

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107584/17

Held in Glasgow on 27, 28 & 29 March 2018

Employment Judge: David Hoey

Mr Richard Hatton

**Claimant
Represented by:
Mr M Briggs -
Solicitor**

Whitbread Group Plc

**Respondent
Represented by:
Mr P Bownes -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant was not unfairly dismissed and the Claimant was not wrongfully dismissed and the claims are therefore dismissed

REASONS

Introduction

1. This is a case for unfair dismissal and breach of contract that called for a 3 day hearing on liability and remedy. The Claimant was represented by a solicitor, Mr

Briggs, and the Respondent by a solicitor, Mr Bownes. The parties had worked together to agree a joint bundle of productions. In fact there were 2 bundles, one with 263 pages and the other with 53 pages. There was a third bundle of documents but the Tribunal was not referred to this. The parties had agreed the authenticity of the relevant productions.

2. Upon the first morning on the first day in accordance with the overriding objective discussion took place as to the issues to be determined by the Tribunal and these were agreed as below. The Respondent advised that there were 3 witnesses. Given availability the witnesses would be heard out of sequence, with the dismissing officer being the last witness. There was no opposition to this.
3. The Tribunal heard from 3 witnesses from the Respondent, Mr Vance, the investigator, Ms Graham, the dismissing officer and Mr Marr, appeal officer and from the Claimant. The Tribunal also heard detailed submissions from both parties.
4. The Tribunal was satisfied that each witness gave their evidence candidly and honestly.

Issues to be determined

5. It was agreed that the Claimant was challenging not only the reason for the dismissal (arguing that the Respondent did not dismiss by reason of misconduct) but also each part of the procedure and that the Respondent did not act fairly and reasonably in dismissing the Claimant. The Respondent was content to defend the case on that basis, arguing that the dismissal was by reason of the Claimant's

conduct, a potentially fair reason, and that the procedure undertaken and the outcome thereof was reasonable in all the circumstances.

6. Although the Claim Form indicated that the Claimant was seeking reinstatement or re-engagement, the Claimant's solicitor confirmed that only compensation was now being sought. The Claimant's solicitor also confirmed that there was no pension loss in this claim.

Findings in fact

7. The Tribunal makes the following findings in fact on the balance of probability. Reference to page numbers are to pages within the agreed bundles of documents before the Tribunal.

Background

8. The Respondent is a large business which operates a number of different establishments, including restaurants.
9. The Claimant was latterly employed by the Respondent as General Manager of one of its restaurants.
10. His employment began on 25 July 2007.

11. he Claimant had previously worked for the Respondent (from 1990), having worked his way up the career ladder from working in the bar to becoming general manager in 1995. He left the business for a period in 2005.
12. As General Manager the Claimant was responsible for the running of the restaurant on a day to day basis.
13. There were around 29 staff for whom the Claimant was responsible in his location.
14. The Claimant was responsible for ensuring the paperwork required by the Respondent was completed correctly, that guests were seen and had a good experience and that the Respondent's policies and procedures were followed.
15. The Claimant was responsible for the staff employed within his area of the business and for ensuring such staff complied with the Respondent's policies and procedures.
16. The role of general manager is a challenging one and requires careful balancing of ensuring the guest experience is excellent while ensuring the administrative tasks are properly completed.
17. The general manager is also responsible for ensuring those to whom other tasks are delegated, including the depute general manager and assistant general manager, are appropriately trained and that their work is checked. The general manager is responsible for ensuring the staff under their control follow the Respondent's policies and procedures.

Audits

18. Audits are carried out in relation to the sites owned by the Respondent to ensure that policies and procedures are followed and are carried out at least once a year.
19. The audit will identify any failures to follow the Respondent's policies and procedures. An action plan is also identified to address any failures found by the audit.
20. The outcome of an audit can be a pass or a fail. The outcome depends upon what issues have been identified, their seriousness and how many failures have occurred.

Policies and procedures

21. The Respondent places considerable weight upon compliance with policies and procedures issued by the Respondent. This is important to the Respondent as it seeks to ensure consistency within each establishment irrespective of location.
22. Policies that the Respondent has issued (at the relevant time) include: Finance policy and procedures manual, Right to work policy, Right to work in the UK process and Disciplinary policy.
23. The Claimant had seen each of these policies.

24. The right to work policy sets out what is required by staff and managers for new employees. The policy states that individuals might be stopped from working after they have been employed to allow evidence to be provided that demonstrates the right to work in the UK. The policy states that the employee's manager will meet the employee and suspend them without pay for up to 2 weeks to provide time to gain the essential documents.
25. The right to work in the UK Line Manager Process sets out what a manager should do in relation to new starts, including what documents to check and copy and what to write on the copy.
26. The Respondent places very high regard upon compliance with its rules in connection with right to work. Emails were issued by senior management on 20 June 2016 and 10 April 2017 emphasising that right to work checks and the appropriate policies need to be followed. Examples are given of the very serious consequences to the business and individuals if these are not followed.
27. The email dated 10 April 2017 notes that "failure to adhere to this will result in the general manager or holding manager being subject to an internal investigation which may include consideration for disciplinary action".
28. In terms of the Respondent's Finance Policy and Procedures Manual steps are provided to "protect team members by providing an audit trail of who is accountable for the safe and its contents at any given time". The risk of non-compliance is stated to be theft and reputational risk.

29. The policy states that a full safe check is to be carried out at the start and end of each shift by both incoming and outgoing manager. This check is to be signed off by both managers "at the time the count takes place". The Finance Policy also states (at page 305): "The Actual v Contract Hours report must be printed, reviewed and signed by the General Manager on or within 5 days of the Friday payments are received. These must be filed in a locked cabinet that is only accessible to Management". That report relates to hours worked by staff and provides important data used by the Respondent.
30. The Respondent has a disciplinary policy which sets out the Respondent's "commitment to making reasonable decisions when handling misbehaviour or performance issues".
31. The disciplinary policy gives examples of misconduct and gross misconduct.
32. Misconduct is stated to include minor paperwork issues, poor performance (and reference is made to a Performance Excellence Policy which was not before the Tribunal) and minor breach of a Policy.
33. That list is not exhaustive.
34. Gross misconduct is stated to be conduct so severe that even a one off incident could result in dismissal. Examples are given under different headings.
35. Under "behaviour" gross misconduct is stated to include encouragement of others to commit acts of gross misconduct.

36. Under "health, safety and security" gross misconduct is stated to include failure to follow procedures for securing the business, serious breach of the company's Finance Policies and Procedures, serious breach of the company health and safety rules, serious breach of the company paperwork or financial transaction procedures.
37. Under "stock and company property" gross misconduct is stated to include fraud and falsification of company documents including timesheets and banking forms.

Audit on 27 July 2017

38. An audit was carried out on 27 July 2017 at the restaurant for which the Claimant was responsible. The outcome of the audit was a fail. The audit identified a number of potentially serious failings. There were 2 "critical controls" and 3 other "key controls".
39. The "critical controls" that were identified were 2 fails in terms of right to work documentation and data security issues (HR cabinet being unlocked and "a number of RTW docs in trays and on the office desks").
40. The "key controls" that were identified were safe checks not having been signed at the time completed, a missing receipt and a "contracted v actual report" not having been reviewed, signed or secured.
41. The surname of an employee was also incorrectly entered into the HR system.

42. Because of the perceived severity of the areas which had failed, the Claimant was suspended and an investigation was carried out.

The investigation

43. The investigator was Mr Vance, a regional operations manager, who had experience in dealing with investigations and disciplinary issues.

44. Mr Vance was the Claimant's line manager.

45. At no stage prior to the Tribunal hearing had the Claimant raised any concerns about Mr Vance investigating the matter.

46. The investigator spoke with the Claimant on 2 separate occasions in connection with the issues arising and he spoke with the Depute General Manager and Assistant Manager. Statements were taken and signed by the relevant persons.

47. The investigator completed an investigation report (pages 153 to 158). The investigator had considered the witness statements and 20 different documents. Page 52 lists the documents that were considered.

48. There had been no failed audits since the investigator had undertaken regional control in September 2015.

49. The Claimant had a clean disciplinary record.
50. The Respondent has a performance management system called "Performance Excellence". The report notes that this had been initiated in relation to the Claimant on 20 July 2017 in connection with guest scores and "performance at Solway Gate [the restaurant for which the Claimant was responsible] falling below the standards required".
51. The Claimant denied receiving the letter about Performance Excellence but accepted there had been a discussion about improving guest scores. The Claimant knew that the area of the business for which he was responsible required to improve in terms of guest scores and relevant websites.
52. The investigation report sets out 5 "allegations and findings".
53. Allegation 1 is headed "behaviour and/or conduct likely to bring the company into disrepute".
54. The Respondent's Finance Policy states that "it is a legal requirement that all potential new team members can provide eligibility to work in this country and provide evidence of this prior to being employed. The copy of ID obtained must state that the original has been seen and checked and show the signature, printed name and date seen of the manager who saw the ID."
55. The report notes that failure to hold the correct right to work documents is against the law. This was a key issue for the Respondent and the Respondent focused on this to ensure staff understood the seriousness of compliance. All general

managers had been trained in this area and checklists had been issued to ensure the correct documents were obtained.

