Case No: 1406210/2020 &
1406303/2020

EMPLOYMENT TRIBUNALS

Claimant: Ms C Hawley and Ms R Hawley

Respondent: Direct Cleaning Services SW Ltd

Heard at: remotely via the Video Hearing Service

On: 12 and 13 December 2022

Before: First Tier Tribunal Judge Volkmer sitting as Employment Judge

Representation

Claimant: Ms Houston (trade union representative)

Respondent: Mr Chaloner (Commercial Manager) in person

JUDGMENT

1. The Claimants' application for a postponement of the hearing is refused.
2. The Claimants were unfairly and wrongfully dismissed by the Respondent.
3. The Respondent failed to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedure.
4. The Respondent failed to pay the Claimants' holiday pay.
5. The Claimants are entitled to remedies payments as follows.

    a. Ms Cindy Hawley is entitled to a remedy payment of:
        i. a basic award of **£348.80;**
        ii. a compensatory award of **£4,534.40 (net)**; and
        iii. holiday pay of **£221 (gross).**

    b. Ms Rebecca Hawley is entitled to a remedy payment of:
        i. a basic award of **£523.20;**
        ii. a compensatory award of **£4,534.40 (net);** and
        iii. holiday pay of **£221 (gross).**

CALCULATION BREAKDOWN CINDY HAWLEY

1. DETAILS

Net weekly basic pay:	£69.76
Claimant's date of birth:	22/10/1988
Period of service:	29/07/2016 to 01/09/2020
Complete years of continuous service:	4 years
Age at effective date of termination (EDT):	31 years
Gross weekly pay:	£87.20
Remedy hearing date	13/12/2022
Date by which employer should no longer be liable	14/11/2021

2. BASIC AWARD

1 (relevant multiplier) x 4 (years' service) x £87.20 (gross weekly pay):	Basic award: £348.80	
Total basic award:		£348.80

3. COMPENSATORY AWARD

Loss of net pay 62.7 (weeks) x net weekly pay (£69.76):	£4,373.95	
Loss of statutory rights:	£200	
Total past loss:		£4,573.95
Uplift in compensatory award due to Respondent's unreasonable failure to comply with Acas Code: 25% x £4,573.95:	adjustment for uplift: £1,143.49	
Compensatory award grand total:		£5,717.44
Statutory cap applied:	£4,534.40	
GRAND TOTAL		**£4,534.40**

CALCULATION BREAKDOWN REBECCA HAWLEY

1. DETAILS

Net weekly basic pay:	£69.76
Claimant's date of birth:	02/10/1958
Period of service:	29/07/2016 to 01/09/2020
Complete years of continuous service:	4 years
Age at effective date of termination (EDT):	61 years
Gross weekly pay:	£87.20
Remedy hearing date	13/12/2022
Date by which employer should no longer be liable	13/12/2022

2. BASIC AWARD

1.5 (relevant multiplier) x 4 (years' service) x £87.20 (gross weekly pay):	Basic award: £523.20	
Total basic award:		£523.20

3. COMPENSATORY AWARD

Loss of net pay 119 (weeks) x net weekly pay (£69.76):	£8,301.44	
LESS earnings from temporary employment:	-£2,701.00	
Loss of statutory rights:	£200	
Total past loss:		£5,800.44
Uplift in compensatory award due to Respondent's unreasonable failure to comply with Acas Code: 25% x £5,800.44:	adjustment for uplift: £1,450.11	
Compensatory award grand total:		£7,250.55
Statutory cap applied:	£4,534.40	
GRAND TOTAL		**£4,534.40**

REASONS

Introduction

1. The Claimants, Ms C Hawley and Ms R Hawley, worked as cleaners for the Respondent, Direct Cleaning Services, cleaning at the Gloucester Docks Museum. The Claimants were employed from 29 July 2016 to 1 September 2020.

2. The dates on the Claimants' ACAS certificates are 28 September 2020 to 28 October 2020. Ms C Hawley's Claim was submitted on 26 November 2020. Ms R Hawley's Claim was submitted on 30 November 2020.

3. The Claimants claim that they have been unfairly dismissed and bring contractual claims of wrongful dismissal in relation to a failure to pay notice pay and for accrued but unpaid holiday pay.

4. The Respondent, Direct Cleaning Services, contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and denies the remaining claims.

5. The Claimants were represented by Ms Houston, Union of Shop, Distributive and Allied Workers. Mr Chaloner (Commercial Manager) appeared in person for the Respondent.

