EMPLOYMENT TRIBUNALS

Claimant: **Mr B Knight**

Respondent: **Off Broadway Limited**

Heard at: **East London Hearing Centre (in public, by video)**

On: **6, 7 and 8 December 2021**

Before: **Employment Judge Moor**

Representation
Claimant: Ms E Grace, counsel
Respondent: Mr M Withers, counsel

JUDGMENT having been sent to the parties on 14 December 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant was employed as a manager by the Respondent company which ran the Off Broadway bar in London.

2. The hearing was held in public remotely by video. I am satisfied that the parties had a full opportunity to be heard. (Mr Selby had difficulties that meant he had to attend the first morning in a public place which was unattended until around 12.40 when he became disturbed. After the lunch adjournment he had resolved this problem.)

Issues

3. The parties agreed a List of Issues, which I clarified with them at the outset and to which I refer. I indicated I would hear liability and remedy together.

4. The claims are for: unfair dismissal; wrongful dismissal (failure to give contractual notice); accrued but unpaid holiday pay including a claim that pay from the 2019/20 holiday year should be carried over.

Applications

5. For reasons I gave orally, I allowed the Respondent to rely on the witness evidence of Mr Ross, despite serving his statement after the time ordered to do so.

6. I accepted that the Claimant could pursue the extra award set out under section 38 of the Employment Act 2002 ('EA') (based on his not having received a 'section 1 statement of employment particulars') without the need to amend his claim.

Findings of Fact

7. Having heard the evidence of Mr Selby, director, Mr Ross, pop-up caterer; Mr Masztalir, customer, Ms Diallo, former bar worker, and the Claimant; and having read the witness statement of Ms Donadio and the documents referred to me in the evidence, I make the following findings of fact.

History of Claimant's Relationship with Respondent

8. The Off Broadway bar ('the bar') has been trading since December 2008. Mr Selby effectively owns it through the Respondent company.

9. The Claimant assisted Mr Selby in setting up the bar and then effectively worked as a manager at the bar until 2011.

10. From 22 May 2010 until 27 April 2017, the Claimant was a director of the Respondent. This was a formal corporate role and not a paid employment position.

11. Between 2011 and 2018, the Claimant worked to set up POND, a restaurant project (which he says was full time-ish), and then Deviant and Dandy Brewery.

12. All agree that, from October 2018, the Claimant worked solely at the bar as manager. Mr Selby contends this was a return to the position. The Claimant contends he had continued to work as bar manager at the bar all along, while also working at POND and Deviant. I accept Mr Selby's evidence on this. Mainly because I find it highly unlikely that the Claimant had the time to work on those two new business projects and continue to work nearly full-time as bar manager of the bar. He may well have overseen the bar, as a director of the Respondent, but he did not work there as manager and nor, importantly, does the evidence show that he was paid to do so before October 2018.

13. Both agree that, from October 2018, the Claimant was paid regularly, the Claimant says weekly, by the Respondent at a salary of £30,000.

14. What is missing crucially is evidence of regular payments from the Respondent to the Claimant evidencing his wage or salary as bar manager prior to October 2018. Ms Grace cross-examined Mr Selby (on instructions) that the Claimant had received such regular payments. The Claimant initially maintained this in his oral evidence – stating clearly and without doubt that he had had regular weekly payments of identified sums. In the light of the complete absence of supporting evidence from bank statements, I find this evidence to be extraordinary and wholly unreliable. The Claimant had asked his bank for statements. They told him he could obtain statements going back 7 years i.e. to 2013/2014, depending on the date of his request. Yet, the only bank statements he has put forward, knowing his employment in those years was disputed, are very few in 2016 and 2017 none of which show regular payments. The Claimant had to accept by the end of his oral evidence that

there was no evidence of regular payments to him from the Respondent in years 2016 and 2017. He was clear this was his only current account (and his savings accounts showed only small amounts).

14.1. In 2016 he received 2, £2000 payments from the Respondent. One payment was at a time when he had no money in his account. I accept it is likely to have been paid to assist him, as Mr Selby recalled. The other the Claimant thought might have been a dividend payment and I agree that was more likely, given his directorship at that time.

14.2. In 2017 one statement shows some irregular payments adding up to no more than £650. These do not evidence a regular weekly wage.

14.3. I find, until October 2018, no regular salary was paid by the Respondent to the Claimant.

14.4. I am concerned, too, that this cavalier approach to reliability in his oral evidence undermined the Claimant's credibility. He was prepared to say what he felt was convenient rather than making the obvious concession against himself until he was forced to do so.

15. Before the end of their working relationship on 8 November 2020 both the Claimant and Mr Selby thought they were business partners. Neither thought that the Claimant was an employee. The Claimant was never paid through the PAYE system and was always responsible for his own tax.

16. As manager of the bar, the Claimant was master of his own time. He rostered himself to work 'behind the bar' as bar tender 3 days a week but he also came and went at other times in his managerial/supervisory capacity. Crucially he could decide what days off to take and he could decide when to take holidays. He says he did not take any holidays but this does not prevent my finding that holidays were within his own gift as the person who organised the roster and managed the bar. He was not under Mr Selby's direction about holidays. The Claimant was not paid hourly; he was salaried. His time was his to organise as he saw best.

17. It is agreed the holiday year ran from 1 October to 30 September.

Coronavirus Rules

18. The law requires that in premises selling alcohol there is a designated premises supervisor ('DPS'). They are responsible for licensed premises when they are present. When they are not there, they must delegate that function to another. At all material times the Claimant was the DPS.

19. During the coronavirus pandemic bars were placed under different restrictions at different times. From 26 March 2020 to 3 July 2020 they were closed altogether. In this period the bar traded as a takeaway through its window. All of the staff except the Claimant were furloughed. The Claimant ran this business and made it a success. There was nothing to stop him taking on temporary staff to work the takeaway on the occasions he decided not to work.

