



EMPLOYMENT TRIBUNALS

Claimant: Donna Pendry
Respondent: The Over 21 Club
Heard at: London South Employment Tribunal, by CVP
On: 22 and 23 April 2024
Before: Employment Judge Yardley (sitting alone)

Representation

Claimant: In person
Respondent: Mrs Kaur-Singh, Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded. The Claimant was unfairly dismissed.
2. There is a 50% chance that the Claimant would have been fairly dismissed in any event.
3. The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 10% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.
4. The Claimant is entitled to a basic award of **£1,956.00** calculated as set out in the reasons below.
5. The Claimant is entitled to a compensatory award of **£992.75** calculated as set out in the reasons below.
6. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. The total monetary award payable is **£2,948.75**. The prescribed element is **£992.75**. The period of the prescribed element is 28 September

2023 to 23 April 2024. The difference between the total monetary award and the prescribed element is **£1,956.00**.

7. The effect of the Recoupment Regulations is that the Secretary of State may recoup the Universal Credit or the additional Universal Credit paid to the Claimant prior to the hearing (or the prescribed element if less) by serving a recoupment notice on the Respondent within 21 days of the date this judgment is sent to the parties or as soon as practicable thereafter. The effect of such a notice is that the Respondent must pay the recoupable amount to the Secretary of State and the balance of the prescribed element to the Claimant. The Respondent is not obliged to pay the prescribed element of compensation to the Claimant until the Secretary of State has served a recoupment notice on it, or has notified it in writing that it does not intend to do so.

REASONS

Introduction

1. Ms Pendry (**'the Claimant'**) was employed by the Over 21 Club (**'the Respondent'**) from 9 September 2017 until her dismissal without notice on 28 September 2023 as an Assistant Manager at the Club.
2. The claim concerns a complaint of ordinary unfair dismissal contrary to sections 94 and 98 of the Employments Rights Act 1996.
3. The Respondent contests the claims. It says that the Claimant was fairly dismissed for misconduct because the Claimant had removed stock without authority or any reasonable excuse. It was therefore entitled to terminate her employment without notice because of her gross misconduct.

Procedure, Documents and Evidence

4. The claimant was unrepresented and appeared as a litigant in person. The respondent was represented by Mrs Kaur-Singh. The Respondent called evidence from Mr Gary Coward, Club Chairman, Mrs Julie Rogers, Club Treasurer and Mr Robin Dyson, CCTV Operator.
5. I considered the documents from an agreed bundle consisting of 220 pages provided by the Respondent together with witness statements from Mr Coward, Mrs Rogers and Mr Dyson. The Claimant had not provided a witness statement and accordingly it was agreed that the contents of the ET1 would stand as her evidence in chief.
6. After the evidence was called, I heard brief closing submissions from both parties.

7. Judgement on liability and remedy was given orally at the hearing, following which the Respondent requested written reasons.

The Issues

8. The list of issues was agreed at the start of the hearing as follows:
- (i) Was the dismissal fair or unfair applying the band of reasonable responses?
 - (a) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
 - (b) If so, were there reasonable grounds for such a belief?
 - (c) Did the Respondent carry out a reasonable investigation by the time of forming that belief?
 - (d) Did the Respondent act reasonably in treating the reason for dismissal as sufficient to dismiss the Claimant in the circumstances?
 - (ii) If the dismissal was unfair, was there a likelihood of the Claimant being dismissed in any event?
 - (iii) Should there be a deduction for contributory conduct on the part of the Claimant?
 - (a) Was there culpable or blameworthy conduct?
 - (b) Did the conduct actually cause or contribute towards the dismissal?
 - (iv) Was there any failure to comply with a provision of the ACAS Code of Conduct?
9. The principal challenges to the fairness of the dismissal made by the Claimant were that:
- (i) the dismissal was unfair because the theft was inadequately investigated by the Respondent and the disciplinary and appeal hearings were procedurally unfair;

- (ii) that the Claimant's actions were not misconduct because she had authority to take the items and other members of staff routinely took home items of stock that was paid for at a later date; and
- (iii) that the real reason for her dismissal was due to the fact that she had made various complaints about Mr Coward which had been ignored.

