EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102121/2017

Held in Glasgow on 18 October 2018

Employment Judge: Ms R. Sorrell

Mr B McGhee	**Claimant** **In Person**
Ms J McPherson **t/a Ross's Original Bar**	**Respondent** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claims for unfair dismissal and holiday pay are well founded and are upheld.

COMPENSATION

(i) The claimant was unfairly dismissed by the respondent and the respondent shall pay to the claimant the sum of **£16,233.32 (Sixteen Thousand, Two Hundred and Thirty Three Pounds and Thirty Two Pence).** This is made up of a Basic Award of **£5,400 (Five Thousand, Four Hundred Pounds)** and a Compensatory Award of **£10,833.32 (Ten Thousand, Eight Hundred and Thirty Three Pounds and Thirty Two Pence)** .

(ii) The Employment Protection (Recoupment of Jobseekers Allowance and Income Support and Universal Credit) Regulations 1996 apply to this award. The prescribed element of the award is **£666 (Six Hundred and Sixty Six Pounds)** and relates to the period from 3 March 2017 to 19 May 2017. The monetary award exceeds the prescribed element by

£15,567.32 (Fifteen Thousand, Five Hundred and Sixty Seven Pounds and Thirty Two Pence).

(iii) The claim for notice pay is upheld and the respondent shall pay to the claimant the sum of **£2,997 (Two Thousand, Nine Hundred and Ninety Seven Pounds).**

(iv) The claim for holiday pay is upheld and the respondent is ordered to pay to the claimant the sum of **£199.80 (One Hundred and Ninety Nine Pounds and Eighty Pence)**.

REASONS

Introduction

1. The claimant has lodged claims for unfair dismissal and holiday pay. He confirmed that he sought compensation only.

2. A Preliminary Hearing was held on 6 February 2018 at which EJ Eccles determined that the Tribunal had jurisdiction to consider these claims.

3. The Final Hearing was scheduled for 19 July 2018. The respondent did not appear and was not represented. EJ McPherson adjourned this Hearing and ordered that it be rescheduled. In his reasons, EJ McPherson noted that the respondent was subject to a Sequestration Order dated 19 May 2017 and that all correspondence should be copied to Mr Patullo of Begbies Trainor who was appointed as the respondent's Trustee.

4. As the claimant was a party litigant, the procedure for this Hearing and the Overriding Objective was explained to him at the outset of the proceedings.

5. The claimant lodged one bundle of productions.

Findings in fact

6. The following facts have been admitted or found by the Tribunal to be proven:

7. The claimant's date of birth is 17 September 1957.

8. The claimant commenced employment with the respondent on 3 March 2008 as a General Manager. He worked approximately 40 hours per week. His gross weekly wage was £400.

9. The respondent company was a bar premises in the city centre of Glasgow that also served food throughout the day.

10. As General Manager, the claimant was responsible for opening and closing the business premises, staff training and recruitment, stock taking and order, banking reconciliation, health and safety and the overall promotion of the business.

11. For the majority of his employment, the claimant had a good working and personal relationship with Ms McPherson. They were both authorised to make payments from the respondent business.

12. The claimant would be asked by Ms McPherson to transfer funds from the respondent business to accounts unrelated to it such as to her sister and to a charity shop that Ms McPherson had acquired about 3 years ago. (D19) Monies from the business were also accounted for in different ways and sometimes not at all depending on the type of payment or till being used. This made it impossible for the claimant to reconcile the cash flow. He was also not fully aware of the outstanding liabilities of the respondent business as he was not party to all of them. This included 'HMRC' because it was under the respondent's name and they would not discuss it with him. There were also occasions when the respondent had insufficient funds to pay respondent bills and the claimant had used his own personal funds to pay them as well as

paying for the respondent's own personal mortgage. Ms McPherson had previously been made bankrupt in respect of another business.

13. On 29 September 2016, the claimant returned from holiday to be called to a meeting with Ms McPherson and her friends, David Brown and Karen Crawford. He was given no prior notice of the meeting. The claimant was shown and asked about correspondence from 'HMRC' regarding outstanding tax liabilities and returns, correspondence from 'NPower' in relation to an electricity debt, monies owed for the public performance licence and a letter from Sheriff Officers, 'Walker Love' in respect of non-domestic rates due. Ms McPherson would have known previously about these outstanding liabilities.

14. It was agreed at this meeting that Ms Crawford, who worked for the Royal Bank of Scotland, would take on the responsibility of organising payment plans and thereafter be responsible for payment of all the bills. The claimant was not provided with any written confirmation of the outcome of this meeting.

15. After this meeting, the claimant met with Ms McPherson in October 2016 and provided her with a list of all outstanding bills for the respondent business. Nothing further was said to the claimant in relation to the matter.

16. In November 2016, Ms McPherson acquired a pub in Paisley as another business outlet. Staff and monies from the respondent company were used for this business.

