to dismiss was her own on the basis of what Ms Morales had told her as well as the advice of the Labour Inspectors who had been shown the screen shots of evidence/warnings in relation to the Claimant's late arrivals at work.

31. Ms Morales' account of the 20th October 2022 Incident was that the shop was full of boxes as it was being decorated by the three staff present for Christmas, and there was lots of work to do but that the Claimant kept going out for a smoke break far more regularly than usual. She was sitting outside on the shop steps whilst everyone else continued working inside. Ms Morales considered this disrespectful. When the Claimant returned to the shop, Ms Morales told her that if she was going to go out every 10 minutes to smoke instead of working she might as well go home as she was being disruptive and slowing down the work that needed to be done by the other staff. It was not an instruction, but a suggestion, according to Ms Morales. The Claimant then left the store for 40 minutes before returning. Ms Morales was working on the till serving a customer, and as the Claimant went past her, she loudly accused Ms Morales in front of the customer of being very unprofessional. Ms Morales told

her that she better go home, by way of instruction. Ms Morales called Ms Rodriguez Cabanelas to tell her she could not put up with the Claimant's behaviour anymore, and that Ms Rodriguez Cabanelas agreed with her. Ultimately, Ms Morales acknowledged that the main reason for the Claimant's dismissal was her lack of punctuality, taking unauthorised breaks, and a lack of respect towards Ms Morales and her co-workers.

32. On cross-examination, Ms Morales stated that the reason came to the same thing, a lack of respect on the part of the Claimant. Her conduct and performance had deteriorated a lot, especially her punctuality, and despite Ms Morales trying to assist her by covering up for those shortcomings. Ms Rodriguez Cabanelas' evidence was that the decision to dismiss was her own on the basis of what Ms Morales had told her as well as the Labour Inspectors, and that she had also seen the screen shots relating to the Claimant's late arrivals at work.

33. Ms Rodriguez Cabanelas' evidence-in-chief was that on Ms Morales informing the Claimant of the termination of her employment the Claimant called her on several occasions on her personal phone to tell her that Ms Morales "*was against her*". Ms Rodriguez Cabanelas told her that she was aware of her unpunctuality and that it was not acceptable, and that she had more free time than other staff to go out to smoke every hour. She also told her that no one was "*out to get her*" and that her problems were of her own making and that she had been given every chance to improve her time keeping and performance and that she had just continued to behave as she liked with complete disregard and respect for her employment or colleagues.

34. Whilst Ms Rodriguez Cabanelas acknowledged on cross-examination that there was a lack of clarity on Ms Morales' part about the relevance of the broken drawer to the 20th October 2022 incident, her evidence was that in the ten years she had been involved in the business she had not experienced an employee being so persistently late for work and showing such a lack of respect and interest in her job. No written warnings had been given to the Claimant, but Ms Rodriguez Cabanelas knew from her verbal discussions with the Claimant, as well as those Ms Morales had communicated to Ms Rodriguez Cabanelas that she had also had with the Claimant, that the Claimant was not interested in her job.

35. Ms Morales' evidence of this general dissatisfaction with the Claimant's conduct and performance, especially during the last few months before the Claimant was dismissed, included the Claimant's poor performance, lack of interest in improving her attitude, leaving the shop in a mess on many occasions to have a smoke break,

taking regular unauthorised smoke breaks, being rude and discourteous when speaking to Ms Morales, needing constant supervision, and accusing her loudly in front of customers of being a very unprofessional person. On those occasions when the Claimant made such accusations against Ms Morales in front of customers, Ms Morales' evidence is that she would not answer her immediately, would talk to her later once the Claimant had calmed down, and that this was probably the reason why the Claimant alleged that Ms Morales ignored her. She tried to guide the Claimant on what she needed to do, but the Claimant would not accept any guidance from her.

36. Ms Morales' evidence was that the Claimant had admitted to her on many occasions that she did not like the job she was doing and wanted to leave. Ms Morales had asked her that if she did not like her job why did she simply not leave. The Claimant's answer, according to Ms Morales, was that she did not want to resign as she would not receive her unemployment benefit in Spain. Ms Morales believed that the Claimant was waiting for her to dismiss her so that she could receive a payment from the Respondent and from the Spanish Government.

37. Ms Morales' evidence was that she had had far too many conversations with the Claimant in the twelve months before her dismissal, even in her own personal time and that the Claimant had abused her trust for a long time. The Claimant's bad mood was affecting the other staff during the last days before Ms Morales gave her notice of termination. As the Claimant had worked for the Respondent for almost four years, Ms Morales gave her time to see a positive change and improvement in her attitude but perhaps too much time Ms Morales thought, but her behaviour simply got worse. So after too many conversations and oral notifications to improve her attitude, and not seeing any improvement, Ms Morales felt compelled to dismiss her for all of the reasons she had stated in her evidence.

English speaking

38. Ms Morales acknowledged that whilst the Claimant would not have been dismissed if this had been the sole reason for her dismissal, there were many other reasons why the Respondent decided to dismiss her.

