RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Goodey**

Respondent: **Star Amusements Limited**

Heard at: **East London Hearing Centre**

On: **11 October 2019**

Before: **Employment Judge Crosfill**

Representation

Claimant: In person

Respondent: Mr J Remblance (Manager)

JUDGMENT

The judgment of the Tribunal is that:-

(1) **The Claimant's claim for unfair dismissal is well founded.**

(2) The Claimant is entitled to a basic award under Section 119 of the Employment Rights Act 1996 of £1,332.24.

(3) The Claimant is entitled to a compensatory award under Section 123 of the Employment Rights Act 1996 of £1,903.20

(4) The Respondent unreasonably failed to comply with the relevant statutory code and the Compensatory Award shall be subjected to an uplift of 12.5%

(5) The total sum payable in respect of the unfair dismissal award is £1,332.24 + (£1,903.20 x 1.125) = £3,473.24 and the Respondent is ordered to pay the Claimant that sum.

(6) The recoupment regulations do not apply to any part of the compensatory award.

(7) The Claimant's claim of breach of contract (wrongful dismissal) succeeds but there is no separate award.

(8) The Claimant's claim for payment in lieu of annual leave accrued but untaken at the time of his dismissal brought under the Working Time Regulations 1998 is well founded and he is entitled to payment of 1.23 weeks annual leave. His weekly gross pay was an average of £380.64. The Respondent must pay the Claimant the sum of £468.19 paid as wages and subject to any deductions required by law.

REASONS

1 I delivered an oral judgment dealing with all matters of liability at the hearing. I then heard further evidence in respect of remedy and informed the parties of my principle conclusions but not the detailed calculations. The Respondent requested full written reasons for my decisions. I provide those reasons here.

Case Summary and issues

2 The Respondent is a Family-owned company which operates a number of amusement arcades in the Southend area. The Claimant started working for the Respondent on 1 September 2014 as a" "floorwalker". He worked in the region of 48 hours per week. In 2018 the Claimant had risen to the position of supervisor receiving at that point a small increase in pay.

3 When the Claimant attended work on 21 March 2018 he was met by Mr John Remblance, one of the family that owned the casino, and his line manager Dmitrij Guzkiewicz. The Claimant was informed that the Respondent believed that he had been taking small cash sums from a cash float, that they considered that to be gross misconduct, and that he was dismissed. The Claimant was not informed of any right to appeal.

4 The Claimant brings a claim for unfair dismissal under Part X of the Employment Rights Act 1996. He also brings a claim for wrongful dismissal claiming damages equivalent to notice pay which is brought under the Employment Tribunals Extension of Jurisdiction (Extension and Wales Order 1994) and, finally he says that he is owed 6.6 days accrued but untaken holiday a claim either brought under Regulation 30 of the Working Time Regulations or indeed as a claim for unlawful deduction from wages pursuant to Part 2 of the Employment Rights Act 1996.

5 The parties were unrepresented and had little understanding of the law or process that would be followed by the Tribunal. For my own purposes I identified the issues as follows:

Unfair Dismissal

(1) The Respondent admits that the Claimant has sufficient continuity of service to present a claim of unfair dismissal.

(2) The Respondent accepts that it dismissed the Claimant.

(3) The Tribunal needed to decide whether the Respondent has established that it dismissed the Claimant for a potentially fair reason falling within Sub-section 98(2) of the Employment Rights Act 1996 or some other substantial reason. The Respondent relies upon "conduct" as a potentially fair reason.

(4) If the Respondent dismissed the Claimant for a potentially fair reason the tribunal must determine whether the dismissal was fair or unfair applying the test set out in Sub-section 98(4) of the Employment Rights Act 1996. In particular having regard to:

(a) Whether the Respondent has carried out a reasonable investigation into the alleged misconduct and

(b) that any belief that the Claimant was guilty of misconduct was formed upon reasonable grounds and

(c) that the decision to dismiss the Claimant was one which was open to a reasonable employer.

(5) If the dismissal was unfair then the Tribunal will need to consider, when assessing whether to make any award of compensation:

(6) Whether any basic award or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 on the grounds that the Claimant caused or contributed to his dismissal; and

(7) Whether the Claimant might have been or would have been fairly dismissed by the Respondent in any event and if so whether it is just and equitable to reduce any compensatory award to reflect that.

(8) Should any compensation be adjusted to reflect any failure, by either party, to comply with a relevant code of practice (here the ACAS Code of Practice on Discipline and Grievances at Work)? If so by how much?