17. On 31 January 2017, the claimant was written to by David Brown as follows:

> *"Dear Brian,*
>
> *This letter confirms that we would like you to attend a disciplinary hearing at Ross's Bar on Friday 3 February 2017 at 11am. The hearing will be chaired by David Brown and a representative from our external HR provider will also be in attendance.*

The purpose of the hearing will be to discuss your alleged gross misconduct, specifically it is alleged that you grossly failed in your responsibilities in the day to day management of Ross's Bar; that you failed to exercise due care and attention and that you deliberately misled management in regards to the payment of overhead liabilities. Please note, we reserve the right to add to or amend these allegations.

You have the right to be accompanied at the hearing by a fellow worker, a trade union official or a trade union representative (who has been certified by their union as being competent to accompany a worker) if you so wish. Your companion will, if you wish, be able to put your case; sum up your case; and respond on your behalf to any view expressed at the hearing.

He/she will also be allowed to confer with you during the hearing. However he/she will not be able to answer questions on your behalf.

Depending on the facts established at the hearing, the outcome could be that you are summarily dismissed from your employment, but a decision on this will not be made until you have had a full opportunity to put forward everything that you wish to raise and the hearing has been concluded.

Yours sincerely,

David Brown." (D21)

18. The claimant contacted his Trade Union representative, Mr McDonald who requested from Mr Brown all relevant documentation in relation to the disciplinary hearing. The documentation provided were up-dated utility bills from the same companies that were shown to the claimant at the meeting on 29 September 2016 (D11). The claimant was not provided with any written statements or the respondent disciplinary policy.

19. On 10 February 2017, Mr Brown sent the claimant a text requesting that he not attend work for any shifts until the date of the meeting (D10). The claimant was not included on the staff rota for the week commencing 13 February 2017. (D17) The claimant's suspension on full pay during the disciplinary procedure was confirmed in writing by Mr Brown to the claimant on 15 February 2017. (D22)

20. The disciplinary hearing was heard on 21 February 2017 after being rescheduled on a number of occasions.(D22)

21. At the disciplinary hearing, the claimant was accompanied by his Union representative. Mr Brown chaired the hearing. Ms McDevitt, who was employed by the respondent's solicitor, was also in attendance as the external Human Resources representative and note-taker. Mr Brown put Ms McPherson's allegations to the claimant regarding his management of the respondent's finances. These allegations were not restricted to the documentation given to the claimant prior to the hearing. The hearing lasted about an hour.

22. After the hearing and in response to the claimant's request, Ms McDevitt provided a copy of her handwritten notes of the meeting to him. (D12) The claimant was not given a formal minute of the disciplinary hearing.

23. On 28 February 2017, Mr Brown wrote to the claimant as follows:

> *"Dear Brian,*
>
> ***Notification of summary dismissal***
>
> *Following the disciplinary hearing held on Tuesday 21 February 2017, I am writing to inform you of the outcome of the hearing. It has been decided that, in view of the seriousness of this matter, your employment*

with Ross's Original Bar should be terminated for gross misconduct without notice and without any warnings.

The reason for your dismissal is that the following allegations have been substantiated against you: that you have grossly failed in your responsibilities in the day to day management of Ross's Bar; that you failed to exercise due care and attention and that you deliberately misled management in regards to the payment of overhead liabilities.

At the outset of the hearing, your union representative asked that the following be noted regarding my previous letter of 15 February 2017: that in relation to the wording of the first paragraph, your refusal to proceed with the previous disciplinary hearing was due to your view that the venue was not private and confidential; that in relation to paragraph 6, you did not recall any investigation being conducted; and that as detailed in paragraph 7, the word 'suspension' had never been used to you before the letter, albeit you were aware of your suspension as it had been implied during earlier correspondence.

In response to your point regarding the investigation, whilst it is accepted that there was no investigation meeting held with you, an investigation was undertaken by way of collating the relevant financial documents, copies of which were provided to you in advance of the hearing.

At the hearing, you denied the allegations that had been made against you with your initial response being that you did not see what the investigation documents had to do with the allegations as there was nothing in there to indicate that you were responsible for paying the bills. Despite this statement, you later conceded that you were in fact responsible for paying the pub's bills as part of your managerial duties. However, you stressed your view that although Miss McPherson was entitled to delegate the management of the pub's finances to you, the

overall financial responsibility for the business should lie with her as the owner of the pub. You also said that you had used £5,500 of your own personal money to keep the pub afloat; you said that on two occasions, you had given £500 to pay Ms McPherson's mortgage as there were no funds available in the pub, that you paid £2,300 to Npower and £1,200 for catering equipment. Although you made clear that this money had never been returned to you, I found it odd that you did not state at any point that you were expecting this money to be paid back to you. Furthermore the company denies that you made any such payments under the circumstances which you have described.