20. Then there was a period of trading under different rules: relating to the numbers allowed and whether food was required. The bar reopened and traded with staff, not just the Claimant. Again, there was nothing to stop him taking appropriate time off for rest and holiday in this period.

21. By October 2020 in Tier 2 areas, including London, a curfew was placed on bars whereby all customers had to leave by 10pm. This was to ensure that more individuals kept to social distancing. A bar could be fined or even closed if it did not stick to the curfew and some establishments were fined. I accept that Hackney Council were keeping Broadway Market under close eye to make sure the rules were followed. The curfew overlaid a public health rule over the licensing rules.

22. At staff meetings all were informed of the changes to the rules to bars. All the staff knew about the curfew and the requirement that there was no-one in the bar after 10pm.

23. Mr Selby accepts that, in the past, the bar had on occasions held private parties after closing hours where the shutters were closed but drinking continued, known as lock-ins. He said that, at that time, the authorities had taken a fairly relaxed attitude to such events. In my judgment, is the hallmark of a credible witness that they admit matters against their self-interest and I take this into account when considering Mr Selby's evidence as a whole.

24. Mr Selby also accepted the photograph in the bundle showed he held a party in the garden of the bar – also his father's home – at which more than 6 people attended. I accept this was nothing to do with the pub but private but was in breach of the lockdown restrictions on all of us at the time.

4 November 2020

25. On 31 October 2020 the Government had announced a further lockdown requiring bars to close their doors on 5 November 2020.

26. Mr Ross provided food at the bar through his own company.

27. Mr Ross informed Mr Selby that he had seen that the bar had remained open to customers after 10pm on 4 November 2020. It is suggested that their evidence about this exchange is untrue. But no other reason has been put forward for why Mr Selby would have wanted to look at CCTV: the Claimant states he did not look at it routinely. Nor has any evidence been put forward for why Mr Selby would have decided to end the relationship. Mr Ross gave clear evidence which I found to be credible: he was concerned that his business was in jeopardy if the bar closed.

28. I do not find it persuasive that, just because Mr Ross confirmed that he had done informed Mr Selby in an email sent on the same date as witness statement exchange, that Mr Selby's evidence or Mr Ross' evidence about what was said in November 2020 is somehow not credible. Mr Ross initially had not wished to give evidence but then agreed to do so. I find nothing surprising in this. Nor do I infer from it that somehow Mr Ross had to be pressed to do so. Giving evidence is not a pleasant task and those not directly involved quite often do not wish to do so. While Mr Ross runs a business at the bar, I do not find that because of this he would have chosen to mislead

me about such a simple matter. If it were untrue, he could merely have continued not to give evidence or be involved.

29. Again, it is not surprising that Mr Ross made his observation: he was usually at the bar until 9.30pm and sometimes chose to stay later, as he did on this night. That there is no CCTV shot of him leaving through a door of the bar was not put to him in cross-examination and I do not have evidence that this was the only door. I cannot therefore place any weight on that matter.

30. (I will deal later, in my own findings for the breach of contract claim, with Mr Ross's evidence about the brief words he had with the Claimant, but I find, too, that they are credible.)

31. Having heard from Mr Ross that he had seen the curfew rules broken, Mr Selby considered the CCTV. He checked the timestamp against his phone and found it to be around 20 minutes out. He said in evidence it was 16 or 17 minutes out, stating he could not remember exactly. I accept his evidence in preference to the Claimant on the time stamp because this is what he likely told Ms Diallo at the meeting with her soon after the dismissal. The notes of that meeting were written by her companion at the time of the meeting. They record '*time stamp 19 mins*'. I find these words can only have come from Mr Selby. This evidence is close in time to his investigation. While the Claimant suggests that, a month, before the CCTV was 45 minutes out, this was not on the day in question. The weightier evidence is that of Mr Selby, as confirmed in his statement near the time.

32. When Mr Selby looked at the CCTV for 4 November he saw, taking into account the time lapse, that there were customers in the bar after 10pm and the Claimant and three other members of staff were present.

Dismissal email

33. Mr Selby decided to dismiss all members of staff and sent an email of instant dismissal to them all on 8 November 2020. He stated he had discovered the bar was open illegally after 10pm '*with all of you in attendance'*.

34. In his email, he set out the legal rules and that fines of up to £10,000 or closure might follow. He stated: '*The lack of respect shown to the other staff and shareholders … is absolutely disgraceful and, as this action in of itself is illegal, I am lead to immediately cease your employment… under the grounds of Gross Misconduct. And the very worst of it is that you put my business at risk of closure in the very month that I am due to have a child. You will not be welcome back to the premises, and the locks have been changed so please dispose of any keys responsibly*.'

35. He informed the staff, because of the difficult times, he would pay them each a sum amounting to 80% of their wages for 4 calendar weeks.

36. He went on '*You have the right to apply for a disciplinary hearing and bring a companion (such as a colleague or union official). Email me at this address to arrange for such a hearing. In the light of the video and other evidence we have of you breaking the law under the Tier 2 restrictions announced by HM Government on 12 October 2020*.'

37. Mr Selby, in cross-examination, said he had looked on the internet for guidance. He admitted that, 'T*he mistake I made I should have suspended everyone rather than dismissing them and then done what I did anyway*.'

Claimant Rejects Offer of Meeting

38. The Claimant was very surprised to receive the email because it described him as an employee (which he did not think he was) and doubtless because it terminated their relationship.

39. On his reading of the email, he took the view that the offered meeting would be fruitless. His reasoning for this is a little odd: because he thought he was not an employee. Furthermore, and somewhat inconsistently he suggested in his oral evidence that he wanted a meeting to discuss the allegations. He wrote to Mr Selby referring to the allegation of gross misconduct as '*unsubstantiated'* but saying nothing more about why and suggesting that they '*discuss an appropriate dissolution agreement'*. Contrary to his oral evidence, I find this letter showed no intention of wanting to discuss the allegations rather than wanting merely to negotiate a payment at the end of the relationship.