39. Ms Morales adduced in evidence the Notification of Vacancy form (**NOV**) filed by the Respondent with the Department of Employment advertising the Claimant's post which required the applicant to have both retail experience and the ability to speak English and Spanish, and stated that all the Respondent's staff members had to have an acceptable level of English and Spanish to deal with its customers; that the

Claimant had informed the Store Manager at her job interview, and subsequently when her contractual terms of engagement were varied, that she was taking English language lessons to improve her English and that she was employed on that understanding. Ms Morales believed those representations to have been false as after almost 4 years she was still unable to hold a proper conversation with an English-speaking person and could not answer the phone if someone called speaking in English.

40. According to Ms. Rodriguez Cabanelas, the Respondent's requirement for the applicant to speak both English and Spanish was specified in the NOV and at her job interview the Claimant had represented to the Respondent that she was taking English lessons to improve her English which turned out to be untrue and she continued to struggle with English speaking customers.

41. According to the Claimant the requirement for her to be able to speak English was not mandatory when she took up employment; that there were many workers who did not speak perfect English as their work as retail shop assistants could still be performed well without this; that there were no complaints about her command of the English language after her probationary period, and that after almost 4 years, it made no sense to her that she would have remained in her position for such a long time if she did not meet the requirements for the job.

42. The witness statement of Ms Yocabed Yolanda Torelli Rodrigo's (**Ms Torelli Rodrigo**), who worked at Cardland for a year and a half, and was according to Ms Morales the Claimant's best friend, was also admitted as hearsay evidence given that she was not available to give evidence on the date of the hearing. She stated that whilst the Respondent's level of English was not high, she had sufficient command of the English language to perform her duties efficiently.

Claimant's evidence -ulterior motive for dismissal

43. The Claimant did not seek to challenge her lack of punctuality directly but alleged that, firstly, she never had any complaints or warnings, not even in writing, and always behaved appropriately without committing any serious offences. Secondly, that the various complaints against her had been concocted by Ms Morales to justify her dismissal, following the grievances she had raised with Ms Morales and which Ms Morales had ignored. Ms Morales denied this. Those grievances related to, firstly, the alleged bad working practice of not paying staff to start work some 15 to 20 minutes early and for stay on after closing time at 7:00pm to tidy up unless they stayed on for more than 30 minutes. Ms Morales denied this was the case, and said

that these allegations made no sense to her about the alleged pre-start unpaid time as the Claimant never started work earlier than her scheduled time, arrived late on many occasions, and that every employee had a responsibility to turn up on time and be ready to start work at the contracted time. Ms Morales' evidence was that it was true that one of the tasks was to keep the shop tidy and clean so everyone needed to do it before the shop closed, but that the Respondent kept a daily calendar where the Claimant and other staff would write down the hours worked and those were the hours paid for. No one was forced to do anything for no pay according to Ms Morales.

44. Secondly, that staff were not provided with proper toilet facilities in the shop and had to use the public restroom at the International Commercial Centre (**ICC)**. On weekends when only one person was on duty for 3 hours on a Saturday (3pm to 6pm shift) and 6 hours on Sundays (10am to 4pm), the Claimant alleged that staff were not allowed to close the shop to go to the ICC restroom and were obliged to use a mop bucket in the shop's office or store when necessary. When Ms Morales went on her maternity leave, staff brought this issue up with Ms Rodriguez Cabanelas, and she had said that that work practice was unacceptable and arranged for a sign to be placed on the door saying the shop was closed temporarily whilst they did so. However, according to the Claimant, when Ms Morales returned from her maternity leave, she again instructed them not to close the shop temporarily to use the ICC restroom when they were alone, and it was only when the Claimant raised this with Ms Morales, that she decided to dismiss her.

45. The witness statement of Ms Jordana Rodriguez Gutiérrez (**Ms Rodriguez Gutierrez**), a former employee of the Respondent who worked as a sales assistant during two different periods namely from January 2022 to January 2023 and from March 2023 to September 2023, was admitted as hearsay evidence given that she was not available to give evidence on the date of the hearing. She complained of the same lack of access to the restroom during these same shifts on a Saturday and on a Sunday during her first period of employment only with the Respondent, and that this working practice had ceased by March 2023. Ms Torelli Rodrigo's stated that this bad working practice imposed by Ms Morales was ended when it was brought to the attention of Ms Rodriguez Cabanelas who said this was wrong and provided staff with the temporary closing sign to put up on the door when staff needed to use the restroom.

46. Ms. Morales denied giving any such instruction, and said that this practice was, to the knowledge of the Claimant first implemented by Ms Morales' predecessor and not Ms Morales, and that even the Claimant herself adopted this practice when she

was temporarily in charge during the Covid-19 pandemic. Ms Morales herself had a sign to place on the door to temporarily close the shop for this purpose, but did not want the Claimant to use this as a pretext to leave the shop for unauthorised smoke breaks.

