Appeal No. UKEAT/0454/13/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 March 2014
Judgment handed down on 15 August 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

UNIQWIN UK LTD APPELLANT

MR M WESTON RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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<u>SUMMARY</u>

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

The Employment Judge failed to follow the case law on gross misconduct notably **<u>Orr v Milton Keynes Council</u>** [2011] ICR 704 at paragraph 78 per Aikens LJ with the result that he substituted his decision on the disciplinary hearing and the appeal for that of the employer. Appeal allowed on the ground for unfair and wrongful dismissal.

Appeal on remedies dismissed. The result was a fair dismissal.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the Judgment and Reasons of an Employment Tribunal consisting of Employment Judge Hargrove, sitting in Newcastle-upon-Tyne on 11-13 December 2012. The Judgment was sent to the parties on 20 December 2012

2. Employment Judge Hargrove decided (i) that the Claimant was unfairly and wrongfully dismissed; (ii) had a fair procedure been followed, there was a one-third chance that the Claimant would have been fairly dismissed in any event; (iii) the basic and compensatory awards for unfair dismissal only were reduced by a further one-third each; and (iv) the awards were increased by 20% for breach of the **ACAS Code of Practice** under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

3. The Appellant (the Respondent below) is represented by Mr David Reade QC. The Respondent (the Claimant below) is represented by Mr William Josling of Counsel. I am grateful to both Counsel for their written and oral submissions.

4. I heard the appeal on 21 March 2014 and reserved Judgment.

The Factual Background

5. The factual background is set out in the Reasons of the Employment Judge at paragraph 4. I take much of what follows from that.

6. The Claimant commenced his employment as the shopping centre manager at the Peterlee Shopping Centre in March 2002. One of his responsibilities involved the receipt and

handling of cash from market stalls in the shopping centre itself. This occurred on a daily basis when the shopping centre was open. He was assisted by a Mrs Puddick, who was the administrator. He would physically collect the cash and issue signed receipts. She was responsible under his supervision for banking those takings. There was no assertion that the Claimant did anything wrong in relation to the handling of these receipts.

7. In addition, on the four Monday Bank Holidays in each year, there were market stalls set up at a different location, namely in the Asda car park attached to the shopping centre. These Bank Holidays were not normal working days for the Claimant. However, it is not in dispute that the Claimant habitually worked them and on those occasions also collected the rents from the market stall holders, some of whom were regulars within the shopping centre. Others were from outside and came only on Bank Holidays. It is in respect of the Claimant's handling of these monies that the allegations of gross misconduct arose.

8. The Claimant was originally employed by the then landlord of the premises, referred to at the hearing as Modus. The Claimant's then contract of employment, which was before the Employment Judge, showed that the Claimant's employer as being the Peterlee Partnership but the contract was signed by the Claimant and by a Mr McFarlane for Modus Peterlee Ltd.

9. There were a number of changes in the Claimant's employer thereafter and a number of changes in the identity of the landlord of the shopping centre and the management agent. It appeared to be the case that, in particular, the Claimant became an employee of Riddell and Partners, one of the managing agents, then Lee Barron, then Storeys SSP, and then when in April 2010 Salford Estates became the landlord, the managing agent and the employer of the Respondent was Saville's.

10. The document recording the Claimant's transfer of employment to Saville's Commercial Ltd from 7 April 2010 was before the Employment Judge. This document identified the Claimant's basic salary, that he had had continuous employment since 4 March 2002, his normal working hours were Monday to Saturday, and the following statement:

> **"However, in order to meet business requirements you may be asked to work outside these normal working hours or at weekends and on Bank Holidays, with or without additional payment, under arrangements with the office management."**

11. There was a further management re-organisation, which took place on or about 30 June 2011. The company employed a Ms Debbie Illingworth. Praxis Real Estate Management Ltd took over the day-to-day management of the shopping centre, but Uniqwin Ltd became the employer of the staff at the shopping centre. It was not in dispute that the Claimant's employment transferred finally to Uniqwin Ltd, the present Respondent.

12. On 24 September 2011 the Claimant returned from holiday. The last Bank Holiday market which he had managed was in August 2011. On 22 September 2011, in his absence, Ms J K Lawton interviewed Mr David Flanagan, a security guard, and Mrs Puddick. The notes of interview were before the Employment Judge. On Monday, 26 September 2011 Ms Lawton interviewed the Claimant with no prior notice. The subject of the investigation was the method of handling cash received from the Bank Holiday stallholders. Mrs Puddick had previously handed certain documents to Ms Lawton. They were before the Employment Judge. At the Claimant's interview on 26 September he handed documents to Ms Lawton, which included an apparent receipt for £50 each signed by all employees of the Respondent who had worked as cleaners at the Bank Holiday market.

13. At the conclusion of the interview with Ms Lawton, the Claimant was suspended. By a letter dated 11 October 2011 the Claimant was invited to a disciplinary hearing. The material part of the letter says this:

> **"The company would like to discuss issues relating to the performance of your contract of employment and your conduct, in particular:**
>
> **1. Further to our investigations it seems that it is agreed that on bank holidays, you did collect cash from the market stalls and before banking the cash you took the sum of £400.00. You have then kept £200.00 for yourself and given £50.00 to a number of guards who helped to clean up the market afterwards.**
>
> **It is the Company's position that you had no authority to deduct any monies from the cash that you have collected. Accordingly by taking Company money to which you are not allowed, the allegation is that you have committed an act of gross misconduct. At the disciplinary meeting we will ask you various questions in respect of your actions so we can consider the matter further.**
>
> **2. In addition to the allegation at number 1, you have received the monies on a gross tax free basis without actually declaring the same, as far as we are aware, thereby avoiding payment of tax and national insurance. The effect of this is not only bringing the Company into serious disrepute with the revenue, you have not paid the correct national insurance and tax, and the Company may now have a liability to pay additional tax. Again if proven this is gross misconduct issue.**
>
> **At that meeting, we will discuss the issues with you and you will have a chance to explain your actions. If your explanation is not considered satisfactory and there are no extenuating circumstances, you will be issued with a formal disciplinary warning in accordance with the company's dismissal and disciplinary procedure. However, in light of the seriousness of your conduct, you should also be aware that one possible outcome of the meeting is your dismissal from employment with the company."**

14. During the course of a further investigation by a Mr Unwin, the Managing Director of Praxis, three witness statements were taken in police format on 12 October 2011. The makers of the statements were Mr Michael Leak, Mr Darren Puddick, the former husband of Mrs Puddick, and finally Mrs Puddick herself.

15. The notes of the disciplinary hearing were taken by Ms Lawton. The disciplinary hearing was chaired by a Mr Higgins. Those documents were before the Employment Tribunal. By a letter dated 19 October 2011 Mr Higgins informed the Claimant that he had been dismissed. The material part of the dismissal letter says this:

> **"The issues in respect of the monies taken on bank holidays are actually quite small.**
>
> **There is no dispute that you did collect cash from the market stalls and as far as I am concerned there is no dispute having looked at documentation that the paperwork evidences**

monies being received, monies being paid to the guards and other staff and monies being deducted and kept by yourself.

The issue seems to be as to your authority to deduct any monies from the cash that you have collected.

In summary of your position, as I understand it, it is your belief that you have authority to deduct those monies and keep £200.00. That authority is based on the fact that you were told by your previous Centre Manager that this is a system that he had adopted and you were allowed to do this.

The issue itself only arose when Uniqwin undertook an audit of the books and paperwork, such an audit had not previously been undertaken by Savills.

The first consideration I have undertaken is have a look at your letter of appointment dated 26th May 2010 from Savills which was attached to the invitation to the disciplinary letter at Annex 1.

In looking at that letter, you were to be paid a basic salary of £40,626.20. The letter sets out how you will be paid and also sets out the potential discretionary bonus scheme. The clauses in that letter deal with your appointment and payment.

There is no mention within that letter of any authority for you to take additional monies.

In my view, if it is that your employers at the time and yourselves were aware that you were having additional income then this would have been clearly set out to you on the 26th May 2010 in line with the other benefits you receive from your contract of employment by way of income.

The letter of the 26th May also refers to the staff handbook of Savills.

Whilst Uniqwin do have their own staff handbook, this has not been officially provided to you, due to the short length of time you have been working for Uniqwin, I am working on the basis that the Savills staff handbook still applies.

The staff handbook itself is very clear on the terms and conditions at Section 1 as to payment of salary and discretionary bonus scheme.

I attach a copy of the staff handbook.

I note there is no reference to cash bonuses. There is reference to a discretionary bonus scheme, however, it does say that you will be notified in writing from time to time of any specific criteria concerning any such discretionary bonus scheme. As far as I am aware there is nothing in writing whatsoever providing you with permission to keep £200.00 tax free. You have not shown me anything either.

In the staff handbook I have also considered Section 2 in respect of professional ethics policy. This policy expressly states that you should not improperly use your position within the company for personal gain to you and you should [be] acting in an ethically and professionally manner in all your business activities. Whilst this is expressly set out in the staff handbook, it is my belief that this be implied in any event into your employment contract.

Whilst I will deal with the issue of payment of tax below, it does seem that you have not informed the wages department of this income you received thereby avoiding any tax and national insurance.

Whilst this does raise an issue of liability for the company which I will deal with below, there is also doubt in my mind that if it was genuinely your belief that taking the monies was an honest action, because, you must have been aware that tax and national insurance is payable on any income you receive from your employment, in particular, you are aware that cash payments are simply not allowed for work.

In fact as I understand it, whilst you do have authority to agree contracts for work at the centre, payments are made direct by Salford Estates to the third party.

I am also aware that you have a responsibility for petty cash, however, you understand and appreciate that you have to account for all payments with receipts.