When asked why you had failed to submit the VAT returns for the periods 5/16, 8/16 and 11/16, you stated that they had not been filed because Ms McPherson had taken the documentation from you just before the first return was due and so you assumed that she would be taking care of it and therefore it was not your responsibility.

When asked about the outstanding debt to HMRC, you stated that you consistently made a monthly payment of £3,000 but you said that you had never been aware, or endeavour to find out, the total outstanding amount owed to HMRC.

You were then asked why you had not kept up to date with the payment of the rates, which resulted in sheriff officers attending the premises; and you were also asked why you failed to make payments to district council for the emptying of the pub's bins which had resulted in notification that the bins were to be taken away. You refused to answer these questions as you said there was no mention of these situations within the investigation documents. However, later in the hearing, you said that you had made it clear to Ms McPherson that another payment plan for the rates would need to be put in place.

You were asked if you had ever told staff not to tell Ms McPherson if sheriff officers turned up at the premises, which you categorially denied.

In relation to the allegation that you had misled management regarding the payment of overhead liabilities, you denied that you had ever misled Ms McPherson, stating that the two of you had a meeting on your own at the beginning of October and that during this meeting, Ms McPherson asked you to list all of the debts that the pub owed, which you stated that you did. You said that the outcome of this meeting was that Ms McPherson calculated that the pub needed to bring in £15,000 gross, just to pay its debt. However, upon further investigation after the disciplinary hearing, I put this to Ms McPherson who is adamant that no such meeting occurred in October, but, in fact, a meeting did occur sometime in July. Ms McPherson's version of events is that at no point during this meeting did you make her aware of the extent of the pub's financial issues but rather you discussed that there had recently been a shortfall in the pub's takings and that you discussed strategy in respect of increasing the takings.

It was put to you that Ms McPherson's version of events significantly contrasted to yours in that her position was that you had never informed her of the full extent of the pub's debts and failures to meet repayment plans but that you had always assured her that everything was up to date and always paid. Your response to this was that you had no idea as to why your versions of events differed so greatly.

You accepted that you had access to the bank statements but you said that you did not pay much attention to them. You also said that you were never aware of the total debt figures for the accounts for which you had arranged repayment plans, including HMRC as mentioned above. Notwithstanding the fact that I find these to be deeply troubling statements from a manager who has significant financial responsibilities for a business, I cannot understand why, being aware

of the pub's financial issues as you were, you would not have checked the bank statements in order to ensure that funds were available to pay the bills. I believe that this is a prime example of your failure to exercise due care and attention. Furthermore I do not find it plausible that as manager of the pub, you would be unaware of the total debt liabilities for which you had arranged the repayment plans (the nature of a repayment plan is such that you must know the initial debt to allow a plan for its repayment to be agreed): that said, even if I was to accept your position in this regard, I would consider such actions to be wholly negligent in all of the circumstances.

While it is accepted that, Ms McPherson should have been more involved and diligent in the finances of the business, Ms McPherson considered you a trusted employee and friend, and therefore she did not have any reason to believe that you had failed to act in the best interests of her business or that you would mislead her in any way.

In considering all of the information and your responses, I was not persuaded by your explanations as I felt they were evasive overall, and at times contradictory. Consequently, I find that your actions amount to gross misconduct and I therefore have no alternative but to summarily dismiss you from Ross's Bar.

You have the right to appeal against your dismissal. If you wish to appeal, you must do so in writing to Karen Crawford at Ross's Original Bar, 78 Mitchell Street, Glasgow G1 3NA within one week of receiving this letter, stating your grounds of appeal in full.

The following arrangements apply with immediate effect (but may be varied or revoked in the event of a successful appeal):

A. *Your dismissal takes effect immediately and your final date of employment is therefore Wednesday 22 February 2017.*

B. You are not entitled to any period of notice or payment in lieu of notice.

C. You shall receive payment in lieu for any outstanding holiday entitlement as part of your final payment of salary. This shall be subject to normal deductions of tax and national insurance contributions.

D. Your final salary payment (for the period up to 22 February) will be made to you in the usual way subject to normal deductions of tax and national insurance contributions.

We shall forward your P45 to you in due course. If you have any questions, please do not hesitate to contact me.

Yours sincerely,

David Brown" (D14)

24. On 8 March 2017, the claimant wrote to Ms Crawford as follows:-

"Dear Karen,

Notification of appeal

Following an email dated 2 March 2017 received from Nicola McDevitt on behalf of David Brown regarding the outcome of my disciplinary hearing, I wish to advise you that I am appealing the decision reached by Mr Brown.

