



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Palmer-Brown  
**Respondent:** DTSN Limited t/a Fordwich Arms  
**Heard on:** 6<sup>th</sup> and 7<sup>th</sup> April 2022 by CVP  
**Before:** Employment Judge Pritchard

## Representation

**Claimant:** In person  
**Respondent:** Ms B Omotosho, solicitor

# RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well-founded and the claim is dismissed.
2. The Claimant's claim for breach of contract (notice pay) is dismissed.
3. The Claimant's claim for deductions from wages is dismissed upon withdrawal.

# REASONS

1. The Claimant claimed unfair dismissal, breach of contract (notice pay), and deductions from wages (arrears of pay). The Claimant confirmed that although he ticked the box to say he was bringing a claim for other payments, he was not bringing any other claim. The Respondent resisted the claims.
2. During the course of the hearing the Claimant withdrew his claim for deductions from wages.
3. The Tribunal heard evidence on the Respondent's behalf from Elliot Bolley-Smith (Restaurant Manager), Daniel Smith (Director and Shareholder), and Natasha Smith (Director and Shareholder). The Claimant gave evidence on his own behalf together with Oliver Ridge (Head Waiter at relevant times), Tania Davey (the Claimant's partner who initially worked and helped in the Respondent's business), and Cedric Tourny (a former member of the waiting staff).
4. The Tribunal was provided with a bundle of documents comprising over 470 pages together with a further bundle of documents provided by the Claimant.

The Tribunal was also shown CCTV footage of the Claimant's actions on 26 and 27 January 2020.

5. At the conclusion of the hearing the parties made oral submissions. The Claimant subsequently provided brief written submissions with the permission of the Tribunal. The Respondent chose not to provide written submissions.

### **Issues**

6. The issues in the case were discussed with the parties at the commencement of the hearing and, following the Claimant's withdrawal of his deductions from wages claim, can be described as follows.

#### Unfair dismissal

7. Can the Respondent show the reason for the Claimant's dismissal? The Respondent relies on conduct. This will require the Respondent to show a genuine belief in the Claimant's misconduct. (The Claimant's case is that he was dismissed because Mr and Mrs Smith no longer wished to be in business with him).
8. If the Respondent shows the reason for the dismissal, and that it was for the potentially fair reason relating to conduct, the Tribunal will have to consider whether the Respondent had in his mind reasonable grounds upon which to sustain that belief and whether, that at the stage at which the Respondent formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
9. Did the Respondent follow a fair procedure?
10. Was the decision to dismiss within the band of reasonable responses?
11. The Claimant challenges the fairness of the dismissal by reason of the following:
  - 11.1. Unreasonable delay;
  - 11.2. Lack of evidence;
  - 11.3. Inadequate notes of meetings;
  - 11.4. Lack of impartiality;
  - 11.5. The decision to dismiss was disproportionate and unfair;
  - 11.6. The decision to dismiss was predetermined;
  - 11.7. The decision to dismiss was taken before the conclusion of the Claimant's grievance;
  - 11.8. The Respondent retained decision-making authority which undermined the purpose of an independent consultant; and
  - 11.9. The disciplinary appeal was heard by Mrs Smith who was subject of the Claimant's grievance and was involved in the disciplinary decision.
12. If the Claimant was unfairly dismissed:
  - 12.1. Has the Respondent shown had it carried out a fair procedure it would have dismissed the Claimant in any event and/or to what extent and when? (Polkey)

- 12.2. Has the Respondent shown that the Claimant contributed to his dismissal by culpable conduct?

Breach of contract (notice pay)

13. Can the Respondent to prove on the balance of probabilities that the Claimant actually committed a repudiatory breach of contract? The Claimant denies that he committed gross misconduct. The Claimant claims entitlement to damages referable to the period of statutory notice.
14. If the Claimant were to succeed in his claims, a further hearing would take place to consider remedy.