> **You have tried to argue that because of this course of conduct had been undertaken previously, your continuation of that act was allowed. I cannot agree with this.**
>
> **I do think it is difficult to imply a term into a contract by conduct or custom that is on the face of it tainted with dishonesty or unlawfulness by non-payment of income tax, national insurance and/or not making it explicitly known to your employer.**
>
> **I would even go so far as to say that a relatively senior employee such as yourself must have been aware that any income received by your employer would be subject to tax and any payment to you would be subject to employer's tax and national insurance and/or also employee's national insurance and tax.**
>
> **I cannot therefore accept that this conduct can amount to a term in your contract.**
>
> **Further, as you are aware, unless an in depth audit was undertaken, the centre owner would not have been aware of the deductions because the only financial information provided was the actual banking receipt of the monies. It was not the practice of owners to undertake audits such as this, until the current owner took over.**
>
> **In light of all the above information that you have provided and the considerations I have set out, I have come to the view and decision that you did take the money, you took the money without authority to do so and on all the evidence as a whole, I do believe that your actions are an act of gross misconduct.**
>
> **In dealing with the second issue in respect of tax and national insurance, bearing in mind that you have seniority in your position, I cannot accept that you did not believe that you should not pay tax and national insurance on income you received, or it had not crossed your mind that your company would be liable for income received to pay the employer's national insurance and your wages.**
>
> **The idea of 'cash in hand' jobs in this day and age, (and legally in any day and age), is wholly inappropriate for any person or business.**
>
> **In light of my findings above in respect of the monies which you are not supposed to take, it follows that by obtaining that secret income, you have failed to pay any tax and national insurance on that income, and created a potential liability for the company to calculate and pay tax and national insurance, which is something the company will now have to sit down and discuss with the company accountants. Again this is an element of gross misconduct that has and/or may bring the company into disrepute.**
>
> **In light of the gross misconduct issues, in particular the taking of the cash, I feel that the company has no option but to summarily dismiss you without notice or payment in lieu of notice.**
>
> **Your last date of employment with the company is Monday 17th October 2011."**

16. By letter dated 25 October 2011 the Claimant appealed. In that letter the Claimant asserted that:

> **"Accounts have been kept on computer and hard copy ever since I started at the centre and was always common knowledge."**

17. The appeal was chaired by Ms Anthea Marsland. She reported to Mr Higgins, who chaired the disciplinary hearing. The Employment Judge thought that the fact that she had never chaired an appeal meeting before and that it was unclear that she had ever conducted a

disciplinary hearing before was significant. The notes of the appeal meeting were before the Employment Judge. By a letter dated 12 December 2011 Miss Marsland dismissed the appeal. The material part of the letter said this:

> **"The appeal letter is dated 25th October 2011, and in the minutes of the appeal meeting I broke down with your agreement the heads of appeal, which are as follows:-**
>
> 1. **Your employment record with the centre.**
> 2. **The money was taken through verbal agreement.**
> 3. **The market was audited.**
> 4. **Accounts had been kept on a hard copy of the computer.**
> 5. **Lack of communications.**
>
> **In dealing with the issues of the Appeal, I have to consider the reasons for your dismissal as set out in the original dismissal letter of 19th October 2011 and the grounds of appeal relating to that.**
>
> **The main issue, as highlighted in the 19th October letter seems to be the fact that you took monies without evidence of authority and without paying any tax and national insurance on those monies.**
>
> **In respect of the authority issue, you say in the Notice of Appeal meeting that you had authority from a Peter McFarlan at Modus Properties and also Andy Phillips of Ridel & Partners, the Managing Agents. We have attempted to contact these people, but Modus no longer operate. There is no verification of your evidence.**
>
> **However, there is evidence that confirms your predecessor in title denies there was any authority for such an agreement. There is no reason for him to lie and this therefore contradicts you.**
>
> **I am also aware, having spoken to Debbie, that you were told that it was your responsibility to ensure that all cash receipts needed to be double checked and accounted for by you because it was your responsibility.**
>
> **In fact, you had in one email of the 11th August stated you count the money together with Susan and make sure it ties in with all the receipt counterfoils and then you bank the money. At no point do you say you make deductions or had not accounted for all the monies.**
>
> **In respect of the deductions themselves, you did reduce them from £300 to £200 and in the appeal meeting you said you thought the £100 would cover tax and national insurance, but you acknowledge that you have never paid tax and national insurance on these monies, despite you receiving a wage slip and P60 evidencing your tax payments.**
>
> **Further as an employee, you should have expected the payment, if it was allowed, to appear on your wage slip as income and the corresponding tax element would have been paid. It is not like you are a junior employee who knows no better, you are a senior employee.**
>
> **You also state you really had no idea how much the tax and national insurance would be. So there is no rationale explanation as to why you calculated exactly £100.00 would suffice. On balance, I cannot accept you were not aware that were receiving money as a 'cash job' and not paying tax.**
>
> **In respect of the original disciplinary hearing minutes, you also said that the deduction was because the markets were slowing down. You also said the £300.00 figure was agreed and you had no authority to alter this, yet quite clearly you were altering it. This is contradictory in nature.**
>
> **I would expect, if it is that you had been given authority to take £300.00 for working the Bank Holiday Market, then as an employee, you would have taken the monies irrespective of the takings as this would have been an agreed payment.**

Further it does not make sense that you decreased your takings because you say the market was not making enough, but you expected the £100 to come out anyway to pay tax, i.e still £300, and even then you would have been aware by your wage slip, that you had not paid tax as the income was not shown.

