EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102224/2017

Held in Glasgow on 22, 23 and 24 January 2018

Employment Judge: J D Young (sitting alone)

Ms Aileen Murdoch	**Claimant** **Represented by:-** **Mr S Healey - Solicitor**
Whitbread Group Plc	**Respondent** **Represented by:-** **Mr Foster - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is :-

(1) that the claimant was not unfairly dismissed by the respondent and that claim is dismissed.

(2) that the claim of breach of the contract of employment of the claimant in dismissing without notice or payment in lieu succeeds and that the respondent shall pay to the claimant the sum of Two Thousand Seven Hundred and Sixty Pounds (£2760) by way of damages in respect of that breach.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining that she had been unfairly dismissed by the respondents. She also sought payment of 12 weeks' notice pay. The respondents admitted dismissal but denied it was unfair maintaining that the claimant was dismissed on grounds of gross misconduct and thus there was no entitlement to notice pay.

to

2. In the claim the issues for the Tribunal were:-

(a) The claimant was dismissed for a wrongful processing of wages of her colleagues. She maintained that she processed these wages in terms of the training she had received. It was maintained that the respondent erred in adopting a disciplinary procedure in relation to conduct and should have adopted a capability procedure.

(b) Even if the respondent used the correct procedure there was insufficient investigation and dismissal fell outside the range of reasonable responses open to the respondent.

(c) Even if the dismissal was procedurally unfair it was maintained the claimant would have been dismissed in any event and thus any award for compensation reduced.

(d) Whether there was any contributory fault by the claimant which would lead to a reduction in compensation.

(e) Whether there were any sums due by way of notice pay by reason of the respondent being in breach of contract.

Documentation

3. The parties had helpfully liaised in producing a Joint Inventory of Productions being paginated 1 - 264. In the course of the hearing further productions were allowed for the claimant being paginated 266/269 and for the respondent one further production being paginated 270 (JP1-270).

The Hearing

4. At the hearing I heard evidence from Cheryl Ann Ewing, Operations Manager since November 2016 at the respondent's Premier Inn in East Kilbride; Colin Jamieson, an Operations Manager and Food and Beverage Manager with the respondents since January 2012; Stephen Crumlish, who had been employed with the respondents for approximately 5 years and since September 2016 held the post of General Manager of the respondent's Beefeater Outlet at Motherwell; and the claimant.

5. From the documents produced, relevant evidence led and admissions made I was able to make findings in fact on the issues.

Findings in Fact

6. The respondents are a large hotel restaurant and coffee shop operator employing approximately 50,000 employees. They operate under a number of brand names including Premier Inn; Hub by Premier Inn; Beefeater and Brewers Fayre.

7. The claimant had continuous employment with the respondents from 15 December 1994 until that employment was terminated by the respondents on grounds of gross misconduct on 6 March 2017. She commenced her employment as a Room Attendant, a position which she occupied for

approximately 10 years. She was then appointed Deputy Housekeeper for 1 year and thereafter for approximately 10 years was Head Housekeeper all at the Premier Inn at East Kilbride.

8. Her employment was governed by a Statement of Terms and Conditions dated 15 May 2015 (JP 44/45). Paragraph 27 of the Statement of Terms and Conditions (JP 45) indicated that the Disciplinary and Grievance Procedures applicable to the claimant's employment were set out in "your Team Handbook " to be found "within the Policies on the Intranet".

9. The "Team Member Handbook" of October 2015 (JP 214/250) provided information on various issues including an outline of the disciplinary process in respect of allegations concerning an employee's conduct or performance (JP 242/250). It was in that section that non- exhaustive examples of gross misconduct were given which included under the heading "Health and Safety and Security" a "serious breach of the Company's Finance Policies and Procedures".

10. The respondent's particular Disciplinary Policy in force from July 2015 (JP 251/256) gave detail of the process to be followed in respect of conduct or performance issues which required attention. Again examples of gross misconduct were given within the Disciplinary Procedure (JP 254/255) which were a mirror of those issues identified within the Team Member's Handbook.

11. The claimant's duties as Head Housekeeper were to manage the team of Room Attendants by allocating their daily tasks and ensuring that those tasks were completed; ordering laundry and consumables as necessary; putting in place any necessary training; and calculating for payroll purposes the wages due to the Room Attendants, Receptionist and herself.

12. The claimant managed on average five Room Attendants as Head Housekeeper. They were paid an hourly rate. The method by which their pay was calculated became the issue which led to the dismissal of the claimant.

13. Notwithstanding that employees they may have entered the building earlier, pay was to be calculated on the time spent at work commencing from the Rota starting time until that work was completed. In or around January 2017 a departing employee raised concerns with Ms Ewing regarding concerns she had with work issues which included the claimants manner towards the team members; the tasks they were being asked to perform; and that they were not being paid for the whole of their working time. The claimant was on leave at that point. Ms Ewing arranged a joint meeting of the Room Attendants who raised their concerns and she then interviewed each team member on an individual basis over 6/8 February 2017 (JP 103/130). In those interviews a concern was raised that individuals were not being paid for the time actually worked but that pay was based on the estimated time it would take for certain tasks to be completed.

14. Ms Ewing examined the timesheet breakdown reports (JP 59/72) for the individual members of the housekeeping team and also the amounts paid to the members of the housekeeping team over December 2016/January 2017. She calculated the wages which should have been paid to the team members based on their time at work in the building and found there to be underpayments.

15. Employees when they were ready to commence work would use their "swipe card" and time at work would be taken from that point. On completion of work they would again use their "swipe card". The respondents relied on employees being truthful about their "swipe in and out" times. The analysis by Ms Ewing was conducted under reference to JP 73/99.

16. Some time later and after dismissal (June 2017) on an analysis in respect of pay sheets over the period January 2016 - January 2017 she found a combined underpayment to Room Attendants of £3,328.29 (JP 205).

Investigation hearing

17. The claimant returned from her leave on 9 February 2017 at which time Ms Ewing met with her to raise the concerns that had come from the individual interviews and her examination of pay. That meeting took place at 8.10am and no notice was given to the claimant of the issues to be raised. The Disciplinary Policy (JP252) indicated that notice of an investigation would not "usually be given".

18. At that time the claimant was asked how long she had been "completing wages on a weekly basis" and responded that she did not know. She was asked what process she followed to complete wages and stated that she went by the "Great Rooms Tool and timesheets". She was also asked if she deducted any time for tea breaks and stated that she did and the time deducted "depends on how long they took". She was asked if the housekeeping staff were paid "extras for corridors or trolleys" and indicated "no, that's what I was shown I thought that was included in the room time".