47. Mr Eduardo Luis Guzman Vazquez (**Mr Guzman Vasquez**), the Claimant's father, gave evidence that on several occasions the Claimant would return from work in an anxious state complaining about the mistreatment, bad manners and constant belittling she was subjected to by Ms Morales and the negative atmosphere this created in the shop.

48. The witness statement of Frederico Augusto Pereira dos Santos (**Mr. Pereira dos Santos**), the former partner of the Claimant, was admitted as hearsay evidence given that he was not available to give evidence on the date of the hearing. Much of what he stated was based solely on what the Claimant had told him had happened at work where he had not been present. However, his other evidence was that before the COVID-19 pandemic when Ms Morales had been on maternity leave, the Claimant had taken on additional responsibilities, brought work home and made herself readily available to her colleagues even when on holiday to demonstrate her commitment to the business, were matters he might have witnessed first-hand, and that during the last month of her employment the relationship between the Claimant and Ms Morales had deteriorated from the Claimant's perspective at least.

49. Ms Rodriguez Gutiérrez' hearsay statement stated that in the last weeks of the Claimant's employment she witnessed the dismissive treatment the Claimant received from Ms Morales, such as deliberately ignoring her contributions, discrediting her work in front of other colleagues, excluding her from regular tasks and not giving her clear instructions. She says she witnessed on multiple occasions the Claimant asking Ms Morales what tasks she needed to do and was ignored, and received inappropriate responses such as: '*If you're just going to be here doing nothing, you might as well go home*.' Despite this, the Claimant continued fulfilling her duties. Ms Rodriguez Gutiérrez never saw the Claimant neglect her duties. Her performance was always satisfactory, and on many occasions, she took on additional responsibilities, such as assisting colleagues with technical issues, especially with discrepancies in the cash register.

50. The Claimant's evidence was that on the 20th October 2022 Incident she was re-stocking cards, and when closing a drawer, she noticed it would not close completely. She pulled out the drawer, and when she put her hand inside, she felt a cup had slipped in behind it. She took it out and tried closing the drawer again but

was unable to do so. It remained open by about 1 cm. Several other items of furniture in the shop were also broken. A colleague told her she that she had already had her lunch break, and that it was the Claimant's turn to take hers. The Claimant did so to avoid delaying another colleague taking their lunch break after her, and would fix the drawer when she returned from lunch. While she was eating, Ms Morales came into the office, slammed the door, hit the chair she was sitting on, looked at her in a defiant way, and said to her "*What? You're going to leave the drawer open?*" The Claimant told her it wouldn't close, and that she had removed the cup from behind it. Ms Morales turned around and left, muttering something the Claimant did not quite hear. When the Claimant returned from her lunch break, Ms Morales told her to go home. The Claimant asked why, since there was work to do, and Ms Morales replied, "*I just don't want to see your face anymore.*" She told Ms Morales that if that was the reason, she wasn't leaving because there was plenty of work to do, as they were decorating the shop for Christmas, and she needed to work her hours until 5pm on that day. When she approached Ms Morales and asked her what task she should do next, Ms Morales replied "*I told you to leave*." As she was leaving at 2:45pm, the Claimant told Ms Morales that she was leaving and that what Ms Morales was doing was very unprofessional. The Claimant's evidence on cross-examination was that she was entitled to take three smoke breaks per day, one before her lunch break, one during it and the other after lunch.

51. The Claimant's evidence is that when she returned to work on 21st October 2022, Ms Morales called her to the office and told her that on 21st November 2022 she would cease working for the Respondent. She asked her why, and Ms Morales told her that she had shouted at Ms Morales in front of a customer, which the Claimant replied was false. The Claimant called Ms Rodriguez Cabanelas to discuss what had happened, and Ms Rodriguez Cabanelas said she would speak with Ms Morales because the reasons given were not valid grounds for dismissal. When the Claimant spoke with Ms Rodriguez Cabanelas again, Ms Rodriguez Cabanelas confirmed that Ms Morales had told her they had developed a toxic relationship, and that she could no longer stand working with the Claimant.

52. Ms Rodriguez Gutiérrez' evidence was that the Claimant's lack of punctuality was not due to a lack of responsibility or commitment to work but due to circumstances beyond her control, such as the closing of the Gibraltar Airport Pedestrian Crossing, and which other staff similarly encountered on more than one occasion.

53. Ms Torelli Rodrigo also stated in her hearsay statement that inappropriate and derogatory remarks were directed at staff by Ms Morales which contributed to a toxic work environment, causing many staff to work in fear or discomfort, as was the case

for her. Ms Morales' evidence is that she couldn't understand why she would have said this but for the fact that Ms Torelli Rodrigo was best friends with the Claimant .