**Findings of fact**

15. Although it was unclear exactly when in 2017 the Claimant commenced employment with the Respondent, it is common ground that the Claimant, Daniel Smith and Natasha Norton (now Natasha Smith: Daniel and Natasha are now husband and wife) set up in business as shareholders and directors of the Respondent which commenced trading in 2017. Its business is that of a pub and fine-dining restaurant.
16. Mr Smith acted as Head Chef and he and Mrs Smith were largely responsible for back of house. The Claimant was responsible for front of house. He also dealt with the majority of the Respondent's finances, payroll and the day to day running of the business. He might be described as the general manager of the business.
17. The Respondent is a small business. At relevant times it employed approximately 25 individuals.
18. The Respondent's Employee Handbook provides:

*Disciplinary Procedure*

...

*Any disciplinary action will only be taken after a full investigation of the facts, and if it is necessary to suspend you for this period of time, you will receive your normal rate of pay.*

*The Company reserves the right to vary the disciplinary procedure dependent on either the seriousness of the allegations of misconduct or capability to be addressed... It also reserves the right to call on a third party to assist with the disciplinary process.*

*Gross misconduct*

*Gross misconduct will result in summary dismissal, which means you lose your right to notice or pay in lieu of notice.*

*Here is a list of offences that are normally regarded as "gross misconduct". It is not exhaustive, but it describes the kind of offence that can result in summary dismissal.*

- *Deliberate failure to comply with the published rules of the company, including those covering cash handling...*
- *Deliberate falsification of records*

*Grievance procedure*

*... if you wish to raise the grievance formally, it should be done in the following way.*

*Submit your formal written grievance to your Line manager who will make every effort to hear your grievance within five working days....*

*If you are not satisfied with the outcome of your meeting...*

*Submit your formal written appeal to a director not previously involved in the grievance decision... every effort will be made to hear your appeal within five working days...*

*Please note that the company reserves the right to call on a third party to assist in resolving grievances*

19. In about April 2018, the Claimant opened a Stripe account to take deposits or pre-payments from customers. Payments were directed into his personal bank account.
20. The Respondent also had in place a portable card-reading machine known as iZettle. Again, payments were directed into the Claimant's personal bank account. Mr and Mrs Smith were aware of this
21. In October 2018, the Respondent was awarded a Michelin star, an accolade it retains.
22. On Sunday 26 January 2020 a regular customer, named Customer X in this judgment, was dining with two guests at table 7. Customer X was known to pay usually in cash. The Claimant removed the dessert menus from the diners at table 7 at 4.42 pm. At 4.47 pm the Claimant presented the bill to the customer at table 7. At 4.51 pm the Claimant collected cash payment from the customer. Having done so, the Claimant walked to the end of the bar where he counted the cash before putting the cash in his pocket and disposing of the bill in the waste bin. At 4.52 pm the Claimant inputted data into the Respondent's PoS terminal in the dining room. The Claimant left work early that evening.
23. Mr Bolley-Smith cashed up after close of business. Although most customers paid by card, he was surprised to find that there was only £80 cash in the till. At this point Oliver Ridge reminded him that Customer X had been dining in the restaurant and told him that he had seen Customer X pay his bill in cash to the Claimant.
24. Mr Bolley-Smith knew that Customer X had been seated at table 7 so he examined the Revel till system which showed that table 7 was not open on the system; nor was there any entry to show it had been closed off. Upon a further search, the bill for table 7 appeared to have been voided.

