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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104585/2020

Hearing Held by Cloud Video Platform (CVP) on 21 June 2021

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Employment Judge: R King

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Miss Lorraine Comrie

**Claimant
In person**

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F5 Pubs Limited

**Respondent
Not present and not
represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant (1) was unfairly dismissed and (2)
30 is entitled to payment of accrued but unpaid holiday pay, and the respondent is
ordered to pay to the claimant:-

1. A basic award for unfair dismissal in the sum of £443.34

2. A compensatory award made up of:-
35 (a) Loss of earnings of £1,921.14.

(b) An award for loss of statutory rights of £250

3. The Tribunal also orders the respondent to pay the claimant an uplift of 25% on the compensatory award because of the respondent's unreasonable failure to follow the ACAS Code of Practice; said uplift amounting to £480.29.

5 4. The Tribunal also orders the respondent to pay to the claimant the sum of £1,428.69 by way of accrued but unused holiday pay.

5. The total award made by the Tribunal is therefore £4,523.36

6. This is a gross award and the claimant shall be liable to the Inland Revenue for any payments of tax and national insurance thereon.

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REASONS

1. The respondent had not submitted a response to the claim and was therefore not in attendance at the hearing, nor represented.

15 2. The claimant has presented a claim for unfair dismissal and a claim for holiday pay. The issues in the case relate to whether the claimant was unfairly dismissed and whether she is entitled to accrued but unpaid holiday pay as at the termination of her employment.

20 3. The claimant gave evidence on her own behalf and lodged a set of documents which she relied on in support of her evidence. The Tribunal found the claimant to be a credible and reliable witness.

4. The Tribunal made the following findings in fact.

25 **Findings in Fact**

5. The respondent employed the claimant at the Kirkhouse Bar and Kitchen, 1365 Shettleston Road, Glasgow from 1 April 2018 until 14 July 2020. At the date of termination of her employment she was 43 years old. She was employed as a member of bar staff.
- 5 6. The claimant's normal working hours were 18 per week, which she worked over Thursday, Friday and Saturday each week. At the time of the termination of her employment her gross hourly rate of pay was £8.21 per hour. Her normal gross daily pay was £49.26 per day and her normal gross weekly pay was £147.78 per week. She received no other benefits in addition to her salary.
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7. At all material times the claimant was also employed on a full-time basis by Network Rail in its commercial department.

The events of 11 July 2020

- 15 8. On Saturday 11 July 2020 the claimant attended work for her first shift at the Kirkhouse Bar and Kitchen ("the Kirkhouse") after the lifting of the Government's lockdown restrictions, having previously been furloughed. This was also the first day that the premises had opened after the restrictions had been lifted.
- 20 9. In advance of the Kirkhouse reopening, the claimant had obtained from Network Rail, with its permission, two box of disposable face masks, which she intended to make available to those customers who attended the bar without one, subject to their paying £2 per mask into the bar staff's tip jar.
- 25
10. During her shift a customer ('customer A') ordered a single pint of Moretti lager at £4.75, for which he handed the claimant a £10 note and she gave him £5.25 change. Rather than entering £10 on the till as the amount handed over in

payment, she mistakenly entered £100. Such a keying error is a mistake that is commonly made.

11. At the same time as this transaction was taking place another customer ('customer B') took two face masks from one of the boxes and left £4 in cash on the top of the bar, which the claimant subsequently put in the tip jar.

The events of 13 July 2020

12. On Monday 13 July 2020, the claimant attended at the Kirkhouse to collect her wages from the bar manager, Alex Kernahan who asked her why she had claimed that customer A had given her a £4 tip on 11 July. The claimant denied that was the case and explained that the £4 she had put in the tip jar had come from customer B who had taken two face masks at the same time she was separately serving customer A.
13. Mr Kernahan told the claimant that he believed she had sold customer A two pints of Moretti but had only recorded the sale of one pint through the till and that she had kept the money for the other, which she had put in the tip jar. He then informed her that he would ask Frank Healy, the son of the licensee (also Frank Healy) to check the CCTV for the time window in which this had occurred. At this point the claimant left the Kirkhouse Bar and Kitchen for the day.
14. The claimant returned to the Kirkhouse on Tuesday 14 July 2020. When she arrived Mr Kernahan told her to wait for him beside the female toilets. When he joined her he explained that Mr Healy had checked the CCTV and it had confirmed his suspicion that the claimant had served Customer A with two pints of Moretti, but had only charged him for one pint and had put the price of the second pint in the tip jar. He told her the CCTV had also confirmed that she had also incorrectly entered £100 instead of £10 for that transaction.

15. When the claimant denied the allegation and asked to be shown the CCTV footage, Mr Kernahan refused. He then informed her that she was dismissed for the theft of the £4 she had put in the tip jar. He told her to leave the pub straight away and that he would not tell anyone why she had been dismissed.
- 5 16. The respondent did not provide the claimant with a letter confirming her dismissal or the reasons for dismissal. When the claimant telephoned and texted the licensee, Frank Healey, on 16 July to discuss her situation he failed to respond to either contact. She subsequently sent an email to Mr Healy on 20 July 2020 in which she asserted to him that she believed she had been 10 unfairly dismissed and then sent a letter by Special Delivery to Mr Kernahan on 21 July 2020, setting out grounds of appeal against her dismissal. Neither her email nor her letter received a response.
17. The claimant found alternative employment on 15 October 2020 at McGuire's Bar, Barlanark on comparable wages. Her loss of earnings claim is therefore 15 for the period from her dismissal until that date. Even though the licensed trade was open during that period she was initially slow to find alternative work as she was embarrassed to approach other employers because of the circumstances of her dismissal and the likelihood that word of that would have circulated around other public houses in the area.

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Holidays

18. The respondent's holiday year is 1 April each year until 31 March in the following year. However throughout her employment the claimant was never 25 allowed to take any paid holidays, as the respondent always insisted that when she took one of her normal working days off on holiday she had to work on an alternative day that week.
19. As at 14 July 2020 her pro rata paid holiday entitlement for the 2020/2021 holiday year amounted to 5 days, of which she took none.

20. For the holiday year 2019/2020 her total paid holiday entitlement was 16.8 days of which she took none.

21. For the holiday year 2018/2019 her total paid holiday entitlement was 16.8 days of which she took none.

5 22. Although the claimant was paid her normal salary up until 14 July 2020 she was not paid for any accrued but untaken annual leave due to her at the date of termination of her employment.

The Relevant Law

10 Unfair Dismissal

23. The Employment Rights Act 1996 (The ERA) sets out the right not to be unfairly dismissed. It is for the respondent to prove that it had a potentially fair reason for dismissal in terms of Section 98(1). While the respondent was not present to lead evidence and make submissions in relation to the reason for dismissal the Tribunal found that the claimant was dismissed and that the
15 principal reason for her dismissal was a reason related to her conduct.

24. In such cases the case of **BHS v Burchell 1980 ICR 303** provides that the Tribunal must find that the respondent had a genuine belief in the misconduct and that its belief must be based on reasonable grounds having carried out a
20 reasonable investigation. It is not required that the tribunal consider whether or not the claimant was in fact guilty of the alleged misconduct and the respondent's belief is to be assessed at the time that the decision is made to dismiss.

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25. If the Tribunal is satisfied there is a potentially fair reason for dismissal then it must assess whether in the circumstances (which includes the size and administrative resources of the respondent) the decision to dismiss for that

reason was fair or unfair. Section 98(4) of the ERA provides that the determination of whether the dismissal was fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

5 26. The test of fairness is really one of reasonableness and the law recognises that different employers acting reasonably may make different decisions based on the same circumstances. It is not for the Tribunal to decide whether it would have dismissed for that reason. Rather the question for the Tribunal is whether the decision to dismiss (and the procedure adopted) fell within the “*range of reasonable responses*” open to a reasonable employer. If so the
10 dismissal is fair.

27. The respondent’s response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss - ***Iceland Frozen Foods Limited v Jones 1983 ICR 17***. It is only if the decision to dismiss was outside
15 that range that dismissal is unfair.

28. The Tribunal will also consider the procedure that is followed. Failure to follow a fair procedure may cast doubt on the reason for dismissal or may, in itself, mean that the decision to dismiss was not reasonable. However the Tribunal
20 must assess the overall fairness of the procedure and not merely whether there was a failure to comply with a contractual procedure.

Holiday Pay

25 29. When a contract is terminated, for whatever reason, the claimant is entitled to payment for any accrued but untaken annual leave.

30. Regulation 14 of The Working Time regulations 1998 provides –

"14.—(1) Paragraphs (1) to (4) of this regulation apply where—

*(a) a worker’s employment is terminated during the course of his leave year,
and*

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

5 (2) *Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

(3) *The payment due under paragraph (2) shall be—*

10 (a) *such sum as may be provided for the purposes of this regulation in a relevant agreement, or*

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

15 *where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;*

B is the proportion of the worker's leave year which expired before the termination date, and

20 *C is the period of leave taken by the worker between the start of the leave year and the termination date.*

(4) *A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.*

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31. As a general rule, Working Time Directive leave (that is the four weeks leave provided for by Regulation 13 (1) of the Working Time Regulations) may only be taken in the leave year in respect of which it is due – Regulation 13 (9)(a). However, there is nothing to prevent an employer and employee agreeing that

the four weeks leave provided by Regulation 13 may be carried over. Leave under Regulation 13A, that is the 1.6 weeks leave under Regulation 13A, may also be carried forward into the next leave year in accordance with a relevant agreement such as a term in the employment contract or a collective agreement.

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32. Where workers do not have an effective opportunity to take their working time holiday entitlement, they should be permitted to carry over unused statutory holiday to the next year – *Kreuziger v Berlin (C-619/16) EU:C:2018: 872*. That decision applies only to the first four weeks of an employee's holiday entitlement, as provided for by Regulation 13(1) of the Working Time Regulations.

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Discussion and Decision

Unfair Dismissal

33. Dealing firstly with the claim for unfair dismissal the Tribunal has to consider whether the respondent has established a potentially fair reason for dismissal.

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34. The Tribunal accepted the claimant's evidence that the respondent's principal concern was that she has stolen £4 and therefore the Tribunal accepts that the respondent had in mind the claimant's conduct in that regard as the reason for her dismissal. The respondent's final words to the claimant at the meeting on 14 July 2020 were clear and unequivocal words of dismissal. The claimant was reasonably entitled to believe that she had been summarily dismissed there and then.

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35. The question in connection with this complaint is not whether the claimant had in fact stolen £4 but whether the respondent genuinely believed that she had and whether it had reasonable grounds for that belief having carried out a reasonable investigation.

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36. No evidence was ever produced to the claimant that indicated that any reasonable investigation had taken place. The CCTV footage described by

Mr Kernahan to the claimant, but never produced, did not match the claimant's account of what had happened in relation to the allegedly stolen £4.

5 37. If the respondent had CCTV footage showing the incident in question it was an essential part of any investigation to show that to her and to obtain her comments and, if necessary, her explanation. It would also have been fair and reasonable to speak to the customers A and B. It did not take any of those steps and therefore it did not carry out a fair and thorough investigation in the circumstances.

10 38. The Tribunal had no hesitation in concluding that the respondent failed to carry out a reasonable investigation in the circumstances. It did not therefore have a genuine belief on reasonable grounds that the claimant had been guilty of the misconduct for which it dismissed her.

15 39. The Tribunal also considered the procedure adopted by the respondent. The claimant was not provided with the details of any allegation in relation to her conduct or details of the evidence relied on by the respondent. She was summarily dismissed in an open area of her place of work with no privacy whatsoever. She received no letter of dismissal and she was given no right of appeal. After her dismissal when the claimant attempted to appeal the respondent's decision the respondent failed to even acknowledge her correspondence. The respondent failed to follow any dismissal procedure whatsoever.

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25 40. No employer acting reasonably would have acted as the respondent did when it dismissed the claimant. In all the circumstances the claimant's dismissal was therefore substantively and procedurally unfair.

Basic Award

41. The claimant's basic award is £443.34, based on a gross weekly pay of £147.78 and two years completed service, the claimant having been aged 43 years as at the date of her dismissal.

Compensatory Award

5 42. The claimant's loss of earnings arising from her dismissal is for the period from 14 July 2020 to 15 October 2020, by which time she found suitable alternative employment. The Tribunal is satisfied that the claimant took reasonable steps to find suitable alternative employment during this period and that her initial reluctance to approach local employers in the licenced
10 trade was reasonable. She is therefore entitled to 13 weeks gross loss of earnings at £147.78 per week, making a total of £1,921.14.

Loss of Statutory Rights

43. As a result of her dismissal the claimant has lost a number of statutory employment protection rights that are dependent on a qualifying period of
15 service - most notably the right not to be unfairly dismissed until she has worked for a new employer for two years. In the circumstances she is entitled to a payment of £250 for loss of those statutory rights.

Acas Code of Practice

44. The Tribunal finds that in all the circumstances the respondent unreasonably
20 failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code'). There was no proper investigation to establish the facts of the case. The claimant was not provided with any evidence of her alleged misconduct. It would have been reasonable for the respondent to have provided the claimant with the CCTV footage, which would have been
25 available to it and to take statements from customers who were in the bar at the material time. She was not invited to a disciplinary hearing and provided with an opportunity to respond to any allegation of misconduct. Following her dismissal the claimant was not issued with a letter of dismissal and even though she requested an appeal that request was ignored altogether. There
30 was no justification whatsoever for the respondent's complete failure to follow

any sort of procedure. The respondent's failure to follow the Acas Code was entirely unreasonable.

45. In all the circumstances it is just an equitable to increase the amount of the compensatory award by 25% in terms of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (as inserted by Section 3 of the Employment Act 2008). The 25% uplift applies only to the compensatory award and amounts to £480.29.

Holiday Pay

46. The Tribunal accepted that the respondent had, by virtue of insisting that she work alternative days when taking holidays for her normal working days, failed to allow the claimant an effective opportunity to take her paid holidays at any time during her employment.

47. It therefore finds that she is entitled to accrued holiday pay for the entire duration of her employment, as follows –

- For the 2020/2021 holiday year, she is entitled to payment for her 5 days accrued but unused holidays, amounting to £246.45 gross.
- For the 2019/2020 holiday year, she is entitled to payment for her 4 weeks (12 days) holiday entitlement, as provided for by Regulation 13(1) of the Working Time Regulations, amounting to £591.12 gross
- For the 2018/2019 holiday year, she is entitled to payment for her 4 weeks (12 days) holiday entitlement, as provided for by Regulation 13(1) of the Working Time Regulations, amounting to £591.12 gross

48. The total gross award in relation to holiday pay is £1,428.69.

Employment Judge: Robert King

Date of Judgment: 19 July 2021

5 Entered in register: 19 July 2021
and copied to parties

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