Meetings with Two of the Dismissed Staff

40. Two members of staff did ask for the disciplinary meeting. Ms Diallo was accompanying by a friend, Mr Crabtree, and the other member of staff her trade union representative. Mr Selby did not reinstate either of them.

41. At Ms Diallo's meeting, she insisted on proof of the breach of curfew. Mr Selby suggests that she admitted the breach: she did not do this, but I understand where this contention came from because what Ms Diallo said was that if he could offer CCTV proof then she would admit that customers were there at 10.01. It was stated (presumably on her behalf) there was a culture of the bar opening late so it was OK on this occasion. She accepted the point of view that staff perception was that the Claimant was in charge.

42. Mr Crabtree's notes do not record any suggestion made by Mr Selby that Ms Diallo would only get a reference if she incriminated the Claimant (to the contrary, his notes record a good reference would be given.) If Mr Selby had said this, so shocking would it have been, that I find it would have been recorded. I do not therefore accept that it was said, and it undermines Ms Diallo's credibility that she made this allegation.

43. Where Ms Donadio's written evidence deals with matters that are in dispute I cannot give it weight because it has not been tested in cross-examination. She tried to explain the till records '*at the end of the night there are some open tabs that we would close off or staff tabs and that explains the transactions after 10pm'*. I will come to why I have not accepted this evidence below.

44. Another member of staff was in the bar as a customer that night, but Mr Selby did not dismiss her because he could not see her in the CCTV and she was not rostered to work. I accept this reasoning: she was a junior member of staff and not the DPS.

What Mr Selby May Have Discovered on Further Investigation

45. Before he made the decision to dismiss, Mr Selby did not:

    45.1. speak to any of the staff members present;

    45.2. look at the till sales data; or

    45.3. check the roster.

46. He would have discovered from the till sales data that no drinks were put through the till after 10pm. Six transactions were made between 9.30 and 9.58, the final one being for £21.50 showing therefore several drinks were bought very near to the deadline.

47. Mr Selby is also likely to have found the till sales data for 28 October 2020 that showed drinks being put through the till until 23.19 with 8 transactions from 9.30 and a further 7 transactions after 10pm.

48. Mr Selby would have discovered that the Claimant was not rostered to bar tend that night and said he was visiting the bar as a customer. He would have likely said had had a few drinks but that he had also helped out by supporting staff and doing work when he was present. Mr Selby would have found out that Ms Diallo thought the Claimant was working.

My findings on what happened on the evidence I have heard

49. Mr Ross asked the Claimant why he saw the curfew being broken and the Claimant told him to 'relax'. The Claimant denies this, but I prefer the evidence of Mr Ross. This was a brief exchange. Mr Ross was concerned. He would likely have addressed his concern to the person he knew to be the manager. The Claimant's evidence on regular payments was shown to be totally wrong and I am therefore persuaded that his denial was more likely made in his own interest.

50. On hearing all the evidence on the time stamp, I find that Mr Selby's evidence as to how he checked the CCTV to be credible and supported by the near-contemporaneous, hand-written note from Ms Diallo's hearing. I find Mr Selby likely found out the time difference was 19 minutes ahead.

51. The stills from the CCTV video that I have seen show:

    51.1. At 22:06 i.e. at 9:47 there were plainly customers in the bar, sitting at the bar. This is before the curfew.

    51.2. At 22:43 i.e. 22:24 there was one worker at the bar; and two customers sitting inside the bar at tables. It is not possible for me to say on the evidence whether the shutters are open or closed. This is after the curfew. Credit card machines were gathered on bar and not being used. The Claimant thinks the customers were Mr Masztalir and his friend, though this was not explored with Mr Masztalir.

52. Mr Masztalir presumed the Claimant was working although he was not sure. He says he believed the bar was not open beyond 10pm but his evidence is not clear cut:

    52.1. He says he left around 10 'maybe just before or just after'.

    52.2. He decided 'to get out before the rush and leave' i.e. on his evidence other customers were there after he left.

    52.3. He had consumed between 4-6 alcoholic drinks: beer and vodka. I find his memory of the precise time is therefore not likely to be reliable. If the Claimant is right and Mr Masztalir is in the CCTV still, then he was, on the facts I have found, in the bar after curfew.

    52.4. He remembered the night to be 'a bit of an event' He explained that 'being able to have freedoms back was an event to remember' but, of course, this had been the case for some months. What I find Mr Masztalir is more likely remembering here is that it was the *last* night of those 'freedoms' before the bar had to close again. Further, if Mr Masztalir was remembering that 'freedoms' were being enjoyed this runs contrary to the idea that he was being turned out at 10pm. I find it more likely that this evidence of 'freedoms' being enjoyed supports that the curfew was not being followed.

53. Ms Diallo's approach to the allegation was in essence: prove it. I find that is what Mr Selby has done. I do not accept her evidence as to the time of closure or the Claimant's before me as being credible. Ms Diallo was plainly angry at being peremptorily dismissed and I find this has coloured her evidence.

54. The till receipts on 4 November show drinks were sold near to the 10pm deadline. I do not find, however, that those drinks were consumed outside – given that the CCTV still shows customers were inside at 10.25 pm. I find, on balance, the bar was not cleared of customers at 10pm on 4 November. No drinks were sold after that time, but it is likely there were still customers inside drinking up. This was against the rules.

55. On 28 October there was a clear breach of the curfew rules: drinks were sold after 10pm. I do not accept these were tabs being cleared off because the sales were separated in time rather than all in a bunch. I find it likely drinks were being sold. Nor do accept that these sales were likely only staff tabs – they were bought drinks by customers on their bills through the evening. And, in any event, if they were staff purchasing drinks after hours, they became customers and that was in breach of the curfew.

