EMPLOYMENT TRIBUNALS

Claimant: **Mr K Smith**

Respondent: **Dan-y-Craig Labour Club and Institute Limited**

Heard at: **Cardiff** **On: 17 and 18 December 2020, 27 May 2021 and 19 July 2021 (parties excused from attending on 19 July 2021)**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:
Claimant: Mr G Williams (representative)
Respondent: Mr A Walton (solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unpaid wages is not well-founded and is dismissed;

2. The claimant's claim for unfair dismissal is well-founded and the respondent is ordered to pay a basic award of £918.38 and a compensatory award of £3238.80 (including ACAS uplift of 20%);

3. The claimant's claim for failure to supply a written statement of employment particulars having been found to be well-founded by consent in the Tribunal's earlier judgment of 18 December 2020, and having succeeded in his claim for unpaid annual leave claim previously within these proceedings as well as the unfair dismissal claim above, the claimant is entitled to 2 weeks' gross pay award totaling £244.90 to be paid by the respondent.

4. The recoupment provisions apply.

REASONS

The Issues

1. Prior to the conclusion of these proceedings on 19 July 2021, I issued a Judgment on 18 December 2020 dealing with the withdrawal of the sick pay claim, the settling of the holiday pay claim and the concession made by the Respondent in respect of liability for failure to supply a statement of employment particulars.

2. This leaves three outstanding matters to be determined by the Tribunal:

    a. an unauthorised deduction from wages claim in respect of the failure to pay the Claimant the wages of a relief steward between March 2019 to the effective date of termination, when the Claimant was no longer employed in that role at the time.

    b. an unfair dismissal claim which arises from the termination of employment that happened on 3 November 2019 (as confirmed to Employment Judge Brace in the Preliminary Hearing of 20 November 2020). Two reasons for dismissal were then relied upon by the Respondent. The first was gross misconduct and the alternative is some other substantial reason as set out in paragraph 24 of the Response, who say that the Claimant has acted in a way calculated or likely to destroy the applied term of mutual trust and confidence culminating in his failure to attend his own appeal hearing. By the conclusion of these proceedings, the Respondent accepted that it did dismissed the Claimant for conduct but said the matters pleaded in relation to the alternative pleaded reason were still relevant.

    c. The amount of compensation to be paid to the Claimant in respect of the admitted failure to supply a written statement of employment particulars – the options are the standard award of two weeks' gross pay, or in the alternative, nothing or four weeks' gross pay if just and equitable.

The legal questions

3. In relation to the wages claim, it was explained to the Claimant at the outset of the hearing when discussing the issues that his wages claim, wholly based on the fact that he did not receive wages for a role he was no longer carrying out, posed an obvious issue. An employee generally should not receive pay if they do not hold the role specified or have not done the work/undertaken the relevant role (with the exception of sick leave or

maternity pay as an example). An issue not for this Tribunal to determine was the fact of the earlier demotion of the Claimant, though this was why he did not carry out the role of relief steward and did not receive the pay for the role. This was the Tribunal's position throughout the proceedings, though both parties made submissions which appeared to be inviting the Tribunal to deal with the issue of the demotion.

4. The Claimant was told about the ability to amend his claim at the start of the hearing and the "*not reasonably practicable*" time limit test that was relevant, but did not avail himself of the opportunity. This means the Tribunal had to determine whether the Claimant was entitled to wages for a job he no longer held or carried out without having before it a breach of contract claim or unfair dismissal claim relating to the demotion. The Tribunal can only fairly deal with the claims before it.

5. The unfair dismissal claim is based on the dismissal of the Claimant on the ground of gross misconduct. I am not allowed to substitute my own view of the situation for that taken by the Respondent. It is for the Respondent to establish the dismissal was on the grounds of conduct. As set out in the legislation and the case of **British Home Stores -v- Burchell [1978] IRLR 379** ("the ***Burchell*** case"), where there is a neutral burden of proof, I have to consider whether:

    a. the Respondent had a genuine belief in the misconduct alleged against the Claimant;
    b. whether any such belief was based on reasonable grounds;
    c. whether the grounds and belief were based on a reasonable investigation;
    d. and whether dismissal was within the range of reasonable responses open to a reasonable employer.
    e. Was the procedure used to dismiss the Claimant fair in all the circumstances?

6. Notwithstanding that I had explained to the Claimant the difference between substantive and procedural fairness when setting out the key questions for unfair dismissal, it is fair to observe that the legislation simply talks about taking into account the reasonableness overall of the actions of the employer and does not differentiate between the reason for dismissal and the manner or process of dismissal.

7. I must have to have regard to the ACAS Code of Practice on Disciplinaries and Grievances, but this was a case where the Respondent argued that it would be futile for the full procedure to have been followed in the circumstances. I explained to the Claimant the legal principles from **Polkey v AE Dayton Services Ltd [1987] UKHL 8** ("the *Polkey* case") and mentioned that if awarding compensation due to a finding that an unfair

dismissal occurred, I would have to consider the difference or the likely outcome had the identified failure not occurred. In addition, when deciding if the dismissal was fair, the range of reasonable responses test applies to the procedure used - I must not ask at the stage deciding whether dismissal was unfair if any procedural flaw made any difference and assess percentages. I should bear in mind that a single procedural flaw does not mean that the procedure as a whole is unfair when viewed as a whole.

8. What I must ask in light of the arguments made in this case is if the procedural steps in certain exceptional circumstances would reasonably be seen as futile by the employer based on what was known to it at the time of dismissal and were not taken as they could not alter the decision to dismiss? If so, I may find that it was reasonable in the circumstances for the employer to dispense with the full procedural steps. In the case of ***Duffy -v- Yeomans and Partners*** **[1995] ICR 1CA,** the Court confirmed that a Respondent acting reasonably could decide that using the formal procedure was futile and the dismissal could be fair.

9. I also have to consider contributory conduct because the Respondent is not only saying that the Claimant contributed in his conduct for the reasons given for dismissal, but also in his response to his demotion as it alleges that he continually failed to attend meetings with the committee to discuss the situation.

10. Another point raised at the outset of the hearing in relation to the unfair dismissal claim is that the Respondent wished to argue that the alternative reason for dismissal was "*some other substantial reason" ("*SOSR*").* The case of ***Gallagher v Abellio Scotrail Limited UKEATS/0027/19/SS*** makes the point that an employer can dismiss an employee for some other substantial reason because there has been a breakdown in the relationship and using the full dismissal procedure would have not only served no purpose, but potentially worsened the situation. It is a rare case that allows a Tribunal to conclude that a dismissal undertaken without the employer following any procedure for some other substantial reason is within the band of reasonable responses, but it is possible. However, as the Respondent accepted in its submissions that the "*couching of the dismissal requires it to be consistently carried out under the SOSR rather than Conduct as is the present case*", this point no longer is an issue for the Tribunal to determine.