<u>Wrongful dismissal</u>

(9) The Respondent accepts that the Claimant was dismissed without notice.

(10) The Tribunal will need to determine what notice period the Claimant was entitled to under his contract of employment (subject to the statutory minimum that the Respondent was required to give).

(11) Can the Respondent establish as a matter of fact that the Claimant's conduct amounted to a serious breach of contract that entitled him to dismiss the Claimant without notice?

(12) If the Claimant was wrongfully dismissed what loss has the Claimant suffered as a consequence?

<u>Compensation for leave accrued but untaken</u>.

(13) What are the dates of the holiday year?

(14) How much leave was the Claimant entitled to

(15) How much leave has the Claimant taken?

(16) What proportion of any leave entitlement remained at the date of termination?

6 Each party had brought their own bundle of documents. There was a considerable overlap between them. The Claimant had prepared a short witness statement on his own behalf. On behalf of the Respondent I had statements from Mr Remblance and Renata Idzikowska who was a colleague of the Claimant and who in these reasons I shall refer to as Renata. Renata Idzikowska had not attended the Tribunal to give evidence. The Respondent had sent to the tribunal what it said was a threatening Facebook message from the Claimant to Renata. The Claimant had immediately responded denying that he was the author of that message. He provided a number of Facebook conversations and text messages which show that he was on good terms with Renata. Renata did not suggest in her witness statement that she had been threatened by the Claimant indeed she said that they were on good terms. I had no evidence from which I could have concluded that the Claimant was responsible for threatening Renata all that that was the reason that she had not attended to give evidence. I therefore gave her witness statement only such weight as was appropriate in circumstances where she did not attend for cross examination.

7 The Claimant and Mr Remblance both gave evidence and each asked the other questions in cross examination. Thereafter they both made submissions which focused mainly on the facts. I shall not set out those submissions here but deal with the arguments raised in my discussions and conclusions.

Findings of fact

8 Mr Goodey was employed by the Respondent from 10 September 2014 initially working just on the minimum wage however he was promoted to a position of a supervisor in about June 2018. He referred to himself as a floorwalker but the difference in title is material. I find that he was trusted throughout his employment and that the position of floorwalker/supervisor involved more responsibility than his previous role.

9 In his witness statement Mr Remblance says that the Claimant's attitude started to change in 2016. He says that the Claimant was given two written warning in May and December and two further more written warnings in April and May 2018. I find that the manner in which the employment was terminated and the existence of this litigation has made all parties involved view each others conduct somewhat differently in hindsight than they did at the time. The reality was, as Mr Remblance accepted, that Mr Goodey had been given some warnings for the use of mobile telephone or perhaps being late but in fact he was one of many employees to use their telephones on the shop floor and the warnings were given just before a new policy was introduced. This is not sufficient to support a suggestion that there had been some significant downturn in attitude. I find that the reality is that Mr Goodey had a good employment record.

10 It is necessary for me to make some findings in respect on how cash was handled within the amusement arcade. Generally speaking the customers of the arcade who wished to play on the various machines required change. Change would be kept in the

cashier's room in which only one person would work at any one given time and the door was generally locked. The float of change was in two parts. There was an active tray from which the cashier would distribute coins in return for notes which would be kept in a draw. In addition to that there was a cupboard in which trays of coins particularly pound coins were kept stacked into piles. Behind the cashier there were also buckets of smaller coins 2 pence and 10 pence pieces.

11 At the material time there were two cashier's Marie Stratten and Renata. I have no first hand evidence from either of them. It is the Respondent's case that the cashiers reported a concern that the Claimant was responsible for moving small amounts of money from their float when he covered their breaks. Whilst Renata has produced a witness statement she has not attended this Tribunal hearing and therefore her evidence remains entirely untested. The Respondent had produced three diary pages which contained a short sentence at the bottom of each which it is suggested amounted to a "witness statement". In fact each diary entry is in almost identical terms. A diary entry of 17 March 2019 says "I Renata … would like to put in writing that today Sunday 17th of March 2019 my float was short by £3 after having a toilet break covered by Aidan Goodey". Entries by Marie are in exactly the same terms on 18 March 2019 but referring to the float being £2 pounds short. I consider it no coincidence that the language used is identical. I find it more likely than not that the terms of the diary entries were dictated to the two employees. It would be extraordinary if they both had written the exact same thing on different days without some orchestration.