Mitigation

56. The Claimant says he applied for jobs in bar tending and management, restaurant management, creative production work and recruitment. He applied for around 9 bar tender roles and around 6-8 bar manager roles. He acknowledges that he has read there is a demand for jobs in hospitality presently. I accept Mr Selby's evidence that in London there are more vacancies than demand can meet for bar staff and managers. I find this likely since restrictions on bars were removed.

57. The Claimant has applied for Universal Credit (UC) and contends he would not have been able to sustain this claim if he had not evidenced a reasonable search for work. (During the pandemic this assertion is not correct because he accepts that during the pandemic his DWP work coach did not insist on seeing a certain number of job searches per week and I take judicial notice of the fact that the DWP brought in an easement of the usual claimant commitment.)

58. The extract from the Claimant's August 2021 UC Journal on which he inputted his work search shows a very small number of applications with, on the same page, many days between job applications. It shows that the Claimant had inputted 32 applications. I find it likely this is from the beginning of his claim; 32 in about 8 months is 4 a month.

59. I have seen no other documentary evidence supporting the Claimant's evidence as to his search for work. He says he used Linked-in, but this is likely to have been evidenced in his UC job search.

60. Lockdown measures continued into 2021 for pubs. They were allowed to reopen outside on 12 April 2021 and from mid-May 2021 inside but with food requirements and social distancing. By mid-July 2021 all rules had been lifted and bars could operate normally again. From soon after, vacancies in this sector outstripped supply.

61. A bar tender job in London for someone with experience is likely to pay approximately £10.50. A bar manager role anything from the high £30,000s to the mid £50,000s.

62. The Claimant is still not in work. He received £1,248 from the Respondent after his dismissal as an ex-gratia payment. He also received loans and donations from friends to help with living costs. The donations were about £2,700.

63. I find it was reasonable for the Claimant to look for managerial work at first, but a reasonable mitigation strategy would have included bar work at a later point to gain money and to make contacts in the business. I find it it was more difficult to find hospitality work until the restrictions eased by mid-July 2021.

64. On those facts, in my judgment, the Claimant has not made reasonable efforts to find alternative work: applying for only 6 -8 manager jobs and 9 bar tender roles in more than a year is inadequate, and, even since July, would still be unreasonable, bearing in mind the increase in vacancies and demand for workers with his experience.

65. I find it likely that had the Claimant made a reasonable effort to search for work he would have obtained bar work from 1 August 2021 at £10.50 an hour for 40 hours a week and, from 1 October 2021, he is likely to have obtained manager work at the wage, at least, he was earning with the Respondent. Therefore, from 30 September 2001 his loss stopped.

Lamps

66. It is alleged lamps were left on in basement by the Claimant on 28 October 2021. Mr Ross is said to have informed Mr Selby of this. Mr Ross does not

refer to the incident in his statement. The Claimant denies it and suggests it was another member of staff. I do not find Mr Selby's evidence about this to be persuasive and consider it a makeweight for the purposes of this case. There may well have been oil lamps left and that may well have been the responsibility of the Claimant, but Mr Selby did not refer to it in his dismissal email and did not treat it with the importance at the time he now places on it.

Submissions

67. Counsel both provided excellent skeleton arguments that they supplemented orally. They each ran persuasive arguments that gave me much pause for thought and neither should feel that the outcome is through any failure on their part.

Legal Principles

Unfair Dismissal

68. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996 ('ERA'). The Respondent relies upon conduct within section 98(2)(b).

69. If conduct has been shown as the reason for the dismissal, then the Tribunal must decide whether the dismissal was fair or unfair under section 98(4) ERA. This '*(a) depends on whether 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.*' This will include consideration of whether or not a fair sanction and procedure have been adopted.

70. Tribunals, in order to apply some structure to their decisions, look at both the substance of the decision and the procedure that led to it. Mr Withers is right that section 98 does not distinguish between these two aspects and I must stand back and consider the reasonableness of the decision overall. But the appellate courts have set out useful guidance as to each aspect.

71. The well-known principles set out in ***BHS Ltd v Burchell*** [1980] ICR 303 apply in misconduct dismissals. The Tribunal should usually consider whether the employer had a genuine belief in the misconduct; whether that belief was based on reasonable grounds and after reasonable investigation in the particular circumstances of the case.

72. I am reminded by ***Sainsbury's Supermarket v Hitt*** [2002] EWCA Civ. 1588 that the 'range of reasonable responses approach' applies to the conduct of investigations as much as to the decision of dismissal. A reasonable employer will be even-handed in its investigation and approach. (Ms Grace referred to ***A v B*** [2003] IRLR 406 where the dismissal led to very serious consequences, the loss of a career. In such a case, the appellate courts have suggested a reasonable employer would take a particularly careful approach to investigations. Ms Grace sought to persuade me that the test was, wherever serious misconduct is alleged, the investigation should be 'rigorous' – I do not accept that the line of cases goes that far. The question for me is what was reasonable in all the circumstances.)

73. In deciding whether the dismissal was fair or unfair, the Tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the Tribunal should consider any appeal and whether the overall procedure adopted was fair, see ***Taylor v OCS Group Limited*** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

74. In ***LB of Hammersmith and Fulham v Keable*** (EA-2019-000733-DA) the EAT made useful observations about the purpose of a fair procedure (para 91):

> "The purpose of a fair procedure is not a 'tick box' exercise. Within an employment disciplinary procedure, a fair procedure should seek to ensure that an individual, whose future employment may be at risk, has the opportunity to convey relevant information to the decision maker prior to a decision being taken. It may also provide a forum within which an individual may reflect upon what has gone before and, possibly, adopt a different position, reflect, apologise, or agree to modify future behaviour. A fair procedure should also ensure that employers do not reach decisions on an inaccurate basis or without all the relevant information and thereby make precipitous decisions through which valued staff are lost to an organisation. A fair procedure is an important part of good employee relations. It enables both sides to reflect on matters relevant to the employment situation."

75. The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles to be applied in disciplinary situations. I have in mind the general elements set out in paragraph 4 in particular: acting consistently; carrying out necessary investigations to establish the facts; informing employees of the problem and giving them an opportunity to put their case *before* any decision is made; and allowing an appeal. I also refer to:

    75.1. Paragraph 5: where practicable different people investigate and hold the disciplinary hearing.

    75.2. Paragraph 9: an employee is to be notified of the disciplinary allegations, the possible consequences and given enough time to prepare an answer. Copies of any written evidence should normally also be provided.

    75.3. Paragraph 11: the employer to hold a meeting.

    75.4. Paragraph 12: the employee is allowed to set out his case, answer any allegations, ask questions, present evidence, and witnesses.

    75.5. Paragraph 26: where an employee feels the disciplinary action taken was wrong or unjust then they should appeal. This should be dealt with impartially and, where possible, by a manager not previously involved.

76. I agree with Mr Withers that the size and administrative resources of the employer will make a difference as to what is reasonable/possible/practicable in the circumstances.

77. When it comes to the substance of the decision, ***Iceland Frozen Foods v Jones*** [1982] IRLR 439 establishes that, in many cases, there may be several responses to an employee's conduct that a reasonable employer might have adopted. I must consider the reasonableness of the employer's action rather than substitute my own view of what I would have done in the circumstances. This need to apply the objective standards of a reasonable employer is often referred to as the 'range of reasonable responses' test.

78. One factor in this question of reasonableness is 'equity', and this can include considering whether there is disparity in the decision e.g. where an employer has led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal or where another employee in the same circumstances has been treated more leniently, see Bean LJ in ***Newbound v Thames Water Utilities Ltd*** [2015] IRLR 734, CA at para 63. Ms Grace referred me to ***Post Office v Fennell*** [1981] IRLR 221. This was a case where another worker had been treated differently. In this type of case, the principle, well-established by the appellate cases, is that the circumstances of the two employees should not be materially different. The courts have made it clear that employers and Tribunals should not be encouraged to adopt a 'tariff' to certain types of misconduct.

Polkey

79. If a dismissal is unfair due to procedural failings but there is a chance that the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, ***Polkey v A E Dayton Services Ltd*** [1987] IRLR 503, HL. I can consider the period for which a compensatory award is made or apply a percentage reduction where I consider there was a chance that this employer could have dismissed after a fair procedure.

Contribution

80. The basic and/or compensatory award may be reduced in some circumstances if the Claimant is guilty of 'blameworthy conduct'. This is known as 'contribution'.

81. Under section 122(2) ERA the basic award can be reduced or further reduced if I consider that any conduct before dismissal was such that it would be just and equitable to do so.

82. Under section 123(6) ERA I can reduce the compensatory award if I find the dismissal was to any extent caused or contributed to by any action of the Claimant. I reduce by such a proportion as I consider just and equitable having regard to that finding.

83. Where I have already reduced awards, for example by virtue of the *Polkey* reduction, I can take these into account in considering the amount of any contribution reduction to avoid 'double-counting' or a result that would be unjust or disproportionate.

Breach of Contract

84. The claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Article 3.

85. It is for the Respondent to show, on the balance of probabilities, that the Claimant was in fact guilty of the misconduct alleged and that it amounted to a repudiatory breach of contract entitling it to dismissal without notice. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

86. If there is no notice provision in the contract, then statute establishes minimum contractual notice periods amounting to 1 week per continuous year of employment up to 12 weeks.

Length of Continuous Employment

87. There is a dispute here about how long the Claimant was employed. This will affect the amount of any basic award and minimum notice.

88. Under section 212 ERA, each week 'during which an employee's relations are governed by a contract of employment counts' towards continuous employment.

89. One significant factor pointing to there being in existence a contract of employment (as opposed to another kind of relationship) is whether the parties agreed a wage for work. The work/wage bargain is usually central to employment contract. One marker of this, usually, is regular remuneration.

90. The fact that the parties have a business relationship and the Claimant is a director in the Respondent's company do not establish, without more, the existence of a contract of employment. It is possible to be both a company director and employee of that company, but employment is not a necessary requirement for being a director.

ACAS Uplift/Decrease

91. If I find a failure to comply with the ACAS Code by either party, and I decide that failure is unreasonable then, I consider whether it is just and equitable to increase/decrease any award by up to 25%.

Section 1 Statement

92. Section 1 ERA provides that employees should be provided with a statement of written particulars at the beginning of their employment. Where such a statement is not given, and the employee succeeds in an unfair dismissal claim, then section 38 of the Employment Act 2002 provides that an additional award may be made in certain circumstances:

    92.1. If I make an award in the other claim, then I must increase the award by the minimum amount (which is two weeks' pay limited by the

statutory maximum amount of a week's pay) and may increase it by 4 weeks.

92.2. Unless, under ss(5) '*there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable'*.

Holiday pay

93. Under Regulation 14 of the Working Time Regulations 1996, on termination, an employee should be paid for accrued but untaken holiday from the leave year.

94. The calculation is set out in Regulation 14. I do not agree that it should be calculated as per Regulation 15A, which relates only to how leave accrues in the first year of employment.

95. Regulation 14 provides that the accrued but untaken leave is calculated as (A x B) – C. Where A is the period of leave to which the worker is entitled: here agreed as 5.6 weeks; B is the proportion of the leave year which has expired; and C is the amount of leave taken in the leave year.

96. A claim to carry over leave from a previous leave year is not normally allowed. But, under the Working Time (Coronavirus)(Amendment) Regulations 2020, in limited circumstances, up to 20 days of the previous leave year can be carried over. I must ask:

96.1. Whether it was not reasonably practicable to take such leave in the leave year?

96.2. And, if so, whether that was as a result of coronavirus (including the effect of it on the worker/employer or wider economy/society)?

97. The leave carried over derives from the EU Working Time Directive. The Claimant relies on ***Max Planck Gesellschaft v Shimizu*** in ECJ C-6845/16 which holds, at paragraph 46: '*should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right of such leave at the end of the authorised reference or carry over period, and, in the event of termination …, the corresponding absence of a payment of an allowance in lieu constitutes a failure*.' The Respondent does not suggest I should have no regard to it, despite Withdrawal, but seeks to argue, on the facts, that the Claimant did have an opportunity to take leave and that it was reasonably practical to do so in the prior leave year.

Application of Facts and Law to Issues

Amount of Continuous Employment

98. In my judgment, the facts I have found point to there being no contract employment between 2011 and October 2018. The parties agree a contract employment was in existence from October 2018, when the Claimant returned full-time to the bar as manager and received £30,000 in regular payments.

98.1. The weightiest factor in my reasoning is that the Claimant was not paid regular remuneration in the earlier period. This is such a strong indication of employment that its absence weighs heavily against the Claimant being an employee.

98.2. While the Claimant had some involvement in the bar throughout, this is not enough to suggest employment, because it was limited by the time spent on other projects.

98.3. That the Claimant was a corporate director and that he and Mr Selby had a business relationship are neutral factors. Further, the directorship ended in 2017.

99. Therefore, the Claimant had 2 complete years' continuous employment by the date of dismissal.

Unfair Dismissal

100. Certainly, the employer had a genuine belief in the misconduct. No other reason has been put forward for the dismissal.

101. In my judgment there was no reasonable investigation. Mr Selby investigated with Mr Ross and by reviewing the CCTV, but the missing feature was to talk to those employees present. I find any reasonable employer, however small, would have done so and I reject the suggestion that time was so pressing or the evidence against so overwhelming that there was no point in doing so. A reasonable employer would have:

101.1. Talked to staff working and present.

101.2. And probably would have looked at other easily obtained data available, here the till receipts.

101.3. The small size or limited resources of the Respondent did not prevent it from speaking to employees to find their response to the allegation. Here the paragraph I have cited in ***Keable*** shows why. Asking them could have made a difference: they might have asked for the CCTV to be played to establish the accuracy of the time stamp. Once they saw that it was 19 minutes out, they might have reflected on their position, admitted the matter, even apologised and/or explained their conduct. They might have referred to Mr Selby's past attitude to lock-ins. The Claimant might have referred to his setting up of the bar and his dedication to the business.

101.4. There was no need to move fast. While trust is important, the bar was to close after that night. There was therefore no immediate requirement for them to comply with the curfew. And, as Mr Selby frankly acknowledged, a suspension would have dealt with his concerns about having those staff working in the meantime.

102. In the absence of a reasonable investigation then Mr Selby cannot have had reasonable grounds for his decision: he was missing any information about the mitigating features of the conduct or an explanation for it.

103. Mr Withers is correct that I do not 'strip out' the ***Burchell*** guidance and decide. Rather I must look at the procedure as whole, as ***Taylor*** holds. I acknowledge and take into account that this was a small employer, with no management structure, and that the allegation was against its main manager, and the owner was having to deal with it. He did not have many resources or options as to who else could do so. I must look at not just what was done before dismissal but what was offered by way of process in the dismissal letter. Mr Withers seeks to persuade me that the offer a meeting after dismissal cures prior defects. I must apply the range of reasonable responses to the overall procedure. I ask, what would a reasonable procedure look like, not what would I have done? I also take into account the ACAS Code.

104. I have considered Mr Wither's surprisingly persuasive argument and those points with care. Nevertheless, I do not agree with him that this procedure overall was reasonable.

    104.1. I consider that paragraph 4 of the ACAS Code - an opportunity is to be given to the employer to put his case before the decision - is weighty guidance. A reasonable employer would not need the Code to guide him: an opportunity to say something about an allegation before a decision about it is really part of natural justice.

    104.2. Also, here, the same point can be made about the investigation: any reasonable employer would have asked those members of staff present for their side of the story. This is so even if it was clear on the CCTV footage and from Mr Ross's observations that customers remained in the bar beyond 10.00pm. This is because such an investigation involves also finding out the explanation and whether there were any mitigating features that could affect sanction.

    104.3. As I have already stated, speed was not of the essence here. I agree with Ms Grace this was a knee jerk decision. Trust is important but so is establishing reasonably whether one incident broke that trust irremediably. I refer again to ***Keable***. Procedures are not tick box but have a real impact on fairness.

    104.4. Does being offered a meeting after the decision cure those problems? I have concluded, while it might in some cases cure defects, here it did not render the dismissal process reasonable because of the decided view expressed by Mr Selby in his dismissal email: that he had evidence of law breaking; that he had changed the locks and told the Claimant he was not welcome back. These words showed a closed mind. The offer of a meeting after expressing such a view does not cure what I have regarded as really basic, major defects in investigation and procedure.

105. Finally, I have considered the inconsistency argument put forward by the Claimant. It is put on basis that the other employee in the bar was not dismissed. She was a junior member of staff, not at work and in no supervisory position. She was plainly not in the same or similar circumstances as the Claimant and, in my judgment, it was reasonable for Mr Selby to treat him differently from her. I note that no submissions could be made on the alternative approach, suggested in ***Newbound***, because the

Claimant has denied the offence rather than argued it occurred because he understood such an approach would be overlooked by Mr Selby because of his prior lax approach to 'lock-ins'. I would therefore not have accepted that was outside the range of reasonable responses on that ground.

106. I have therefore decided because of unfairness in the investigation and procedure the dismissal was unfair. Sanction I will consider under the *Polkey* and *Contribution* issues below.

Mitigation

107. For speed, I have set out my conclusions on mitigation in my findings of fact section.

Loss of Statutory Rights

108. This is an award to recognise the time it will take for the Claimant to regain protection against unfair dismissal as employee. I accept that a good way of valuing this loss is to multiply those lost 2 years by the maximum week's pay of £538.

Polkey

109. If a fair procedure had happened, what are the chances this employer would have dismissed?

110. A reasonable procedure would have involved speaking to employees and probably looking at the till data (either before or on their suggestion). In my view this is what is most likely what Mr Selby would have done if acting reasonably.

    110.1. The Claimant and other staff statements are all likely to have denied the allegation. But I find it would have been reasonable still to prefer Mr Ross's account which was given to Mr Selby very soon after, was clear and plausible. He recalled the Claimant telling him to 'relax', which was plausible, given that the Claimant may well have been relaxed about rules on the last night of 'freedom' before closure.

    110.2. The Claimant would likely have claimed the time stamp was out about 45 minutes to an hour and Ms Donadio that it was 30 minutes out and Ms Diallo would have told him the CCTV had never worked properly. Mr Selby may well have done a test in front of the Claimant to check. In my view, this is most likely to have shown the 19 minutes that Mr Selby found on his initial test, for the reasons I have given.

    110.3. Mr Masztalir is unlikely to have been interviewed, but even if he had been, I find Mr Selby likely would have reasonably preferred Mr Ross to him, especially as Mr Masztalir was drinking.

    110.4. The Claimant would have argued that their practice was to ask for customers to drink up from 9.30 to make sure the bar emptied by 10pm and that plastic cups were offered. He would have pointed

out that one CCTV still showed that glasses were on the bar and the credit card machines on the bar and not in use. But I find it likely Mr Selby would have rejected that explanation on drinking-up and plastic cups because the CCTV showed people sitting in the bar some 25 minutes after curfew.

110.5. I find it is also likely that Mr Selby, in a reasonable investigation, would have seen the till receipts from 28 October 2020 showing drinks were sold after 10pm, which was plainly in breach of the curfew rules and arguably worse. He is likely to have reasonably rejected the explanation that these were 'staff tabs' because staff were bought drinks by customers and in any event, it would have been a breach of the curfew rules as the staff then were purchasing drinks. Plus, tabs were not cleared off at around 10, but sales were made at different times indicating them more likely as normal sales.

110.6. The Claimant will have argued he was not rostered. But I find Mr Selby will have likely decided this did not mean he was not responsible. The Claimant was DPS when he was on the premises, he adopted flexible hours as manager, and the staff took their cue from him as manager when he was there. He was also doing some work. He was not obviously only a customer. It was therefore reasonable to consider him in charge.

110.7. If the Claimant had referred to prior 'lock-ins' but also denied the allegations, I find it would have been reasonable to reject such a 'disparity' argument. This is because, by his denial, he was not arguing that it influenced his behaviour. In any event it would have been reasonable for Mr Selby to distinguish the two cases: the breaches of the covid rules added a public health element and surveillance by the authorities was stronger i.e. the risk of penalty was greater.

110.8. For the reasons given above, I do not consider that it is likely Mr Selby would have taken into account the lamp problem. No action was taken at the time.

110.9. Looking at all of this overall, I consider it likely that Mr Selby would have decided the Claimant was guilty of serious misconduct – a breach of the rules, a risk of a fine, a breach of trust and that it was reasonable to dismiss him.

111. When considering this necessarily hypothetical question, I do however consider that a different set of circumstances could have occurred if the Claimant had been invited to a disciplinary meeting before any decision was made. If the Claimant had been informed of a possible breach of the rules, provided with the CCTV stills and given information about the time stamp lapse, and Mr Ross' statement or a summary of it, and information showing the till sales from 28 October, then it is possible, facing all of that evidence, that the Claimant would have admitted the breach of curfew, sought to explain and apologise. (I have in mind the purpose of a disciplinary meeting as explained in ***Keable***.) The Claimant might have argued Mr Selby's own approach to previous lock-ins had led him to understand Mr Selby would not

have taken such a serious view. Mr Selby might have accepted the mitigation that no drinks were sold on one of the nights and that the Claimant was there primarily as a drinking customer. There is a chance that in the light of such an explanation and apology, trust could have been maintained and Mr Selby would have chosen to give the Claimant a final warning rather than dismissing him. I assess this chance at no higher than 20%.

112. For these reasons I have decided that there was an **80% chance** that this employer would have fairly dismissed the Claimant.

113. I also consider that a fair decision to dismiss would have taken **a further two weeks**. This takes into account the arranging of a disciplinary meeting, the need for the Claimant to be given time to prepare, including obtaining documents and statements and testing the CCTV.

Contribution

114. I consider the Claimant, on the facts I have heard, was guilty of blameworthy conduct by:

    114.1. managing a bar on 28 October 2020 in breach of curfew by selling drinks and likely allowing customers on the premises well after 10pm; and

    114.2. being in effective supervision of a bar on 4 November 2020 in breach of curfew by allowing customers to remain on the premises until at least 10.25pm. This was not customers on their way out the door but still sitting in the bar at that time.

115. I find that the second matter was attributable to his dismissal and is significant contribution.

116. I find that both matters were blameworthy conduct that happened before dismissal and it would be just and equitable to reduce the basic award because of them. The curfew was an important public health measure and the Claimant was the person responsible for keeping to the rules.

117. While I appreciate that the Polkey and contribution adjustments are different questions, to some extent they overlap. I have already made a significant reduction under the Polkey award by finding it 80% likely the Claimant would have been dismissed and I have taken into account his conduct in this assessment. It therefore seems to me it is just and equitable to avoid double-counting and to avoid making a disproportionate reduction to avoid an unjust result. Therefore, while the contribution is significant, I make smaller reductions to avoid such a result.

118. A further reduction for contribution of **75%** should be made to the basic award. This is to recognise both elements of blameworthy conduct and especially because on the earlier occasion drinks were sold. This was very serious. The Claimant was mainly to blame as the supervisory person. It is not 100% to recognise that it was his first offence, he had a clean record, and that just and equitable not to make a full award because Respondent's earlier attitude to lock-ins at the bar pre-covid may have contributed to the offence.

