



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Towers v Church Warsop

**Respondent:** Church Warsop and Warsop Vale Memorial Club Limited

**Heard at:** Nottingham Employment Tribunal

**On:** 4, 7, 8, 9 and 11 March 2022 and in Chambers on 10 March 2022

**Before:** Employment Judge K Welch (sitting alone)

## Representation

**Claimant:** Mr S Towers, family member

**Respondent:** Mr E Webb, Counsel

# WRITTEN REASONS

1. Following judgment and reasons having been given orally on 10 March 2022, the written judgment only was sent to the parties on 15 March 2022. The claimant made a request for written reasons on 25 March 2022, which follow.
2. This is a claim brought by the Claimant against her former employer Church Warsop and Warsop Vale Memorial Club Limited for unfair dismissal.
3. The case had been before EJ Dyal on 19 October 2020 and was supposed to be a Full Merits Hearing, but this was converted to a case management hearing to consider the claimant's application to amend her claim to include a complaint of unlawful deductions from wages. This application was refused and the case was listed for hearing for 3 days starting on 28 June 2021.
4. Once again, this hearing was unable to proceed on this day due to the time allocation being insufficient and the lack of resources to play the CCTV footage which the

respondent wished to be played in the hearing. It was therefore converted to a case management hearing which agreed the list of issues referred to below.

**The hearing**

5. The hearing was held in person over 6 days, as listed at an earlier case management preliminary hearing. The parties were not required to attend the Tribunal on the fifth day, so that I could consider my Judgment in Chambers.
6. The Claimant brought her claim on 13 June 2020 following a period of ACAS early conciliation from 17 April to 1 May 2020.
7. I had been provided with an agreed main bundle of documents of over 575 pages, together with a separate bundle dealing with remedy. Page numbers referred to in this Judgment refer to page numbers within the main bundle.
8. I was also provided with witness statements for all witnesses attending the Tribunal to give oral evidence, including a supplementary statement for one for the respondent's witnesses dealing with matters arising from the claimant's 72 page witness statement, for which there was no objection from the claimant.
9. I heard from the following witnesses:
  - a. Mr J Proud, Secretary of the respondent;
  - b. Mr A Dennis, Treasurer of the respondent;
  - c. Mr A Gay, appeal officer; and
  - d. The Claimant herself;
10. The witnesses gave sworn evidence, which was tested by cross examination and questions from me.
11. The respondent had brought with it copies of relevant parts of the CCTV footage from December 2019 to January 2020. The claimant had no objection to the footage being

played. Most of the footage was shown on a large screen during the claimant's cross examination, so that all people attending the hearing could watch the images at the same time. However, some of the footage was unable to be watched on the large screen and therefore, the respondent's representative showed this on his laptop, firstly to the claimant, her representative, myself and then the observers to the hearing.

12. The Claimant accepted that she had been dismissed, although contended that her dismissal was unfair. The Respondent relied upon conduct as the reason for the Claimant's dismissal. The issues had been previously agreed by both parties at the earlier hearing before EJ Adkinson and were confirmed as agreed at the start of the hearing as follows:

**LIST OF ISSUES**

Unfair dismissal

13. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
14. If the reason is misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
- a. there were reasonable grounds for that belief;
  - b. at the time the belief was formed the respondent had carried out a reasonable investigation;
  - c. the respondent otherwise acted in a procedurally fair manner;
  - d. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

15. if there is a compensatory award, how much should it be? The tribunal will decide:

- a. what financial losses has the dismissal caused the claimant?
- b. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?
- c. If not, what period of loss should the claimant be compensated?
- d. Is there a chance that the claimant would have been fairly dismissed anyway, if a fair procedure had been followed, or for some other reason (called a Polkey reduction after the rule in Polkey v AE Dayton Services Ltd [1987] ICR 142 UK HL)?
- e. If so, should the claimant's compensation be reduced? By how much?
- f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- g. Did the respondent or the claimant unreasonably fail to comply with it?
- h. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- i. If the claimant was unfairly dismissed, did she cause or contribute to her dismissal by blameworthy conduct?
- j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- k. Does the statutory cap apply?

16. What basic award is payable to the claimant, if any?

17. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

**Findings of fact**

18. The Claimant was employed by the Respondent, who I will refer to as the respondent or the Club, from 6 June 2004 until her dismissal on 15 March 2020 for gross misconduct.
19. Originally, the claimant had been employed as bar staff within the respondent's private members' club, but had subsequently been promoted to Bar Manager, a position she held from 2009 until her summary dismissal on 15 March 2020. At one point she was elected and acted as the Club's Treasurer from 2006 to 2007, which meant that she was provided with a set of keys for the safe within the office, although she gave evidence that these were returned when she ceased as Treasurer.
20. The claimant's husband was Secretary of the club prior to the current Secretary, Mr Proud. The Secretary and Treasurer of the club are provided with keys to a safe kept within the club's locked office, which is located behind the bar.
21. The Respondent is a registered society, which operates the Church Warsop and Warsop Vale Memorial club, a private members club. It has a main clubhouse at which there is a bar, artists perform, people play cards, socialise and attend bingo. The respondent also runs an additional venue, called the Tudor Barn, which is a separate venue on a different site from the clubhouse, which also generates cash from takings within that venue.
22. There was a difference in evidence as to how many employees the respondent had at the time of the claimant's dismissal. The respondent contended that there was only 1, but I accept the claimant's evidence that the club had 2 employees; a bar manager (the role previously occupied by the claimant) and a cleaner. The only other employee was a relief bar manager who appeared to be employed occasionally, as and when required.

23. The claimant's contract of employment [pages 49 – 53] was from 2009 and, from the claimant's evidence, had not been updated for some years, despite changes having been made to her role and terms and conditions of employment.

24. The short contract contained a disciplinary procedure which included the following:

*"The committee reserves the right to dismiss you without previous warnings in cases of gross misconduct or gross neglect of the bar manager's duties.*

*The following list provides examples of offences which are normally regarded as gross misconduct: theft, fraud, deliberate falsification of records... Serious negligence which causes unacceptable loss, damage or injury,..."*

*"If you are accused of an act of gross misconduct, you may be suspended from work on full pay while the committee investigates the alleged offence."*

*"Appeal against dismissal*

*An appeal against the decision to dismiss, must be notified to the club secretary in writing, within seven days of the dismissal, being notified. The hearing of the appeal shall be held on a date to be mutually agreed. In any event, the appeal must be heard within a period of 14 days from receipt of notice of appeal."*

25. It was clear that the claimant was a hard working individual, and that there were no issues raised with her about her work until the events prior to her dismissal, referred to below.

26. The claimant's role involved her managing and running the bar within the Club, together with managing events at the Tudor Barn. This involved her in cash handling, ordering stock, managing deliveries, organising staff rotas and cleaning.

27. The Club runs a lotto and a tote. It also has fruit machines within its premises. All of these generate money for the Club in addition to takings from the bar. The claimant was responsible for managing the cash generated by the Club's activities, which she would collect and give to the Treasurer, who at the time was Mr Dennis, together with

a handwritten note of the Club's takings. These were then banked by Mr Dennis, the Treasurer.

28. The bar has a locked cupboard and a safe in which the claimant kept cash. She had a key for these. The safe in the bar was in addition to the safe within the office. The office was locked, and the claimant, along with the Secretary and the Treasurer, had keys for the office. However, the safe within the office only had two known keys, within the possession of the Treasurer and the Secretary of the Club.
29. The respondent's evidence was that the claimant must have retained a copy of the key for the safe in the office either from when she was Secretary, back in 2006 – 2007 or from when the claimant's husband ceased being Treasurer in or around February 2019. The claimant denied this and provided evidence of text messages [pages 57-58] which showed that the keys had been lost for a short period at the time of her husband's resignation. The claimant's husband suggested at this time that the Club, "buy a new cash tin, buy a new [safe] only 40 quid".
30. There appeared to be no basis for the assumption that the claimant had retained a key, other than money purportedly going missing from the safe when neither of the keyholders took it.
31. Evidence was also provided that, on at least one occasion, the Treasurer had left out a cash tin on a table in the Club's public bar. It was accepted that this was not the tin containing the donation monies.
32. The takings from the Tudor Barn were kept separate to those from the Club. It was clear that the Club's procedures for the handling of the cash takings were not as robust as they should have been. It appeared that their procedures had evolved from previous times and it was not entirely clear to me that there were proper procedures in place in order to make individuals properly accountable for the cash.
33. Prior to December 2019, there appeared to be no reconciliation between the amounts the claimant handed over to the Treasurer and the amounts taken on the till. The

claimant prepared a handwritten tally for each week for the Club's takings [examples appearing at pages 492-498] which was provided to the Treasurer with the cash for banking.

34. Prior to June 2019, it was clear that the Treasurer was not aware that printouts for the Tudor Barn till takings were provided to the respondent every six months. In June 2019, Mr Proud, the Secretary for the Club, was handed printouts/ accounts for the Tudor Barn takings for the period January to June 2019. He handed them over to the Treasurer thinking that the Treasurer would have seen them before. The Treasurer confirmed that he had never seen them before. The Secretary requested that Tudor Barn provide these accounts on a three monthly basis going forward.

35. In September 2019, the Tudor Barn printouts/ accounts for July to September 2019 were received. At that point, according to the monthly accounts up until that date, it was clear that the claimant had not handed over the Tudor Barn takings such that there was a shortfall of £4,471.30 relating to the value of the takings from the printouts. The Treasurer asked the claimant to provide the shortfall or an explanation as to what had happened. He made it clear that the money was required to be accounted for by the end of the year in time for the filing of their accounts.

36. The claimant disputed that she had been asked to account for the Tudor Barn Money. The claimant's evidence was that she kept the takings from the Tudor Barn in a draw at the Tudor Barn venue. This included notes and coins received from the takings. Her evidence was that she accounted for the Tudor Barn money at the end of the year only. I accept that the claimant only accounted for the money once a year, but do not accept that she was not asked for the money by Mr Dennis.

37. In November 2019, the Club started raising money through donations to enable the Club to purchase its premises. At a meeting, the Secretary told the members of the Club that donations would be collected by the Treasurer and/or the Secretary, but that these donations would be kept confidential unless the donor wished to publicise them. It was agreed that the donations would be recorded in a donations book [page 248],



which would identify the name of the donor, the amount donated, the date of the donation along with the initials of either the Treasurer or the Secretary, depending upon who had taken the donation.

38. It was clear from the record of donations [page 248] that, prior to 19 January 2020, the Club had collected £5,940. From the evidence of Mr Proud and Mr Dennis, the Secretary and Treasurer respectively, which I accept, this money was kept in a cash tin within the safe within the office. The book of donations was also kept in the safe until some point in the run up to Christmas 2019 when there was insufficient room in the safe to keep the cash takings, the float, the donation box and the book. The donation book was then removed from the safe and was kept under papers within some form of filing cabinet/drawer, so that it would not be easily seen. However, the respondent's evidence was that the deposit box remained in the safe.

39. On 18 January 2020, Mr Proud, Club Secretary, received three £10 donations from Club members. He did not put this money in to the safe, but wrote the amounts in the donation book and left the cash for Mr Dennis, the Treasurer, to put in the donation box the next day, when a substantial donation was expected from another of the Club's members.

40. On 19 January 2020, Mr Dennis, Treasurer, noticed that there was no money in the donation box and that the box itself had changed from the one that was normally used. Mr Dennis initially thought that Mr Proud had moved the money and it was not until 20 January 2020 when they spoke to each other, that they realised that the money was missing.

41. The police were informed by Mr Proud of the missing money and attended the Club's premises to investigate. They asked to see the CCTV footage of the bar and watched footage from Saturday, 18 January 2020. This footage showed the claimant taking money from the till and putting it in her purse.

42. As a result of this, the police arrested the claimant, searched her house, took her to the police station for questioning and then later released her without charge.
43. There was some evidence concerning Mr Proud initially believing that Mr Dennis might be responsible for the missing money, and getting the claimant's husband to question him at the members' meeting at which this was going to be announced. However, I do not find it necessary to make findings on this, since even if true, it does not materially affect the questions I have to answer in order to come to a decision on this case.
44. The police suggested to Mr Proud that he view the CCTV footage between 24 December 2019 and 19 January 2020 as these were the likely dates between which the donation money had gone missing.
45. Mr Proud, together with Mr Wright, a committee member of the respondent, viewed the CCTV footage intending to find out what had happened to the missing money. However, on viewing the CCTV footage, there were several instances of the claimant taking money either from the till, from the cashbox within the safe in the bar or from the cupboard. This money did not appear to be replaced by the claimant at any point in the hundred plus hours of CCTV footage that Mr Proud and Mr Wright watched and I accept Mr Proud's evidence in this regard.
46. The claimant accepted in cross-examination that she had taken money from the till on a number of occasions as shown by the CCTV footage. She accepted that she took money, despite having her own purse to hand, to play lotto and to purchase tickets for the Tote. However, she suggested that the reason that she was taking this money was either from tips that she had received, was to provide money for stock or was possibly to pay for acts who were appearing in the club.
47. The claimant gave evidence that she kept a record of the amount that she took out of the till in order to be able to pay this back later. However, there was no evidence of any such record being kept on the CCTV footage nor were there any copies of

handwritten notes from the claimant explaining what had been taken and what was due back to the Club.

48. I therefore do not accept the claimant's evidence that she repaid this money. She appeared to use the Club's money instead of her own, even when her own purse was close by, to pay for her lotto and/or tote.
49. I was referred to CCTV footage from 29 December 2019, which the respondent contended showed the claimant acting suspiciously. On the CCTV footage she did go into the locked office and came out wearing a pair of gloves, which had been left in the bar and which she said she had taken into the office to try on. She said that she tried them on in the office and, when they didn't fit, left them on the bar. There was further footage from the same day where the respondent contended that the claimant left the kitchen with the donation box from the office safe under her jumper. I do not consider that this was clearly shown from the CCTV footage I saw. This was speculation, in my view, and would have meant that the claimant had retained keys to the safe from either when she left as Secretary over 10 years previously, or when her husband had left as Treasurer some time before. I did not find this to be plausible.
50. On 20 February 2020, the claimant attended a meeting with Mr Proud, Secretary, and Mr Wright, Club committee member. At this meeting [minutes for which appear at page 269], the claimant was told, "*we have been investigating the theft from the club and we have been looking at CCTV cameras. [The claimant] was told there is a lot of wrongdoing on camera on her part. She asked in what way. I told her she was on camera putting bags of money in her coat pocket, she said it would be to pay for deliveries to her house for the club.... I told her there is no evidence of her putting any monies in the till.... she replied I always put money in the till.*"
51. At this meeting, the claimant was suspended on full pay until an investigation had been completed. On the same day, Mr Proud and someone from Tudor Barn, checked the till and drawer down at the Tudor Barn venue. Other than two bags of coins found inside the drawer, there was no other money in the till or in the drawer.

52. Later that same day, the claimant returned her club keys to Mr Proud and informed him that she did not want anyone to count the money at Tudor Barn unless she was there.
53. On 21 February 2020, the claimant and Mr Proud went to Tudor Barn. On opening the drawer, there were a number of notes which Mr Proud says were not there before. The claimant says that Mr Proud had not looked in the correct place. I prefer the evidence of Mr Proud in this regard.
54. A letter was sent to the claimant [page 97], dated 22 February 2020, which confirmed the claimant's suspension on contractual pay, "*to allow an investigation to take place following the allegations of: alleged theft of money from Church Warsop and Warsop Vale Memorial Club*".
55. On 24 February 2020, the claimant attended an investigation meeting. The minutes for this meeting incorrectly headed "*formal disciplinary hearing*" appear at pages 298 – 304. The hearing was carried out with all members of the committee present, who could attend. This included Mr Dennis, Treasurer, who went on to hear the disciplinary hearing. This was in accordance with the disciplinary procedure contained within the claimant's contract of employment.
56. In addition, an individual, JT, attended as notetaker. The claimant gave evidence that she was shocked at the number of people in attendance. but also that JT had been invited to take the minutes since she had a personal issue with JT that Mr Proud was aware of. In the meeting, the claimant confirmed that she was "fine" with JT being present, but stated in evidence that her presence meant that she was unable to properly deal with the questions put to her.
57. At this meeting, a number of instances from the CCTV footage were discussed with the claimant. These included times when the claimant had taken money and used it to buy lotto tickets or place money in her purse or cardigan.

58. On 27 February 2020, the respondent sent a letter to the claimant [page 99] offering her the opportunity to view the CCTV footage during a second investigation meeting on 2 March 2020. The claimant responded asking for a different minute taker due to “*very well-known, historic, personal and public grievance*” between herself and JT. She also requested copies of her contract and the disciplinary procedure. These were provided by letter of 1 March 2020 [page 101] together with a copy of the minutes from the meeting on 24 February 2020. This letter confirmed that the meeting due to take place on 2 March was postponed to 3 March 2020, in order to allow time for the claimant to consider the documents provided. The letter confirmed that the claimant had the right to be accompanied by a work colleague or a union official although, wrongly stated that this was “of which you are a member”.
59. The reconvened investigatory meeting therefore took place on 3 March 2020 [minutes at pages 328 – 339] with Mr Proud, Secretary, and an alternative note taker, LH. The claimant read out a statement at the beginning of the meeting. The CCTV footage was watched during the meeting and the claimant was given the opportunity to explain during the meeting why she was seen taking money.
60. She denied some of the incidents, although accepted that she had taken money to buy lotto tickets, but said that she had either put this money already into the till or would add it in later when cashing up. She also said that on some occasions she was taking money to pay for stock or deliveries to her home.
61. The explanations were investigated by Mr Proud, and were found to be unlikely. For example, there had been no deliveries to her home in the period for which the CCTV covered, and the two stock items purchased by her were already covered by receipts.
62. Mr Proud prepared a report [pages 340 – 344] on 12 March 2020 following his investigation into the alleged misconduct. It detailed a number of instances where money was taken from the tills, cupboard, safe or office, together with the responses given by the claimant.

63. On 11 March 2020, a letter was sent to the claimant confirming that the disciplinary hearing was to take place on 13 March 2020 before Mr Dennis, Treasurer of the Club. The letter referred to the disciplinary hearing considering, "*all the evidence from the investigation into the alleged theft from the club.*" It again gave the right to be accompanied although, once again, mistakenly confirmed that the claimant was entitled to bring a member of the union of which she was a member or a colleague of her choice. The letter also confirmed that a possible outcome, should it be found to be gross misconduct, was the claimant's summary dismissal.
64. The disciplinary hearing took place on 13 March 2020 at which Mr Dennis read out the details of the findings from the investigation report. This report had been sent to the claimant prior to the hearing taking place.
65. At the disciplinary hearing, the claimant was given the opportunity to explain what had happened regarding the taking of money. She denied taking the donation money and considered that she was being made a scapegoat. She also stated that there were no discrepancies between her accounts and the till receipts.
66. The claimant was dismissed by letter dated 15 March 2020 [page 106]. This confirmed that the claimant's, "*conduct has been unacceptable and that [she is] dismissed without notice. The reasons for [her] dismissal:*
- 1) *The answers [she has] provided to justify [her] actions are just not credible.*
  - 2) *Taking money from the till and not putting it back.*
67. In evidence, Mr Dennis confirmed that he had taken into account the claimant's length of service and previous good record in coming to his decision. He also stated that he took into account the fact that he believed that the claimant had been taking lotto money from the Club for some time prior to her dismissal, an allegation which was never put to the claimant.

68. The claimant appealed the decision by letter dated 21 March 2020. The appeal was heard by Mr Gay, who is not associated with the Club other than having a personal friendship with Mr Dennis, who lives with his mother.
69. There were some issues raised over correspondence concerning the appeal. However, I do not consider that this had any bearing on the fairness or otherwise of the appeal. Due to the pandemic, there was some delay in the appeal being heard. Also, it was agreed that the appeal would be dealt with by written representations only.
70. Mr Gay was provided with grounds of the claimant's appeal together with attachments [pages 128 –172]. He forwarded these on to Mr Proud, although I accept Mr Gay's evidence, that Mr Proud was not involved in his decision on the appeal.
71. The appeal was a review of the original decision, rather than a rehearing. The appeal was not upheld. The outcome was given on 5 June 2020.

### **Submissions**

72. Both parties provided me with written submissions on the case and I set out briefly details of their submissions below. Whilst both parties were given the opportunity to address me further orally, the claimant chose not to and confirmed that she relied upon the written submissions only. The respondent did address me orally in addition to the skeleton argument supplied prior to the start of the hearing.
73. The claimant considered that there was no evidence upon which to form a reasonable belief that she had stolen the donation money and that she had been set up as a scapegoat to take the blame for this missing money, caused by the negligence of the Secretary and Treasurer, who were both actively involved in the claimant's disciplinary procedure.
74. There was no evidence that the claimant had retained keys to a safe, which would have had to have been kept from years before; similar keys to the same safe having been misplaced by the Secretary. The decision to dismiss was made prior to the disciplinary procedure being completed. The claimant denied taking monies but

accepted that using the tills in the way she had was not the “best idea”. No evidence had been given of missing money other than the donation money.

75. The respondent contended that the reason for the claimant's dismissal was theft, for which there was evidence against the claimant. This allegation was made clear to the claimant, who knew what she was being investigated for. There were investigation meetings with limited involvement from Mr Dennis, although this was in accordance with the respondent's disciplinary procedure as contained within the claimant's contract. The investigation was reasonable and was not required to be perfect. The decision to dismiss was within the range of reasonable responses following a disciplinary hearing. The respondent therefore contended that the dismissal followed a fair procedure which did not breach the ACAS code. The respondent therefore contended that the dismissal was fair and the claim should be dismissed. Should the claimant succeed in showing a procedurally unfair dismissal, then there should be a reduction on Polkey principles of 100% from the compensatory award and a deduction for contribution from the basic and compensatory awards.
76. I was referred to no authorities by the parties, other than the respondent referencing BHS v Burchell and Polkey v A E Deyton Services Limited.

### **Law**

77. The respondent has to prove the reason for the dismissal and that it was one of the potentially fair reasons provided by section 98(1) and (2) Employment Rights Act 1996 ('ERA'). The respondent relies upon the reason in s 98(2)(b) ERA namely, “conduct”.
78. Once an employer has shown a potentially fair reason for dismissal, “*the determination of the question whether the dismissal is fair or unfair ... (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.*”



79. Since this is a misconduct dismissal, I bear in mind the guidance given by the EAT (approved repeatedly since) in BHS v Burchell [1980] ICR 203. I therefore need to ask the following:

- a. Did the respondent genuinely believe that the claimant was guilty of misconduct?
- b. Did the respondent have reasonable grounds upon which to form that belief? and
- c. Did the respondent carry out as much investigation as was reasonable in the circumstances?

80. The Tribunal must also consider whether the procedure followed by the respondent was reasonable, including whether it complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

81. It is necessary for the Tribunal to be satisfied that dismissal was, in all the circumstances, within the range of reasonable responses of a reasonable employer and that a fair procedure had been followed by the employer (Iceland Frozen Foods Ltd v Jones [1983] ICR 17), as subsequently approved by the Court of Appeal in other cases. This is authority for the well-known proposition that a Tribunal must not substitute its own decision on the reasonableness of a dismissal for that of the employer; rather, the Tribunal must decide, objectively, whether the decision to dismiss was within the range of reasonable responses of a reasonable employer.

82. Section 122(2) ERA provides: "*Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

83. Section 123(1) and (6) ERA 1996 state:

*“(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

*(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”*

84. Both the basic and compensatory awards may therefore be reduced under sections 122 and 123 ERA 1996 by reason of contributory conduct on the part of the employee.

85. A Tribunal may also reduce the amount of compensation, by the appropriate percentage, to reflect the possibility that the employee might have been dismissed fairly in any event even if procedurally unfair – the so-called ‘Polkey’ principle. Such a reduction is only applicable to the compensatory award. There is no reason why an award may not be reduced for both Polkey and contributory conduct.

86. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that a compensatory award may also be increased by a maximum of 25% for failure to comply with the ACAS Code of Practice.

### **Conclusions**

87. I am satisfied that the reason for the claimant’s dismissal was conduct, namely theft from the Club. I do not accept the claimant’s assertion that she was dismissed in order to cover up alleged negligence by the Secretary and/or the Treasurer of the Club as they had lost the donation monies.

88. Conduct is a potentially fair reason for dismissal in accordance with section 98(1) and (2) ERA. I therefore have to consider whether the dismissal was fair or unfair in accordance with section 98 (4) ERA. This allows me to take into account the size and administrative resources of the respondent in considering whether the decision to dismiss was fair in all such circumstances. I take into account the fact that the respondent is a small employer with limited resources.
89. Turning to the test required by BHS v Burchell, I am satisfied that the respondent had a genuine belief in the claimant's misconduct, namely theft of monies from the Club. At the time of her dismissal, Mr Dennis genuinely and honestly believed that the claimant had taken cash from the club, had taken the donation monies and had taken money from the lotto.
90. I have to consider, however, whether that was based on reasonable grounds following a reasonable investigation. I remind myself that the range of reasonable responses test applies not only to the decision to dismiss, but also the investigation. Whilst the investigation was not perfect, it was within the range of reasonable investigations an employer with the size and administrative resources of the respondent may have carried out.
91. I do not consider, however, that the respondent had reasonable grounds for believing that the claimant had stolen either the donation monies or the lotto monies, although had reasonable grounds for believing that she had taken cash from the till without replacing it.
92. There was no clear evidence on which the respondent could base its decision that the claimant had gone into the respondent's locked safe using a key that she must have retained from years before and taken the money and changed the donation box. For the purposes of the contributory conduct, I consider that to be implausible, despite there being some behaviour from the claimant which the respondent considered to be suspicious around this time.

93. There was no basis for Mr Dennis's decision that the claimant had taken lotto money, as this was not supported by any evidence, was not investigated by Mr Proud and was not put to the claimant.
94. The respondent had reasonable grounds to believe that the claimant had taken monies from the Club, namely the cash taken from the till referred to above. However, there were no reasonable grounds to believe that she had taken the donation monies or lotto monies.
95. The claimant accepted she had taken money as shown by the CCTV, but asserted that she had returned that money, or that it was money owed to her for deliveries, tip money or stock. I accept that Mr Dennis believed that these monies had not been returned and were not owed to the claimant. Rather, the claimant used the Club's money as if it were her own to buy lotto tickets and pay her tote. While she may have intended to pay these monies back, there appeared to be no record of her calculations showing how much she owed, and I accept Mr Proud's evidence that he found no such records in his investigation, and that there was no evidence showing that she had returned the money to the till during the entirety of the hundred+ hours of CCTV footage that he had watched. Whilst the cash handed over to the Treasurer tallied with the claimant's handwritten accounts, I do not consider this shows that the money was returned.
96. My concern over the procedure followed is that there did not seem to be a clear indication of the specific allegations against the claimant relating to all the matters that were taken into account by Mr Dennis in coming to his decision to dismiss. He admitted taking into account missing lotto money over a period before the claimant's dismissal. However, this assertion was never put to the claimant and she did not have the opportunity to answer it. Also, it was not entirely clear what amounts the claimant was alleged to have taken other than the donation monies.
97. The procedural irregularities were not remedied on appeal.

98. Whilst I accept, as contended by the respondent, that I need to consider the principal reason for the dismissal, which I accept to be conduct due to theft, in order to be a procedurally fair dismissal, I need to be satisfied that the claimant was aware of the specific allegations against her and was given a fair opportunity to respond to them.
99. I therefore find that the dismissal was procedurally unfair due to the failings referred to above. I was not overly concerned that Mr Dennis had attended an investigation meeting as part of the committee prior to handling the disciplinary hearing itself. His involvement in the investigation appears to have been limited to one question/comment at that investigation meeting on 24 February 2020. I note that the respondent's disciplinary procedure, which should be updated, provides that the committee carries out investigations into alleged misconduct. The ACAS code of practice on Disciplinary and Grievance Procedures makes clear that "*in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*" In this case, an organisation where there are only six committee members, and only two employees, I am satisfied that this did not breach the ACAS code of practice.
100. The claimant admitted to taking money, but asserted that she paid this back whilst carrying out her administrative tasks in the kitchen, which is not shown on CCTV footage. I accept that the respondent had reasonable grounds for believing that this money was not paid back. Further, for the purposes of contributory conduct, I do not accept that the claimant paid the money back despite her intention to do so.
101. I therefore consider that had the procedural irregularities outlined above not occurred, there is 100% chance that the claimant would have been dismissed fairly in any event. Therefore, I consider that there must be a 100% reduction in any compensation that would be awarded to the claimant for the compensatory award for unfair dismissal.

102. Also, I find that the claimant contributed to her dismissal such that it is just and equitable to reduce the compensatory award and the basic award by 100 percent so that she receives no compensation for her unfair dismissal.

103. Since I have made findings on liability, Polkey and contribution, it is unnecessary to consider remedy further in this case.

Employment Judge Welch

Date: 1 April 2022