56. Two employees had incorrect or insufficient right to work information and a third's name on the Respondent's system did not match the ID given.
57. The Claimant was aware of what he ought to have done in connection with the failures that had been discovered by the auditor, which was to check the position with regard to those who start in the business to ensure appropriate documentation is provided and processed. The individuals continued to work despite the Respondent's rules not having been followed.
58. The second allegation is headed "falsification of documents or records".
59. The Claimant had been reminded by his subordinate to sign safe checks days after the day the check had been done. These were important as the checks counted the cash held in the safe and two managers were required to sign at the time the check was done to confirm the position.
60. The investigator found three more occasions where this had happened and concluded that there was a pattern of behaviour exhibited by the Claimant in terms of not completing the documents when required. There was no evidence of any other employee failing to sign the checks on the day the check was done.
61. The Respondent viewed signing the safe checks at the time they are done as very important. It is for employees' and the Respondent's benefit that cash is counted

and is accurate and procedures are followed to prove this has been done at the time.

62. This was a basic duty for which the Claimant was responsible.
63. The third allegation is headed "serious breach of company paperwork procedures".
64. Two sections of the Finance Policy are relied upon. Firstly the policy requires an HR file to be kept for each team member and that this is kept in a locked cabinet. Secondly the policy states that at all change of management shifts, a full safe check must be completed and signed by both managers.
65. The report notes that during the key control audit "numerous items of personnel paperwork were found scattered in the office". The audit had also noted that cabinets containing team files were not locked and right to work documents were found throughout the office. The Claimant had admitted during the investigation to leaving an employee's right to work document (a copy of a National Insurance card) in his in-tray.
66. A "contract vs actual report" had not been reviewed and was not secured in the locked cabinet. The Claimant had returned from holiday on 10 July 2017 and had not taken action to review, action and secure the report prior to the audit which took place on 27 July 2017. This was an important report containing information about staff working hours.
67. The Claimant had also failed to sign the safe checks on the day in question on 7 occasions over the last 4 months.

68. The fourth allegation is headed "serious breach of company health and safety rules".
69. An employee within the restaurant for which the Claimant was responsible had not completed her health and safety training. The Claimant had contacted the individual to ask her to complete her training (on 10 July 2017, which was 11 days after the deadline for completing the training had passed) but this had not been followed up by the Claimant. The Claimant had allowed the employee to continue work and had not suspended her.
70. As a public facing business the Respondent viewed it as essential that each team member completed their health and safety training within the required timescale.
71. This allegation had arisen not as a result of the audit. The investigator identified this issue during the investigation process.
72. The Claimant had sent the employee in question a message to complete the training where he had said that "honestly if you don't do it, it puts the business at risk. This puts my job at risk...". The Claimant had failed to follow up and check that the training had been done.
73. The report also made reference to a Worksafe board not being completed and that best practice had not been followed although the report noted that the investigator was satisfied actions were in place.

74. The final allegation is headed "incitement of others to commit acts of gross misconduct".
75. The report states that by signing safe checks days after they were completed condoned this practice "along with other acts of gross misconduct". The personnel cabinet was unlocked during the audit visit. One employee had noted during the investigation that this had happened in the past "on more than one occasion". Another employee had been completing audits confirming that all checks had been completed and that all relevant procedures had been followed when the checks had not all been done satisfactorily and that not all checks had been completed. The Respondent was of the view that the Claimant ought not to have allowed this to happen.
76. The investigator was concerned that the Claimant, as a leader of his area of the business, was allowing serious breaches of policy and procedures to take place and had failed to ensure appropriate training and supervision of managers was carried out, all of which was his responsibility.
77. The investigation report concludes that there were several areas of potential gross misconduct and that a disciplinary hearing should be convened to determine the matter.

Invite to disciplinary hearing

78. As a result of the investigation that was undertaken, the Claimant was invited to a disciplinary hearing by letter dated 4 August 2017.

79. The letter states that the hearing was to consider 5 separate allegations.
80. The first allegation was that the Claimant's behaviour/conduct was such that it was likely to bring the Company into disrepute.
81. The second allegation was that documents or records had been falsified.
82. The third allegation was that there was a serious breach of the Company's paperwork procedures
83. The fourth allegation was that there was a serious breach of health and safety rules
84. The fifth allegation was that the Claimant had incited others to commit acts of gross misconduct.
85. The letter does not provide any specification as to what these 5 allegations means but instead encloses not only the investigation report (the "findings" of which are set out above) but each of the documents that was were considered during the investigation.
86. The letter advised the Claimant that disciplinary action could follow from the hearing, up to and including dismissal.

Disciplinary hearing

87. The disciplinary hearing was chaired by Ms Graham, who is regional operations director.
88. At the time of chairing the hearing, Ms Graham was regional operations manager.
89. The hearing took place on 9 August 2017. The Claimant took a fellow worker to the hearing. The investigator was present at the hearing.
90. Ms Graham looked at each allegation in turn and the Claimant gave his response.
91. Ms Graham considered each of the documents that had been produced during the investigation process together with audits that had taken place in December 2015 (which had failed), February 2016 (which had passed) and February 2017 (which had passed). The additional information was available during the hearing.
92. Ms Graham produced a "disciplinary outcome report" (page 198 to 204) which was the result of Ms Graham's considered response to each allegation.
- 92A. In relation to the first allegation (behaviour and/or conduct likely to bring the company into disrepute), Ms Graham concluded that the Claimant knew what the procedures were in connection with right to work documentation and had admitted to not following them.
93. Ms Graham upheld the first allegation. Ms Graham's view was that the failure to comply with the rules in this regard opened the Respondent to reputational

damage given the consequences that could flow from a breach of the rules in this area. She considered this to be very serious.

94. Ms Graham noted that there were two employees under the Claimant's responsibility who had been allowed to start work without the correct documentation being in place. The Claimant was not at work when the two employees started but it was his responsibility to check, upon his return from work, that the correct process had been followed and he had failed to do so when he returned to work.
95. It was the Claimant's responsibility to check the position almost as soon as he had returned from holiday and he had failed to do so.
96. Ms Graham's position was that a failure to comply with the rules in this regard is extremely serious, even if the failure seemed administrative in nature, and she concluded that the Respondent was guilty of gross misconduct in light of his conduct. She concluded that the Claimant's conduct was likely to bring the Respondent into disrepute.
97. In relation to the second allegation of "falsification of documents or records" the Claimant understood the procedures to be followed. The Claimant had been told following the December 2015 audit to ensure safe checks were completed correctly at the time. He had largely done so as no further audit (until the one in question) had raised any issue.
98. The Claimant admitted to failing to complete the safe checks at the time in question. There had been seven occasions over a four month period when this had not been done correctly which had been discovered during the investigation process.

99. Ms Graham's outcome report states that "completing the documentation at a different time is viewed as falsification". Ms Graham concluded that the Claimant had repeatedly to go back and sign important documents in the business. This allegation was upheld. Ms Graham concluded the Claimant's conduct in this regard amounted to gross misconduct.
100. Ms Graham was not satisfied that the safe checks had actually been carried out by the Claimant. The investigator had taken the Claimant at face value when the Claimant said they had been done. The factual basis of this allegation was that the safe checks had not been signed at the time they were done, even although Ms Graham went further and believed the checks had not been done.
101. Ms Graham's view was that not signing at the time the check was done creates significant risk for the Respondent. It could not be shown the check was carried out at the time. The signing at the time ensures at every time there is visibility as to the checking process and risk is managed.
102. Ms Graham's view was that the Claimant had failed to sign at the time when the check was alleged to have been done which was a very serious breach of the Respondent's Finance Manual regarding cash control and amounted to gross misconduct.
103. In relation to the third allegation, "serious breach of company paperwork procedures", a number of failures were relied upon.

104. Firstly the cabinet containing personnel files was unlocked on the day of the audit. A similar issue had been discovered in the December 2015 audit. The Claimant was not on-site when the cabinet had been unlocked on this occasion.
105. Secondly the Claimant admitted that he had left an employee's right to work documentation in his in-tray. He said he had left the information there (rather than in a locked file) to remind him to post it. That information revealed some confidential information in relation to the individual, even although some of the document was illegible.
106. Thirdly the Claimant had admitted to not reviewing and signing the "actual v contract hours report" which was within the unlocked HR cabinet.
107. Finally the Claimant had admitted to not completing the safe checks on the days in question as set out above.
108. Ms Graham decided to uphold this allegation. Ms Graham's view was that this was a serious breach of data protection rules and the company's procedures. She concluded this amounted to gross misconduct.
109. In relation to the fourth allegation, "serious breach of company health and safety rules", an employee for whom the Claimant was responsible had been allowed to continue to work despite not completing the mandatory health and safety training. The Claimant had told the employee in question to complete the training (albeit after the time for completing the training had expired). The Claimant did not follow this up.

110. Ms Graham concluded that by failing to ensure the mandatory training had been completed, and by allowing the individual to continue to work, the Claimant exposed the business to risk and failed to take appropriate action.
111. In relation to the failure to complete the worksafe board, an appropriate reason had been given and corrective action had been taken.
112. The allegation was therefore partially upheld. Ms Graham believed the allegation that was upheld amounted to gross misconduct.
113. In relation to the final allegation, "incitement of others to commit acts of gross misconduct" Ms Graham's report notes that "this point relates to areas already discussed in this report – failure to sign safe checks at the correct time, personnel cabinet being left unlocked and important documents being left lying around".
114. Ms Graham noted that the Claimant's team stated they had not been trained in key controls and did not have a clear understanding of their objectives. This was disputed by the Claimant who had advised Ms Graham that appropriate training was provided.
115. In her conclusion in relation to this allegation Ms Graham noted that incitement of others to commit acts of gross misconduct is "strong terminology". She said that "what it means in this situation is that because Richard is getting his team to complete key tasks and controls within the business without ensuring full training, checking their knowledge or checking their competence, he is unwittingly causing them to breach company policy and procedure which is viewed as gross misconduct".

