



EMPLOYMENT TRIBUNALS

Claimant: Mrs A C Blagden
Respondent: The Coniston Hotel Ltd
Heard at: Leeds **On:** 4, 5, 6, 7 and 8 March 2019
Before: Employment Judge Rogerson
Members: Ms N H Downey
Mr D W Eales

Representation

Claimant: Ms H Gardiner of counsel
Respondent: Ms A-N Dickinson of counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.
2. The complaint of discrimination arising from dismissal made pursuant to section 15 of the Equality Act 2010 fails and is dismissed.
3. The complaint of direct disability discrimination made pursuant to section 13 of the Equality Act 2010 fails and is dismissed.
4. The complaints of breach of contract (wages during suspension) and unpaid annual leave are withdrawn and are dismissed.

REASONS

Issues

1. The issues to be determined at this hearing had been identified at an earlier preliminary hearing, and are set out at pages 48 to 49 of the bundle. In summary, the complaints are all about the claimant's dismissal on 28 March 2018, for alleged misconduct for her behaviour while in a state of intoxication at a works Christmas party, on 29 January 2017. The claimant complains that the resultant dismissal was unfair, it was direct disability discrimination because the real reason why the claimant was dismissed was her disability (microscopic colitis), or it was discrimination arising from disability because the claimant's alleged misconduct arose from her drinking alcohol when

taking codeine (medication taken to relieve one effect (diarrhoea) of her physical impairment of microscopic colitis).

2. By the time of this hearing the respondent conceded that the claimant was a 'disabled person' at the material time (dismissal) because of her physical impairment of microscopic colitis.
3. At the preliminary hearing and at the beginning of this case, the claimant had accepted she was guilty of the alleged misconduct (drunkenness/associated behaviour) but complained that the sanction imposed of dismissal was too harsh, unfair and outside the band of reasonable responses (see 6.5 below) and the real reason was not her behaviour at the Christmas party but an unspecified allegation of drinking at work on a separate occasion (see 6.1 below).
4. During cross examination the claimant's position changed. She accepted that she was very drunk at the Christmas party but denied any associated drunken behaviour. She accepted the respondent had found the misconduct proven at the time of dismissal based upon the evidence of 5 witnesses, who were not drunk and were able to recall her behaviour on that night.
5. Later she accepted she was guilty of 2/6 allegations of misconduct, which were allegation 1: that she "failed to follow a reasonable management instruction to drink sensibly" and allegation 5: that she "displayed unprofessional conduct". The latter charge was clearly based upon the drunkenness and the associated drunken behaviour 'displayed' at the party. By the end of the hearing, the claimant's position changed again and she denied she was guilty of any 'associated drunken behaviour'. On each occasion, when clarification was sought the claimant's position changed from accepting misconduct, to a qualified acceptance of misconduct, to no acceptance of misconduct.
6. For the unfair dismissal complaint, the 6 challenges to the fairness of the dismissal were identified at pages 50 as follows:

6.1 "The claimant maintains that she was dismissed in reality, arising out of allegations that she had been drinking on duty separate from the Christmas party incident (allegations of which she was unaware until 21 February 2018) and allegations of her assaulting colleagues at the Christmas party (which she found out about only on 4 October 2017).

6.2 The claimant had been allowed to attend work for 2.5 days with no reference to any potential disciplinary sanction before she was suspended, thus demonstrating that the respondent did not consider her conduct so seriously.

6.3 At a meeting on 1 February 2017, the claimant had been told that she would be provided with help and support and asked if she would undertake a drugs and alcohol test and see a doctor to which she agreed. However, on 2 February the respondent changed its position and determined to pursue a disciplinary process with no support provided.

6.4 An external third party was appointed to be the decision maker and the claimant says that Mr Blackett as the authorised decision maker was not the appropriate person, because he had been interviewed for the

grievance, a non-executive director Duncan Browning should have been appointed instead.

6.5 *Whilst the claimant accepted that she had been drunk at the Christmas party and was guilty of misconduct, she considered that the sanction of dismissal was outside the band of reasonable responses and again a complete contradiction to a decision made at 1 February 2017 meeting that the matter would be dealt with by simply placing a note on her file.*

6.6 *In addition, the claimant maintains that she was treated inconsistently in being dismissed when compared to a former food and beverage manager (A) who had a catalogue of issues including being drunk on duty and who at a preceding Christmas party had been carried back into the respondent's hotel unconscious by colleagues where he continued to drink further alcohol. In contrast to the claimant's treatment it is said that he suffered no disciplinary action. The claimant also relies on (B) another comparator who was guilty of drinking whilst on duty but was not dismissed".*