11. Finally, when considering remedy, I can only award compensation for the financial losses caused by the unfair dismissal itself. If there is a supervening event, such as argued by the Respondent that the Claimant became the full-time carer of his mother in 2019, this may mean that compensation is limited to that date. The Respondent has the right to argue that the Claimant has not made sufficient attempts to mitigate his loss.

12. I was clear with the parties that I only wanted to hear matters as they related to the issues before me for determination as the bundle demonstrated that there were other contentious issues between them that this Tribunal could not determine within these proceedings to address the case before it; for example, the issue as to whether or not the Claimant had been lawfully demoted, which meant the events that led up to his demotion were not relevant unless they affected the decision to dismiss. I was content that the events that arose after his demotion were relevant for the reasons relied upon by the Respondent in its defence. I was also satisfied that it was relevant to consider the Claimant's conduct towards Ms Carol Davies as this was part of the reasons for his dismissal relied upon by the Respondent and the grounds for dismissal, and potentially contributory conduct.

13. I outlined to the parties (and steps were taken in relation to the evidence) that I could not consider without prejudice material or material involving ACAS.

14. The parties provided written submissions (though an opportunity for oral submissions was offered). I adopt those submissions, and address key points within them where relevant to my judgment.

The hearing

15. I declined to hear from the Claimant's proposed witnesses, with the exception of Mr Keith Williams, on the basis that they were not able to provide evidence relevant to the issues I had to determine.

16. I was in the course of hearing from Mr Hugh Watkins on behalf of the Respondent when he became ill and was ordered to self-isolate on 18 December 2020; his evidence was concluded on 27 May 2021. I made it clear to the parties that the adjournment was not an opportunity to adduce new evidence or try and bring new witnesses.

17. The hearing took place in a hybrid model; the Claimant and his witnesses (and his representative Mr Gary Williams, who was professional and of great assistance) were in the physical hearing room with the Judge. Mr Walton, appearing on behalf of the Respondent, and the Respondent's witnesses appeared through CVP. At times, Mr Walton's connection (both in December 2020 and May 2021) was not as good as one would hope, though the Respondent's witnesses' connection was fine. The hearing had to be adjourned several times and the location changed to enable adjustments to be made to improve Mr Walton's connection. It was evident that the delay between the physical hearing room and Mr Walton led to him innocently speaking over witnesses as they tried to answer his questions. On one occasion, on 27 May 2021, Mr Walton did not mute himself and

made a number of comments and gestures when the Claimant was giving evidence when being re-examined; I immediately dealt with the matter. These observations are made to record that there were difficulties with the hearing which caused it to be lengthened (Mr Walton's connection and the ill-health of Mr Watkins), but I am satisfied that, through the combination of adjournments, adjustments and interventions, the hearing was fair.

18. I heard orally from Mr Mike Dale (the former steward), Ms Carol Davies (former colleague), and Mr Hugh Watkins (Chair of the managing committee) for the Respondent, and the Claimant and Mr Keith Williams on the Claimant's behalf. In the view of the tribunal, Mr Dale was of limited assistance as he was not involved in the allegations for which the claimant dismissed (as he was on sick leave), while Ms Davies gave evidence about the underlying allegations made by her regarding the claimant (relevant to the issue of gross misconduct and contributory conduct). Mr Watkins gave evidence both in December and in May, and despite the submissions of Mr Walton, gave the impression of not really understanding what had happened or the obligations upon the Respondent as an employer. Mr Watkins was in the judgment of the tribunal an honest witness as he made concessions that were not to the benefit of the respondent; for example, he readily admitted mistakes were made and he may have got various issues confused. At one point, he said, "*I'm lost*". The Tribunal was unable to view Mr Watkins as a witness who recalled the detail had happened, but his evidence was helpful in that it showed the true view of the Respondent of the Claimant, which was not positive.

19. Mr Keith Williams was able to assist the Tribunal in relation to the events of 29 September 2019, and while he had to be reminded to answer the question and to stop making unhelpful remarks, his evidence largely mirrored that of the other witnesses. The claimant was a witness who needed to be focused on answering the question, and whose oral evidence was more extensive than his witness statement. However, even allowing for hearsay evidence provided and the wholly new evidence arising out of his oral evidence, the Tribunal found the Claimant's evidence of most assistance when considering the subject of remedy, rather than the issue of unfair dismissal itself.

The Facts

20. The Claimant was originally employed as a member of bar staff at the Dan-Y-Graig Labour Club and Institute from 25 June 2014 (a date now accepted by the parties as the start date). In 2016, he was given the additional responsibility of Relief Steward, but at the request of Mr Dale, the Claimant's Line Manager and Steward at the time, the committee of the Respondent (an incorporated club under the Industrial and Provident Society

Legislation) demoted the Claimant to solely undertaking the role of bar staff on or around 11 March 2019. The lawfulness or otherwise of that decision is not something that I can deal with in these proceedings as it is not one of the claims currently before the Tribunal. Decisions of the Respondent were made by the committee of the club. The demotion was due to a belief by the Respondent that the Claimant had made false allegations about Ms Carol Davies, a colleague, and had falsely claimed that the allegations had been made by members of the club, including a Mr J Hodgson.

21. However, it is evident from the account of the parties and the evidence before me that this demotion was the start of the breakdown of the relationship between the Claimant and the Respondent. In response to the Notice of Demotion, Mr Smith and then later his solicitor sent a number of letters to the Respondent. While the tone of the letter from the solicitor was appropriate, the tone of the letters from Mr Smith at points in my view were not constructive, bearing in mind the mutual duty of trust and confidence - he continually demanded the demotion was reversed and threatened the committee with Court or Tribunal proceedings, but repeatedly failed to turn up to meetings, despite invitations by the committee, to discuss the matter. I find that the Claimant was invited to attend meetings to discuss this point – for example, a letter of 12 April 2019 says, "*Please can you attend a Meeting on Sunday 21/0/419 at 10.30am, to discuss your case the letters that you sent to the Committee."* The reference to the Claimant's letters refer to those objecting to his demotion, and later letters rearranging the meeting do not indicate any change of topic.