116. She upheld this allegation and concluded that the Claimant's conduct amounted to gross misconduct.
117. In her conclusion Ms Graham stated that each of the 5 allegations could, in their own right, be considered gross misconduct. Taken together, the effect of the Claimant's conduct was of sufficient seriousness to amount to gross misconduct in her view.
118. Ms Graham would have dismissed for each allegation individually and in any event decided that taken together dismissal was an appropriate outcome, the Claimant having committed gross misconduct.
119. Ms Graham concludes that she did not have the confidence that the Claimant would ensure the business would operate in a way that ensures it meets its legal requirements given his conduct to date. She was not satisfied that the issues that had arisen would not be repeated.
120. Ms Graham took the view that the Claimant had lengthy service with the Respondent which had given him enough time to demonstrate his ability to comply with the various policies and procedures.
121. Ms Graham considered whether demotion or other sanctions would be appropriate but decided none was appropriate in the circumstances.

122. The Claimant was summarily dismissed by reason of gross misconduct. The Claimant was told this following an adjournment of the hearing.
123. The decision was communicated to the Claimant in writing by letter dated 11 August 2017 which referred to the above report (which was included with the letter).
124. The Claimant was told of his right to appeal.

Appeal

125. The Claimant appealed against his dismissal by letter dated 22 August 2017.
126. In his letter he stated that he wished to "appeal the decision based on the believe (sic) that the sanction was to (sic) extreme in all the circumstances. This is reflected in a number of inconsistencies within the investigation, the disciplinary meeting and the outcome report."
127. The appeal letter stated that his appeal would include 16 points which were set out in the letter. These comprised (in summary):
- Reference had been made to the Claimant being placed on Performance Excellence and yet the Claimant had received no formal notification of this nor were any objectives set for him.

- In relation to allegation 1 it was suggested the Claimant only took corrective action regarding return to work after the audit which was not correct as action had been taken before the audit and the correct documentation relating to 2 of the 3 individuals was onsite.
- During the hearing Ms Graham had incorrectly quoted the Finance Policy
- During the hearing documentation regarding previous audits was introduced but not provided in advance
- Action had been taken for issues that had occurred while the Claimant was on holiday and beyond his control
- In relation to the second allegation (falsification of documents) the report states that Ms Graham questioned the Claimant's ability to complete documentation despite the Claimant having a long history with the company of doing so.
- Ms Graham stated that the Claimant was unable to present a plan of action regarding future corrections to in house procedures yet she had not asked the Claimant for this.
- No effort had been made to discover the operational issues within the business during the time from the Claimant's return from holiday to the audit
- Ms Graham upheld the last allegation and yet the staff members had been given relevant training

- Ms Graham did not correctly understand a challenge the Claimant had made to one of the interview notes
- One of the witness's statement should be disregarded due to an untruth.
- All managers have the same objectives
- There had been management meetings
- When the Claimant had been suspended collusion had taken place with the other staff
- Ms Graham's report is contradictory in terms of management responsibility.
- The report required the actual v contract report to be submitted within 5 days which is not possible due to holidays over 5 days prior to pay day. There is no company guidance how this is to be dealt with.

128. The Claimant was advised as to the details of the appeal hearing by letter dated 6 October 2017.

129. The appeal officer was Mr Marr, Area Manager.

130. There had been a delay in identifying an appropriate manager due to the independence and seniority of the manager required and due to the holiday period.
131. After Mr Marr had agreed to chair the appeal hearing, Ms Graham was appointed Mr Marr's line manager.
132. Mr Marr did not know Ms Graham well.
133. Mr Marr considered matters and decided to continue to hear the appeal on the basis that he considered there to be no conflict of interest. He was trained in dealing with disciplinary matters and was satisfied that he would hear the matter fairly and fully.
134. The Claimant was not told that Ms Graham had become Mr Marr's line manager by the date of the hearing which was a fact the Claimant discovered after the appeal process had concluded.
135. Mr Marr was not influenced by Ms Graham in the making of his decision and made a decision based on the information and facts before him.
136. The Claimant brought a trade union representative to the appeal meeting.
137. The basis of the Claimant's appeal was that he considered the sanction (dismissal) to be too severe. There was no new evidence brought to the appeal as such, with the focus on challenging the decision Ms Graham had made.

138. Mr Marr was given the full set of documentation that had been before and considered by the dismissing officer together with the outcome report.
139. The appeal hearing took place on 10 October 2017 and lasted for over 3.5 hours.
140. The appeal hearing looked at each of the 16 points raised by the Claimant and the substance of the allegations as appropriate (in connection with the relevant appeal points).
141. Following the appeal hearing the appeal officer considered the 16 points raised by the Claimant and the evidence that had been provided during the disciplinary hearing.
142. Mr Marr had undertaken some further inquiries following the appeal meeting to clarify a number of issues he had with both Mr Vance and Ms Graham. Mr Marr took those answers into account in reaching his decision.
143. The outcome of the appeal is set out in the report from pages 247 to 257.
144. The outcome of the appeal was sent to the Claimant by letter dated 3 November 2017.
145. Mr Marr went through each of the points raised in the Claimant's appeal and considered Ms Graham's reasoning in detail.

146. In relation to point 1, that the Claimant was not aware that a performance management process had been undertaken, a letter had been emailed to the Claimant which Mr Marr accepted as proof that performance excellence (the Respondent's performance management regime) had been initiated.
147. In relation to point 2, that action to correct right to work issues had begun prior to the audit, Mr Marr notes that initially the Claimant denied that there had been breaches of the right to work rules and then later changed his position and admitted that there had been breaches. The Claimant maintained attempts had been made to correct the situation.
148. This was in essence an appeal against allegation 1.
149. Mr Marr noted that the business had issued a number of communications emphasising the seriousness of right to work checks. Ms Graham's position was that the Claimant had not conducted any right to work checks prior to the audit on his return from holiday. The Claimant had alleged that he was being held responsible for his manager's failings in some respects. Ms Graham had concluded that ultimately it was the manager's responsibility to ensure staff were appropriately trained. Further and in event event the Claimant had failed to conduct the relevant checks to ensure the tasks were being completed correctly, despite having had the opportunity to do so.
150. Point 3 related to reference to the correct finance policy. Mr Marr could find no evidence to support this challenge or how it impacted upon the outcome of the hearing.

151. Point 4 related to failure to provide audit documentation before the meeting. This was accepted by Mr Marr, albeit the Claimant was given the opportunity to review and comment on the documents during the meeting. The Claimant had also been involved in the documents at the time they were prepared.
152. Point 5 related to previous audits which were outwith the Claimant's control. This had not been raised at the time and the Claimant had discussed the relevant audits during the meeting. Mr Marr accepted that the documentation should have been provided in advance of the hearing.
153. Mr Marr noted that Ms Graham had identified that each of the points of failure of the July 2017 audit had been raised in previous audits. The Claimant had completed the action plans in relation to those audits to ensure there was corrective action. That led to the conclusion that the issues could well be repeated again given the issues had recurred in the July 2017 audit.
154. Point 6 relates to the fact the Claimant had shown many years of complying with administrative tasks. The Claimant had 27 years' service in total with an unblemished disciplinary record and yet he is being held responsible for failing to complete administration.
155. Ms Graham had noted that the Claimant had shown that he knew of the relevant policies and procedures but admitted to not doing what he was required to do. She had concluded that there was a recurring theme of the Claimant having to go back and sign documents that ought to have been signed at the correct time and that he was failing to conduct the required checks, identify issues and take appropriate and timely action within his areas of the business.

156. Ms Graham had concluded that his length of service and experience meant he ought to have known what to do (and indeed he had complied with the relevant policies before).
157. Point 7 related to not being asked about a plan of action. The Claimant had been given the chance to put his position forward.
158. Point 8 relates to the fact no attempt was made to discover the operational issues within the business between the Claimant's return from holiday and the audit. The Claimant had spent the time trying to improve the guest experience with less of a focus on administration. Mr Marr concluded that the issues that gave rise to the failed audit were issues that ought to have been under control irrespective of the other pressures upon the Claimant.
159. Point 9 questioned the training structure. Ms Graham had stated that the Claimant had failed to check upon his team's level of competence before providing tasks. The decision had been made as a result of the Claimant's lack of follow up.
160. Points 10 and 11 relate to the veracity of one of the witness statements. Mr Marr found no evidence to support this issue.
161. Point 12 was that all managers have the same objectives. Mr Marr did not consider this to relate to the allegations or have any material impact upon the outcome.
162. Points 13 and 14 related to internal management meetings. Even if there were a lack of minutes of management meetings, Mr Marr's view was that this gave further support to the Claimant's lack of control of the business.