Notice of Termination on 21st October 2022

54. According to Ms Morales, she spoke to the Claimant on the 21st October 2022 and told her that her employment would be terminated on the 21st of November 2022. The Claimant refused to sign the notice she provided her with because she said she did not agree with the reasons given by the Respondent for her dismissal. The Claimant accepts that she was verbally informed about the termination of her employment on 21st October 2022 but without the real reasons being communicated to her then, and that such notice was only given to her on 9th November 2022 when the Respondent wrote to the Claimant stating: "*This letter is being written to confirm that you received the notice of termination the 21st of October 2022 at Interbrand Ventures Gibraltar Ltd. T/A Cardland owing to all the reasons I have been telling you during the last year and which will be expressed in the termination of the contract."*

55. Ms Morales' evidence was that not only did the Claimant acknowledge in the DoE Notice of Termination that notice of termination had been given to her on 21st October 2022 terminating her employment on 21st November 2022 with a payment of £1,245.90 as evidenced by her pay slip, but that she had also signed the letter dated 9th November 2022 to this effect too, and referred to in paragraph 54 of this Decision. Ms Morales' evidence is that she had prepared that letter as she suspected the Claimant would make a claim that she had not received the verbal notice of termination on 21st October 2022.

56. Ms Rodriguez Cabanelas stated that no right to appeal against the decision was given to the Claimant because whilst the Respondent had a staff manual it had not been signed by staff. She also stated that whilst verbal warnings were given to the Claimant, they had now updated the process to include written warnings.

Claim for Unemployment Benefit

57. The Claimant alleges that at the meeting on 29th November 2022 she asked Ms Morales how the U1 Unemployment Benefit-Application for U1 Certificate for the Department of Social Security in Gibraltar (**U1 Application Form**) process worked so that she could claim unemployment benefit in Spain having worked in Gibraltar,

and that Ms Morales had told her that she would request it for her, but she didn't know whether it would be sent to the Claimant's address or to the shop, and promised to let her know in due course. The Claimant alleged that it was Ms Morales' mishandling of her U1 Application Form that impacted on her ability to access her unemployment benefits.

58. The U1 Application Form adduced by the Claimant in her evidence directs the former employee, not the employer, to submit the request immediately on termination of employment, warns that any delay in doing so may result in loss of benefits and that the request should be accompanied with the termination contract or letter of dismissal. It expressly states that if such documents are not available that that should not delay the submitting of the application. The Claimant signed the U1 Application Form on 10th February 2023.

59. On 16th March 2023 the Claimant requested in a text to Ms Morales that the Department of Social Security HM Government of Gibraltar DSS Form entitled "Employer's Declaration of Employee's Social Insurance Contributions (**DSS Form**) be completed and signed by the Respondent, and which she had posted to it. She further stated in the text to Ms Morales that "*This is preventing me from collecting what I am entitled to*". Ms Morales actioned this immediately, internally, by forwarding the DSS Form on the same day to her Administration Department, and followed up on this with a further internal reminder on 20th March 2023. She then sent it back completed on that same day when received back from the Administration Department.

60. On 22nd March 2023 the Claimant alleges that she requested her P7 2022 from Ms Morales by text, and which she was sent on the same day by Ms Morales.

61. In the U1 Application Form the Claimant stated that she had been dismissed for disciplinary reasons. It was dated 28th March 2023 by her, and then on 19th May 2023 by the Department of Social Security HM Government of Gibraltar, with the only noticeable discrepancy between the two forms being section 2.3 with the income from employment for 2023 being omitted. The Claimant's evidence is that she received the officially stamped U1 Application Form by email on 19th May 2023. Notwithstanding the delays in her submitting the U1 Application Form, the Claimant confirmed that for the period January 2023 to July 2023 she received approximately €1,000 per month in unemployment benefit paid retrospectively to her from January 2023, and despite the initial delays in making this application.

Losses

62. In the Claim Form, the Claimant stated that she was earning £1579.50 gross and £1245.90 net a month with the Respondent and without any pension entitlement. The Respondent accepted these amounts in its Response. During the period January 2023 to July 2023 the Claimant received approximately €1,000 per month in unemployment benefit, and she found alternative employment in July 2023 as a Customer Service Assistant at approximately £1,300 net per month and was still in that employment at the time of the hearing.

Findings and determination

Principal reason for dismissal

63. The Respondent accepted that if lack of command of the English language had been the sole reason for her dismissal, the Claimant would not have been dismissed and therefore it cannot constitute the sole or principal reason for her dismissal but was at best another reason for her dismissal to the limited extent that the Respondent may have felt misled by the Claimant's assurances that she was taking lessons to improve her English.

64. After 4 years of employment the Claimant did not have a good command of the English language, which was apparent at the hearing itself. Whilst both Ms Morales and Ms Rodriguez Cabanelas may have both genuinely felt that they had been misled by the Claimant saying she was taking lessons to improve her command of the English language, it must have been clear to them both early on that she was not doing so and they accepted that position. Whilst the Claimant denied this to be the case, and adduced the hearsay statement of Ms Torelli Rodrigo, her best friend, to confirm that her English was as adequate as any of the other staff, I am satisfied on the evidence that this was not the case despite those denials. However, the Respondent had accepted the situation for what it was, and this could not therefore be the principal reason for dismissal.