22. The committee's position from the evidence given is that they viewed the Claimant's correspondence as an appeal against the demotion and they wanted to hear from the Claimant in person on that topic. The Claimant had a number of sick notes signing him off work on the grounds of stress at the time. It is settled law that a sick note does not mean that employees are not able to engage in disciplinary and grievance matters, particularly when they themselves are seeking a reversal of a sanction imposed by their employer. The Respondent invited the Claimant to attend meetings to discuss the situation on a number of occasions:

    a. an invitation on 12 April 2019 to attend a meeting on 21 April 2019, which the Claimant refused to attend on 17 April 2019 as he wanted Keith Williams to attend as his companion (while the Employee handbook says a companion has to be an employee, the evidence I heard confirmed that Mr Keith Williams was not an employee).

    b. an invitation on 21 April rearranging the meeting to 2 June 2019 – the response from the Claimant sought information about other issues and led to a reminder from the Respondent on 21 May 2019 that the meeting had been arranged for 2 June 2019. On 29 May

2019, the Claimant responded again and insisted that he was told the outcome of investigations against him in relation to other issues before attending the meeting on 2 June. He did not attend the meeting.

c. A further invitation on 3 June 2019 telling the Claimant he had to turn up to a meeting on 23 June 2019 and if he did not, the committee would deal with the case without him and there would be no further meetings (it also asked who would accompany the Claimant). On 22 June 2019, the Claimant responded and demanded information about work done by colleagues and why his sick pay had not been paid in full and threatening to go to the Department of Work and Pensions - there was nothing about him not being able to attend the meeting. He did not attend the meeting on 23 June 2019. On 24 June 2019, the Respondent through the committee wrote to say the matter had been dealt with in his absence and no further action would be taken.

23. The letters from the committee did not unambiguously state that the topic of the conversation was to consider the Claimant's appeal against his demotion; as found above, the chain started with a reference to the Claimant's letters objecting to his demotion, but the Respondent did not tell him that the matter was viewed as an appeal. The matter was further muddled by the Claimant's correspondence straying onto other topics. The Claimant's evidence was that he was confused by the announcement that no further action would be taken. The Respondent's position was that this meant the Claimant's appeal against his demotion had been ended due to his repeated non-attendance at meetings.

24. The focus then moved on to the issue of the Claimant's return to work, which happened on or around 13 August 2019.

25. On 24 August 2019, Carol Davies, a colleague of the Claimant, raised a grievance to the Respondent about his actions towards her, which she described as harassment, and to respond to allegations which she understood to be made about her by the Claimant from what she had heard "*on the grapevine*". She told the Respondent in writing that she had been told by the Claimant that he had people monitoring her social media account, that she was involving the police and she wanted it made clear that she did not want the Claimant to contact her in any way; if he continued to do so, she would view it as harassment. It appears from her evidence that while Ms Davies thought that this would mean that the Respondent would have to tell the Claimant to leave her alone; in her letter she did not say that she wanted the Respondent to do this.

26. Ms Davies' grievance triggered a letter to the Claimant on 2 September 2019 from the Respondent asking him to attend a committee meeting on 15 September 2019 to discuss his behaviour and allegations made. The letter does not make it clear whether this is an investigation or disciplinary meeting.

27. On 3 September 2019, the Claimant asked to know what the allegations were and the behaviour of which he was accused. On 6 September, the committee wrote to confirm that the issues to be discussed were "*Did not turn up for meetings 21 April 2 June 23 June. Continuously phone and texting committee and staff. Retaining copies of time sheets, when on the sick. C Davies worked on 20 August 2019 and 27 May 2019 not N Jones, wrong name on time sheet. You said that you were writing to the DWP about us. The allege (*sic*) persons that you said had complained about C Davies. C Davies has informed us that she has been to see the police, and handed us a letter, It will be read out in the meeting".* Most of these issues were not raised before the Tribunal in any real detail; the focus became the allegations by Ms Davies, the attitude of the Claimant after his demotion and other matters (such as the allegation of swearing at Ms Jones and the complaints later made by other staff).

28. The natural interpretation of this letter in the view of the Tribunal was that it telling the Claimant that the Respondent wanted to investigate why the Claimant did not turn up for the meetings dealing with his appeal against his demotion between April and June 2019, his contact since with staff and committee members, and the allegations he had made about alleged fraud, particularly in relation to work done when Nadine Jones (the new relief steward) and Mike Dale (the steward) were on holiday in Bulgaria, and the allegation recently raised by Ms Davies of harassment by the Claimant. The Claimant's response was to ask for CCTV footage, confirm what texts he had sent, and request details of who was alleging what. He also asked what allegations had been made as he understood that the case had been dealt with on 24 June 2019 and no further action would be taken. The Claimant added that he would not attend the meeting as his witness was not available and then he was off to Blackpool.

29. The Respondent on 17 September 2019 invited the Claimant to a meeting on 29 September 2019 and warned him if he did not attend, the committee would deal with the issues in his absence, which may lead to disciplinary action. The letter did not tell the Claimant if the meeting was an investigation or disciplinary meeting. The Claimant responded on 17 September 2019 and said that he would not pursue his case for illegal demotion and loss of earnings, but he wanted a return to his role as Relief Steward. Ms Davies wrote to the Respondent on 27 September 2019, providing more detail about whom she had been dealing with at the police regarding the Claimant.

30. A meeting took place between the Claimant and the committee on 29 September 2019. From reading the notes of the meeting, it seems that the issue of the original demotion was discussed, and that the Claimant had called a person Mr J Hodgson "*a liar*" and "*a wanker*" (the Claimant disputes this) and was not willing to hear the letter from Ms Davies about the police read out. Mr Watkins' evidence confirms this contemporaneous written account, but the Claimant denies using such terms about Mr Hodgson, supported by Mr Keith Williams (Mr Keith Williams said as the meeting descended into chaos, the Claimant did swear, along the lines of "*this is a fucking waste of time"* and added that the committee were aggressive*).* The minutes record that the committee were unhappy with the aggressive behaviour by the Claimant during the meeting and his demand to be reinstated to the role of Relief Steward; the minutes also record that the Claimant threatened to go to Court and cost the club thousands and then go to an Employment Tribunal.