25. At 7.38 pm, Mr Bolley-Smith sent a text to the Claimant saying he could not find payment for Customer X. The Claimant promptly replied to say he thought Customer X had paid by card and that he would do the cash up on Wednesday. The Claimant said he would look on his laptop when he returned home. Shortly thereafter, the Claimant sent a text to say that he gave payment to Dawn (the bartender). A few minutes later he sent a further text: *"maybe he paid cash I remember giving the bill to Dawn"*. He instructed Mr Bolley-Smith *"if the cash works leave it"* and *"We can have a look next week"*. Later that evening the Claimant sent a yet further text to Mr Bolley-Smith: *"Maybe I had [Customer X's] payment in my jacket thinking about it"*.
26. On Monday 27 January 2020, when the business was closed, the Claimant arrived at the pub shortly after 11.00 am and, after attending to matters in the bar area, he went to the office. At 11.28 am the CCTV security cameras stopped working. At 11.30 am the Claimant caused a bill to be produced in the sum of £181.00 plus 12.5% service charge for table 30 to which the Revel system allocated bill number 50411. The Claimant inputted data to show that the bill had been paid. The Claimant left the cash payment he received from Customer X on the desk in the office together with the bill. Just before 11.40 am the CCTV cameras again became operative. The Claimant left the premises about 5 minutes later.
27. On Wednesday 29 January 2020 the Claimant attended the premises and cashed up with Mr Bolley-Smith. The bill and the cash payment meant the figures could be reconciled. The Claimant then banked the cash.
28. That evening, having viewed the CCTV footage and spoken to both Mr Bolley-Smith and Mr Ridge, Mr Smith made a telephone call to the Claimant suspending him with immediate effect.
29. The Respondent confirmed the Claimant's suspension in writing. The allegations of possible misconduct were stated as:
- 29.1. Claiming expenses from the business for goods that are for personal use; and
  - 29.2. Irregularities regarding cash takings and banking.
30. Daniel Smith carried out an investigation. Among other things, he interviewed staff members, reviewed the CCTV footage, and obtained a report for BT regarding internet connection outages.
31. On 12 February 2020, the Claimant submitted a formal grievance through his solicitors complaining of the following matters:
- 31.1. His suspension was in breach of contract with no detailed reasons given for the suspension;
  - 31.2. Unreasonable delay in carrying out an investigation meeting;
  - 31.3. Breach of his confidentiality due to investigation details being shared with his colleagues;

- 31.4. The Respondent's failure to pay him his dividend;
  - 31.5. That there was a longstanding arrangement that the Claimant had been permitted to claim expenses for personal use which were then deducted from the Claimant's pay;
  - 31.6. No intention to follow a fair procedure; and
  - 31.7. The Respondent was trying to find allegations against him.
32. The Claimant was invited to attend a disciplinary investigation meeting. The matters for investigation were as follows:
- 32.1. Irregularities regarding cash takings and banking; in particular insufficient cash at the end of 26 January 2020;
  - 32.2. Claiming expenses from the business for goods that are for personal use;
  - 32.3. Voiding items from the Revel till system, specifically that relating to Table 7 for Customer X on 26 January 2020; and
  - 32.4. Disabling the CCTV system between 11:28 AM and 11:38 AM on 27 January 2020
33. On 17 February 2020, Alexandra Whiting, independent HR consultant, facilitated the disciplinary investigation meeting. Mr Smith attended the meeting and took notes. The Claimant covertly recorded the meeting and left the recording device running when he was no longer in the room without the knowledge of Ms Whiting or Mr Smith.
34. Alexandra Whiting also facilitated a grievance meeting which took place the same day. Mr Smith again attended and took notes.
35. After the meetings, Mr Smith contacted Revel to find out more about the bill which had been produced following the Claimant's actions on 27 January 2020.
36. By letter dated 21 February 2020, Mr Smith informed the Claimant of his decision that his grievances were not upheld and the reasons why.
37. By email dated 21 February 2020, Mr Smith invited the Claimant to attend a second investigation meeting to discuss further matters which had arisen in the course of the investigation, namely:
- 37.1. Misappropriation of funds, specifically that Company funds have been paid into your personal account instead of the Company bank account;
  - 37.2. Further evidence which had come to light about voiding items from the Revel till system, specifically the orders relating Customer X's bill 50377.
38. The second disciplinary investigation meeting took place on 24 February 2020 by Skype, again facilitated by Ms Whiting.