7. Another issue where the claimant's evidence changed during the hearing was in relation to her 'contemporaneous' notes of a disputed meeting of 1st February 2017. She first referred to the existence of these notes in cross examination at the end of the first day. She said the notes were produced on her lap top at the time of the meeting on 1st February 2017. She was requested to bring the notes on the second day and it was pointed out to the claimant that an audit trail would exist showing the precise date and time the document was created. On the second day of the hearing, the claimant produced some handwritten notes and some typed notes which were different to typed notes she had disclosed to the respondent's solicitors in January 2019. The date of creation of the typed notes was 7 August 2017 with a later version created in January 2019 which had been disclosed. The claimant said the handwritten notes were her contemporaneous notes of the meeting, which included her thoughts of events at the time. She said she had never disclosed those notes to the respondent prior to dismissal or in these proceedings because she thought they did not need to be disclosed.
8. Given the importance of this disputed meeting of 1 February 2017 to the claimant's case (see issue 6.3 above), her knowledge and experience of note taking and record keeping, we found the claimant's answers extremely surprising and not credible. During the respondent's grievance investigation in September 2017, a month after the notes were created, the claimant was asked if she had any notes of the 1 February 2017 meeting and she denied having any notes at all. The claimant knew when she answered that question that her answer was untrue.
9. For these reasons, and from the rest of the evidence we saw and heard we found the claimant's evidence overall was not credible. We found her to be an unreliable and untruthful witness. In making that assessment we considered whether the claimant may have been confused/ misunderstood the questions but we were satisfied that was not the case. The claimant has 29 years' experience in HR, she is CIPD qualified, and is familiar with and is experienced in conducting disciplinary/grievance hearings, note taking and record keeping. She says that over her career she has undertaken 'hundred's'

of disciplinary hearings/investigations. She understood the importance of those notes during the internal investigation and in these proceedings. Her decision to lie about the existence of the notes at the time and to suggest now that she did not know they should be disclosed was deliberate, not because of any mistake/misunderstanding.

10. The respondent's witnesses on the other hand we found to be credible witnesses. They answered questions honestly, were willing to make concessions, were not evasive or unhelpful. We found them to be truthful witnesses whose evidence was supported by the other evidence that we saw and heard. Whenever there was a factual dispute we preferred and accepted the respondent's witness evidence to that of the claimant.
11. The alleged misconduct that resulted in the claimant's dismissal was her behaviour at the Christmas party on 29 January 2017 while in a state of intoxication in the toilets through to her departure from the venue. Fundamentally the claimant's account is that although she cannot remember the alleged behaviour that occurred in the toilets the five witnesses who recalled her behaviour were lying because of a 'witch hunt' instigated by Louise Bolton and Nick Bannister. In any case where there is a dispute of fact, when one party can clearly recall the facts, and the other party has no recollection, it is difficult to see how the party that cannot recall the facts can prove their account is true on the balance of probabilities. The respondent applied that test when finding the allegations proven against the claimant and we apply the same test in these proceedings.
12. The claimant gave evidence and called evidence from her husband Michael Blagden and her brother-in-law, Stephen Blagden. The Respondent called evidence from Ms Louise Bolton(Director), Mr Nicholas Bannister (Senior Director), Mr Colin Blackett (Finance Director), Ms Angela Furness (HR Consultant), Ms Claire Mitton (HR Consultant) and Ms Joanne Gittins (HR Consultant).
13. From the evidence we saw and heard we made the following findings of fact.:
 - 14.1 The claimant was employed by the respondent as HR manager from 16 October 2012 until her summary dismissal on 28 March 2018. She is a fully qualified HR professional, became a fellow of the CIPD in 2005 and has 29 years' HR experience. She has conducted hundreds of disciplinary hearings and grievance hearings, in which she has advised/recommended the action senior managers should take. The respondent's senior management team relied very heavily upon the claimant's advice on HR matters as the business grew and developed.
 - 14.2 The claimant was highly regarded by the respondents in her role, and no criticisms were made of her performance as a HR manager. She produced new policies and procedures for the respondent and provided advice on HR matters when required. She was part of the senior management team and as such was invited to attend board meetings, which was not the case for other managers at her level. It was clear she held a position of trust within the business.
 - 14.3 The respondent is a hotel/hospitality business and employees approximately 150 staff. Some of those staff are young students who work

regularly/seasonally for the respondent because of the flexibility this type of work offers in terms of seasonal/holiday work.