31. The Claimant was accompanied by his friend Mr Keith Williams, though the Claimant had no right to be so accompanied under the Code or contract of employment as Mr Williams was not an employee. It was suggested by the Respondent that Mr Keith Williams had an axe to grind with the Respondent as a former Chair of the Committee. The Claimant's evidence was that the meeting was "*a shambles*" and the committee lost control. Mr Keith Williams' evidence was that the Claimant did refuse to listen to the reading out of Ms Davies' letter but wanted the committee to listen to (and sign) his prepared statements and terms of settlement. Mr Watkins' evidence was that the Claimant *"effectively took over the meeting"* and it became "*volatile*" because the Claimant was not willing to listen to the committee and talked over them. He added that "*the whole thing became impossible*".

32. From the evidence before the Tribunal, it is abundantly clear that the meeting of 29 September 2019 was a disaster as the parties could not talk calmly during that meeting. Having heard the evidence of several attendees, I am of the view that there were several causes for this state of affairs. The Respondent failed to set out the allegations or the purpose of the meeting in advance. The Respondent failed to provide the evidence obtained so far in advance (I appreciate the Respondent's position was that Ms Davies' letters were sensitive, but this was not explained to the Claimant in advance). If the meeting was an investigatory meeting, having it conducted by a committee (even with a Chair) was not conducive to finding out the Claimant's position about the allegations. Finally, the Claimant's unrealistic approach, expecting the Respondent to sign his letters and simply agree to everything he wanted without dealing with the allegations, was not likely to result in anything less than an argument. I accept the word "*shambles*" described accurately the meeting of 29 September 2019. I also find that the Claimant did swear, but I make no finding about his alleged comments about Mr Hodgson as it is not necessary to the issues I must determine.

33. There is witness evidence before me that the committee felt that it was impossible to progress the Claimant's complaints about his demotion because he would not attend to give his side of the story and that the meeting on 29 September 2019 was a disaster. It was described by Mr Watkin as *"a very volatile meeting and his language was disgusting*" *"it was just a slanging match he wasn't prepared to listen to any of us he talked over me most of the time he was shouting and swearing. At one stage I tried to read him a letter from John Hodson at which point KS stated he's a fucking liar and a wanker and it's his word against mine. The whole thing became impossible, and the meeting was adjourned and no final decision was taken regarding it*".

34. Following this meeting, the evidence from Mr Dale and Mr Watkins, which the Tribunal accepts, was that the committee did not know "*what on earth to do*". It seems nothing was done for a period of time.

35. On 21 October 2019, Nadine Jones, the daughter of Mr Dale, complained that the Claimant continually undermined her authority and did not recognise her then position as Acting Steward. She said that he was shouting and swearing in her face when she took him aside to ask a question, and the Claimant was making her position impossible.

36. A written warning in relation to the Claimant's conduct towards Miss Jones was issued by the Respondent, saying that for the next 6 months he had to improve his attitude immediately "*due to unacceptable behaviour by shouting and swearing at the Acting Stewardess*" and that the likely consequence of failure to improve would be a second written warning. This appears to have been issued on 21 October 2019 (it is more likely to be 21 October 2019 due to the recording of this date in the minutes of the committee of 3 November 2019 and the date given by the Claimant in his evidence). The Claimant responded asking to know details of the allegation and why he had not been invited to an investigation or disciplinary meeting. The warning letter had been signed by Mr Watkins.

37. In relation to the complaint raised by Nadine Jones, Mr Watkins' evidence was "*we decided to issue a separate written warning concerning his behaviour towards Nadine. There was some dissent within the committee as some members felt that he was already out of control. One person said it was the tail wagging the dog and not the other way around but there was still a majority for giving him a written warning because the case against KS in this regard was open and shut."* Mr Watkins accepted that Ms Jones' word had been accepted in relation to the Claimant's alleged actions without question. There was no investigation or opportunity to hear from the Claimant before the written warning was issued, though Mr Watkins in his evidence (see paragraph 38 below) said the conduct was admitted.

38. Mr Watkins' evidence was that when the written warning was handed to the Claimant, he said that he was not accepting it and threw the warning on the floor, and then brought various members of the club up to Mr Watkins and demanded that he explained what was going on to them. Mr Watkins described the Claimant as "*a compulsive liar*" but said that the Claimant had "admitted he had sworn at Nadine, but because he had said "*would you please fuck off Nadine*", it was alright." Mr Watkins said the admission was made in front of himself, Ken Parry (the Treasurer) and Ms Jones herself, and described the Claimant as "*particularly nasty I would say he was agitated and aggressive. I personally thought he was losing it".* The Claimant denied acting as alleged towards Ms Jones or Mr Watkins.

39. Complaint letters were received from Cerys Palmer, Bailey Neil, and Morgan Tandy (colleagues of the Claimant), but it is not clear when those complaints were received. The Claimants suggests that the employees were somehow put up to it by Mr Dale, but at its highest, all that the Claimant can rely on is the allegedly similarity of the wording (which as the complaints all centre on the Claimant's attitude allegedly taking credit for the drink sales of others is not in itself suspicious) and the evidence of Mr Dale that when one member of staff complained to him, he told them to write it down and send it to the committee. I am not satisfied on the basis of the evidence before the Tribunal that there was a conspiracy.

40. These letters must have been received by 25 October 2019 as on that date the Claimant was requested to come to a meeting on 3 November 2019 in a letter that said if he did not attend "*the committee will deal with your case in his absence which may lead to disciplinary action as you could be in breach of your contract*". No information is given about the purpose of the meeting, the allegations, or the possibility of dismissal. It is not clear from the letter if the meeting was investigatory or disciplinary, but implied from the words, the meeting appeared to be more likely to be disciplinary (despite not having put any allegations to the Claimant).

41. On 3 November 2019, the Claimant did not attend the meeting. The notes record that the committee said that he had received a written warning on 21 October 2019 for unacceptable behaviour shouting and swearing at the Acting Stewardess. The minutes record the receipt of five letters of complaint had been received from the staff and that the Claimant would be dismissed (it is not clear why the minutes record five letters, unless they are also referring to the earlier letters from Ms Davies). On the same date, a notification of termination of employment on the grounds of gross misconduct was served upon the Claimant.

42. Mr Watkins' evidence was that *"the committee were at their wits end. We were clearly now faced with the prospect of losing five members of staff who*

were going to walk out unless we did something about this man…. We decided that yet again we would call him in front of us to hear his side of the story to give him an equal opportunity to put his side of the story.". In Mr Watkins' view, *"the result of his dismissal had become inevitable by 3 November due entirely to his own behaviour and attitude towards the club and its staff".*

Conclusions

43. The Respondent is required to establish the reason for dismissal. It relied on conduct, a potentially fair reason. The Tribunal accepts that the Respondent subjectively believed that the Claimant was dismissed for conduct, and in several respects the Claimant did not help himself, but the Respondent's objective failings means that this burden of proof has not been satisfied to establish the reason for dismissal. The Respondent is relying on everything done by the Claimant since March 2019 as "*conduct*", but the minutes of the meeting of 3 November 2019 (which is the only record of the reasons for dismissal) only refers to the written warning from October 2019 and the five letters of staff complaints. The dismissal letter does not refer to any allegation.

44. There are clear failings by the Respondent raised by this case:

    a. The Respondent demonstrated a lack of clarity throughout at various dates in its letters to the Claimant about exactly what was being dealt with and being done/considered;
    b. The Respondent did not tell the Claimant about his right to invite an appropriate companion to disciplinary meetings;
    c. The Respondent's own letters and evidence indicate a failure to understand the difference between an investigation and a disciplinary meeting;
    d. The Respondent failed to put the allegations fairly and squarely to the employee, to such an extent that by the time he was dismissed, it was not clear why he was being dismissed – the letters preceding the dismissal (including the letter of 6 September 2019 at page 119 which is arguably irrelevant for dismissal purposes as it covers allegations not considered at the actual dismissal meeting, and is faulty as it does not tell the Claimant the type of meeting intended or supply the evidence) do not set out the allegations to be considered at the dismissal meeting, the minutes of the dismissal meeting refer the written warning for swearing at Ms Jones and letters from others (not the majority of the allegations in the letter of 6 September), but the thrust of the Respondent's evidence during these proceedings was reliance on the allegations by Ms Davies and the Claimant's response to his demotion;

e. The Respondent failed to provide the evidence that was being relied upon in advance to the Claimant (I accept the Respondent was concerned about sensitivity, but having read the letters I see nothing that justified refusal to provide the evidence to the Claimant and the other evidence later produced by other employees was not disclosed);
f. There appears to have been no investigation carried out in response to the staff complaints or an interview with Ms Davies – the point about the other employees was never put to the Claimant;
g. In relation to the written warning, again there is no evidence of an investigation – the word of Ms Jones was accepted as truth and there is no independent confirmation of the Claimant's alleged admission – it is striking that Ms Jones' letter of complaint (to her father and the committee) is dated the same day as the written warning was issued, indicating as Mr Watkins accepted that there was no investigation;
h. The Claimant was not offered his right of appeal in the dismissal letter.

45. The evidence within the bundle regarding Ms Davies' complaints was in the Tribunal's view problematic. The text messages within the hearing bundle (which mostly appeared to be innocuous with the exception of the reference to "*dogging*" at page 186, though it is not for the Tribunal to substitute its view for that of the Respondent) were not disclosed to the Claimant in advance or at any meeting as far as the evidence shows. The Claimant says they have been edited; there is no evidence showing this point was investigated and the failure to investigate the allegations properly means it is impossible for the Tribunal to know whether the Claimant is right or if the reference to "*dogging*" was unwanted conduct. The alleged pornographic material relied upon is not in my view pornographic. The Claimant's evidence is that this material is from a website for "*shapewear*" (underwear that assists ladies to look different to their normal shape); from the image at page 202, I cannot find that the Respondent's interpretation is reasonable. The proposed trip to Porthcawl could be a family-friendly trip or a date; there is no way to tell without an investigation. I accept that the Claimant's message at p.181 and 183 of the bundle that he had "*friends monitoring [Ms Davies'] Facebook*" could reasonably be viewed as threatening but equally could be viewed as a desperate attempt to stop social media rumours about him circulating. The failure to properly investigate the allegations or put the evidence to the Claimant during the disciplinary process means no conclusion can fairly or reasonably be drawn from the evidence.

46. The Respondent's answer to this is to say that the Claimant would not co-operate. However, if the Respondent had followed the procedure outlined in the ACAS Code of Practice for Disciplinaries, the Claimant would have received notice of the actual allegations he faced, a copy of the evidence in advance, an invitation to an investigation meeting with an investigation

officer/member of the committee, and then after a reasonable investigation was carried out, if there was a case to answer, an invitation to a disciplinary meeting with the right to be accompanied and a warning that dismissal for gross misconduct was a potential outcome. None of this happened. If it had, the Respondent's argument that the Claimant would not co-operate with the process would have had some force (and I suspect that some of the Claimant's correspondence would not have been sent).

47. The Respondent in its submission argues that the case of *In Talon Engineering Ltd v Mrs S Smith* UKEAT 0236 17 BA applies. This is a case which indicates that if an employee is "*persistently unable or unwilling to attend the disciplinary hearing*", it can be reasonable for an employer to proceed. I accept that the legal principle is correct but I do not accept that it applies here. The Respondent relies in part on the Claimant's failure to attend meetings about his appeal against demotion, but the Claimant was never told clearly that this was the topic for discussion (he did not know that it was seen as an appeal) and this is a wholly separate matter to disciplinary proceedings months later. In my view, the disciplinary matters considered at the dismissal meeting according to its minutes did not arise until Ms Davies' complained. There was no attempt to have an investigation meeting with the Claimant and the letters from the Respondent fail to comply with the provisions of the Code in so many respects that I cannot find the Claimant at fault for failing to attend, particularly after the "*shambles*" of the meeting of September 2019, demonstrating that the Respondent was unable to control proceedings to have a constructive dialogue.

48. In light of the above findings, the Tribunal considered the *Burchell* questions and made the following findings:

    a. Genuine belief - on the basis principally of the evidence of Mr Watkins, the Tribunal accepted that the Respondent genuinely believed in the misconduct of the Claimant. However, that belief was based on more than the reasons for dismissal recorded in the minutes of the disciplinary meeting, but also on the basis of the Claimant's conduct since his demotion;
    b. Reasonable grounds - the belief was not in the view of the Tribunal based on reasonable grounds. As set out below, the investigation was not reasonable, the belief was based on more than is recorded at the disciplinary meeting, and it was based on matters that have no connection to the reasons for the disciplinary procedure. In essence, the real reasons why the Respondent believed that the Claimant was guilty of misconduct was based on the wider reasons connected to his demotion and his conduct afterwards, which could potentially be viewed as "*some other substantial reason*", not conduct;
    c. Reasonable investigation - as outlined above, the investigation carried out was not reasonable. The respondent, as shown by Mr

Watkins's evidence, accepted the word of Miss Jones in relation to the allegation that the claimant; the only evidence that the claimant admitted to it was the oral evidence of Mr Watkins (as the other witness was not called). The respondent, again as shown by the oral evidence of Mr Watkins, was wholly confused about the correct process (not understanding the difference between investigation or disciplinary meetings or the importance of explaining to the employee which type of meeting he was being asked to attend). The letters to the Claimant were at times almost inarticulate and did not give him a proper opportunity to respond to the allegations relied upon at the dismissal meeting. There appears to have been no investigator. No evidence was supplied to the claimant in advance. The only meeting took place on 29 September 2019 which predates the complaints relied upon at the dismissal letter with the exception of the Carol Davies allegations; there appears to be no investigation complaints raised by the other employees about either the attitude of the claimant or the allegations he was taking credit for their sales; there was no clear invitation to the claimant to attend an investigation meeting;

d. Dismissal within the band of reasonable responses open to a reasonable employer - given the lack of investigation, it is difficult to see how dismissal would be within the band of reasonable responses. If the matter is viewed at its highest, the allegation made by Ms Davies is serious but mostly focuses on matters not dealt with at this tribunal. It is not until the end of the original grievance letter that Ms Davies raises concerns about the Claimant monitoring social media account and her involvement of the police. There is nothing about sexual harassment within this grievance letter (pages 108 to 115), nor within a follow-up letter of 27 September 2019 (pages 132 to 133). It is not until the witness statement provided for the purposes proceedings that Ms Davies makes a number of allegations of matters which could be viewed as sexual harassment - this was not before the Respondent at the time of dismissal (nor was it clear whether the text messages and video was before the Respondent at the time of dismissal). The potential sexual harassment therefore could not be a reason for the dismissal of the Claimant in November 2019. The allegations made by the three other employees could well found a finding of misconduct, but not gross misconduct, particularly in the absence of any evidence that taking credit for other employees' bar sales had any financial benefit for the Claimant (a point dealt with in cross-examination). The written warning given for swearing at Ms Jones could not support in my view a finding of gross misconduct – it was not a repudiatory action. It is also worth bearing in mind the allegation of swearing at Miss Jones was dealt with by the imposition of a final written warning; accordingly, there was no basis to deal with the matter again as gross misconduct - there is no evidence of a

formal appeal. The Tribunal finds that dismissal was not within the range of reasonable responses open to a reasonable employer, even if the allegations considered at the dismissal meeting were well-founded and taken at their highest.

49. This conclusion means the Claimant was unfairly dismissed, both on procedural and substantive grounds.

Polkey/Contributory conduct

50. The Respondent argues in its submissions that, due to *Polkey*, the "*some procedural issues*" which the Tribunal might find made no difference to the outcome as the Claimant should be seen as "*blocking off*" progress due to his unreasonable refusal to attend meetings. It also argues if the Tribunal is not so persuaded, then given the overall background, the decision to dismiss was inevitable. The Respondent adds that the Claimant contributed to his own dismissal, for example in the written "*threats*" sent to the Respondent, him taking credit for the sales of others by adjusting the tills (not admitted by the Claimant in the Tribunal's view, despite the submission to the contrary by the Respondent), the Claimant's swearing in the meeting of 29 September 2019, the failure to take part in the process or accept an amended version of the Employee Handbook, the written warning and the Claimant's general attitude (including his repeated demand to know the outcome of the investigation before it had concluded).

51. By any reasonable definition, the relationship of mutual trust and confidence between the parties appears to have broken down by the time of dismissal on 3 November 2019. The Claimant and the committee from the evidence appear to have held each other in mutual contempt. However, while the Tribunal accepts that much of the correspondence from the Claimant from his demotion onwards was inappropriate in tone (threatening your employer to go to court to claim thousands of pounds if you do not get exactly what or demanding to know the outcome of an investigation before it has completed is conduct likely to undermine or significantly affect the relationship of mutual trust and confidence), from an objective perspective, much of the Claimant's correspondence was triggered by the Respondent's. I have already found that the respondent utterly failed in its obligations under the ACAS Code of Practice to set out the allegations to the Claimant, the evidence that had been gathered, or explain clearly what stage the process was at in order to tell the claimant of his statutory rights. In the same way that if one inputs nonsense into a computer, one tends to get nonsense produced by that computer, if an employer wholly fails in its duties in conducting an investigation and disciplinary process (as is the case here), it is hardly a surprise if the employee reacts intemperately, inappropriately, and in a way that is not constructive.

52. The Tribunal is required to consider what is likely to have happened if the failings it has identified did not occur. The failings identified in these proceedings are extensive. In addition, the Tribunal has found that the allegations relied upon according to the minutes of the dismissal meeting did not constitute gross misconduct. The Tribunal has also found much of the Claimant's conduct of which the Respondent complains (correspondence, attitude, conduct on 29 September) was due to the Respondent's failings. In the circumstances, no *Polkey* deduction is justified.

53. The Tribunal also considered the point that by 3 November 2019 the relationship of mutual trust and confidence between the parties had broken down. This was not a point unambiguously argued by either party in the submission stage, though at the outset of the hearing the respondent indicated it did want to rely on the potentially fair reason of "*some other substantial reason*" (SOSR), and its submissions arguably touched on the issue. A fair hearing requires the tribunal to only consider matters that had been argued before it. The respondent was legally represented and had the opportunity to make extensive written submissions. That said, it could be an error of law not to consider the point, and it has been foreshadowed as early as the ET3, and could be viewed through a *Polkey* prism (or remedy).

54. The Tribunal concluded that had a fair and reasonable investigation and process been adopted by the Respondent, the relationship of mutual trust and confidence required to exist between an employer and employee may not have broken down. This is not to suggest that the relationship would not have been under some significant strain, given the Claimant's reaction to his demotion and the complaints made about him by other employees, but the disastrous meeting the 29 September 2019 is more likely not to have been conducted by both parties in a much more appropriate and calm manner. This is because the Claimant would have received proper notification of the allegations, a copy of the evidence to be considered, would have understood whether he was attending an investigation or disciplinary meeting, and have had an opportunity to respond to the allegations. This, I consider, would have taken most, if not all, of the "*heat*" generated at that meeting. In light of this finding, *Polkey* is not engaged but the point remains relevant to the issue of remedy as the relationship did break down.

55. The Tribunal then turned to consider contributory conduct as asserted by the Respondent in its submissions. It has not been established that the Claimant adjusted the tills as alleged, and the Tribunal has found that the Claimant's unfortunate general approach/failure to take part process was in its view triggered by the Respondent's procedural failures. The swearing that Mr Keith Williams accepted the Claimant had done at the meeting of 29

September 2019 was, in the Tribunal's view, minor and understandable, given that the Respondent itself describes the meeting as a "*shambles*". No finding has been made in relation to the comments allegedly made about Mr Hodgson by the Claimant. The written warning according to the evidence of Mr Watkins had been issued entirely on the basis of what Ms Jones has said without an investigation, and therefore cannot be taken at face value. On the basis of the evidence before it, there was no basis on which the Tribunal was able to find that the Claimant contributed to his dismissal though blameworthy conduct.

The wages claim

56. As set out in paragraphs 3 and 4 above, the Tribunal did not have as an issue before whether or not the demotion of the claimant from the role of relief steward to that of bar staff constituted either an unfair dismissal or breach of contract. The Claimant was given an opportunity to remedy this and did not take up the invitation. This means that the Tribunal can only engage with the issue of whether there has been unlawful deduction from wages within the context that the Claimant was not the relief steward, did not carry out the hourly paid work of the relief steward, and was an ordinary member of bar staff. The Claimant is not asserting that he did not receive the right pay when carrying out the role of bar staff; he is asserting he should have been paid for the work of relief steward when he was not carrying out that role.

57. *"13 Right not to suffer unauthorised deductions*
(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part

as a deduction made by the employer from the worker's wages on that occasion.
(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

58. Section 27 of the Employment Rights Act 1996 defines "*wages*" as *"any sums payable to the worker in connection with his employment".* The Claimant for the period in which he is claiming an unlawful deduction of wages was not employed as the relief steward and did not carry out that role; he was employed as bar staff. In the judgment of the Tribunal, no sum was payable to the Claimant in connection with his employment in relation to the role of relief steward as he was not employed as such.

59. In the written submissions received from the Claimant, he argued that the demotion was unlawful and a breach of contract. However, this is not the claim that the Claimant issued within these proceedings. At the end of the relevant section, a reference is made to s.13 but his submission remains predicated on the basis that the breach of contract has been established. This is not the case.

60. The Claimant's claim for an unlawful deduction from wages is not well-founded.

Unfair dismissal remedy

61. A claimant who is successful in in claiming unfair dismissal is entitled to two awards; the first is the basic award and the second compensatory award. The relevant provisions of the Employment Rights Act 1996 are:

"118 General

(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—
(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and
(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

119 Basic award
(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—
(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment.
(2) In subsection (1)(c) "the appropriate amount" means—
(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c) half a week's pay for a year of employment not within paragraph (a) or (b).
(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

…

123 Compensatory award
(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the

amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.
(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
(5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—
(a) calling, organising, procuring or financing a strike or other industrial action, or
(b) threatening to do so, was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.
(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
…
(8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

124A Adjustments under the Employment Act 2002
Where an award of compensation for unfair dismissal falls to be—
(a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or
(b) increased under section 38 of that Act (failure to give statement of employment particulars), the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).”

62. The basic award is a matter of straightforward mathematics is based on a combination of the weekly pay, the years of full service as an employee, and the age of the Claimant. The Claimant was born on 1 December 1964, making him 54 at the effective date of termination and 56 by the time these proceedings concluded. The parties agree that his service with the Respondent started on 25 June 2014, giving the Claimant five full years of service, all of which he was aged 41 and above.

63. One difficulty in this case is the issue of the weekly pay. The Claimant’s case as he was entitled to a higher weekly pay because he believed he was still the relief steward (which is not what this tribunal has found), the statement of employment particulars in the bundle is out of date and the

payslips in the bundle are not a complete set. The ET1 was not fully completed, leaving the issue of pay unaddressed but information within section 9.2 indicated that the Claimant worked in the twelve weeks preceding his dismissal variable hours between 9.5 and 25.25 hours a week at a rate of £8.33 gross per hour (£8.20 per hour appeared to be the rate for a few occasions but overall, the consistent sum appeared to be £8.33, and this was the sum stated in the Schedule of Loss). No challenge was made by the Respondent and the Counter-Schedule of Loss stated a different figure of £191.50 which suggested the Claimant worked more than 20 hours a week. The Schedule of Loss stated an average of 20 hours a week as bar staff.

64. The Tribunal is required to identify the correct weekly rate when the parties do not agree. Using the figures from the ET1, I calculated an average of 14.7 hours a week (using the provisions of s.224 ERA); the Claimant only once exceeded 20 hours a week in this week and generally worked around the 14 hours a week mark. In the Tribunal's view, the correct weekly pay figure for the purposes of compensation for the unfair dismissal claim and the failure to provide a statement of employment particulars claim is £122.45 gross.

65. Accordingly, this means the basic award for the Claimant is 7.5 x £122.45 = £918.38.

66. Before the Tribunal deals with the issue of the compensatory award, the issue of re-instatement must be addressed. The Claimant in his ET1 and the Schedule of Loss said that he was seeking this. This is the primary remedy for unfair dismissal, though rarely sought (and even less rarely given) as it means the Claimant returning to his old job. If sought, it is common practice within the Employment Tribunal to separate the issue of remedy from the issue of liability and hold another hearing as returning to the employ of the Respondent may not be straightforward, particularly after a contested hearing. For example, it may not be practical, or the relationship of mutual trust and confidence has become impossible to achieve.

67. At the outset of proceedings, I checked with the Claimant's representative the position regarding reinstatement. I was told the Claimant no longer wanted the job and sought compensation only, after I explained the position. I was told that the Claimant was now the full-time carer for his mother from December 2019 onwards, and this was why he just wanted compensation. This was not evidence (as Mr Gary Williams, the lay representative who appeared on the Claimant's behalf, was simply answering a question posed by the Tribunal), but the date mentioned of December 2019 was an issue that troubled the Tribunal when deciding the compensatory award.

68. A claimant who is successful in the claim for unfair dismissal is required demonstrate financial loss in relation to the compensatory award. The respondent's position is that the claimant has failed to mitigate his loss as shown by his oral evidence. The Claimant accepted when questioned that he had not undertaken much of a search for work, hoping that a job in the local Co-op would come up as it was near his mother's house. The wider evidence confirmed that there were public houses in or near Treharris, but the Claimant did not refer to seeking work from these potential employers. No evidence was produced about the Claimant's efforts to find work.