The grounds of my appeal are based on the following –

An investigation meeting should have been held involving myself and not just other people collating documentary evidence provided to me prior to my hearing. Evidence of the investigation that you wished to use against myself was not provided freely prior to the date of my first

scheduled disciplinary hearing, and in fact the meeting had to be postponed until the evidence you wished to be used could be gathered. An investigation should be a thorough fact finding exercise not simply producing bills. The fact that Mr Brown raised points of previous statements, and based his decision on statements from Ms Jane McPherson, none of these were produced as evidence prior to the meeting being held, nor were statements produced after the meeting to show the basis of his decision.

Re paragraph 4 – I find it beyond belief that on two occasions, I paid Ms McPherson's personal mortgage for her and she persists in totally denying this. A copy of my bank statement will indicate that £2,300 was paid to Npower and a copy receipt for £1200 for catering equipment will also show that this was paid by me, on behalf of Ross's Bar. At the meeting in October between myself and Miss McPherson, which she seems to have difficulty in recalling, I produced to her at that point a list of all monies owed, which she said 'I told you to take the money back for my mortgage', which I replied 'how was I supposed to do this when there was no money in the pub to do so'.

Re paragraph 5 – as Miss McPherson had the paperwork for periods 5/16, 8/16 and 11/16 – how could I possibly be responsible for submitting these to the accountant?

Re paragraph 7 – Miss McPherson knew clearly what the position was regarding the rates. On the advice of my trade union representative, the payment of council bins was not discussed as there was no prior warning that this would be raised at my disciplinary hearing. As stated in the ACAS Code of Practice, all allegations and evidence must be produced prior to the disciplinary hearing. This should have been raised during the investigation stage should it have formed part of the reason for my termination of employment, not merely thrown in at the disciplinary hearing.

Re paragraph 9 – Miss McPherson states that the meeting I held with her took place in July and not in October – surely if that is the case, then Miss McPherson knew about the pub's financial position three months prior to the date of the alleged meeting by her own admission. This was written clearly by Mr David Brown as a statement of Ms Jane McPherson in the disciplinary outcome letter, yet a further admission of guilt that Miss McPherson was aware of the financial difficulty the pub was in, yet seven months later we are in this position, where her debts have soared whilst the responsibility of paying these was placed in your hands as of the meeting on 29 September 2016.

Re paragraph 11 – I advised that as there was no money in the pub to be paid into the bank and that the only credits to the account would be credit and debit card payments made by customers, then the importance of checking bank statements was not a priority. Miss McPherson also set up the facility with TSB, that they would advise her when payments were due to be deducted from the account and it would be her responsibility to ensure there were sufficient funds lodged.

During the meeting I raised my concerns that I had been suspended for gross misconduct pending a disciplinary hearing at the start of February 2017 but:

1. *According to Miss McPherson, I sat with her and went over the finances of the pub in July.*

2. *On September 29th I sat at a meeting with Miss McPherson, David Brown and Karen Crawford. I was challenged about the debts owed to Npower, HMRC and Performing Rights Society. Miss McPherson advised that Karen Crawford would take over the responsibility of any payments due to these companies. Four*

months later I was suspended because I had not advised Miss McPherson about their debts.

3. *On Monday 17th October 2016 – Npower called leaving a note that they would be seeking a warrant to disconnect the electricity. Miss McPherson advised that I send a photo of this to Karen Crawford, which I duly did and have the evidence of – so on 17th October both Miss McPherson and Karen Crawford were aware of the seriousness of the debt owed to Npower.*

4. *Following the meeting held on 29th September 2016, where it was agreed Karen Crawford would take on the responsibility of paying the companies aforementioned, yet the letters produced as evidence of my misleading management are dated 19th December for HMRC, 10th January 2017 for Npower and 19th January 2017 for Glasgow City Council. All of these debts were raised after the responsibility was removed from me.*

5. *Please find attached a copy of the staff rota week commencing 13th February 2017. I had a disciplinary hearing scheduled for 14th February 2017 – yet you will notice that my name is not included on the rota. I wish to raise my concerns that a decision may have been preempted prior to my hearing. Copies of Miss McPherson's social media accounts, belittling my position within the company, have been copied and will be used henceforth if she can provide me with a copy of the company's social media policy.*

6. *Also attached is a copy of my wage slip week ending 24th February 2017 which you will notice was a payment of two days. My disciplinary hearing took place on Tuesday 21st February 2017 and I would put it to you, that again the outcome of the disciplinary hearing was preempted as a decision was not given to me until 2nd March 2017.*

7. *Further to the notes that I received from Nicola McDevitt – on two occasions David Brown asked why I did not do monthly conciliations of cash records against accounts and bank statements. I suggested that David Brown should ask Miss McPherson why they would never balance. As there was no response to this in the outcome letter, then I propose to you how I was meant to be able to balance a cash sheet and bank account when there was no clear visibility of what monies belonged where. Miss McPherson operated a separate till, that did not appear on cash sheets, these monies on average were £2,000 per week which were never declared by Miss McPherson. Shot money was procured which was never until recently rung through a till, but was paid directly into her personal bank account at her request. Monies from Ross's Bar were used to pay rent on Miss McPherson's charity shop, as and when these were available. Monies from Ross's Bar were used to pay several members of staff from both Ross's Bar, the charity shop and 42 New Street, which had no receipts signed for nor were these processed through the accountancy firm which looked after Ross's Bar's wages.*