163. Point 15 related to alleged contradictions in connection with delegation by Ms Graham. This was not upheld as Mr Marr believed the evidence showed the Claimant had failed in this regard.
164. Mr Marr noted that Ms Graham had taken time to consider the outcome and had looked at demotion. She had concluded that the Claimant would require to complete the same tasks if it were a junior management role and he had not proven that he could complete those checks in a safe legal and compliant manner.
165. Point 16 related to the company procedure requiring action within 5 days which is impossible in the event of holidays lasting more than 5 days. Ms Graham had stated that there were 17 days when the Claimant could have checked the position but he had failed to do so. The Claimant had admitted that he knew he ought to have reviewed the report and could give no reason for not doing so. Mr Marr concluded that this again showed the Claimant to have failed to conduct the required level of checks within the business.
166. Mr Marr concluded by deciding that the decision to dismiss was the correct one in all the circumstances. The appeal was not upheld (aside from the minor points set out above). He acknowledged that the outcome was severe but concluded it was justified from the evidence. He would have dismissed for the reasons Ms Graham did.
167. Mr Marr noted that "first and foremost" the Claimant had failed in the legal requirement to ensure that the correct right to work documentation for people working in his business had been properly obtained. The Claimant had been aware of the requirements. Although the Claimant was not on site at the relevant time he

had failed to check the tasks had been completed correctly, and had sufficient time to do so.

168. Mr Marr would have dismissed for the failure to check that the right to work checks had been carried out correctly alone.
169. Mr Marr viewed allegation 2 as the failure to sign the safe checks on the date that the check had been done, which was a very serious breach of the policy. Mr Marr noted the investigating officer had accepted the Claimant's position that the checks had been done. The issue was that the Claimant had not signed at the time the checks were doing creating real risk for the Respondent.
170. Mr Marr also noted that there is a "weight of evidence" that the Claimant had failed to complete a number of tasks and responsibilities in a wide range of areas as general manager. Mr Marr was of the view that there were real risks of repetition of the failures that had been demonstrated on this occasion which was not something the business could risk.
171. Mr Marr concluded that there were real questions around the Claimant's ability to lead and run the business in a safe, legal and compliant way and he agreed with the conclusions reached by Ms Graham.
172. Mr Marr considered alternatives to dismissal, including a final written warning or demotion but concluded such alternatives would not be appropriate.
173. The decision to dismiss the Claimant by reason of gross misconduct was therefore upheld.

174. The Claimant earned £826.92 a week gross with the Respondent which amounted to a net weekly salary of £625.37.
175. The Claimant suffered 4 weeks of unemployment. It was accepted that the Claimant had mitigated his loss following his dismissal.
176. He then secured a job earning £692.30 gross a week (amounting to £515.73 net a week).
177. Going forward the differential between the Claimant's new role and that he enjoyed with the Respondent is £109.64 a week (net).

Observations on the evidence

178. The Tribunal was satisfied that each of the witnesses was credible and reliable. There were few facts that were disputed in terms of what was said and done at the material time and the findings in fact above set out the position as determined by the Tribunal from the evidence.
179. The dispute in this case centred around firstly the reason for the dismissal – whether it was related to the Claimant's conduct – and secondly the reasonableness of the decision to dismiss, both in terms of the investigation and procedure and in terms of the severity of the sanction.

The Law

Unfair dismissal

180. Section 98 (1) of the Employment Rights Act 1996:-

“In determining 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.”

181. Section 98(2) of the Employment Rights Act 1996:-

“A reason falls within this subsection if it:

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed to do
- (b) relates to the conduct of the employee

- (c) is that the employee was redundant or
- (d) is that the employee could not continue to work in the position which he held without contravention.. of a duty or restriction imposed by an enactment”

182. Section 98(3) of the Employment Rights Act 1996:

“In subsection 2(a) -

- (a) capability, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or other physical or mental quality.”

183. Section 98(4) of the Employment Rights Act 1996:

“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 reasons 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”.

184. In accordance with the tests set out in ***British Home Stores Ltd v Burchell 1980 ICR 303*** the Tribunal must consider:-

- (i) Did the Respondent believe the Claimant was guilty of misconduct?
- (ii) Did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and
- (iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

185. Range of reasonable responses:-

- (i) When assessing whether the ***Burchell*** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

- (ii) The starting point should always be the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

- (iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether 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. However, the band is not infinitely wide and is not a matter of procedural box ticking

Compensation

186. In addition to a basic award (Section 119 Employment Rights Act 1996), Section 123(1) Employment Rights Act 1996 provides for a compensatory award: "... the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

187. Contributory conduct:-

- (i) Section 122(2) Employment Rights Act 1996 states:

Where the Tribunal considers that any conduct of the complainant before the dismissal ... 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

- (ii) Section 123(6) Employment Rights Act 1996 states:

Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding.

- (iii) Before making any finding of contribution:-

- a. A claimant must be found guilty of blameworthy or culpable conduct; that enquiry is directed solely towards the conduct of the claimant and not towards the conduct of the employer or other employees.
- b. For the purposes of a contributory fault reduction the employee's conduct must be known to the employer at the time of dismissal and have been a cause of the dismissal.

- c. Once a finding of blameworthy or culpable conduct is made the Tribunal must make a contributory fault reduction, the proportion of the reduction being such amount as it considers to be just and equitable.

Mitigation

188. Section 123(4) Employment Rights Act 1996 requires a claimant to mitigate their loss and a claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The Tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

Polkey

189. Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

190. The Tribunal has also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “Section 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).

“(2) If it appears to the Tribunal that -

- (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
- (b) the employer has failed to comply with that Code in relation to that matter, and
- (c) that failure was unreasonable,

the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment Tribunal that—

- (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%”.

Wrongful dismissal

191. Section 3(2) of the Employment Rights Act 1996 and Article 3 of Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 SI 1994/1624 gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.
192. Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract.
193. In accordance with s86 Employment Rights Act 1996, employees are entitled to one week's notice for each complete year of service unless dismissed for gross misconduct. If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

194. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2) and (3) may apply (see above).

Submissions

Submissions for the Respondent

195. Mr Bownes set out the terms of section 98 of the Employment Rights Act 1996 noting that the Respondent maintains the reason for dismissal in this case is conduct. He reminded the Tribunal of the test set out in *BHS v Burchell* and *Iceland*. It is important the Tribunal does not substitute its view as to whether it would have dismissed. He reminded the Tribunal that the range of reasonable responses test applies to the investigation too (***Sainsbury v Hitt 2003 IRLR 23***).
196. In ***Chubb v Harper 1983 IRLR 311*** the Tribunal is reminded that it is the reasonableness of the employer's decision that is to be considered not the injustice to the employee.
197. The Respondent maintains that this is a conduct and not capability case. The distinction is someone who "won't" do something (conduct) as opposed to someone who "cannot" do it (capability). He gave ***Sutton 1978 IRLR 488*** as an example of this.
198. Mr Bownes also pointed out that in terms of ***J P Morgan*** 11 May 2017 EAT@ para 42 culpability is not necessarily inherent in a misconduct dismissal where

Richardson J states "It is not a requirement of section 98(1) and (2) that the employer establish the conduct to be culpable".

199. In ***Brito-Babapulle v Ealing*** 2013 IRLR 854 @ para 17 Mr Bownes points out that the Claimant does not need to know what they are doing is wrong for it to be misconduct. If something is set out in writing, that may make the position clear.

200. Mr Bownes said that the Claimant had accepted that he could do the job, since the Claimant had emphasised that he had been doing it for many years and therefore his failings on this occasion were misconduct. The Respondent did not view this as capability but made reference to the policies which clearly set out the conduct to be followed. Mr Bownes noted that part of the Claimant's case was that he had chosen to focus on certain areas to the exclusion of administration activities, which again showed that this was a question of conduct as the Claimant was capable of the relevant activities.

201. Mr Bownes took the Tribunal to paras 27 to 29 of ***Wincanton plc v Atkinson*** 19 July 2011, Employment Appeal Tribunal, in connection with the risk of reputational damage. This case, said Mr Bownes, is authority for the proposition that the risk of damage or the potential consequences can be sufficient to amount to misconduct.

202. In this case the right to work checks were clearly legal requirements with potentially very significant sanctions to the business and individual. Besides legal sanction there was the potential for reputational damage by way of press interest. The Respondent's evidence that the company's reputation could be damaged had not been challenged.

203. Mr Bownes also pointed out that the same could be said of allowing staff to serve customers without completing the health and safety training – there were potential consequences.
204. It was therefore sufficient for there to be the risk of reputational damage for that to amount to gross misconduct.
205. Mr Bownes also noted that the claim brought before the Tribunal was far broader than that brought via the internal appeal. The Respondent had been denied the opportunity to resolve things internally by the Claimant's failure and this, said Mr Bownes, amounted to a breach of the ACAS Code justifying 25% reduction.
206. Points that had been raised during the Tribunal that had not been raised before include the alleged bias of the investigator and the points that allegedly made the investigation unfair.
207. The Claimant had by and large admitted that he had not followed the relevant policies etc. The Claimant knew how serious the issues were and that his job was at risk.
208. The Claimant had disclosed further points during his evidence that he had raised at the time of the internal processes, such as the nature of the module of the health and safety training that had not been completed and that the Claimant had chased the employee on 2 occasions not 1 to complete the training.
209. By the Claimant's own admission there were serious breaches of company procedure and the Claimant had admitted that serving a member of the public

without full health and safety training was serious and that was what had happened.