119. A further reduction of **50% to the compensatory award** to recognise that the dismissal was not attributable to the 28 October conduct but only the 4 October conduct. It is also lower because Polkey takes this conduct into account already, because there is no evidence of drinks being sold after 10pm and the Claimant was not formally at work that night and because the Respondent's earlier attitude to lock-ins at the bar pre-covid may have contributed to the offence. Despite these mitigating features, there is clear evidence that customers were still there well after 10pm, and that the Claimant was effectively in a supervisory person when present and this means it was serious misconduct and it is still just and equitable to make this further reduction.

Section 38 EA

120. No section 1 statement was provided. The parties now agree the Claimant was an employee from October 2018. But at the time they did not consider that he was an employee. This was not a situation where the non-employment was a sham or exploitation, both thought they had a business relationship as partners, and only on examining the legal effect of their agreement, do they both accept the Claimant was an employee.

121. I agree with Mr Withers that those are exceptional circumstances making it unjust and inequitable to make an award under section 38. This was not an employer seeking to hide information about rights from an employee. This is a situation where two men in business did not understand their relationship to be employment in law.

ACAS Uplift/Decrease

122. In the light of my decision on procedure, I do consider here that the Respondent has failed to comply with several paragraphs of the Code:

    122.1. paragraph 5 – reasonably investigating (as I set out above);

    122.2. paragraph 9 informing of alleged misconduct;

    122.3. paragraph 12 holding a meeting to explain, allow employee to state case with opportunity to give evidence/call witnesses; and

    122.4. paragraph 4 – doing this before the decision was made.

123. Are those failures unreasonable? In my view they were. Despite the size of the employer, it would not have taken much to inform the Claimant, arrange a meeting, allow him time to gather information and make his points.

124. As to the amount of the increase, I consider these are significant failures but not wholesale: Mr Selby did do some investigation and offered a meeting afterwards with a companion or trade union representative. I therefore consider the increase should be 20%.

125. As to whether there should be any decrease for the Claimant's failure to appeal. He did fail to appeal and thereby failed to comply with paragraph

26 of the Code. But, in my view, it was not an unreasonable failure because the letter of dismissal stated such a decided view (to the extent that the locks had been changed). It is not fair therefore to make any decrease.

Wrongful Dismissal

126. I must decide whether the Claimant was guilty of gross misconduct, on the facts I have found on the evidence before me.

127. I have decided there were two clear breaches of the curfew rules.

    127.1. First, on 28 October the breach was arguably the more serious because drinks were sold after the 10pm closure deadline. I have not accepted the explanation that these sales were simply the closing off of customer or staff tabs. They were likely customer drinks' sales.

    127.2. On 4 November I have accepted the CCTV time-lag likely to have been 19 mins, customers plainly still in bar well after 10pm and that itself was a breach of the curfew.

128. In my judgment the Claimant's misconduct was very serious indeed:

    128.1. He was the responsible person on both occasions. These were breaches of the licensing and public health rules.

    128.2. There was a significant risk of the Respondent being caught and fined, by the increased surveillance.

    128.3. He has made no apology or shown any kind of remorse. Mr Ross's evidence, which I have accepted, showed the Claimant had a relaxed attitude to the rules and this, coupled with his denial undermines the fundamental trust required in a person in his role.

129. I have considered the mitigating features:

    129.1. On 4 November the Claimant was not formally rostered. But this was not a weighty feature because this was only for his bar tender work not his managerial work and because he worked flexible hours. When on the premises he was the DPS, staff assumed he was supervising, and he did some work.

    129.2. On 4 November no drinks were sold after 10pm. Nevertheless, customers were still on the premises well after the curfew.

    129.3. The Claimant had shown much dedication to the business;

    129.4. Mr Selby's prior approach to lock-ins is a feature that arguably makes a breach of the rules less weighty but I distinguish it from these breaches because the authorities were less likely to enforce and because they were public health rules.

130. Overall, taking all of those factors into account, in my judgment the Claimant was guilty of gross misconduct justifying immediate dismissal. He was

supervising the bar when it committed two serious breaches of curfew rules in place for public health purposes and risked the Respondent being at least fined. This was a fundamental breach of trust.

Holiday

131. I have not heard sufficient evidence of the existence of a rolled-up holiday pay arrangement. In any event, it is doubtful that such an arrangement would be legal.

132. I have found that the Claimant worked flexibly as bar manager. In my judgment he had the opportunity to take holidays from work when he wished to do so.

133. I agree with Respondent's submissions as to the proper calculation for holiday under the formula at Regulation 14 set out above. I do not agree with the Claimant's submission about Regulation 15 for the reasons I set out in the legal principles section. The Claimant is therefore due a payment for 3 days' holiday accrued but untaken in the relevant leave year.

134. I do not award pay in respect of the argument about carry over from the year 2019/20 for the following reasons:

    134.1. It is clear to me that the Claimant was master of his own timetable: he was free to organise his own working time as manager. He organised the roster and rostered himself on 3 days per week as bar tender. But it was within his own gift to take days off as holiday and he knew he would be paid because he received an annual salary rather than being hourly paid.

    134.2. From 1 October 2019 to late March 2020 the Claimant had the opportunity to take holiday.

    134.3. While there will have been some weeks thereafter where it would not have been reasonably practicable to take holiday, for example, while setting up the takeaway service. In the other weeks, it was reasonably practicable to find staff to run it on a temporary basis. In any event, lockdown lifted in early July 2021 and there was trading for the rest of the holiday year. In this period the Claimant had every opportunity to take holiday when he wished. There is simply not enough evidence that coronavirus interfered with the ability to take holiday for the Amendment Regulations to apply and I find that it did not do so. I do not make any award.

Employment Judge Moor
Date: 29 December 2021