12 I do accept that the three days 17, 18 and 19 March 2019 Marie and Renata carried out checks believing that money was going missing. I am satisfied that Marie and Renata reported to their Line Manager, Dimitrij that money had gone missing during breaks covered by the Claimant.

13 Mr Remblance gave evidence that he had instructed the cashier is to undertake a float check before and after the Claimant covered any breaks. The suggestion in the witness statement of Renata is that she did carry out a full check. She suggests in her statement that coins were missing from the trays in the cupboard. She does not say what checks she carried out. I was told, and accept, that during the day customers would often drop coins on the floor and it was normal for these to be handed in by the floorwalker is another employees to the cashiers office. As such it was difficult to do any reconciliation. The Claimant said that he frequently handed in coinage to the cashier's office. He was not challenged on that evidence. It might be thought that that pointed away from a suggestion he was dishonest. There is a real paucity of evidence as to how the cashiers could have come to a reliable conclusion that there was money missing rather than misplaced. No records were kept of the sum that the cashiers expected to find in the float or how they concluded a few pounds were missing. I was shown no documentary evidence whatsoever other than the three short statements in the diary and Renata's untested, and I find vague, witness statement which would establish that money was missing at all.

14 The Claimant has speculated on the reasons why he was singled out as a suspect. He believes that there was some plan to replace him with another employee. There is no evidence that that was the case.

15 On 21 March 2019 the Claimant turned up for work at some point before 8 AM. He was met by Mr Remblance and Dimitrij, his manager. By that stage Mr Remblance had already decided that the Claimant was to be dismissed believing that he had taken money from the float. The meeting, if it could said to be a meeting at all, took place when the

parties were standing beside an exit door. Mr Remblance told me the place selected because it would be easier for Aidan Goodey to leave, as and when, he was told he was dismissed. I find that Mr Remblance had no intention of investigating matters any further and had already determined the Claimant should be dismissed.

16 When Mr Goodey was told the nature of the allegation against him he protested. He demanded to see any CCTV evidence believing the cashier's office to be covered by CCTV. I accept that as a matter of fact there is no relevant CCTV evidence but that was not known to the Claimant. It is said by Mr Remblance that he offered the Claimant access to the 'statements' made by Renata and Marie. The Claimant says that he was never given an opportunity to see those statements before his dismissal. I accept his evidence on that. My reasons for doing so are that it seems to me entirely inconsistent with somebody demanding the CCTV evidence do not take up an offer to see written statements against him. The Claimant was told that if he wished to contest his dismissal (in other words the dismissal had taken place) he needed to write to the Respondent. He was not given the opportunity to be accompanied at the disciplinary meeting and he was not offered any right of appeal.

The Law

Unfair dismissal

17 The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> *98 General.*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3) …..

(4) 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 a sufficient reason for dismissing the employee, and

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

18 For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

19 Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

20 The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

21 The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

22 In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

23 Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

24 Unless the employee seeks reinstatement or re-engagement the Tribunal must consider making both a basic and compensatory award. ***Polkey v A E Dayton Services Ltd*** **[1987] IRLR 503** is authority for the proposition that in assessing what compensation is 'just and equitable' an employment tribunal are entitled to have regard to the possibility that had the employer acted fairly there might or would have been a dismissal in any event. The proper approach to hypothetical as opposed to real events is that set out in ***Software 2000 Ltd v And*rews** **[2007] IRLR 569** although that now needs to be understood in the light of the repeal of the statutory dismissal procedures (see the references to Section 98A(2)). Elias J (P) (as he then was) gave the following guidance:

> *"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
>
> *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).*
>
> *(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*
>
> *(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*
>
> *(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.*

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely."

25 Following the repeal of the statutory dismissal procedure in ***Ministry of Justice v Parry*** **[2013] ICR 311** it was said (by Langstaff J (P)):

"We should add that some of the way in which this subject is dealt with in Harvey has the capacity to be misleading. At para 2558 (Vol 1, D1) it cites Software 2000 Ltd v Andrews [2007] IRLR 568, [2007] ICR 825, and accurately quotes a lengthy passage from the judgment of the EAT given by Elias P. Under para 54, at point (7) under in his distillation of the effect of the authorities he says:

"(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly . . . ."

Unfortunately, it is not made clear in the text of Harvey that this part of the decision is no longer appropriate guidance, since s 98A(2) was in force at the time it was delivered, and has been repealed since. When it was in force the range of chance of dismissal met a watershed at 50% above which – by however little or however much – a completely fair hypothetical dismissal was to be assumed for the purposes of compensation to be awarded for an actual one already held unfair. It is not in force any more. Chance of dismissal now runs across the whole spectrum from zero to 100%, as assessed by the tribunal. It would therefore be best if this part of the otherwise very helpful guidance were no longer put forward as if it might be relied upon.

Wrongful dismissal

26 An employee is wrongfully dismissed when the employer terminates the contract of employment in a manner which amounts to a breach of its terms. Contracts of employment generally, and in this case do, provide that either party may terminate the contract upon notice. Section 86 of the Employment Rights Act 1996 provides for minimum periods of notice in certain circumstances.

27 In addition to any right to give notice a contract of employment, in common with any other contract, may be terminated by the "innocent party" if the "guilty party" acts in a manner which amounts to a serious or repudiatory breach of contract. In the employment context this is usually referred to as "gross misconduct".

28 To amount to "gross misconduct" the conduct must be such that it *'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'* ***Neary v Dean of Westminster*** **[1999] IRLR 288**. Gross misconduct may be established without proving dishonesty or wilful conduct. Gross negligence that undermines trust and confidence will suffice. Whether it does so in any particular circumstances is a question of fact and judgment for the Tribunal ***Adesokan v Sainsbury's Supermarkets Ltd*** **[2017] EWCA Civ 22**.

29 The question of whether there was or was not any conduct that could be categorised as "gross-misconduct" is an objective one for the employment tribunal which must make its own findings of fact and is not bound by any conclusion or belief of the employer although the reaction of the Employer may be a relevant matter to take into account.

Discussion and conclusions

30 I shall deal first with the unfair dismissal claim taking as my guide the issues set out above.

31 I have rejected the Claimant's theory that there was some other reason of his dismissal other than a belief that he was responsible for money is being missing from the float. I accepted Mr Remblance's evidence that it was that matter and no other that caused him to take the decision to dismiss the Claimant. Taking money, but more bluntly theft, can certainly amount to 'conduct' for the purposes Section 98(2) of the Employment Rights Act. As such I am satisfied the reason for the dismissal was potentially fair.

32 As set out above a tribunal will ordinarily look at whether any belief was based upon reasonable grounds. That is not the same thing as the tribunal deciding for itself whether the conclusion reached was correct. Different people faced with the same evidence might come to different conclusions. The evidence before Mr Remblance was limited to the reports of the cashiers. At the time he made his decision he had not made any enquiries whatsoever of the Claimant. No records were kept as to how any float checks were undertaken. Mr Remblance believed that coins taken from trays in the cupboards would be visibly missing. He was not told that a full count had taken place before after and had not asked for the totals.

33 The issue of whether there were reasonable grounds for a decision is bound up with the question of whether there was a fair investigation. It is a simple matter to rush to a

conclusion that somebody has done something wrong but it will be a very rare case that there would be reasonable grounds for that decision without asking the person accused whether there was a contrary explanation. Clearly what is meant by a reasonable investigation will depend on all the facts and circumstances of the case. There may be some cases that are so clear cut that no investigation whatsoever is necessary for example when the employee admits a misconduct or where they had been convicted in a Criminal Court. At the other end of the scale there will be cases which require careful meticulous investigation. Here the Claimant was facing an allegation of dishonesty and an allegation of dishonesty almost always needs to be carefully investigated. On the facts of the present case I do not think it can be said that there were reasonable grounds for the decision or that there was a fair investigation when the conclusion that money was missing in the first place was itself not so clear that only one answer was possible.

34 My findings of fact set out above made it quite clear that there is been a wholesale flouting of the ACAS code of practice. There was no recognisable disciplinary process. The Claimant was taken entirely by surprise on the morning of 21 March 2019. He was not provided with any of the evidence against him. He did not know of the allegations he was going to face. He was not given the statutory right to be accompanied by a trade union representative or workplace colleague. He was not given the right to appeal the decision that was made but told that he might write if he disagreed with it. That is not the same as offering an appeal.