6. The Claimant prepared a paginated bundle of 82 paginated pages for the hearing. Mr Chaloner sent an email dated 11 December 2022 attaching the Respondent's documents. Ms Houston sent three emails to the Tribunal on 12 December 2022, each attaching a document. Mr Chaloner sent emails to the Tribunal on 12 and 13 December 2022 attaching further documents. Ms Houston sent updated Schedules of Loss to the Tribunal on 13 December 2022. No objections were raised in each case in relation to the documents being considered by the Tribunal and the other party was given additional time in each case to consider the relevant documents.

7. Neither party had prepared written witness statements. Oral evidence was heard from Ms C Hawley and Ms R Hawley (for the Claimants), and Mr Chaloner and Ms Watson (for the Respondent).

Preliminary Matter – application to postpone the hearing

8. On 6 December 2022, the Claimant made an application to strike out the Defence, which was considered by Employment Judge Livesey, the following was sent to the parties on 9 December 2022.

The case is not struck out at this stage, but neither is it postponed in the absence of evidence in relation to the Respondent's health. All possible steps should be taken to comply with outstanding directions ahead of the hearing. A failure to do so may result in a Judge ultimately deciding that the case cannot be heard when the issue is considered at the start of the hearing. If the failure has been the

Respondent's the Judge may consider making costs/preparation time orders in addition to further case management directions.

9. The Claimants representative stated that the Claimants had been unable to prepare written witness statements as a result of the Respondent's failure to disclose documents. For this reason, an adjournment was requested by the Claimant. The Respondent was happy to continue based on oral evidence.

10. The Tribunal decided that the application should be refused. The parties and witnesses were present and ready to start. Both parties were on an equal footing, since neither party had prepared written witness statements. An adjournment would be likely to create a significant delay, which would be detrimental to all of the parties and not in the interests of the overriding object.

11. There was a 35 minute break in order for Ms Houston to get some documentation from another room and discuss with her clients.

Issues for the Tribunal to decide

12. The Tribunal needed to decide the following issues:

Unfair Dismissal

a. Was the claimant dismissed? *The parties agree that the Claimant was dismissed.*
b. What was the reason or principal reason for dismissal? *The Respondent says the reason was misconduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*
c. If the reason was 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:
    i. there were reasonable grounds for that belief;
    ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
    iii. the respondent otherwise acted in a procedurally fair manner;
    iv. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

d. If there is a compensatory award, how much should it be? The Tribunal will decide:
    i. What financial losses has the dismissal caused the claimant?
    ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    iii. If not, for what period of loss should the claimant be compensated?
    iv. 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?
    v. If so, should the claimant's compensation be reduced? By how much?
    vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    vii. Did the respondent or the claimant unreasonably fail to comply with it by?

viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
ix. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
xi. Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

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

Wrongful dismissal / Notice pay

g. What was the claimant's notice period?
h. Was the claimant paid for that notice period?
i. If not, was the claimant guilty of gross misconduct?

Holiday Pay (Working Time Regulations 1998)

j. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
k. If so, how many days and at what rate?

Remedy

l. How much should the claimant be awarded?

Findings of Fact

13. The relevant facts are as follows, in my finding, on the balance of probabilities.

14. The Claimants, Ms C Hawley and Ms R Hawley, worked as cleaners for the Respondent, Direct Cleaning Services, cleaning at the Gloucester Docks Museum, which I will refer to as the "museum". The Claimants were employed from 29 July 2016 to 1 September 2020. The Claimants were contracted to work from 4pm to 6pm, Monday to Friday, a total of 10 hours per week. These facts are agreed.

15. The Respondent's client and point of contact was Fountains OCS and the end-user, Gloucester Docks Museum, was a third party to that client relationship. This finding is based on the witness evidence of Mr Chaloner.