39. On 28 February 2020, the Claimant submitted an appeal against the grievance outcome.
40. On 6 March 2020, Mr Smith instructed the Claimant that he was required to attend a disciplinary hearing to address the following allegations:
  - 40.1. Theft of cash on Sunday 26 January 2020, disabling of CCTV cameras and adjustment of the Revel till system;
  - 40.2. Misappropriation of company funds, specifically it is alleged that between April 2018 and August 2018 you transferred funds from Stripe into your personal bank account without authority for your own personal gain;
  - 40.3. You are unable to prove how iZettle were balanced and the evidence you provided had already been shown as a breakdown of expenditure of the original £70k investment and some of the payments had been claimed back from the business as expenses.
41. The Claimant was provided with a copy of the investigation report together with all relevant documents gathered in the course of the investigation. He was informed of his right to be accompanied. He was also informed that if the explanations for his alleged actions were unsatisfactory, then a possible outcome could be summary dismissal.
42. On 13 March 2020, Mr Smith sent a revised letter to the Claimant setting out the allegation being misappropriation of company funds, in particular:
  - 42.1. On the 26th of January 2020, it is alleged that the takings from a customer, amounting to £200, were not placed in the till and were not accounted for in line with procedures and instead the transaction at the time was voided. The transaction was subsequently re-installed but this was after you were asked to account for the missing monies.
  - 42.2. It is further alleged that you disabled the CCTV system on Monday 27th of January 2020 between 11:29 and 11:39 AM.
  - 42.3. It is alleged that you made unauthorised Stripe payments from the business directly into your personal bank account between April 2010 and August 2010.
  - 42.4. It is alleged that you have failed to account for iZettle payments made into your personal bank account between November 2017 and December 2017.
43. Although initially it was thought that the disciplinary hearing would take place on 20 March 2020, Mr Smith emailed the Claimant to inform the Claimant that due to the covid pandemic, the disciplinary hearing would take place on 24 March 2020.
44. The disciplinary hearing took place on 24 March 2020 by Skype. An external HR consultant facilitated the meeting.

45. Following the disciplinary hearing, the Respondent caused further investigations to be carried out by a member of the support team at Revel till systems. Mr Smith also interviewed Mr Bolley-Smith and Oliver Ridge.
46. On 6 April 2020, Daniel Smith informed the Claimant in writing of his decision that he was dismissed for gross misconduct and the reasons for the decision. Mr Smith found all the allegations proven.
47. On 7 April 2020, Natasha Smith heard the Claimant's grievance appeal. Part of the Claimant's grievance was that his suspension had not been kept confidential. In support of this grievance, he sent to Mrs Smith copies of text messages he said he had received from two customers which appeared to show that the customers knew of his suspension.
48. On 15 April 2020, the Claimant appealed against his dismissal.
49. On 23 April 2020, Natasha Smith informed the Claimant that his grievance appeal was unsuccessful.
50. Natasha Smith held a disciplinary appeal meeting on 29 April 2020. She emailed the Claimant on 18 May 2020 to inform him that his appeal had been unsuccessful.

### **Applicable law**

#### Covert recordings/admissibility

51. In Amwell View High School Governors v Dogherty 2007 ICR 125 it was said that on the one hand there is a clear public policy that claims brought before a court or tribunal should be tried on all available relevant evidence. On the other hand, there are clear public policy justifications for the occasional exclusion of other relevant evidence. The Employment Appeal Tribunal stated that there is an important public interest in parties before disciplinary and appeal proceedings complying with the ground rules upon which the proceedings in question are based. No ground rule could be more essential to ensuring a full and frank exchange of views between members of the adjudicating body (in their attempt to reach the right decision) than the understanding that their deliberations would be conducted in private and remain private.

#### Unfair dismissal

52. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).
53. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; W Devis and Sons Ltd v Atkins 1977 ICR 662.



54. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.
55. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:
- 55.1. The employer must show that he believed the employee was guilty of misconduct;
  - 55.2. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
  - 55.3. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
56. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation.
57. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.
58. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
59. Inconsistency of treatment between employees accused of the same offence is a factor Tribunals will take into account, although the respective roles each employee played in the incident, their past records, and their level of contrition may justify different treatment.

60. An argument by a dismissed employee that the treatment he received was not on par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances:

- 60.1. if there is evidence that employees have been led to believe by their employer that certain categories of conduct will be overlooked or not dealt with by the sanction of dismissal;
- 60.2. where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for the dismissal
- 60.3. evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate in the circumstances.

61. In Paul v East Surrey District Health Authority [1995] IRLR 305 Beldam LJ stated:

*Ultimately the question for the employer is whether, in a particular case, dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct it would not be fair to change that policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.*

62. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

63. The Respondent referred the Tribunal to Buzolli v Food Partners Limited UKEAT/0317/12/KN, a case in which the Employment Appeal Tribunal held that irregularities, when viewed in the circumstances, were not such as to render the dismissal unfair. Looking at that decision of the Employment Tribunal in the round, the Tribunal was alive to the procedural flaws exhibited in the respondent's disciplinary process and, taken overall, the dismissal was substantively fair and not rendered unfair by procedural failures

64. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact.

#### Contribution

65. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

66. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

#### Wrongful dismissal

67. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

68. A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.

69. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

70. In cases of wrongful dismissal, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: Shaw v B & W Group Ltd UKEAT/0583/11.

### **Conclusion and further findings of fact**

#### Covert recording

71. At the commencement of the hearing, the Respondent applied to have that part of the transcript of the recording relating to a private discussion between Mr Smith and Ms Whiting excluded from evidence. The Claimant said the transcript showed that Ms Whiting asked Mr Smith what she would like him to do. The Claimant did not expand on his submission but the Tribunal assumes that he seeks to show that the Respondent was seeking to manufacture evidence to support his dismissal. The Tribunal decided to determine the issue at the conclusion of the hearing.

72. If what the Claimant appeared to suggest is true, the evidence is highly relevant. Neither party suggested that the private discussion concerned deliberations or a full and frank exchange of views between members of an

adjudicating body. This is not a case in which there are public policy justifications for the exclusion of such evidence.

73. The Tribunal has therefore admitted in evidence, and had regard to, the relevant part of the transcript. However, the thrust of the discussion between Mr Smith and Ms Whiting concerned the Claimant's explanation for his conduct and how investigations were to proceed. The Tribunal is unable to discern any element of the conversation which supports the Claimant's case in the way he suggests.

#### Credibility

74. Throughout the hearing, the Claimant sought to explain his actions, as he did during the disciplinary process. He denied any wrongdoing.

75. A notable feature of the case was the exchange of text messages to and from the Claimant and customers. The copies of the exchanges provided to Mrs Smith purportedly show the Respondent's failure to keep the Claimant's suspension confidential.

76. Mrs Smith investigated this matter by speaking to the customers concerned, both of whom denied including in their text message the words the Claimant relied on. Indeed, the customers provided screen shots/photos of the actual chain of text messages which did not show that they had used the words relied on by the Claimant. The Claimant was unable to offer any credible explanation as to why two separate customers might have changed their records of the text messages or been untruthful to Mrs Smith. In the grievance outcome, Mrs Smith, not unreasonably, reached the conclusion that the Claimant had fabricated the evidence.

77. The Claimant's evidence in this regard was highly unsatisfactory. This apparent fabrication on the Claimant's part has been influential in leading the Tribunal to prefer the Respondent's evidence.

#### Unfair dismissal

78. The Claimant's explanation for not placing the cash payment from Customer X in the till was that he first wished to speak to Elliott Bolley-Smith and Oliver Ridge to ensure that desserts had not been missed off the bill and that he had moved the bill to table 30 on the Revel system, not voided the bill as alleged.

79. The Respondent investigated the Claimant's explanation by discussing it with Revel support and examining the Revel reports. The investigation confirmed that the bill had been voided under the Claimant's login, not moved. The CCTV showed the Claimant inputting data onto the Respondent's PoS at the same time as the void was recorded. There was no evidence that table 30 was created on 26 January 2020. Investigations also showed that the Claimant had not re-opened the bill on 27 January 2020, as he maintained, but that he had created a new bill. Further, in the Respondent's view, discarding the bill was inconsistent with the Claimant's explanation that he wished to discuss it further with waiting staff. The CCTV footage showed that Claimant had cleared the dessert menus and shortly afterwards placed the bill on the table. It was not in dispute that the Claimant had placed the cash in his pocket.

80. With regard to the CCTV, the Claimant denied turning off the system but said he had to pull out the plug from a gang socket in order to re-boot the internet router so he could use his computer. The Respondent gathered information from Guardian security who said that the cameras were inactive for about double the time one would expect if a plug was removed and put back in. The Respondent had regard to the coincidence of times at which the security cameras were inoperative and the time at which the bill was recreated. BT were able to confirm that the internet itself remained operative. The Tribunal was shown evidence to suggest the Claimant might have been using his computer during the time in which he says the wifi was down.
81. With regard to the allegation about Stripe, the Claimant's explanation was that both Mr and Mrs Smith knew that the payments were going into his own bank account in order to pay staff cash in hand. The Tribunal prefers the Respondent's evidence that Mr and Mrs Smith were unaware that Stripe payments were being paid into the Claimant's bank account. (Whether or not Mr and Mrs Smith knew staff were being paid cash in hand is a different matter).
82. With regard to iZettle, the allegation related to a failure to account for payments into the Claimant's bank account during the early days of the business in the period November 2017 to December 2017. Mr and Mrs Smith were aware that payments were being made into the Claimant's account; the allegation was that the Claimant failed to account for them. During the investigation, the Claimant provided an account which the Respondent found to be unsatisfactory, inconsistent and of questionable authenticity.
83. In respect of all the allegations, the Tribunal prefers the Respondent's evidence.
84. Based on the evidence, and notwithstanding the Claimant's attempts to undermine the findings of the Respondent's extensive investigations, the Tribunal is satisfied that both Mr Smith and Mrs Smith held a genuine belief in the Claimant's misconduct, based on reasonable grounds following as much investigation as was reasonable in the circumstances.
85. Turning to the specific allegations of unfairness alleged by the Claimant.

Unreasonable delay

86. The ACAS Code of Practice states: "*Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions*".
87. From the date of the Claimant's initial suspension to dismissal was a period of just over three months. In many cases, this might be overlong. However, the question is whether the Respondent acted unreasonably in the circumstances of this case. The Claimant was a part owner of the business and a director of the company. The allegations of wrongdoing were serious. The investigations involved technical and accounting matters and were necessarily extensive. Further investigations had to be carried out in light of the explanations put forward by the Claimant. The Tribunal concludes that the length of time taken was not unreasonable in the circumstances: disciplinary proceedings were not unreasonably delayed.

88. The Claimant appealed against his dismissal on 15 April 2020, an appeal hearing took place on 29 April 2020, and the outcome was provided to the Claimant on 18 May 2020. In the circumstances of the case, this was not an unreasonable timescale.
89. A hearing to consider the Claimant's grievance appeal of 28 February 2020 did not take place until 7 April 2020, the day after dismissal. During this period, Mrs Smith had given birth and been in hospital for a week. The Respondent was having to deal with the effects of the national lockdown on its business. Although the Respondent's policy states that every effort would be made for a hearing to take place within 5 working days, neither the delay or the timing of the grievance appeal hearing led to unfairness in this case.

Lack of evidence

90. The Tribunal disagrees that there was a lack of evidence. The Tribunal has been provided with many documents illustrating it.

Inadequate notes of meetings

91. An employer is not expected to make verbatim notes of meetings. The Tribunal has considered the notes of the meetings taken in this case which are more than adequate judged by the standards of a reasonable employer.

Lack of impartiality

92. The evidence suggested that there might have been some resentment on the part of Mr and Mrs Smith who, it appears, were required to work in the kitchen and unable to take holidays like the Claimant. Equally, there was evidence to suggest that the Claimant and Mr and Mrs Smith enjoyed a good and friendly relationship. The Tribunal is not persuaded that any resentment on their part led to the disciplinary proceedings being instigated or the Claimant being dismissed. Rather, the Tribunal is satisfied that it was the Claimant's own wrongdoing which triggered the procedure and his dismissal. Nor does the evidence support the Claimant's contention that the Respondent was looking at ways to justify his dismissal.
93. The Claimant also complains that he was dismissed for matters which Mr Smith himself was guilty, namely taking money from the safe for personal goods and failing to account for it. However, the allegations against the Claimant related to his failure to account for monies in addition to what clearly appeared to be an attempt to misappropriate monies. Given the circumstances in which the Claimant's wrongdoing came to light and the seriousness of the allegations, a like for like comparison can not be made.
94. The Claimant sought to compare his treatment with that of a former member of the waiting staff who had voided a table from a bill and who had been given a written warning. The reason for the ex-employee's actions was because a customer had walked out without paying and the ex-employee had been told that any unpaid balances would be deducted from tips. The ex-employee appears to have admitted wrongdoing, unlike the Claimant. The Claimant faced additional allegations of misconduct. The Claimant was acting as general manager and in a superior position of trust. The circumstances relating to the former employee and the Claimant are not truly parallel. No unfairness can be

identified. The Tribunal notes in any event that this argument appears to be inconsistent with the Claimant's case that he did not void the bill.

The decision to dismiss was disproportionate and unfair

95. The Claimant was in a position of trust and a member of senior management. The Respondent's decision to dismiss for the dishonesty shown by the Claimant was well within the band of reasonable responses.

The decision to dismiss was predetermined

96. There was no credible evidence that this was the case. The Claimant's argument that the Respondent wished to remove him from the business in order to set up a new business with company money lacked clarity and was not persuasive.

97. The Claimant complained that his suspension was unwarranted and unfair. Mr Smith's decision was no knee-jerk reaction: he first viewed the CCTV footage and spoke to two members of staff. In such suspicious circumstances, and in light of the Claimant's position within the business, the Tribunal is satisfied that the Respondent acted reasonably in suspending the Claimant for precautionary reasons.

The decision to dismiss was taken before the conclusion of the Claimant's grievance

98. The outcome of the Claimant's grievance was provided to him on 21 February 2020. He was not dismissed until 6 April 2020 following a disciplinary hearing on 24 March 2020. The decision to dismiss was not taken before the conclusion of the Claimant's grievance.

99. With regard to the Claimant's appeal against the grievance outcome, that was considered and answered before the outcome of appeal against dismissal.

100. The only way in which the Claimant's allegation of unfairness can be understood is that the Respondent should have considered both the Claimant's grievance and his appeal against the grievance outcome before deciding to dismiss him.

101. The ACAS Code of Practice states "*Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the disciplinary and grievance cases are related it may be appropriate to deal with both cases concurrently*".

102. The thrust of the Claimant's grievance concerned the disciplinary process itself. It would have been open to the Respondent to deal with both issues concurrently. Instead, the Respondent dealt with the two procedures separately, no doubt in an attempt to follow a fair process overall. The Tribunal is unable to discern any unfairness by the way in which the Respondent dealt with the two procedures or the timing of them.

The Respondent retained decision-making authority which undermined the purpose of an independent consultant

103. Under section 98(4) of the Employment Rights Act 1996, when considering whether the dismissal was fair or unfair, the Tribunal must have regard to the size and administrative resources of the employer's undertaking.

104. The Respondent was a small employer. The Tribunal heard evidence that the Covid pandemic had an adverse effect on its financial situation. The Tribunal is unable to conclude that the Respondent acted outside the band of reasonable responses in the way in which it conducted its affairs in relation to the matters in question.

105. In any event, in the Tribunal's view, it was right and proper for Mr and Mrs Smith, as co-owners of the business to take the decisions.

The disciplinary appeal was heard by Mrs Smith who was subject of the Claimant's grievance and was involved in the disciplinary decision.

106. As above, the Tribunal must have regard to the size and administrative resources of the employer's undertaking. Since Mr Smith had handled the Claimant's grievance, the only person left to consider his grievance appeal was Mrs Smith. The Tribunal has considered the documents relating to the grievance appeal and is satisfied that Mrs Smith dealt with it impartially and fairly.

107. The Claimant was not unfairly dismissed.

108. If the Tribunal is wrong in its conclusion, the Tribunal would in any event find that the Claimant had wholly contributed to his dismissal such that compensation should be reduced by 100%.

Wrongful dismissal/breach of contract

109. The Respondent has shown, on the balance of probabilities, that the Claimant committed the acts of misconduct for which he was dismissed. That misconduct was a repudiatory breach of the contract of employment; it fundamentally undermined the contract.

110. The Respondent did not breach the Claimant's contract of employment by failing to give notice or compensate him by paying in lieu.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Pritchard

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Date: 14<sup>th</sup> April 2022