I would have also expected that if it is as you say, the £100.00 was an guesstimate for tax, you would have checked somewhere what the correct payment should be, whether, that be more than £100.00 and therefore you owe money, or less than £100.00, leaving you in a position to claim money back, or increase your payment. You simply did not do this.

It is also not clear how you decided £100 was the amount of tax to be paid, if it is you were not aware of what tax you should have paid previously. Your explanation in my view is not credible.

In the dismissal letter itself, there are a number of issues in respect of there being clear documentation relating to your contractual terms and potential bonuses. You agreed with this and have never provided any evidence to support your position that there was a separate agreement.

In fact with the predecessor to the job, denying the existence of an agreement, it makes it difficult for me to believe your argument, that in addition to the clear contractual documentation, there was a separate agreement.

In respect of the fact that whilst your letter of employment says that you work bank holidays without additional payment you argue that the markets were separate from the centre.

I have to disagree with this because quite simply you are the centre manager and responsible for everything that goes on at the centre and the markets are something that goes on at the centre and that is why you bank the monies and you send confirmation of what has been banked to the owners of the centre.

If it was a separate entity then you would not do this. I think to argue that the markets are a separate business and they are not part of your role as a centre manager, is not credible in my opinion. It is not a pick and mix approach to your responsibilities.

In considering the evidence before the disciplinary hearing, I do believe that that decision was a fair and reasonable decision to take.

In particular, as a senior employee running the centre, your employer has to have full confidence and trust in you.

Your vagueness, contradictory statements and lack of rationale in your explanations, does throw serious doubt on that trust and confidence your Employer has in you. The information raised in the appeal does not help you or resolve the matter on those particular issues."

Unfair Dismissal: the Employment Judge's Conclusions

18. The Employment Judge's conclusions in respect of unfair dismissal are contained at paragraph 6.1-6.4 of the Reasons. The Employment Judge said this:

"6.1 The respondent failed to make proper disclosure of the product of the investigations to the claimant at any stage of the disciplinary process. JKL interviewed David Flannagan on 22 September 2011, pages 46 -47, but the evidence that he gave is irrelevant. Susan Puddick was interviewed on 22 September 2011, at pages 48 – 49. There are contents of that interview which are very important. The claimant was interviewed on 26 September 2011, at pages 50 – 51. Only the claimant's notes of interview were disclosed prior to the disclosure process which preceded the Tribunal claim. Mr Unwin, who was not called to give evidence before the Tribunal and who has not provided a witness statement, apparently interviewed the following, Michael Leak on 12 October 2011, at page 58. The subject of this interview has nothing whatsoever to do with the matters properly to be investigated by Mr Unwin and for which the claimant had been suspended. The statement does however contain allegations which are prejudicial to and critical of the claimant. That statement was not disclosed at any stage to the

claimant. Next Gary Puddick, he was interviewed on 12 October also by Mr Unwin, see pages 61 - 64. This statement was disclosed to the claimant by JKL by a letter of 14 October at page 254. It was the only disclosure except for the claimant's notes of interview. A number of points need to be made about this statement from Mr Puddick. First Mr Puddick denies ever having received cash for working the bank holiday markets before the claimant's arrival in 2002. He claimed he had received a £300 bonus annually and on another occasion £300 for showing a new agent how to run the market and a further one off payment of £300 from the claimant for his first bank holiday market. He also said that his estranged wife, Susan Puddick, had also received £200 cash in that respect. He purports to corroborate that statement in a statement to the Tribunal, but Mr Puddick has not been called to give and that is significant in relation to the issues of wrongful dismissal and the issues of contribution. The claimant accused GP, that is Mr Puddick, of lying during the disciplinary process. He is criticised for not having explained why he thought Mr Puddick was lying. No further enquiry was made of GP by or on behalf of the disciplinary officers Higgins or Marsland. GP admits that he blames the claimant in his witness statement for bringing about his and obviously Mrs Puddick's son's dismissal, but there are other reasons to doubt the reliability of that first witness statement. At the time it was taken by Mr Unwin there was a police enquiry taking place into the specced theft of the market money. Were GP to admit to having a hand in it he would also have become a suspect. He had clear motives for not telling the truth. The format of the witness statements taken by Mr Unwin is also unsatisfactory. I have already identified that irrelevant and prejudicial material was included in them. That applies to all three witness statements taken by Mr Unwin, but in addition he used pro forma Police witness statements with, bizarrely, the non-disclosable attachment giving the contact details of the witness, which is a course which the Police never follow in an official enquiry. That information is kept strictly confidential. This Tribunal has come across before the practice on the part of retired Police Officers of using Police format pro forma witness statements. It is highly undesirable. It gives a wholly bogus air of respectability to what was in this case not a respectable process that was taking place. Finally and most importantly, Mr Unwin took a lengthy witness statement from Mrs Puddick at pages 66 - 72. There was a failure to disclose this to the claimant at any stage of the disciplinary process. It is of importance because it confirms that Modus (Peter Macfarlane) was aware that the claimant at least was taking cash payments from the bank holiday money and paying himself and the cleaners from it. However, it also states that later owners and agents had not been aware of the practice and that the claimant had actively discouraged her from disclosing documentary or other evidence of the circumstances of these payments to them. In the investigatory interview with JKL on 22 September 2011, at page 48, SP had disclosed the important information that her ex-husband GP had received a payment from Modus 'then it changed to MW' that is a reference to the claimant. She also stated that she believed from MW that Modus had given the authority for the deduction of the money from the takings. These two assertions, when taken together, were very important to the claimant's defence, particularly to the first charge in the disciplinary letter of 10 October 2011, at page 55, which Mr Higgins interpreted with some reluctance before the Tribunal as being an allegation of dishonesty and in effect theft, which it was. They also tended to discredit GP's statement to Mr Unwin which was disclosed, yet SP's interview note was not. There was also the failure to disclose important documents which SP had handed to JKL at her interview on 22 September. These included the records kept back to April 2010, but there is no reason to doubt much further than that by SP, exemplified by the document at page 105. This records that the claimant and four others had received cash payments and the amount of them, £200 in the case of the claimant and £50 in respect of each of the others. This document also detailed the total repeats for the bank holiday Monday in April 2010 and the net sum banked. This was not disclosed to the claimant nor was it disclosed to either of the disciplinary officers. On the other hand the claimant did disclose a record of payment of cash to the cleaners, this is at page 106. These failures to disclose to the claimant are highly significant but there was also a failure to disclose the full product of the investigation to Mr Higgins. He says he did see the JKL interview statements, including that of SP, but which he ignored. He did not see SP's documentary evidence. Ms Marsland, at the appeal, saw only GP's statement to Mr Unwin, Mr Higgins' outcome letter and the notes of Mr Higgins' disciplinary hearing with the claimant on 17 October. That is absurd. She could not possibly have properly applied her mind to the essential issue for the appeal without seeing all of the relevant evidence.

6.2 These defects are sufficient to make the dismissal procedurally unfair, but I am further satisfied that the failures to disclose material capable of being of assistance to the claimant must have been deliberate. It could not reasonably have been mere negligence or forgetfulness or oversight by mistake. There is more, however. It is a fundamental principle that an employee who is dismissed should have a right of appeal. The parties have not referred to the ACAS Code of Practice 2009. Paragraph 4.45 on pages 211 to 213 of Butterworths says this, 'Wherever possible provide for the appeal to be heard by someone senior or in authority to

the person who took the disciplinary decision and if possible someone who was not involved in the original meeting or decision'. How on earth anybody could have thought that Ms Marsland was the appropriate person to hear this appeal has not been explained but certainly she was not even provided with any information which might have assisted the claimant's case and that was deliberate.

6.3 I now turn to the *Burchell* test. So far as the reasonableness of the investigation and the belief of the dismissers were concerned there was a failure to investigate at the proper time, namely up to the outcome of the appeal process, the claimant's fundamental contentions that he had received authority for the payments, in particular from Mr Macfarlane, and that there were documentary records of the payments on computer and hard copy, see eg his appeal letter at page 82, and at the appeal meeting before Ms Marsland on 1 November, see page 86. By this stage the claimant had specifically identified Peter Macfarlane from Modus, Andy Phillips from Riddell and partners and was claiming that an audit had been done by Lee Barron, another agent. This is Ms Marsland's response to that further information in her outcome letter, at page 88:

> **'In respect of the authority issue you say in the notice of appeal meeting that you had authority from a Peter MacFarlan (sic) at Modus Properties and also Andy Phillips of Riddell and Partners the managing agents. We have attempted to contact these people but Modus no longer operate. There is no verification of your evidence. However there is evidence that confirms your predecessor in title (that is a reference to Mr Puddick) denies there was any authority for such an agreement. There is no reason for him to lie and this therefore contradicts you.'**

So far as the attempts to contact were concerned, I notice that the respondent did not even ask the claimant where these people could be contacted and I accept that he knew the information was contained in a desk book or diary which he had left at work when he was suspended. That they were contactable was also apparent subsequently when Debbie Illingworth, after the horse had bolted, managed from her own efforts and her own knowledge to contact both of them. A further point that I make about this letter is that the statement 'there is no verification of your evidence' appears to be reversing the burden of proof. It is suggesting that the claimant must prove that he is telling the truth, not that the respondent must make reasonable enquiries into whether he was or he was not telling the truth. The comment about Mr Puddick's statement is appalling in the light of what I have already said about the credibility of Mr Puddick and the failure to disclose the evidence which discredited it. In any event I am not happy about the evidence which Ms Illingworth gave as to the supposed lack of memory by the two she contacted. She took no written note of it, I would have expected her to have done so. Both apparently gave the same sort of response, like two of the three monkeys. I am minded to accept the claimant's evidence of a conversation with PC Brown which took place some time after the dismissal and the appeal. I find that PC Brown did manage to contact Mr Macfarlane and that Mr Macfarlane did tell PC Brown that he could remember the circumstances in which he had given approval to the claimant accepting money for market payments for the bank holiday.

6.4 For each of these reasons I find that no reasonable employer would have acted in this way in respect of the investigation and no reasonable employer would have decided fairly to dismiss. The investigation and the decision failed the rest of the hypothetically reasonable employer and there was no reasonable belief that the claimant at least had taken money without authority and was in fact a thief.

I now pass on to make some observations about the significance of the Police investigation. In the ordinary circumstances of a Burchell claim coming before a Tribunal, if there has been a Police investigation and charges have been laid which are the same or substantially similar to the misconduct for which the claimant was apparently dismissed, the Employment Tribunal will often consider whether a claimant should have his claim structure out at a pre-hearing review, on the basis that a reasonable employer must have held the belief in the misconduct in order to satisfy the *Burchell* test. This is an exception. There were two investigations by the Police. The first terminated by notice of discontinuance. The respondent then made a further complaint to the Police. Precisely what extra information, if any, was provided is unclear and there is some reason to doubt, although I am not making a positive finding on this point, whether full information was in fact provided to the Police, including the exculpatory evidence. We do not know what investigation was carried out by the Police, except that the claimant was interviewed under caution and both Mr and Mrs Puddick were interviewed and must have had witness statements taken from them. Those have not been made available to the Tribunal. As I have said above, I am minded to accept the claimant's evidence about what he was told by PC Brown who had at that time contacted Mr Macfarlane. In any event I am

not at all surprised that a charge of five counts of theft of £400 was dropped. The high water mark of any case can only have been that the claimant had failed to disclose to the respondent that a previous employer had authorised the system of payment for a bank working. The fact of prosecution carries little, if any, weight in assessing the fairness of the dismissal."

Remedies: The Employment Judge's Conclusions

19. There are in fact two sections headed "Damages", each of which is described as paragraph 7. They are different. The material parts seem to me as follows:

> **"7.1 I next undertook the difficult exercise of assessing the chance that if in this case the employer had adopted a fair instead of a grossly unfair procedure, that a fair dismissal would have resulted. This is an exercise because it involves the substitution of different misconduct from that considered from the respondent. At least in relation to the charge in count 1 using that to describe paragraph 1 of the letter of 11 October 2011. I do not accept that any reasonable employer would have thought that the second charge was equivalent in gravity to count 1. There is a principle which comes from *King v Eaton No. 2* that if in undertaking the *Polkey* test the Tribunal reaches the conclusion that this was quite impossible to reconstruct the world as it has never been that the Tribunal should not embark on the exercise at all. I am satisfied that if the claimant had been taxed with failing to inform the respondent of the bank holiday payment arrangement, that charge would have clearly have included the fact that the employer was not properly accounting to the Inland Revenue for the PAYE and national insurance. Mr Williams submits that the claimant would inevitably have been dismissed. I do not accept that. I think it is possible that the claimant might have been fairly dismissed but by no means inevitable. A reasonable employer could well have decided not to dismiss having regard to the fact that the arrangement only operated for four days in a year and that there was no suggestion that the claimant, who have handled large sums in cash from all other stall holders within the main body of the shopping centre on a daily basis, had operated improperly in that respect. I therefore conclude that there is no more than a one third chance that an employer would have dismissed the claimant.**
>
> **7.2 The next issues I have to consider, and I consider them together, is contributory conduct and wrongful dismissal. I bear in mind that the tests for contributory conduct under sections 122(2) and 123(6) of the Employment Rights Act on the one hand and for wrongful dismissal are not the same. But the outcome depends in both cases upon what level of misconduct I find the claimant guilty of. In relation to the wrongful dismissal an employer is entitled to dismiss without notice if he can prove to the satisfaction of the Tribunal and if necessary in reliance upon after acquired information, that is to say that which came to light after the dismissal, that a claimant is either guilty of gross misconduct or that he is guilty of conduct which is so serious to as to destroy trust and confidence. The essential question here is whether this was mere inadvertence or forgetfulness on the claimant's part or was it deliberate concealment of that which, as the claimant must have known, would be instantly repudiated by his new employer. Or is it something in between? In the absence of any sworn evidence from SP her contention that the claimant had instructed her to conceal documents and information is not accepted by the Tribunal. I accept that he knew that she was keeping a record of the payments including to him and he made no attempt from stopping her from doing so and he took no steps to destroy the record. I find however that there was at least an element of deliberation in the claimant failing to disclose to any of the at least four subsequent employers after Modus that he was in receipt of additional income or its source. The result was that none of it can possibly have been disclosed for tax purposes. I cannot accept that the claimant simply forget about it or overlooked it. Clearly the claimant must have been receiving income in this way after the respondent took over the claimant's employment on 30 June 2011. Its receipt could not possibly be squared with the contractual terms which applied to him. Clearly the income cannot have been declared to the Inland Revenue. Understand that I have taken into account that if he had informed the respondent of the position, although quite clearly the respondent would have ended this system because it was highly unsatisfactory. It was not the claimant's fault that that system had been introduced. It had been introduced before he had even arrived at the premises and originally Gary Puddick was a party to it. But the respondent may well have taken the view that the claimant was indeed entitled to some additional payment for working all bank holiday Mondays in the year and which would have been taxable. The amount of £200 was close to what the claimant might reasonably have expected to receive. I conclude not least from the odd arrangement about which the claimant**

> **speaks for the notional deduction of £100 that the claimant must himself have felt uncomfortable about it. The fact of the matter is that he could have at any time disclosed the payment or at least he could have stopped taking it, but he did not. He went on taking it. I think there is some indication of unease about it in that he apparently expressed the view to some people that he was not happy about the bank holiday working. I find that on the basis of this finding of fact that it would be appropriate to make a further reduction, that further reduction is a third on top of the *Polkey* reduction.**
>
> **7. Remedies**
>
> **7.1. By reason of the very serious breaches of the ACAS Code of Practice 2009, detailed above, and in particular paragraphs 4.16, 4.18 and 4.45, I concluded that under section 207A of the 1992 Act it would be just and equitable to award an uplift of 20%. Mr Josling argued that that the breaches had been found to be so serious that the maximum of 25 per cent should be awarded. Mr Williams conceded that the Tribunal had found serious breaches of the Code but did not agree it would be appropriate to award the maximum. That uplift is to be applied to each of the rewards made below and, under section 124A is to be applied immediately before any reduction under section 123(6).”**

The Grounds of Appeal

20. The Notice of Appeal raises a number of issues. I take each in turn.

Ground 1: Substitution

21. Mr Reade began his submissions as to the relevant law: **London Ambulance Service NHS Trust v Small** [2009] IRLR 556 at paragraph 43 per Mummery LJ; **Graham v the Secretary of State for Work and Pensions** [2012] EWCA Civ 903 at paragraphs 34-36 per Aikens LJ; and **Orr v Milton Keynes Council** [2011] ICR 704 at paragraph 78 per Aikens LJ.

22. Mr Reade submits that there were two separate charges of gross misconduct against the Claimant. This is clear from the dismissal letter: Appeal Bundle page 71. Both the dismissing officer and the appeal officer rejected the Claimant’s case that he had been authorised to make the deduction in 2002 by Mr McFarlane, following a practice that had been adopted by the previous store manager, a Mr Puddick, and that he continued this practice up to August 2011. The basis for the employer’s reasonable belief was (a) the terms of the Claimant’s employment, which the dismissing manager had considered and (b) whether the sums had been disclosed by

the Claimant for the purposes of tax and National Insurance. Mr Reade QC submits that a proper application of the **Burchell** approaches articulated in **Orr** required the Employment Judge to consider whether the employer had carried out a reasonable investigation in all the circumstances of the case in respect of the formulation of its belief that the Claimant had committed two separate acts of gross misconduct. A reasonable investigation must relate to the belief which the employer has formed on the conduct. It is not a general concept of a reasonable investigation. Mr Reade QC submits that the Employment Judge erred in law in not properly focusing upon the reasons for the employer's decision that the Claimant was guilty of gross misconduct. He erroneously determined the reasonableness of the dismissal against his own perception of the reasons for the dismissal. The procedural errors the Employment Judge identified do not relate to the basis of the employer's belief properly analysed.

23. Mr Josling submits that this part of the appeal relates to the second allegation against the Claimant, namely that he failed to account for tax and National Insurance, which is separate and distinct from the first ground (taking the cash without authority). He submits that the Employment Judge made no error because it is impossible to separate the two allegations. He refers me to the letter of dismissal: Appeal Bundle page 69 and the ET3. He submits that the Respondent cannot be said to have held a separate and reasonable belief in the Claimant's gross misconduct in respect of the second allegation, the approach of the Employment Judge, who found that no reasonable employer would have treated the second allegation as equal in gravity to the first, and made a reasoned **Polkey** deduction so found that "no reasonable employer would have decided fairly to dismiss": Reasons paragraph 6.4.

24. I agree with Mr Reade QC for the following reasons:

(i) The Employment Judge identified a failure in the investigation in not disclosing to the Claimant, or providing to the dismissing manager, a statement from Mrs Puddick obtained in the investigation which the Tribunal considered to be important in confirming the Claimant's account in respect of Mr McFarlane. This was not relevant to the dismissing manager's belief in the Claimant's gross misconduct, either as to the lack of any authority under the terms of his employment or the failure to account for tax and National Insurance;

(ii) The Employment Judge takes a pejorative approach to the form of the witness statements which had been taken in the investigation: Reasons, paragraph 6.1. It is irrelevant to the issues the Judge had to decide;

(iii) The dismissing manager found both of the charges of gross misconduct to be made out. None of the procedural errors the Employment Judge identified rendered the dismissal unfair or concerned the finding of the failure to account for tax and National Insurance.

25. I also accept Mr Reade QC's submission that this error of law becomes clear when one considers what the Employment Judge himself said at Reasons paragraph7.2 when considering the question of contribution. He found the following:

(i) The Claimant failed to disclose to at least four subsequent employers after Modus that he was in receipt of additional income or its source;

(ii) The sums cannot have been disclosed for tax purposes;

(iii) The receipt of the payment could not be squared with the 'contractual terms which applied to him'.

In my judgment the Employment Judge here found the facts that were the basis of the employer's belief that the Claimant was guilty of gross misconduct under both disciplinary charges.

Ground 2: The Internal Appeal

26. Mr Reade QC submits that the Employment Judge's substitution approach extends to his criticisms of the appeal which was heard by Ms Marsland. He points to the following matters:

(i) The Employment Judge said she could not possibly have applied her mind to the essential issue for the appeal without seeing all of the relevant evidence. That was to substitute the evidence which was material and which was heard by Ms Marsland for that which the Employment Judge thought she ought to have seen. The issue was whether she could fairly have reached the decision based on the material she saw.

(ii) The Employment Judge also criticises Ms Marsland as not being an appropriate person to hear the appeal. She was not senior to Mr Higgins, who was the dismissing officer. He referred to the **ACAS Code of Practice 200**9 paragraph 4.45: Reasons, paragraph 6.2. However, that is not a reference to the Code of Practice but to the **ACAS Guide on Disciplinary Procedures**, which has no statutory force. Furthermore, paragraph 4.46 of the **ACAS Guide on Disciplinary Procedures** recognises that such an arrangement might not be possible in a small employer. The requirement is that the appeal is heard in an impartial manner. It was not suggested that Ms Marsland was biased;

(iii) At paragraph 6.3 the Employment Judge appeared to find that the appeal process failed to adequately investigate the Claimant's case as to the original circumstances in which he had been permitted to deduct the cash. This ignores the actual basis of the decision to dismiss, which was founded upon facts properly found by the employer and

which were consistent with the Employment Judge's own findings in Reasons paragraph 7.2 The Employment Judge therefore reached contradictory conclusions.

27. Mr Josling submits that for the reasons given by the Employment Judge he was entitled to reach the finding he did in respect of Ms Marsland's competence and the quality of the material put before her.

28. I prefer the submissions of Mr Reade QC. For the reasons he has given and which I have set out above, I am satisfied that the Employment Judge's criticisms of the appeal process were entirely misplaced and amount to an error of law.

Ground 3: Remedies for Unfair dismissal

29. It follows from the above that the question of compensation for unfair dismissal ought not to have arisen. However, if I am wrong in that, then I consider the further grounds of appeal advanced by Mr Reade, which are on the basis of perversity, which he recognises is a high hurdle for him to surmount: **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 92-95 per Mummery LJ. Mr Reade submits that on the basis of the findings of fact made by the Employment Judge, particularly in Reasons paragraph 7.2, the Employment Judge should have properly concluded that there was 100% chance that the Claimant would have been dismissed had a fair procedure been followed: **Polkey**. His alternative submission is that the Claimant's conduct contributed to his dismissal such that a reduction of 100% should have been made pursuant to sections 122(2) and 123(6) of the **Employment Rights Act 1996**.

30. Mr Josling submits that this ground of appeal has no merit because Reasons paragraph 7.1 shows that the competing considerations were weighed carefully and properly. I agree. This case does not reach the high hurdle set by **Yeboah**.

Ground 4: ACAS Code of Practice uplift

31. Mr Reade QC submits that the Employment Judge erred in law in applying an uplift for breach of the ACAS Code pursuant to section 204A of the **Trade Union and Labour Relations (Consolidation) Act 1992** in that:

(i) He purported to find breaches of paragraphs 4.18 and 4.45 of the Code of Practice. These are, however, paragraphs of the ACAS Disciplinary Guide which have no statutory force and so therefore do not give rise to the statutory power under section 207A to an increased award;

(ii) In respect of the breach of paragraph 4.16 of the Guide this does not quote an extract from the Code of Practice and the Employment Judge erred in law in giving no reasons for why there was a breach of the Code.

32. The difficulty I have with this submission is the fact that the Employment Judge records in the second paragraph 7.1 of this Reasons that "Mr Williams conceded that the Tribunal had found serious breaches of the Code but did not agree it would be appropriate to award the maximum." Mr Reade QC's answer to that is that Mr Williams (acting for the employer) could not concede in law something which is wrong. It was therefore not a valid concession. However, I have no information or notes about this concession. In the absence of any evidence to the contrary, I am not able to accept that Mr Williams did not make a proper concession in the circumstances of the case which he was conducting before the Employment Judge.

Ground 5: Wrongful Dismissal

33. Mr Reade QC submits that the Employment Judge was in error in awarding damages for wrongful dismissal when he had not made a finding of wrongful dismissal and also did not provide any reasons for so concluding even if by implication he had made such a finding. He refers me to *Chitty on Contracts* at paragraph 39/179-180 (31st Edition) for a statement of the law on summary dismissal.

34. It is clear that the issue of wrongful dismissal was one of the issues that the Employment Judge had to decide: Reasons, paragraph 5.10. The Employment Judge had properly directed himself in law on wrongful dismissal: Reasons, paragraph 2.5. The Employment Judge indicated at the beginning of his Judgment, paragraph 1, that the Claimant was wrongfully dismissed and he referred to it again in dealing with remedies at paragraph 7.3. I accept that there is no specific paragraph in the liability section of the Reasons setting out the Employment Judge's findings as to why there was wrongful dismissal in this case. However, I bear in mind that this appears to have been an extemporary Judgment given at the end of a three-day hearing. In my judgment, the Reasons are implicit within the reasons in relation to unfair dismissal. However, I have found that reasoning to be defective for the reasons I have given and it must therefore follow that the finding of wrongful dismissal must also be set aside.

Conclusion

35. For these reasons, grounds 1, 2 and 5 are allowed and grounds 3 and 4 are dismissed. The practical effect of this is that the appeal is allowed and I substitute a finding of fair dismissal.