65. Nor am I satisfied that the principal set of facts, or beliefs, known to Ms Morales as the dismissing manager, and operating on her mind at the time of the dismissal on 21st October 2022, and endorsed by her superior, Ms Rodriguez Cabanelas, was the Claimant's lack of punctuality as alleged in the Response to constitute a qualifying reason for dismissal under s.65(2)(b) EA 1932. It may have been considered by Ms Morales to be the best, most frequent and well-documented

example of misconduct when seeking advice on the 21st October 2022 from the Gibraltar Labour Inspectors for dismissal for that ground alone, given the existence of the Whatsapp messages and CCTV footage evidencing this, but it had nothing specifically to do with the 20th October 2020 Incident. Whilst I agree that in a small business such as the Respondent's staff being persistently late for work because of air traffic at the Gibraltar Airport Pedestrian Crossing, as opposed to occasionally, is not acceptable, the action taken by the Respondent to remedy this misconduct was not disciplinary action, but rather to change the Claimant's starting time as an alternative to dismissal. It was not accompanied by any form of specific written warning or other disciplinary sanction.

66. The 20th October 2022 Incident did not involve punctuality but on the basis of Ms Morales' own evidence, and this was disputed by the Claimant, that (a) the Claimant had been careless leaving a drawer open in the shop which Ms Morales considered a health and safety issue; (b) the Claimant had taken an unauthorised smoke break during normal working hours when other staff were very busy working and needed her assistance; and (c) the Claimant had shouted at Ms Morales in front of customers and accused her of being unprofessional in an insubordinate manner. Ms Morales' own evidence is that she called Ms Rodriguez Cabanelas on suspending the Claimant on 20th October 2022 to explain to her that she could not put up with the Claimant's behaviour anymore and that the main reason for her proposed dismissal was the Claimant's lack of punctuality, taking unauthorised breaks and lack of respect for Ms Morales and other staff. Those multi-reasons for dismissal had by filing of the DoE Notice of Termination on 30th November 2022 been extended to a non-exhaustive list of *"……the following reasons among others:* ***misconduct, regularly turning up late for work; inappropriate and discourteous behaviour; poor job performance, she still needs constant supervision; unable to speak English properly; lack of interest to improve"***. This results in me not being satisfied on the evidence as to what the principal reason was for this dismissal within that non-exhaustive mix of performance and conduct related issues.

67. The Respondent's failure to discharge this burden of proof is not on the basis of the Claimant's evidence that the allegations against her were concocted by Ms Morales to find a way to dismiss her as a consequence of the grievances she had raised about unpaid wages and bad working practices for use of the restroom at weekends. The restroom access was remedied by Ms Rodriguez Cabanelas when she was notified of it, and the alleged unpaid wages for arriving early to work, and then staying behind after the shop closed to clean up, never formed part of this Claim for unpaid wages or otherwise. Similarly, the allegation that Ms Morales had

deliberately delayed the processing of the U1 Application Form as evidence post-termination of her antagonism and hostility towards the Claimant was not borne out by the evidence as it was clearly for the Claimant to obtain and submit this form, and which Ms Morales actioned immediately when asked to do so by the Claimant. Ms Morales was a credible witness, but who had obvious difficulties managing the Claimant, and if anything averse on taking the necessary disciplinary action when she should have. The Claimant's failure to acknowledge her lack of punctuality, and to unfairly blame Ms Morales for the delays with the processing of the U1 Application Form, is indicative of the difficulties Ms Morales faced when trying to manage a strong character like the Claimant who was clearly unhappy that Ms Morales was promoted to Shop Manager.

68. Ms Morales frankly explained her difficulties in managing the Claimant, and the reasons for her inaction when dealing with issues of the Claimant's performance and conduct, when she stated:

"*However, Eliana continued to arrive late more frequently, and her English never improved, nor did her desire to improve. I have spoken to Eliana many times about her tardiness, but she always ignored me. Eliana never accepted that I was in a higher position than her, which led her to ignore my instructions. I was always unsure about what to do with her – whether to dismiss it or not – due to all the disrespect. In the end, I always chose to give her another chance because I didn't think it was right to fire her when I was the one who gave her the opportunity to improve. It became routine for her to be late and to go outside to smoke frequently, and I almost unconsciously accepted it as part of my reality. A reality that affected me personally, not just at work, since I always covered in front of our boss, I never said anything became unacceptable, known that if our boss found out about her actions, she would be dismissed*".

69. The ground that the Respondent might have chosen to rely on, and assert, would have been under s.65(1)(b) EA 1932, namely a " *substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held*", being an irretrievable breakdown in the relationship between Mrs Morales and the Claimant in a small shop where staff need to get on. The evidence of this breakdown is reflected, firstly, in Ms Rodriguez' evidence that the Claimant continually complained to her about Ms Morales' promotion to Shop Manager which caused her to have a bad attitude to Ms Morales as she did not believe she should have been promoted. Secondly, Ms Rodriguez Cabanelas' evidence that she was unaware of the Claimant's lack of punctuality until notified of this very late in the day by Ms Morales when she could not put with it any longer because of its frequency.