- 14.4 The claimant managed the respondent's entire HR function and was the respondent's most experienced HR adviser. The claimant had one HR assistant working with her.
- 14.5 In November 2016, the claimant attended a regional awards event (White Rose Awards) on behalf of the respondent. Other businesses were present at this event which was hosted externally. Louise Bolton, a director and the claimant's line manager, also attended the event. She witnessed the claimant becoming very drunk during that event. The claimant lost her handbag, with the respondent's hotel master keys in it, and had to be helped off the bus at the end of the event. The claimant had also been verbally abusive and aggressive in her behaviour.
- 14.6 The claimant accepts she lost her handbag but does not accept that she was drunk or needed help to get off the bus. She said she was sober and Ms Bolton's version of events was false. Interestingly, the claimant's husband when describing the claimant's state of intoxication on 29 January 2017, confirms she had no keys on that occasion either (having lost her handbag), she arrived home in a taxi and he describes her as *"drunk but no drunker than I had seen her at other Coniston events"*. The clear implication was the claimant's state of intoxication on 29 January 2017, was not unusual/ different to any other work event she had attended and contradicts the claimant's description of being 'sober'.
- 14.7 We prefer Ms Bolton's account of the claimant's behaviour. The claimant was very drunk, she had difficulty standing, she was physically and verbally abusive to those around her, she had lost her handbag and had to be helped off from the bus.
- 14.8 In December 2016, Ms Bolton spoke to the claimant about her behaviour because she wanted to avoid any repetition at the next work event which was the Christmas Party. She recalls that the claimant was very apologetic and fully accepted responsibility for her behaviour and promised that in future she would restrict her consumption of alcohol to one type of alcoholic drink, instead of mixing her drinks, which she said had been the problem for her in November 2016.
- 14.9 The claimant denied that Ms Bolton had spoken to her about her behaviour at that event, but does recall a discussion about her sticking to one type of drink. She does not provide any context to that comment or why it would be made if she was 'sober'. Although Ms Bolton could not be specific about the exact date of the conversation we accepted and preferred her evidence. The claimant was informally warned, about her behaviour before the Christmas party in January 2017, because Ms Bolton wanted to avoid a repeat of that behaviour knowing that alcohol was going to be available at the party.
- 14.10 Also in December 2017, Ms Bolton asked the claimant to draft a 'zero tolerance alcohol and drugs at work' policy. The claimant says Ms Bolton did this because of the drunken behaviour of employee (A) and employee (B) who drank at work and had behaved inappropriately. She describes this request as a 'fad' of Ms Bolton. It is a surprising the claimant

views the request in this way given her HR role, and her reference to the problems identified with the 2 employees, which Ms Bolton was trying to address by implementing this policy.

- 14.11 In June 2016, employee (A) had been given an informal warning about his drinking after work on work premises. In December 2016, following other incidents in November 2016, employee (A) was suspended. He admitted the misconduct and admitted to alcoholism. An outcome letter dated 19 December 2016, (drafted by the claimant) was sent to employee A, issuing him with a final written warning for 18 months, a demotion, loss of salary and confirming the agreed programme of counselling and drugs and alcohol testing designed to address the admitted alcoholism.
- 14.12 Employee (A)'s admitted misconduct had occurred prior to the introduction of the 'zero tolerance policy'. Employee (A) admitted to all the alleged misconduct (being drunk and the associated behaviour) and had disclosed to the respondent his drink problem which was treated as a mitigating factor warranting very serious action short of dismissal.
- 14.13 Employee (B) was a night porter who had also admitted to drinking at work and to associated drunken behaviour. He was suspended on 6 December 2016 and subsequently resigned. Again, the alleged misconduct was admitted and occurred prior to the introduction of the 'zero tolerance' drink and drugs policy.
- 14.14 It was clear that Ms Bolton wanted to make it clear to all employees that going forward there would be 'zero tolerance in relation to drink and drugs at work. The policy drafted by the claimant (Page 67f) makes it clear that drinking while at work is 'strictly forbidden' and any breach would be treated as gross misconduct. Additionally, because the notice was issued in December 2016, it referred to the festive season approaching and that this was an "opportunity to remind staff of the code of conduct". Ms Bolton wanted to send a clear message to employees about the sea change in approach so that any impression of tolerance that might have existed was removed.
- 14.15 Ms Bolton also asked the claimant to draft a 'staff announcement' before the Christmas party on 29 January 2017, to ensure the expected standards of behaviour at the works party were made clear to all staff and were adhered to. Surprisingly, in the claimant's witness statement, there is no reference at all to this, to explain why the claimant was asked to draft it or why it was felt necessary. In cross examination the claimant refers to the announcement as another 'fad' of Ms Bolton.
- 14.16 Ms Bolton does refer to the document and explains its purpose was to avoid any repetition of the earlier type of conduct by the claimant or any other employee at the forthcoming event. She asked the claimant to draft the announcement for the "Coniston Christmas Party" which was placed on the staff notice board.
- 14.17 The invitation was to all the staff to the party arranged at an outside venue on Sunday 29 January 2017. It was a private staff only event. The respondent organised travel to/from venue. The relevant parts of the announcement (page 205) are the third and fourth paragraphs which state:

“Can I please take this opportunity to remind you all that you are ambassadors for the company whether on or off the premises. With this in mind, can I please request that you respect the venue and all of the staff and drink sensibly, i.e drink what you normally drink, not shots at the start of the evening. Can I also request that you remain seated throughout the dinner service, there will be a 10 minute break after the main course.