Findings of Fact

10. The Claimant was employed by the Respondent from 9 September 2017 until her dismissal without notice on 28 September 2023.
11. The Respondent is a private members social club based near Croydon with 585 members. The services supplied by the Respondent include providing alcohol, charity fundraisers and family support to members.
12. The Club is run by a committee ('the **Committee**') comprising of 13 members who are all volunteers.
13. The Club is covered by approximately 26 CCTV cameras both inside and outside the premises. These cover multiple areas including the bar, the kitchen and the tills.
14. On 20 July 2023, the Claimant was observed by Kevin Foreman, a member of the Committee, leaving the club carrying a box which he believed to contain drinks on account of the fact that he could hear them clinking.
15. In August 2023, Mr Foreman brought the incident to the attention of the other Committee members. He questioned whether the items the Claimant had taken had been paid for.
16. Mr Dyson was asked to review the CCTV footage from the date of the alleged offence to substantiate what Mr Foreman had observed. In his witness statement, Mr Dyson said that the CCTV showed the Claimant "*removing stock from the cellar which was two small bottles of prosecco and at least 15 cans for assorted soft drinks*". It also showed her taking the box to her car. Mr Dyson was unable to find any evidence that she had paid for the items.
17. The Claimant was suspended on 1 September 2023 while an investigation took place. The Respondent engaged Peninsula to conduct the investigation.
18. As part of the investigation, Samantha Marshall, from Peninsula interviewed the following people:

- (i) Taryn Price, the Manager;
- (ii) Kevin Foreman, Committee Member;
- (iii) Julie Rogers, Club Treasurer;
- (iv) Cindy Merrit, Assistant Manager; and
- (v) Robin Dyson, CCTV Manager.

19. The Claimant was also invited to meet with Ms Marshall. She was sent a letter dated 5 September 2023 asking her to attend an interview the following day, 6 September 2023, at 12.00pm.

20. The evidence regarding whether the letter was actually delivered to the Claimant was inconclusive. During cross examination, Mr Coward said that he had hand delivered the letter to the Claimant's house in the early afternoon of 5 September 2023 as she lived a short distance from the Club. However the letter did not contain an address and the Claimant denied ever receiving the letter. She said that had she received the letter she would have attended the meeting and I find it more likely than not that the Claimant was not aware of letter inviting her to the meeting but that Ms Marshall proceeded with her investigation on the basis that she reasonably believed that Mr Coward had delivered the letter by hand.

21. The following day Mr Coward contacted the Claimant regarding her non-attendance at the meeting via Facebook. The Claimant subsequently found an e-mail from Ms Marshall, sent on 6 September 2023 as 12.26pm inviting the Claimant to respond to a list of questions regarding the investigation and provide details of anything else that should the Claimant wished to be considered.

22. The Claimant replied to the questions promptly on 7 September 2023 at 20.38. Her responses are set out pages 150 – 152 of the bundle and included the following relevant matters:

- (i) The Claimant accepted that on 20 July 2023, she had removed a box containing two small bottles of Prosecco and some cans of drink from the Club.
- (ii) The Claimant said she had asked her manager, Taryn Price, permission to take the drinks because that she didn't have the money or her bank card on her to pay. She said that she would pay for the drinks when she was next in and would have paid in cash with her tips.

- (iii) The Claimant said that Ms Price had always let her and other members of staff take drinks home and pay for them on a later shift and that Ms Price also did same. The Claimant said she always sought permission first.
- (iv) The Claimant explained that the prosecco had been paid for by members. She said that one had been purchased on a members night in February 2023 and the other was bought for her by a member. She said the reason she had only taken the bottles in July was because she was going out that weekend.
- (v) The Claimant said that she would have written down the cans she had taken and put a note in her tip jar as a reminder to pay when she was next in. She said she would have used tips as and when she got them to pay for the drinks and would normally print a receipt with her name on and put a copy in her tip jar in case questions are asked.
- (vi) The Claimant believed that the paperwork was still in the tip jar. However as the Claimant had not been into the Club since the suspension she was unable to confirm this.
- (vii) The Claimant also said that two Committee members had a personal problem with her that has not been resolved. She said that she raised grievances in writing but that nothing had been done.
- (viii) The Claimant said that she could provide evidence that other members of staff had drunk alcohol without payment and that others had also taken drinks and paid afterwards.
- (ix) The Claimant mentioned that she would not have missed the original meeting arranged by Ms Marshall if she had known about it as she wanted to have her input. She also said it was strange the Mr Coward had messaged her about the meeting after it had happened but no-one had contacted prior to the meeting despite the Committee having her contact details.

23. Following completion of the investigation, Ms Marshall prepared a report dated 13 September in which she recommended that the Claimant be invited to attend a disciplinary hearing.

24. The Claimant was invited to attend a disciplinary meeting on 14 September 2023. The invitation set out the allegations and advised that "*if proven, this would represent a gross breach of trust and may be considered gross misconduct*". The letter did not include that dismissal was a potential sanction,

nor did it mention the Claimant's statutory right to be accompanied at the meeting.

25. A disciplinary hearing was conducted on 19 September 2023. The meeting was chaired by Kerry Tipple of Peninsula and the Claimant was unaccompanied.
26. During the hearing the Claimant accepted that she had taken the items but stated that this often happens and they are paid for on the next shift. She explained that most staff do this. The Claimant was aware that drinks could be purchased directly from the club but this was only if you wanted to buy a whole case rather than individual drinks.
27. As part of the disciplinary hearing, Ms Tipple spoke to Amelia Hewett, who also worked on the bar. Ms Hewett said that on rare occasions staff have been allowed to take a drink and pay another day, usually the next day or next shift, and leave a note with money on the side if the till has already been cashed up.
28. Ms Tipple noted that there was evidence to suggest that some staff took drinks and paid on a later date and put this to the Respondent. The Respondent's reply did not specifically answer the question and merely stated that no drinks or stock had been taken by Ms Hewett.
29. Following the meeting Ms Tipple prepared a report which included a recommendation that having given full and thorough consideration to the information, that the Claimant should be dismissed from her employment without notice.
30. The Claimant was dismissed for gross misconduct on 28 September 2023. The dismissal letter stated that *"You took part in activities which caused the company to lose faith in your integrity namely, but not limited to, that you have stolen company property, further particulars being: on 20 July 2023 you removed stock/property namely multiple bottles of alcohol, valued at approximately £24.20, from the company's premises without authority or reasonable excuse for your own use or for the use of another. These allegations represent a gross breach of trust."*
31. The Claimant appealed against her dismissal in writing to Mr Coward the same day. She stated that she disagreed with the way the disciplinary action was taken and that the outcome was too harsh. She also stated that she had additional evidence that should be considered and asked to be accompanied at the appeal by Amelia Hewlett.

32. The Claimant was not invited to attend an appeal meeting, however the appeal was considered on 10 October 2023 by the same members of the Committee as those that determined the original disciplinary decision, at which the decision to dismiss was upheld.

The Law

33. The relevant statutory provisions are to be found in sections 94 to 98 Employment Rights Act 1996.

- (i) Section 94 ERA 1996 confers on employees the right not to be unfairly dismissed. The Respondent admits that it dismissed the Claimant within section 95(1)(a) ERA 1996.
- (ii) Section 98 ERA 1996 deals with the fairness of dismissals. The employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. Misconduct is a potentially fair reason under section 98(2)(b) ERA 1996.
- (iii) Section 98(4) ERA 1996 provides that the determination of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 this shall be determined in accordance with the equity and the substantial merits of the case.

34. Following the guidance in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827** the Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on genuine grounds and after carrying out a reasonable investigation. In deciding whether the employer acted reasonably or unreasonably within section 98(4) ERA 1996 the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances in all aspects of the case, including the investigation, grounds for belief, penalty imposed and procedure followed. It is immaterial how the Tribunal would have handled the events or what decision

35. I do not have to decide whether, in fact, the Claimant committed theft by taking the drinks and indeed I make no findings in relation to this.

36. It is also immaterial how I would have handled events or what decisions I would have made and I must not substitute my own view for that of the

reasonable employer: **Iceland Frozen Foods Limited v Jones 1982 IRLR 439.**

37. In considering procedural fairness I take into account all of the circumstances of the case, including the size and administrative resources of the employer and the principles of natural justice, including: whether the employee knew the case against her; whether there has been undue delay at any stage; whether the employee has had a chance to put her case; whether the employee is given a fair hearing and has the opportunity to be accompanied to the hearing; whether, where possible, the disciplinary hearing is held by independent third parties with sufficient seniority; and whether the employee is given a right of appeal.

Conclusions

Reason for Dismissal

38. In this case, it is not in dispute that the reason that the Respondent dismissed the Claimant was because it believed that the Claimant was guilty of gross misconduct by reason of theft. Misconduct is a potentially fair reason for dismissal under section 98(2)(b). The Respondent has therefore satisfied the requirements of section 98(2)(b)

Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

39. I have considered the Claimant's contention that the Respondent did not genuinely believe that she was guilty of misconduct and the allegation was due to a personal vendetta against her.

40. Whilst the bundle contains various copies of correspondence regarding the conduct of the Committee, the bundle only appears to include a one recent letter dated 3 August at page 86 where the Claimant makes a direct complaint about Mr Coward but this postdates the alleged misconduct. Accordingly, I find that the Respondent had a genuine belief in the Claimant's misconduct.

If so, were there reasonable grounds for such a belief?

41. Reminding myself that it is not for me to put myself in the shoes of the employer, I find that there were reasonable grounds for the Respondent's belief that the Claimant had committed misconduct for the following reasons:

- i. the Claimant has never denied taking the items and has been unable to produce evidence that the items had been paid for.

- ii. the Respondent was influenced by the eyewitness account from Kevin Foreman which was confirmed by the CCTV footage showing the Claimant leaving the premises carrying a box.
- iii. the Respondent relied on the independent investigation carried out by Peninsula.

42. The Claimant says that the Respondent did not have reasonable grounds on the basis that it was common for members of staff to take drinks and pay for them at a later date. However, at the time that the belief was formed, which was almost 2 months after the alleged incident, no evidence that the Claimant had ever paid for the drinks had been found.

Did the Respondent carry out a reasonable investigation by the time of forming that belief?

43. The Respondent in this case is a fairly small organisation, employing a handful of people and operating at a single site. The Committee is made up of volunteers and an external company was engaged to carry out the initial investigation, hold the disciplinary process and make recommendations as to any follow up course of action.

44. However, notwithstanding this, I find that a reasonable investigation was not carried out by the Respondent and there were a number of serious deficiencies in the extent and quality of the investigation and the procedure. and therefore that the decision to dismiss was outside the range of reasonable responses for the reasons set out below.

45. The Claimant was given less than 24 hours' notice to attend the initial investigation meeting carried out by Peninsula. Further no attempt was made to follow up with the Claimant to check she was aware of the meeting even though she lived only a few hundred yards from the Club and the Committee had other ways of contacting the Claimant. I do not find that this is a reasonable amount of notice to give the employee given the serious nature of the allegations and that her contribution to the investigation at this stage may have helped unearth evidence that the items had been paid for.

46. Whilst the Claimant was subsequently provided with an opportunity to put forward her views via email to the Peninsula, the report dated 13 September 2023 does not appear to have given any consideration to the Claimant's representations. Paragraph 8 of the report only references that Ms Price, Mr Foreman, Mrs Rogers, Ms Merrit and Mr Dyson were spoken to as part of the investigation.