Thirdly, by Ms Velez' hearsay evidence that the Claimant's continuing problem with punctuality was because she had taken advantage of Ms Morales. Fourthly, the Claimant's own evidence that when she challenged Ms Morales about why she was being suspended she replied "*I just don't want to see your face anymore*" and that Ms Rodriguez Cabanelas had told her on 21st October 2021 following her dismissal that the reason for her dismissal was that Ms Morales had told her that they had developed a toxic relationship and that Ms Morales could not stand working with the Claimant anymore. Fifthly, on prior occasions similar to the 20th October 2022 Incident, Ms Morales' evidence was that the Claimant had been rude, insubordinate and loud in front of customers so Ms Morales would effectively ignore her and only speak to her when she had calmed down. She tried to guide the Claimant but the Claimant would not be guided by her. However, this was not the ground the Respondent has relied on, and for that reason it has not discharged the burden of proof to my satisfaction.

Fairness of the dismissal

70. If I am wrong in finding that the Respondent has not discharged the burden of proof to establish a potentially fair reason for dismissal, and that the principal reason for dismissal was one of generic misconduct in the form of "*misconduct, regularly turning up late for work; inappropriate and discourteous behaviour"* as opposed to generic non-performance in the form of *"poor job performance, she still needs constant supervision; unable to speak English properly; lack of interest to improve*", or vice versa, then I would have found in any event that the Respondent did not act reasonably in treating such misconduct, or lack of performance, as a sufficient reason for dismissal for the following reasons:-

    a. The alleged misconduct involving the Claimant and Ms Morales in the 20th October 2022 Incident, and which led to the Claimant's immediate suspension from work, should have been properly investigated by Ms Rodriguez Cabanelas to establish whenever there were reasonable grounds to sustain a dismissal, including taking a statement from any other employees present in the shop at the time of this exchange between the Claimant and Ms. Morales. Ms Rodriguez Cabanelas' sole reliance on Ms Morales' account of the 20th October 2022 Incident coupled with a review of the CCTV, was insufficient and unreasonable.

    b. If the Claimant was entitled to take smoke breaks at certain times as Ms Rodriguez Cabanelas had said in her evidence she was hourly and more often than other staff, the Claimant had said she was entitled to do so three

times per day and to take a lunchbreak too, with Ms Morales herself admitting that her complaint was not that the Claimant was not so much that she was taking an unauthorised smoke break having tolerated smoke breaks for some time based on her own evidence but that she was taking too many when the shop was busy, the issue that need to be investigated in relation to the 20th October 2022 Incident was whether Ms Morales was entitled to reprimand the Claimant, and then to suspend her, when she returned from her lunchbreak, or at least an authorised smoke break, or not, and because she had left a broken drawer open.

c. Ms Rodriguez Cabanelas intimated that the real issue in relation to the 20th October 2022 Incident is that the discussion/argument between the Claimant and Ms Morales should have taken place in the back office away from customers, and which is consistent with Ms Morales' evidence of how she had previously ignored the Claimant when this had happened in similar circumstances, and spoken to her after she had calmed down.

d. The disciplinary process should also have included the Claimant being notified of the disciplinary charges against her in advance of any disciplinary hearing, the likely disciplinary outcome if those disciplinary charges were determined to be well-founded, and being given the opportunity to respond to any allegations made against her, and to put forward any extenuating or mitigating circumstances. She should also have been afforded a right of appeal against any disciplinary action.

e. Despite the clear evidence of persistent lack of punctuality, at no stage was the Claimant issued with any form of formal written warning, final or otherwise, to let her know explicitly what would happen if she did not improve her punctuality or other conduct or performance. Ms Morales admitted that she had given the Claimant the benefit of the doubt on far too many occasions, and simply chose to give the Claimant another chance without taking disciplinary action for similar incidents previously. This would account for the fact that Ms Rodrigeuz Cabanelas only found out very late in the day the problems Ms Morales was encountering with the Claimant's lack of punctuality. However, even when Ms Morales brought these issues to the attention of Ms Rodriguez Cabanelas late in the day, Ms Rodriguez Cabanelas said it was only when Ms Morales she could not put up with that lack of punctuality anymore. Even at that very late stage, Ms Rodriguez Cabanelas simply instructed Ms Morales to give the Claimant a warning that such continued lack of punctuality might "*possibly*" result in a review of her

continued employment rather than a final and explicit written warning that her job was at risk if there was any repetition of that or similar conduct or performance issues.

f. There had been according to Ms Morales prior incidents similar to that of the 20th October 2022 Incident where the Claimant had been rude, insubordinate and loud in front of customers when speaking to Ms Morales. Ms Morales' evidence is that she would simply ignore such behaviour during the course of the outburst, only speak to the Claimant once she had calmed down and then try to guide her, albeit unsuccessfully because the Claimant would not be guided by her. This is strong evidence of prior inconsistent treatment on the part of the Respondent and is unfair, in that it had not previously dealt with such misconduct by way of disciplinary action, and this would have lulled the Claimant into believing that she could get away with such unacceptable behaviour.

g. Ms Rodriguez Cabanelas' was managing and overseeing three different shops, and had been in that position for over 10 years. She had also prepared a staff manual for staff. She was conscious of the fact that no explicit warnings had been issued to the Claimant making it clear that the Claimant's job was now on the line given her persistent lack of punctuality, and other conduct/performance issues, and also that a right of appeal could have been offered to her following the dismissal but decided not to.

