



EMPLOYMENT TRIBUNALS

Claimant Mr S Todd

Respondent: Bedrock Bars Limited

HELD AT: Leeds

ON: 27 and 28 June 2019
29 July 2019
(reserved decision in chambers)

BEFORE: Employment Judge Cox

Representation:

Claimant: In person

Respondent: Mr Wood, counsel

RESERVED JUDGMENT

1. By consent, the claim for accrued holiday pay due on termination of employment succeeds and the Respondent is ordered to pay the Claimant £28.85.
2. The claim of unfair dismissal succeeds and the Respondent is ordered to pay the Claimant compensation of £6,636.34.
3. The claim for damages for breach of the contractual right to notice of termination of employment fails and is dismissed.

REASONS

1. Mr Todd has brought a claim alleging that the Respondent, Bedrock Bars Limited (“the Company”) unfairly dismissed him and owes him notice pay and accrued

holiday pay due on termination of employment. The holiday pay claim was settled during the course of the Hearing and a consent Judgment was made.

2. At the Hearing, the Tribunal heard oral evidence from Mr Todd himself and from Mrs Dawson, who worked for the Company at the relevant time. For the Company, the Tribunal heard oral evidence from Mr Westwell, the Company's Director and owner; Mr Barnett, an independent consultant who carried out a disciplinary investigation on the Company's behalf into Mr Todd's alleged misconduct; Mr Perryman, another independent consultant, who conducted a disciplinary hearing on the Company's behalf; and Mr Huckstepp, also an independent consultant, who conducted the hearing of Mr Todd's appeal on the Company's behalf. On the basis of that evidence and the documents to which the witnesses referred it, the Tribunal makes the following findings of fact relevant to Mr Todd's claim.

The facts

3. The Company operates music venues in Batley. Mr Todd began working for the Company on 5 August 2016 as Deputy Manager and became General Manager on 22 February 2018. He was responsible for the overall running of the businesses, including: ensuring that the conditions of the premises license were met; ensuring that health and safety requirements were met, including the checking of equipment; paying contractors; and carrying out inductions for new members of staff. He was the Designated Premises Supervisor (DPS). It is illegal for the Company to operate its venues without a DPS in post.
4. Although Mr Todd's employment with this company began in August 2016, he had been working for and with Mr Westwell in another business for three years before that and they both considered themselves to be good friends.
5. On 6 August 2018, Mr Westwell was concerned at the size of an invoice he had received for alcohol. He asked Mr Todd to undertake a stock count. Mr Todd, who was engaged in cashing up the week's takings at the time, did not expressly refuse to do a stock take, but he argued forcefully with Mr Westwell that it was a waste of time, effectively resisting Mr Westwell's instruction that he carry one out. Mr Todd thought that a stock take would not explain the size of the invoice Mr Westwell was concerned about, because that invoice related to stock levels in the previous month, not current stock levels.
6. Frustrated at what he considered to be Mr Todd's insubordination and refusal to co-operate, Mr Westwell lost his temper and the two men ended up shouting at each other. This was not unusual for them: although they were long-standing friends, they would on occasion have heated arguments. Their evidence to the Tribunal on exactly what was said during this argument differed in important respects.

7. Mr Westwell's evidence was that he said to Mr Todd: "that's it you're done for today, give me your keys and get the fuck out of my club". Mr Todd replied: "Think about what you're doing, you can't do this in this day and age, you have to give a reason for suspending me...what's the reason?" Mr Westwell told him he was being suspended for insubordination. They carried on arguing as Mr Westwell escorted Mr Todd off the premises.
8. Mr Todd's evidence was that Mr Westwell said: "Give me your keys and fuck off!" Mr Todd asked him: "Are you suspending me?" to which Mr Westwell replied: "No, I'm fucking sacking you". Mr Todd responded: "You can't just do that in this day and age" to which Mr Westwell replied: "I can do what the fuck I like, it's my fucking business, now get out of my fucking building".
9. The Company argued that Mr Westwell's account of what was said should be preferred because there were differences between the accounts Mr Todd gave of what he had said during the course of the subsequent investigations, his claim form and his evidence to the Tribunal. In contrast, Mr Westwell's account had been entirely consistent. The Tribunal does not consider that the minor differences between Mr Todd's accounts are significant. It prefers the evidence of Mr Todd to that of Mr Westwell on the content of the exchange between them on 6 August, for several reasons.
10. As Mr Westwell accepted, he had had angry arguments with Mr Todd on previous occasions, and asked for his keys on one occasion, but on those occasions Mr Todd had not left the building, because the two men had made up. Mr Todd was clear that this occasion was different. He was so clear that Mr Westwell had said that he was sacked that he was not prepared to co-operate with the ensuing disciplinary process (described below) unless and until the Company acknowledged that he had been dismissed. The Tribunal considers it unlikely that he would have adopted this intransigent position, which meant that he did not put his side of the case in relation to the disciplinary allegations that were made against him, had he not been dismissed.
11. The Tribunal also finds that Mr Westwell unapologetically adopts an authoritarian management style. It accepts the evidence of Mr Todd and Mrs Dawson that it was not unusual for Mr Westwell to decide to sack staff summarily. Mr Todd would then intervene and persuade Mr Westwell to allow him to deal with the issue by speaking to the member of staff involved. It was therefore not out of the ordinary for Mr Westwell to sack someone on the spot. The difference here was that Mr Todd had no one to intervene on his behalf.
12. Further, on the day after the incident, Mr Todd changed the password on his Company email account. The Tribunal accepts his evidence that he did so because he wanted to prevent anyone sending emails as if from him that he had not in fact written and to protect any emails or invoices that he had been sent

from being deleted. The Tribunal does not think he would have felt the need to take that step if he had not been dismissed.

13. As explained further below, the Tribunal accepts that Mr Westwell did not contact Kirklees Borough Council, the licensing authority, to replace Mr Todd as DPS, it was Mr Todd who initiated that process. In the circumstances of this case, however, the Tribunal does not consider that Mr Westwell's failure to contact Kirklees was inconsistent with him having dismissed Mr Todd on 6 August. That is because the Tribunal finds that Mr Westwell decided to maintain that he had only suspended Mr Todd and not acknowledge that the dismissal had ever happened.
14. Although the Tribunal concludes that Mr Westwell did dismiss Mr Todd on 6 August, it also accepts that both men initially expected that one or other of them would extend an olive branch and that the two men would, as Mr Westwell put it, "kiss and make up". That might have happened on this occasion also, had Mr Westwell not noticed the following day that Mr Todd had changed the password on his Company email account. Mr Westwell changed the password again and removed Mr Todd from the Company's Facebook page. Because of the password change, Mr Westwell was concerned that Mr Todd might be intending to harm the business in some way and decided to do a "full unit check" to ensure that there was nothing else of concern. This involved checking the safe, floats, till drawers, petty cash boxes, and the paperwork, including that relating to staff inductions, health and safety and fire safety checks. During that process and other investigations he did over the next few days Mr Westwell discovered that: some fire safety checks and checks on equipment for working at height had not been done; staff inductions, which cover health and safety matters, fire safety and licensing law, had not been completed for five new members of staff who had joined in July and August; there were missing invoices for payments to a disc jockey; and other paperwork relating to cash movements was missing.
15. On 8 August 2018 Mr Westwell wrote to Mr Todd purporting to confirm his suspension. The Tribunal is satisfied that he knew that he had in fact dismissed Mr Todd and that he should not have done so in the way he did and that this was an attempt to regularise the situation. Mr Westwell had access to legal advice under an insurance policy to handle Mr Todd's case, but the Tribunal heard no evidence that Mr Westwell admitted to his legal advisers, or to any of the three independent human resources professionals involved in the disciplinary process, that he had dismissed Mr Todd.
16. The suspension letter set out various disciplinary allegations and invited Mr Todd to attend an investigatory meeting to discuss these on 14 August 2018. The allegations were: lack of co-operation or attitudes to work; failure to achieve the required standards of performance; failure to carry out procedures with regard to money-handling; and refusal to obey a reasonable and lawful instruction.

17. By the end of this week, it was clear that, on this occasion, neither Mr Westwell nor Mr Todd were intending to extend an olive branch to resolve the conflict between them. At around 4pm on Friday 10 August, Mr Todd telephoned Kirklees Borough Council, the licensing authority, and told them he had been dismissed so was no longer the DPS for the Company's premises. When Kirklees let Mr Westwell know they had received this call, he replaced Mr Todd as DPS.
18. Doubtless because Mr Westwell's involvement in the case made it impossible for him to conduct the disciplinary process himself, not having the necessary objectivity, the Company's legal advisors arranged for Mr Barnett, a human resources consultant, to conduct an investigation into Mr Todd's alleged misconduct. Mr Barnett interviewed Mr Westwell and Mr Dyson, the Deputy Manager, and took statements from them and examined the relevant paperwork. He attempted to interview Mr Todd but he was unwilling to engage because, he said, he had not been suspended but dismissed. Mr Barnett recommended that the matter go forward to a disciplinary hearing at which Mr Todd would have the opportunity to explain why he believed he had been dismissed on 6 August. Mr Barnett would himself have been prepared to discuss with Mr Todd why he believed that he had been dismissed on 6 August, but Mr Todd was not prepared to engage at all.
19. The Company's legal advisors arranged for Mr Perryman, a human resources consultant, to conduct the disciplinary hearing. When Mr Todd was invited to attend that hearing he replied that the Company first needed to admit that it had dismissed him and was only now changing this to a suspension. He would not be answering any of the suspension allegations, which he was completely prepared to do, as he had been dismissed. Mr Perryman decided as a first step to satisfy himself that Mr Todd had in fact been dismissed on 6 August, as he alleged. He reinterviewed Mr Westwell and viewed the CCTV footage of the conversation on 6 August, which had no sound but showed that the two men were involved in a heated discussion. He decided that Mr Westwell had not intended to dismiss Mr Todd and that it was in everyone's interests for the disciplinary hearing to go ahead: Mr Todd would have the opportunity to put his case and challenge the evidence, Mr Westwell and Mr Todd could both give their accounts of what the CCTV footage showed and Mr Perryman would then be able to decide what had happened on the balance of probabilities.
20. The disciplinary hearing was held on 24 August. By this stage, the allegations against Mr Todd were as follows:
 - a. Maliciously exposing the Company to risk by informing the local licensing authority that he had been sacked and he was no longer the DPS.
 - b. Failing to pay a hotel bill for £55 after recording that the sum had been removed from the safe.
 - c. In breach of his contract terms on confidentiality, telling the local licensing authority that he had been sacked.

- d. Failing to achieve the required standards of performance by:
 - i. not inducting five new members of staff or issuing them with contracts of employment;
 - ii. failing to carry out monthly checks on the working at height equipment after March 2018;
 - iii. failing to report weekly checks for the fire alarm and emergency lighting systems after 15 June;
 - iv. making eleven cash payment of £225 to a DJ without an invoice;
 - v. changing the password to the Company's email account; and
 - vi. insubordination on 6 August 2018 by remonstrating with Mr Westwell about his instruction to carry out a stock count.
21. The letter enclosed relevant documentation, including copies of the statements made by Mr Westwell and Mr Dyson.
22. The disciplinary hearing on 24 August lasted one-and-a-quarter hours but Mr Todd refused to discuss the allegations with Mr Perryman. He would discuss only his contention that he had already been dismissed. He wanted, he said, an apology from Mr Westwell and an admission that he had dismissed Mr Todd on 6 August. He said that Mr Westwell had contacted Kirklees to change the DPS so that also supported him having dismissed Mr Todd.
23. In advance of the disciplinary hearing, Mr Todd had asked for a copy of the CCTV recording of the exchange between himself and Mr Westwell. Mr Perryman did not send him this as he had intended to view the CCTV footage at the disciplinary hearing and ask for the two men's comments on it. The hearing never progressed to this stage because of the position Mr Todd was taking, but Mr Perryman did send Mr Todd a link to the footage after the hearing.
24. After the hearing on 24 August, Mr Perryman undertook further investigations into what happened on 6 August in order to decide whether Mr Todd had in fact, as he alleged, been dismissed on that date. He proposed to hold a further meeting on 30 August. If he had by then concluded that Mr Todd was dismissed on 6 August the intention would be to discuss with Mr Todd and Mr Westwell what should happen next. If he concluded that Mr Todd was not dismissed, he would go on to conduct a formal disciplinary hearing into the allegations set out in the letter inviting Mr Todd to the earlier disciplinary hearing.
25. Mr Todd spoke to Mr Westwell again about what Mr Todd had said in the disciplinary hearing. He sent Mr Todd the link to the CCTV footage. He also asked Mr Todd for a written response to certain questions relating to why he thought he had been dismissed. Mr Todd would do no more than refer Mr Perryman back to what he had said at the disciplinary hearing on 24 August.
26. Mr Perryman considered all the information he had and concluded that Mr Todd had not been dismissed on 6 August. As he reached a different conclusion to that

reached by the Tribunal, the Tribunal considers it appropriate to comment on his reasoning. He appears to have based his conclusion on the fact that it was not in Mr Westwell's best interests to have dismissed Mr Todd. This may well not have been the case, but it does not mean that Mr Westwell did not dismiss Mr Todd in the heat of an argument. He also noted, as has the Tribunal, that it was Mr Todd, not Mr Westwell, who had contacted Kirklees to say that Mr Todd had been dismissed. Mr Perryman also thought that, if Mr Westwell had dismissed Mr Todd on 6 August, he would have known that he needed to contact Kirklees immediately to appoint another DPS, and he had not done so. The Tribunal has reached a different explanation for Mr Westwell's actions, as explained above, namely that he had decided to proceed on the basis that he had not dismissed Mr Todd when in fact he had, in the hope that he could regularise the situation.

27. Mr Perryman appears to have believed that Mr Todd was saying that Mr Westwell had taken the initiative in contacting Kirklees to change the DPS. If that had been the case, Mr Perryman would have had good reason to doubt Mr Todd's credibility because the evidence before Mr Perryman and the Tribunal confirmed that it was Kirklees who contacted Mr Westwell, to say that Mr Todd had contacted them to say he had been dismissed. In fact, however, the transcript of the disciplinary hearing confirms that Mr Todd admitted to Mr Perryman that it was him who first contacted Kirklees. The point that Mr Todd was making was that when Mr Westwell spoke to Kirklees he could have said that Mr Todd was only suspended, in which case he would not have needed to change the DPS, but in fact chose to change the DPS, indicating that he accepted that Mr Todd had been dismissed.
28. On 30 August Mr Perryman sent Mr Todd a copy of his report concluding that Mr Todd had not been dismissed on 6 August and invited him to a further disciplinary meeting on 30 August, subsequently changed to 1 September. Mr Todd said that he would not attend because Mr Perryman was not willing to co-operate and correspond fully. At the Tribunal Hearing Mr Todd said that he could not attend on 1 September because of practical problems he was having arising from the care arrangements for his parents-in-law. He did not, however, tell Mr Perryman this at the time. Mr Todd also accepted in his evidence to the Tribunal that although he said to Mr Huckstepp at his appeal hearing that he had told Mr Perryman he *could* not attend, he had in fact told Mr Perryman he *would* not attend.
29. The second disciplinary hearing was held on 1 September 2018 in Mr Todd's absence. Mr Westwell attended and answered questions put to him by Mr Perryman. Mr Perryman decided that although Mr Todd not been dismissed on 6 August, he had been guilty of gross misconduct and that dismissal was the appropriate sanction. He identified several instances of gross misconduct. He concluded that Mr Todd had delayed telephoning Kirklees until late in the afternoon on Friday 10 August in order to inflict damage on the business by leaving it without a DPS for the coming weekend. Further, failing to inform Mr

Westwell that he had told Kirklees that he had been dismissed was gross misconduct because it could have led to the Company operating illegally and brought the Company into disrepute. There was no paperwork to account for £55 removed from the safe to pay a hotel bill and this was gross misconduct because it breached the Company's procedures for handling and recording cash payments. He had also been guilty of gross misconduct in not ensuring that five new employees were inducted, failing to carry out monthly safety checks, paying a DJ without an invoice and changing his Company email password when suspended. Finally, Mr Perryman concluded that Mr Todd had argued back against Mr Westwell's reasonable management instruction to carry out a stock take on 6 August and that this also amounted to gross misconduct.

30. Mr Perryman concluded that Mr Todd should be dismissed for gross misconduct and reported as much to Mr Westwell. Mr Westwell wrote to Mr Todd on 2 September 2018, adopting Mr Perryman's decision and purporting to terminate his employment for gross misconduct, setting out the relevant allegations.
31. The following day, Mr Todd emailed Mr Westwell saying that he intended to appeal.
32. The Company's legal advisers arranged for Mr Huckstepp, a human resources consultant, to conduct the hearing of Mr Todd's appeal, which took place on 5 October 2018. The appeal hearing lasted three-and-a-half hours. Mr Todd accepted in his evidence to the Tribunal Hearing that at the appeal hearing he had a full opportunity to make all the points he wanted to make in relation to his dismissal and the allegations of misconduct.
33. Mr Huckstepp wrote to Mr Todd on 9 October 2018 giving full reasons as to why he had decided that the decision to dismiss him was "correct". The Tribunal finds Mr Huckstepp's conclusions opaque in relation to the fundamental issue of whether Mr Todd had been dismissed on 6 August. In his letter he stated: "I believe that the evidence does not adequately establish whether the dismissal took place on that day with any degree of conclusiveness". The Tribunal interprets that as a finding that Mr Todd was not dismissed on 6 August, because Mr Huckstepp went on to state: "However, *if you had been* [Tribunal's emphasis] dismissed on that day, I do not believe that the decision would have been wrong". This was because Mr Todd's failure to carry out Mr Westwell's reasonable management instruction to conduct a stock take could not, in Mr Huckstepp's view, be seen as anything other than gross misconduct and, as Mr Westwell was witness to those events, he had "little need" to commission a separate investigation.
34. In his letter, Mr Perryman explained that he had also concluded from the evidence before him, which included all the evidence before Mr Perryman and what Mr Todd had told him at the appeal hearing, that Mr Todd had been guilty of other acts of serious misconduct. That included the fact that he had left it late on

a Friday, whether intentionally or negligently, to inform Kirklees that he was no longer DPS: this could have caused the venue to have to close for the weekend, with a significant impact on the business's income. He had also been guilty of gross misconduct in recording £55 as being removed from the safe when in fact it was still in the safe, albeit stored separately in an envelope. This was a breach of the Company's cash handling procedures. It was also gross misconduct and a breach of the Company's procedures for him to have paid DJs before receiving their invoices. Even if this was common practice, as Mr Todd alleged, he was the General Manager and should have taken steps to stop the practice, as well as not acting in this way himself. Further, he had not ensured that health and safety checks and staff inductions had taken place. Even if, as he maintained, he had delegated some of these tasks to Mr Dyson to carry out, it remained his responsibility to ensure that they had happened. Logging on to the Company's computer network after he believed he had been dismissed (to change the password) was also gross misconduct.

Applying the law to the facts

35. If an employee alleges unfair dismissal, it is for him to establish that he has been dismissed. As indicated in the above findings of fact, the Tribunal accepts that Mr Westwell dismissed Mr Todd on 6 August 2018. The next question for the Tribunal is, what was the reason for dismissal and did it fall within the potentially fair reasons for dismissal in Section 98(1)(b) or (2) of the Employment Rights Act 1996 (the ERA). The Tribunal finds that the reason for Mr Westwell's decision to dismiss Mr Todd related to Mr Todd's conduct, namely, that he had vociferously resisted Mr Westwell's instruction to carry out a stock take. That was a reason relating to his conduct within Section 98(2)(b) ERA.
36. The fairness of the dismissal depends upon whether in all the circumstances Mr Westwell acted reasonably or unreasonably in treating Mr Todd's conduct as a sufficient reason to dismiss him (Section 98(4) ERA).
37. As noted above, the Tribunal finds that Mr Todd never refused outright to do a stock take. At the Tribunal Hearing, Mr Westwell accepted that Mr Todd probably would have done a stock take at some point that day. The Tribunal accepts, however, that Mr Todd was guilty of insubordination. Although he felt he had good reason to argue back against Mr Westwell's instruction, the fact remained that Mr Westwell was his manager. His instruction to do a stock take was a reasonable management instruction that he should not have vociferously resisted. Although the nature of the relationship between the two men was such that disagreement between them was not unusual, Mr Westwell was entitled to expect Mr Todd's co-operation and a degree of respect for his orders. Mr Westwell, as the owner of the business, was entitled to ask his General Manager to conduct a stock take, if he felt the need to have an accurate picture of current stock levels.

38. The Tribunal considers that the situation escalated further because Mr Todd asked whether he was being suspended. Mr Westwell was angry and irritated at Mr Todd's resistance to his order and, in the heat of the moment, decided to tell him he was not suspended, he was dismissed. This was not a situation, however, where an employer almost immediately retracts a dismissal, such that it should properly be viewed as not having taken place. Mr Westwell did not try to retract the dismissal or retrieve the relationship, because he found out that Mr Todd had changed his email password and events then developed as set out above.
39. Even though the Tribunal accepts that Mr Todd's resistance to Mr Westwell's order did amount to insubordination, it does not accept that Mr Westwell's decision to dismiss Mr Todd on the spot for that insubordination was reasonable. This was a case where any reasonable employer would have followed a proper disciplinary process, as set out in the ACAS Code of Practice on disciplinary procedures. That would have given both Mr Westwell and Mr Todd an opportunity to consider their positions in a calmer atmosphere.
40. The Tribunal concludes that Mr Todd's dismissal was unfair.

Compensation

41. Mr Todd seeks compensation for his unfair dismissal rather than re-employment by the Company.
42. Mr Todd was 55 at the effective date of termination of his employment. His week's pay was £576.92. He had completed two years' continuous employment. Applying the formula in Section 119 ERA, the basic calculation of his basic award is $1.5 \times 2 \times £576.92 = £1,730.76$.
43. The Tribunal has power, however, if the Claimant has been guilty of culpable or blameworthy conduct before his dismissal, to reduce the basic award to the extent it considers just and equitable for that reason (Section 122(2) ERA; Nelson v BBC (No. 2) (1980) ICR 110). In this case, the Tribunal is satisfied on the evidence it heard that Mr Todd had been guilty of dereliction of his duties as a General Manager. There was no paperwork to confirm that new members of staff had received their induction on matters such as health and safety, cash handling and underage drinking. This could have very serious implications for the business. Further, Mr Todd admitted in evidence at the Tribunal Hearing that he had failed to carry out some safety checks on equipment for working at height and fire safety checks. Even if Mr Todd had delegated some of these tasks to Mr Dyson, as he alleged, he remained accountable for these being carried out. In his submissions to the Tribunal, Mr Todd said that "management should not be held accountable for inaction by juniors". This indicates that even now he is not prepared to acknowledge the extent of his responsibilities as a General Manager. He had failed to ensure that the correct paperwork was in place in relation to payments to DJs. That was a breach of Company procedures even if, as he

alleged, others were also guilty of not following the procedure. Mr Todd also accepted in evidence at the Tribunal Hearing that he had been wrong to change the password on his Company email account after he had been dismissed. Finally, the Tribunal accepts that Mr Todd was insubordinate towards Mr Westwell when he was told to carry out a stock take. In summary, the Tribunal accepts that in arguing vociferously with Mr Westwell about his request, Mr Todd was failing to follow a reasonable management instruction.

44. Viewing all these matters in the round, the Tribunal considers it just and equitable to reduce Mr Todd's basic award on account of this conduct by 75%, bringing it down to £432.69.
45. Turning to the compensatory award, this is such amount as the Tribunal considers it just and equitable to award having regard to the loss sustained by the Claimant as a result of his dismissal (Section 123(1) ERA).
46. Mr Todd was paid by the Company until 2 September 2018. At the date of the Hearing on 28 June 2019 Mr Todd was unemployed and had been since the date of his dismissal on 6 August.
47. A Claimant is under a duty to make reasonable efforts to minimise his loss of income from his dismissal by making reasonable attempts to find alternative employment. The Tribunal accepts that Mr Todd's job search may have been hampered by his age, the fact that his work experience has been entirely in the hospitality sector and the impact the dismissal had on his motivation and confidence. Mr Todd said that for the first few months after his dismissal he was too depressed to work, but the Tribunal is not prepared to accept that he was too unwell to even look for work during that time, in the absence of medical evidence to that effect. Mr Todd has limited his job search to management positions in the hospitality sector. The Tribunal accepts the Company's submission that Mr Todd has been unreasonable in restricting his search in this way, and that he could and should have widened the scope of the jobs he was considering after three months or so. At the Hearing Mr Todd confirmed that he had two leads that might lead to new employment once this Tribunal litigation is concluded.
48. Taking all these matters into account, the Tribunal considers it just and equitable to assess Mr Todd's loss of earnings on the basis that, had he taken reasonable steps to obtain alternative employment, he would have replaced his income from the Company within a year of his dismissal on 6 August. His net income from his employment with the Company was £1,973.40 a month. He was paid until 2 September. His net loss of earnings for the remaining 11 months of that year totalled £21,707.40. The Tribunal also considers it just and equitable to compensate Mr Todd for the loss of his statutory rights in the sum of £350. The basic calculation of Mr Todd's loss results in a figure of £22,057.40.

49. The Tribunal has considered the extent to which it would be just and equitable when calculating Mr Todd's compensatory award to reflect his misconduct, some of which came to light after his dismissal, as set out in paragraph 43 above. In particular, the Tribunal has considered whether there was a chance that the Company would have dismissed Mr Todd for his insubordination towards Mr Westwell, even if he had not been summarily dismissed on 6 August, and whether his compensation should be reduced to reflect that possibility (Polkey v A E Dayton Services Limited (1988) ICR 142).
50. Mr Todd told the Tribunal that he did not deserve to be disciplined at all, presumably implying that if Mr Westwell had acted reasonably there would have been no chance that he would have been dismissed. The Tribunal disagrees. If the Company had adopted a fair disciplinary process to deal with Mr Todd's insubordination, it would still have used the services of external HR professionals to ensure objectivity. From the evidence it heard, including the appeal outcome letter, the Tribunal is satisfied that Mr Huckstepp conducted a thorough consideration of Mr Todd's appeal. Mr Todd himself accepted in his evidence to the Tribunal that Mr Huckstepp gave him a fair hearing. Mr Todd did not accept, however, to Mr Huckstepp or to the Tribunal, that he had been guilty of insubordination on 6 August.
51. In the light of Mr Todd's position, the Tribunal is satisfied that there was a 60% chance that, even if a fair procedure had been followed, Mr Todd would have maintained his position that he had done no wrong and the Company would have decided to dismiss him for insubordination. The Tribunal therefore considers it just and equitable to reduce the compensatory award by 60% to reflect that chance.
52. In addition, the Tribunal considers it just and equitable to reduce Mr Todd's compensatory award by a further 15% to reflect the other aspects of his misconduct.
53. This leads to the compensatory award being reduced to £5,514.35.
54. Under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if the Tribunal is satisfied that an employer has unreasonably failed to comply with the ACAS Code of Practice on disciplinary procedures, it may, if it considers it just and equitable in all the circumstances to do so, increase the award it makes to the employee by up to 25%. In this case, the Company dismissed Mr Todd without complying with any aspect of the Code. Although the Company did subsequently follow what would have been a fair procedure, it did so on a false premise and without acknowledging the fact it had already dismissed Mr Todd. On that basis, the Tribunal considers it just and equitable to increase Mr Todd's compensatory award by 25%, bringing it up to £6,892.94.

55. If the Tribunal considers that a Claimant has by his own conduct contributed to his dismissal to any extent, the Tribunal has power to reduce the compensatory award to the extent that it considers just and equitable in the light of that finding (Section 123(6) ERA). In this case, the Tribunal finds that Mr Todd's insubordination towards Mr Westwell led directly to his dismissal. Even taking into account that these two men routinely disagreed with each other during the course of their working day, as owner and Director of the Company Mr Westwell was entitled to expect Mr Todd to accept a straight instruction from him without persisting in arguing back. The Tribunal has already taken Mr Todd's insubordination into account in deciding that there was a 60% chance that he would have been dismissed for that misconduct even if he had not been dismissed on 6 August. In order to avoid "double counting" for the insubordination, therefore, the Tribunal considers just and equitable to reduce Mr Todd's compensatory award by 10% for this contributory conduct, a substantially lower figure than it would otherwise have chosen. This brings the compensatory award to £6,203.65.

56. The Tribunal therefore awards Mr Todd total compensation of £6,636.34.

Breach of contract

57. The parties agreed that Mr Todd was entitled under his contract of employment with the Company to receive two weeks' notice of termination of his employment. The Tribunal accepts, however, that by his insubordination and other failings, Mr Todd was guilty of conduct that was likely to destroy or seriously damage Mr Westwell's trust and confidence in him as General Manager. That amounted to a repudiation by Mr Todd of his contract of employment. The Company was therefore released from its own contractual obligation to give him notice of termination. Further, even if the Company had been obliged to give Mr Todd notice of termination on 6 August, he was in any event paid until 2 September, beyond the end of what would have been his notice period. He has therefore not sustained any financial loss that could be reflected in damages.

58. The Tribunal therefore dismisses Mr Todd's claim for damages for breach of contract.

Employment Judge Cox
Date: 29 July 2019