210. The Claimant admitted he had kept paperwork on his desk that ought to have been stored securely. That was a breach of the obligation to protect personal data.
211. Given the Claimant's admissions and the clear appeal points (which were against sanction only) the appeal did not need to completely rehear the matter. In any event the appeal did look at the substance of the allegations.
212. Mr Bownes said that Ms Graham had considered all the facts including the Claimant's service. This was not a capability or training issue since the Claimant knew what was to be done and could have done it. He knew the procedures and the consequences of not complying.
213. Ms Graham had seen a pattern emerge and was right to take account of the fact that the issue had happened before.
214. The Claimant had been told very clearly how serious the issues were and what the consequences would be. The Respondent is entitled to protect itself. Ms Graham had no confidence that there would be no repeat of the misconduct and this was not challenged.
215. Mr Bownes candidly accepted that the 5th allegation was not entirely clear. Nonetheless the Claimant by his actions had failed to show leadership and allowed breaches of company procedure to happen.

216. Mr Bownes submitted that the Tribunal should take account of the reasoning of Ms Graham in choosing to dismiss for the reasons she did. The safe checks were not signed when they should have been. That was a clear breach of policy with important sanctions. The right to work checks had not been verified.
217. The appeal hearing had considered all the material points and had in fact gone further than just consider the 16 points of appeal. The substantive issues were considered afresh.
218. Alternatives to dismissal were considered and again the Respondent was not satisfied that there would be no recurrence.
219. Overall the investigation that was carried out was reasonable.
220. The decision to dismiss for each allegation would have been reasonable as was the decision to dismiss for all 5 allegations. The dismissal was therefore fair.
221. As to remedy the basic award had been set out by the Claimant in the revised Schedule of Loss at £6846.
222. Mr Bownes did not accept the 2 years' ongoing losses fixed since the evidence suggested some wage rise at some point.

223. Mr Bownes relied on *Polkey* to contend that even if the procedure was unfair, had a fair procedure been followed the outcome would have been the same and therefore any procedural errors made no difference.
224. As to contribution, Mr Bownes reiterated the 2 test for reduction of the basic and compensatory awards and argued that both should be engaged to reduce the awards ordered. The Claimant knew what his failures were and that they were serious. In short both awards should be reduced by 100%.
225. If the Tribunal was minded to make any award, Mr Bownes submitted that the award should be reduced because of the Claimant's unreasonable failure to comply with the ACAS Code of Practice. The Claimant had not raised the issue as to the investigator's alleged bias until the Hearing, nor had he raised the general points of unfairness before the Hearing (focusing on the severity only). There were also 2 additional points the Claimant raised in evidence that had not been raised during the internal process. He sought a 25% reduction in compensation.

Submissions for the Claimant

226. Mr Briggs for the Claimant began his submission by accepting that none of the witnesses was deliberately dishonest but suggested that the Respondent's witnesses were more guarded sometimes to the point of reaching a logically impermissible conclusion. The suggestion that leaving a bank card in a busy restaurant is as serious as leaving a photocopy of an NI card is an example. Given the Respondent's witnesses' level of guardedness Mr Briggs urged the Tribunal to treat the Respondent's witnesses' evidence with some hesitation. That, he said, was in contrast to the Claimant's evidence which was given in a frank and forthright way.

227. As to the reason for the dismissal, Mr Briggs submitted that the authorities relied upon by Mr Bownes had not altered the commonly understood position to the identification of the reason for the dismissal.
228. This was a question of fact – what was in the mind of the dismissing officer.
229. Mr Briggs submitted that Ms Graham was looking forward and said that the Claimant did not have the skills. Ms Graham had accepted that the Claimant had not gone out of his way to deliberately sabotage the business.
230. Mr Briggs suggested the evidence pointed to the Respondent dismissing for capability related reasons. At the moment the Claimant was dismissed the motivating factor in the mind of the Respondent was that he could not do the task which was not conduct.
231. If the Tribunal did not accept that submission, the next question was whether the Respondent had acted reasonably in all the circumstances in light of **BHS**. In Mr Briggs's submission there had been no reasonable investigation into the allegations in a meaningful sense.
232. The allegations in the investigation report were all upheld. There was no dispute as to the factual core of the allegations but the Respondent had taken a leap without any evidence or consideration of each allegation.

233. In relation to the right to work allegation contrary to what Ms Graham said, there were only 2 people the audit had flagged up as having incorrect documentation. 1 had not been properly verified (and the Claimant had missed it) and this had been fixed the following day. In both situations the documentation was on site.
234. Mr Briggs said that it was not reasonable to conclude that there was a risk of reputational damage from these facts.
235. Mr Briggs submitted that it was not clear what the second allegation was. Ms Cameron suggested it was the failure to sign the safe sheets on the day in question and then suggested it was the failure to carry out the checks themselves.
236. If the latter was correct, that would result in the investigation being unreasonable since the point was not investigated (nor put to the Claimant).
237. On the bare facts the policy says that the sheet should be signed on the day in question. It is a leap from saying the Claimant forgot to sign to saying he fraudulently produced a document. That colours the rest of the decision. There was no suggestion of dishonesty and yet this appears to have been taken into account.
238. For the third allegation to characterise the breach of company paperwork as serious is histrionics. Ms Graham suggested that there were no shades of grey with regard to paperwork breaches which was not reasonable. This was obviously at the milder end of the scale and should have been regarded as such.

239. The 4th allegation about serious breach of health and safety was not fully investigated. Noone had checked what precisely had not been completed. Mr Briggs questioned whether not doing the training is itself a breach of health and safety.
240. The Respondent allowed staff to work for 28 days without completing the training. Why does it become so serious on day 29 asked Mr Briggs.
241. The 5th allegation about incitement of others to commit gross misconduct was unreasonable submitted Mr Briggs. Even if you ignore the label, this was an attempt to punish the Claimant twice for the same issues. The Respondent is saying that the Claimant did something bad and then saying by doing something bad others might do so and that is therefore another wrong.
242. The other staff had not committed gross misconduct and so the Claimant could not have incited them to commit gross misconduct.
243. The labels applied to the allegations are important said Mr Briggs since they are the hooks which bring them back to the disciplinary policy.
244. With regard to the reasonableness question looked at in the round no reasonable employer could have taken the decision to dismiss in all the circumstances.
245. The Claimant was a manager in a busy restaurant. He had just returned from holiday and his assistant was going on holiday. Ratings had gone down and the Claimant was being pushed to improve the position.

246. It is not surprising that a number of important things were missed. It is not the Claimant's position that these are irrelevant but there is little by way of culpability that can attach to the Claimant.
247. The decision to dismiss falls outwith the range of reasonable responses.
248. The Claimant had committed 27 years of his life to the Respondent. To use that as an aggravating factor is not reasonable.
249. The core facts of not having a locked cabinet, not tidying up errors in right to work documents are not misconduct individually or cumulatively.
250. It is not reasonable to dismiss a long standing employee with no disciplinary record in all the circumstances.
251. The Claimant had also taken steps to fix the errors that had arisen.
252. With regard to procedural matters, the fact that the dismissing officer had become the appeal officer's line manager is a failure that is so gross to make the dismissal unfair. It is impossible to say what would have happened had another person heard the appeal.
253. The fact the investigator was the Claimant's line manager also adds to the unfairness since he was responsible for the Claimant which would have coloured his view. There could have been personal prejudice there.

254. As to compensation, the basic award amounted to £6846 (14 x £489).
255. In terms of the revised Schedule of Loss the compensatory award amounted to 4 week's actual losses at £625.37 a week and then 2 year's ongoing losses (of a differential of £109.64) giving £13,994.04.
256. Mr Briggs submitted that there should be no **Polkey** reduction as it is not possible to say what would have happened had a fair procedure been followed. The outcome may have been different.
257. Mr Briggs conceded that there was a degree of contribution on the Claimant's part given his blameworthy conduct had contributed to his dismissal but this was very low, around 10% which would apply to both basic and compensatory award.
258. Mr Briggs denied that there was any breach by the Claimant as to the ACAS Code and in any event there was no unreasonableness on the Claimant's part. Parliament had not intended the ACAS Code uplift to be a stick to bear a successful Claimant in Mr Briggs's submission.
259. Loss of statutory rights had been agreed by both parties as a sum in the region of £400.
260. Both parties accepted that in relation to wrongful dismissal, the award, if successful would be for damages for the notice period of 10 weeks which would amount to 4 week's actual losses (£625.37 a week) and 6 weeks at the differential £109.64.

261. The Respondent denied that the dismissal was wrongful.

Decision

Unfair dismissal claim

Reason for the dismissal

262. The first issue to determine is whether or not the reason relied upon by the Respondent to dismiss the Claimant was conduct as alleged by the Respondent. The Claimant's position is that the decision to dismiss was driven by capability issues and not conduct.

263. The Tribunal is satisfied that the reason for dismissal in this case, the set of facts or beliefs held by the Respondent that caused the Respondent to dismiss the Claimant, is properly regarded as relating to the Claimant's conduct. The Respondent's policies and procedures clearly set out what the Claimant needed to do. The Claimant had previously complied with the relevant requirements. He was undoubtedly capable of the relevant tasks. For example, the Claimant admitted in cross examination that he had not reviewed the "contract v actual hours report" because he was trying to improve guest scores. He conceded that it was not acceptable to ignore mandatory administration. One point of the Claimant's appeal was that the Respondent had not taken into account how busy the Claimant was (which affected his work).