71. As Lord Bridge of Harwich at page 364C in Polkey summarised in part the essence of procedural fairness:-

"….If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by s.[98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken."

72. There was no proper disciplinary process engaged on the 21st October 2022 and that rendered any decision resulting from it so procedurally flawed as to render the substantive decision to dismiss unfair. The requirements of s.65(6) and the expressions of principle by the House of Lords in *Polkey v A E Dayton Services* indicate that although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, that

could not have been the case here when determining whether the events of the 20th October 2022 Incident which were not certain to have resulted in dismissal as this kind of alleged behaviour had been routinely accepted previously according to Ms Morales until she finally snapped. Nor was this last act of alleged misconduct on the 20th October 2022 Incident treated as gross misconduct by the Respondent so as to result in summary termination of the Claimant's employment. She was given 1 month's notice of termination.

Remedies

General

73. Following such a finding of unfair dismissal, s. 70(2) and (3) EA 1932 stipulate:-

"*(2) Where on a complaint relating to dismissal the tribunal-*

(a) finds that the grounds of the complaint ……are well-founded; and

(b) considers that it would be practicable, and in accordance with equity, for the complainant to be re-engaged by the employer or to be engaged by a successor of the employer or by an associated employer,

the tribunal shall make a recommendation to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so re-engaged or engaged.

(3) Where in such a complaint the tribunal finds that the grounds of the complaint are well-founded, but-

(a) does not make such a recommendation as is mentioned in subsection (2); or

(b) makes such a recommendation, and (for whatever reason) the recommendation is not complied with,

the tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal."

Re-engagement and apology

74. An order of re-engagement was sought by the Claimant in paragraph 7.1 of the Claim Form together with compensation and an apology. It is a discretionary remedy, and non-binding form on the parties. It would be wholly impracticable in a

small shop such as Cardland employing approximately three employees only to make such a recommendation of re-engagement as the relationship between the Claimant and Ms Morales had irretrievably broken down and was evident in their interactions as parties to these legal proceedings some two years after the dismissal. The evidence indicated that the Claimant never accepted Ms Morales promotion to Shop Manager and tested her managerial authority and capacity to the limit.

75. Moreover, and even if I had the power to order the Respondent to issue the Claimant with an apology, on the evidence I have heard, I would not make any such order given the Claimant's material contribution to her own dismissal.

Compensation

76. S. 71 EA 1932 stipulates that where an Employment Tribunal makes an award of compensation for unfair dismissal under section 70 the award shall consist of both a basic award and a compensatory award to be calculated in the manner prescribed by the Minister in regulations, which are contained in the Employment Tribunal (Calculation of Compensation) Regulations 2016 (**Regulations**). Regulation 2(1) of the Regulations provides:-

"*The amount of the basic award provided in section 71(a) of the Employment Act, shall be £2,200 or such higher amount as calculated by- (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed, (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and (c) allowing the appropriate amount for each of those years of employment*".

The "*appropriate amount*" is defined in regulation 1(2) as being: "*(a) one and half weeks' pay or three times the weekly minimum wage, whichever is the greater, for a year of employment in which the employee was not below the age of forty-one, (b) one week's pay or twice the weekly minimum wage, whichever is the greater, for a year of employment (not within paragraph (a)) in which he was not below the age of twenty two, and (c) half a week's pay or the weekly minimum wage, whichever is the greater, for a year of employment not within paragraph (a) or (b)*".

The "*weekly minimum wage*" is defined in regulation 1(2) as being "*the amount prescribed as the minimum weekly remuneration payable under the Conditions of*

Employment (Standard Minimum Wage) Order 2001 as amended from time to time or under any such Order that prescribes the minimum weekly remuneration payable".

77. The current minimum wage with effect from 1st August 2025 under the Conditions of Employment (Standard Minimum Wage) (Amendment) Order 2025 is £1605.50 per month which is marginally higher than the Claimant's then monthly wage of approximately gross £1,579.50 at the time of her dismissal. The Claimant was born on 13th July 1989 , and had completed 3 years of service above the age of 20 but below the age of 41, from 21st January 2019 to 21st November 2022, which would result in a basic award for each of those 3 years of twice the weekly minimum wage (£370.50 x 2 x 3) resulting in a total basic award of £2,223.00 subject to any reductions or deductions I might be minded to make.