69. There is also the complicating factor of the potential supervening event. The Claimant's mother is unwell (the details of which do not require disclosure within this Judgment) and now requires full-time care from the Claimant. This has been the case since April 2019, before the Claimant was dismissed, and before the date of December 2019 mentioned by his representative. The Claimant's Schedule of Loss said he was in the process of selling his home in Cardiff to move in with her, but remained available to work in evenings nearby as his sister could manage while he was at work. The Claimant's mother's health is described as deteriorating and Carers' Allowance is paid. His witness statement was entirely silent on the topic of efforts to find work or his mother's health; the evidence only came out orally.

70. The Respondent submits that the Claimant's efforts to find work are hampered as shown by his oral evidence to the effect that *"it must be convenient and tied in with his mother*". However, the fact that the Claimant was able to work for the Respondent in 2019 shows that his evidence that he can work if the hours are suitable to ensure that his mother is cared for in his absence was true in the aftermath of April 2019. It is also likely to be correct, as the Claimant says, that in such a small community, the nature of his dismissal has made it harder for him to find retail or pub work, even before the Covid-19 pandemic arrived in March 2020. There is no evidence before the Tribunal about December 2019, other than page 214 which is a letter confirming the Claimant's mother had an outpatients' appointment that month (of a nature the Tribunal will not record here as the lady is entitled to privacy and the nature of her ill-health is not relevant, other than it is not likely to improve). In March 2020, the DWP declined an application for Attendance Allowance, but it is unknown whether that decision was appealed (page 219), though such appeals are common. The fact that the application was made in the Tribunal's view supports the position of both parties that the Claimant's mother needed care (and there is no dispute that the Claimant was providing it). The Tribunal concluded that the Claimant's mother's ill-health was not a supervening event and pre-dated his dismissal.

71. The gross weekly pay in the Claimant's case is the same as the net pay as his payslips show he did not pay tax. Taking everything into account, the Tribunal concludes that the Claimant was capable of work, notwithstanding

the care of his mother, but had failed to properly mitigate his loss. The work that the Claimant did for the Respondent was undertaken on a part-time basis on evenings and weekends - this is also the type of work that can be reasonably sought from retail and hospitality venues. While the Claimant preferred to work as close to his mother's home as possible for understandable reasons, as his evidence was that his sister was able to provide care while he was absent, the Tribunal considered it unreasonable for the Claimant to only consider employment within very close geographical area to his mother's house for so long. However, the Tribunal accepted that the nature of the Claimant's dismissal and the close-knit nature of the community would inevitably make it more difficult for the Claimant find work nearby.

72. The Tribunal bore in mind that as it had found that the Claimant had not committed gross misconduct, he should have remained in the employ of the respondent if conduct was the only issue. However, it was clear the relationship of trust and confidence had broken down. The Tribunal considered that the Respondent's position was as Mr Watkins said in his evidence *"the result of his dismissal had become inevitable by 3 November due entirely to his own behaviour and attitude towards the club and its staff".* The Respondent's evidence, which the Tribunal accepts, was that the position was untenable, that the mutual duty of trust and confidence was destroyed, and complaints were now being made by a wider body of employees about the Claimant and his attitude. The meeting of 29 September 2019 would be fresh in the committee's mind.

73. The Respondent in the judgment of the Tribunal was likely to dismiss the Claimant with notice for the well-founded potentially fair reason of SOSR shortly after 3 November 2019. Such a dismissal was likely to have been completed by the end of December 2019 (allowing for five weeks' notice) due to the strong feelings of the Respondent and the loss of the mutual duty of trust and confidence. The correspondence from the Claimant (and his oral evidence) in the view of the Tribunal shows he no longer had any trust and confidence in the Respondent; his comments about his view of the committee from March 2019 onwards were such that they could only be described as contemptuous (and confirmed by the contents of his letters). The period of loss must therefore include up to 31 December 2019.

74. The Tribunal considered that by 23 March 2020 (when the first lockdown was announced), it is reasonable to expect the Claimant to have actively sought and obtained work wider than an employer near his mother's home, and not only contact the Co-Op. The Claimant's failure to provide evidence of his attempts to mitigate his loss and his refusal to consider working a further distance away (particularly as he had identified the barriers to employment near his mother's home) meant that the Tribunal will not award compensation past the date of 22 March 2020. The compensatory award is

limited it to 20 weeks' pay (£2449.00). Loss of statutory rights is valued as £250.

75. The Tribunal then considered whether an uplift for the failure of the respondent to comply with the ACAS Code of Practice on Disciplinaries should be awarded under section 207A of the Trade Union and Labour Relations (Consolidation) act 1992. The Tribunal considered that such an award should be made on the basis that the Respondent had almost wholly failed to comply with the provisions of the Code. However, the failure had not been complete and therefore the Tribunal judged 20% to be the appropriate uplift.

76. Accordingly, using the weekly pay rate of £122.45 for 20 weeks, together with the award for loss of statutory rights £250, the total compensatory award before the ACAS uplift is £2699. Including the ACAS uplift, that increases the compensatory award to £3238.80. The recoupment provisions apply.

Failure to supply a written statement of employment particulars remedy

77. On 18 December 2020, the Tribunal found by consent in the Claimant's favour in relation to unpaid holiday pay and liability for the failure to supply a written statement of employment particulars. The statement provided to the Claimant had been signed and dated 18 August 2016, when it should have been provided within eight weeks of the start of his employment on 25 June 2014.

78. Remedy was reserved to this hearing. Given that a statement of employment particulars was supplied, albeit late, the Tribunal did not consider just and equitable to award four weeks' gross pay. Equally, there were no grounds on which the tribunal could find it unjust and inequitable to make any award. The submissions of the Respondent were silent this point.

79. Accordingly, the Tribunal considered that the standard order of two weeks' gross pay should be awarded to the Claimant; the Respondent is ordered to pay the sum of £244.90.

Costs

80. At the end of its written submissions, the Respondent briefly indicated that it would seek costs in the event that it successfully defended the claim. Costs are not awarded on the basis of who wins in the employment tribunal, one of the ways in which the Tribunal differs from a court. In addition, if the Respondent wishes to seek a costs order, it is best practice to consider the

contents of any Judgment and then set out in detail the basis of the application relying on the findings within that Judgment. Accordingly, the Tribunal does not consider a costs application to have been properly made and does not determine the issue within this Judgment.

Employment Judge C Sharp
Dated: 19 July 2021

JUDGMENT SENT TO THE PARTIES ON 20 July 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche