EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Ryall**

Respondent: **Rogerstone and Bassaleg Social Club Ltd**

Heard at: **Cardiff** **On: 14 February 2019**

Before: **Employment Judge S Davies (sitting alone)**

Representation:
Claimant: **In person (supported by her husband)**
Respondent: **Mr Henry**

JUDGMENT

It is the judgment of the Employment Judge sitting alone that the following claims are upheld:

1. unfair dismissal;
2. unpaid notice pay (10 weeks' pay); and
3. unpaid holiday pay (number of days to be quantified).

REASONS

1. Oral judgment with reasons was given at the conclusion of the hearing on 14 February 2019. Written judgment dated 15 February 2019 was sent to the parties on 16 February 2019. These written reasons are provided at the request of the respondent.

Hearing

2. I heard from Mrs Ryall and on her behalf from Mrs Collier, who was formerly a committee member at the Respondent social club (the Club). For the Respondent I heard from: Mr Colin Jones, Chair, Mr Mark Twohigg, Treasurer and Mr Garraway Berry, Secretary. I also read a witness statement from Mrs Fay Dixon, cleaner, which I placed little weight on because Mrs Dixon did not attend to give evidence.

3. It emerged during the hearing that witness statements had only been exchanged between the parties late the previous evening, 13 February 2018, in breach of tribunal orders. As a litigant in person, I checked with the claimant whether she was able to continue and, after a short break for her to review the statements, she confirmed she was ready to proceed with cross examination.

Factual background

4. The Claimant was a cleaner at the Club for around 14 years, commencing employment in July 2006. She was also a co-opted committee member for a period of 6 years, resigning at around the same time that she submitted a grievance against Mr Berry.

5. The Club is run by a committee of volunteers. Around the time of the disciplinary process there were approximately 10 committee members.

6. There were no live formal warnings on the Claimant's employment record with regards to the standard of her work. Mr Berry gave a warning to the Claimant in 2017, but this was not properly issued as it was not referred to the committee. Mr Berry took matters into his own hands and said during evidence that the Claimant should have been sacked at that point.

7. The Claimant's contract of employment (pages 30-41) provides for a contractual grievance and disciplinary procedure (page 34-40). The contract states, at page 37, "prior to the disciplinary hearing the club will provide you with a copy of the evidence that it intends to rely upon in good time prior to the disciplinary meeting". It also states, "no employee will be dismissed for a breach of discipline except in the case of gross misconduct". The possibility of dismissal without notice is included (page 39) and examples of gross misconduct include 'abusive conduct' (page 40).

8. A discussion took place between the officers and the Claimant and her cleaner colleague, Mrs Dixon, on or around 21 May 2018 to discuss what the Respondent says were concerns with regard to the cleanliness and standard of cleaning at the Club. The Claimant disputes that any issues were raised with her about the standard of her cleaning but recalls there

was a general discussion about performing a deep clean. There are no records of this meeting; the Secretary, whose role includes taking minutes, was not in attendance.

9. At some point in early June 2018, the Claimant spoke verbally to Mr Twohigg about her concerns regarding Mr Berry. She was asked by Mr Twohigg to put those concerns in writing and she did so, in a 3-page grievance letter dated 14 June 2018. The contractual grievance process was not complied with, there was no meeting with the Claimant to consider her grievance or to understand her desired outcome. There was no investigation meeting with Mr Berry, who said in evidence that he was unaware of the contents of the grievance letter.

10. The grievance was discussed at a committee meeting. Mrs Collier can remember the grievance being mentioned at committee but could not recall the outcome. I accept Mr Berry's evidence that he left the room when the grievance letter was read out at committee, even though that was not in the witness statements of the Respondent. The only correspondence sent to the Claimant about her grievance was a letter dated 9 July 2018 (page 52). The letter indicates that the officers will undertake further enquiries with regard to the grievance; this never happened. No formal grievance outcome was provided to the Claimant.

11. Mr Twohigg spoke with the claimant in the club on Friday 6 July 2018 to invite the her to a 'staff meeting' on the following Monday 9 July 2018. Mr Twohigg says he told the Claimant in passing that the grievance was not being taken further. The Claimant disputes this and says all she was told was that it would be discussed at the staff meeting on 9 July 2018. In light of the letter of 9 July 2018, I prefer the claimant's account.

12. Both the claimant and Mrs Dixon attended the 'staff meeting' on 9 July 2018 together. No minutes were taken. Mr Berry's evidence was that it was thought better that he did not attend the meeting because of the poor working relationships between him and the claimant.

13. In between times, Mr Jones and Mr Twohigg had reviewed the Claimant's contract of employment, which states that the Claimant's working hours are 'as required'. At the meeting on 9 July 2018, the officers sought to reduce the Claimant's working hours from 14 to 2 per week. No reduction was proposed in respect of Mrs Dixon's working hours. There is a dispute as to whether the Claimant was told that this was because of her relationship with Mr Berry, but there is agreement that the Claimant's standard of work was given as a reason.

14. The Claimant became upset, she admits that she swore at her colleague Mrs Dixon using words to the effect, "why didn't you fucking stand up for

me?" outside the meeting, during a break. She also accepts that she said the situation was "bullshit". The Claimant says she was very upset, and the Respondent says she was angry and abusive.

15. This incident led to the letter of 10 July 2018 (page 53) being sent inviting the Claimant to a disciplinary meeting. The letter mentioned gross misconduct but did not warn the Claimant that a possible outcome of the meeting was dismissal.

16. Mr Jones wrote some handwritten notes of what had happened on 9 July 2018 on or around the next day or so, but these were not provided to the Claimant in advance of the disciplinary meeting (nor were they disclosed in this litigation or in the bundle for the tribunal hearing).

17. The disciplinary meeting took place on 18 July 2018. All 3 witnesses for the Respondent at the Tribunal hearing were present at the meeting (notes at page 60). The Claimant asked if she could bring Mrs Collier as a companion, but that request was refused, as Mrs Collier was not a worker.

18. The conclusion of the disciplinary was that Mr Twohigg and Mr Jones felt that they were being called liars by the Claimant. It is minuted that when the Claimant sought written statements of what it was alleged she had done/said, this request was refused. When the Claimant asked for specifics of the allegation, the officers refused to provide it and said that they would not repeat the words used. Rather than putting the allegation to her, Mr Twohigg is minuted as requesting the information from the Claimant.

19. The letter of dismissal (page 56) is expressed as being with immediate effect from 18 July 2018. The Claimant was informed of her right of appeal, she exercised that right and her appeal was heard before other committee members; Mr D Jones and Mr W Blenkin, again with Mr Berry present to take notes (minutes at page 61).

20. During the appeal meeting, Mr Berry read aloud witness statements which had been provided by Mr Jones and Mr Twohigg after the disciplinary meeting had concluded. These statements (pages 62 and 63) were not provided to the Claimant in advance of the appeal meeting. The statements refer to 'foul and abusive' language but they do not include the precise words that the Claimant is accused of using. Mr Jones even says "I would not like to repeat such language" in his statement.

21. Mr Berry's evidence was that he took no part in the decision at appeal; he was present to take minutes. I did not hear evidence from the officers who did take that decision. The appeal outcome letter of 31 July 2018 (page 59) simply says that the decision to dismiss will stand; it provides no reasoning. As such, I am left without an understanding of how the appeal officers

reached their decision. Mr Berry said that the appeal officers felt the weight of evidence, 3 peoples' word against the Claimant, was such that they had to uphold her dismissal, but that is evidence from Mr Berry who did not take part in the decision.

22. The claimant was paid for part of her notice period (2 weeks to the end of July 2018), despite her dismissal being stated as being with immediate effect. Mr Twohigg said that this was in an effort by the Club to be fair to the Claimant, the Claimant disputes this and asserts it was because there was an error with the P45 issued to her.

Law

23. I apply for purposes of unfair dismissal, section 98 of Employment Rights Act 1996 (ERA). I also consider the test in ***BHS -v- Burchell*** and the standard applied to investigations in ***Sainsburys -v- Hitt***. The range of reasonable responses as to appropriate sanction in ***Iceland Frozen Foods -v- Jones.***

24. When it comes to the breach of contract claim (notice pay), the burden of proof is on the Respondent where full payment of notice has not been made (as in this case). I need to consider a 3-part test: the Respondent must show that the employee did the act that they rely on, that the act amounts to a fundamental breach of contract and that the dismissal was for that reason.

Conclusion

25. When considering the process adopted by the Club, I acknowledge that the committee act as volunteers. The only paid member of staff is Mr Berry. The respondent is a small organisation with limited resources. However, I balance that with the fact that all of the officers that gave evidence told me that they tried to comply with the ACAS Code on disciplinary and grievance. The Code is not an extensive document, being only a few pages long. Despite that and the fact the officers were aware of the Code, there were some significant failures to comply with it.

26. Paragraph 6 of the ACAS Code says, "in a misconduct case where practicable different people should carry out an investigation and the disciplinary". Mr Jones and Mr Twohigg were the accusers and decision makers at dismissal. No attempt was made at an investigation or neutral decision making process. There were around 10 committee members at the time of the disciplinary and appeal process and it would have been possible for the Club to have adopted a process with individuals who were not directly involved in the allegations.

27. Paragraph 9 of the ACAS Code says that if a disciplinary is required, the employee needs to be notified of that in writing, the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the disciplinary. It would normally be appropriate to provide copies of any written evidence and statements with that notification letter.

28. As well as failing to follow the ACAS Code, the Respondent failed to comply with its own contractual disciplinary provisions; the evidence of misconduct was not provided to the Claimant in advance of the disciplinary or the appeal meeting. The letter inviting the Claimant a disciplinary meeting lacked specifics of the words she was alleged to have used and, together with not sending any statements (which did not exist prior to the appeal meeting stage), hampered her ability to deal with the allegations against her. Both the officers involved indicated that they refused to repeat the words; effectively making it impossible for the Claimant to deal with the precise allegations.

29. The invitation letter failed to warn the Claimant that dismissal was a possible outcome of the disciplinary and therefore the Claimant would not have been fully appraised of the potential seriousness of the meeting in advance.

30. No investigation was carried out prior to the disciplinary meeting. The claimant was not asked for her version of events. Witness statements were not obtained from anyone prior to a disciplinary decision being taken. Statements were read out to the Claimant during the course of the appeal but were not provided in writing to the Claimant for her to consider prior to the appeal meeting. The Claimant, in evidence, voiced concerns that the statements she was read by Mr Berry at the appeal meeting were different to the written witness statements she was subsequently provided with. This is an understandable concern in the circumstances.

31. It is possible to cure defects in disciplinary process at the appeal stage, but because I did not hear any evidence from the appeal officers, I am unable to consider their reasoning. The appeal outcome letter is brief, it does not provide reasoning. Even if I were to consider Mr Berry's third-party evidence that the appeal officers took a decision on the weight of the evidence, I cannot ignore the lack of particularity in the allegations.

32. Mr Berry says he always takes notes at meetings, but it seems inappropriate and gives the impression of unfairness, that he was allowed to attend in a note-taking capacity when the Claimant had only recently raised a grievance against him that had not been dealt with. Mr Berry did not attend the meeting about reducing the claimant's working hours due to their poor working relationship and it seems inconsistent then to have allowed Mr Berry to attend the disciplinary and appeal meetings.

33. Whatever the true position as to the reasons for it, the fact that the Claimant continued to be paid after she was ostensibly dismissed for gross misconduct undermines the Respondent's position that her conduct was so serious that she should leave immediately or that dismissal should be without full notice pay.

34. There was a lack of evidence before me that the officers gave due consideration to the Claimant's length of service when taking the decision to dismiss her.

35. Insufficient notice appears to have been taken of the fact that the incident which sparked the disciplinary, occurred in circumstances where the Respondent was seeking to change the terms of her contract without notice. I note the contract of employment states that hours are 'as required' but it was the Claimant's unchallenged evidence that she had been paid 14 hours per week on a regular basis. The Claimant's response on 9 July 2018 was intemperate but more understandable in those circumstances.

36. The Claimant submitted that there was an ulterior motive to remove her from the Club, due to her poor relations with Mr Berry. It was submitted by the Respondent that the grievance really boiled down to a complaint that Mr Berry was nit-picking; I reject this submission. The grievance letter is 3 pages long and details wider concerns including adjusting her terms (hours), opposing her co-option onto the committee and Mr Berry lining up his own preferred candidate for the Claimant's job. The fact that Mr Berry admitted to giving the claimant a warning without reference to the committee and expressed his view that she should have been sacked in 2017, indicates to me a level of animus towards the Claimant on his part. The grievance was raised only a few weeks before the incident which led to the disciplinary. The committee said they would deal with it but never did. I consider the fact that the grievance was not properly addressed or concluded, is a fact from which I draw an inference that the grievance itself has affected decision making to dismiss the Claimant and that affects the fairness of the dismissal.

37. The Respondent submitted that the Claimant's case was implausible on the basis that her standard of work was poor and if the Respondent wished to sack her because of that they could have done so for performance reasons. Mr Twohigg's evidence in his witness statements was that he reviewed CCTV of the Claimant at work, yet none of this evidence was previously disclosed to the Claimant at all, let alone as part of a performance review or conduct disciplinary. The Claimant's said that the first she had heard of that piece of evidence was when she received the witness statements the night before the tribunal hearing. I am not persuaded by the Respondent's submission. Performance dismissals must follow a procedure and there

was no informal or formal warning with regard to the Claimant's performance on her record.

Notice pay

38. Turning to the breach of contract claim, the Claimant was paid for 2 weeks after her dismissal (page 70), which indicates that the Respondent did not view her conduct as fundamentally breaching her contract. Because of the deficiencies in the disciplinary process, it is not possible for me to say that she is guilty of the matters alleged against her. The Respondent's witnesses' accounts have changed over time. I do not take into account the particulars of what the Claimant is supposed to have said as set out in the Respondent's witness statements served on the Claimant last night, because those specific allegations were not put before the disciplinary or appeal meetings. It is not possible for me to reach the conclusion that the Claimant has breached her contract.

Holiday pay

39. As to holiday pay, this claim requires evidence and submissions from both sides. The Claimant asserts in her Schedule of Loss that she is due payment for 15 days holiday. I heard no evidence from the Respondent about this. The holiday year runs from January to January and a pro-rata calculation should be based on an effective date of termination of 18 July 2018. I made orders to the parties to deal with the holiday pay claim, which can be addressed at a remedy hearing.

Contribution

40. Whenever a Tribunal considers an unfair dismissal case, it is obliged to consider whether there is contribution by the Claimant to their dismissal. ***Nelson -v- BBC*** specifies that I must identify conduct that is culpable or blameworthy (the outburst on 9 July 2018) and that conduct needs to have caused or contributed to the dismissal. It must be just and equitable to make a reduction, which can be a figure of anything between 0 and 100%.

41. Although the grievance and the relationship with Mr Berry have affected fairness, I also consider that the claimant's outburst on 9 July 2018 has contributed dismissal. The particular circumstances on 9 July 2018 were that the Claimant was called into a meeting in the presence of her colleague and told that her hours are being reduced unilaterally and with no notice, there is significant context to the outburst which amounts to provocation of the Claimant. Things were said in the heat of the moment that might give cause for regret later, that said, in the circumstances I find it was culpable or blameworthy conduct to swear at a colleague/committee members. In all the circumstances a 10% reduction to awards is appropriate.

Employment Judge S Davies
Dated:11 March 2019

JUDGMENT SENT TO THE PARTIES ON

……16 March 2019……

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS