EMPLOYMENT TRIBUNALS

Claimant: Mrs V Kennedy

Respondent: Michael Cottington and Irene Cunliffe sued as Committee Members of the Golborne Bowling Club

HELD AT: Liverpool **ON:** 20, 21, 22 & 23 November 2023

BEFORE: Employment Judge Shotter

MEMBERS: Mr G Penne
Ms C Doyle

REPRESENTATION:

Claimant: Mr Rochford, consultant
Respondents: Mr S Hoyle, consultant

JUDGMENT having been sent to the parties on 24 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. By a claim form received on 5 January 2023 following ACAS early conciliation between 24 October 2022 to 5 December 2022, the claimant who was employed as a cleaner brings claims of unfair dismissal, age discrimination, wrongful dismissal (notice pay) and holiday pay.

Evidence

2. The Tribunal heard oral evidence from the claimant, her daughter Leanne Barnes and ex-husband Paul Kennedy, who were all found to have given straightforward and credible evidence.

3. On behalf of the respondent the Tribunal heard from Michael Cottington, whose evidence was not always credible. On the question of employment status and other matters the Tribunal found Michael Cottington to have been an evasive witness. His disingenuous evidence to the effect that the claimant had been overpaid and suggesting that this was some form of nefarious agreement between the claimant, her daughter and ex-husband (when she clearly had not) was not credible. He intentionally gave the impression to the Tribunal that Leanne Barnes, the claimant's daughter, had presented him with a "shopping bag full of papers" when the reality was that he had been provided with four lever arch files sorted, indexed and up-to date together with a number of other documents.

4. The Tribunal was referred to a text message sent by Dave Allen to Michael Cottington after the claimant was dismissed. The text message was presented by the respondent as an email from Leanne Barnes instructing the committee not to respond to correspondence sent by the claimant and written on her behalf by Leanne Barnes. The Tribunal found Michael Cottington's evidence that he believed the email had been sent by Leanne Barnes not credible. It found Michael Cottington, despite his denials to the contrary, possessed Dave Allen's mobile number as a fellow committee member, friend and neighbour. Michael Cottington had taken part in a number of telephone discussions with Leanne Barnes and would have her mobile number mobile on his phone which he would not have confused with that of Dave Allen's against a background of a discussion about the claimant's employment. It is undisputed that on the 6 July 2023 the claimant's solicitors notified the respondent that the message had not come from Leanne Barnes or a phone number she had control of, confirming it belonged to Dave Allen, a former committee member. Four and half months later the respondent persisted in asserting that the text message came from Leanne Barnes, and gave two completely different versions of how Michael Cottington came to be told that it was not her number. Michael Cottington stated "when I got home last night" (being the night after the claimant had given evidence to the Tribunal on this point) he had spoken with Dave Allen about the text, Dave Allen "checked through his phone and it was there." In a question from the Tribunal after re-examination Michael Cottingham confirmed he had found about the text "a months ago when I was taking a chimney breast out" at Dave Allen's house The Tribunal concluded that Dave Cottington was an unreliable witness and inaccurate historian as referred below in its findings of facts.

Parties list of agreed issues

5. The parties had agreed between themselves a list of issues which was discussed at the outset of the liability hearing. The agreed list of issues is as follows:

Employment status

1. Whether or not the claimant was employed under a contract of employment Contract of employment issue Section 230(1) ERA. The Respondent contends that the Claimant was a worker. The Respondent conceded that the claimant did not have a contract of employment and was not issued with a statement of main terms and particulars in accordance with S1 of the Employment Rights Act 1996 as amended..

Unfair dismissal

2. It is common ground that, if the claimant was employed by the respondent, the respondent dismissed her.

3. The issues are:
3.1. Contract of employment issue
3.2. Qualifying period
3.3. Can the respondent prove that the sole or principal reason for the dismissal was:
(a) That the claimant was redundant (see section 139 ERA); or
(b) The need to secure the financial health of the club.
3.4. If it was the latter reason, was that a substantial reason capable of justifying the dismissal of a cleaner?
3.5. If the respondent proves the reason, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?
4. If the dismissal is found to be unfair, the respondent will argue that the claimant's compensation should be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event.
5. The parties agreed that this issue should be determined at the same time as the fairness or otherwise of the dismissal.

Direct age discrimination

6. We discussed the difference between direct and indirect discrimination. This included a reminder to the parties that direct discrimination may be conscious or unconscious. Mrs Barnes confirmed that this is a complaint solely of direct discrimination.
7. It is the claimant's case that the respondent treated less favourably than it would treat others in two ways:
7.1. by dismissing her; and
7.2. to the extent that it is different, by failing to redeploy the claimant into a suitable alternative role.
8. There is no dispute that the claimant was treated in these ways.
9. The claimant says that her age was at least part of the reason for the treatment. Her case is that the respondent wanted to provide additional paid work for a younger person who is employed as the Steward. It is common ground that the circumstances of the Steward were materially different from those of the claimant - they were employed in different roles - but the claimant says that the allocation of paid work to a younger person following her departure is a fact from which the tribunal could conclude that the respondent was motivated by her age.

10. Here are the issues that the tribunal will have to decide:

10.1 The Claimant relies upon Danielle Cunliffe as a comparator. The age given of this comparator is 28 – 32 years of age. The Claimant is in her sixties. The claimant alleges that Ms Cunliffe is a current employee.

10.1.2 The Respondent's position on this new allegation is that Ms Cunliffe was brought in to cover the sickness absence of Will. She had never worked at the Respondent previously. It was not intended that she become employed. She was brought in to cover an emergency absence. But the Claimant has also referred to other younger staff in her witness statement and refers to Jennie Davies at paragraph 29 of her witness statement. Jennie Davies is mid thirty's (estimated) and commenced employment "before Christmas 2022". The Claimant alleges that Ms Davies is a current employee.

10.2. Equality law employee issue

10.2.1 Why was the claimant dismissed?

10.3. Why was she not found suitable alternative employment?

10.4. (In both cases) Was it because of her older age? Or was it wholly for other reasons?

10.5. If it was wholly or partly because of her age, Was it a means of achieving the aim of securing the financial health of the club?

10.6. Did that aim of sufficient public policy importance to justify direct age discrimination?

10.7. Were the means proportionate? Redundancy payment

11. If the claimant was continuously employed for two years under a contract of employment, she is entitled to a redundancy payment. The respondent would not dispute her entitlement.

12. The issues are.

12.1. contract of employment issue

12.2. qualifying period

12.3. length of service. Wrongful dismissal

13. The respondent concedes that if the claimant was an employee she was entitled to notice of termination and was not given such notice.

14. The tribunal will have to decide:

14.1. contract of employment issue and

14.2. length of service. Holiday pay

15. This is a claim for compensation for untaken holiday on termination of employment. The claimant says that the holiday year ran from January to December. There are two components to her accrued annual leave. The first is the leave to which she was entitled during the holiday year in which her employment was terminated. It is determined by multiplying 5.6 weeks by the proportion of the holiday year that had expired on 13 October 2022. The second component was a period of leave carried over from previous years for reasons connected to the COVID-19 pandemic. When those two periods of leave are aggregated, the total (according to the claimant) is 4.42 weeks.

16. It is not clear on what basis holiday pay claim is defended. Mr Taylor asked for time to take instructions. Unless notified in writing to the contrary, the tribunal will assume that the only issue it has to decide is the worker issue.

3. The list of issues were further clarified at this hearing. The withdrawal of the age discrimination complaint by the claimant at oral submission stage and a concession made on the part of the respondent that the claimant was an employee and not a worker made it unnecessary for the Tribunal to consider most of the

issues. With the agreement of the parties, judgment was given in favour of the claimant who was found to have been unfairly dismissed, wrongfully dismissed and owed accrued holiday pay (although the amount was not established at that stage). The Tribunal went on to hear oral submissions dealing with remedy after the parties were given the opportunity to provide a schedule and counter-schedule of loss. The Tribunal expressed its gratitude for the proactive way both parties have addressed this litigation and their compliance with the overriding objective.

4. Before and during oral submissions further concessions and agreements were made. The basic award was agreed at £1080.66, with the remaining issues to be resolved by the Tribunal being the compensatory award, mitigation, loss of statutory rights and ACAS increase of the award from zero to 25%.

5. The wrongful dismissal complaint (notice pay) was agreed in the sum of £720.44 and unpaid accrued holidays brought under the Working Time Regulations agreed at the sum of £809.26 net. The parties agreed the weekly rate of pay at £102.92 and that the claimant earned below the threshold for lawful deductions of tax and national insurance.

6. Finally, it was agreed that the respondent had failed to provide a statement of terms and conditions of employment in accordance with section 1 of the ERA, although Mr Hoyle submitted that there should be zero award, or at the very most 2 weeks pay.

<u>Issues on remedy</u>

7. The agreed issue that were to be dealt with at the remedy hearing were as follows;

1.1 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?

1.2 If so, should the claimant's compensation be reduced? By how much?

1.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.3.1 What financial losses has the dismissal caused the claimant?

1.3.2 Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

1.3.3 If not, for what period of loss should the claimant be compensated?

1.3.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.3.5 Did the respondent or the claimant unreasonably fail to comply with it by failing to follow any procedure whatsoever as conceded on behalf of the respondent?

1.3.6 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

1.3.7 Does the statutory cap apply?

<u>Findings of facts relevant remedy</u>

8. The claimant was employed as a cleaner from 3 January 2015 until the effective date of termination when she was dismissed without notice on 13 October 2022. It is undisputed the claimant also worked behind the bar and used the bar till, albeit infrequently. According to the claimant it was once every 2 months, Mr Kennedy, the claimant's ex-husband and steward confirmed it was two or three times a year. The Tribunal concluded the claimant was called upon occasionally to work behind the bar by Mr Kennedy, which she was able to do without issue. Upon Mr Kennedy's resignation from the position of full-time steward in January 2022, the claimant did not work behind the bar again.

9. The respondent initially disputed the claimant was not an employee, maintaining she was a worker until conceding after all the evidence had been heard that she was an employee. It is undisputed the claimant worked 6-days a week with variable hours as and when required, including cleaning after midweek funerals and parties at the weekend. The claimant cleaned before the club was opened, she generally started at 10am on a Saturday, 11am on other days and if there was a birthday party she would clean up at 5pm ready for when the club to open at 6pm for business. The bar personnel carried out a small amount of cleaning, such a cleaning spillages and wiping down sticky tables. They were unable to carry out the cleaning undertaken by the claimant when the club was open and alcohol was being served behind the bar. Carrying out the bins, brushing the yard outside, vacuuming, mopping and toilets which were all jobs carried out by the claimant, could not be undertaken when customers were using the bar and facilities. In order to carry out the claimant's cleaning jobs, the bar and till have to left unattended by the bar worker when he or she was away cleaning.

10. The evidence before the Tribunal that the new till purchased on 20 September 2022 was left open when bar staff were working. The Tribunal found on the balance of probabilities that bar staff would not be in a position to carry out the claimant's cleaning duties, and did not. The respondent employed one person to work at the bar Sunday, Monday and Tuesday, and it was not credible he or she picked up the claimant's ancillary duties because they would have to leave the bar unattended and unsupervised. For the remaining days two people worked behind the bar during Quiz night, Bingo night and the busy Friday and Saturday nights.

11. The respondent employed a total of three employees at various intervals in addition to the claimant; Jan, Kath, Owen (who only helped out behind the bar occasionally) Tev and Will who took on the role of steward after Mr Kennedy had

resigned, although he continued to occasionally work on the bar, The respondent also brought in other people as and when required, including the claimant's named comparator who came in to help on the one occasion covering Halloween night due to shortage of staff.

12. The staff should have been managed by the committee, but they were not. The evidence before the Tribunal was that the committee of twelve unpaid volunteers initially objected to the employment of the claimant, but this was resolved back in 2015 and the claimant continued in her employment unchallenged until the decision to dismiss was reached by the committee. The unchallenged evidence was that any disciplinary process would have gone to the committee to deal with, and there was one instance of a person who resigned before a disciplinary process. The claimant had a clean employment record.

13. The committee included Dave Allen, who had been involved with the club (but always not as a committee member) since the claimant started her employment. Dave Allen lived across the street from Michael Cottington, who had joined the committee on a date in early 2022 and acted in the capacity of treasurer as of September 2022, all on a voluntary basis. Michael Cottington had no experience of dealing with employees as in his own business he used self-employed contractors he described as "on the cards." Michael Cottington was unaware of what was involved for a person to fall under the definition of employee. He and the committee were aware the claimant who provided individual service with no right to substitute, had worked for the respondent without gaps for 7 years as a cleaner using the equipment provided by the respondent and subjected to the instructions of the committee and steward. Had the committee properly addressed their minds to it it was obvious the claimant was an employee with no question of her acting in a self-employed capacity or falling under the definition of a worker.

14. The committee and named respondents should have been aware that no employees had contracts setting out their terms and conditions of employment, and the argument that the claimant (and her family) had reached an agreement that no contract was to be provided as submitted by Mr Hoyle was unfounded and disingenuous. The claimant. Paul Kennedy and Leanne Barnes, referred to by the respondent as a "clan" were not responsible for producing contracts of employment and/or a statement of terms and conditions. This was the responsibility of the committee, and not the claimant who was described by both parties, as a low skilled worker with no qualifications. Apart from the people who act as treasurer and secretary the committee members had no designated role, and at the time no one person was responsible for ensuring the statutory responsibilities in respect of employees was met including compliance with the ACAS Code of Practice.

15. The agreed evidence before the Tribunal was that Leanne Barnes and Michael Cottington were in discussions concerning the handover, and these took place by phone. It is not credible that Michael Cottington genuinely believed Leanne Barnes had sent him the text message on the 3 November 2022 following various committee meetings during which the claimant's dismissal was discussed, instructing him not to communicate verbally or in writing with the claimant. The claimant had been dismissed by letter on the 13 October 2022 in which the respondent confirmed

“it is with regret that the committee now feel it necessary to terminate your employment” and there was no issue with employment status at that stage, and nor was there any reference to the claimant being a worker and not entitled to the one week notice pay offered and never paid. The letter of dismissal clearly acknowledges the claimant was an employee and entitled to notice pay, and so the Tribunal finds. The termination letter also referenced the claimant’s “employment” being terminated to avoid the “inevitability of bankruptcy,” when there was no satisfactory evidence to this effect before the Tribunal. There was no documentary evidence concerning other employees, the reduction in their duties and alleged cutting bar staff by one third, yet bar staff according to the respondent carried out the claimant’s duties. After Will Heaton’s resignation, the evidence was that Laura Mathews, the new steward, was in the words of Michael Cottington, “hungry” and her Mother/sister cleaned without payment. The Tribunal concluded on the evidence before it that the respondent was concerned that there was insufficient work for the bar staff, and there was no suggestion there was insufficient work for the claimant working on her contractual cleaning duties and the Tribunal found the need for a cleaning continued beyond the claimant’s dismissal and the requirements set out in section 130 of the ERA were not met.

16. The claimant responded to her dismissal seeking notice and redundancy pay in a letter dated 17 October 2022 following which the committee replied on the 23 October 2022 and on 3 November 2022 seeking evidence of her employment status, on which topic Leanne Barnes contended she had provided documents in the lever arch files. Will Heaton since January 2022 had been paying the claimant’s wages using the same system that had been followed over the 7 years, including not providing the claimant with payslips. Any reasonable employer would have known and/or taken legal advice and told that the claimant was an employee, and the new committee had the opinion of checking the position with Will Heaton. The issue concerning worker status was a smokescreen used by the respondent to avoid paying the claimant her redundancy and notice pay, in short, denying her access to employment rights including holiday pay to which workers are entitled to in law and using the lack of a statement of terms and conditions of employment to support the respondent’s position.

<u>Law</u>

17. Section 139(1)(b) of the1996 Act provides that for the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to... (b) the fact that the requirements of that business - (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

18. There is a three-stage process, namely: "(1) Was the employee dismissed? If so, (2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so, (3) was the dismissal of the employee...caused wholly or mainly by the state of affairs identified at stage (2)?": see <u>Safeway Stores plc v Burrell</u> [1997]

ICR 523; IRLR 200 endorsed by the House of Lords in Murray & anor v Foyle Meats Ltd [1999] ICR 827; IRLR 562 per Lord Irvine of Lairg LC.

19. Redundancy (as defined in Section 139 above) is a prima facie fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996 ("the 1996 Act"). Section 98(4) provides that:-"*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".

20. The respondent conceded at closing submission stage of the proceedings it followed no redundancy procedures before dismissing the claimant, the dismissal was unfair and the no difference rule in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL applied.

Conclusion applying the law to the facts relating to remedy.

21. With reference to the first issue, namely, 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, the Tribunal found the procedure adopted by the claimant was so fundamentally flawed that it was not possible to assess the percentage chance of the claimant being fairly dismissed.

22. The fundamental approach for assessing fairness in the context of redundancy dismissals was established in the Employment Appeal Tribunal well-known case of Williams v. Compare Maxam Ltd [1982] ICR 156. The EAT held that a reasonable employer would seek to act in accordance with five principals and in the claimant's case not one of the principles were met. In addition, the Tribunal, taking into account the less than credible evidence given by Mr Cottingham that the claimant's duties had been distributed to the Mother and sister of Laura Mathews, the steward, who cleaned daily for no payment, is not satisfied that the definition of redundancy set out in section 139(1) of the ERA was met as the cleaning work continued on a daily basis as it had been when the claimant carried it out. For the reasons given above, it was not credible that bar staff took over the claimant's cleaning duties either, and given the evidence that there were too many bar staff who were underused, the Tribunal cannot be certain that had a fair procedure taken place the claimant, who was not given the opportunity to suggest alternative employment, may have made the case for being kept on as a cleaner and bar staff employee given her experience in helping behind the bar. The Tribunal accepted the claimant's evidence on the balance of probabilities that she would have remained in employment after retirement, and she would have worked the hours necessary behind the bar.

23. In short, the evidence of Mr Cottingham cannot not be relied on, the respondent argued as soon as the claimant requested a redundancy payment and notice pay that she was not an employee but a worker with the sole intention of not

making any payments to her thus avoiding their statutory and contractual obligations. It is also notable that the claimant's dismissal came soon after the resignation of Leanne Barnes. In his witness statement Mr Cottingham refers to the claimant being "engaged" by her family, the club being "in a mess" because of the actions of Leanne Barnes "who was in total control" and the family paid the claimant "twice what other staff were from 2015" when there was no evidence to this effect, the statement unsupported by any documentation and manifestly incorrect. Taking into account the factual matrix, lack of credible evidence given by Mr Cottingham and the flawed dismissal procedure that went to the heart of fairness, the Tribunal is unable to speculate on what may have happened had the committee acted differently, in a fair manner complying with its legal obligations. The Tribunal did not accept Mr Hoyle's submission that it would have taken the respondent 1 week to follow a fair procedure. It was clear from the correspondence sent to the claimant the respondent contended she was a worker without any basis, and the Tribunal finds on the balance of probabilities that it was more unlikely than not that a fair procedure would not have been followed in the foreseeable future.

24. With reference to the second issue, namely, if so, should the claimant's compensation be reduced, the Tribunal found that it was not just and equitable in the circumstances of this case to have reduced the claimant's compensation.

25. With reference to the third issue relating to the compensatory award and how much it should it be, the Tribunal decided the claimant suffered a loss of earnings directly as a result of the dismissal. As at the effective date of termination she was near state retirement age and reasonably she believed it was more difficult for her to find alternative employment given her age. Mr Hoyle submitted that the claimant should not be discriminated against on the grounds of her age in the job market place, suggesting she had no basis for believing it would be difficult for her to find alternative employment, especially when retailers such as Tesco, Asda and Lidl employed older employees. The claimant, who believed correctly that her cleaning job continued as the club could not open without the premises being cleaned on a daily basis believed the real reason for her dismissal was age. The age discrimination claim was withdrawn on the claimant's behalf, nevertheless it was a factor when the claimant came to seek alternative employment, coupled with the response of one large retail company who did not offer her employment because she could not say whether she would continue working with it after state retirement age, the claimant having been reluctant to commit because she did not know if she would like working in a supermarket.

<u>Mitigation</u>

26. With reference to the issue of mitigation, namely has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job, Mr Hoyle acknowledged that the evidence in the bundle was deficient. In short, the respondent produced no evidence whatsoever that there was suitable vacancies available for the claimant to apply for near to where she lived.

27. The claimant does not have a car and is reliant on public transport. She worked approximately 2 hours a day when cleaning for the respondent and it would not be unreasonable for the claimant to look for work based in close vicinity to her

home, which she did when she approached four retail supermarkets. Mr Hoyle's argument that the claimant should pay for and travel by public transport taking over three quarters of an hour to the nearest town was not reasonable taking into account she was on minimum wage and worked part time i.e. 2 hours. The claimant was entitled to seek work within the geographical area in which she lived, and despite Mr Hoyle's submissions on Brexit leading to numerous vacancies including in hotels and at Haydock race course, the respondent produced no evidence to this effect suggesting in effect that the Tribunal should infer such vacancies existed when there was no evidence on which the Tribunal could conclude the claimant would have been able to find work.

28. It is undisputed that the claimant stopped looking for work when her application for Universal Credit was refused. The claimant signed on, went into the job centre and was provided a list of vacancies and she kept a log which was not disclosed to the respondent and omitted from the bundle. By February 2023, the claimant's application for Universal Credit was rejected. There was no evidence that this was because the claimant had not taken sufficient steps to find employment, a submission made by Mr Hoyle as the basis for his argument that the claimant should not receive a loss of earnings award.

29. The claimant's evidence was that she did not apply for cleaning jobs because she saw none advertised, and the respondent has not produced any documentation to show otherwise. When her Universal Credit application was refused the claimant no longer looked for work between an unknown date in February 2023 to 15 June 2023 when she received her state pension. After that date the claimant did not look for work.

30. In cross examination the claimant conceded when asked whether it was reasonable for the respondent to "bank roll" her loss of earnings to June 2023 that it was not. The Tribunal considered whether, taking into account the claimant's concession, she had failed to mitigate her loss by seeking alternative employment. concluding that it did not have sufficient evidence to reach this view taking into account the factual matrix in this case, including geographic area and the claimant's age. It is an unfortunate feature in the job market that older people have greater difficulty obtaining new employment, hence the requirement for statutory protection. The claimant was a number of months from retirement age and this, coupled with the fact she relied on public transport and did not have a car, would have disadvantaged her in the labour market.

31. With reference to the issue, namely, what financial losses has the dismissal caused the claimant, the Tribunal was satisfied on the balance of probabilities the claimant would have worked for the respondent beyond her state retirement age as it was a job she enjoyed, she never had a sick day and was in good health, and had attended the club to socialise out of working hours which stopped immediately she was dismissed. The respondent has not brought to the Tribunal's attention any evidence to the contrary. The respondent employed people who were older than the claimant behind the bar, and no discussion ever took place with the claimant as to whether she was thinking about retirement and nor did she offer up this information at any stage during her employment.

32. The statutory cap of fifty-two weeks' pay applies. The period of loss if from the effective date of termination 13 October 2022 to 12 October 2023, the maximum period the Tribunal can award. Mr Rochford trying to compromise and find middle ground with Mr Hoyle, invited the Tribunal to award 75 percent of the 12 month period as opposed to the entire period. The Tribunal concluded, taking into account all the circumstances of this case, that it was just and equitable to order damages for loss of earning for the entire 12 month period. The financial losses are calculated by the agreed weekly rate £102.92 x 52 weeks totalling £5351.84, a figure agreed with the parties.

Loss of statutory rights

33. The claimant is entitled to an award following her unfair dismissal reflecting her loss of continuity of employment and inability to bring an unfair dismissal case until she has 2 years continuity of service in a new job. Mr Hoyle submitted that there should be no award on the basis that the claimant had no intention of returning to the workplace as she retired in order to draw state pension. For the reasons set out above made in respect of loss of earnings which the Tribunal does not intend to repeat, it does not agree. The fact that the claimant is in receipt of pension does not necessarily follow she will not work in the future, and the claimant's evidence that she would have remained working for the respondent beyond retirement was accepted by the Tribunal. The claimant's representative originally argued for a payment of £721 and during oral submissions indicated that the claimant would accept £500 loss of statutory rights. Taking into account the factual matrix in this case, her rate of pay, the value of the amount to the claimant and the length of the claimant's service the Tribunal concluded that it was just and equitable to order the sum of £450 loss of statutory rights.

ACAS Uplift

34. With reference to the issue, namely, did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply, it is undisputed between the parties that it did.

35. With refence to the issue, namely, did the respondent or the claimant unreasonably fail to comply with it by failing to follow any procedure whatsoever as conceded on behalf of the respondent, the Tribunal found it was unreasonable on the part of the respondent only. The claimant, who was not informed of her right to appeal the dismissal, did not unreasonably comply with it.

36. With reference to the issue, namely, if so is it just and equitable to increase or decrease any award payable to the claimant, the Tribunal concluded it was just and equitable to increase the award by 25%, the maximum taking into account the respondent's default and how they dealt with the claimant's dismissal and aftermath particularly the correspondence aimed at avoiding any payment to the claimant. Mr Hoyle submitted that there should be no uplift because there were clear requests made to the claimant by the respondent concerning her employment status. It is notable that the requests for information were sent to the claimant after she had been summarily dismissed with one week's notice that has remained unpaid to date. The respondent's request for information had nothing to do with the dismissal

process because the decision had already been made, and ultimately the respondent paid nothing, resisted paying the claimant any money and used the lack of an employment contract as a smokescreen to avoid payment in the future. Finally, as found by the Tribunal above, there was no satisfactory evidence the claimant had failed to cooperate after termination of her employment, Leanne Barnes had handed over a voluminous number of documents including up-to-date information in the updated accounts, the respondent having entered into new contracts with an accountant and payroll provider. In addition, Will Heaton had acted as steward since January 2022 and he was fully involved in paying staff, dealing with hours and forwarding the information to the treasurer, Leanne Barnes, an unpaid volunteer who continued to assist after she had formally resigned.

Compensation under S.38 Employment Act 2002

37. Section 38 EA 2002 states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA — Ss.38(1)–(3).

38. Where the tribunal finds that the employer breached its duty to provide full and accurate employment particulars, it:

•must award the ‘minimum amount’ of two weeks’ pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and

•may, if it considers it just and equitable in the circumstances, award the ‘higher amount’ of four weeks’ pay — S.38(2)-(5).

39. Mr Hoyle submitted the claimant should not receive any award under this head on the basis that she had consented to a statement of terms and conditions not being provided, and it was down to Mr Kennedy in his capacity as steward and Leanne Barnes as treasurer to provide the statement of terms and conditions of employment. The Tribunal did not agree and refers to its findings of facts above. It was not Mr Kennedy’s responsibility and it is notable that in the minutes committee meeting 28 September 2022 that the employment of staff was “Laura’s sole responsibility” and at the 11 October 2022 meeting that “staffing, contracts, hours, issues [were] with committee members.” Contracts were an agenda item, and the respondent did not produce any earlier minutes up and including the claimant’s start date when contracts were expressly minutes. The responsibility for ensuring employees were provided a statement of terms and condition and complying with section 1 of the ERA was with the committee and nobody else.

40. It is also notable that at the 11 October 2022 meeting, when the claimant’s dismissal was decided, there is a reference to three hours and days worked for a variety of staff and to all staff being aware wages will be paid through the books and there will be no cash in hand payments. This entry reinforced the Tribunal’s conclusion that the committee members were well aware of how employees were paid, including the claimant, and the lack of contracts/terms and conditions of employment. Mr Cottington discussed with Leanne Barnes whether bar staff were

entitled to holiday pay during one of their telephone conversations, and she confirmed that they were.

41. Taking into account the culpability of the respondent and its small size, the Tribunal concluded it was just and equitable to award the maximum of 4 weeks on the basis that the respondent's failure had led to it using the lack of a statement of terms and conditions of employment as a sword and shield against the claimant when it attempted to avoid paying her contractual and statutory entitlement on the basis that she was a worker, in circumstances where the claimant was clearly an employee on any analysis, not least the fact that she turned up to work 6-days a week for over 7-years, for which she was paid, used the respondent's equipment and if she purchased bleach handed in the receipt and was repaid, was subject to the control of the committee and there existed the mutuality of obligation of personal service with no right to substitute. Had the respondent committee provided a statement of terms and conditions of employment in the knowledge that the claimant was an employee as set out in the dismissal letter which gave 1 weeks' notice as opposed to 7 weeks (which remained unpaid) the stress, time and expense of the claimant proving she was in fact an employee and not a worker, would have been avoided. The Tribunal concluded that despite the small size of the committee (12 members) the failure to follow the ACAS Code was unreasonable.

42. Mr Hoyle submitted that the fault lay with the claimant on the basis that had she provided the respondent with the information they requested about her employment, the matter would have been resolved. The Tribunal did not agree for the reasons already stated. It is also not reasonable to excuse current committee members from culpability on the basis that some of the committee members had changed. There should have been minutes that dealt with staffing issues, employment contracts and/or a statement of terms and conditions of employment and none were discussed by the committee throughout the claimant's employment however that committee was made up.

43. In conclusion, by admission, the claimant was unfairly dismissed and her claim for unfair dismissal is well founded and is dismissed. The respondent is ordered to pay to the claimant compensation for unfair dismissal (consisting of a basic award £1080.66, compensatory award consisting of loss earnings £5351.84, loss of statutory rights £450 totalling £5801.84 and ACAS uplift at 25% of £1450.46 totalling £7252.30.

44. The claimant's claim for a redundancy payment is subsumed by the basic award.

45. The claimant's claim for unlawful age discrimination brought under section 13 0f the Equality Act 2010 is dismissed on withdrawal by the claimant.

46. The claimant was dismissed without notice and her claim for wrongful dismissal is well-founded. By consent, the respondent is ordered to pay to the claimant damages for wrongful dismissal (notice pay) in the sum of £720.44. There are no lawful deductions to be made.

47. The claimant's claim for unpaid accrued holidays brought under the Working Time Regulations is well-founded. By an agreement reached between the parties the respondent is ordered to pay to the claimant the sum of £809.26 net. There are no lawful deductions to be made.

48. The respondent failed to provide a statement of terms and conditions of employment in accordance with section 1 of the ERA and the respondent is ordered to pay to the claimant £411.68 (£102.92 x 4).

49. The recoupment regulations do not apply.

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20.12.23 Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

29 December 2023

FOR THE SECRETARY OF THE TRIBUNALS