78. Regulation 2(5) of the Regulations provides that:-

"*Where the Employment Tribunal considers that any conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Employment Tribunal shall reduce or further reduce that amount accordingly*". I consider that it would be just and equitable to reduce the basic award by 50% for a number of reasons. Firstly, the Claimant's own consistent and persistent lack of punctuality had led to a change in her working hours, and formed part of the background to her ultimate dismissal. Secondly, she had not accepted Ms Morales promotion above her and was most likely the reason for her bad attitude towards Ms Morales, the difficulties Ms Morales experienced in managing her, and why both Ms Velez and Ms Maria del Carmen Garcia stated that the Claimant did not take Ms Morales seriously and ignored her warnings. Thirdly, she showed a general lack of respect for Ms Morales, as evidenced in the manner she spoke to her in front of a customer on 21st October 2022, whatever the reason, rightly or wrongly, may have been for that outburst. That lack of respect for Ms Morales was evident from Ms Rodriguez Carbenales' evidence, and that of Ms Velez and Ms Maria del Carmen Garcia too, and is likely to have led to her dismissal at some later stage. Fourthly and lastly, she was disinterested in her job which would have been an additional reason why Ms Morales encountered the many difficulties she had with her, and he Claimant never questioned the evidence of Ms Morales in this respect. I am therefore reducing the basic award from £2,223.00 to £1,111.50 by reason of such 50% reduction.

79. With respect of the compensatory award, the relevant sub-regulations of regulation 3 of the Regulation stipulates:

"*(1) Subject to the provisions of this Regulation, the amount of the compensatory award shall be such amount as the Employment Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*.

(2) *The loss referred to in subregulation 3(1) shall be taken to include (a) any expenses reasonably incurred by the Claimant in consequence of the dismissal; and (b) subject to subregulation 3(3), loss of any benefit which the complainant might reasonably be expected to have had but for the dismissal*.

(4) *In ascertaining the loss referred to in subregulation (1) the Employment Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Gibraltar*.

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

(8) The amount of a compensatory award to a person calculated for the purposes of section 72 of the Employment Act, shall not exceed the lesser of (a) the amount which, in the case of the person who has presented a complaint under section 70 of the Employment Act, represents 104 weeks' pay; or (b) the amount calculated as follows - 104 x (2 x the weekly minimum wage), whichever is the less.

(10)The limit imposed by this regulation applies to the amount which the Employment Tribunal would, apart from this regulation, award in respect of the subject matter of the complaint after taking into account-(a) any payment made by the respondent to the complainant in respect of that matter, and (b) any reduction in the amount of the award required by any enactment or rule of law.

80. The calculation of the Compensatory Award, broadly, can be considered in three stages. Firstly, to assess the loss of employment which involves the Tribunal taking a view as to how long the Claimant would have been employed but for the dismissal, and working out the loss, in terms both of pay and other benefits, during that period and which the Claimant has sustained in consequence of the dismissal, and in so far as the loss is attributable to action taken by the Respondent. It is for the Claimant to establish her loss. The Claimant started working sometime in July 2023 for a new

employer at a marginally increased net wage of £1,300.00 per month and remained in employment at the time of this hearing so the actual loss relates to the period 22nd November 2022 to 30th June 2023 only. She was earning monthly £1,579.50 gross, (£1,245.90 net per month) at the time of her dismissal, and was receiving from 1st January 2023 the sum of €1,000 monthly in unemployment benefit, which at the average conversion rate applicable in January 2023 of Euros to Sterling of 0.8811 would amount to £881.10 per month. Her actual gross loss of earnings between 22nd November 2022 to 30th June 2023 (31 weeks) would have amounted to £11,299.50 less the money she received in unemployment benefit during that period of £5,286.60 (applying the above rate of conversion), leaving a net loss of £6,012.90.

81. Secondly, and with mitigation of loss not being raised as an issue, had the, the Claimant caused or contributed to her own dismissal. For the same reasons as I have given in paragraph 78 of this Decision I find she did, and therefore reduce the compensatory award by 50% to £3,006.45 for the same reasons as I have given in paragraph 78 of this Decision.

82. Thirdly, what the Tribunal considers is it "*just and equitable*" to award in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the Respondent. I see no reason to adjust my award further on this ground.

83. By way of summary, I award the following amounts to be paid by way of compensation to the Claimant:-

a. Basic award: £1,111.50
b. Compensatory award: £3,006.45

Total: £4,117.95

Contractual Claim

84. The Claimant claimed a minimum statutory notice of 1 month's pay in accordance with s. 54 EA 1932 given that the Claimant was monthly paid and had done less than 4 years' service on the date of dismissal. The Claimant received her full 1 months' notice, but had to work it out. Therefore this part of the Claim is dismissed.

SRP

85. This was not a "*redundancy*" for the purposes of the RDTO. The reason for her dismissal was related to the Claimant's conduct and/or performance and she was certainly at fault for her own dismissal, even if in part only. She was not dismissed for reasons wholly unrelated to her as an individual, and by way of example only, as a result of a management initiative to improve organisational efficiency by way of a reorganisation, restructuring, or de-manning so that she had simply been sacrificed to the needs of the organisation through no fault of her own. The Claimant was at fault for her own dismissal, even if in part only, and is therefore not entitled to be paid SRP and this part of the Claim is also dismissed.

Mark Isola K.C.

Chairperson

15th October 2025