8. *Had my job as a manager been solely of dealings with the sole accounts of Ross's Bar, then the financial burden wouldn't have been so hard upon Miss McPherson. However by trying to operate in effect three businesses from one income the end result was inevitable. This has been proven previously when Miss McPherson tried and failed to operate more than one business five years ago, which also resulted in Miss McPherson reaching a point of bankruptcy.*

9. *As this appeal is being written prior to receiving the minutes of disciplinary hearing, I reserve the right to raise any further points that were discussed at the hearing, but were not mentioned in David Brown's letter dated 28th February 2017.*

Yours truly,

Brian McGhee" (D9)

25. While the effective date of termination of the claimant's employment was 2 March 2017, the decision to dismiss the claimant was made before the disciplinary hearing. This is because in December 2016, Ms McPherson made a post on-line which ridiculed the claimant and indicated that she was seeking a new manager to start in January 2017. (D18)

26. The appeal hearing was scheduled for 19 June 2017. The claimant was subsequently advised in an email dated 13 June 2017 from Julie Barnett, the respondent's legal representative, that Ms McPherson had disappeared and that as a result she was instructed to hear the appeal on behalf of the landlord of the bar premises. On 16 June 2017 Ms Barnett further advised that Ms Crawford would be chairing the appeal hearing and that the landlord of the bar premises would be the claimant's employer until a new tenant was found.

27. On 16 June 2017, the claimant responded to Ms Barnett advising that he would decline the invitation to attend the appeal meeting scheduled for 19 June 2017 because his employer was Ms McPherson trading as Ross's Bar and not the landlord of the premises. (D16)

28. The claimant was only paid for two days work for the week commencing 20 February 2017 while he was suspended on fully pay, which is indicated in his wage slip dated 24 February 2017. (D6)

29. The claimant's annual holiday entitlement was 28 days which ran from 1 April to 31 March each year. During this period and up until his dismissal, the claimant took 8 days leave from Saturday 17 September 2016 to Wednesday 28 September 2016 and 6 days leave from Thursday 12 January 2017 to Friday 20 January 2017.

30. The claimant has made efforts to secure alternative employment since his dismissal. Immediately after his dismissal he registered with Partick Job Centre and has been seeking employment which involves working with the public. He has applied for numerous jobs. He has had two interviews for stock taking work and two interviews for care home assistant employment, but was not successful in obtaining any of these jobs.

31. The claimant secured temporary work with the Royal Mail between 4 December 2017 and 22 December 2017. He worked a 35 hour week and was paid £8.50 gross per hour.

32. The claimant has been in receipt of Universal Credit since the end of April 2018. He receives £57 per week. He has no other sources of income.

Relevant Law

Unfair Dismissal

33. The law relating to unfair dismissal is contained in Section 98 of the Employment Rights Act 1996 (the 'ERA'). It is initially for the employer to establish that the claimant was dismissed for a potentially fair reason, one of which is for "conduct", as set out in Section 98(2)(b) of the 'ERA.'

34. The leading case relating to conduct as a reason for dismissal is **British Home Stores v Burchell [1980] ICR 233.** This states that in order for an employer to rely on misconduct as the reason for dismissal, the employer must believe that the claimant was guilty of the misconduct alleged. The Tribunal must then ask itself whether there were reasonable grounds for this belief and at the time it formed that belief, that the employer carried out as much investigation into the matter as was reasonable in the circumstances. As per Arnold J : "The test and the test all the way through, is reasonableness and ... a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

Fairness of the Dismissal

35. If the employer succeeds in proving there was a potentially fair reason for the dismissal, then whether the dismissal is to be considered fair or unfair depends on whether, in the circumstances (including the size and the administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. This question has to be determined in accordance with equity and the substantial merits of the case (Section 98 (4) of the 'ERA') and includes an assessment of whether the procedure adopted by the employer was fair. It is now well established that a dismissal may be found to be unreasonable under Section 98(4) of the 'ERA' on account of an unfair procedure alone. This was the result of the decision in **Polkey v AE Dayton Services Limited [1988] ICR 143, HL**.

36. What has to be assessed is not whether the dismissal is "fair" to the employee in the way that is usually understood, but whether with the knowledge that the employer had at the time, the employer acted reasonably in treating the misconduct that he believed had taken place as a reason for dismissal. In **Orr v Milton Keynes Council (2011) IRLR 317** Aitkens LJ states at para 44: "The approach taken in these cases to the determination of the fairness of the dismissal concentrates on the conduct and state of mind of the employer immediately before and at the time of the dismissal. In substance it requires one to ask whether, when he took the decision to dismiss the employee, the employer had taken all reasonable steps to inform himself of the facts, whether, having done so, he formed the view on reasonable grounds that the employee had behaved in a way that justified his dismissal and, finally whether his conclusion that the conduct justified dismissal was itself reasonable."

37. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer, that the employer has therefore acted unreasonably. The well known case of **Iceland Frozen Foods Limited v Jones [1983] ICR 17, EAT**, makes it clear that there may be a "band of reasonable responses" to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different

response. In accordance with **J Sainsbury PLC v Hitt [2003] ICR 111, CA, t**he Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to the dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

Compensation

38. If the Tribunal find that the claimant has been unfairly dismissed, it can order reinstatement, re-engagement and/or award compensation.

39. The claimant has indicated in this case that he seeks compensation only. This is made up of a Basic Award and a Compensatory Award. The Basic Award is based on age, length of service and gross weekly wage (Section 119(2) 'ERA').

40. The Compensatory Award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal, insofar as that loss is attributable to action taken by the employer (Section 123(1) 'ERA'). This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate, and a figure representing losses such as statutory rights, benefits and pension loss.

41. If the Tribunal finds that the claimant's conduct has contributed to his dismissal, it can reduce the amount by such proportion as it considers just and equitable as set out in Section 123(6) of the 'ERA.' If the dismissal is found to be unfair on procedural grounds, it may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed, that a fair dismissal would still have occurred. This is known as a **Polkey** reduction. In such circumstances, the Tribunal must have regard to all relevant evidence, as set out in **Software 2000 Limited v Andrews & Others [2007] ICR 825**. The Tribunal can also reduce the Compensatory Award if the claimant has failed to mitigate their losses (Section 123(4) of the 'ERA').

Effect of Failure to Comply with ACAS Code

42. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), provides that if the ACAS Code of Practice entitled "Disciplinary and Grievance Procedures" applies and it appears to the Tribunal that the claim concerns a matter to which the Code applies; the employer has failed to comply with the Code in relation to that matter; and the failure was unreasonable, then the Employment Tribunal may, if it considers it just and equitable in all the circumstances, increase the award it makes to the employee by no more than 25%. There is a similar provision for reduction if the employee has failed to comply with the Code and the failure was unreasonable. The ACAS Guide, which complements the ACAS Code, reinforces the principle that the more serious the allegations against the employee, the more thorough the investigations conducted by the employer ought to be.

Breach of Contract

43. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee is able to bring a breach of contract claim to recover damages in respect of the contractual notice period. Damages in a wrongful dismissal claim will be limited to the employee's losses occurring during the period between the date of dismissal and the date at which the contract could lawfully have been brought to an end by the employer in accordance with the contractual notice period.

44. Section 86 of the Employment Rights Act 1996 sets out minimum periods of notice required to terminate a contract of employment. Where notice is given by an employer, the notice required is one week for employees who have been continuously employed for at least one month, but less than two years and one week for each year of service for employees who have been continuously employed for two years or more, up to a maximum of 12 weeks

for continuous employment of 12 years or more. If the contract provides for more notice, it is the longer notice period which prevails.

Holiday Pay

45. Section 27(1) of the "ERA" 1996 defines "wages" as "any sums payable to the worker in connection with his employment". Holiday pay is listed as a specific payment that is to be counted as wages. (Section 27(1)(a) of the 'ERA.')

Issues to be Determined by the Tribunal

46. The Tribunal identified the following issues required to be determined:-

i. Has the respondent shown the reason for dismissal?

ii. Is the reason for dismissal a potentially fair one?

iii. Did the respondent follow a fair procedure?

iv. Did the respondent's decision to dismiss fall within the band of reasonable responses?

v. If the claimant was unfairly dismissed, what remedy is appropriate?

vi. If compensation is to be awarded, how much should be awarded?

vii. Did the claimant cause or contribute to the dismissal and if so, it is just and equitable to reduce compensation?

viii. Were there any failures by either party to follow the ACAS Code and if so, were such failures unreasonable?

ix. Has there been a breach of contract by the respondent arising from the termination of the claimant's contract of employment in failing to pay adequate notice?

x. Has the claimant suffered a loss as a result of that breach?

xi. Is the claimant entitled to any outstanding holiday pay entitlement? If so, how much compensation should be awarded?

Conclusion

47. It was not in dispute that the respondent's reason for dismissal of the claimant was 'conduct' as set out in Section 98(2)(b) of the 'ERA.' The primary issues in dispute were whether the respondent met the **Burchell *("supra")*** test and whether in all of the circumstances it was within the band of reasonable responses for the respondent to dismiss the claimant for gross misconduct.

48. As the respondent did not appear at the Hearing, the only oral evidence heard was from the claimant. Overall, I found the claimant to be a credible and reliable witness who gave consistent evidence in a straightforward manner.

49. Having examined all of the evidence in the round and in applying **Burchell *("supra")***, I found that while the respondent believed that the claimant was guilty of the misconduct alleged, there were no reasonable grounds for that belief and that the respondent had not carried out as much investigation into the matter as was reasonable in the circumstances. In reaching this view I have taken account of a range of factors.

50. I found that the respondent believed the claimant was guilty of the misconduct alleged because it detracted from Ms McPherson's own failings in her financial responsibilities towards the business and potentially absolved her from any future obligation of making a sizeable redundancy payment to the claimant. As the owner of the business with previous personal experience of bankruptcy, I am satisfied that Ms McPherson would have known about the escalating debts and dire financial state of her business even if she had chosen to ignore them and the ramifications of that. I therefore found it incredible that she was unaware of the outstanding liabilities in respect of the bills produced at the meeting with the claimant on 29 September 2016 and

the updated versions of them provided to the claimant prior to the disciplinary hearing.

51. While the claimant accepted he was also responsible for management of the respondent's finances, I found his account credible that this became impossible to do. This is because he could not reconcile the finances due to funds regularly being transferred to Ms McPherson's other business interests, the way in which money was accounted for or not depending on the type of payment or till being used and that he was not party to outstanding liabilities where Ms McPherson was the only named account holder. In the claimant's own words, he was unable to manage the respondent's finances because the respondent was effectively "robbing Peter to pay Paul."

52. I further accepted the claimant's evidence as credible that the outcome of the meeting on 29 September 2016 was that Ms Crawford would take on the responsibility of organising payment plans and thereafter be responsible for payment of all the bills and that in October 2016, the claimant gave Ms McPherson a list of all outstanding bills for the respondent business.

53. I therefore found it extraordinary that five months later, without any further meeting with the claimant or formal investigation undertaken, the respondent requested the claimant to attend a disciplinary hearing in February 2017 in order to respond to generic allegations of gross failure in his management of the respondent finances and that the only specification of these allegations were updated bills from the same sources as those shown to him at the meeting of 29 September 2016. (D11)

54. Overall, I found the disciplinary process to be significantly flawed. The chair of the disciplinary hearing, Mr Brown and the chair who would have led the appeal hearing, Ms Crawford were both at the meeting of 29 September 2016 and so had direct involvement and knowledge of the discussion that took place and the outcome of it. Yet, there is no mention of this meeting by the respondent throughout the disciplinary process, which in view of it being about precisely the same issue, made it conspicuous by its absence. I further considered that their involvement in the disciplinary process was a breach of

the ACAS Code as they were both friends of Ms McPherson and not managers of the respondent business or indeed employed by it at all which, together with the unexplained absence of Ms McPherson throughout, led me to doubt the impartiality of the process as a whole.

55. Furthermore, in spite of the generic allegations contained within the invitation to the disciplinary hearing, the little that can be gleaned from the sparse notes taken at the hearing by Ms McDevitt, together with the dismissal letter, indicate that specific allegations were put to the claimant which he had not been given advance notice of. Moreover, as there had been no fact finding exercise undertaken prior to the disciplinary hearing, the particular allegations made by Ms McPherson were put to the claimant verbally by Mr Brown without any supporting witness statements or documentary evidence.

56. I am also of the view that it was more than likely the dismissal was pre-determined because of the post on-line by Ms McPherson in December 2016 about the claimant and her seeking a new manager which was made two months before the disciplinary hearing. However, I did not consider that the claimant being under paid for the week ending 24 February 2017 or that the claimant being excluded from the staff rota for the week commencing 13 February 2017 was further evidence in support of that as the disciplinary hearing was held in the same week as the underpayment and on 10 February 2017, Mr Brown sent the claimant a text requesting that he not attend for work for any shifts until the disciplinary hearing, which he subsequently confirmed was suspension on full pay.

57. In respect of an appeal against his dismissal, it was evident from the claimant's letter of 8 March 2017 that he wished to exercise that right and I found that his subsequent refusal to attend an appeal hearing because he did not accept his employer could be anyone but the respondent was entirely reasonable in the circumstances.

58. In applying **Iceland** ***("supra")*** and **Hitt** ***("supra")***, the role of the Tribunal is to determine whether or not the dismissal fell within the band of reasonable responses available to an employer. This test does not permit the Tribunal to

substitute its own view for that of the employer as to what is fair or not**.** As long as the employer's decision falls within this band of reasonable responses, it is a fair dismissal.

59. Taking into account all of the above circumstances and in applying **Orr ("supra")** to these facts, the Tribunal concluded that the dismissal was unfair and that it fell out-with the range of reasonable responses available to an employer.

60. I also considered that the dismissal was unfair on procedural grounds in accordance with the ACAS Code of Practice and specifically the following paragraphs:-

- Carry out any necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case (Para.5);
- Notification of a disciplinary meeting should contain sufficient information about the alleged misconduct to enable the employee to prepare to answer the case at a meeting (Para. 9);
- A decision to dismiss should only be taken by a manager who has the authority to do so (Para. 22);
- The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case (Para.27).

61. It is not the case that a failure to comply with the ACAS Code means that the dismissal is necessarily unfair. However, the Tribunal is bound to take its contents into account. The Tribunal considered in this instance that there were essential issues of unfairness in the respondent's disregard for aspects of the ACAS Code.

62. For all these reasons the dismissal was unfair.

Compensation

63. The claimant was seeking compensation only.

Breach of Contract

64. I found that the respondent has breached the claimant's contract in that notice pay was not paid to the claimant upon termination of his employment. This is because the process that led to the claimant's dismissal was significantly flawed and I could therefore not be satisfied that he was in material breach of his contract and that the respondent had sufficient grounds to summarily dismiss him for gross misconduct. In accordance with the claimant's length of service and Section 86 of the 'ERA,' he is therefore entitled to a notice payment of 9 weeks net pay. This is calculated at 9 weeks x net weekly pay at the date of dismissal as 9 x £333 = £2,997

Basic Award

65. In respect of the Basic Award the calculations are based on the claimant's age, length of service and his gross weekly wage. The claimant's gross weekly wage at the date of dismissal is calculated at £400.00. This is calculated at 13.5 weeks x £400 = £5,400. On these findings, I took the view that the claimant's conduct did not contribute to his dismissal and therefore it would be not be just and equitable to make a reduction to the basic award.

Compensatory Award

66. I considered that there should be compensation for loss of earnings up to the date of the Sequestration Order made in respect of the respondent business on 19 May 2017 because the claimant would not have been employed by the respondent after that date. There should also be compensation for loss of statutory rights. In respect of future loss, I considered that six months was a reasonable period on account of the claimant's age and the difficulties that he has already encountered in securing alternative employment. I further found that the claimant has mitigated his losses as he gave credible evidence that since his dismissal he has been active in seeking to secure alternative employment.

67. I found that a Polkey reduction did not apply in this case as in the event the respondent had conducted a fair procedure, it would still have not resulted in a fair dismissal. This is because on these facts the claimant was prevented from carrying out his financial responsibilities due to Ms McPherson's overall financial mismanagement of the business and therefore it could not be capable of amounting to a fair dismissal for gross misconduct. Furthermore, a reduction to this award on the basis that the claimant's conduct had contributed to his dismissal, would not be just and equitable on these facts.

68. The Tribunal considered that there had been an unreasonable failure on the part of the respondent to comply with the ACAS Code and that a 20% uplift was just and equitable under Section 207A of "TULRCA" because of the significant nature of these breaches.

69. The Tribunal has calculated the compensation as follows:-

70. The Compensatory Award is made up of net loss of earnings, from 3 March 2017 to 19 May 2017 at 11 weeks x £333 = £3,663. The Tribunal has deducted from this figure the claimant's net notice payment of £2,997. This gives a total net loss of earnings of £666 (3,663 – 2,997). In respect of future loss, the Tribunal has awarded six months x £1,443 (net monthly wage) = £8,658.The Tribunal has deducted the claimant's net earnings of £796.23 from his temporary employment at Royal Mail in December 2017. This gives a total of £7,861.77 (8,658-796.23). The claimant is awarded £500 for loss of his statutory rights. The total Compensatory Award before adjustments is £9,027.77 (666 + 7,861.77 + 500).

71. The increase under Section 207A of "TULRCA" at 20% is 20% of £9,027.77 = £1,805.55, giving a total Compensatory Award figure of £10,833.32 (9,027.77 + 1,805.55).

Holiday Pay

72. This has been calculated on the basis that the termination date of employment was 2 March 2017 and that the claimant was entitled to 26 days annual leave from 1 April 2016 to 2 March 2017. As he took 14 days leave during that

period, at the date of dismissal he was entitled to 12 days holiday pay. After his dismissal, the respondent paid the claimant a further 12 days pay from 3 March to 10 March 2017. Of these 12 days, I have calculated that 3 of the days were for the underpayment of the claimant's wages in respect of the week ending 24 February 2017 while he was suspended on full pay and that the remaining nine days were for holiday pay. This means that the claimant is still due 3 days holiday pay from the respondent. As the claimant was paid £66.60 net pay per day the total holiday pay due is therefore £199.80 (3 x £66.60)

Recoupment Regulations

73. As the claimant has been in receipt of Universal Credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it. In the meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds, if any, the prescribed element. The balance, if any, falls to be paid once the respondent has received the notice from the Department for Work and Pensions.

Employment Judge: R Sorrell
Date of Judgment: 13 November 2018
Entered in register: 14 November 2018
and copied to parties