16. On 31 July 2020, Mr Chaloner was sent an email by his client contact stating the following.

"*There are some really important jobs the cleaners are not doing each day, especially with COVID-19 it is important they get done. My teams are currently covering during the day but please can you make sure they are:*

- *Cleaning all door handles and push points daily*
- *Cleaning all hand rails including the stairs daily*
- *Ensuring the window ledges are clear of cob webs as the visitors have been complaining*

Can you also remind them of the following:

- *There is no need to clean the offices on our behalf unless instructed by Steve Bosworth as part of the office move*

- *They must use their own equipment not ours, as we have strict COVID-19 protocols in place and they have been using our hoover*
- *Tables must be wiped down not hoovered as I saw them hoovering the tables last week*"

17. Although Mr Chaloner's evidence was that the Respondent had concerns regarding the timekeeping of the Claimants and reports that they had not been wearing the correct uniform, this is not reflected in the contemporaneous correspondence, namely the email of 31 July 2020. In my finding, the reason for sending the area manager, Michelle Doig, to make a site visit at the Claimant's workplace was that the client had raised performance concerns, namely those set out in the email of 31 July 2020.

18. On 19 August 2020, Ms Doig and the Claimants had a conversation in which Ms Doig discussed with them:

    a. the fact that they were not wearing the correct uniforms;
    b. the organisation of a cupboard with cleaning equipment in it; and
    c. stated that there was an issue with time keeping.

    Ms Doig asked the Claimants to call her from the museum landline on arrival and departure as a means of clocking in and out. These facts are agreed between the parties.

19. What is not agreed between the parties is the manner in which this discussion took place. The Claimants allege, and gave evidence, that Ms Doig was rude, aggressive and kept speaking over them. The Respondents allege that it was the other way around. Ms Doig did not give evidence. Mr Chalanor and Ms Watson gave evidence that she had told them this. An email was produced from a museum employee dated 21 September 2020 (page 62 of the Claimant's bundle) stating that: "*I did hear voices raised but not by who*". On this point, I prefer the Claimant's account. This is because they were present during the conversation and could therefore give the Tribunal evidence from their own knowledge. No written account of Ms Doig, or contemporaneous notes of any discussion with Ms Doig were produced to the Tribunal. Mr Chalanor and Ms Watson were only able to give hearsay evidence, which must be given lower weight.

20. On 20 August 2020, Mr Chaloner received a call from his contact at Fountain OCS saying that the Claimants had been rude to staff at the museum. In giving evidence, Mr Chaloner could not recall what it was alleged had been said by the Claimants. No notes of the call were produced to the Tribunal.

21. On 20 August 2020 Ms R Hawley received a call from Ms Doig saying that she and Ms C Hawley should not return to work.

22. On 21 August 2020 Ms Jones, Commercial Director at the museum sent an email to Ms Watson and Mr Chaloner stating the following:

    "*Further to my conversation with Michelle please see below with reference to both incidents this week.*

Following on from Michelle's audit at the museum, Cindy approached my Duty Manager on Wednesday 19th August, in her office. She was confrontational towards her, accusing her of going behind her back and to her, if she had a problem she needs to say it to her face. My Duty Manager was very upset with the incident and raised it with me in the afternoon.

On Thursday 20th August, I was approached by two of my front of house staff. The first had been questioned about ants which have recently appeared in the museum, with the suggestion we were going to be reported for an 'insect infestation'. The second had been asked to show their museum cleaning caddy, to which the cleaner took pictures of the museum products and accused them of stealing items. Both members of the team were upset, with one worried they would be investigated for stealing items.

Please can you investigate the matter."

23. A letter dated 21 August 2020 was sent to both Claimants stating the following:

> "*I am writing to inform you that the decision has been taken to suspend you on full pay, from your position of cleaning operative at Gloucester Museum with immediate effect and you will not be required to return to site on Monday, pending further investigations of the following allegations of gross misconduct.*
> - *Rude and abusive behaviour to our Area Manager Michelle*
> - *Rude and abusive behaviour to our clients at Gloucester Museum*
> - *Poor Time Keeping and not completing your contracted hours*
> - *Attending site without uniform*
>
> *Once we have finalised our investigations, we will contact you to inform you of the outcome.*
> *You have the right to appeal against this decision and should you wish to appeal you must set out the grounds in writing and respond within the next 7 days."*

24. No factual details of the allegations were provided to the Claimants. The Claimants were not sent a copy of the email from Ms Jones. Ms C Hawley rang the Respondent, with Ms R Hawley present, and spoke to Ms Watson to attempt to find out details of the allegations being made against them. However, no further details were given and she remained confused as to what they were being accused of. She was told that she should wait for a letter. This finding is based on the evidence of the Claimants. Whilst Ms Watson gave evidence that she had explained the contents of the email from Ms Jones on 21 August 2020, I prefer the evidence of the Claimants because it is consistent with the contemporaneous documentation, in particular the letter dated 4 September 2020 at page 59 of the Claimant's Bundle which states "*how are we supposed to properly respond to these accusations when we don't even now [sic] what we have done*".

25. According to the evidence of Ms Watson, the investigation undertaken by the Respondent consisted of Ms Watson speaking to Ms Doig about her account of events and asking Ms Doig to follow up the incidents with the museum which had been raised in Ms Jones' email on 21 August 2020. There are no notes of any investigation meetings, such as the discussions with Ms Doig. In fact, there

is no record at all of Ms Doig's account of the alleged incident. No meeting was arranged with the Claimants to hear their side of events.

26. The Claimants position is that they sent a letter to the Respondent dated 25 August 2020, at page 57 of the Claimants' Bundle. In my finding, that was not received by the Respondent until it was later re-sent.

27. In a letter dated 1 September 2020, the Respondent dismissed the Respondent with immediate effect. The letter stated the following:

"*Further to my letter dated 21st August I must now inform you that due to third party pressure and following further investigations regarding the allegations of rude and abusive behaviour on site that your employment will now be terminated.*

As previously stated, the allegations are set out below, and as you have not responded to my previous letter defending these allegations, we have no alternative than to class this as gross misconduct.

- *Rude and abusive behaviour to our Area Manager Michelle*
- *Rude and abusive behaviour to our clients at Gloucester Museum*
- *Poor Time Keeping and not completing your contracted hours*
- *Attending site without uniform*

Your pay will be calculated up to and including Monday 1 September and will credit your account on Friday 25th September.

You have the right to appeal against this decision and should you wish to appeal you must set out the grounds in writing and respond within the next 7 days."

28. In a letter dated 4 September 2020, at page 59 of the Claimants' Bundle, Ms C Hawley wrote to the Respondent stating that neither she or Ms R Hawley had been told exactly what they were said to have done and as a result could not properly respond to these accusations.

29. The Claimants' position is that Respondent did not respond to this letter. It was said in submissions that Ms Watson phoned Ms C Hawley in response. It is clear is that there was no independent appeal manager, no appeal meeting and no written response to this letter.

30. On 21 September 2020, Samantha Cowell, the Duty Manager at the museum, to whom it was alleged the Claimants had been rude, emailed Ms Doig, setting out her own account of what happened. Her email states the following:

After you left they asked to speak to me Cindy said that both of them were upset that I had not talked the them about the problems in their cleaning of the museum . I told them that my manager had been sat in the museum while they had been cleaning and reported them to you (Michelle). She was not happy with way they had been cleaning as well as their hours which they should have been in . I felt I did not deserve the way that Cindy had spoken to me and Rebecca would not even look at me as Cindy was speaking to me.

31. Taking into account the witness evidence of the Claimants and the email from Ms Cowell, which is put in much less serious terms than it had been described in the email from Ms Jones on 20 August 2020, In my finding there was a discussion between the Claimants in which Ms C Hawley stated that both Claimants were upset that Ms Cowell had not spoken to them directly about concerns with their cleaning. Ms R Hawley was present but not involved in the conversation. In my finding this was inappropriate on Ms C Hawley's part in the context but I find that it was not abusive as alleged by the Respondent. This finding is based on the Claimants' evidence and Ms Cowell's email.

32. Two other matters raised by Ms Jones in the email on 20 August 2020 related to ants and a photograph. In an email on 16 September 2020 another member of staff states that:

I was there when they took a photograph in the museum. I was walking my staff members, Chris Voisey Adams and Beth Voisey Adams around the building as there were some changes they needed to be aware of. As we walked past the front desk Rebecca asked Chris to hold a bottle up and while she took a picture of it. It was one of their polish bottles in our caddy on the desk.
I know this made staff feel uncomfortable, as if they were trying to get us into trouble. They also remarked when they saw ants near the café, saying this is very unhygienic. Again this made staff feel uncomfortable. The ant issue is something we have logged internally and have put measures in place to stop. Again this felt like they were trying to get the museum into trouble.

33. In relation to the comment alleged to have been made to the client about ants. Ms R Hawley stated that she said "do you know you have ants", and that was it. She stated that she did not threaten to report them and had no reason to do so as she liked working there and wanted to continue. Both Claimants denied taking a photograph of a bottle of cleaning materials. On this matter, I prefer the evidence of the Claimants, because they were able to give evidence from their own knowledge and were present in the courtroom to be questioned. Even if these events had taken place as alleged, in my finding they would not be sufficiently serious so as to constitute gross misconduct.

34. No evidence was put forward by the Respondent in relation to the Claimants' alleged "poor time keeping and not completing [their] contracted hours". A letter was produced to the Tribunal dated 16 January 2019 in which the Respondent raised this as an issue with the Claimants, but since this was more than 18 months before the Claimants were suspended, in my finding it is not relevant to the matter at the time of the dismissal. Timekeeping was not raised as an issue in the email from the client to Mr Chaloner dated 31 July 2020 which initiated the audit by Ms Doig. Since there is no evidence of it, I find that "poor timekeeping or failing to complete contracted hours" has not been proven.

35. In relation to the question of wearing uniform, the Claimants admitted that they were not wearing uniform. Their evidence was that Ms R Hawley's uniform was dirty as a bird had defecated on it, and Ms C Hawley's did not fit. The Claimants evidence was that they had asked for more uniform and had not been provided with it. The Respondent had no record of this. I find the Claimants' account to be correct because I found them to be credible witnesses and there was no evidence to contradict their account. In the circumstances, in my finding, this

did not constitute gross misconduct.

Facts in relation to Holiday Pay

36. The Claimants were not paid in relation to notice pay or holiday pay. Both parties agree that the Claimants did not make any requests to take annual leave during the leave year which ran from 1 January 2020 to 31 December 2020. The parties agree that 2 January 2020 was a bank holiday which was taken by the Claimants as holiday. The Claimants were on furlough between 30 March 2020 and 16 July 2020 inclusive. I will deal with the question of the treatment of bank holidays during that period in my outcome. The Claimants' contractual notice period was four weeks.

The Law

37. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").

38. I have considered section 98 (4) of the Act which provides "…. *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (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*".

39. Applying *Iceland Frozen Foods Limited v Jones*, the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.

40. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. Applying *British Home Stores Limited v Burchell*, a helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. Applying *Sainsbury's Supermarkets Ltd v Hitt*, the band of reasonable

responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

41. When considering whether a dismissal on the grounds of conduct is fair, it is important to consider only matters which the employer was aware of at the time of the dismissal; the question is whether the employer reasonably concluded that the misconduct occurred at the time of dismissal, not whether the misconduct actually happened (*Devis (W) & Sons Ltd v Atkins [1977] HL*).

42. In contrast, in relation to the wrongful dismissal claim, the Tribunal must determine whether, on the balance of probabilities the Claimants committed gross misconduct entitling order to find gross misconduct, the tribunal must be satisfied on the balance of probabilities that there has been wilful conduct by the employee that amounts to a repudiatory breach of the employment contract, permitting the employer to accept that breach and to dismiss the employee summarily, see Wilson v Racher and the decision of Lord Jauncey in Neary v Dean of Westminster.

Compensation

43. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. The compensatory award is dealt with in section 123. Under section 123(1) "*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*".

44. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") which sets out that "*If, in the case of proceedings to which this section applies, it appears to the employment tribunal that— (a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b)the employer has failed to comply with that Code in relation to that matter, and (c)that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25".* In this case it is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code") which is relevant.

45. Potential reductions to the compensatory award are dealt with in section 123 of the Act. Section 123(6) provides: "*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*."

46. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. Considering *Polkey v A E Dayton Services Ltd [1988] ICR 142 HL* and applying *Software 2000 Ltd v Andrews and ors 2007 ICR 825*, EAT the Tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how

long the employee would have been employed but for the dismissal.

Applying the Law to the Facts

47. The principal reason for the dismissal was conduct. That is a potentially fair reason for the dismissal. In my finding, there was a genuine belief by the decision makers, Mr Chaloner and Ms Watson that the Claimants had committed misconduct.

48. However, in my finding this belief had not been formed on reasonable grounds for the following reasons:
    a. at the time the belief was formed the Respondent had not carried out a reasonable investigation;
        i. the Claimants were not told what the factual basis for the alleged misconduct was;
        ii. no differentiation was made between allegations against the two Claimants even though some of the incidents were alleged to have been related to the actions of one, and some alleged to have been the actions of the other;
        iii. the Claimants were not provided with evidence which was considered by the Respondent, namely Ms Jones' email of 20 August 2020 or the account given by Ms Doig;
        iv. no meeting was held in order to obtain an account from the Claimants as to what they said had happened. Reference is made to asking the Claimants to write to the Respondent firstly in my finding that was not clearly put in the letter of 21 August 2020 which appeared to be stating that an appeal against the suspension should be put in writing not requesting that the Claimant's put forward their position regarding the alleged misconduct. Secondly, the Claimants did not have sufficient information to answer the allegations in any case;
    b. the Respondent did not conduct itself in a procedurally fair manner. In addition to the above, the Claimants were not informed of what the potential outcome was of the disciplinary process;
    c. given the above, in my finding the dismissal was not within the range of reasonable responses.

49. Breach of the ACAS Code. I consider that there were the following breaches of the ACAS Code of Practice on disciplinary and grievance procedures:

    a. the notification of the disciplinary proceedings to the Claimants did not:
        i. contain sufficient information about the alleged misconduct to enable the Claimants to prepare to answer the case; or
        ii. set out the possible consequences of the disciplinary action;
    b. no written evidence, such as the email from Ms Jones on 21 August 2020, was provided to the Claimants;
    c. the Respondent did not hold a meeting with the Claimants, and consequently they were also not informed of their statutory right to be accompanied to such a meeting by a colleague or trade union representative;
    d. the appeal was not dealt with impartially by a manager who had previously not been involved; and

e. the Claimants were not informed of the appeal outcome in writing.

50. In my finding, it is not appropriate to make a Polkey reduction in this case. As highlighted in the case law, this is always a speculative exercise – particularly in a case like this where there has been substantive and procedural unfairness. I take into account my findings on the facts:
    a. that Ms Doig was at fault in her discussion with the Claimants;
    b. that there was an inappropriate discussion between Ms C Hawley and a Museum employee, Ms Cowley, but not one that could constitute gross misconduct;
    c. in relation to the remaining two allegations, even at their highest (that the Claimants threatened to report the museum for an ant infestation, and that one took photographs of a bottle of cleaning fluid), these do not in my finding constitute gross misconduct.

51. In my finding, had there been a fair process, the relationship between the Claimants and the museum may have been repairable, but in any case if the end user client was not open to this, the Respondent would have been likely to offer alternative work to the Claimants. I make this decision because the evidence of the Respondent was that alternative work could have been considered and was not, and because the Respondent in fact made the offer of work two weeks later (at pages 63 and 64 of the Claimants' bundle). This was made in error by an individual it is said was ignorant of the dismissal decision, but nevertheless demonstrates that alternative work was available.

52. In relation to the wrongful dismissal claims, based on my findings of fact at paragraphs 19, 31, 33, 34 and 35, I make a finding that there was no gross misconduct which justified a summary dismissal. The discussion with Ms Cowley could reasonably have been found to have been misconduct, but not gross misconduct justifying a dismissal. I do not propose to award separate compensation in relation to the one month's notice pay as it will be a period covered by the compensatory element of the unfair dismissal compensation.

53. The burden of showing a failure to mitigate rests on the Respondent and no evidence or submissions were made in that regard. In my finding, Ms C Hawley's losses ended when she obtained a Team Leader role at Tesco, on 14 November 2021. Ms R Hawley has only obtained temporary roles and her losses are therefore calculated to the date of this hearing.

Holiday Pay and Notice Pay

54. The Claimants were on furlough between 30 March 2020 and 16 July 2020 inclusive. The Respondent's position is that bank holidays were taken as they fell during that period. However, there was no evidence before me that any days, including bank holidays were actively taken as holiday during the period that the Claimants were on furlough. An indication of this, in particular, is that they were being paid 80% of their wages in line with being on furlough rather than taking holiday. If the Respondent had required this, reasonable notice to the Claimants would have been needed, requiring them to take holiday. That was not given.

55. The Respondent's position, without advancing any evidence of the same, was

that the Claimants had taken unauthorised holiday, but the Respondent stated it did not know whether or not that had happened in 2020. However, given it had happened in the past, they claimed, holiday could not be calculated. I find that to be erroneous. In the absence of any proof of unauthorised holiday, there is no entitlement for the Respondent to withhold holiday pay.

56. It is agreed between the parties that 18.8 days' holiday were accrued during 2020. The Claimants took 2 January 2020, a bank holiday, as leave. I have already made a finding that no holiday was taken during the furlough period. As such, each Claimant has 17.8 days' accrued but untaken holiday.

First Tier Tribunal Judge Volkmer
sitting as Employment Judge
13 December 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
20 January 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE