EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4113050/2018

Hearing Held at Aberdeen on 12 and 13 November 2018

Employment Judge: Mr A Kemp

Mr John Walters	**Claimant** **In person**
Mrs Sally Dowden trading as Speyside Wildlife	**Respondent** **In person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant was unfairly dismissed and the Claimant is awarded the sum of TWO THOUSAND FOUR HUNDRED AND SEVENTY SEVEN POUNDS EIGHTY THREE PENCE (£2,477.83) payable to him by the Respondent.

REASONS

Introduction

1. The Claimant made a claim for unfair dismissal against the Respondent. The Claim was denied.

Issues

2. The Tribunal identified the following issues:
   (i) What was the reason for the Claimant's dismissal?
   (ii) If the reason was potentially fair, was that dismissal unfair under section 98(4) of the Employment Rights Act 1996 ("Act")?
   (iii) Would a fair dismissal have resulted from a different procedure, and if so what reduction in compensation should be made for that?
   (iv) Had the Claimant contributed to the dismissal and if so to what extent?
   (v) What was the extent of the Claimant's losses?

Evidence

3. The Tribunal heard from Mrs Suzanne Dowden who is a sole trader, Miss Kate Mennie a Trainee Wildlife Guide, Mrs Lisa Gunn an Accounts Administrator, Mr Duncan Macdonald a Wildlife Guide, and from the Claimant himself. Documents were spoken to from a bundle the Respondent had prepared, which was added to by the Claimant at the commencement of the hearing, and by both the Claimant and the Respondent after it had commenced. Whilst not all of the documents are referred to in these Reasons, all were considered.

4. Neither party was represented, and neither had experience of Tribunal proceedings, and in accordance with the overriding objective I sought to assist each of them with the presentation of their case. Each party was given a full opportunity to ask any question of a witness that they wished, and when giving evidence themselves to speak on all issues that they wished to. Each of the

parties did so. During the course of the hearing I indicated on occasion that an issue was not likely to be relevant to my decision, or had been explored as far as was reasonable. There were a number of issues explored in evidence which were at best background.

Facts

5. The Tribunal found the following facts to have been established:

6. The Claimant is Mr John Walters. He is 58 years of age. He was employed by the Respondent as a Guide, working at a Hide located in a forest about three miles outside Aviemore. He has wide experience of working with animals in various capacities.

7. The Respondent is Mrs Suzanne, known as Sally, Dowden. She is a sole trader. She trades as Speyside Wildlife. Her business provides guided tours and related events where the viewing of wildlife is a principal attraction. She has about twenty employees, some full-time and some part-time. She leases a hide which is used for viewing wildlife ("the Hide"). The Claimant was employed to work at the Hide. It was located on the Rothiemurchus Estate ("the Estate").

8. The Claimant was employed under a written statement of terms of employment sent to him by letter dated 7 May 2015. The statement itself was signed by him on 13 May 2015, which was the day his employment started. It referred to disciplinary rules in the Company Handbook.

9. There was provided a Company Rules document, sent to the Claimant with the letter dated 7 May 2015, which included a disciplinary procedure. That included the following under the heading "Principles":-

    - No disciplinary action will be taken against an employee until the case has been fully investigated

- At every stage in the procedure the employee will be advised of the nature of the complaint against him or her and will be given the opportunity to state his or her case before a decision is made
- At all stages the employee will have the right to be accompanied by an employee, representative or work colleague during the disciplinary interviews……"

10. There were provisions as to oral, written and final written warning under the heading "the Procedure".

11. There was a provision headed "Gross Misconduct" as follows:

"The following list provide examples of offences which are normally regarded as gross misconduct:

Theft
Fraud
Deliberate falsification of records
Fighting
Assault on another person
Deliberate damage to company property
Serious incapability through alcohol or being under the influence of illegal drugs
Serious act of insubordination
Unauthorised entry to computer records".

12. It included a provision entitling the employer to suspend the employee suspected of gross misconduct.

13. The Claimant received a form of initial induction into how the Hide was operated by Mr Duncan Macdonald, an experienced Wildlife Guide, and Mr John Poynter, who was also an experienced Guide. Both were then employees of the Respondent, but Mr Poynter left that employment shortly after giving that induction.

14. The Hide was constructed of wood, and sunk into the ground. It had windows on two sides, one side of which was capable of being opened for use by photographers, the other side of which looking out onto an area for viewing pine martens in particular. They are wild animals native to the area. The Hide could accommodate 15 persons, and had cameras which provided images on computer screens inside. It had heat, light, and other facilities. The Hide had been constructed by the Estate.

15. The two types of wild animals which were most popular for viewing were pine martens and badgers. Other animals and birds could also be viewed from the Hide.

16. The Claimant's principal role was to look after guests for evening viewings at the Hide. The viewing would normally last about 3 hours. It started at about 9pm in the summer, and earlier outside summer hours, as the viewings were principally conducted in the dark. He normally worked six days per week during the summer season, which was between April and October each year. In the winter season the work varied with the bookings received. He was paid a daily rate of £35 for each evening's viewing undertaken.

17. His role also included taking guests and staff to and from Inverness airport from time to time, obtaining bait and other goods for use at the Hide, cleaning it, and distributing pamphlets. Where those duties were performed he was paid extra. If carried out, either Mrs Gunn the Accounts Administrator would be aware of it having made a request, or the Claimant would telephone her to inform her that he had done so. The sums due were then paid, with a wage slip given on which the detail of the payment was provided on the reverse.

18. Originally the Respondent intended that the Claimant live at a cottage situated close to the Hide ("the Cottage"). It was a condition of the lease of the Hide from the Estate that someone employed by the Respondent live at the Cottage. That was referred to in the letter of offer, which the Claimant had accepted.

19. The Claimant at best partly moved in to the Cottage, but did not fully do so as he cared for his elderly mother who lived in Kingussie. About a year after his employment commenced it was agreed by the parties that the Claimant did not require to live at the Cottage, but on the basis that he attended at the Hide when required to leave bait for the wild animals without further payment.

20. During his employment with the Respondent the Claimant was not subject to any disciplinary procedure, and not issued with any written warning.

21. In March 2017 arrangements were made for an annual conference of the Respondent's staff, to be held in November 2017. On 20 March 2017 the Claimant emailed the Respondent's office staff to state "I will be there".

22. During 2017 the Claimant noted that the numbers of pine martens had reduced from about 20 to about 3. He noted that on occasion persons would attend near the Hide with lights, which he thought may have been used as part of hunting of animals. On about two occasions he heard shots fired at what sounded to him as being near to the Hide. He told guests that woodcock were being shot, but he had a concern, and an opinion, that pine martens were being deliberately killed, and that that was the reason for the reduction in the pine marten numbers. The Claimant held the opinion that they were being culled by the Estate as it was seeking to protect a flock of capercaillie which had been introduced with finance from the European Union.

23. Pine martens live in a large area of territory. They move location from time to time. Their numbers at any particular location can vary widely for that and other reasons.

24. The Respondent provided an online facility for guests at the Hide to leave comments, and were also sent questionnaires which had 14 standard questions in relation to the experience of the evening, the Guide, and related matters. Guests who attended sometimes did provide feedback, but did not always do so.

25. The online comments and questionnaire replies were collated and sent, usually on a monthly basis, by email to the Respondent by Mrs Gunn the Accounts Administrator, and to the Claimant. The Claimant did not see those emails, although they were sent to his email address. The Claimant was not adept in using emails, although he had received training from the Respondent's staff on that.

26. Some of the comments made by guests on the online facility or questionnaire replies were very supportive of the experience that they had received, and were complimentary about the Claimant. That included comments such as "Excellent" and "Very friendly and knowledgeable."

27. Others were to an extent critical of both the experience and the Claimant. Some were critical of his making comments about the activity of a couple near the Hide on one occasion, others that he had talked too much, others as to comments about religious views, and others as to personal matters such as looking after his mother.

28. The Claimant was aware of some feedback but from Trip Advisor, an online platform open to the public, which he had his sister print out for him on occasion. He considered that he was performing his role of Guide well, and that he created an informal atmosphere for the guests by telling light hearted stories on matters other than in relation to wildlife. He considered that the negative comments were not justified, and that in any event were a small proportion of all of the responses.

29. The Respondent sought a meeting with the Claimant in early October 2017 to discuss the feedback she had become aware of. She was concerned that some of it indicated that he had made comments on matters that she had told him not to raise, being in relation to religious views, his view that pine martens were being culled by the Estate, comments about sexual activity by a couple in the vicinity of the Hide, and his views on badger baiting. She had not wished

him to make such comments as she considered them inappropriate. She was also concerned to reduce the number of negative feedback comments so far as she could.

30. That meeting took place on 3 October 2017 at the Respondent's private residence. The Respondent prepared a file note of it shortly afterwards, which is a reasonably accurate record of it. After the Respondent raised her concerns, the Claimant responded by stating that she was always negative towards him, and when asked not to shout said that he was entitled to shout at his boss. He claimed that she was a good friend of the owner of the Estate and that is why she did not believe him about the culling, and that religious views had been made by two ladies who were Jehovah's witnesses, not by him as he was an atheist. The Respondent had incorrectly referred in her note to members of the Flat Earth Society.

31. The Respondent replied that if the Claimant had evidence of the culling of pine martens he should give that to her so that she could take it up with the Estate. She explained that such remarks were potentially defamatory, and was concerned at them being made. She reiterated that he was not allowed to mention the topics referred to above to guests, and that it was completely inappropriate. She became increasingly alarmed at his attitude towards her, and behaviour she asked him to leave, which he did.

32. The Claimant did not provide the Respondent with any evidence as to his belief of the culling of pine martens.

33. The Respondent continued to receive comments from guests in relation to the Claimant that caused her concern. One was in late October 2017 from a Girl Guide Leader who had visited the Hide to assess whether the visit there was suitable for girl guides aged about 10-15. She concluded that it was not, because of what she considered the Claimant had said which in her view was inappropriate for girls of that age, although they had not then been present.

That was set out in an online comment, and she did not book the Hide thereafter.

34. On one occasion, the precise date of which was not provided in evidence, the Claimant attended the Hide on a Sunday evening. He did so to clean it, and he expected that it was not being used. In fact Mr Macdonald was present with a party of guests from the Steading, but the Claimant had not been told about that.

35. On 10 November 2017 the Claimant and Mr Macdonald were in a van together driving to Inverness airport. The Claimant stated that he was convinced that the Estate were culling pine martens. He referred to lamping taking place, being the use of lights, and hearing gun fire close to the Hide. Mr Macdonald did not consider that there was sufficient evidence to conclude that culling had taken place, and said so. He stated that it was not in the interests of the Estate to shoot pine martens given their financial interest in the Hide.

36. The Claimant then commenced what Mr Macdonald considered to be a rant, including about the incident on the Sunday evening referred to above. He said that he was the wrong person to raise that with.

37. The Claimant did not attend the annual conference in November 2017. He claimed that he was unable to do so as he had not been aware of the date and had made arrangements to look after another person's dog.

38. The Claimant rang the Respondent on 24 November 2017. The Respondent prepared a file note shortly after that call, and it is a reasonably accurate record of it. The Claimant stated that he had visited his GP following their meeting in October 2017, and had received medication for the stress he had felt. There was a discussion about a further meeting, and each party wished to be accompanied by another person for that. Arrangements were then made for that meeting in a series of emails.

39. On 25 November 2017 the Claimant sent the Respondent a letter referring to his feelings of being undervalued and expressing the hope that matters could be sorted out, adding “if not please sack me (put me out of my misery)”. The Respondent did not reply.

40. On 15 December 2017 the Claimant’s General Practitioner sent a letter to the Respondent which asked that someone be present with him at the meeting, in light of the anxiety he had expressed about it. The Respondent had agreed to do so.

41. The meeting eventually took place on 18 December 2017, at the Grant Arms Hotel, Grantown-on Spey. The Claimant was accompanied by his sister Anne. The Respondent was accompanied by her Administrator Mrs Lisa Gunn. Mrs Gunn prepared a note of the meeting which is a reasonably accurate record of it. During the meeting the Respondent tried to raise a number of issues, but did so with difficulty as the Claimant spoke over her. He tended not to deal with the point she was seeking to address. Towards the end of the meeting however he agreed to sign a document that set out a list of instructions on what he was not, or was, to say to guests visiting the Hide. The meeting ended after a little over an hour, and both parties thought that it had gone reasonably well. It had been an attempt to clear the air between them, informally, and not a formal disciplinary hearing.

42. In January 2018 Miss Kate Mennie was employed by the Respondent as a Trainee Wildlife Guide, and to carry out social media work, including the writing of blogs. She was not employed to replace the Claimant. There was little information passed to the Claimant about the role Miss Mennie would perform.

43. The Grant Arms Hotel in Grantown-on-Spey had its own wildlife guides, and by agreement with the Respondent used the Hide about five times per year. Their own guides would attend to assist their guests, rather than the Claimant. When the Claimant sought to do so, the hotel owner indicated that she

preferred that their own guides do so, and expressed a measure of criticism of what the Claimant was understood to have told guests in the past.

44. The Claimant had been paid for leafletting up to July 2016, but after then he had not made any request for payment until in March 2018 as referred to below. The Respondent was not aware of his carrying out any leafletting in 2017. Ms Mennie informed her that there were two boxes of leaflets in the Hide, one of which had been the subject of damage by mice, and the Respondent decided that she would ask Ms Mennie to carry out leafletting, at about the start of March 2018. She did not inform the Claimant of that, at that time.

45. The Claimant was unhappy when he found out about the instruction of Miss Mennie to carry out leafletting shortly afterwards. Miss Mennie had also moved into the Cottage. Relations between the Claimant and Miss Mennie were not good because the Claimant started to consider her a spy for the Respondent. He was also concerned that he did not have much direct contact with the Respondent herself.

46. On 14 March 2018 the Claimant spoke with Mrs Gunn, after she had left a message with him concerning Miss Mennie and her parking of her car near the Hide. She prepared a note of that call immediately afterwards and it is a reasonably accurate record of it. He outlined some concerns that he had, and she suggested that he speak to the Respondent at the pre-season meeting shortly to take place. Mrs Gunn also repeated the comment that she had made previously, on instruction of the Respondent, that if the Claimant had any problem he should raise it with the office.

47. The Claimant attended the pre-season meeting held by the Respondent with all her staff on 22 March 2018. She wished to speak with him regarding some feedback. The discussion between them was brief, and did not directly address those issues as the Claimant did not engage with them. The Respondent considered that he was in denial about them. She was concerned at his attitude. She did not however directly address that issue, or commence any

disciplinary procedure. She asked him to arrange a meeting with her to discuss matters further. The Claimant did not provide suggested dates for the meeting as she had sought.

48. Shortly before the pre-season meeting commenced, and on the same day, the Claimant informed Mrs Gunn that he had carried out leafletting work totalling 14.5 hours over the past few months, and that he had done so in the areas of Newtonmore, Kingussie, and Nethybridge. She noted that, and made arrangements to pay for those hours, which were paid in the March payroll.

49. At the pre-season meeting the Claimant later spoke with Mr Duncan Macdonald, a Wildlife Guide employed by the Respondent. The Claimant re-iterated his concerns that pine martens were being culled by the Estate. Mr Macdonald did not agree, and told him so. He said that the Claimant did not have evidence to back up that claim. The Claimant had placed his hand on his shoulder when having part of that conversation. Mr Macdonald explained that he had managed to "extricate" himself from the conversation in an email to the Respondent sent shortly afterwards to describe their conversation.

50. On 7 April 2018 a visit took place at the Hide, at which Ms Mennie was present. Photographers who were conducting a visit complained that the lights from computers were disturbing the quality of their photographs. She did what she could to mask the lights. To do so, one step she took was to tear from a log book kept in the Hide from what she thought was an empty page at the back, about half way down the page. She taped that over the light. It was dark when she did so.

51. The Claimant later noticed that the log book had had the lower half of a page torn out. He was concerned that that had removed an entry he had made that day, and had been deliberately done. He prepared a new page repeating both the existing entry in the upper half of the page and the removed entry on the lower half of the page, and also wrote the following in block capitals and underlined "Kate don't you ever destroy notes in this book ever again! These

are for my eyes only. Have reported you to Sally. I don't want you in the Hide again!"

52. Ms Mennie emailed the Respondent shortly after she saw that entry, explaining what had happened with the log book, and saying that she felt "hurt that he would say these things to me".

53. On 8 April 2018 the Respondent emailed the Claimant referring to the meeting that had had at the pre-season meeting and asking him to provide dates for a meeting between them, which she had yet to receive.

54. On 8 April 2018 the Claimant prepared a letter to send to the Respondent which he completed and dated 9 April 2018. It referred to Miss Mennie spying on him and asking that she be removed from the Hide.

55. On 9 April 2018 both the Claimant and Ms Mennie were present in the Hide with a party of guests at about 8.20pm. They were in the process of inviting the guests into the Hide. Entry is gained through a door, and the party numbered 13 such that the Hide was reasonably full when they had all entered. As Ms Mennie herself was entering, and about to close the door, the Claimant spoke to her. He did so in a firm voice, but was not shouting. He said something to the effect "I want my log book back". He had the replacement log book in his hand when he did so, and tapped her arm with it twice when he spoke. She tried to explain that the Respondent had taken it, and he replied "I don't care what Sally said." He then placed it on a shelf near the door.

56. Whilst still in the Hide and about half an hour later Ms Mennie emailed the Respondent from her mobile phone with the subject "John" to state "I was walking into the hide with the guests he just shouted at me and hit me with the notebook saying 'I want my notebook back. I'm not too happy'."

57. The Respondent replied to offer that someone else come round, but Ms Mennie said in a further message at 10.04pm that it was "okay. In the hide with 13

guests. I'll just leave in with the guests so he can't talk to me and I'll just be going so I'm good thanks."

58. The Respondent learnt of the message that was left in the log book by the Claimant. She thought that it was not appropriate, and not one that should be read by others who were at the Hide, including guests. She decided to remove it, and replace it with a new log book. She did so, with Ms Mennie in attendance, on the afternoon of 9 April 2018. Shortly afterwards she emailed the Claimant, at 3.52pm, stating "I have taken the log book from the hide and replaced it with a new one." The Claimant did not see that email until the following day.

59. On 10 April 2018 at 9.20am Ms Mennie sent a more detailed email to the Respondent setting out what had happened. She stated in that that he had hit her left arm twice with the notebook, and that when she had said that the Respondent had taken it he had raised his voice. She said that the Claimant had said "I want my notebook back, alright" and "I don't care what Sally said."

60. The Respondent considered that she had a duty to protect her staff from what she considered to be physical contact at an unacceptable level. She also took into account her own experience of meetings with him in October 2017 and March 2018 as referred to above, the log book entries, and the concerns that she had from the feedback from guests. She decided to dismiss him summarily at that point. She did not follow any form of procedure. There was no full investigation. The Claimant was not informed of the allegations against him, or the outcome of any investigation. He was not given an opportunity to respond to those allegations at a hearing. He was not given any opportunity to be accompanied by a colleague or trade union representative.

61. The Respondent communicated the decision to dismiss by a letter delivered to the Claimant's property that day, 10 April 2018, which is the effective date of termination. She also left a message on his answerphone to state that she had done so, and to instruct him not to attend at the Hide or the Cottage. The

Claimant considered that the message had included a reference to his having carried out an assault. The Claimant heard that message the same day.

62. The letter of dismissal is dated 10 April 2018 and states:

> "I am terminating your employment with Speyside Wildlife with immediate effect on the grounds of gross insubordination. Your behaviour in the last few days towards me and my staff has been unacceptable and is a culmination of unacceptable behaviour over the last few weeks, despite our previous meeting and the parameters that were set, within which you agreed to operate. I will not tolerate that and must protect both me and my staff from future occurrences."

It continued by dealing with outstanding wages and the return of property.

63. The Claimant sent an email on 14 April 2018 saying that he was sad and glad that his employment had been terminated. He claimed that he had been treated very badly over six years, that he had been undermined as Kate was a spy, stating that he would send a further letter.

64. A meeting between the parties took place on 24 May 2018, which started with the Claimant placing a recording device on the table, and providing the Respondent with a list of questions he had written and on which he sought answers. There were initial discussions between the parties, but the Respondent asked for a transcript of the meeting before she would respond. The meeting ended, and although the Claimant stated that he had prepared a transcript he did not send it to the Respondent.

65. The Claimant's net pay per month, using the standard abbreviations for the months, was as follows:

2017

Month	Amount (£)
Jan	302.15
Feb	285.75
Mar	538.90

Apr	908.98
May	799.20
Jun	946.49
Jul	820.17
Aug	843.80
Sep	792.95
Oct	664.28
Nov	450.20
Dec	210.20

2018	
Jan	258.90
Feb	140.00
Mar	512.28
Apr	246.68

66. The Claimant made reasonable efforts to secure new employment, but did not do so successfully by the time of the Hearing. He had not claimed benefits, but had lived off savings.

67. The Claimant commenced Early Conciliation with ACAS on 29 June 2018. The Certificate was issued on 6 July 2018, and the present Claim presented on 1 August 2018.

Submissions for Respondent

68. The following is a summary of the submission made. The Respondent had become increasingly concerned about the Claimant's conduct from the autumn of 2017 onwards, from comments by guests, at the meetings she held with him, and the allegations that Kate was spying. When she had discussions he talked over her, and was in denial about what had been happening. He claimed that the log book was his private one, which was not true. Her concerns increased when the log book entries were reported to her, but when there was physical

contact she felt that she had to act to make sure that she protected a young female member of staff.

69. She had not been aware until this was explained at the start of the hearing of the terms of the ACAS Code of Practice. She thought that if it had taken place there would have been the same escalation of behaviour towards her as did take place. She thought that she acted responsibly in dismissing him, keeping her staff safe. The meeting that was a form of appeal had involved him talking incessantly, and he had not produced any transcript. The next she heard was the claim being made.

Submissions for Claimant

70. The following is a summary of the submission made. He started by referring to the letter of offer, which referred to Mr Picton in the induction arrangements. The Respondent accepted that she had been in error. The Claimant argued that the procedures were wrong, he had had no warnings and not procedure followed for an instant dismissal. He had worked hard and had been treated terribly. He had been respectful, working alone much of the time. Most of the feedback had been positive, and only some negative.

71. He said that he knew what was happening to pine martens, and felt that the animals should have been protected. It was very hard to prove but was happening. He was not supported. He was not being communicated with. It had been a great strain on him, and he had not been well. He thought that things could have been sorted out properly.

Law

72. Section 98 of the Employment Rights Act 1996 provides, so far as material for this case, as follows:

"98 General

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

(2) A reason falls within this subsection if it—

(a) ……

(b) relates to the conduct of the employee,

.

…….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”……..

Discussion

(i) Observations on the evidence

73. All of the witnesses who gave evidence sought to do so honestly.

74. The Respondent gave evidence in a clear and candid manner. Generally speaking I accepted her evidence as reliable. There were some aspects that were not accurate, one being that she had claimed that the Claimant had not been inducted into the operation of the Hide by Mr Picton as he had claimed, which latterly she accepted she had been wrong about.

75. Miss Mennie gave evidence in a very straightforward and convincing manner. She described what had happened on 9 April 2018 without exaggerating, and I considered honestly and accurately. Whilst there were some inconsistencies between the two emails describing what had happened, she was clear in her evidence that when the Claimant had told her he wanted the log book back he had tapped her on the arm with it. She had used the word "hit" in the emails, but she was able to explain orally in more detail what was meant.

76. Mrs Gunn was very clear in her evidence, and I accepted it. She did not agree with the Claimant that he had called her about the leaflets he had distributed early in March, but immediately before the pre-season meeting that month. She was clear in her recollection of the meeting in December 2018 and that her record of it was accurate, including that the Claimant had been talking over the Respondent.

77. Mr Macdonald was a very impressive witness. He was an experienced Guide, and I accepted his evidence. It appeared to me that he was very convincing in his opinion that there was insufficient evidence to suggest that pine martens had been culled.

78. The Claimant is clearly a very committed Guide, and from the feedback received many of the guests had had an enjoyable experience with him, and praised him.

79. He does however also have strong views on some issues. I did not accept his evidence that there had been culling of pine martens, as referred to further below. It appeared to me that Mr Macdonald was entirely right in his assessment that there was insufficient basis to make such an allegation.

80. I preferred Miss Mennie's description of the events of 9 April 2018, as it did not appear to me likely that the incident had occurred as he had described, with his description of the book just brushing her arm when he returned it to the shelf.

81. There were other areas of his evidence where its reliability was called into question. For example, he claimed not to have known of the dates of the November conference until late on by which time he had made other arrangements, when he had sent an email to acknowledge it on 20 March 2018. He claimed to have worked for six years, when it was less than three. His suggestion of raising the leafletting he had done previously very early in March 2018, some two weeks before the pre-season meeting, is not something raised in the note of the call held between Mrs Gunn and him after that, and her description and evidence was I considered preferable. It appeared to me that Mrs Gunn's evidence also more easily fit into the timeframe of Miss Mennie being given the role of leafletting, which was done as the Respondent had thought that the Claimant had not done so, and in any event the last claim for payment for that was made in July 2016 by him. His claim that Miss Mennie was a spy was one I did not consider reasonably made and it appeared to me that she had been employed primarily to improve the social media profile. The Claimant by his own admission is not adept at using email, let alone writing blogs or similar social media work. The Claimant's view that his log book entries on 7 and 9 April 2018 were appropriate is not one I agree with.

82. Overall I considered that there was a basis for the Respondent's evidence that the Claimant was in denial over many of the issues raised by some of the guests, and there was a certain lack of insight into his own actions. The two log book messages were unusual ones to leave, in what was a document others who included guests could view. They were bound to cause Miss Mennie some degree of concern at least. The log book was not his, contrary to the view he expressed, but that of the Respondent. The views of the Guide Leader were not determinative, but consistent with some other feedback, and I consider that the Respondent was right to have a concern as to what was being said by guests, and that the Claimant was wrong to dismiss those comments.

83. There were accordingly concerns as to the reliability of the evidence he gave. Where there was a dispute, I generally preferred the evidence of the Respondent's witnesses, including the Respondent herself.

(ii) Reason

84. The first issue is what was the reason for that dismissal. The evidence was clear that it was for the conduct of the Claimant. That is potentially a fair reason.

(iii) Fairness

85. The second issue is that of fairness under section 98(4) of the Act. There is no onus on either party to prove or disprove fairness.

86. I require to take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures under section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992. That sets out the procedure that ordinarily an employer would be expected to follow when considering dismissing an employee for issues of conduct. It was accepted in this case that the Respondent had not followed that Code of Practice at all, and had not followed any form of procedure. Indeed the Respondent's own Company Rules, which I considered to be the Handbook referred to in the Statement of Terms document, was not followed either.

87. The Respondent was wrong in her view that she could dismiss summarily without any process as there had been, she thought, gross misconduct. Her view about the meaning of the Company Rules was wrong.

88. The Claimant denied that there had been misconduct on his part, let alone gross misconduct. Whilst there had been an allegation made, it was only that. There ought I consider to have been both an investigation, and a hearing at which he was aware of the allegations, the evidence against him, had an opportunity to respond to that, and had an opportunity to be accompanied by a fellow employee or trade union representative, all before any decision was made.

89. It was also accepted that there had been no formal written warnings given prior to the dismissal.

90. Whilst investigating and then having a hearing with an employee before deciding to dismiss is not a rule of law that must always be followed, the importance of doing so normally was set out in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***, in which Lord Bridge made the following comments:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus…….; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;……. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and

therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied."

91. The basic requirements are also set out in the case of ***British Home Stores Ltd v Burchell [1978] IRLR 379,*** in which the Employment Appeal Tribunal stated:

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

92. In ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432***:, the following was stated, referring to the then statutory provision now found in section 98(4) of the Act

"We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by s.57(3) of the 1978 Act is as follows.

(1) the starting point should always be the words of s.57(3) themselves;

(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they

(the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

93. I consider that in all the circumstances there was an unfair dismissal under the terms of section 98 of the Employment Rights Act 1996. Mrs Dowden did not actively consider that taking procedural steps would have been futile, rather she assumed that as there was a list of gross misconduct offences in the Company Handbook she could dismiss summarily. That was however a misunderstanding on her part.

94. There ought to have been a procedure, and there was I consider no basis for failing to comply with the ACAS Code of Practice at all. Whilst it is Guidance rather than statutory provision, it sets out at a relatively basic level the steps required to be followed for what would normally be regarded as a fair dismissal. The employee should have the opportunity to lead evidence to exculpate him, including giving his side of the events, or in mitigation. In the present circumstances there had been no formal warning of any kind. There had been some history of issues arising, and of disagreement between the Claimant and his employer, but the more recent of these had been the subject of a meeting on 18 December 2017, after which some agreement had been reached, and recorded by the Claimant signing what amounts to a list of instructions when

acting as a Guide with guests. That was accepted however not to be a disciplinary process of any kind.

95. At the time of the event itself, Miss Mennie had not been sufficiently upset to require someone to attend immediately at the Hide, as had been offered. The precise circumstances of what had happened were not clear from her emails, and required adequate investigation in addition to giving the Claimant the opportunity of commenting himself. In the absence of that, I consider that the dismissal was procedurally unfair. Whilst the Respondent thought that she was being responsible, I do not consider that that excuses the absence of procedure. For the reasons I shall come to, I also consider that it was substantively unfair.

(iv) Reduction under Polkey principle

96. The next issue is whether it is appropriate to make any deduction under the principle derived from ***Polkey v A E Dayton Services Ltd [1988] ICR 142,*** which requires an assessment of the possibility of there having been a fair dismissal had the procedure adopted been a fair one. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.

97. I consider that in the circumstances no reasonable employer would have dismissed. The issue is one of gross misconduct. In the letter of dismissal the Respondent referred to “gross insubordination”. There was a degree of that in the comment the Claimant admitted he had made that he did not care what the Respondent said, and in his attitude generally towards her, but not sufficient to amount to gross misconduct.

98. In her evidence the Respondent accepted that what had led to the dismissal was the email by Miss Mennie describing physical contact. Whilst there had been some background to that, the events prior to April 2018 had not been the subject of any disciplinary process at all. I do not consider that they are of material significance as a result of that.

99. That then leaves three matters in April 2018, two log book entries and the incident at the Hide itself. The two log book entries are inappropriate. They did cause a degree of hurt to Miss Mennie. I do not consider however that they amount to gross misconduct. The incident at the Hide did involve physical contact, but Miss Mennie described in her evidence that the contact was such that she had been "tapped" on her arm. She accepted that at the time of her initial email she had been somewhat upset by it, and the words used then had not been entirely accurate. Similar words were used in the second email.

100. I had the clear impression that the Claimant did as she described, and that he did so as a way of emphasising his point that he wanted the log book originally there replaced. It may be that he did not realise that he was using the log book that way but I consider that he was. He also accepted that he said that he did not care what Sally said. That tends to support the view that he was taking little or no account of others, including Miss Mennie herself.

101. What he did was clearly inappropriate. She had not removed the book, the Respondent had, as she had emailed him about, albeit that at that time he had not read it. His speaking to Miss Mennie in the terms that he did, not shouting but using firm tones of voice, was wrong. He had quite correctly been told to raise issues with the office, and did not do so. He did it with her, as he had with the log book entries. His behaviour in all three matters together was wrong, but in my judgment was not such that a reasonable employer might properly regard as amounting to gross misconduct and dismiss summarily for. The contact was reasonably slight, it was not intended to cause injury but was for emphasis, 13 guests were present and there was no evidence of any complaint or issue raised by any of them, and at the time Miss Mennie's comments were that she was "not happy" about it. That is entirely understandable. She was right not to be. But that level of reaction supports the conclusion that the behaviour was not gross misconduct, as does her rejection of the offer of having someone else attend.

102. The Respondent may have felt a degree of exasperation at the failure of the Claimant to do as she wished, and she may have had a degree of legitimate concern at his behaviours at meetings, but she did not address them in any formal way, no warnings were given, and they were not sufficient to lead to a reasonable fear of assault as that term is ordinarily understood. It is not without significance that the allegation in the letter of dismissal was of "gross insubordination", rather than of assault.

103. I consider that any reasonable employer would have issued either a written warning, or at most serious a final written warning, for the incidents that had taken place as described above.

104. Given all of the background issues that I have set out, in particular the Claimant's continued belief, and making of allegations, that culling had taken place without having adequate evidence for that, his lack of insight into the issues that he caused including in his comments to guests, his erroneous belief that Miss Mennie was a spy, and the deteriorating relationship with the Respondent herself, I consider that had there been a final written warning issued at that time, the Claimant is likely to have acted in a manner that constituted a further example of misconduct within a further period of three months. Such a further example of misconduct is I consider likely to have been sufficient to lead to a dismissal which would be regarded as fair under section 98 of the Act. I consider that in light of the time for proper disciplinary procedures for both such a final written warning, and a later dismissal, the Claimant's employment would have terminated fairly four months after the actual date of termination in any event, and that the period of compensation should be restricted to that four month period after dismissal accordingly. The assessment that employment would not long have continued is supported by the rather unusual terms of the letter of 25 November 2017 when the Claimant refers to his own dismissal.

(v) Contribution by Claimant

105. Section 122(2) of the Act, dealing with the basic award, provides:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

106. Section 123(6) dealing with the compensatory award provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

107. In the case of ***Nelson v BBC (No 2) [1980] ICR 110*** the Court of Appeal set out the factors that require to be established for contribution to be made. In this regard, the issue is not one of belief, but whether the Respondents have established that there was a degree of culpability or blameworthiness on the part of the Claimant, and that his actions caused or contributed to the dismissal, after which the level of contribution is to be assessed according to what is just and equitable.

108. I consider that there was a material element of contribution by the Claimant. His behaviours were inappropriate in a number of respects, such that they are I consider properly regarded as blameworthy. I consider that he did engage in what were described as "rants" at meetings. He did tend to talk over the Respondent, such that she could not get her points across well. He did not accept any criticism, and did not always act in relation to some guests in a manner that they considered appropriate. It was entirely reasonable for the Respondent to seek to correct that, and wrong of him not to engage with that process.

109. In that regard, his continuing allegation of culling by the Estate despite being instructed not to do so, but to provide any evidence to the Respondent so that she could take it up, was not appropriate. Firstly, the instruction was I consider

a reasonable one. Secondly, no evidence was supplied by him. Thirdly, whilst he expressed his opinion in evidence I consider that the evidence he sought to base his opinion upon was nowhere near sufficient to conclude that there had been culling. The letter he submitted in support from Mr John Poynter does not establish anything, only that some form of lamping activity was possible.

110. I accepted entirely the evidence of Mr Macdonald both that the evidence was insufficient, and that the Estate did not have an interest in acting as alleged.

111. His behaviour towards Miss Mennie in writing the two log book entries was wrong, and at the Hide itself on 9 April 2018 was particularly wrong. The entries were insensitive. There was an impression formed in the evidence that he regarded the Hide, and its log book, as his own. They were not. The words used in those entries were also insensitive. They were a breach of the instruction to raise issues he had through the office. Their terms supported Miss Mennie's description of what happened at the incident at the Hide on 9 April 2018. There was a degree of forcefulness in how he acted and what he said that would be of concern to an employer, and was to Miss Mennie herself. The effect however is described above, and was relatively moderate.

112. These issues led cumulatively, but particularly the incident with Miss Mennie at the Hide on 9 April 218, to the dismissal. They are I consider actions by the Claimant which are properly regarded as blameworthy, and contributed to the dismissal.

113. They do however require to be placed in the context of communications between the parties not always being good. It does appear to me that there were occasions when the Claimant was not fully informed of what was to happen, what changes there were, and in particular about the role of Miss Mennie in detail. The occasion on a Sunday evening when the Claimant was not informed of the use of the Hide, and travelled from his home to it abortively, is one example, and another is the lack of full explanation to him of Miss Mennie's role when she started, or when she was asked to carry out leafletting.

In addition, the absence of any form of disciplinary procedure at any time requires to be taken into account.

114. There are some aspects of the evidence I should also comment on. The Claimant submitted a letter from Mr John Picton, who had assisted with his induction, which contained various allegations against the Respondent. Mr Picton did not however give evidence and it was of no real evidential value as a result. In any event, it did not comment directly on matters that were material to the decision in the present case. The Claimant further tendered a letter as a form of reference for him. It was also of no real evidential value or assistance.

115. The assessment of the level of contribution is a matter of degree taking into account all of the circumstances. I have not found it an easy task, but having considered all the circumstances I have concluded that the contribution of the Claimant to his dismissal is properly assessed at 40%.

116. I do not however consider it just and equitable to reduce the basic award, given the complete absence of procedure. The compensatory award alone shall be reduced by that amount.

Remedy

117. The Claimant had not provided a Schedule of Loss, but had indicated that he sought an award of £6,000 – £8.000. He had not found employment by the time of the Hearing. He explained that he had tried to find employment by looking in the local newspaper, and asking those he knew. The Respondent gave evidence of being told of many vacancies for evening work in the hospitality industry. Not without hesitation I found that the Claimant had done sufficient to mitigate his loss.

118. The Claimant is entitled to a basic award under section 119 of the Act, which in light of his years of service and age is for three weeks' pay. The payslips

that were produced by the Claimant indicated no deductions, and taking the period of January 2018 to the effective date of termination, the weekly pay was the sum of £82.70. The basic award is the sum of £248.10.

119. In relation to the compensatory award under section 123 of the Act, the period of loss is the four month period from the effective date of termination of 10 April 2018. I consider that it is appropriate to take the earnings in 2017 as the basis of the calculation of what earnings he would have received in that four month period following termination. Taking 20 days of the April 2017 earnings produces £605.98, and taking 10 days of the August earnings produces £544.38. Adding to those sums the earnings for May, June and July 2017 produces a total of £3,716.22 That sum is then reduced by 40% for contribution, leading to a net sum of £2,229.73.

120. I then considered whether it was appropriate to increase the compensatory award in light of the failure to follow the ACAS Code of Practice under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. I resolved that it was not appropriate to do so as I did not consider that the Respondent's failure was unreasonable, firstly as the Respondent was unaware of its terms such that she did not fail to follow the procedure deliberately or in bad faith, secondly she is a sole trader with no prior experience of Tribunals, thirdly she had misconstrued the terms of the Company Rules and thought that she could do as she wished, and finally, and most significantly, she acted to protect the interests and safety of her staff in a manner she considered part of her duty of care when she had been told by her employee that she had been "hit", which led her to believe that the responsible action, given all the background and her own experience at the meeting in October 2017 in particular, was to dismiss summarily.

121. I accepted the Claimant's evidence that he had not applied for or received benefits and no recoupment is required accordingly.

Conclusion

122. There was an unfair dismissal of the Claimant by the Respondent, and he is awarded the sum set out above, which has been reduced for the reasons given above.

Employment Judge: **Alexander Kemp**
Date of Judgment: **20 November 2018**
Entered in Register: **22 November 2018**
Copied to Parties