I’m sure that you will all agree that The Coniston Christmas party is a fantastic event that we all enjoy and I ask that you respect the generosity of the Bannister family who kindly host this annual event” (underlined text our emphasis).

- 14.18 The intention behind the message was clear it was for employees to enjoy themselves, to drink sensibly, behave sensibly, be respectful and to act as ‘ambassadors’ of the company at this external venue. The claimant in her statement refers to the free bar at the event and the speech of Michael Bannister (Chairman), who had punched his arm in the air saying: “go for it”. From this, the claimant understood that this meant it was a **“free for all, anything goes, no restrictions on behaviour”**.
- 14.19 That was clearly not the message in the staff announcement and was not a reasonable interpretation by the claimant of the expected standards of behaviour at a works social event. No one else’s behaviour on the night accords with that interpretation. Her evidence, demonstrates a complete lack of insight on her part.
- 14.20 In relation to the instruction to ‘drink sensibly’, the claimant accepts she was not sober. She says she drank less than she would normally drink and believes the codeine and alcohol interacted to make her drunk quicker. Her doctor prescribed the codeine in May of 2016. She hadn’t taken it before and hadn’t read the leaflet or the front of the box warning about the effects of mixing the drug with alcohol. She accepts that she was “reckless” in not doing so and accepted it was her responsibility to manage the medication she was taking.
- 14.21 The claimant recalls going to the bar which was closed before the meal and persuading the barman to serve her with drinks. She said that she then passed Ms Bolton and complained she could not get gin and tonics to drink with the meal. She wanted to drink gin and tonic and not wine because she is less tolerant of wine. The claimant knew that there was wine on the table, and if she couldn’t get gin and tonic she had the choice of drinking water instead of wine. She cannot remember how much alcohol she drank but recalls that the water and wine on the table were replenished regularly. The ‘gin and tonic’ discussion she admits to fits in with the earlier warning given by Ms Bolton, when the claimant had promised to stick to one type of drink to avoid a repeat of her drunken behaviour at the White Rose event.
- 14.22 Ms Bolton describes the claimant ‘bragging’ about being served when the bar was closed, and no one else was served drinks. The claimant had used her position as a manager to flout the instruction to

obtain drinks and she then drank wine excessively throughout the evening.

- 14.23 In relation to the behaviour in the toilets. Ms Bolton was informed by another employee RD, that the claimant was locked in the toilet and was swearing, when RD had offered to assist. Ms Bolton went to the toilets and tried to persuade the claimant to come out. She was told to “fuck off” by the claimant. After 10 minutes, the Duty Manager of the venue, KW was asked to assist. The toilets were closed to prevent other staff coming in. The door was opened by KW. The claimant was in a state of undress, very drunk and could not stand up. Ms Bolton, RD, and KW tried to assist the claimant to get up and get dressed. The claimant was uncooperative, abusive and aggressive, striking out and waving her arms. She had to be helped to walk through the venue with 2 other employees assisting to the exit where a taxi was arranged to take her home.
- 14.24 Ms Bolton had not been drinking alcohol on the night and gave a clear account of events to the tribunal and during the respondent’s internal investigation. 4 other witnesses corroborated that account. Ms Bolton considered that the claimant was in danger of injuring herself and others and her conduct as a HR manager was unprofessional inappropriate and embarrassing. Her behaviour was witnessed by the staff because the toilets were closed and the claimant had to exit out of the venue in front of staff.
- 14.25 The claimant did not recollect anything that had happened in the toilets during the internal investigation but in her witness statement denies being in a state of undress in the toilet or having any difficulty standing up. She denies struggling. She admits she may have sworn but not directly at anyone. She says she is very ‘docile’ when she has had too much to drink. The claimant says that none of the alleged conduct by her was physically possible.
- 14.26 We find it odd that the claimant was able to give that account of her behaviour in these proceedings, yet had no recollection of her behaviour at the time. We prefer the account of Ms Bolton which was consistent with the account given at the time of the events and was more reliable.
- 14.27 On 31 January 2017 (next working day after the event) a pre-arranged board meeting took place. Ms Bolton informed the claimant that because of her behaviour at the Christmas party she was not to attend that board meeting. The claimant’s response to this was to blame the closure of the bar and her inability to get gin and tonics, implying that was the reason she had got drunk.
- 14.28 Chronologically the claimant’s first complaint of unfairness (6.2 above) is that she was permitted to work 2.5 days before suspension which indicated to her that her conduct could not be treated as ‘serious’. However, in this same period, she was excluded from the board meeting because of her behaviour at the party and was spoken to about that