47. In the Claimant's email to Peninsula of 7 September 2023, the Claimant offered an alternative explanation for what had happened. She suggested that a copy of the receipt evidencing that she had paid for the items was in her tip jar which she had not had access to since her suspension. The report does not make any reference to this. I have heard today that the Club is covered by multiple CCTV cameras and the quality of the footage is good enough to be able to identify a 5 pence piece in someone's hand. I have also heard that the Claimant's tip jar was found with only her membership card in it. Accordingly, I find it would have been reasonable to check the CCTV footage to ascertain what happened to the papers in the Claimant's tip jar to confirm or refute her assertions. This may well have put an end to the matter and would not have taken long to carry out.
48. The Claimant asserted that it was usual for staff to routinely take drinks and pay for them at a later date and had evidence of the same. This accords with the evidence of Ms Hewett at the disciplinary meeting. It does not appear that this evidence was properly considered as part of the investigation or the disciplinary meeting and I find that a reasonable employer would have determined from other members of the bar staff what they understood the Club policy to be and where this policy could be found.
49. The Claimant's next shift following the incident was on 25 or 26 July 2024. This period does not appear to have been covered by the till receipts that were reviewed as part of the investigation. The Claimant can also not be sure if she paid by cash or card. Whilst it appears that Ms Rogers did her best to review the card transactions that matched the Claimant's bank card, it is not clear whether all of the cash transactions in the week following the incident were reviewed.
50. The letter dated 14 September 2023 inviting the Claimant to the disciplinary hearing does not comply with paragraphs 9 or 10 of the ACAS Code. It does not advise the Claimant that summary dismissal is a potential outcome or that she could be accompanied at the meeting which is her statutory right.
51. The decision to dismiss the Claimant and the appeal was made by the same group of individuals on the Committee. Whilst the Club is a small employer with limited resources and the Committee members are volunteers, there were at least 12 members of the Committee and therefore it would not have been unreasonable for a subset of members to have considered the original decision and another subset to consider the appeal.
52. Further, notwithstanding that the Claimant clearly expressed a wish to appeal the decision, the Claimant was not afforded the opportunity to attend an appeal hearing or be accompanied by a colleague as was also her statutory right.

53. In summary, for these reasons I find that the Respondent has failed to demonstrate that it carried out a reasonable and proportional investigation and has also failed to comply with the ACAS Code when it would have been reasonable to do so. Accordingly the deficiencies in the Respondent's investigation make this dismissal unfair. Further, whilst a proper investigation may have concluded that the Claimant had taken the drinks without making payment, it was not inevitable that they would do so, and therefore the decision to dismiss was outside the band of reasonable responses.

Did the Respondent act reasonably in treating the reason for dismissal as sufficient to dismiss the Claimant in the circumstances?

54. Although the Respondent's belief was genuinely held, I do not consider that it was reasonably held. The flawed process adopted in respect of both the investigation and procedure meant that the Respondent did not gather evidence which was potentially highly relevant to whether or not the Claimant had in fact been guilty of misconduct

55. In all the circumstances, the deficiencies were such that the Respondent could not have had a reasonable belief in the Claimant's guilt because of the unreasonable process which led to that belief.

Conclusion

56. Having considered all of the evidence before me and the full submissions made by the parties, I find that the claim for unfair dismissal is well founded.

57. I must therefore go on to consider whether there should be any adjustments to the Claimant's award.

If the dismissal was unfair, was there a likelihood of the Claimant being dismissed in any event?

58. In accordance with the principles in **Polkey -v- AE Dayton Services Ltd [1987] UKHL 8**, I must consider whether any adjustments should be made to the compensatory element of the Claimant's award on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed.

59. Mrs Kaur Singh sought briefly to persuade me that there should be a reduction if I found a procedural failing, on the basis that there was still a serious and substantial finding of misconduct, namely theft.

60. Given it is impossible with any certainty what evidence may have been unearthed by a proper investigation, and what if any conclusions a different set of committee members hearing an appeal may have found, I consider that there is a 50% chance that the Respondent would have still concluded that the Claimant had committed the alleged misconduct and would still have been dismissed.

Should there be a deduction for contributory conduct on the part of the Claimant?

61. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

62. Ms Kaur Singh did not address me on the issue of contributory fault but In determining whether any deduction should be applied to either part of the Claimant's award as a result of contributory fault, I must first identify what conduct on the part of the Claimant could give rise to contributory fault. I must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.

63. The only conduct that I can identify which could give rise to contributory fault are the Claimant's actions of taking the drinks without paying for them. However if the Claimant's explanation that she did pay for them on the following shift is accurate, and is something which is permitted by the Club on occasion, (and the insufficiency of evidence from the Respondent) then she is entirely innocent and cannot be said to be culpable, blameworthy or unreasonable. Accordingly, I make no adjustment for contributory fault.

Was there any failure to comply with a provision of the ACAS Code of Conduct?

64. Neither party has addressed me on whether there was a failure to comply with the ACAS Code of Conduct but I have nevertheless considered it.

65. Whilst the Respondent followed a process of suspension, investigation and disciplinary hearing, it failed to properly carry out an appeal hearing. Further the Claimant was not advised that she could be accompanied or represented at the disciplinary hearing and despite asking to be accompanied in her letter of appeal, was not afford the opportunity to do so either at the appeal hearing.

66. The Claimant was also not given the opportunity to attend an appeal hearing. Further no notes are available of the matters considered at the appeal, and the Respondent has failed to provide any evidence at all that the appeal was carried out in accordance with paragraphs 9 and 10 of the ACAS Code.

67. Paragraph 27 of the ACAS Code says that wherever possible an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. Given that the Claimant had, prior to suspension, made a number of complaints about Mr Coward, Mr Coward was involved in both the original decision to dismiss as well as the appeal and it was possible for a different subset of impartial Committee members to deal with the appeal, I find that the Respondent has not complied with the ACAS Code when it would have been reasonable to do so.
68. For these reasons I find it is just and equitable to impose an uplift of 10% on the Respondent for breach of the ACAS Code.

REMEDY JUDGEMENT

69. Having given judgment on liability, I then considered the issue of remedy. The Claimant requested re-instatement, or alternatively compensation, as set out in her schedule of loss. The Respondent submitted that remedy should be limited to monetary compensation and re-instatement would not be practicable.
70. I heard evidence from the Claimant and both parties made brief oral submissions.
71. The Claimant's date of birth is 8 January 1985. She commenced employment with the Respondent on 9 September 2017. The Effective Date of Termination (EDT) of her employment was on 28 September 2023 at which time the Claimant was 38 years old and she had completed 6 years of continuous employment. It was agreed by the parties that at the Claimant's gross weekly pay was £326.00 and the Claimant's net weekly pay was £230.00. Since dismissal, the Claimant said she has been in receipt of benefits.
72. The Claimant submitted that it would be possible to continue in her old position. She refuted any allegation that she had taken items from the Club without paying for them and reiterated that it was common practice to pay for any drinks taken on a later shift. She accepted that there are ongoing personal issues between herself and some of the Committee Members but did not consider that this would interfere with her work on the basis that she typically works on her own and gets on well with other employees and members of the club.

73. The Respondent strongly opposed reinstatement. Mrs Kaur Singh submitted that there had been a breakdown of trust and confidence between the Claimant and the Respondent. She also said that the Committee were aware of other personal issues with other employees and club members and there was a significant risk that these employees and/or members would leave the club if the Claimant was reinstated. The Respondent also asserted that the position of Assistant Manager was no longer available as the Club no longer requires two Assistant Managers.
74. Since the date on which her employment was terminated, the Claimant has openly stated that she has not found or sought to find any alternative employment since her dismissal some 7 months ago. She said the reason for this was because she wanted to await the outcome of today's hearing before seeking new employment and suffers with anxiety which impacts her ability to find work. The Claimant did not provide any evidence of this.
75. Mrs Kaur-Singh submitted that there is currently a much publicised need for workers in the hospitality sector, and that it would be relatively easy for the Claimant to find alternative employment. Accordingly she submitted that any loss of earnings should be limited to 6 weeks following the date of termination.
76. In her schedule of loss, the Claimant sought loss of wages and tips from the date of dismissal to the date of this remedy hearing and beyond. The Claimant stated that she earned tips of between £300 to £600 and on cross-examination she said that this represented her total estimated tip earnings over the 12 week period following the date of dismissal. The reasons for the large range was because this included the holiday period in November and December when generally tips are higher.
77. Under section 113 of the Employment Rights Act 1996 the Tribunal may make an order for reinstatement or re-engagement as it may decide.
78. Section 116 provides, among other things:
- (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—*
- (a) whether the complainant wishes to be reinstated,*
- (b) whether it is practicable for the employer to comply with an order for reinstatement, and*
- (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.*

(2) *If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.*

(3) *In so doing the tribunal shall take into account—*

(a) *any wish expressed by the complainant as to the nature of the order to be made,*

(b) *whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and*

(c) *where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.*

(4) *Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.*

79. I also had regard to the case of **Port of London Authority v Payne and Others [1993] 11 WLUK 35**, in that the test to be applied when reinstatement or re-engagement are sought is not whether it is *possible* to reinstate or to re-engage the claimant, but whether it is *practicable* to do so. When considering whether reinstatement or re-engagement are practicable, the tribunal must give due consideration to the commercial judgement of the respondent.

80. It was clear that the Claimant wished to be reinstated in her old role. The Claimant still has the skills to undertake the work and did not consider that any personal issues would impact her ability to continue in that role.

81. The Respondent on the other hand said that the role of Assistant Manager was no longer available. Further, it is clear that the Committee remains convinced that the Claimant is guilty of misconduct and have undoubtedly lost trust and confidence in the Claimant. I therefore find that it would be difficult for the Respondent to welcome back the Claimant to the workplace and it is unlikely that re-instatement is capable of being carried into effect with success.

82. I have also considered whether re-engagement is practicable and I find that it is not. The Respondent is a small member-only club with limited, if any, opportunities for paid employment outside of the bar staff.

83. If no order is made for reinstatement or re-engagement, section 112(4) ERA 1996 requires that I turn my attention to the question of compensation.

84. Section 118 provides that where a Tribunal makes an award for unfair dismissal the award shall consist of a basic award and a compensatory award.

85. Section 119 provides that the amount of the basic award shall be calculated by:

- i. Determining the period, ending with the effective date of termination, during which the employee has been continuously employed;
- ii. Reckoning backwards from the end of that period the number of years employment falling within that period; and
- iii. Allowing the appropriate amount for each of those years of employment

86. The relevant appropriate amount in relation to the Claimant means one weeks' pay for each year of employment in which the employee was not between the ages of 22 and 40.

87. The Claimant is therefore entitled to a basic award of £1,956 calculated as follows:

$$6 \times 1 \times \text{£}326.00 = \text{£}1,956$$

88. Section 123 provides that 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 Claimant in consequence of the dismissal in so far as that loss is attributable to the action taken by the employer.

89. Section 123(4) provides that the Claimant is under a duty to mitigate their loss by making reasonable efforts to obtain alternative employment.

90. The Claimant has been honest in that she had not sought to find alternative employment, and therefore it was not difficult to find that the Claimant has failed to mitigate her losses. Whilst I note that the Claimant has said that she suffers from anxiety which prohibits her ability to find work, no evidence was provided of this. In any case, the Claimant also sought re-instatement which indicates that she is still capable of carrying out such work.

91. I am also satisfied following a simple search of local job listings for bar staff that there are a number of potentially suitable job opportunities. Indeed the likelihood is that there were also a great number of vacancies for bar staff over the holiday period from November 2023 to January 2024.

92. I therefore award six week's loss of wages. This assumes that the Claimant would have found alternative work within a relatively short period of time following the date of her termination given the time of year and the well-publicised pressures in the hospitality sector at such time.

93. When calculating the compensatory award, I have used the total net weekly pay of £267.50 and added a sum of £37.50 to represent the average weekly tips (£230 + £37.50):

$$6 \times £267.50 = £1,605$$

94. If a Claimant is in receipt of certain benefits, compensation for immediate loss of earnings (i.e. from dismissal to date of hearing when the Tribunal decides on compensation), is subject to the provisions of the Employment Protection (Recoupment of Benefits) Regulations 1996. This element of the compensatory award is subject to recoupment.

95. It is commonplace for Tribunals also to award a nominal sum for loss of statutory rights, namely the loss of the right to claim unfair dismissal until employed by a new employer for the statutory qualifying period. I therefore make an award of £200.00.

96. I make no award for further or future loss.

97. The compensatory award in respect of the Claimant has also been adjusted for the reasons stated above as follows:

Compensatory Award:

<i>Loss of earnings</i>	£1,605.00
<i>Loss of statutory rights</i>	£200
	£1,805.00
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<i>Less 50% - chance that the Claimant would have been fairly dismissed in any event</i>	(£902.50)
<i>Increase by 10% - ACAS uplift</i>	£90.25
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Total compensatory award after adjustments	£992.75

98. The total award therefore payable to the Claimant is the sum of **£2,948.75** (£1,956 + £992.75).

Employment Judge Yardley

Dated: 23 April 2024

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Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.