35 I have no hesitation in finding this dismissal unfair.

36 I then turned the question of compensation and address the questions set out above in the list of issues. The first question is whether or not the basic or compensatory award should be reduced by reason of the Claimant's conduct. That requires me to make a finding of fact whether the Claimant was the person responsible to taking the money. That is the same exercise as I am required to undertake in the wrongful dismissal claim. I am entitled to have regard to the evidence before me and not just to the evidence before the Respondent at the time it took the decision to dismiss

37 The Claimant denied any dishonesty but could not comment positively on why it was that the cashiers had said that money was missing after breaks they had taken. I have commented above on the paucity of the evidence as to how the float check was undertaken. Mr Remblance did not suggest that a full count could have shown discrepancies as coins were added to the float during the day. He thought that a visual inspection had been done. It is quite possible for inaccuracies to creep in in those circumstances. I am puzzled at the suggestion that if the Claimant was indeed the thief he would take coins from neatly stacked piles which would be plainly visible rather than simply pocketing some of the money from the cash box which everybody knew could not usually be reconciled. That would be particularly stupid. The fact that to cashiers had come to the conclusion that the Claimant was responsible of the taking money does not necessarily assist. I would need to be satisfied that it was more likely than not firstly that there was money missing and secondly that the Claimant was responsible for that. Whilst he covered the cashiers' breaks nobody has suggested that he was the only person working on those days. I should not disregard the fact that the Claimant has protested his innocence from the very moment he was accused of taking money. He had worked for the Respondent for some years in an environment where cash was plentiful and no suggestion had been made previously that he was helping himself. The Respondent has not satisfied me that it is more likely than not either but money was missing at all or that if it was the Respondent was inevitably the person who was responsible. I therefore have

concluded that there is no conduct which would justify me reducing either the basic or compensatory awards.

38 I turn to the question of whether the Respondent, had it acted fairly, would or could have dismissed the Claimant in any event. Even before me the Respondent has not provided evidence that satisfy me on the balance of probabilities any money was missing at all. As I have said above the Claimant did not provided positive case before me but I was hearing the matter some months after the dismissal and I would be speculating as to what the Claimant might have been able to say had he been questioned fairly closer to the events. Had the Claimant been given details of how it was that the floats were checked he may have been able to challenge the assumption that money was missing. He may have been able to point to others who might have been responsible. I consider that I would be speculating wildly in reaching any conclusion that the Respondent could or would have fairly dismissed the Claimant. Had an open-minded approach being taken given the seriousness of the allegations and the Claimant's good track record and looking at the totality of the evidence deployed before me I am not persuaded that I can reach any reliable conclusion that there could, or would, have been a fair dismissal in any event. I therefore declined to make any reduction to the compensatory award.

39 It follows from my findings above that I am not satisfied on the balance of probabilities that the Claimant committed any act of gross misconduct which would have justified his summary dismissal by the Respondent. I therefore find that he has been dismissed in breach of contract usually referred to as a wrongful dismissal.

40 I make the following additional findings of fact in relation to the claim for holiday pay. The Claimant told me that the holiday year started on 1 January. That was not disputed by the Respondent. He had had five days holiday in 2019 that he told me, and I accept, he did so on the express understanding that those days were to be taken out of his unused 2018 holiday entitlement. The Claimants contract of employment provides that holiday may not be carried over other than with permission of the Respondent however the Claimant produced a holiday record or rota bearing a note by Renata expressly indicating that this holiday was from the Claimant's 2018 entitlement. I find that that was the case and that the leave was authorised as suggested. It therefore follows that the Claimant is entitled to compensation for the holiday that he accrued between 1 January 2019 and his dismissal on 21 March 2019.

Remedy

41 I have set out above my conclusion is that there is no basis to reduce either the basic or compensatory award payable to the Claimant.

42 The Claimant had calculated the basic award on the basis that he had been employed for four full years. Whilst there was no dispute that the Claimant had been employed for 4 ½ years for one of those years he was under the age of 22. He is therefore entitled to 3 weeks gross pay for each year over the age of 22 and half a week's pay for the remaining year. He claimed that his average gross pay was £380.64. In fact if I look at his final pay slip he has perhaps underestimated that by a pound or two. Calculation of compensation may be on a broadbrush basis and I consider it just and equitable to accept the figure given by the Claimant. He is entitled to a basic award of 3.5 x £380.64 = **£1,332.24**.

43 In his schedule of loss the Claimant had not made any claim for loss of wages other than bringing a claim of wrongful dismissal. He had indicated in his ET1 that he had obtained new employment on 29 April 2019. When he gave further evidence in respect of remedy he said that in fact he had started work on 27 March 2019 but on the minimum wage for approximately 40 hour week. On 29 April 2019 his new employment was formalised. He made no claim beyond that date.

44 I initially attempted to calculate whether the Claimant had suffered any loss of wages prior to 29 April 2019. There was no evidence before me about exactly how much the Claimant earned during that period. I apologise to the Respondent that it was only during the course of our discussions that I realised I had overlooked an important matter. In ***Norton Tool Co Ltd v Tewson*** it was held that an Employment Tribunal was not constrained by ordinary common law principles when assessing loss. Good industrial practice required an employer who dismissed without notice to make a payment in lieu of notice. The employment tribunal should compensate loss having regard to what was good industrial practice and should not require an employee to give credit for sums earned during any notice period. That decision has been criticised but remains good law where it is the employer who expressly dismisses the employee.

45 In the circumstances I find that it would be just and equitable to award the Claimant the equivalent of a payment in lieu of notice that ***Norton Tool*** tells me is good industrial practice. The four-week notice period would have expired on 19 April 2019. I was not provided with adequate evidence by the Claimant to properly assess whether he suffered any loss of earnings in the period between 19 April 2019 and 29 April 2019. I suspect that he might have done but a suspicion is no basis for making an award of compensation. He could if he had chosen to do so have brought his payslips to put the matter beyond any doubt. Following changes in legislation in April 2018 payments in lieu of notice are taxable. It is therefore appropriate to make a gross award and I award four weeks pay at the figure proposed by the Claimant of £380.64 which as I have indicated above, if incorrect, is more favourable to the Respondent.

46 Given this conclusion I make no separate award in respect of the wrongful dismissal claim the Claimant having been fully compensated in this award.

47 The Claimant claimed a figure for loss of statutory rights. He had the right not to be unfairly dismissed and he had the right to 4 weeks statutory minimum notice. In those circumstances I consider it appropriate to make an award for loss of statutory right to fix that sum as being the same as one week's gross pay. That it seems to me is sufficient to guard against the risks the Claimant will be dismissed in future before acquiring the same rights.

48 I have found above that the Respondent flagrantly breached the ACAS code of practice and the Claimant sought an uplift on any compensation. I consider that it would be just and equitable to do so. I accept that the Respondent is a small employer nevertheless the right not to be unfairly dismissed has been in existence for over 40 years. The ACAS code of practice has been in place and publicly available for almost as long. The statutory right to be accompanied is an important right which should not be overlooked. Whilst the Claimant did not bring a separate claim for infringement of that right it seems to me that it is a matter that I take into account in assessing the level of any uplift. I have concluded that it is appropriate uplift compensatory award by 12 ½% to reflect these failures.

49 The calculations are therefore as follows:

49.1 the Claimant is awarded the sum of four weeks' pay at £380.64 to reflect the principle in Norton Tool = £1,522.56

49.2 the Claimant is awarded one week's pay at £380.64 as compensation for loss of his statutory rights

49.3 the total of £1,903.20 is then uplifted by 12.5% to come to a total of **£2,141.10**.

50 I have considered whether the Recoupment Regulations should apply to any of the compensatory award. I find they do not. Whilst I understand that the Claimant's family received some Universal Credit, the Recoupment Regulations will bite only on awards relating to loss of wages. A payment in lieu of notice is not a payment of wages nor is an award for loss of statutory rights. I have therefore set out above that the Recoupment Regulations have no application to the present case.

51 The Claim for holiday pay is for holiday pay in the period between 1 January 2019 and 21 March 2019. The Claimant had claim for 6.6 days holiday. The proper calculation is as follows. Firstly I must calculate the proportion of the leave year that had expired before the dismissal. There are 80 days between 1 January and 21 March. The Claimant was entitled to 5.6 weeks of holiday per year. The Claimant has satisfied me that the 5 days holiday he did take were taken by consent from the balance of his 2018 leave year. Again, I use the gross weekly wage suggested by the Claimant of £380.64. The number of weeks accrued is 80/365 x 5.6 = 1.227 weeks. The amount that was therefore due in lieu of that accrued holiday is 1.227 x £380.64 = **£468.19**. That sum may be subject to deductions of tax and perhaps national insurance.

52 I do not consider it necessary to uplift the holiday pay because of any failure to follow any statutory code of practice. Insofar as the Respondent should have identified the Claimant is bringing a grievance its failure to do so was not unreasonable and would not justify a separate uplift.

53 For the avoidance of doubt the Respondent is ordered to pay each of the sums set out in this remedy section of the judgment and underlined in bold.

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Employment Judge John Crosfill
4 December 2019