19. The "Great Rooms Tool" utilised by the respondents forecast or estimated the time to be taken in respect of particular tasks undertaken by Room Attendants in their housekeeping duties. Particular times would be forecast for the cleaning of a room depending on whether the room was a "depart" or "make" the difference being between whether a guest was leaving the hotel or continuing his/her stay. The claimant's position was that she paid the Room Attendants for the length of time that the Great Rooms Tool advised the task should take and not the length of time actually taken. The principles of the "Great Rooms Tool" were set out at JP 54/58. The Great Rooms Tool had been in operation for about 5 years at that time (JP148)

20. The claimant advised in the interview with Ms Ewing that she was paid on the basis of the time she was working in the building and when asked "should the housekeeping teams' wages not be calculated in the same way" stated:- "yes but I have been told that was what they were meant to be paid. I agree it is wrong. I have always been told that is how it has been". The claimant

explained in evidence that when she used the word "wrong" she meant "unfair". Her position was that she calculated the wages in the way that she had been taught namely by reference to the Great Rooms Tool.

21. Other issues were canvassed in the course of the interview and at conclusion Ms Ewing advised that "due to the nature of this investigation being carried out I find it would be best for you to be suspended with pay for the investigation to be carried out impartially" to which the claimant responded "for what?" and was advised "for the wages being incorrect". The claimant stated that she had "always done them the way I have been shown" the claimant again indicated "what I am I suspended for" and was told "the wages being incorrect. I will send you out a letter with a copy of everything" (JP 131/138).

22. By letter of 9 February 201 7 (JP 139) the claimant was advised that she was suspended on full pay pending the outcome of an investigation into allegations of:-

- Low performance that do not meet our standards.
- Negative behaviours affecting the team.
- Failure to process correct payment of team members.

23. By letter of 11 February 2017 (JP 140) the claimant was advised that she would require to attend a disciplinary hearing in relation to these matters which hearing would be taken by Colin Jamieson. Ms Ewing as the Investigating Officer would be present for part of the hearing. She was advised of the right to be represented by Trade Union official or "fellow employee" .The claimant received with that letter a copy of the investigation report which was prepared by Ms Ewing (JP 140/141). The report concluded in relation to pay that Ms Ewing believed there had been a failure to process the correct payment of team members and in her conclusion stated:-

> "I also believe the Head Housekeeper's wages are always correct or have been over what she has worked in a day. I believe there has

> been a manipulation of hours the housekeepers have worked for possible gain on the Head Housekeeper's part. I would recommend that the housekeepers are reimbursed with the hours that they have worked as it appears there is a significant variance..."

24. Ms Ewing explained that she believed the "possible gain" would occur as there was a bonus incentive scheme in place for Head Housekeepers at that time. That incentive scheme would be triggered by an individual meeting three targets one of which was that the housekeepers, in the duties required of them, met the forecast times for tasks within the Great Rooms Tool. Pay being calculated in accordance with the times forecast for tasks on the Great Rooms Tool meant that target would always be met thus easing the way toward a bonus payment. The incentive scheme terms and conditions for 2015/16 (and supporting brief) (JP 46/53) indicated incentive payments would be made following the "collation of housekeeping team turnover, bedroom and bathroom cleanliness scores and meeting model hours". Hitting model hours was essentially an efficiency target being the combined number of labour hours used by the housekeeping team against forecast hours within the Great Rooms Tool.

25. Ms Ewing had not investigated whether the claimant had received any payment of incentive or not; over what period and whether those payments would have been made had the claimant made payment of wages for hours worked rather than against forecasted times within the Great Rooms Tool.

Disciplinary hearing

26. The disciplinary hearing took place on 16 February 2017 (rather than 15 February 2017 as indicated in the letter of invite at JP140) to allow the appropriate notice to be given to the claimant of the hearing. Mr Jamieson was independent of the Premier Inn at East Kilbride and had not worked before with the claimant. Notes were taken of the hearing (JP 145/154) and the claimant produced for the hearing a written statement (JP 143/144). Ms Ewing joined the disciplinary hearing part way through (JP 151). The

disciplinary hearing covered the various issues that had been raised in the investigation but at its conclusion Mr Jamieson indicated that after consideration the "serious matter is the pay. . and that he needed to make further enquiry and the disciplinary hearing was adjourned for that purpose.

27. In the course of the hearing the claimant's position was that when she was trained to "carry out the task of doing the wages by the then manager" she followed the instructions "to the word" and that the manager at the time "had no concerns whatsoever in how I calculated the housekeeping teams' wages". She also stated "May I also add that the four or five managers that have followed since then never raised any concerns over the way the wages were calculated by me. So it would appear that I have been disciplined for following precise instructions given to me by the then manager which is not my fault". In the course of the hearing the claimant advised that past line managers included "Janice Baird, Colin Jewell, Claire Ford, Charmaine Lewis and Chris". She stated that she could not remember who trained her in the use of the Great Rooms Tool as a method for making payment of wages.

28. She indicated that she feel certain aspects of the way payment was made was unfair with particular reference to a non-entitlement to pay on breaks and was asked why this had not been raised by her with her immediate managers and stated "well it is. I can't say its anything else. I have always disagreed with this. I have said to managers its unfair. The team were told when they started that breaks were unpaid." She also stated "I have told the girls that when we are quiet they will get less hours unless I call someone off but they agreed they would rather all come in and get paid for something".

29. She also agreed that she paid herself for the time she was at work on her shift and was asked why it was "different for you?". She replied that because she was Head Housekeeper she would be paid for doing more work. She could not leave "until the girls are away so I can check them".

30. The issue of the quarterly incentive was raised and the claimant advised that she had received this "three times maybe. I also got a reward two weeks ago

for going above and beyond from Cheryl-Ann and Bryan because I had covered some reception shift and I had done Cheryl-Ann's conference call. I have done reception shifts which I am not trained for but I still done."

31. She was asked if she would agree that it was to her benefit in incentive payments that attendants were being paid by use of the Great Rooms Tool rather time spent working as "otherwise you may not have hit your target?" and responded:-

"AM - to my benefit?

CJ - Yes if you are set a target

AM - 1have only had three out of how many so I would say no .

CJ - if you reach the hours then you will hit target and get the reward

AM - I have never thought of it that way."

32. She indicated that she could do nothing about variances in calculations between hours spent by room attendants working and her calculations on the Great Rooms Tool as that is what "I have always been told to do". If there were unpaid hours then she indicated "I can't do anything about that, that is not my fault".

Adjournment

33. In the period of adjournment of the disciplinary hearing Mr Jamieson obtained information on training modules taken by the claimant (JP 206) but none of those modules related to the calculation of wages payments. He also made enquiry with named former managers of the claimant to ascertain the position on training and the calculation of wages. Two of the managers named by the claimant namely Janice Baird and "Chris" had left the respondent's employ and he made no enquiry with them. He conducted a telephone interview with

Colin Jewell (JP 155/156) who was Operations Manager between 20 July 2013 until 20 July 2014 at Premier Inn East Kilbride when the claimant worked as Head Housekeeper. Mr Jewell advised that he had not given the claimant any training on the Great Rooms Tool and that "Aileen was already using the GRT when I arrived on site'*. Mr Jamieson asked the question:-

> "Was it ever brought to your attention by Aileen or any other team member that she was paying the girls' hours but using the GRT i.e. the time it generates based on number of rooms and types; rather than their clock in/out times (the time they are in the building)?" and received the response:-
>
> During my time with East Kilbride Central PI Ian Lyons my Cluster Manager at the time had conducted a listening group with team members from all over the cluster and Ian Lyons came to my site and informed me that some of the team have complained that they think they are not being paid fairly.
>
> We looked at the payroll and found no suspect issues with the payroll checked at the time. Can't remember exact dates. I did speak with Aileen following this so she knew about the issue and knew how payroll was to be processed.
>
> None of this was documented."

34. He was also asked if he had instructed the claimant "to pay herself by clock in/out times and have paid breaks despite her housekeepers being paid by GRT with unpaid breaks" and responded "no".

35. Mr Jamieson conducted a telephone interview with Claire (Ford) McIntosh (JP 157/1 58) who was a "Holding Operations Manager for around six weeks" around January/February 2015. She confirmed that the claimant was Head Housekeeper at that time but had no information to assist Mr Jamieson. She had not trained the claimant in relation to calculation of wages.

36. Mr Jamieson conducted an interview with Charmaine Lewis (JP 159/1 60) who had worked as Lead and Head Receptionist at the site when the claimant acted as Head Housekeeper. She did not carry out any training with the claimant on calculation of wages. In answer to the question whether she was aware that the claimant was paying by using the Great Rooms Tool she responded:-

> "After I had stepped down from Lead Receptionist it was brought to my attention by my own observation really, watching her doing payroll. Aileen was doing it on the screen and I would ask what's that?; i.e. the Great Rooms Tool, and so it seemed as if that was the tool she was using. But I had no reason to question she was doing it wrong. That would have been years ago though. She was experienced, we got on, and as I say I hadn't no reason to question her".

37. Mr Jamieson sought information from Ian Lyons, Area Manager (referred to by Mr Jewell) and received an e-mail from him regarding calculation of wage payments and his e-mail of 27 February 2017 (JP 170) stated:-

> "Following on from our conversation on the phone. Although I cannot remember exact dates I do recall conversations that were had with Aileen regarding team member pay.
>
> During our conversation with the housekeeping team members from East Kilbride Central it came to light that there was concerns about the number of hours paid vs hours worked. I asked Colin Jewell, OM at the time, to investigate with Aileen and others from the team.
>
> At the time this was put down to a misunderstanding of the process of how we pay people. Aileen was coached by Colin around the correct process. We saw a spike in hours as this was adjusted to but going forward Colin was comfortable with the procedures in place and through future conversations with team.

Let me know if I can assist further or if you need more detail".

Continued disciplinary hearing

38. The claimant was advised by letter of 1 March 2017 that the continued disciplinary hearing would take place on 6 March 2017. She was sent the notes of interviews with Claire (Ford) McIntosh, Colin Jewell, Charmaine Lewis and Ian Lyons. There was also sent to the claimant at that time a note of CCTV footage from Premier Inn, East Kilbride (JP 100) showing the times of arrival and departure of the claimant from the premises showing "arrival times; clock in time and paid time" for dates between 12 January 2017 and 1 February 2017 (JP 100).

39. At the continued Hearing the claimant was referred to the statements from Ian Lyons and Colin Jewell and asked if she could "recall conversations taking place about the processes that should be followed with wages" and responded :-

> "I can't recall what the conversations were about. If it had been about the wages it could have been regarding the breaks. With regards to Ian Lyons' statement he has wrote it is hours worked vs hours paid instead of hours worked v hours in the building which the girls have always been paid for what they worked. I don't know when the wages changed. The girls have always been paid for what they worked work than being in the building. They said they checked the wages and there was nothing wrong with them. There were conversations but can't recall any specifics but the investigation came about after questions regarding process."

40. The claimant was also asked if the issues raised had ever been raised again by herself or another manager since those discussions and the responded "not that I know of'.

41. The claimant was also asked about the CCTV times in respect of her own entry to and exit from the building and asked if she could "explain the variances'* to which the claimant asked whether this was "a separate investigation". She was advised that this issue was related to her not being paid by means of the Great Rooms Tools but by means of hours worked. The matter was not taken any further.

42. Mr Jamieson raised two other matters in this adjourned hearing being "another couple of points I would like to raise at present which would be further investigated if this proceeding or appeal based on any outcome was to be re-heard". He then raised an issue regarding the completion of the "Your Say Survey" and whether the claimant had completed "Your Premier Inn Fire Safety Training" online. These were not issues which had been canvassed with the claimant prior to the adjourned hearing and she had no notice that they were to be matters which were raised. The concern on the fire safety issue appeared to be whether she had completed the training on behalf of another team member.

43. After reviewing matters Mr Jamieson returned to advise the claimant that he was concerned with her accountability given that she was not able to recall who had trained her in the process of wages. He also raised again the issue of fire training and the "Your Say Survey". He indicated that were these matters to be further investigated fully it would "lead to gross misconduct". The claimant disputed there was any wrongdoing in this respect. Mr Jamieson concluded by saying:-

> "I haven't focused on the misconduct regarding performance as the most severe allegation was regarding the wages. It is gross misconduct as you have not adhered to paying wages correctly...."

And that the responses from the claimant "have not been concrete enough to back up any argument as you can't really remember anything."

He then indicated that balancing the information the conclusion was dismissal. He also advised that there was a right of appeal (notes of disciplinary hearing JP 172/182).

44. In terms of the respondent's procedures Mr Jamieson prepared a disciplinary outcome report dated 6 March 2017 (JP 183/184). His findings were that in respect of any allegations regarding performance and negative behaviours that could be addressed by informal coaching and discussion. In relation to the payment of wages to team members he was concerned that the claimant stated that she followed instructions "to the word" and followed "precise instructions" but was not able to confirm by whom or when those instructions were given. It was considered that there was plenty opportunity for the claimant to have raised the issue of pay if she was uncertain as to its fairness. He indicated that "it strikes me that either she did not care or it was not in her interest or financial benefit to do so."

45. He also made comment on "fraudulently completing Your Say on fire training on behalf of others". He commented that it had come to his attention prior to the continued hearing that she had completed these surveys on behalf of others. Apparently these allegations had been made "confidentially" to Cheryl Ann who then" informed me". However he stated that it was not in his opinion appropriate to prolong the investigation further by undertaking further investigations but these issues should at least be raised in the continued hearing and "that should an appeal hearing be heard on the outcome of the original allegations then these will also be investigated due to their serious nature." He went on to indicate that "further investigation would be required" on these issues and that these "findings do not form part of the hearing outcome."

46. His hearing outcome was that:-

> "Aileen is a time served and experienced HHK agreeing to her code of conduct, ways of working, and principles; with a support network

around herfor concerns to be raised and training, coaching and advice given.

Vague responses were offered by Aileen in the majority of questions regarding specifics; which I believe is not how an employee with responsibility and accountability should conduct themselves and therefore looks guilty by concealing information.

Although Aileen acknowledges that the way she processed payroll was wrong: there has never been an apology or concern for the effect this will have had on her team or the wider business, instead just says it's the way she has always been shown.

It is therefore my opinion to decide upon an outcome of dismissal."

47. This was followed by letter of dismissal to the claimant dated 7 March 2017 (JP 185) which indicated that the decision was to dismiss the claimant for gross misconduct and that the reason for this was:-

"Failure to process correct payments to team members".

Appeal

48. The claimant was given the right of appeal to Stephen Crumlish, Operations Manager at Premier Inn, Buchanan Galleries.

49. The claimant appealed by letter of 15 March 2017 (JP 186). She stated that the "main reason for the appeal is that over the past 6 or 7 years I have been doing payroll as trained by a previous manager and I felt that this process was wrongly explained to me and has not been picked up by any subsequent manager how could I be held responsible for inadequate training which I obviously was given". She considered that re-training should have been given and not dismissal. She also wished to raise at the appeal that the minutes produced of 6 March 2017 were not "a true and accurate statement of events."

50. The appeal was heard on 22 March 201 7. The claimant was again advised that she was entitled to bring a fellow employee or authorised Trade Union representative but declined that invitation. Notes were again taken of the hearing (JP 193/203) and the claimant submitted written appeal notes at that time (JP 187/191).

51. In those notes she made comment on the issues concerning CCTV coverage of her entering and leaving the premises; payment for breaks and other issues raised by the team members in their written statements. On the issue of calculation of pay she stated that she could not remember what the conversation was with Ian Lyons and when that took place. Neither could she remember what the misunderstanding concerning hours paid against hours worked could have been. She indicated in that written statement "it could have been about the girls taking too long a break but I am not sure". She pointed that Mr Jewell had indicated "we looked at the payroll and found no suspect issues with payroll checked at the time..." and commented "if it was a big problem should it not have been documented and put into my training records". She also said:-

> "Ian has said hours paid v hours worked - not hours paid v hours in building. They both agreed they checked and I was doing wages right - look back on records and you will see I have always paid girls for work done not for when they are in the building, nothing changed after: and Ian checked regarding this."

52. At the appeal hearing the claimant's position on payment of wages remained that she considered she processed wages in accordance with the instruction that had been given to her. Again she could not recall who had given her that instruction.

53. In relation to the points made by Colin Jewell and Ian Lyons the claimant at the appeal hearing stated that the issue raised may have been about sofa beds and how the work involved in either putting up or taking down a sofa

bed might be measured. In evidence the claimant repeated that position advising that she considered the discussion involving Colin Jewell and Ian Lyons related to whether or not extra time should be given to team members of the housekeeping staff for putting up sofa beds. That did not appear to be a task identified on the Great Rooms Tool whereas taking down sofa beds was identified.

54. She reiterated that she used the Great Rooms Tool to measure payment for identified tasks. She also indicated that she did not think using the Great Rooms Tool was entirely fair in certain respects but confirmed that she had not raised that with a manager. She advised that at "cluster meetings" amongst other housekeepers there would have been talk about the Great Rooms Tool but not about its use as a method of payment. The conversation would relate to the time allocated for certain tasks and how that might impact on an individual by being too short as a forecast of the time that would be taken.

55. In the hearing she was asked if she had ever received the incentive bonus and stated "two times I think" when asked if that was a "driving force" she answered "no".

56. In so far as she had raised the concern that the minutes of the meeting of 6 March were inaccurate her issue was that Mr Jamieson had said that she knew that she was wrong to pay wages by using the Great Rooms Tool when in fact she did not know the correct process.

57. She also indicated that she took exception to that part of the disciplinary outcome note prepared by Mr Jamieson which indicated that she had not apologised to staff saying "why apologise when I didn't know how I was doing it wrong. I am not allowed to speak to them. I can only stress I done it the way I was trained. I have been doing wages for years if I find out when Great Room started we could find out who trained me."

58. The appeal hearing concentrated on the reason that had been given for dismissal namely failure to process correct payment of team members. At the conclusion of the hearing Mr Crumlish took time to consider matters. His view was that the claimant processed wages in accordance with the Great Rooms Tools forecast so that she could benefit from incentive payments.

59. He did not identify in evidence that the claimant's gross misconduct related to that part of the disciplinary procedure which referred to "serious breach of the Company's finance policies and procedures" but considered the relevant parts were damage to the reputation of the respondent in not paying what was due; deception leading to financial gain; gross negligence causing loss or damage; falsifying company documents including timesheets and failure to carry out legitimate instructions.

60. He considered that while the claimant had been a long serving employee without discipline on her record he could not accept her contentions. Proper pay was fundamental and not something that the respondents could get wrong. He considered that the intervention by Mr Jewell and Mr Lyons was extremely relevant in advising the claimant of the correct processes.

61. No enquiry was made by Mr Crumlish into bonus payments made to the claimant; over what period and whether or not she would have benefited from the incentive bonus had the correct processes been used for payment of wages. He was also of the view that the incentive bonus had only been "in force for a year".

62. By letter of 27 March 201 7 (JP 204) the claimant was advised that the appeal had been unsuccessful and that the reason for dismissal namely failure to "process team member pay correctly" stood.

Matters arising in evidence

63. The claimant advised in evidence that she had been told by Charmaine Lewis to "do the wages" but when asked who taught her the process namely how to

calculate wages she indicated "I don't know". She could not recall who trained her on the Great Rooms Tool but she did know and had known from commencement of the investigation by the respondent that her manager had been Charmaine Lewis when she was told to process the wages. She acknowledged that this was not information that had been volunteered to the respondent in the course of the investigation, disciplinary or appeal hearings .

64. The claimant agreed that she had adequate opportunity to put forward her position in relation to the processes involved in payment of wages. While she could not recall receiving certain papers regarding variances in the team members' wages she agreed that made no difference to her defence to the allegation. She also agreed that any warning of the investigation meeting would not have altered her position in relation to the process of wage payments.

Compensatory issues

65. The claimant sought compensation were her claim to be successful. The parties had helpfully agreed in respect of any compensation that the basic award amounted to £6,408.22 and that if successful in her claim compensatory loss to the claimant could be agreed at £12,821.64 (being the statutory cap of a year's pay) subject to any reduction which might be made by way of contributory fault or under the *Polkey* principle.

66. In reliance on the claimant's medical report of 11 October 2017 the respondent did not contend that the claimant had failed to mitigate her loss. The claimant was in receipt of Employment Support Allowance and so the recoupment provisions would apply in respect of any compensatory award which might be made .

Submissions

67. I was grateful for the full submissions made for and on behalf of the parties. No disrespect is intended in the summary which is made .

For the respondent

68. For the respondent it was submitted that the reason for dismissal was conduct being one of the potentially fair reasons for dismissal.

69. It was emphasised that what was in the mind of the dismissing officer was the failure to process pay correctly. No other matters had been mentioned in the letter of dismissal. While other matters were mentioned in the course of the disciplinary hearing they played no part in the reason for dismissal.

70. The disciplinary procedure for a conduct issue had been followed and while the claimant may say that the process which should have been followed was "capability" the matter at issue was a conduct issue given the belief of the manager that the claimant was knowingly using the wrong process for payment of wages.

71. It was also submitted that a reasonable investigation had taken place and that the dismissing officer had a genuinely held belief in the guilt of the employee. It was important to bear in mind that the Tribunal should not substitute its own view but consider whether the dismissal came within the band of reasonable responses of the reasonable employer.

72. The investigation had been initially taken by Ms Ewing who had made appropriate enquiry. There was no suggestion made by the claimant at that time that anyone else might be involved in payment of wages.

73. The disciplinary hearing which followed was adjourned so that further investigation might be taken by Mr Jamieson who then spoke to three managers who had been named by the claimant as those who may have trained her in the use of the Great Rooms Tool.

74. Despite being asked repeatedly who she had been trained by the claimant was unable to provide an answer. It was submitted that the investigation was reasonable. The enquiry made by Mr Jamieson of Mr Jewell and Mr Lyons

was significant. The claimant had been unable to say who had trained her. Mr Jamieson had information from Mr Jewell and Mr Lyons that she had received instruction on the correct processes to follow and it was reasonable for Mr Jamieson to reach the conclusion he did namely that the claimant well knew the correct processes.

75. The claimant believed that her method of making payment of wages was "wrong" by which she meant "unfair" but took no seps to raise this with her managers or others at group or cluster meetings.

76. Neither did the claimant know of anyone in the company who dealt with the matter in this way. The claimant also knew that she calculated her pay on a different basis namely hours worked. She also calculated pay for reception on the basis of the time they spent on their shift.

77. The question as to who trained the claimant fell into irrelevance given the information received from Mr Jewell and Mr Lyons. They had told her what she needed to do. There was no innate capability issue. The claimant knew that she was processing payments the wrong way and there would be illegality as a result in the respondent not paying their staff properly. That could possibly lead to reputational damage. Mr Jamieson did not have the same conviction as Mr Crumlish had regarding the motive of the claimant but there was no motive necessary. Knowing that the payment should be made in a different manner than was actually being used was sufficient to demonstrate gross misconduct.

78. While no investigation had taken place into incentive payments made to the claimant the respondent was entitled to take from her that she had received certain incentive payments from the scheme.

79. Albeit questions around "Your Say" and "Fire Safety" had been raised in the process they were not relied upon in relation to reasons for dismissal. They had been expressly removed from the equation by Mr Jamieson in his disciplinary outcome. They had not been raised at the appeal and played no

part in the reason for dismissal. Reference was made to *D Najjary v Aramark Limited UKEAT/0054/1 2/CEA* which emphasised that a reason for dismissal under Section 98(4) of ERA was concerned with the employer's actual reason for dismissal and not reasons for which the employee might otherwise have been dismissed. A Tribunal should not substitute a reason or supply an additional reason which the employer had not in fact adopted at the time.

80. Separately in accordance with the case of *NHS v Pillar UKEA TS/0005/1 6/JW* there was no bar to the respondent taking into account the advice and training given to the claimant by Mr Jewell following the discussion involving both Mr Jewell and Mr Lyons. That was relevant in considering conduct of the claimant at a later stage.

81. Mr Jamieson had been clear about the provision upon which he relied in the disciplinary policy. Mr Crumlish was less clear. However that made no difference. The claimant knew of the issue which was in play namely the failure to process wages correctly. Both found dismissal warranted. It was not unreasonable to say that the Head Housekeeper should know how to pay her staff.

82. The claimant had also been given all documentation. Any papers that she claimed she had not received made no difference to the issue at stake which was the basis of pay.

83. If there was any procedural matter which affected fairness then it would be proper to make a *Polkey* deduction. It was not considered that any procedural matter would affect the substance of the case and the true merits and so any deduction should be 100%.

84. It was also submitted that there would be contributory fault by the claimant which would affect the basic and compensatory award.

85. So far as the claim for notice pay was concerned it was submitted that the actions of the claimant amounted to repudiatory breach. It was incumbent on her to act lawfully. That would be an implied term of her contract and if she

acted unlawfully then there was potential for prosecution of the respondent. That would be implicit in a decision that the claimant acted knowingly in processing the wages on the wrong basis.

For the Claimant

86. Reference was made to the outline written submission which had been lodged for the claimant. There it was stated that the claims were for unfair dismissal and separately for notice pay for breach of contract.

87. There was agreement as to the general approach which required to be made by a Tribunal in assessing a claim for unfair dismissal.

88. It was maintained that the decision was unfair as essentially this was a capability issue. There was not enough evidence for the employer to assess that the claimant had deliberately sought to benefit from the bonus scheme. There had been insufficient investigation into the incentive payments to make any reasonable conclusion that the motive of the claimant was to benefit her financially.

89. There was a difference between the approach by the dismissing officer and the appeal officer in this respect. It was clear that at appeal Mr Crumlish had been of the view that there had been deliberate manipulation by the claimant but he simply did not have enough evidence to come to that conclusion.

90. The respondent had placed great weight on the previous incident regarding wages raised in discussion with Mr Jewell and Mr Lyons. However there was no documentation to show what that discussion was about and the information that had been gained was insufficiently clear.

91. In this case the evidence led to the view that the processing of wages incorrectly was due to the claimant being trained to make payment in that way rather than her deliberately calculating payment in an incorrect manner. That was a training issue and the matter should have been dealt with as one of

capability. The Great Rooms Tool had been in use for about 5 years and in all that time the wages prepared by the claimant had never been questioned. There were no issue disclosed in any audit, no complaint and no grievance lodged. It would appear that Charmaine Lewis (JP 159) was aware that the claimant used the Great Rooms Tool in terms of her statement.

92. It was also submitted that there was insufficient investigation into the matter. The most that the respondents could say was that they knew who did not train the claimant. They had not gone to Janice Baird or "Chris" to make any enquiry. It was submitted that it was a struggle to see why the statements from Mr Jewell and Mr Lyons were considered enough in the circumstances.

93. The respondents should have been able to identify clearly who managed the claimant given the size of their resources and to be able to produce the information.

94. The previous incident on wages if similar to the present circumstances should have been documented and dealt with by way of advice or written communication to the claimant. If it had been the case that payment was being made wrongly by the claimant then again staff should have been repaid any variance as was the case here. It was incumbent on Mr Crumlish to ascertain whether sofa beds did play a part in the discussion as was stated by the claimant at her appeal.

95. Additionally the claimant had not had fair notice of charges which were being raised against her in relation to fire safety and "Your Say". If of concern to the respondent these were issues which should have been put aside and not raised in the midst of the disciplinary proceedings on another issue.

96. It was also submitted that in the enquiry that was made with the managers identified by the claimant causing the disciplinary proceedings to be adjourned that there was fault in Mr Jamieson pursuing those enquiries. The matter should have been returned to the officer responsible for the initial investigation.

97. If the claimant was not aware of what she was doing and believed she was paying wages correctly then there were no grounds to accuse her of gross misconduct. That would be an unfair finding. She had processed the wages in this way for 5 or 6 years and it was an institutional failing and unfair for her to shoulder the blame.

98. There was no evidence to suggest that no other head housekeeper or manager used the Great Rooms Tool to make payment of wages. There was insufficient evidence to come to that conclusion. This was a very easy fix to make in any event so that wages were paid correctly. There was no innate inability to make the necessary change and it was wrong for the respondents to consider that further training would not assist.

99. Given the wrong procedure used by the respondents there should be no Polkey deduction. If the correct procedure had been used then the result of that process was unknown. Neither should there be any contributory fault levelled against the claimant. She had an unblemished record over her 22 years' service which should be taken into account.

Conclusions

100. In the submissions made there was no dispute on the law and the tests that should be applied. Reference was made to Section 98 of the Employment Rights Act 1996 (ERA) which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely, (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in Section 98(1) and (2) of ERA and (2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under Section 98(4). As is well known, the determination of that question:-

> "(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and;

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

101. Of the six potentially fair reasons for dismissal set out at Section 98 of ERA one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondents in this case.

102. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. At this stage the burden of proof is not a heavy one. A "reason for dismissal" has been described as a "set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee" *-Abernethy v Mott Hay and Anderson [1974] ICR 323.*

103. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

104. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case *(Iceland Frozen Foods Limited v Jones [1982] IRLR 439).* In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

105. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell [1978] IRLR 379* with regard to the approach to be taken in considering the terms of Section 98(4) of ERA:-

> "What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view in those circumstances."

106. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small [2009] IRLR 536* where he said that the essential terms of enquiry for employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

107. Additionally a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal should not "descend into the arena" - *Rhonda Cyon Taff County Borough Council v Close [2008] ICR 1283.*

108. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal - W *Devis and Sons Limited v Atkins [1977] ICR 662.*

109. Both the ACAs Code of practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however when assessing whether a reasonable procedure has been adopted Tribunals should use the range of reasonable responses test - *J Sainsbury's Pic v Hitt [2003] ICR 111.*

110. Single breaches of a company rules may found a fair dismissal. This was the case in *the Post Office t/a Royal Mail v Gallagher EAT/21/99* where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also in *A H Pharmaceuticals v Carmichael EAT/0325/03* the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight. The EAT commented:-

> "In any particular case exceptions can be imagined where for example the penalty for dismissal might not be imposed, but equally in our Judgment, when a breach of a necessarily straight rule has been properly proved, exceptional service, previous long service and/or

previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal."

111. This all means that an employer need not have conclusive direct proof of an employee's misconduct. Only a genuine and reasonable belief reasonably tested.

Conclusions

Reasons for Dismissal

112. In this case there was an issue as regards the particular reason for dismissal of the claimant. The initial investigation and the disciplinary proceedings instituted concerned allegations of:-

"1. Low performance that do not meet our standards.

2. Negative behaviours affecting the team.

3. Failure to process correct payment of team members."

The investigation report concerned all these matters and the disciplinary hearing with Mr Jamieson also concerned these issues however it was clear that the first two issues were not matters that impinged on the belief held by Mr Jamieson at conclusion of the disciplinary proceedings that the reason for dismissal in his mind was the failure to process correct payment of team members. That is the only matter that is stated in the dismissal letter of 7 March 2017 to provide a reason for dismissal for gross misconduct (JP 185). Additionally the "disciplinary outcome report" (JP 183/184) makes it clear that the first two allegations concerning the claimant could (so far as found to be of concern) be dealt with by discussion with the claimant's line manager and

the setting of certain expectations. Accordingly as regards the first two allegations considered at disciplinary I do not consider they affected Mr Jamieson's judgment and his concentration on the sole reason for dismissal namely failure to process correct payment for team members.

113. At the adjourned disciplinary hearing Mr Jamieson raised issues concerning "Your Say" and "Fire training". The allegation in respect of these matters would appear to have been that the claimant completed the surveys on behalf of others which would be contrary to the respondent's procedures. Mr Jamieson puts it in his disciplinary outcome as "fraudulently completing Your Say and Fire training on behalf of others". That inclusion was in the continued disciplinary hearing and inevitably brings with it the question as to whether those matters affected Mr Jamieson in his judgment of the position and although on the face of it stating these were excluded from his consideration were in fact matters which affected his consideration of or reason for dismissal.

114. Again I could not make a finding that the reason for dismissal contained more than failure to process team members' pay correctly. While these matters were raised in the adjourned disciplinary hearing there was no particular discussion. In his outcome paper Mr Jamieson explains that he considered these matters should at least have been "raised in the second hearing" and that if there was to be an appeal then it may well be that these matters would also be investigated. However at the stage of him making a decision following the disciplinary hearings I did not consider that there was any other reason for dismissal than the failure to process pay correctly. Again that is the single reason mentioned in the letter of dismissal after the disciplinary hearings and the contemporaneous "outcomes note" (dated 6 March 2017) prepared by him. That note details his thoughts on these particular issues and it is clear they are separate considerations. That assists in making the finding that they were not at play when he came to decide on dismissal.

115. In his evidence Mr Jamieson did not point to any possible motive by the claimant. It seemed enough for him that the pay was processed incorrectly.

The nub of the matter for him was his belief that the claimant knew the correct way to process pay but deliberately processed the pay for her team members incorrectly. Thus his issue was that the claimant knew the way in which it should be done but chose to ignore it. It is difficult to consider that he would not have in mind what motive the claimant might have. After all this was something that had been flagged by Ms Ewing in her investigation report which indicated a view that the claimant may be manipulating the pay in order to gain from the incentive bonus which was available. Utilising the Great Rooms Tool to calculate pay meant that one of the factors for achieving bonus would be achieved. Mr Crumlish was far more pointed in his approach in ascribing a very definite motive to the claimant of making payments incorrectly in order that she would financially benefit from incentive payment. However at the root of that of remains the fact that both Mr Jamieson and Mr Crumlish had a belief that the claimant was making payment by using the Great Rooms Tool albeit knowing perfectly well the correct method. The question of motive does not affect that core issue

116. Deliberately processing pay incorrectly is a conduct issue. I could not accept that the matter should be dealt with other than as a conduct issue. The position of the respondents was that they believed the claimant knew the correct procedure and so it was not a matter of capability. The claimant paid herself by using the correct methods and so she was clearly capable of processing the pay in that way. The claimant was innately capable of performing the correct process. Her position was that she believed she was processing pay correctly for her team members. She believed that because she stated she had been trained to make the payments in that way.

117. I considered therefore that the reason for dismissal related to conduct which is one of the potentially fair reasons. I also accept that both Mr Jamieson and Mr Crumlish held a genuine belief in the guilt of the claimant. The issue then becomes whether the respondents carried out a reasonable investigation and that there were reasonable grounds to sustain their belief. Thereafter it is then necessary to decide if dismissal came within the band of reasonable responses.

Investigation

118. I accepted the respondent's position that the claimant was making payment of wages to housekeeping staff on the wrong basis namely using the Great Rooms Tool rather than hours actually worked. There was certainly no challenge to that position by the claimant in the course of any enquiry or at the Tribunal Hearing. Not to have accepted that position would have meant that the respondents were guilty of gross deceit in pretending that the claimant was making payment of wages incorrectly simply to find a reason for dismissal of the claimant. I could make no such finding.

119. Neither was it challenged that using the correct method of calculation of wages meant that there were variances for individual employees in the amounts that they had been paid against the amounts that they should have been paid. Over the period of a year's calculation there was a shortfall of pay to the individuals concerned.

120. In the investigatory process the claimant's position was that she processed pay by using the Great Rooms Tool as that was the way that she had been shown or trained how to make payment of wages. From the evidence it appeared that the Great Rooms Tool had been in use for approximately 5 years prior to dismissal. However the claimant could not recall who it was who had trained her in how she should make payment in accordance with that tool.

121. She was asked to identify her managers over the previous period of a few years. The respondent made enquiry of those managers and none of them were able to confirm that they had trained the claimant to use the Great Rooms Tool in processing pay for her team members.

122. At the hearing the claimant acknowledged that she had always known who it was who had instructed her to process pay for the team members namely her manager Charmaine Lewis. That may well have been a useful start point for

the respondents in their investigation to identify who may have instructed the claimant in the use of the Great Rooms Tool to process pay but it was not information that was disclosed to them by the claimant in the course of their enquiry.

123. The investigation with the previous managers disclosed in the view of the respondents significant responses from Colin Jewell and Ian Lyons.

124. Those statements (JP 155 and JP 170) referred to a period when Mr Jewell was Operations Manager at East Kilbride between 20 July 201 3 and 20 July 2014. He reports that Mr Lyons came to the site to inform him that some of the team had complained that they were not being paid fairly and that a discussion took place with the claimant so that she knew "about the issue and knew how payroll was to be processed". The statement from Ian Lyons was that while he could not remember the exact dates "I do recall conversations that were had with Aileen regarding team member pay". He goes on to state:-

> "During a conversation with a housekeeping team member from East Kilbride Central it came to light that there was concerns about the number of hours paid vs hours worked. I asked Colin Jewel, OM at the time, to investigate with Aileen and others from the team.
>
> At the time this was put down to a misunderstanding of the process for how we pay people. Aileen was coached by Colin around the correct process. We saw a spike in hours as this was adjusted to but going forward Colin was comfortable with the procedures in place and through future conversations with the team."

125. The statement from Ian Lyons is precise in indicating that the issue raised was "hours paid vs hours worked". He also talks of a "spike in hours as this was adjusted to". This is quite a precise statement of the issue and the consequence of the pay process being corrected. It would follow that there was a spike in hours had the claimant been advised that pay was being wrongly processed and that the correct procedures should be implemented.

126. There was criticism of the respondent in not interviewing the two managers named by the claimant but who had left the respondent's employ. Of course it was the position that the claimant did not identify either of those individuals as those who trained her in use of the Great Rooms Tool. In any event the respondent's position was that they had information that sometime in the period July 2013 - July 2014 instruction had been given to the claimant as to how to process pay correctly and so there was evidence that she should know the proper processes but for whatever reason had chosen not to follow those processes.

127. In the course of the disciplinary hearings there were two possible reasons given by the claimant as to the discussion involving Mr Jewell and Mr Lyons namely either payment or non-payment for breaks or whether there should be a recognition for putting up sofa beds. Neither of those matters were mentioned by Mr Jewell or Mr Lyons in their statements. It was submitted that the statements obtained were sufficiently ambiguous so that the issue of breaks or sofa beds may well have been the matters discussed rather than use of the correct processes for pay.

128. The test is whether or not the investigation was adequate by the standards of the reasonable employer. This investigation disclosed that pay was not being processed correctly; that the claimant stated that she had been trained to process pay in accordance with the Great Rooms Tool but could not say who it was who had trained her in that approach; and enquiry disclosed that the issue of pay had been addressed with the claimant in 2013/2014. The claimant had been shown the statements by Mr Jewell and Mr Lyons and made no claim that there was further discussion thereafter with any other manager regarding pay. Against the standard of the reasonable employer that investigation with the claimant and with other managers who may be able to shed light on the position appeared adequate particularly where the claimant was not identifying any other source of information that it may be useful for the respondents to access. Consistently she indicated that she could not

remember who would have trained her in use of the Great Rooms Tool to process pay and did not identify any individuals who may be able to assist.

129. In the investigation that was conducted the grounds disclosed to the respondents were:-

(a) Payment of wages was being made incorrectly for the housekeeping staff. The method used for them was different to that used for the claimants own wage assessment.

(b) The claimant acknowledged that there was unfairness in making payment of wages in this way.

(c) The claimant was unable to identify who it was who had advised her to make payment of wages in this way albeit the Great Rooms Tool had relatively recently been introduced.

(d) There was information from former managers that the claimant had been advised of the correct processes involved in making payment of wages following an issue raised by housekeeping staff.

130. The information from Mr Jewell was not as unambiguous as that given by Mr Lyons. At the same time he did say that he had spoken with the claimant "so she knew about the issue and knew how payroll was to be processed". Mr Lyons pointed to the issue being one of hours paid against hours worked and with particular reference to there being a "spike" in hours after the discussion.

131. Given the information that was available to the dismissing officer it would appear that there were reasonable grounds upon which to sustain a belief that the claimant knew the correct method to process wages but for whatever reason had chosen not to follow that process. The information would form reasonable grounds to lead to a belief that the payment of wages by the wrong process was deliberate and there was thus misconduct.

132. The issue would then become one of whether the misconduct was sufficient to amount to gross misconduct and that dismissal came within the band of reasonable responses. Gross misconduct must amount to a repudiation of the contract of employment by the employee and consist of deliberate wrong doing or gross negligence. Given the information that the claimant had been advised of the correct processes to use in making payment of wages then there was essentially only one conclusion for the respondent namely that the conduct was deliberate and willful and contradictory to a fundamental term of the claimant's duties namely to process payment of wages correctly

133. Certainly there appeared to be no audit process in place which would be capable of checking the processes adopted by the claimant. However that would not excuse the adoption of a course which was known to be wrong.

134. While the claimant had an unblemished record and long service and while it may have been that the matter could have been dealt with by way of a final warning and re-training it could not be said that dismissal was outwith the band of reasonable responses of the reasonable employer.

135. As a large employer with a brand reputation to protect the issue of correct payment of wages is clearly fundamental. It is fundamental for the employees quite apart from any reputational issues involved. It is one thing that payments might be made in error it is quite another that they might be paid knowing the wrong process was being used. It is the claimant's knowledge which is crucial. Given the information available then it would appear there were grounds upon which the respondents were entitled to take a view that the claimant knew what she was doing. That is not to say that she did actually know. As indicated the test is not one whether she did know but whether there were reasonable grounds upon which the respondents were able to come to that conclusion arising out of the investigation.

Appeal

136. While Mr Crumlish was not able to identify precisely the ground of gross misconduct within the disciplinary procedure as was relied upon by Mr

Jamieson it was clear enough that his reason for dismissal was incorrect payment of wages. He ascribed a motive to the claimant for that. That related to the incentive scheme and his belief that the claimant had manipulated the matter so that she could benefit from the incentive scheme. I do think that more enquiry would have been required of the payment made; of the length of time the scheme had been in operation; whether there was any difference between what was paid by way of incentive and what might have been paid had the wages been calculated correctly against hours worked before coming to a conclusion that there was financial gain. At the same time there was a possible motive given in terms of the scheme and one which was clearly in the mind of Mr Crumlish. There was nothing raised at the appeal by the claimant which might have meant further enquiry. The claimant was still unable to assist in identifying who might have instructed her in payment of wages by use of the Great Rooms Tool. There was it would appear mention of there being an issue over sofa beds but that would not square with the information received from Mr Jewell and Mr Lyons that the issue which had been discussed related to hours paid against hours worked.

Procedure

137. The procedure which was followed by the respondent did not appear flawed. The essential issue for the claimant was whether there was adequate investigation and reasonable grounds to sustain the belief that the respondents had arising out of that investigation. That matter has been considered. The respondents in investigating and considering the complaints followed their disciplinary process. The claimant was well aware of the complaint that was being made. She had ample opportunity to make a response and consider her position. She introduced written material into the disciplinary and appeal hearing for consideration.

138. It was indicated that the enquiry made by Mr Jamieson should have been made by the investigating officer given that there was a role for an investigating officer within the respondent's procedure. I did not think that could be classified as a procedural failure. Mr Jamieson was seized of the

matter in the disciplinary hearing and was aware that the essential issue was whether the claimant had been trained or instructed to make payment of wages in accordance with the Great Rooms Tool. In my view it was better that he got the response to that enquiry first hand so he could assess the strength of the claimant's position rather than through a named investigating officer.

139. There was an issue over whether or not the claimant had received paperwork which would relate to variances within the payment of wages to housekeeping staff between the method used by the claimant and the correct procedure. She acknowledged that sight of those papers would not have made any difference to her position that she was acting in accordance with instructions. The question of accuracy of any variances was not the issue but whether she knew she was making payment of wages using the wrong process.

140. In all the circumstances and adopting the approach which must be made in considering complaints of unfair dismissal I do not find that the dismissal was unfair and that claim is dismissed.

Claim for notice pay (wrongful dismissal)

141. Wrongful dismissal is a common law action based on breach of contract. It is different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant. The consideration is only whether the employment contract has been breached. That issue is whether the employee is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract. If so then no notice pay would be due. But if not then a claim for breach of contract representing the amount of the pay that would have been payable in the notice period is available to the employee. Subject to the limits imposed a Tribunal has jurisdiction to consider such a claim by virtue of section 3 of the Employment Tribunals Act 1996 and Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

142. The essential issue of wrongdoing here is whether the claimant knew what she was doing by way of processing wages was wrong. If that is the case then the conclusion would be that there was a conduct entitling the respondent to summarily dismiss without notice. She has always denied deliberate wrongdoing. The standard of proof necessary in a claim for breach of contract is the balance of probabilities namely whether that is more likely or probable than not. That is a different test than in a claim for unfair dismissal where it is enough that the employer had a reasonable belief in the guilt of the employee which as indicated I consider was the case.

143. Whether the claimant actually chose a deliberate intention to disregard an essential term of the contract by knowingly processing pay wrongfully is more difficult to determine. The burden of proof is on the respondent in establishing the breach of contract. The respondent did not contact two of the managers who had been identified as overseeing the claimant in her period of employ and (apart from Mr Jewell and Mr Lyons) other managers could shed no light on the essential matter.

144. In my view satisfaction of the onus hinges on the evidence available from Mr Jewell and Mr Lyons. No evidence was led from either and so could not be tested and only the documents could be examined. I do not consider the evidence available from Mr Jewell would be sufficient to reach the civil standard of proof without further testimony as little detail is given and he says that when pay was queried “we looked at payroll and found no suspect issues with the payroll checked at the time"

145. The email from Mr Lyons is more specific as has been highlighted. He does speak of concerns on “hours paid vs hours worked”, that Mr Jewell was to coach the claimant and there was then a spike in hours. While that would give grounds to establish reasonable belief I could not say that would meet the civil standard without hearing more from Mr Lyons. I appreciate the fine distinctions being made and that it is unusual to make different findings between unfair and wrongful dismissal. However I consider more detail would be necessary from Mr Lyons particularly against the claimant’s challenges to

satisfy the onus on the respondent to establish that it was more probable than not that the claimant then knowingly calculated pay using the, wrong processes. Again lest it be thought that the need for more detail from either Mr Jewell or Mr Lyons in applying this test means that there was insufficient investigation in the claim for unfair dismissal then I do not consider that to be the case. There are different tests being applied and as indicated in the conclusions on unfair dismissal I consider that the respondents met the test on reasonable investigation.

146. In those circumstances that would leave the position to be that pay was being wrongly calculated but not that it had been proved to the requisite standard that the claimant did that knowingly. That would not be misconduct so serious to justify summary dismissal and so the breach of contract claim succeeds. That means the claimant would be entitled to her notice pay. Given her length of service that amounts to 12 weeks net pay which was agreed as £230 per week giving an award for breach of contract of £2760.

Employment Judge: **J Young**
Date of Judgment: **28 February 2018**
Entered in register: **12 March 2018**
and copied to parties