behaviour on the same day. The claimant was not given a misleading impression by the respondent by a delay of 2.5 days before suspension. Ms Bolton explained that given the claimant's involvement in the process, she had to seek external HR advice about the claimant's suspension which explains the delay, which was in any event not unreasonable.

14.29 On 31 January 2017, Ms Bolton and Mr Nick Bannister (Senior Director) met with the claimant to discuss her behaviour. Ms Bolton shared her recollection of the events she had witnessed. The claimant had no recollection of locking herself in the toilet or of any abusive behaviour towards others. Ms Bolton referred to the fact that the claimant had mixed her drinks (wine and gin) in circumstances where she had promised she would only have one type of drink in the future. The meeting ended with Ms Bolton and Mr Bannister informing the claimant that they would consider the matter again later in the week. Mr Bannister contemporaneous diary records that the next meeting was planned for 2 February 2017 and we accepted that was the date the next meeting took place.

14.30 The claimant then alleges unfairness (6.3 above) in that a further meeting took place on 1 February where she was told the incident would be dealt with by way of a 'note on the file' providing that she agreed to some alcohol and drugs testing and GP support. She complains the respondent changed its position and then determined to pursue a disciplinary process without providing GP support. In the claimant's witness statement, the GP support she refers to is to enable the respondent to understand more about her disability. She makes no admission of having any alcohol problem. Understanding her disability was not the issue that was discussed or under consideration. The claimant's account makes no sense and is not plausible. We do not accept this meeting occurred and the complaint of unfairness in relation to this meeting is not made out.

14.31 The next meeting that took place was on 2 February 2017 when the claimant was suspended. At this stage Ms Bolton was still seeking external HR advise about this matter. Her note identifies 8 allegations of misconduct relating to the claimant's behaviour at the works party. The claimant's response was to blame: the invitation of the Chairman to 'go for it', the food that made her sick, the free drinks and the interaction of codeine with the alcohol. There was no remorse shown at that hearing or any admission made or apology offered for the behaviour.

14.32 On 3 February 2017, the suspension was confirmed in writing and claimant was invited to an investigation/disciplinary meeting. It is accepted that Ms Bolton had used the claimant's template document incorrectly failing to remove the reference to a 'disciplinary hearing'. The claimant would have known that was the case.

14.33 On 6 February 2017, the claimant was signed off as unfit to work by her GP and her sickness absence continued until her dismissal in March 2018.

- 14.34 On 27 March 2017, the claimant raised a grievance and then a further grievance on 16 June 2017 complaining that her suspension was unjustified.
- 14.35 Ms Angela Furness, an external HR consultant was engaged by the respondent to conduct the grievance hearing. On 24 October 2017, Ms Furness decided the outcome of the grievance. Unusually the grievance involved an investigation of the same matters that were to be considered in the disciplinary process. This meant all the relevant witnesses were interviewed, giving the claimant the benefit of having prior disclosure of that evidence prior to her own disciplinary interview.
- 14.36 The claimant requested that the disciplinary process was delayed pending the outcome of the grievance process. The respondent agreed to that request. We cannot see the justification for that decision but any delay in commencing the disciplinary process arises from the claimant's request. It has also resulted in the claimant obtaining full pay for the lengthy suspension that followed, which forms part of the complaint that has now been settled and withdrawn.
- 14.37 On 25 October 2017, the disciplinary process was effectively restarted with a letter setting out all the allegations of misconduct. The investigation was to be conducted by another external HR consultant engaged by the respondent, Claire Mitton.
- 14.38 On 1 November 2017, Ms Mitton held an investigation meeting with the claimant. At this meeting the claimant was accompanied by her brother-in-law. The meeting was 2.5 hours long. The claimant had full opportunity to put her account (having knowledge of the evidence already gathered) and identified further areas of investigation for Ms Mitton to pursue on her behalf.
- 14.39 Between the 6 to 21 December 2017, Ms Mitton interviewed all the relevant witnesses, including the witnesses identified by the claimant.
- 14.40 On 2 January 2018, Ms Mitton produced her investigation report which is at pages 147 to 207. In that report she records the case presented by the claimant, that she was drunk but could not remember anything once she was in the toilets. She sets out her findings on the areas the claimant had asked her to consider which were: the seating arrangements at the dinner, whether the allegations made were untrue and the drinking culture at the respondent. She sets out her conclusions and outcome. We found that Ms Mitton carried out a reasonable, thorough and fair investigation. She identifies 6 allegations of potential gross misconduct (including the 2 the claimant accepted at this hearing). She leaves it to the respondent to decide what to do next as part of the disciplinary process.
- 14.41 On 6 February 2018, the claimant is invited to attend a disciplinary hearing on 12 February 2018 (page 207A). The invitation identifies 6

allegations of misconduct relating to the claimant's "**behaviour** at the workplace annual function on 29 January 2017" alleging the claimant had:

- Failed to follow a reasonable management instruction to drink sensibly.
- Displayed aggressive behaviour and used foul and abusive language towards two employees.
- Displayed behaviour likely to cause injury to self and others.
- Damaged the company's reputation.
- Displayed unprofessional conduct.
- Had not behaved in a manner expected of a HR manager and seriously damaged the trust and confidence between the parties.

14.42 The letter also informs the claimant that a possible outcome could be summary dismissal. She is provided with the investigation report containing the evidence gathered by Ms Mitton. Importantly the letter explains to the claimant that she would be given the "*opportunity to explain her case, answer the allegations, ask questions, dispute the evidence, provide her own evidence and otherwise argue her case*". She would also be able to put forward any mitigating factors that she considered were relevant to her case. The letter expressly confirms "due consideration would be given to any factors or explanations" before the disciplinary sanction was decided.

14.43 As an experienced HR Manager, the claimant understood the importance of attending and participating at that hearing so that any representations she wanted to make could be considered before a decision was made. She also knew that if she did not participate a decision would be made without that input.

14.44 The claimant was informed that the disciplinary hearing would be chaired by Ms Joanne Gittins, another external HR consultant engaged by the respondent. The claimant's response was to immediately object to Ms Gittins appointment. Oddly, she suggests either Louise Bolton or Nick Bannister should chair the hearing, the 2 individuals she believed had fabricated evidence against her/were involved in a witch hunt.

14.45 The respondent does not agree with the claimant's request explaining Ms Gittins was an impartial third party to chair the disciplinary who was appointed to ensure that the proceedings were conducted fairly and impartially.

14.46 Another complaint of unfairness (6.4) was that Mr Blackett who was the decision maker at the disciplinary hearing, should be excluded because at the claimant's request he was interviewed in the grievance process. Unlike Ms Bolton and Mr Bannister, Mr Blackett had not attended the Christmas event, he was not involved in the disciplinary process or implicated in any of the disputed events (1st February 2017 meeting). He was a director and was an appropriate person to decide the case. Just because the claimant identifies at this hearing another (non-executive) director she would have preferred that does not mean the respondent has acted unfairly by not agreeing to her objections and suggestions at the time.

14.47 The disciplinary hearing was then delayed at the claimant's request on four different occasions and eventually took place on 26 March 2018. We note that during the course, of this hearing, the claimant has made some serious allegations against Ms Gittins alleging bad motive, harassment and victimisation. We found those allegations were completely unsubstantiated. Ms Gittins was an impressive witness who approached her role conscientiously and carefully. The minutes of the disciplinary hearing show the number of unsuccessful attempts she made to try and persuade the claimant to participate in the process. She recalls that the claimant had already made up her mind that she wanted to make a brief statement and then leave. She wanted the claimant to stay because she had planned to explore areas with the claimant to better understand her position in light of the evidence gathered during the investigation. Her planning is clearly set out in the report with her recommendations.

14.48 The Tribunal asked the claimant why she did not participate and present her case for the respondent to consider when she understood the potential consequences of not doing that. Her answer was that she had lost all trust and confidence in the respondent by this stage. She confirmed the notes that Ms Gittins took of the meeting were accurate. The pre-prepared statement the claimant made was that she did not recognise Ms Gittins authority, the others were lying and the five people that had made allegations against her, were on a 'witch hunt'. Ms Gittins tried to persuade the claimant to stay so that she would have the opportunity to ask some questions and hear what the claimant had to say. The claimant refused. Ms Gittins asked the claimant the question "*what do you want to happen at this point?*" The claimant's response was "*I want this to be withdrawn and to go back to work*". Miss Gittins explained that the allegations could not be withdrawn and the disciplinary process would continue. The claimant's parting comment to that was that she didn't recognise the process, would not be taking part and she left.

14.49 Miss Gittins attached the minutes of that meeting to her report which was provided to Mr Blackett as the decision maker. Looking at the that report it is clear Miss Gittins very carefully went through each of the allegations and she accurately summarised the evidence before making her assessment. She also identifies the questions she would have asked the claimant if the claimant had participated. One example is in relation to the allegation of "*failing to follow a reasonable management instruction to drink sensibly*". She worked through the evidence and considered the following questions – "*was the instruction reasonable? Did the claimant receive the instruction and know that it applied to her? Was the instruction itself clear? Did the claimant fail to follow this instruction?*" She would have asked the claimant what her drinking habits were to ascertain whether there were any mitigating circumstances (such as alcoholism) however because the claimant was not there to engage with her in the hearing she was unable to do so. She followed the same thought process for each of the allegations demonstrating her reasoned approach to the hearing.

- 14.50 The claimant's position was that the allegations to be withdrawn because she accepted no responsibility at all for her actions. She could have challenged or disputed the evidence provided or presented to support her position but did not do so.
- 14.51 Mr Blackett read the report and all the information provided before making his findings and reaching a decision. He sets out his rationale for finding each allegation proven. He found the claimant was guilty of all six allegations of misconduct arising out of her behaviour on 29 January 2017. He concluded it was gross misconduct because of the seriousness of the proven misconduct and summarily dismissed the claimant. He formed the view the claimant did not appear to accept any responsibility for her actions and the only way the respondent could reasonably be expected to ensure that this behaviour did not happen again was by dismissing the claimant. The claimant had shown no insight into her behaviour, no remorse.
- 14.52 By way of example, we set out some of the reasoning of Mr Blackett to show his approach to decision making for allegations (1) and (2) (5) and (6). Allegation 1 – Mr Blackett concluded that the claimant understood the meaning of her own memo about drinking sensibly and the memo was unambiguous. He finds *“during the investigation you admitted that you were drunk and could not recall what took place in the toilet. Furthermore, it is evident that you chose to drink wine in the full knowledge that it would make you drunk and fail to appropriately consider the interaction of your alcohol consumption with your medication”*. He concludes that the claimant's conduct was entirely of her own volition. He found that the allegation was proven on the balance of probabilities.
- 14.53 Allegation 2- aggressive and foul language. He identifies the evidence against the claimant, which was from an employee of the venue, LB and the other witnesses. He refers to the claimant mentioning a witch hunt during the disciplinary hearing but does not agree that was the case. He accepted the evidence of the witnesses that had provided statements. He found that allegation was therefore proven on a balance of probabilities.
- 14.54 Allegation 5: He finds that based on the findings made in relation to allegation 2, it was clear that the claimant had displayed unprofessional conduct. Allegation 6: He finds the behaviour was not the type of behaviour the respondent would have expected from their HR manager. He states *“for example, you took wine from other tables in order to drink more alcohol. You became extremely intoxicated and tried to procure more drinks from the bar citing your managerial role, you were unable to walk and you were partially undressed in front of staff members. We have concluded that your behaviour has seriously damaged our trust and confidence in you.*
- 14.55 Mr Blackett considered the claimant's ill-health and states *“We are extremely sympathetic about the ill health you have suffered and continue*

to suffer, however such ill health does not in our view mitigate your misconduct”.

14.56 Having considered all the circumstances Mr Blackett decided the appropriate sanction was summary dismissal. The claimant’s complaint of unfairness alleging that her dismissal was for some other allegation of drinking at work is completely unsubstantiated and unsupported by the evidence. We cannot see why the employer would start a process for one reason (the claimant’s behaviour at the Christmas party) gather evidence, and proceed on that basis, if they had in their mind another unidentified event at work.

14.57 Mr Blackett ends his letter informing the claimant of her right of appeal to Michael Bannister the Chairman. The claimant does not exercise that right of appeal which brought the internal process to an end. The claimant then submitted her claim to this Employment Tribunal.

Submissions and Applicable Law.

14. Both counsel have helpfully provided written submissions with some legal authorities and have accurately set out the applicable law which is contained in sections 98(2) and (4) of the Employment Rights Act 1996. Section 13 and 15 of the Equality Act 2010 and section 136 of the Equality Act 2010. The questions to be determined in applying the law to the complaints made are also identified in the list of issues.

Conclusions

15. The first question for the Tribunal to decide is the reason for dismissal. We were satisfied that the reason why the claimant was dismissed and the only reason for dismissal, was the claimant’s behaviour while in a state of intoxication at the Christmas party on 29 January 2017. She was very drunk, abusive, aggressive, displayed unprofessional behaviour and seriously damaged the respondent’s trust and confidence in her as their HR Manager. Her dismissal had nothing whatsoever to do with her disability (micro-colitis) or anything arising from her disability. The claimant has not proved any facts from which the tribunal could conclude disability discrimination in relation to her dismissal. She has failed to establish a prima facie case so the disability discrimination complaints fail.

16. The claimant at the end of the hearing denied any associated drunken behaviour. Given that drunken behaviour is material to her dismissal and to that of her actual comparator it is difficult to see how she can complain of direct disability discrimination. Her comparator (employee A) admitted the drunken behaviour and admitted to having a problem with alcohol, both are material differences between the claimant’s case and that of her comparator. That complaint is not made out either on the ‘reason why’ approach explained above or on an analysis of the circumstances of her actual comparator.

17. For the disability related discrimination, prior to this hearing the claimant’s case was that her admitted behaviour “arose from drinking alcohol when taking codeine”. In her evidence the behaviour/effects described are that it would make her extremely tired, dozy and dizzy. She does not say the effects

are the associated drunken behaviour (abusive aggressive and unprofessional behaviour) which she denies occurred. It is difficult to see how that complaint could succeed given the claimant's position. The question is in any event academic, given our conclusions above on the reason why the claimant was dismissed.

18. Turing then to the unfair dismissal complaint, the questions is whether the respondent (based on the findings of fact made by this tribunal) acted reasonably in dismissing the claimant for the potentially fair reason of 'conduct', having regard to the requirements of section 98(4) of the Employment Rights Act 1996 and the band of reasonable responses test. We have dealt with in our findings, each of the allegations of unfairness which have not been proved. (Allowing the claimant to work 2.5 days before suspension, the meeting on 1 February 2017, the appointment of Mr Blackett as the decision maker, whether other unspecified alleged misconduct formed the basis of the dismissal). Our findings are clear the dismissal was only about the claimant's behaviour while in a state of intoxication at the Christmas Party not some other unspecified allegation of drinking at work that was never put to the claimant as an allegation of misconduct.
19. The other unfairness alleged is inconsistency of treatment of the claimant compared to employee (A) and employee (B). The case law is clear the circumstances must be 'truly parallel' for the inconsistency argument to succeed and the circumstances of the claimant and her chosen comparators were not. The claimant did not/does not admit misconduct, (A) and (B) did. A 'zero tolerance' policy was implemented after (A) and (B) had committed their misconduct. Employee (B) resigned. Employee (A) admitted to an alcohol problem, was demoted and issued with an 18 months final written warning, a serious sanction short of dismissal. The claimant never accepted responsibility for the misconduct. At the disciplinary hearing she suggested the allegations should be withdrawn completely not that a lesser sanction like a final written warning was more appropriate.
20. Applying the test of reasonableness in a conduct case requires the tribunal to answer three questions as identified more recently by the Court of Appeal in the case of *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA 903 at paragraph 35 and 36 Aikens LJ.

"Once it is established that an employer's reason for dismissing the employee was a valid reason within the statute the Employment Tribunal has to consider three aspects of the employer's conduct. First did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case ... Secondly, did the employer believe that the employee was guilty of the misconduct complained of and thirdly did the employer have reasonable grounds for that belief.
21. From our findings it is clear there was a thorough and fair investigation conducted by Ms Mitton who investigated the areas identified by the claimant. Ms Gittins conducted a fair disciplinary hearing in circumstances where the claimant did not want to participate. She carried out a reasoned evidence based assessment before making her recommendations to Mr Blackett. Mr Blackett genuinely believed the claimant was guilty of gross misconduct for evidence based reasons which he clearly sets out in his decision. It is difficult

to see how the claimant can complain of unfairness when she chose not to participate in that process knowing the consequences of that decision when she made her choice. We were satisfied Mr Blackett had reasonable grounds for his belief that the claimant was guilty of misconduct. The claimant could have challenged that decision at Appeal but chose not to.

22. As to the question of the sanction imposed and whether it falls within the band of reasonable response for the respondent to dismiss. We found it did because the respondent reasonably concluded that claimant's behaviour was unprofessional and seriously undermined trust and confidence in her as a HR manager. She was expected to set the standards of expected behaviour for the respondent for other employees to follow. She had been informally warned about her drunken associated behaviour shortly before this event and had drafted the staff announcement which contained another warning about the expected standard of behaviour. She chose not to heed those warnings. Mr Blackett considered the risk of repetition of that type of behaviour with the claimant who showed no insight into her own behaviour and accepted no responsibility for her actions. Dismissal falls within the band of reasonable responses. In those circumstances all the complaints fail and are dismissed.

Employment Judge Rogerson

Date: 3rd April 2019