



EMPLOYMENT TRIBUNALS

Claimant: Mr J Butcher

Respondent: The Yarmouth (Isle of Wight) Harbour Commissioners

Heard at: Southampton

On: 1 & 2 May 2019

Before: Employment Judge Maxwell

Representation

Claimant: Mr Blitz, Counsel

Respondent: Mr Sheppard, Counsel

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is well-founded and succeeds.
2. The basic and compensatory awards will be reduced by 85% as a result of the Claimant's conduct.

REASONS

Preliminary

1. By a claim form presented on 30 April 2018, the Claimant complained of unfair dismissal.
2. The Tribunal was provided with an agreed bundle of documents running to 167 pages and heard witness evidence from:

for the Claimant

- 2.1. Jeremy Butcher, the Claimant and formerly Deputy Harbour Master;
- 2.2. Lindsay Taylor, a Harbour user;

for the Respondent

- 2.3. Timothy Adams, the Harbour Master;
- 2.4. Anthony Stables, Vice-Chairman of the Respondent;
- 2.5. Caroline Crampton-Thomas, Solicitor and HR Consultant.

Facts

3. The Claimant was employed by the Respondent Harbour authority from 1 May 2015 as Deputy Harbour Master.
4. The Claimant was responsible for the day to day running of the Harbour and reported to Tim Adams, the Harbour Master. Tracey Cooper was the Administration Manager.
5. In addition to being an employee of the Harbour, the Claimant was also a customer. He had a berth for his own boat. In January 2017, the Claimant sought to change his mooring licence. He had recently sold his (large) boat, Titan, and did not want to incur the substantial cost of a large berth at the Harbour when he was not using it. On the other hand, the Claimant did not want to surrender his Harbour licence entirely, as in the event of acquiring a new vessel he would then have to go on the 'waiting list' before he could obtain a new berth. The Claimant, therefore, sought to 'downsize' to a small river mooring, which was much less expensive, but which carried with it the advantage of allowing him, once he had purchased a new boat, to go onto the 'transfer list' for a suitable large berth. In effect he wanted to pay less but keep his place in the queue. The Claimant approached Mr Adams and Ms Cooper and they agreed to this proposal. The varied licence was granted with respect to the Claimant's (small) RIB vessel, Tolesto.
6. Separately from matters at the Harbour, the Claimant's wife was terminally ill at this time. Tragically, she died during the disciplinary proceedings.
7. In about May 2017, the Claimant bought a new large boat, which he also named Titan. On 27 May, the Claimant brought his new boat onto the Harbour and moored it.
8. In his evidence at the Tribunal, the Claimant said at some point between 31 May and 2 June, he approached Ms Cooper and asked her for a change of details form, so that his mooring licence would be amended to refer to Titan and he would be charged the appropriate rate. Ms Adams commenced annual leave on 9 June and the Claimant says he left the paperwork on her

desk. The Respondent has not found any paperwork completed at this time and disputes the Claimant's account.

9. On 21 July 2017, the Claimant completed a notification of change of boat details form, providing information about his new boat, which he signed and dated. On the Claimant's case this was a further form, the original one having been mislaid, whereas the Respondent only found this form.
10. The change of details form in use at this time did not have a question which expressly sought the date from which any change was to be effective, although it did have an "other information" box which the Claimant left blank. Accordingly, there was nothing on the form to indicate that his new boat had already been on the Harbour for two almost months and that any increased charges due should be backdated.
11. Ms Cooper processed the Claimant's change of details form and produced an invoice, which: (i) refunded the 12-month fee for the river mooring; (ii) charged a pro-rata fee for the river mooring reflecting the period (less than 12 months) before the change; (iii) charged the Claimant at the appropriate rate for his larger berth going forward. Ms Cooper used the date on the change of details form, namely 21 July 2017, which I accept was the Respondent's standard practice, to calculate the relevant sums. The net effect was the Claimant was only charged the rate for a larger berth from 21 July and, therefore, benefited from being undercharged for the period 27 May to 20 July 2017.
12. In August 2017, Mr Adams was reviewing outstanding payments due for mooring licences, one of which was the Claimant's. On looking at the invoice, Mr Adams was surprised to see the date of 21 July 2017, as he was aware of the Claimant bringing his new boat onto the Harbour long before that point. Mr Adams's assumption was that this discrepancy in dates was the reason the invoice had not yet been paid (i.e. he expected the Claimant had queried it with Ms Cooper).
13. In September 2017, Mr Adams was notified the Claimant had paid his invoice, which prompted him to look further into the matter. Mr Adams discovered and was concerned the date on the licence was 21 July 2017. Mr Adams was also troubled because he couldn't establish how the berth had been allocated to the Claimant (i.e. how the Claimant's position on the transfer list and the allocation of a vacant berth to him had been dealt with). Mr Adams raised this matter with Belinda Walters, Chair of the Respondent, and she asked him to investigate the matter, to see if there had been any breach of the rules.
14. By a letter of 29 September 2017, the Claimant was invited to an investigatory meeting concerning "potential manipulation of Harbour rules and regulations and a possible falsification of records / misdeclaration in relation to your personal mooring / berthing arrangements".

15. The Claimant attended the investigatory meeting with Mr Adams on 2 October 2017. I accept the notes taken fairly reflect the answers given. The Claimant's account included:

15.1. "I know what the rules are as that is my job";

15.2. he took delivery of a new boat in June 2017, obtained a change of details form, completed that and mislaid it;

15.3. his mind was on other things at this time;

15.4. following a discussion with Ms Cooper about the allocation of berths, the Claimant decided to take an available 10m berth;

15.5. the boat was first in the Harbour between 27 May and 15 June 2017;

15.6. "if the next question is 'are there fees outstanding' then yes, there are. Was not sure what I was going to do. Intended to sort out later";

15.7. in response to the suggestion that procedures were not followed when his boat was brought onto the Harbour, the Claimant said "not sure what we were going to do about the boat" before saying everyone knew he had a boat;

15.8. when it was suggested the form should have been done earlier, the Claimant said it was not at the forefront of his mind and he was not trying to hide anything;

15.9. asked about outstanding fees for the period prior to 21 July, the Claimant said his boat wasn't in the Harbour all of the time, "didn't feel necessary, didn't feel taking advantage. AM should have been made from 15th of June when I changed the boat";

15.10. agreeing with Mr Adams' summary of his account as being "essentially an oversight";

15.11. "completely denied any wrongdoing. Not tried to hide or conceal anything. If any monies are outstanding that shouldn't have happened and I take responsibility".

16. Mr Adams went on to interview Ms Cooper about this matter and her account included:

16.1. she was responsible for the "administration" of annual mooring licences, the Claimant for the "operational side";

16.2. she referred to clauses 6.1 and 6.3.1 of the mooring licence terms:

6.1 You must tell us as soon as possible if any of the licence information changes or you believe that it may change. We may

require you to notify us of changes by completing an appropriate form for the relevant circumstances.

[...]

6.3.3 If in the Harbour Masters reasonable opinion the proposed new Boat can be safely moored on your allocated mooring, then we would normally agree to such variation.

If the proposed new Boat cannot be safely moored on your allocated mooring, our offer to you of a variation to the licence will depend upon whether we have a suitable alternative mooring available. If we do, we will tell you, and we will tell you what terms (including as to Mooring Charges) you must agree to if you wish to accept such a variation of the License.

If we do not have a suitable mooring available, then you may ask to be returned to any mooring waiting list that we run at that time.

- 16.3. when a change of details form is received, she would check with the Claimant whether the mooring is suitable;
 - 16.4. on 20 July 2017, at a meeting held to allocate vacant annual moorings, the Claimant requested a change of details form for himself;
 - 16.5. when reminded she had given him such a form several months earlier, the Claimant said he had misplaced that;
 - 16.6. in w/c 24 July, the Claimant gave her the change of details form dated 21 July;
 - 16.7. normal practice was to take the date for change as that put on the form, save unless the licence holder advised otherwise;
 - 16.8. the Claimant had not put anything in the "other information" section or verbally informed her that a different date should be used for invoicing;
 - 16.9. she created an invoice.
3. Subsequent to his interview with Mr Adams, the Claimant provided a written statement, which included:
 - 3.1. he complained the allegations were vague;
 - 3.2. he complained he had little time "less than 8 week day work hours" to seek advice and prepare for questions;
 - 3.3. he did not have access to documents;
 - 3.4. "As a result, some of the answers that I gave to the questions put may not have been as accurate as I would have liked. Now that I have a

better understanding of the areas being probed I have had the opportunity to consult my work diary, documents relating to my boat, information from the previous owner of the boat, records at Berthon Marina and have been reminded of events by my wife. Given the length of time that has passed since the purchase, the state of my mind due to my wife's serious illness and the lack of documentary proof regarding the movements of my boat since the purchase, I cannot be entirely sure of the accuracy of the dates, however I have made this statement to the best of my knowledge and belief”;

- 3.5. he recollected bringing the boat to the Harbour on 30 May, but records from Berthon Marina and CCTV at Yarmouth suggested and he accepted, this may have been on 27 May;
- 3.6. in the period 31 May to 2 June he asked Ms Cooper for a change of details form, however on 5 June he learned that his wife's health had worsened, her “time was limited” and this was relevant to his “lack of memory” of “less important matters”;
- 3.7. having received confirmation of his insurance cover, around 15 June he “submitted the change of details form to Tracey”, “Tracey was on leave” and he did “not recall handing the form to her”;
- 3.8. he “wanted to have a discussion on the possibility of changing my berth straight away as the berth I was occupying had been relinquished and was available but I did not know the status of the transfer list. I was sure that I was at or near the top of the list but that was only from memory. In any event nothing would have been allocated until Tracy returned from leave.”;
- 3.9. he was on pre-booked leave from 23 June to 2 July, then busy with family and hospital visits and “put the berthing arrangements to the back of my mind”;
- 3.10. following a meeting on 18 July with Ms Cooper to discuss the allocation of berths / mooring licences, the Claimant concluded that he was next on the transfer list for an available 10m berth;
- 3.11. “I was completely satisfied that in my private capacity as an annual mooring holder I was entitled to the berth. I then allocated W70 to Titan”;
- 3.12. “Various other allocations were made during our meeting and it was at this time that Tracy informed me that she had not received my change of details form. At some point Tracy printed out a new form and I took it home to complete...”;
- 3.13. “the date shown on the change of details form relates to the date of signature and nothing else. There is no place on this form to indicate

a date of change or arrival of the boat, a failing that with the benefit of hindsight needs to be addressed.”;

- 3.14. the Claimant denied any standard practice of an invoice being raised based on the date in the change of details form;
 - 3.15. the date of change “would be entered on the appropriate list by Tracey as a result of a conversation or email with the customer - a conversation I believe I had with Tracey when I asked for the change of details form in June”;
 - 3.16. Ms Cooper and Ms Adams were aware the Claimant had brought a new boat onto the Harbour “well before” the date he put on the change of details form;
 - 3.17. he had no reason to scrutinise or question the amount in the invoice.
4. Mr Adams produced an investigation report on 5 October 2017, attaching copies of the interviews, notes recording the recollections of two berthing masters and an ex-employee the Claimant had referred to, the Claimant’s subsequent witness statement and various other relevant documents. Mr Adams’ conclusions included:
 - 4.1. as the Claimant had no licence for Titan, he could only bring that boat into the Harbour on the basis of paying day rates, at least until such time as he applied for a long-term visitor permit or submitted a change of details form with respect to his licence for Tolesto;
 - 4.2. no long visitor mooring or change of his existing licence was issued to the Claimant before 21 July 2017 and he made no effort during that period to regularise the position;
 - 4.3. the Claimant, as Deputy Harbour Master would have known that no mooring or licence had been issued for Titan;
 - 4.4. he “did not find it credible” that the Claimant would not have recognised the invoice he received had failed to charge him appropriately for the period prior to 21 July 2017;
 - 4.5. the Claimant had benefited from the undercharging;
 - 4.6. a recommendation of “initiate formal disciplinary hearing”.
 5. By a letter of 6 October 2017, the Claimant was required to attend a disciplinary hearing in connection with allegations:
 - 5.1. You breached Harbour rules and procedures in relation to the entry, and subsequent mooring of your own vessel “Titan” (previously “Miss Naughty”).

- 5.2. You failed to notify the relevant staff of, or otherwise probably bring to their attention, the presence of your vessel in the Harbour between 27 May 20 July 2017.
 - 5.3. Having received your mooring licence and invoice / statement for the period from 21 July 2017, you have failed to bring any underpayment, or discrepancy in dates, to the attention of relevant staff in good time, or at all.
 - 5.4. As a consequence of the breeches/failures identified at 1, 2 and 3 above, you have avoided paying fees properly due to the Harbour.
 - 5.5. You have put your own interests ahead of those of the Harbour and have, effectively, abused your position as Deputy Harbour Master for your own benefit.
 - 5.6. That your actions could damage the reputation of the Yarmouth Harbour Commissioners by bringing the transparent management of the Harbour into disrepute.
6. The disciplinary letter indicated the allegations, if proven, were likely to amount to gross misconduct and the outcome might be summary dismissal. A copy of Mr Adams' report with attachments was enclosed.
 7. The Claimant's disciplinary hearing was held on 18 October 2017. Anthony Stables was the decision-maker and he was supported by Clare Hammond-Sayer, HR Consultant from NatWest Mentor. The Claimant, who chose to be unaccompanied, was permitted to make an audio recording of the hearing and this was subsequently transcribed. The hearing included:
 - 7.1. the Claimant relied upon and / or repeated the account in his witness statement;
 - 7.2. in response to questions about the arrangements made to change his original licence to a mooring which did not exist in the name of his small boat Tolesto and whether this was common practice "no, which is why I approached Tim to see if there was a way to retain the licence. I do not get involved with the issue of licences. We all discussed the possibilities (Tracey, Tim and I) and this is what we came up with and agreed to";
 - 7.3. asked about clause 6.1 and the requirement to "tell us as soon as possible if any of the licence information changes or you believe that it may change", the Claimant replied:
 - 7.3.1. "Yes, I do accept it's a change but also the 'Tell Us' refers to 'Tell me' as the Berthing Master. Section 6.1 of the Harbour Commissioners License Terms for Non Commercial moorings";

- 7.3.2. "...it means either myself as DHM or someone employed by YHC";
- 7.4. an exchange exploring the operational and administrative aspects of mooring and licences:
- 7.4.1. Stables - "so there is a change in a licence and the changes need to be notified. DHM can satisfy the first, which is to ensure the correct mooring is allocated but it can't satisfy the second which is the change of licence. So there was no change of licence as of 27th May..."
- 7.4.2. Claimant "No but there should have been. I don't change the licences";
- 7.4.3. Stables "So the licence can only be made by an application to change?"
- 7.4.4. Claimant "Yes";
- 7.5. the Claimant said that having completed the change of details form circa 15 June, he either left it in Ms Cooper's locked office or the admin tray outside and "it appears to be lost or mislaid and I can't understand why";
- 7.6. the Claimant said he didn't breach the rules "my role as DHM crosses over with my own entitlement and having an AML in my own name. The two things will interact as long as I have a boat here. For me the change of details form and the administration is not a matter of urgency. It will get done when it gets done. The operational side is important because this is how we make our money and deliver customer service.";
- 7.7. pressed on how Ms Cooper would have known to charge him from 27 May 2017, the Claimant responded "It was a discussion had with Tracey. No different to anyone else. Information would have been relayed to Tracey, either by telephone call, email or otherwise during that week that I asked for change of details form on 31st May. Relayed that information when I requested the change of information form which was 31st May."
- 7.8. the Claimant said "I take more care over my own mooring because as an AM holder there is a crossover with my role as DHM. This would affect my berth. There is no way around it. I have acted properly and professionally";
- 7.9. the Claimant said "this whole episode has been engineered";

- 7.10. the Claimant complained that Mr Adams was not a fair person to investigate as he was a witness, being “aware about my boat” and that his report was biased;
- 7.11. the Claimant said the disciplinary hearing had been “very fair”.
8. Mr Stables made some further enquiries of Mr Adams and Ms Cooper.
9. In letters of 27 October and 13 November 2017, the Claimant was advised that Mr Stables required more time for further investigation and deliberation. Mr Stables also decided upon a further postponement on learning that Mrs Butcher had passed away.
10. The Claimant was dismissed by the Respondent’s letter of 23 November 2017 with pay in lieu of notice; his employment terminated immediately on receipt, but he received a payment with respect to what would otherwise had been his notice period. The letter attached a report from Mr Stables containing his findings:
 - 10.1. on 27 May 2017, the Claimant had no right to moor Titan other than as a day or long-term visitor and he did not register or attempt to pay as such;
 - 10.2. although not a mandatory step, the Claimant had the knowledge and opportunity to complete a change of details form with respect to his existing licence prior to bringing Titan into the Harbour and as Deputy Harbour Master it would have been reasonable to expect him to have done so;
 - 10.3. the only change of details form received was that dated 21 July 2017;
 - 10.4. between 27 May and 20 July 2017, the Claimant did not hold a licence for Titan and had not taken appropriate steps to obtain one;
 - 10.5. the Claimant did not question the invoice as relating to the period from July rather than May and should have been aware that the charges were less they would have been if they had related back to May, which matter he had a duty to raise;
 - 10.6. allegation 1 - the Claimant was not entitled to the mooring he purported to allocate himself, either by virtue of his licence for a smaller berth or place on transfer list, he could enter only as a day or long-term visitor but he did not pay the charges for that;
 - 10.7. allegation 2 - the Claimant’s first application for a change of details of his existing licence was 21 July 2017, his vessel was unlicensed prior to that and he had failed to notify relevant staff or properly bring to their attention the presence of his vessel;

- 10.8. allegation 3 - the Claimant was invoiced from July rather than May and failed to bring this to the attention of relevant staff;
- 10.9. allegation 4 - additional fees were due for the period prior to July;
- 10.10. allegation 5 - the Claimant was aware of the requirements necessary to bring his boat onto the Harbour, he had the opportunity to comply with those requirements and failed to do so, which constituted an abuse of his position;
- 10.11. allegation 6 - although no evidence was presented on this point, if the Claimant's actions became public knowledge that could undermine transparent management and damage the reputation of the Harbour Commissioners:
- 10.11.1. Mr Stables' evidence at the Tribunal as to whether he upheld (i.e. found to be proven) allegation 6 was not easy to follow;
 - 10.11.2. at one point he said that he could not come to a conclusion on allegation 6 and at another point, he said that if he upheld allegations 1 to 5, then allegation 6 could be upheld;
 - 10.11.3. doing my best to make sense of these answers, it appears that Mr Stables was satisfied the Claimant's conduct, if it became widely known, had the potential to damage the reputation of the Harbour Commissioners, but he appears to have approached allegation 6 on the basis that it required some damage was actually going to be done, on which latter point he was not satisfied;
- 10.12. Mr Stables was not impressed with the Claimant's attempts to deflect blame by saying others (i.e. Ms Cooper and Mr Adams) were aware of his boat and should have raised any concerns, rather he concluded the onus was firmly upon the Claimant to ensure his boat was in the Harbour properly;
- 10.13. Mr Stables found the Claimant to have been an inconsistent witness;
- 10.14. having considered whether the Claimant's actions resulted from intent or omission, Mr Stables "discounted omission":
- 10.14.1. Mr Stables evidence at the Tribunal was also not easy to follow with respect to his finding about the Claimant's intent;
 - 10.14.2. whilst the relevant passage in his report, discounting omission, might have been read as implying he had found the Claimant acted with dishonest intent, Mr Stables said that was not the case;

- 10.14.3. having been asked questions in cross-examination, re-examination and by the Tribunal, Mr Stables evidence was that he did not reach a conclusion on the Claimant's state of mind;
 - 10.15. the Claimant's personal circumstances (i.e. his wife's poor health) offered mitigation but did not explain or excuse his actions;
 - 10.16. the allegations found amounted to gross misconduct;
 - 10.17. whilst summary dismissal without pay would ordinarily be the appropriate penalty, given the Claimant's lack of prior disciplinary history, the recent loss of his wife and concern for his financial position, the sanction would be dismissal with pay in lieu of notice.
11. The Claimant appealed by a letter of 6 December 2017. He set out detailed argument in this regard over 6 pages and also asked a number of questions. After a chasing letter from the Claimant, by an email of 23 January 2018, Caroline Crampton-Thomas addressed the Claimant's questions. Mr Adams was tasked with making some further enquiries, concerning precisely which berth Titan had occupied (W66 or E62) and CCTV to establish periods when Titan had been taken out of the Harbour.
 12. The appeal took place on 6 February 2018. The appeal decision-maker was Mrs Crampton-Thomas, the Claimant was accompanied by Philip Keen. Selected pages from a lengthy transcript were put before the Tribunal. The appeal hearing included:
 - 12.1. Mrs Crampton-Thomas said Ms Cooper was only present to take notes, she would have no part in the decision made and if the Claimant wished, she could be asked to leave the room - the Claimant said he was not made uncomfortable by Ms Cooper's presence, rather he was raising this as a matter of proper procedure;
 - 12.2. whereas Mrs Crampton-Thomas had intended to go through the Claimant's appeal letter, he preferred to address his remarks to Mr Stables' report and did so;
 - 12.3. some way into the appeal hearing, the Claimant said "for the record I'm still not in a fit condition to do this";
 - 12.4. the Claimant appeared to make some limited concessions: there are things on both sides that could've been done better" and "I've made errors but I've done nothing wrong to warrant a dismissal" - in evidence at the Tribunal the Claimant backed away from this saying Mr King (who accompanied him) had put "words into [his] mouth", his error was in not "going above and beyond" and Mr Blitz said the "species of error" conceded was "not having done very well";
 - 12.5. about three quarters of the way through the appeal hearing, Mrs Crampton-Thomas asked "do you think we could try and wrap it up in

about half an hour” - the Claimant responding “my career and my life are at stake”;

12.6. Mrs Crampton-Thomas also said that she would need time to consider matters and cited the “very technical” nature of the facts - the Claimant disputed the matter was technical;

12.7. the Claimant said “I have the authority and the responsibility to allocate moorings. I’ve received no instructions on how to deal with my own mooring, so I’ve treated my own moorings as I would anyone else, and it’s only TC that can issue licences and invoice for annual moorings, and because of that holiday period and the assumption on my part that the change of boat details form was received by TC, the original one, that I assumed that things were progressing. So, on paper, if someone during that period 27th May to 20th July looked at the record they would see that I only have a mooring up the river and not a walk ashore, because there’s not been an opportunity to change the details because TC hasn’t been there. It’s a misunderstanding...”

13. By a letter of 12 February 2019, Mrs Crampton-Thomas did not uphold the appeal. She set out her rationale over 10 pages. Although there are some sentences which tend to suggest that Mrs Crampton-Thomas was making independent findings of fact, read as a whole it is apparent that she saw her role as reviewing whether Mr Stables had reasonable grounds to find the facts and on the allegations as he did; and she was so satisfied. Her analysis included:

13.1. “it is reasonable to conclude that you intentionally avoided paying the mooring fees”;

13.2. Mr Stables “was entitled, on the evidence, to believe that you exploited your position as Deputy Harbour Master by manipulating the annual mooring licence process for your own financial benefit”;

13.3. at the Tribunal, Mrs Crampton-Thomas gave ambiguous evidence about whether or not she had understood allegation 6 to have been found proven by Mr Stables.

Law

14. Pursuant to section 98(1)(a) of the **Employment Rights Act 1996** (“ERA”), it is for the respondent to show that the reason for the claimant’s dismissal was potentially fair and fell within section 98(1)(b).

15. If the reason for dismissal falls within section 98(1)(b), neither party has the burden of proving fairness or unfairness within section 98(4) of ERA, which provides:

In any case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer -

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

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

16. Where the reason for dismissal is conduct the employment tribunal will take into account the guidance of the EAT in **BHS v Burchell [1978] IRLR 379**. The employment tribunal must be satisfied:
 - 16.1. that the respondent had a genuine belief that the claimant was guilty of the misconduct;
 - 16.2. that such belief was based on reasonable grounds;
 - 16.3. that such belief was reached after a reasonable investigation.
17. The employment tribunal must also be satisfied that the misconduct was sufficient to justify dismissing the claimant.
18. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal; see **Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.
19. The band of reasonable responses test applies as much to the **Burchell** criteria as it does to whether the misconduct was sufficiently serious to justify dismissal; see **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA**.
20. The level of care required of the reasonable employer carrying out an investigation must reflect the gravity and seriousness of the alleged misconduct, especially where the alleged misconduct is of a very serious character and may impact upon the employee's ability to carry on in their chosen profession; see **A v B [2003] IRLR 405**:

58. [...]the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee. As we have said, that was not in fact his principal submission to the tribunal on this point.

[...]

60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require

the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.

61. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

21. The fact-finding exercise of the reasonable employer must also take account of gravity and seriousness; see **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA**, per Elias J:

73. The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other.

22. Where an appeal hearing is conducted then the **Burchell** criteria must also be applied at that stage, in accordance with the decision of the House of Lords in **West Midlands Co-operative Society v Tipton [1986] IRLR 112** and the speech of Lord Bridge:

“A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal.”

23. After an appeal, the question is whether the process as a whole was fair ; see **Taylor v OCS Group Limited [2006] IRLR 613 CA**, per Smith LJ:

46. [...] In our view, it would be quite inappropriate for an ET to attempt such categorisation. What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.

47. [...] The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.

Conclusion

Reason

17. The Claimant was dismissed because the Respondent, in the person of Mr Stables, thought he was guilty of misconduct, namely allegations 1 to 5.

Investigation

18. Mr Blitz criticised the investigation undertaken by Mr Adams on the basis that rather than simply gathering evidence and presenting facts, he purported to make findings, including on one point expressing doubt about the credibility of the Claimant's account. I am satisfied that any such opinions expressed did not result in unfairness to the Claimant. Mr Stables reached his own conclusions on the evidence independently and was not limited or unduly influenced by Mr Adams. The clearest indication of Mr Stables' independent approach is that his conclusions were, in important respects, more generous to the Claimant than those of Mr Adams. Notably, whereas Mr Adams expressed doubt about the Claimant's credibility (which is suggestive of dishonesty) Mr Stables did not. Mr Stables decided that he could make no finding about the Claimant's intention.
19. Mr Blitz argued that Mr Adams was not independent, as he was a party to approving the use of 'ghost berths' (notional rather than actual berths, allocated as a means of preserving a place in the queue for a real berth). This point seems to have little relevance to the conduct for which the Claimant was dismissed and, in any event, only arose in Mr Stables' report setting out the reasons for dismissal. Accordingly, when tasked with investigating this matter, the potential conflict (if any) had not been identified and would not have stood as an obstacle to the appointment of Mr Adams.
20. Mr Blitz also criticised Mr Adams on the basis that his report did not include various points the Claimant had made. Whilst it is correct that in his summary Mr Adams does not recite the entirety of the Claimant's account, there was no need for him to do so. The summary is, however, a fair reflection of the main factual dispute and, importantly, the report attached both the notes of the Claimant's interview and his subsequent witness statement. Accordingly,

the investigation report and its attachments included all the Claimant had contributed.

21. Moreover, Mr Adams undertook a thorough investigation. He interviewed appropriate witness and obtained relevant documentary evidence. The Claimant's representations resulted in further enquiries being made.
22. Although Mr Stables made some further enquiries of Mr Adams and Ms Cooper, nothing material to the decision to dismiss emerged.

Grounds

23. The Claimant gave inconsistent accounts. His initial account, broadly, was that he had brought Titan into the Harbour at a time when he wasn't sure whether or where he would be keeping the boat, he had intended to submit a change of details application but mislaid it and this had all come about by way of an oversight on his part. Thereafter the Claimant's account changed, he had made an early application for change of details, there was no breach of the rules because he had complied with clause 6.1 by granting himself a licence acting as both deputy harbour master and customer, and others (i.e. Ms Cooper or Mr Adams) should have brought any discrepancy to his attention. Given these changes, Mr Stables had ample grounds upon which to find the Claimant had given inconsistent evidence. Furthermore, in circumstances where there was no trace of an earlier application, that documentary absence coupled with the Claimant's inconsistency gave Mr Stables a reasonable basis upon which to reject his account of having submitted an earlier application. Accordingly, the Respondent was entitled to conclude the first application made by the Claimant for a change in licence was on 21 July 2017, nearly two months after Titan had been brought into the Harbour.
24. At the Tribunal, the position argued on the Claimant's behalf was that in his capacity as Deputy Harbour Master he could and did grant himself a change of licence details on 27 May 2017, satisfying clause 6.1. The steps that Ms Cooper might have taken (and did not) would have been merely to record and implement the Claimant's decision. As such it was said, Titan was never on the Harbour without a licence. This was not, however, the position the Claimant adopted prior to dismissal. During the disciplinary and appeal proceedings, the Claimant accepted there was a two-stage process, whereby he would make a decision about mooring a vessel at a particular location but only Ms Cooper could issue a licence change. At the disciplinary and appeal, the Claimant accepted that no licence for Titan had been issued, but said that was not his fault as he had made a timely application which he had appropriately delivered to Ms Cooper. It was also noted, that when the Claimant had required a previous change to his licence he had actively sought the agreement of Ms Cooper and Ms Adams to it. Given the Claimant's own position in addition to the evidence of Ms Cooper, it was reasonable for Mr Stables to find that Titan was not on the Harbour pursuant to an annual licence between 27 May and 20 July 2017.

25. On this basis, allegations 1 & 2 were made out. Mr Stables had reasonable grounds to conclude that Titan was on the Harbour in breach of the rules (not under an annual licence and without the Claimant seeking a day or long visitor permit) and the Claimant failed to notify relevant staff between 27 May and 20 July (he did not apply to Ms Cooper for a change of his annual licence and did not apply to any person for a permit).
26. There were reasonable grounds to support allegation 3. The Claimant was only invoiced for the period from 21 July 2017 and did not bring this underpayment to anyone's attention. Whilst the Claimant argued he was unaware of the discrepancy, the allegation did not include a requirement that it was done knowingly. Furthermore, assuming the Claimant did not know he had been charged less than was due, his conduct was still culpable: (i) Titan had been on the Harbour without a change of licence application or permit for almost two months; (ii) the change application when made was very late (iii) the claimant was Deputy Harbour Master and also responsible for this unsatisfactory state of affairs; (iv) it would be reasonable to have expected him to check the invoice.
27. Allegation 4 follows from 1, 2 and 3. On the findings made, the Claimant had not made a change of licence application for almost two months. He was charged only from the point when he eventually applied. He avoided two months' charges (even if only inadvertently); either at the day rates (the Respondent's position) or the increased annual licence rate (the Claimant's case).
28. On the findings made, the Claimant brought his boat onto the Harbour and made no attempt to regularise its position there for almost two months. At the same time, he was Deputy Harbour Master. It was reasonable for the Respondent to find that he had misused his position in this regard. No member of the public had or would be allowed to proceed in such a fashion. As such, there were reasonable grounds for allegation 5.
29. Allegation 6 was not upheld. To the extent Mr Stables came to the conclusion that the Claimant's conduct might have done damage to the Respondent's reputation had it become known, that was a reasonable conclusion to draw in the circumstances. This is a factor that could properly be taken into account when determining sanction, without the need for a discrete allegation. This is not a finding of the Claimant having done any further misconduct, rather it is a measure of the seriousness of the conduct already found against him.

Sanction

30. Although the Claimant was dealt with on the basis that he had no dishonest intent, the misconduct found was still serious.
31. The Respondent would be required to take into account the Claimant's personal circumstances in terms of his wife's health and did so. Her health was not, however, found to explain or excuse the Claimant's actions and such

a conclusion was, reasonably, open to the Respondent on the evidence it had. Mr Blitz suggested that the Claimant was or may have been unfit for work during the material period, although that would appear to be inconsistent with the information the Respondent had at the time of deciding to dismiss. There was no medical evidence to sustain a finding that the Claimant had been unfit for work. There was no evidence of any dip in the Claimant's work performance during these many months such as might have suggested he was struggling. Separately, the Claimant was able to purchase, transport, insure and otherwise deal with the acquisition of a new boat. Furthermore, the Claimant engaged with the disciplinary (and appeal) process in a vigorous and thorough manner, developing his argument and setting this out in great detail, both orally and in writing.

32. The Claimant was in a position of trust. He had responsibility for the day to day running of the Harbour and together with Ms Cooper and / or Mr Adams, had an opportunity to make or influence decisions about who might use the Harbour and upon what terms. Whether express or implied, his duties must have included ensuring those who used the Harbour did so legitimately, using the correct berth, obtaining a licence or permit and paying fees.
33. The trust placed in the Claimant was increased because he was also allowed to access the Harbour as a customer. Necessarily, there was potential for a conflict of interest and it would, reasonably, have been incumbent upon the Claimant to ensure that he did not act in such a way as to use his position, deliberately or otherwise, to obtain better treatment than other customers. As such, there would be a reasonable expectation the Claimant would conduct himself with propriety in any situation where he was wearing two hats (dealing as Deputy Harbour Master with himself as customer). In failing to make an application for a change of licence or visitor's permit for almost two months and then failing to draw to the Respondent's attention to the fact that he had been undercharged, the Respondent could reasonably find the Claimant had fallen considerably short of what was expected, even if this state of affairs had arisen without the Claimant actively intending to deceive or obtain a financial advantage. The Claimant had, on the Respondent's findings, received better treatment than other customers. His boat, Titan, was on the Harbour for almost two months, without a change of licence application having been made, or day / long-term visitor rates paid. No other customer had been allowed to keep a boat in the Harbour this way. Whilst at the time of the decision to dismiss, there was no evidence of the public at large having become aware of this situation and thereby the reputation of the Respondent having been damaged, there was plainly considerable scope for this to come to pass.
34. Whilst some reasonable employers might, on the facts found, have decided not to dismiss, perhaps taking into account the Claimant's clean record and tragic personal circumstances, I cannot say that no reasonable employer would have dismissed. Some such employers might, reasonably, have concluded that the Claimant's conduct was incompatible with the position of trust and responsibility he held.

Appeal

35. The Claimant's position at the appeal, disputing Mrs Crampton-Thomas' observation about the matter being technical, was unrealistic. There was a fair degree of technicality and detail relating to: the operation of the Harbour; the different berths, nomenclature and charging regimes; the roles of various personnel in allocating berths or granting licences; the different licences or permissions under which a vessel might be moored at the Harbour; the terms of the Claimant's licence for Tolesto; the differing accounts the Claimant had given about when and how he came to apply for a change of details; the invoice raised and the actions of the Claimant subsequent to that.
36. Mrs Crampton-Thomas' reference to "wrapping up" the appeal was one of a number of clumsy comments. I do not find, however, that these remarks detracted from an otherwise careful approach to determining the appeal, or caused the Claimant any disadvantage.
37. Whilst in many respects the appeal involved a full and fair exploration by Mrs Crampton-Thomas of the Claimant's appeal points and consideration of whether Mr Stables had reasonable grounds for his findings, I have concluded there was one very significant error. Unsurprisingly, given Mr Stables reference to having discounted omission, Mrs Crampton-Thomas understood him to have dismissed the Claimant on the basis he had intentionally avoided paying the appropriate fees to obtain a financial benefit. Mr Stables did not, however, as clarified at the Tribunal, make such a finding. Mr Stables visited the Claimant's state of mind to the extent of discounting omission, but it is difficult to know what to make of that conclusion in circumstances where no other finding was made about his intention and in particular no finding was made that the Claimant acted dishonestly, or with a positive intention to deceive or avoid paying fees. This is a point of fundamental importance, since it goes to the reason for dismissal and gravamen of the Claimant's conduct. In substance Mrs Crampton-Thomas dealt with the appeal on the basis the Claimant had been dismissed for dishonesty (although that word was not used, the findings she understood to have been made amounted to that in substance) when that was not the case. This was such a fundamental flaw in the appeal process that I am satisfied undermined the Claimant's right to appeal. As a result, his dismissal was not fair. The whole dismissal process was not fair, it was undermined by a substantially flawed appeal stage.

Contribution

38. The Respondent did not, in the event of a finding of unfair dismissal, contend for a reduction of the compensation otherwise due to the Claimant to reflect the likelihood of a fair dismissal in any event (**Polkey v A E Dayton Services Limited [1988] 1 AC 344 HL**). The Respondent did, however, argue for a 100% reduction for contributory fault. When considering whether the Claimant was unfairly dismissed, the Tribunal's function is to review the evidence obtained by the Respondent and consider whether it had

reasonable grounds to sustain the findings it made. When deciding upon the question of fault under ERA sections 122(2) and 123(6), the Tribunal is required to make its own findings of fact.

39. I have no hesitation in finding that the Claimant's account as first given in the investigation is the most reliable guide to what he did and why. Notwithstanding the Claimant was somewhat 'hazy' on dates, the account not only appears to be a realistic one with the clear 'ring of truth', it also fitted with the recollection of Ms Cooper obtained in the same investigation, as well as explaining why the Respondent had found no earlier application for a change of details (i.e. because there was not one). The Claimant's subsequent accounts were reconstructions and became increasingly self-serving.
40. I find that the Claimant did not immediately seek a change of details for his existing licence because he wasn't sure whether or where he would be keeping the new boat. Titan did leave the Harbour on occasion and also I accept the Claimant was at times distracted by his wife's poor health. I do not find the Claimant intended to avoid paying the appropriate fees altogether, rather he delayed in applying for a licence change whilst making up his mind about what to do with the boat. Thereafter he neglected to put the position right. I find this was an oversight rather than something done with a dishonest intent.
41. Given the proximity of the meeting with Ms Cooper on 20 July and the Claimant's application on 21 July for a change of details, I find he was prompted by the discussion on 20 July, which reminded him that he had not applied for a change of details in the proper way, and he did so immediately thereafter.
42. As for the invoice, whilst it does only refer to July, the manner in which the adjustment and fees are set out is not entirely clear and I accept the Claimant did not scrutinise it closely at the time. After having been called to an investigatory meeting, however, the Claimant must have returned to this document and realised he had been undercharged, as this would explain his "if the next question is..." comment.
43. I find the Claimant's conduct to have been seriously blameworthy:
 - 43.1. there was an element of deliberate misuse of his position by not seeking a change of licence or paying day rates initially, albeit I accept he probably intended to put the position right retrospectively;
 - 43.2. thereafter, by way of an oversight rather than with dishonest intent, the Claimant failed to regularise the position of his boat;
 - 43.3. having been prompted by Ms Cooper on 20 July the Claimant completed the change of details form - he could easily have noted in the further information section that his boat had been on the Harbour

for a considerable period of time and given that it was his oversight that resulted in such a late application he should have done so;

- 43.4. although he did not scrutinise the invoice closely he should have done so given, again, it was his oversight that resulted in such a very late application for change of details and it was incumbent to make sure in those circumstances that he had paid all that was due;
 - 43.5. he gave inconsistent accounts, which made him look incredible and then sought to blame others for this state of affairs rather than accepting the failure was his;
 - 43.6. there was no evidence to support the Claimant's contention that he took more care over his own mooring because of the Deputy Harbour Master / customer cross-over;
 - 43.7. as both Deputy Harbour Master and customer there was obvious scope for a conflict of interest and the Claimant did little or nothing to avoid an actual conflict and personal advantage accruing;
 - 43.8. the Claimant occupied a position of responsibility and trust, which was undermined by his conduct in this matter;
 - 43.9. there was obvious scope for damage to the Respondent's reputation if this matter became widely known.
24. Not only was the Claimant's conduct seriously blameworthy, it led directly to his dismissal.
 25. In the circumstances, the appropriate reduction is 85%. Had I found the Claimant to have been dishonest, which I do not, the reduction would have been 100%.
 26. The same reduction, 85%, will be applied to both the basic and compensatory awards (ERA sections 122 and 123).

Orders

44. The parties are invited to seek to agree remedy by 28 June 2019 and to notify the Tribunal on or before that date as to whether they have been successful.
45. In the event of remedy not being agreed, the following directions will apply:
 - 45.1. by 28 June 2019, the Claimant to provide an updated schedule of loss;
 - 45.2. by 5 July 2019, the respondent to provide a counter-schedule of loss;
 - 45.3. by 12 July 2019, the parties to agree a bundle of documents relevant to remedy, limited to 50 pages;

45.4. by 19 July 2019, the parties to exchange witness statements (if any);

45.5. a 1-day remedy hearing will take place at 10am on **1 August 2019 at the Southampton Employment Tribunal, 100 The Avenue, Southampton SO17 1EY.**

Employment Judge Maxwell

Date: 15 May 2019
