EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Mark Brown	AND	The Tewkesbury Marina Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 6 April 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Mr W Clarke Brown, Friend**
For the Respondent: **Did Not Attend**

JUDGMENT

The judgment of the tribunal is that:
1. The claimant was wrongfully dismissed without his eight weeks' contractual notice, and the respondent is ordered to pay the claimant damages for breach of contract in the net sum of £2,148.68; and
2. The claimant was unfairly dismissed; and
3. The respondent is ordered to pay the claimant compensation for unfair dismissal in the total sum of £21,264.65; and
4. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply.

REASONS

1. In this case the claimant Mr Mark Brown claims that he has been unfairly dismissed, and he also bring a claim for breach of contract for his notice pay. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and denies the remaining claim.
2. This has been a remote which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 75 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have heard from Mr Timothy Collier and Mr William Clarke Brown on his behalf. The respondent did not attend this hearing,

and had not agreed the bundle of documents nor exchange statements of any witnesses before the commencement of this hearing.

4. The respondent Tewkesbury Marina Limited is a private company which as it suggests operates the Marina at Tewkesbury in Gloucestershire. The claimant Mr Mark Brown commenced employment with the respondent as a Harbourmaster in January 2012 and was subsequently promoted to Senior Harbourmaster. The claimant was summarily dismissed for gross misconduct on 10 February 2020 in the following circumstances.
5. In July 2017 Mr William Clarke Brown, a friend of the claimant who has represented him today, joined as a Harbourmaster. The claimant was his line manager at that stage. Mr William Clarke Brown was then promoted to Marina Manager in February 2019 and became the claimant's line manager. He submitted his resignation in February 2020 shortly after the claimant's dismissal.
6. The claimant had been issued with a written statement of the terms and conditions of his employment which incorporated the respondent's disciplinary procedure as an appendix. This procedure allowed for summary dismissal for gross misconduct, and the non-exhaustive list of examples included theft, fraud and deliberate falsification of records.
7. The respondent's managing director is Mr Mark Cottrell. On 10 February 2020 the claimant was informed by one of the administrative staff to attend a meeting with Mr Cottrell in his office. The claimant was given no prior warning of this meeting, and neither was his line manager Mr William Clarke Brown. At that meeting Mr Cottrell told the claimant that after taking legal advice he was dismissing him immediately for acts of gross misconduct over the previous nine months and said words to the effect: "This is my business, I am the chairman, ultimately I do the hiring and firing, you are fired with immediate effect." He then instructed the claimant to collect his belongings and to leave the Marina immediately.
8. The claimant had not been informed that the meeting was of a disciplinary nature or that it might result in his dismissal. He was not informed of the allegations that he would have to face. He was not presented with any evidence to support those allegations. He was not informed of his statutory right to be accompanied by a fellow employee or a trade union representative.
9. The claimant wrote to Mr Cottrell on the next day on 11 February 2020 simply stating: "I Mr Mark Brown formally request that you send to me a letter giving reasons and explanation for termination of employment at Tewkesbury Arena Limited."
10. Mr Cottrell wrote to the claimant by letter dated 19 February 2020 to confirm the reasons for his dismissal. This letter explained that: "The allegations were that you have been dishonest and misled the Managing Director demonstrated through financial mismanagement and day-to-day communications. After careful consideration of the evidence, I determined that the allegations should be upheld in full and the reasons for coming to this decision can be summarised as follows: (i) that you failed to appropriately record moorings to the value of £100,000 on the system which has led to financial irregularity; (ii) that you have been party to backhand agreements with berth holders. This has subsequently caused a substantial monetary loss to the Marina and reputational damage; (iii) that you have been party to the subletting of a berthing licence contrary to the Marina terms and agreement; and (iv) that you have repeatedly provided inaccurate information and excuses when being asked to undertake your job role. This is a demonstration of your dishonesty and repeated failure to follow reasonable management instructions." The letter confirmed that the claimant had been summarily dismissed with effect from 10 February 2020. The letter also confirmed that accrued holiday pay and salary to the date of dismissal would be paid, and it afforded the claimant the right of appeal within seven calendar days.

11. The claimant appealed against his dismissal by letter dated 22 February 2020. More detailed grounds of appeal were attached to that letter which challenged and denied each of the four grounds explained in the dismissal letter. The grounds of appeal also disputed that there was any evidence to support the respondent's allegations, and it requested copies of any information or evidence upon which the respondent was relying. The claimant also raised a formal written grievance against what he perceived to be the respondent's inadequate procedure which had led to his dismissal.
12. The respondent then appointed an HR consultancy namely Eagle HR to conduct the appeal on the respondent's behalf. It was agreed between the parties that this meeting would also deal with the claimant's grievance, because they were inextricably linked. This meeting took place on 27 April 2020 by Zoom because of the Covid-19 pandemic. The meeting was chaired by Elaine Fisher of Eagle HR, with a notetaker present. The claimant went through the grounds of appeal and challenged and denied the conclusions which had been reached by the respondent, and challenged the procedure adopted by the respondent. The claimant explained the nature of his job duties, and he asked for evidence of the disputed allegations against him. At no stage did the respondent or Ms Fisher of Eagle HR provide the claimant with any evidence of the allegations against him. The meeting was concluded on the basis that the respondent would make further contact with the claimant after a few days.
13. However, nothing then happened, and no evidence was ever provided to the claimant to substantiate the allegations of gross misconduct made by the respondent. The claimant then made contact with ACAS under the Early Conciliation procedure on 20 March 2020 (Day A), and ACAS issued the Early Conciliation Certificate to the claimant on 20 April 2020 (Day B). The claimant presented these proceedings on 20 April 2020 claiming both wrongful dismissal in respect of his lost eight week notice period, and for unfair dismissal.
14. The respondent entered a notice of appearance denying liability for the claims, but in breach of the Tribunal case management orders then failed to take any further substantive steps to prepare for this hearing. The respondent did not agree the proposed bundle of documents which was prepared by and on behalf of the claimant, and it did not exchange any witness evidence upon which it wished to rely. The respondent failed to attend today's hearing.
15. Having established the above facts, I now apply the law.
16. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
17. I have considered section 98 (4) of the Act which provides "…. 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. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
19. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
20. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR

439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.

21. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
22. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
23. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.
24. I deal first with the claimant's claim for wrongful dismissal in respect of his lost eight week notice period. The respondent has adduced no evidence to suggest on the balance of probabilities that the claimant was guilty of any gross misconduct, either during the latter stages of the claimant's employment, or subsequently during these proceedings or at this hearing. The respondent has therefore failed to prove on the balance of probabilities that the claimant committed any gross misconduct. In the circumstances he was wrongfully dismissed when he was entitled to a statutory and contractual period of eight weeks' notice.
25. At the time of his dismissal the claimant earned a gross salary of £25,000 per annum, which resulted in net pay of £1,441.76 per month. This equates to a net weekly figure of £332.71. Eight weeks' notice at this rate suggests damages in the sum of £2,661.68, but the claimant commenced a new job in Tesco five weeks after his dismissal at the weekly take home rate of £171.00. The claimant therefore gives credit for three weeks alternative employment at this rate, or £513.00, which leaves a net sum of £2,148.68. Accordingly, the respondent is ordered to pay the claimant the net sum of £2,148.68 as damages for breach of contract
26. I now turn to the unfair dismissal claim. Before the claimant attended the meeting which led to his summary dismissal, he was not informed that the meeting was of a disciplinary nature or that it might result in his dismissal. He was not informed of the allegations that he would have to face. He was not presented with any evidence to support those allegations. He was not informed of his statutory right to be accompanied by a fellow employee or a trade union representative. Although he was offered the right of appeal, and attended a form of appeal hearing, this was not a rehearing of the earlier decision to dismiss. Despite his request no evidence was ever produced to substantiate any allegations of gross misconduct, no such

allegations were put to him at the appeal hearing, and the appeal and grievance rather petered out without any substantive reply.

27. A dismissal of this nature falls woefully short of the normal modern standards of good industrial relations, and it was in breach of the ACAS Code in a number of respects. I have no hesitation in finding that the respondent failed to undertake a reasonable investigation and procedure before dismissing the claimant. The respondent has failed to adduce evidence to prove on the balance of probabilities that it genuinely believed that the claimant had committed gross misconduct. Even if the respondent did hold that belief, I cannot find that it had reasonable grounds for so doing, because no evidence has ever been provided to the claimant, either at the time of his dismissal, or since, to substantiate the very serious allegations which have been laid against him.
28. Accordingly, I have no hesitation in finding that (even bearing in mind the size and administrative resources of this employer) the claimant's dismissal was unfair. The investigation and disciplinary procedure were clearly defective; the respondent has not proven that it genuinely believed that the claimant was guilty of gross misconduct; I have seen no evidence to suggest that any such belief could have been based on reasonable grounds; and in these circumstances dismissal was clearly not within the band of responses which was reasonably open to the respondent when faced with these facts.
29. I therefore declare that the claimant was unfairly dismissed.
30. I now turn to compensation for unfair dismissal, which consists of a basic award and a compensatory award. The claimant had completed eight years' service all over the age of 41 and his gross weekly pay was £480.77. His basic award is therefore £5,769.24.
31. I calculate the compensatory award as follows. In the first place I make an award for loss of statutory rights in the sum of £500.00. The claimant seeks loss from the end of his lost notice period of eight weeks (which has already been compensated for above), that is to say from 6 April 2020, until the date of this hearing which is exactly a year. At £1,441.76 net per month, this is a starting point for his net loss of £17,301.12. The claimant continued working at Tesco at the weekly rate of £171 for another 15 weeks, which is alternative earnings from Tesco in the sum of £2,565.00. With effect from 22 July 2020 he obtained employment at a higher rate with Morrisons with weekly take-home pay at the rate of £200.70. This continued for another 37 weeks until the date of this hearing, which is alternative earnings of £7,425.90. His total alternative earnings were therefore £9,990.90, which gives net loss for the year of £7,310.22. The claimant also seeks future loss but accepts that (despite his age and the difficulties surrounding the pandemic) he should be able to find an alternative job earning more than the Morrisons position within about 26 weeks. I agree, and I award future loss limited to 26 weeks at the weekly rate of £132.01 (which is the difference between his net pay per month with the respondent of £332.71 and the Morrisons rate of £200.70). This is future loss of £3,432.26. The compensatory award is therefore loss of statutory rights in the sum of £500.00; net loss to the date of this hearing in the sum of £7,310.22, and future loss of £3,432.26, which is a total of £11,242.48.
32. Total compensation for unfair dismissal is therefore £17,011.72, which consists of the basic award in the sum of £5,769.24, and compensatory award in the sum of £11,242.48.
33. The claimant has also applied for, and I award, an uplift of 25% following the respondent's repeated breaches of the ACAS Code. This is a further amount of £4,252.93, which makes the final compensation for unfair dismissal in the sum of £21,264.65. This is within the statutory cap for unfair dismissal compensation.

34. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
35. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 14; a concise identification of the relevant law is at paragraphs 15 to 23; how that law has been applied to those findings in order to decide the issues is at paragraphs 24 to 29; and how the amount of the financial award has been calculated is at paragraphs 30 to 34.

Employment Judge N J Roper
Date: 06 April 2021

Judgment and Reasons sent to the Parties: 20 April 2021

FOR THE TRIBUNAL OFFICE