



EMPLOYMENT TRIBUNALS

Claimant:

Mr P Wateridge

v

Respondent:

Hankley Common Golf Club

Heard at:

Reading

On: 20 November 2017

Before:

Employment Judge S Jenkins (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Miss N Owen (Counsel)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent and his claim therefore succeeds.
2. The Claimant contributed to his dismissal and his basic and compensatory awards are reduced by one-third to reflect that contribution.
3. The Respondent is ordered to pay the Claimant the total sum of £17,553.35 by way of compensation.

REASONS

Background

1. The claim before me was for unfair dismissal arising from the dismissal of the Claimant on 31 August 2016. I heard evidence from the Claimant on his own behalf and from Mr Iain McColl, the Respondent's Secretary; Mr Phillip Feibusch, a member of the Respondent's management committee; and Mr Lee Beckett, the Respondent's Captain up to January 2017; on behalf of the Respondent. I also considered the documents within the agreed bundle to which my attention was drawn.

Issues and Law

2. The initial issue for me to address in relation to the Claimant's claim was the reason for dismissal and whether it was a potentially fair reason falling

within section 98(1) of the Employment Rights Act 1996 (the “Act”). In that respect, the Respondent contended that the reason was the Claimant’s conduct. The Claimant did not necessarily accept that the reason for his dismissal was his conduct but did not put forward any indication of what he felt the reason had been.

3. If I was satisfied that the Respondent had established that the reason for dismissal was the Claimant’s conduct, I then needed to consider the overall fairness of the dismissal decision pursuant to section 98(4) of the Act. In the context of a conduct dismissal, this involved me applying the well-known test set out in the case of BHS v Burchell [1980] ICR 303. That essentially required me to consider whether the Respondent had a genuine belief of guilt in relation to the alleged misconduct on the part of the Claimant, whether that belief was based on reasonable grounds, and whether those grounds were based on reasonable investigation.
4. In this context, the reasonableness of the investigation was to be assessed by reference to consideration of whether the investigation undertaken fell within the range of responses open to a reasonable employer in such circumstances, applying the direction of the Court of Appeal in the case of Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23. I was also conscious, bearing in mind that this was a case involving allegations of stealing and misuse of property, of the direction provided by the line of authorities commencing with A v B [2003] IRLR 405, taking in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 and Monji v Boots Management Services Ltd (UKEAT/0292/13) and culminating in the decision earlier this year of Moncrieffe v London Underground Limited (UKEAT/ 0235/16), that particular care needs to be taken in relation to the extent of the investigation where grave allegations are made which have potentially serious consequences for the employee.
5. If I considered that the BHS v Burchell test had been satisfied, I then needed to consider the issue of sanction and to bear in mind a further, also well-known, test set out in Iceland Frozen Foods v Jones [1983] ICR 17, which required me to consider whether the decision to dismiss fell within the range of responses open to a reasonable employer in the circumstances.
6. In addition to that, I also needed to consider aspects of procedural fairness both in terms of the Respondent’s own procedure and the ACAS Code.
7. If my conclusions in relation to the above issues led to a finding that the dismissal was unfair, whether on substantive or procedural grounds or both, I then needed to consider the issue of remedy. This would include consideration of the appropriateness of the steps taken by the Claimant with regard to mitigation, the potential impact of the Claimant’s contributory conduct in relation to his dismissal, and the potential application of the Polkey rule relating to an assessment of whether the dismissal would have occurred in any event had appropriate procedural steps been taken.

8. In overarching terms, I was conscious that my role was not to establish the correctness of the employer's actions, but only to establish whether they were reasonable; it was not for me to step into the shoes of the employer and to take a view as to whether the decision to dismiss was right or wrong.

Findings

9. The Respondent is a members' golf club and the Claimant was employed as its head chef from 19 April 2010 until his dismissal on 31 August 2016. The Claimant was in charge of the Respondent's kitchen which provided food for the bar and restaurant. The Respondent's facilities were also available for hire for private functions for which food would be provided. The Claimant was assisted by a sous chef and a trainee.
10. There does not appear to have been any indication of concern with regard to the Claimant's performance or conduct until the events which occurred in July 2016 which ultimately led to his dismissal the following month.
11. By way of background, the Respondent orders its produce, in the form of meat, seafood and vegetables, from three local suppliers. The Claimant, as head chef, would generally order the food, with invoices then being sent to the Respondent's accounts department who would arrange for them to be paid.
12. It appears that there was a practice of orders also being placed with those suppliers by staff for their own personal use, including by the Claimant himself. This then led to deductions being made from the employees' salaries for the cost of the produce and there was documentation in the bundle to confirm that that had happened in the past. The Claimant indicated this practice had been sanctioned by a previous club secretary who had left in 2014 although there was no indication that the practice was officially sanctioned or that any member of the Respondent's management was aware of the practice after the departure of the previous club secretary in 2014. The practice nevertheless continued after 2014.
13. The issue which led to the Claimant's dismissal arose in July 2016 and related to events on the weekend of 16 and 17 July. Following that weekend, later in the month, the Respondent's house manager, Michael Clark, contacted the club's chairman, Graeme Ricketts, and Mr Feibusch to inform them that he had concerns about a private party which had been held by the Respondent's course manager, Gareth Roberts, on Sunday 17 July. Mr Roberts lived in accommodation at the course and initially there seem to have been concerns over the level of noise from the party, although that was not relevant for the case before me.
14. However, what ultimately was investigated and led to the Claimant's dismissal involved the provision of food to that party, prepared by the Claimant, and an allegation that the purchase of that food had been undertaken by the Claimant, in collaboration with Mr Roberts, via

increased ordering for a private function which took place at the Respondent's premises on Saturday 16 July 2016. I note that Mr Roberts was himself dismissed in relation to his role regarding the events and that he is himself pursuing an unfair dismissal claim in respect of that. It appeared that Mr Clark had reviewed the invoice from the butcher for the event on 16 July and had reviewed CCTV footage which showed trays of food being taken from the Respondent's premises on Sunday 17 July and that he felt that the amount of food ordered was high for one event being held in the clubhouse on 16 July.

15. Mr McColl was directed to undertake an investigation into the issue that had arisen. He first spoke to Mr Roberts on 4 August and a copy of the CCTV footage was viewed. Mr Roberts volunteered that what was being shown was the delivery of food for his party and that he had an invoice to cover the food which he had obtained from the supplying butcher. He provided a copy of this invoice, totalling £194.51, to Mr McColl and confirmed that he had paid cash for the products.
16. Mr McColl subsequently met with the Claimant and showed him an invoice from the butcher for £506.53 dated 15 July 2016. The Claimant confirmed that it was solely to cover the private function, a wedding anniversary celebration, held at the club on 16 July. The Claimant confirmed that the meat was solely for that function and that all the food had been used with the small exception of some beef and ham that had been left over. He suggested that that had been used behind the bar.
17. Mr McColl also asked the Claimant about the separate invoice for £194.51. The Claimant confirmed that that related to meat ordered for Mr Roberts' party and also that the Respondent's kitchen had been used to prepare the food. He did not accept a suggestion that food from the function had been used for Mr Roberts' party but did accept responsibility for not getting authorisation to prepare the food and for using club facilities to store the food. He indicated that he had ordered food for other members of the club's staff in the past, and indeed had prepared food for other members of staff. He noted that, when this happened, members of staff received independent invoices which they paid for separately, but this was found by Mr McColl not to be an accurate statement as some produce was found to be ordered using the Respondent's account, and had thus been paid for by the Respondent with reimbursement subsequently being provided.
18. In that regard, Mr McColl noted that, immediately following the meeting, the Claimant had contacted the Respondent's fish supplier to pay for an order of prawns worth £30 that he himself had ordered and which had been listed on an invoice to the Respondent. Mr McColl also noted that the following day, Vicky Heath, the club's contracted gardener, came in to pay for fish that she had herself received through the club's supplier.
19. Mr McColl, together with Mr Beckett, visited the butcher on two occasions. The date of one visit was 10 August 2016 although it is not clear whether that was the first or second visit. Nevertheless, the particular butcher, Mark

Turner, was not present on either occasion, being out of the country on holiday. Mr McColl was concerned at the significant difference in numbering of the two invoices, despite the fact that they had ostensibly been issued on the same day. However, he discovered that the butcher kept two separate invoice books, one for the Respondent's business and another for orders placed by staff. However, no counterfoil or carbon copy of the invoice for Mr Roberts could be found by staff at the butcher's on either occasion.

20. Mr McColl also contacted the fish supplier and the fruit and vegetable supplier by telephone who both confirmed that they do not issue separate invoices for private orders and that any invoices for products supplied to the Respondent would be addressed to the Respondent.
21. Mr McColl also spoke to Vicky Heath, who it appears, in addition to providing gardening services to the Respondent, also runs her own catering business, and she confirmed that she would place orders with the Respondent's suppliers via the Claimant from time to time for her own use when catering outside the club.
22. Finally, in terms of investigation, Mr McColl obtained statements from Mr Clark and from Amanda Harris, another of the club's employees, regarding their understanding of the events on Saturday 16 and Sunday 17 July. The statement from Ms Harris stated that she had agreed with the family who had hired the Respondent's premises for the private function on 16 July that there would be a buffet for 50 guests, 44 adults and 6 children. The children would have sausage and chips but the adults would then have a buffet following a menu prepared by the Claimant. Ms Harris noted that the Claimant had not worked on 16 July itself but had confirmed that he would order the products in on Friday 15 July and prepare most of it himself on the Friday.
23. The sous chef, Nico Masili, and the trainee, Brian Nahandra, were both present on Saturday 16 July supported by two others. Ms Harris confirmed that she noted that there was a lot of activity in the kitchen on the Saturday and that some preparation was needed. She later noted that there was more food of the same type on shelving and a trolley and that she asked Mr Masili if this was to replenish the buffet table and was told that she was not to touch it as that was doubled up for Mr Roberts' party. She recalled that the family which had hired the Respondent's premises for the private function had taken away leftover couscous, coleslaw and cheese for a family barbecue that they were holding the following day, but had not required anything else. She further indicated that she was alerted by her partner the following day to a vehicle at the back door of the Respondent's premises with four men then entering the premises. She indicated that she recalled that she felt that this was not a problem as it was Mr Roberts' vehicle and she thought that they were collecting the party food.
24. Ms Harris observed that she was shocked at the quantity of food cooked and prepared and collected on the day, involving not only beef, ham,

coronation chicken, duck wraps, pork pies and Scotch eggs but also two salmon terrines together with bowls of coleslaw, couscous, pasta salad and other salads. She recalled looking at the meat order and felt that it was "vast".

25. Mr McColl then met with Mr Nahandra who confirmed that he had prepared the food seen in the CCTV footage on 17 July and that he had been instructed by the Claimant that the food in the fridge was for Mr Roberts and that he was to wait on that day until Mr Roberts had collected it. Mr Nahandra also stated that food from the lunch function had been used in Mr Roberts' function. Mr McColl did not speak to Mr Masili.
26. It appears that a decision was then taken to suspend the Claimant from duty and a letter was sent to him by Mr Ricketts on 19 August 2016 noting that he was suspended and that he should refrain from having any contact with the club's members, visitors, suppliers and contractors. On the same day, Mr Ricketts sent a further letter to the Claimant notifying him of a disciplinary hearing to be held on 25 August. The allegations that the Claimant was to face were that food had been provided to Mr Roberts which had not been paid for and also which did not take into account the staff costs of preparing it during normal working hours. This was held to involve falsifying working hours, stealing from the club, serious insubordination and misuse of the Respondent's property which, in its view, constituted gross misconduct. The letter also indicated that copies of various documents; the statements, the invoices and the CCTV video were enclosed with it. The Claimant was also informed of his right to be accompanied by a work colleague or trade union representative.
27. Prior to the meeting, the Claimant sent an email to Mr McColl on 20 August noting that he did not have a copy of the vegetable order and that this would need to be checked with Mr Roberts but he asserted that all of the supplementary products purchased for the event, i.e. over and above meat, were obtained from an individual called Luke from the vegetable supplier who often covered missing products such as mayonnaise. The Claimant also sent Mr McColl a further email later that day asking for a copy of the seafood delivery note which, he stated, recorded that the produce was "c/o Pete", i.e. care of himself. In this email he also asked for information as to the catering numbers on 15 July and those attending a club event (it transpired an event called the "Rabbit's Tankard") on the Sunday and a major event on the Monday, stating that these would explain the spending pattern.
28. The Claimant sent Mr McColl a further email on 23 August asking him to obtain statements from a number of individuals, including Mr Masili, regarding the events of the weekend and previous practices where food was bought for, and cooked for, other staff members by kitchen staff alongside their other duties. Ultimately, Mr McColl only provided a copy of the seafood supplier's invoice, stating that the invoice was the delivery note, and confirmation that catering numbers for 15 July were 60, and for 16 July were 48, and that there were 12 Sunday lunches served on 17

July. He also confirmed that the Rabbit's Tankard event had 40 entries. He did not seek to obtain any further statements.

29. The disciplinary hearing took place on 25 August and was chaired by Mr Feibusch, supported by Jeremy McIlroy and Carolyn Wahlen, an external HR adviser. I understand that the same panel dealt with the disciplinary allegations against Mr Roberts subsequently.
30. Mr Feibusch felt that there were several inconsistencies and contradictions in the explanations the Claimant had provided. These included the dates of the events referred to which the Claimant felt accounted for the volume of food ordered, the number of people attending both the function at the club and Mr Roberts' party, and the arrangements for ordering the food. Ultimately, the panel were not satisfied with the Claimant's explanations regarding the amount of meat which had been paid for by the club and felt that there had been an artificial attempt to demonstrate that Mr Roberts had paid for the food but that, in reality, the club had been significantly overcharged.
31. The panel was also concerned about an invoice for fish and vegetables. The panel noted that the Claimant had indicated that this had been a special order passed to an individual called Luke who was an employee of the Respondent's normal vegetable supplier. However, that supplier denied any knowledge of the matter and confirmed that they would never supply fish when, in fact, the invoice included salmon and prawns. The panel also noted that the invoice covered couscous, coleslaw and pasta salad when the Respondent's staff would usually make up those items from raw ingredients. The panel also noted that these items were contained on the CCTV footage showing produce being delivered to Mr Roberts.
32. The panel noted the amount of food that had been taken from the Respondent's premises for Mr Roberts' party and the Claimant observed that he had not been present, that he had prepared the food in advance and had played no part in the passage of food to Mr Roberts on the Sunday. The Claimant also observed that Mr Masili might have decided to send leftovers from the Saturday function but the panel considered that there was a significant amount of food being placed in Mr Roberts' car, over and above the items on the invoice, which seemed a significant amount for a few leftovers. The panel were also concerned that they saw that two salmon terrines were taken for Mr Roberts' party. The Claimant confirmed that he had not prepared any terrine for that party but had prepared two for the anniversary function, with the second to be used as a reserve in case more was required. However, it appears that both terrines were provided to Mr Roberts.
33. The panel decided that they needed to speak to Mr Masili before reaching a decision (I observe that the Claimant had in fact asked Mr McColl prior to the disciplinary hearing to obtain a statement from Mr Masili but that had not been done) and Mr McIlroy and Mr Feibusch spoke with Mr Masili on

his return from holiday. They did not take notes of the meeting but a brief, handwritten summary, which appeared to have been taken by Mr McIlroy, was within a document in the bundle in which it was recorded that Mr Masili had stated that he had seen the invoice for the fish and vegetables and had thought that it was odd, and that he had given Mr Roberts pork pies and Scotch eggs as they would go off.

34. The Claimant also sent a lengthy letter dated 25 August 2016 to the disciplinary panel which confirmed that he had prepared for Mr Roberts' party on the Friday and that the only additional work done on the Saturday had been the final plating up of the food. He stated that all the food relating to the function had been paid for directly by Mr Roberts and that any additional items would have been sent over by Mr Masili, the Claimant observing that this would have been on the basis that Mr Masili would have considered that the unused items would not be usable to sell, could not be frozen, and therefore would otherwise have been thrown away. The Claimant also contended that if an examination was made of the gross profit figures relating to the weekend at issue, it would have been clear that no concern would have arisen.
35. Ultimately however, the panel considered that there had been theft of food from the club, misuse of the club's equipment and resources without permission and therefore that acts of gross misconduct had occurred which justified the dismissal of the Claimant. A letter was sent to the Claimant dated 31 August by Mr Feibusch noting that fact, confirming that the four allegations had been upheld and that he was to be immediately dismissed on grounds of gross misconduct. The letter concluded by informing the Claimant of his right to appeal.
36. The Claimant submitted an appeal the following day by letter stating that he had not falsified his working hours as there was no extra work involved in preparing Mr Roberts' food. He also denied any element of insubordination, asserted that nothing had been stolen, and that using the kitchen for its normal everyday purposes at the same time as food being prepared for other events did not amount to misuse of the club's property.
37. The appeal took place on Monday 26 September, the Claimant himself having been absent on holiday for the first two weeks of September, and was chaired by Mr Beckett together with Mr David Barclay, another club member, and Emma Knapp, an external HR advisor.
38. In advance of the meeting, the Claimant had obtained an email from Luke which confirmed that, on 15 July, he had received a call from the Claimant asking him if he would do him a "massive favour" to pick up some bits as he had forgotten to order them. Luke indicated he had done this for the Claimant many times before and had given the invoice to the Claimant when he dropped the items off and had collected an envelope with cash in it on the following Tuesday. The Claimant had also obtained a statement from Mr Masili by email. In this email, Mr Masili confirmed that preparing the same food for more people would take the same time and that he had

given leftover items from the Saturday buffet to Mr Roberts as he was otherwise going to put it in the bin. Mr Masili also indicated that he had been involved on previous occasions in the ordering of food for others, such as Vicky Heath, and the preparation of food for others, including for Amanda Harris. The Claimant himself then provided a further, lengthier letter of appeal dated 23 September 2016.

39. With regard to the four allegations which had led to the Claimant's dismissal, the appeal panel in fact overturned the decision in relation to two of them. They did not consider that there was any indication that the Claimant had deliberately avoided seeking permission to use the kitchen or that he had tried to hide his use of the kitchen for the preparation of food for Mr Roberts and therefore that the charge of insubordination should be rejected. The panel also accepted the Claimant's comments that he had not falsified his working hours or those of staff. However, the panel considered that the two other allegations, those of stealing from the club and misuse of club's property and staff, should be upheld.
40. The panel were concerned about what they considered was a significant inconsistency in the amount of food shown to be taken out of the kitchen and the amount which appeared on the invoices produced, one of which, that for the vegetables, they felt appeared to have been falsified. They concluded that the amount of food ordered for the private event had been high and felt that it had been deliberately over-ordered to provide for Mr Roberts' party. They also felt that the preparation of the food on such a scale involved a considerable cost to the club in terms of gas, electricity and staff time and other ingredients and therefore that the decision to dismiss on that basis should be upheld. A letter to the Claimant confirming that was sent to him on 30 September 2016.

Conclusions

41. In applying my findings to the issues identified at the outset, I first needed to consider the reason for dismissal and whether it was a potentially fair reason. There was no evidence before me to suggest anything other than that the concerns regarding the Claimant's conduct lay behind the dismissal. I was therefore satisfied that conduct was established as the reason, and therefore a potentially fair reason, for dismissal.
42. Moving on to the assessment of the overall fairness in considering the Section 98(4) test in the context of the BHS v Burchell requirements outlined earlier, I first considered whether the Respondent had genuinely believed that misconduct had occurred. In that regard, there was no evidence of any ulterior motive, or bad faith, on the part of the Respondent's officers; there was no suggestion that any of the investigators or decision-makers had anything other than proper intentions in relation to the consideration of the disciplinary issues and there was no history of concerns about the Claimant's conduct or performance. I was therefore satisfied that the required element of genuine belief had been made out.

43. With regard to the other two aspects of the Burchell test, I focused on the reasonableness of the investigation undertaken by the Respondent, applying the Sainsbury's test and considering whether the investigation fell within the range of reasonable responses. In that regard, much of what the Respondent did was what would have been expected of a reasonable employer. The investigator, Mr McColl, spoke to many of the main protagonists and took steps to obtain evidence from the produce suppliers in an effort to try to get evidence of what produce had been ordered for the relevant weekend.

44. However, an employer in a situation such as this is required to pursue avenues of enquiry which might explain the employee's conduct as well as those which might point to his or her guilt. That is not to say that the employer must investigate to the extent that it can be said to have left "no stone unturned", but it must take steps to investigate areas which are clearly relevant. The expectation was accurately summed up by HHJ Eady QC at paragraph 44 of her judgment in Monji, where she said:

"44...The requirement is not that the employer adopts the safeguards of a criminal trial but that a careful and conscientious investigation of the facts is carried out and inquiries should focus no less on any potential evidence that may exculpate or point towards the employee's innocence as the evidence that might prove the charges in question."

I was not satisfied that the Respondent had fulfilled that expectation in this case.

45. I noted that the Claimant had sent emails to Mr McColl in advance of the disciplinary hearing asking for information and documents which might help to establish his innocence of the charges against him, I have in mind the request for a copy of the seafood delivery note, which was not procured.

46. Of more importance however, was the request by the Claimant for Mr McColl to interview other members of staff, in particular his sous chef, Mr Masili. This was a particularly important request because it had been made clear to the Claimant in his suspension letter that he could not himself contact anyone involved.

47. The Claimant had not been work on Saturday 15 July and Mr Masili had been in charge of the kitchen on that day and had therefore been in charge of the preparation of the food for the private event on that day and the delivery of food for Mr Roberts' party on Sunday 16 July. However, no formal statement was ever taken from Mr Masili, with only a very cursory record being taken of a discussion with him by Mr Feibusch and Mr McIlroy. Yet, when Mr Masili produced a statement in an email in advance of the appeal, his version of events largely supported that of the Claimant. Crucially, he confirmed that only left-over food from the Saturday event was used on the Sunday.

48. In addition, The Respondent's officers appeared to have placed great store on the invoices from the butcher and the discrepancy between the numbers of the invoices relating to the Respondent's purchase of meat for the private function on 15 July and Mr Roberts' purchase of meat for his party on 16 July. However, there was a very straightforward explanation for that due to the fact that the butcher operated two separate invoice books, one for the Respondent's own purchases and one for purchases by members of staff. Also, the Respondent's officers appeared to become overly focused on the inability of the butcher's staff to locate the counterfoil, feeling that this meant that the invoice was false. However, the invoice was in the same handwriting as the other invoice produced by the butcher, and no attempt was made to go back to speak to the butcher himself to finally clarify the issue following his return from holiday.
49. Similarly, the Respondent appeared to place great store on the invoice from the vegetable supplier which contained fish and other products which suggested that it was not genuine. However, no attempt was made to speak to the individual involved, Luke, and yet the limited evidence he provided by way of a rather garbled email at the appeal stage again supported the Claimant's contention that he was in the habit of ordering "last minute" items from Luke in this way.
50. The Respondent also did not seem to have taken any account of the fact that the Claimant was not himself in work on Saturday 16 July, and therefore that the actual delivery of food to Mr Roberts' party was not undertaken by him.
51. Finally, whilst not itself a compelling factor, the Respondent also did not take steps to look into the Claimant's contentions that an examination of the accounts for the week in question would have shown a similar level of profit to other weeks.
52. Overall therefore, I did not consider that the extent of the investigation undertaken by the Respondent, at all stages, was sufficient and did not fall within the range of responses of a reasonable employer. As a consequence, I did not consider that the Respondent had reasonable grounds for its belief of the Claimant's guilt and therefore concluded that its dismissal of him was unfair.
53. With regard to procedural aspects, I considered that the Respondent had complied with the requirements set out in the ACAS Code, in that although I concluded that the investigation had been insufficient, an investigation had been carried out. In addition, all other procedural formalities had been observed. I noted that the Claimant had asserted that the involvement of Mr Beckett in the visit to the butcher at the investigatory stage led to a deficiency in the fairness of the procedure as Mr Beckett had been a member of the appeal panel. However, I did not consider that Mr Beckett had played any material role at the investigation stage; he had certainly not been a decision-maker at that juncture, and I therefore did not see that that impacted on his role as a member of the appeal panel. I did not

therefore consider that there were any procedural deficiencies which impacted on the fairness of the dismissal.

Remedy

54. In considering the issues relating to remedy I first considered the Claimant's mitigation efforts and whether he had done enough to mitigate his losses. I noted that the Claimant had, after some limited agency work in the immediate aftermath of the termination of his employment, obtained work at Winchester College some six weeks after his dismissal albeit at a much lower salary. He had then, some four months later, obtained a position with Compass, which although better paid, was still paid at a substantially lower level than the Claimant had earned with the Respondent. The Respondent contended in its submissions that the Claimant had made insufficient attempts to mitigate his losses, and had noted several examples of roles which it contended the Claimant could have applied for. The Claimant in reply noted that he was attempting to rebuild his career and therefore, whilst he had taken the opportunity to improve his earnings by taking the role with Compass, had not felt that it was appropriate for him to apply for other jobs at this stage and that he should wait until he had built up a record of good employment with his current employer.
55. I was conscious that I should assess whether the Claimant had taken reasonable steps to mitigate his loss, and, in that regard, I looked at this issue in a similar manner to that in which I had assessed the Respondent's actions, i.e. by reference to the range of reasonable responses. In this case, whilst I considered that there were better paid jobs for which someone in the Claimant's position could have applied, I did not think that his actions in waiting to build up a record of good employment with his current employer could be said to fall outside the range and therefore I did not conclude that the Claimant had taken insufficient attempts to mitigate his losses.
56. The next issue for me to consider in terms of remedy was whether to apply a Polkey deduction. The Respondent's representative submitted that I should conclude that any deficiencies that might have existed in terms of investigation would have been remedied by an appropriately detailed investigation, which would then have led to the same result, i.e. the dismissal of the Claimant. However, I could not accept that contention.
57. In light of my conclusions above, I considered that the deficiencies in the investigation were fundamental ones, such that had an appropriate investigation been undertaken then no reasonable employer would have concluded that dismissal would have been appropriate. There would have remained the Claimant's admissions that he had failed to get permission to prepare food for his colleague's party and to use the Respondent's facilities for that purpose. However, I did not see that that would have led to anything more than a disciplinary warning. In other words, I considered that if the Respondent had taken the investigative steps that I considered a reasonable employer would have taken then dismissal would not have

ensued. I did not therefore consider that any Polkey deduction should be made.

58. That then left the issue of contributory conduct. That potentially had relevance for both the basic and compensatory awards which, although the tests set out in the Act are slightly different, both provide that if there is considered to be any culpable conduct by a claimant which contributed to their dismissal then it would be appropriate to reduce the awards to reflect that culpability. In this regard, the Respondent's representative contended that a reduction in the order of 50% would be appropriate.
59. In this case, I was conscious that the Claimant had accepted that he had not sought permission from the Respondent to use the kitchen, and indeed his own labour, and to a limited extent, that of his kitchen colleagues for the purposes of Mr Roberts' party. He was therefore guilty of some culpable conduct which contributed to his dismissal, as, had he sought permission, the investigation and disciplinary action would never have arisen. He would either have been given permission or it would have been refused, following which, I presume, he would not have proceeded to prepare the food.
60. However, I did not agree that the level of the Claimant's contributory conduct should reduce his basic and compensatory awards by as much as a half. I considered, assessing the circumstances as best I could, that a reduction of one third would be appropriate and I therefore proceeded to apply that reduction to both the basic and compensatory awards.
61. With regard to the assessment of compensation, I calculated the sums to be ordered by reference to the Claimant's schedule of loss in the bundle. The Claimant was not cross-examined on the content of the schedule of loss although the Respondent's representative did cover elements of the schedule, those relating to holiday pay and bonus, in submissions at the outset of the hearing. In relation to holiday pay, I indicated to the Claimant that he had not brought a claim in respect of holiday pay, and that he was now out of time to do so, although he had the ability to make an application to amend his claim form to include a claim for holiday pay. In the end, the Claimant did not make any such application and therefore I did not consider any element of holiday pay.
62. With regard to bonus, the Respondent's representative submitted at the outset of the hearing that the Claimant had also not made any claim for breach of contract and therefore no account should be made of bonus. On considering the schedule further after the hearing however, I could see that the reference in it to bonus did not specify it as a head of claim in its own right, but as an element of loss for the purposes of the compensatory award, being a sum that he asserted would have been paid to him in November 2016. However, as I had heard no evidence on the point at all, I did not consider that I could take any account of it.
63. Finally in relation to the schedule of loss, the Claimant specified all his salary figures as gross sums, whereas compensation is awarded by

reference to net earnings. I considered attempting to convert all the Claimant's figures into net ones before calculating compensation, but in the end I concluded that it would be more straightforward for me to work with the Claimant's gross figures and then convert my final result into a net figure.

64. In terms of the period of loss for which compensation should be ordered, the Claimant had taken steps to mitigate his losses in the ways I have described at paragraph 54 above, although he was still incurring losses at the date of the hearing. With regard to the future, I considered that there were jobs available in the Claimant's area which would be likely to provide him with a salary at the same level as that he had enjoyed with the Respondent. I also considered that, in light of this Judgment, and the removal of the stain on his employment record that might otherwise have arisen from a summary dismissal, he would be likely to be able to obtain such a position and that he would do so within a period of six months from the date of hearing. I therefore felt that I should limit my assessment of the Claimant's losses to that period.
65. That then led to the following sums being ordered to be paid by way of compensation for the Claimant's unfair dismissal.

(i) Basic Award

6 years' service all whilst under the age of 41, with the Claimant's weekly salary being above the statutory cap:

6 x £479.00 -	£2,874.00
Less contributory conduct deduction of one-third	<u>(£958.00)</u>
	<u>£1,916.00</u>

(ii) Compensatory Award

- (a) Period from dismissal (31.08.16) to commencement of initial alternative employment at Winchester College (13.10.16) – 6 weeks

Earnings with Respondent -	£4,243.74
Less earnings from agency work	<u>(£909.50)</u>
	<u>£3,334.24</u>

- (b) Period to commencement of work at Compass (13.10.16 to 20.02.17) – 4 months

Earnings with Respondent -	£12,259.68
Less earnings from Winchester College	<u>(£5,895.92)</u>
	<u>£6,363.76</u>

- (c) Period to hearing (20.02.17 – 20.11.17) – 9 months

Earnings with Respondent -	£27,584.28
Less earnings from Compass	<u>(£19,125.00)</u>

£8,459.28

(d) Future loss – 6 months

Earnings with Respondent -	£18,389.52
Less earnings from Compass	<u>(£12,750.00)</u>
	<u>£5,639.52</u>

(Total salary losses before contributory conduct deduction - £23,796.80)

(e) Other non-salary losses:

(i) Pension – The Claimant received pension contributions of 3% of salary from the Respondent, did not then have any pension benefit until he had worked for Compass for three months (01.06.17), and then only had contributions at the rate of 1% of his salary, although that will increase to 2% in April 2018.

10 months at 3% differential	£1,532.50
10 months at 2% differential	£1,320.00
2 months at 1% differential	<u>£221.50</u>
	<u>£3,074.00</u>

(ii) Private healthcare - £1,196.00 per annum for 21 months

£2,093.00

(Total non-salary losses before contributory conduct deduction - £5,167.00)

66. The total of the Claimant's taxable losses therefore amounted to £28,953.80. As I indicated above, that needed to be reduced to leave a net figure and, using the HMRC tax calculator, that led to a net figure of £22,977.02. To that needed to be added the further non-taxable element of loss in relation to statutory rights of £479, leading to a total compensatory award, before application of the deduction for contributory conduct, of £23,456.02. After applying the deduction, that left a final compensatory award figure of £15,637.35.

67. In total therefore, the Respondent was ordered to pay the Claimant the sum of £17,553.35.

Employment Judge S Jenkins

Date: 8/12/2017

Sent to the parties on:

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For the Tribunals Office