264. Mr Briggs had suggested that the fact Ms Graham considered the risk of repetition of the issues in the future points to the driving factor being capability and not conduct. The Tribunal concluded that this did not alter the fact that the reason for the dismissal was related to the Claimant's conduct.
265. In this case each of the allegations relied upon by the Respondent to dismiss him related to his conduct – the failure to check the position in relation to right to work checks and comply with the policy in this regard, the signing of safe check documentation days after the check had been done (in breach of the finance policy), the failure to check the “actual v contracted hours report”, the act of leaving documentation in an in-tray and the failure to ensure an employee for whom the Claimant was responsible had completed health and safety training.
266. In all the circumstances therefore the Tribunal has decided that the reason for the Claimant's dismissal relates to the conduct of the employee as required by section 98(2)(b) of the Employment Rights Act 1996.

Sufficiency of investigation

267. The Tribunal considered each element of the ***BHS v Burchell*** test in connection with each allegation in depth. The Tribunal was satisfied that the Respondent genuinely believed in the guilt of the Claimant (for the reason identified), that such a belief was honestly held and that the Respondent had carried out a reasonable investigation in the particular circumstances.

268. The Tribunal did not accept Mr Briggs's submission that the investigation in relation to each allegation was not meaningful or that the investigation that led the Respondent to reach its conclusions was unreasonable. The Respondent had taken time to consider each of the issues arising and the Claimant was given a fair opportunity to present his response to each of the allegations, which response was fully taken into account by the Respondent. Mr Briggs accepted that the factual core of each of the allegations was not in dispute. The Respondent fully engaged with and considered each of the points advanced by the Claimant as the minutes of each internal meeting show.
269. One of the challenges levelled against the Respondent in connection with the investigation was the fact that the Claimant's line manager had carried out the investigation. The Tribunal considered this but was not satisfied doing so was unreasonable. There was no concern raised by the Claimant about this during the process. In any event the investigation that Mr Vance undertook was reasonable. The investigator properly considered the issues arising in terms of the audit. He spoke to the relevant witnesses and clearly set out the facts. He considered all the relevant documentation and formally spoke to the Claimant twice. Mr Vance noted for example that in relation to one part of an allegation appropriate action had been taken.
270. The Tribunal is therefore satisfied having considered the submissions of the Claimant and the Respondent and having considered the evidence before the Tribunal that the requirements as adumbrated in **BHS v Burchell** (as set out above) were appropriately followed and that the Respondent's investigation was reasonable in all the circumstances. The investigation that was carried out fell within the range of reasonable responses.

The fairness of the dismissal for that reason

271. The next issue is whether or not the Respondent acted fairly and reasonably in all the circumstances in treating that reason, conduct, as sufficient to dismiss in all the circumstances, taking account of the size, resources, equity and merits of the case.
272. The Tribunal reminds itself that it must not substitute its decision and must instead apply the statutory wording to decide whether in all the circumstances the Respondent acted fairly and reasonably. The Tribunal has considered the legal tests as set out above in considering this issue.
273. Ms Graham, as the dismissing officer, was of the view that each of the allegations individually amounted to gross misconduct and in any event taken together the Claimant had committed gross misconduct.
274. Ms Graham believed that each allegation taken individually would have justified dismissal and that in any event the cumulative effect of the Claimant's actions justified dismissal.

275. The Tribunal must therefore consider each allegation separately and then the cumulative effect of the Claimant's conduct to answer the statutory question to determine the fairness of the dismissal.
276. In relation to allegation 1 the allegation heading is that there was "behaviour or conduct likely to bring the company into disrepute". The nub of this allegation was that the Claimant, who was general manager responsible for ensuring right to work checks were correctly carried out, had failed to ensure the appropriate processes were followed and as a result there was a risk of reputational damage.
277. The behaviour and conduct relied upon was the failure of the Claimant upon his return from holiday to ensure the relevant checks had been carried out in relation to those staff who had joined during his absence.
278. There were 3 issues in this regard.
279. Firstly one employee had joined and the correct documentation had not been obtained.
280. Secondly an employee had joined whose ID documentation had been copied but this had not been verified appropriately and was not legible on the copy.
281. Thirdly an employee's surname had not been properly recorded on the system (and so his name did not match the ID documentation held).

282. The Respondent took right to work processes with the utmost of seriousness and various communications had been issued to the Claimant underlining the importance of compliance with the rules, and noting disciplinary sanctions in the event of noncompliance. Ms Graham's view was that the risk of reputational damage in the event that the said breaches were discovered would be high. As Mr Bownes had submitted the authorities recognise that an employer is entitled to take into account the risk of reputational damage occurring as a result of an employee's misconduct even if the worst case scenario does not happen.
283. The Tribunal finds that Ms Graham's decision to uphold this allegation and conclude that it amounted to gross misconduct fell within the range of reasonable responses open to an employer. A reasonable employer faced with the particular facts applicable to this allegation could have so acted. A reasonable investigation had been carried out and the Claimant's response had been fully considered.
284. The Tribunal has carefully considered the Claimant's evidence in relation to the steps he had taken in connection with each issue under this allegation. While he did take corrective action, and while not every employer (or the Tribunal) would necessarily regard this as serious as the Respondent did, the Tribunal has concluded that a reasonable employer could view the failure by the Claimant at the time in the circumstances as gross misconduct.
285. Mr Briggs argued that it was not reasonable to conclude that there was the potential for reputational damage. The Tribunal does not accept that proposition. The emails issued by the Respondent (at pages 264-267) make it clear what can happen if incorrect right to work documentation is obtained. While some may view these failures as administrative, it is likely that the Respondent's reputation would be at risk if the failures were discovered. The Tribunal concluded therefore that the Respondent acted reasonably in its conclusion in this regard.

286. The nature of the Respondent's business and the very clear approach it takes to ensuring compliance with the rules in this area could not have been clearer. The Claimant knew the seriousness of this issue and the consequences that could flow from a failure to follow the rules. The Claimant accepted that for one of the employees in question his failure to check the position was serious. Compliance with the rules was of the utmost seriousness to the Respondent and the Claimant's failure to follow the rules was reasonably considered to amount to gross misconduct.
287. The second allegation is entitled "falsification of documents or records".
288. This allegation relates to the Claimant's admitted failures to sign the safe checks at the time he carried out the checks. Seven occasions were discovered when he had been reminded by junior staff to sign the checks.
289. The Respondent's policy in this regard is clear and requires checks to be signed at the time of checking. There are compelling commercial reasons for doing so, including the need to ensure accountability for the money within the safe at all times. The rules protect employees and the business.
290. When asked why "falsification" was used, the investigator's position was that the documents had been retrospectively signed and therefore falsely suggested it had been signed on the day in question.

291. The disciplining officer in examination in chief stated that the document had not been completed correctly which was something that had been identified in previous audits.
292. In cross examination when asked whether there was an element of dishonesty in the term "falsification" Ms Graham explained that there was as the document was being signed after the date when the check was carried out. Ms Graham accepted that there was no intent to deceive but that the procedure was clear and a failure to sign when the check was done meant it was not possible to be sure the figures were correct at the time of checking.
293. In cross examination when Ms Graham was asked whether she accepted the checks were done and the signature followed on a later date or whether the check was not done and the signature still followed, she said that she assumed the checks had not been done. Ms Graham said she would need to reread the minutes to determine this (and did not do so while giving evidence).
294. When asked in cross examination what the basis for believing that the safe had not been counted was, she again was unable to answer without checking the minutes (which she did not do when giving evidence).
295. In re-examination it was put to Ms Graham that there was in fact evidence that the safe check had in fact not been done by the Claimant. During the investigation meeting (page 127) the Claimant was told that there was one example where the Claimant had not done the check. During the disciplinary hearing (at page 163) the Claimant admits that he did not complete the check on "the 25th".

296. Ms Graham's outcome report (page 200) states:

"Richard admitted to failing to complete safe checks and handovers in line with policy and ensuring documentation was completed correctly at the time in question. ... Completing the documentation at a different time is viewed as falsification."

297. This issue had been identified in previous audits.

298. There is no mention in the outcome report of the fact that Ms Graham concluded that the Claimant had not in fact completed the checks on the day in question, although she stated in cross examination that she had that belief. The report notes that Ms Graham concluded that the Claimant had not completed the safe check paper work at the time it was created which, itself, was a serious breach of the Respondent's policy.

299. She concluded that this amounted to gross misconduct. The Tribunal is satisfied that the nub of this allegation is that the Claimant failed to sign the checks at the time of carrying out the checks, a fact he admitted. The term "falsification" is open to interpretation. The Claimant stated at the disciplinary hearing (page 163) "Fully understand it is counted as fraud. Didn't understand this at time but do now." The Claimant accepted that fraud was not a term that the Respondent had used.

300. The Tribunal has considered all the evidence in connection with this allegation. It was clear that the Claimant understood the underlying facts in connection with the allegation. The Claimant knew the allegation was, namely that he had signed the safe check sheets days after the check was done, with his signature post dating the date of the check.

301. If the allegation had been that the Claimant had not carried out the checks, and had thereby falsified the records, the Tribunal would have accepted Mr Briggs's submission that the decision to uphold the allegation would have been unreasonable. The disciplinary hearing (and investigation) focused on the fact the Claimant had not signed the checks on the days the checks were done. That was what the allegation related to.
302. On balance, the Tribunal is satisfied that upholding the allegation was reasonable. While Ms Graham had concluded that the Claimant had not carried out the safe checks, Ms Graham concluded that the failure to complete the paperwork in itself (which was admitted by the Claimant) (which is termed "falsification of documents") amounted to gross misconduct. That was a reasonable decision in all the circumstances.
303. The Tribunal took into account the fact that a failure to complete the safe check document in itself would not by itself lead to a failed audit. On this occasion the Claimant had failed to comply with the policy on a number of occasions. This issue had previously been brought to the Claimant's attention and he had been advised to take corrective action. The Claimant accepted that this was not a one off failure.
304. The appeal officer's evidence was clear: this allegation related to the Claimant's failure to sign the checks at the time the checks were done, which he concluded by itself amounted to gross misconduct. While not all employers would have considered this to amount to gross misconduct, the test is whether a reasonable employer could have done so. The Tribunal is satisfied in all the circumstances that the decision to uphold this allegation, and conclude that it was gross misconduct, falls within the range of reasonable responses open to an employer

in the particular circumstances. A reasonable employer could have adopted the approach that the Respondent did to this allegation. The fact that Ms Graham concluded the Claimant had not done the checks did not alter the fact that the admitted failures to sign on the date in question was an act of gross misconduct.

305. The third allegation was termed "serious breach of company paperwork procedures". There were 4 issues arising in this regard.
306. Firstly the cabinet containing personnel files was unlocked on the day of the audit. A similar issue had been discovered in the December 2015 audit. This was unlocked on a day that the Claimant was not onsite. The Claimant was accountable to ensure his team complied with the rules.
307. Secondly the Claimant admitted that he had left an employee's right to work documentation in his in-tray. He said he had left the information there (rather than in a locked file) to remind himself to post it.
308. Thirdly the Claimant had admitted to not reviewing and signing the "actual v contract hours report" which was within the unlocked HR cabinet. This report identifies hours worked by staff. The report was an important part of the Respondent's administration to assess hours worked and related matters.
309. Finally the Claimant had admitted to not completing the safe checks on the days in question. The report notes that he had failed to do so on seven occasions over the last four months.

310. Ms Graham decided to uphold this allegation. Ms Graham's view was that this was a serious breach of data protection rules and the company's procedures.
311. The Tribunal is satisfied that the decision to uphold this allegation and to conclude that it amounted to gross misconduct was reasonable. The failure to review the report was a serious failure given the importance placed upon this report by the Respondent and the clear instructions that were given to (and understood by) the Claimant.
312. The Claimant was under pressure given the Performance Excellence issues and the amount of responsibility placed upon him but the paperwork procedures formed an essential part of his role. The Claimant understood how important it was to follow the relevant procedures.
313. One concern the Tribunal had was the fact that the auditor had concluded that "a number of RTW documents" were found "scattered around the office". No attempt was made to identify what the other documents were. Had this been the specific allegation, a reasonable employer would have made further enquiries as to the specific documents that were allegedly left around the office. The basis of this allegation in fact (and the basis upon which Ms Graham determined the allegation) related to the Claimant's admission that he left a personal document relating to an employee in his in-tray in his office and that the relevant report had not been reviewed by him. The fact that other documents may not have been properly secured was not relied upon to any material extent to dismiss the Claimant. The Tribunal was satisfied from the evidence before the Respondent that a reasonable employer could conclude that there was a serious breach of the Respondent's paperwork procedures.

314. It was reasonable to conclude that this failure, in light of the particular facts, amounted to gross misconduct.
315. The fourth allegation is headed "serious breach of company health and safety rules" and relates to an employee for whom the Claimant was responsible having been allowed to continue to work despite not completing the mandatory health and safety training. The Claimant had told the employee in question to complete the training (albeit after the time for completing the training had expired). The Claimant did not follow this up. Ms Graham concluded that by failing to ensure the mandatory training had been completed, and by allowing the individual to continue to work, the Claimant exposed the business to risk and failed to take appropriate action.
316. The Claimant knew how serious this allegation was and admitted in cross examination that allowing an employee to continue to work (and in this case serve the public) without completion of the mandatory training was serious.
317. The Tribunal has decided that upholding the allegation and concluding that it was gross misconduct falls within the range of reasonable responses. While not all employers would have so acted, the question is whether a reasonable employer in the particular circumstances could have done what the Respondent did and the Tribunal is satisfied that a reasonable employer would have done so.
318. The Tribunal has taken into account that the employee in question had completed a large part of the training. Nevertheless the Claimant knew that there was part of the training that had still to be completed. He knew this was the case and did not follow it up. Given the seriousness with which health and safety training is viewed by the Respondent, which was well known to the Claimant, it was reasonable for

the Respondent to conclude that the Claimant's conduct on this occasion amounted, on balance, to gross misconduct.

319. The final allegation is entitled "incitement of others to commit acts of gross misconduct". The label applied to the allegation bears little resemblance to what the allegation actually was, which was in essence by failing to comply with the Respondent's policies and procedures the Claimant was setting a bad example. Ms Graham upheld the allegation since it was clear that the Claimant had failed to follow procedures and had allowed his staff to see his failures in that regard. The Tribunal is not satisfied, however, that this amounts to incitement of others to commit acts of gross misconduct nor that the conduct relied upon justified a finding of gross misconduct. This allegation is essentially a consequence of the earlier allegations being upheld. It is unreasonable to impose a further sanction for the same misconduct. The Tribunal concludes that no reasonable employer would have considered this allegation, as drafted, as a separate act of misconduct. It is not reasonable to consider this allegation, by itself, as gross misconduct. The Tribunal considers that no reasonable employer would have upheld this allegation in the way the Respondent did.

320. The Tribunal notes that the Claimant did by his actions allow breaches of the Respondent's policies and procedures to take place, which, as has been decided above, were reasonably viewed as gross misconduct. The Claimant knew that one of his staff was submitting a report indicating that the relevant policies and procedures had been complied with when he knew that this was not the case. Nevertheless that would not reasonably be considered as incitement of others to commit gross misconduct, culpable as it was.

321. Taking the conduct of the Claimant as a whole, the Tribunal is satisfied from the evidence before the Respondent at the time, that a reasonable employer would

have concluded that the Claimant was guilty of gross misconduct, even if the final allegation is not considered.

322. As to outcome, Ms Graham considered dismissal as the appropriate outcome in all the circumstances. She did consider alternative roles but concluded that the nature of the Claimant's failures were so grave as to give her no confidence there would be no repetition.

323. The Tribunal considered this point carefully. Mr Briggs submitted that the Respondent had taken an unreasonable leap in upholding the failures to deciding that dismissal was an appropriate outcome. Ms Graham explained why she would have chosen to dismiss in relation to each allegation. She was satisfied that the risk to the business was too great to allow the Claimant to continue in any management role. That reasoning was echoed by Mr Marr in his conclusions. It was open to a reasonable employer in all the circumstances to reach those conclusions. The fact some employers would not regard the Claimant's failures as culpable as the Respondent did does not mean another reasonable employer would not reach a different conclusion.

324. Mr Briggs submitted that the Claimant's lengthy service ought to have been a mitigating factor. This is something the Tribunal has taken into account. Issues had previously been identified in audits that had arisen in the audit in question. The Claimant knew the relevant policies and procedures. The Respondent was entitled to take the length of the Claimant's service into account in the way that it did.

325. Some employers may have considered length of service as mitigation by itself but it was not unreasonable to take the Claimant's service into account as the

Respondent did. The Claimant was an experienced manager who knew the rules. He had applied them before and been warned about failure to comply where issued had arisen.

326. The Tribunal is satisfied that a reasonable employer could have dismissed the Claimant in the circumstances. The Tribunal is satisfied that for each of the four individual allegations which the Respondent reasonably concluded amounted to gross misconduct, would themselves justify dismissal.
327. The nature of the Respondent's business and the surrounding circumstances are such that the failures were reasonably considered of sufficient seriousness individually to justify dismissal even taking account of the mitigation that was present and taking account of all the points raised by the Claimant.
328. The Tribunal has concluded that the Claimant's conduct as established in terms of allegations 1, 2 3 and 4, was reasonably viewed as conduct justifying dismissal of the Claimant in all the circumstances taking account of the size and resources of the Respondent and determining the matter in accordance with equity and the substantial merits of the case.
329. The Tribunal carefully considered the submissions on behalf of the Claimant in reaching this decision. It was argued that some of the breaches were relatively minor in nature and that dismissal was severe. The Tribunal has taken into account the nature of each of the breaches and the policies and procedures of the Respondent and the particular facts of this case. The Tribunal has concluded that the Respondent was entitled to conclude the Claimant's conduct in relation to allegations 1, 2, 3 and 4 was reasonably viewed as gross misconduct justifying dismissal individually and cumulatively.

330. Mr Briggs submitted that the decision of Mr Marr to hear the appeal rendered the decision to dismiss unfair. There was a delay in seeking an appropriate manager to hear the appeal. Mr Marr agreed to hear the matter. Subsequent to this decision, Ms Graham was appointed Regional Operations Director and in effect became the Mr Marr's line manager.
331. It was put to Mr Marr in cross examination that he was being asked to consider overturning the decision of his line manager and that this was unfair. His response was that he would make his own decision and he would not be influenced by Ms Graham. The Tribunal accepted that evidence.
332. It was also put to Mr Marr that the Respondent is a large business such that there were many others who could have heard the appeal who had no connection with the persons involved. Mr Marr said that at the time he agreed to hear the appeal Ms Graham was not his line manager. Mr Marr said that he considered the matter carefully and he was certain he would hear the appeal fairly.
333. The length of the appeal hearing and the detailed information that was considered and examined and analysed and the approach Mr Marr took in relation to the appeal, coupled with the evidence Mr Marr gave, supports Mr Marr's position.
334. The Tribunal has considered Mr Brigg's submissions on this point carefully in light of the evidence and the statutory test. His position was that the Mr Marr's decision to proceed and hear the appeal renders the decision to dismiss unfair.

335. He argued that there is no evidence that supports a finding that an appeal officer who was not involved in the case would have reached the same outcome and therefore the decision to dismiss is unfair. Equally there is no evidence that supports a finding that the decision would have been different.
336. The Tribunal has had regard to the ACAS Code in this regard. The Code states that (at para 27): "The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case." This was followed in the present case. There was no suggestion that Mr Marr was previously involved in the case prior to being appointed as the appeals officer.
337. The ACAS Guide to Discipline and Grievances at work (2015) under the "Provide employees with an opportunity to appeal" heading and under the subheading "What should an appeals procedure contain" heading states that "wherever possible provide for the appeal to be heard by someone senior in authority to the person who took the disciplinary decision and if possible someone who was not involved in the original decision".
338. The Tribunal has also taken into account natural justice and the overriding requirements of fairness and considered the evidence and submissions carefully.
339. While no authorities were presented on this point, ultimately the decision to dismiss must fall within the range of reasonable responses: was the decision to dismiss reasonable in all the circumstances?

340. An appeal is an important part of the Respondent's decision to dismiss and the fairness of the appeal process must be considered when deciding upon the statutory test underpinning unfair dismissal.
341. While an appeal can potentially cure defects that existed in relation to the original decision to dismiss, it is possible for an unfair appeal to render an otherwise (potentially) fair dismissal unfair.
342. Ultimately the question for this Tribunal is whether the Respondent in proceeding to conduct an appeal chaired by Mr Marr, against the decision of his then line manager, Ms Graham, led to an unfair dismissal.
343. In other words could a reasonable employer in the particular circumstances have allowed this situation to occur?
344. The Tribunal has carefully considered the evidence and the statutory test. A fair appeal hearing is an inherent part of a fair procedure.
345. On balance the Tribunal is satisfied that the fact Mr Marr heard the appeal was not unreasonable by itself and did not thereby result in the dismissal becoming unfair.
346. The Tribunal is satisfied in the particular facts of this case that the appeal officer fully and fairly considered the points raised by the Claimant and appropriately examined the substance of the allegations. The Tribunal was satisfied that the approach to the appeal in this case was reasonable.

347. The Tribunal is satisfied in the particular circumstances that a reasonable employer would have proceeded as the Respondent did in this case.
348. Given the Claimant's appeal was solely in relation to the severity of the outcome, most of the salient facts were not disputed and that no materially different evidence was introduced upon appeal, the Tribunal is satisfied that the approach taken by the Respondent in connection with the appeal was reasonable. The decision taken by Mr Marr was carefully considered and detailed. The decision fell within the range of reasonable responses open to an employer facing the particular circumstances of this case.
349. While it would be best practice to ensure that the person hearing the appeal is more senior to the person whose decision is being considered, the facts in this case have resulted in the Tribunal deciding that the approach taken by the Respondent, and the decision to dismiss in all the circumstances, was fair, falling within the range of reasonable responses open to an employer in these circumstances.
350. The conduct of the Claimant that was relied upon in relation to each of the 4 allegations that were reasonably upheld was clear, as was the Respondent's approach to the issues in terms of their policies and procedures. The evidence from the Respondent in terms of their culture in terms of their approach to dealing with the issues was clearly established. The Respondent placed the utmost seriousness upon compliance with the relevant policies and procedures. The evidence in connection with the right to work process was very clear and this was a major issue for the Respondent as evidenced by the emails that had been issued by senior management. The need for consistency across the Respondent was also relied upon by the Respondent.

351. In all the circumstances, the decision to dismiss therefore fell within the band of reasonable responses and was fair (procedurally and substantively). The claim of unfair dismissal is therefore dismissed.

Wrongful Dismissal

352. The Tribunal must decide whether in fact the Claimant committed a repudiatory breach of contract that entitled the Respondent to summarily dismiss the Claimant. The issue is not just that the Respondent had a reasonable belief that the Claimant committed the misconduct.

353. The Tribunal is satisfied that the Claimant did commit the misconduct relied upon in terms of allegations 1, 2, 3 and 4. Indeed the Claimant admitted that he had done so. The Tribunal is satisfied that the conduct relied upon by the Respondent in terms of these allegations amounted to a fundamental breach of his contract and was sufficiently serious to amount to a repudiation.

354. The Respondent did not therefore wrongfully dismiss the Claimant. His dismissal was justified on the basis of his misconduct which amounted to a fundamental breach of contract. Accordingly he is not entitled to sums in lieu of his contractual notice.

356. It follows that the Claimant was not wrongfully dismissed and that claim is therefore dismissed.

Compensation

357. In the event that the Tribunal had found the decision to dismiss as unfair the Tribunal would have awarded the following by way of compensation.

Basic award

358. The parties had agreed that this would be £6,846 (14 x £489).

Compensatory award

359. It was accepted that the Claimant had mitigated his losses. He had 4 week's full wage loss (£625.37 net).

360. Thereafter the Claimant secured another role resulting in an ongoing shortfall. The Claimant accepted in his evidence that there was the potential for a wage rise at some point in the future which may have reduced the shortfall but this would at least have been one year away.

361. The Tribunal would have awarded a further 52 week's loss of £109.64 (net) per week.

362. The Tribunal was not satisfied that it would have been just and equitable to award any further losses given the degree of speculation involved.

363. It was possible that the Claimant may have secured another more remunerative role or that the wage differential may have disappeared. It was too speculative to award anything further by way of wage loss.

364. An award would have been made for loss of statutory rights in the sum of £400.

Grounds to reduce compensation

365. If the Tribunal had found that the dismissal was unfair due to procedural failures, the Respondent argued that dismissal would have been inevitable given the underlying evidence and the Claimant's conduct. The Tribunal would have been minded to accept that submission. The Tribunal would have considered Mr Briggs's submission that there were too many imponderables to say that a fair dismissal would definitely have followed. The evidence led by the Respondent identified a clear culture with regard to compliance with the Respondent's policies in this area. Its approach to right to work checks was beyond doubt. Compliance with the rules as to the safe checks and health and safety training was clear. It would have been difficult to see how the outcome would have been different in light of the Respondent's approach to each of the allegations that were reasonably upheld.

366. Having heard the parties' submissions in relation to contribution and in light of the (different) statutory tests in relation to the basic and compensatory awards as set out above, in light of the Claimant's conduct, the Tribunal would have concluded that a reduction of 100% would have been appropriate in all the circumstances. The Claimant's admitted failures caused his dismissal. The Tribunal would have accepted Mr Bownes's submission in this regard that the Claimant's failures were

serious and created real risk to the Respondent's business. Such a reduction would be just and equitable.

367. Mr Bownes argued that any compensation should be reduced due to the Claimant's failure to follow the ACAS Code. Mr Bownes argued that the Claimant had raised matters before the Tribunal that had not been put to the Respondent before and had they been raised (for example during the disciplinary or appeal hearing) the Respondent might not have dismissed.
368. The ACAS Code states (at para 26): "Where an employee feels that disciplinary action taken against them is wrong or unjust, they should appeal against the decision". There is no provision within the Code that could require the Claimant to raise each of the issues that the Respondent relied upon prior to the Hearing. The Tribunal would not therefore have reduced any compensation for this reason and Mr Bownes's submissions in that regard would have been rejected.
369. Had the Tribunal found that the Claimant had been wrongfully dismissed, it would have awarded damages for the duration of the 10 week notice period in the sum of 4 week's full loss (at £625.37 a week net) and 6 week's differential (at £109.64 a week net) with the compensatory award being reduced accordingly.
370. As the Tribunal has concluded that the decision to dismiss was fair, the claims are dismissed.

Observations

371. By way of general comment, the Tribunal notes that the Respondent's approach to setting out the allegations by way of a general heading and reference to an attached report was unclear.
372. The allegations were not set out in the correspondence with any degree of clarity or specification. Broad headings were used in the invite letter with reference to the investigator's report which summarised evidence and the approach taken. The report was not always clear in terms of the specific behaviour or conduct that was being relied upon. This gave rise to uncertainty. While the Tribunal was satisfied that the Claimant understood what the allegations were, given the way in which the hearings were conducted and the information that was presented, it is best practice to ensure have absolute clarity as to what each allegation means without the need to rely upon an interpretation of evidence or broad factual assertions.
373. Finally, the Tribunal wishes to formally record its thanks to both solicitors for their professional approach during the hearing and for their cooperation in terms of the overriding objective.

Employment Judge: D Hoey
Date of Judgment: 13 April 2018
Entered in register: 18 April 2018
and copied to parties