



# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Mr A Hague

AND

(1) Shorewood Leisure  
Group Limited

(2) Percy Wood Leisure Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 19 & 20 October 2017  
8 November 2017

Before: Employment Judge Martin

### *Appearances*

For the Claimant: In person

For the Respondents: Mr Bealey (Employment Consultant)

## **RESERVED JUDGMENT**

The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £2,634.50.

## **REASONS**

### **Introduction**

- 1 Mr Richard Roberts, area manager for the first respondent; Mr Alan Cremins, group head of sales for the first respondent; and Mr Paul Allison, general and compliance manager for the first respondent, who is also the brother of Mr David Allison the owner of the First Respondent all gave evidence on behalf of the respondents.
- 2 The claimant and Mr Paul Marrin, a former colleague of the claimant at Witton Castle Caravan Site, gave evidence on behalf of the claimant.

- 3 The Tribunal were provided with a bundle of documents from the respondents marked Appendix 1 and an additional bundle of documents from the claimant marked Appendix 2.

**The law**

- 4 The Tribunal considered the following law:-

Section 98(1) Employment Rights Act 1996 (ERA 1996) –

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-  
(a) the reason for the dismissal”.

Section 98(2) ERA 1996 –

- “(2) A reason falls within this subsection if it:-  
(b) relates to the conduct of the employee”.

Section 98(4) ERA 1996 –

- “(4) 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”.

- 5 The case of **British Home Stores Limited v Burchell [1978] IRLR 379** where the EAT held that:-

“In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct the employment tribunal has to decide whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involves three elements:-

First there must be established by the employer the fact of that belief; second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and third the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case”.

- 6 The case of **Iceland Frozen Foods Limited v Jones [1982] IRLR 439** where the EAT held that:-

“An employment tribunal must consider the reasonableness of the employer’s conduct not simply whether they the employment tribunal consider the dismissal to be fair; The EAT noted that there is a band of reasonable responses to the employee’s conduct whereby one employer might reasonably take one view and another quite reasonably take another view; the function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to

dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted”.

7 Section 122(2) Employment Rights Act 1996:-

“(2) Where the tribunal considers that any conduct on the part of the complainant before the dismissal is such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce that award accordingly”.

8 Section 123(1) Employment Rights Act 1996:-

“(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 insofar as that loss is attributable to action taken by the employer”.

Section 123(4) ERA 1996:-

“(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales”.

Section 123(6):-

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

9 The case of **Polkey v A E Dayton Services Limited [1987] IRLR 503** where the House of Lords held that:-

“The tribunal can consider whether an employee would still have been dismissed even if a fair procedure had been followed. If the employment tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment”.

10 The case of **Gardiner-Hill v Roland Berger Technics Limited [1982] IRLR 498** where the EAT held that:-

“Where there is a case of a failure to mitigate the tribunal has to consider what would have happened if a particular step had been taken after a particular time on a balance of probabilities and what alternative employment might have been gained.

An employee does not necessarily fail to mitigate his loss by setting up in business on his own account after being dismissed rather than trying to get another job. The question that must be asked is whether what he did was reasonable. A claimant is entitled to recover the loss that flows from the wrongful act. The duty on the claimant is to take such steps as are reasonable in all the circumstances to reduce the loss he suffers from the wrongful act”.

- 11 The case of **Nelson v BBC No 2 [1979]** IRLR page 346 where the Court of Appeal held that:-

“In determining whether to reduce an employee’s unfair dismissal compensation on grounds of his contributory fault, an employment tribunal must make three findings:-

First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. The concept of culpability or blameworthiness does not necessarily involve only conduct which could amount to a breach of contract or a tort. It includes conduct which could be foolish or bloody-minded or unreasonable in all the circumstances. Secondly, there must be a finding that the matters to which the complainant relates were caused or contributed to some extent by action that was culpable or blameworthy. Thirdly it must be just and equitable to reduce the amount of the compensation to that extent”.

- 12 The case of **Hollier v Plysu Limited [1983]** IRLR page 260 where the Court of Appeal held that:-

“In considering whether compensation should be reduced on the grounds of the employee’s contribution to the dismissal, the employment tribunal’s function is to take a broad commonsense view of the situation to decide what part, if any the employee’s own conduct played in causing or contributing to the dismissal and then to decide what, if any, reduction should be made”.

The Tribunal also took note of the ACAS code of practice on disciplinary and Grievance Procedures 2015.

### **The issues**

- 13 The issues which the Tribunal had to consider was firstly the reason for the claimant’s dismissal? Did it relate to conduct? In that regard the Tribunal had to consider whether the respondents had a reasonable belief that the claimant had committed an act of gross misconduct, whether that was based on reasonable grounds and followed a reasonable investigation.
- 14 The Tribunal also had to consider whether the respondent followed a fair procedure and whether there were any issues in relation to bias in respect of this dismissal. The Tribunal needed to finally consider whether dismissal was a reasonable response in the circumstances of the case.
- 15 The Tribunal then had to consider in terms of any remedy what loss was sustained by the claimant and over what period. The Tribunal also had to consider whether the claimant had acted reasonably in mitigating his loss and whether he might have been fairly dismissed in any event and if so when and/or what was the chance of that happening.
- 16 The Tribunal had to finally consider whether the claimant had contributed to any extent to his dismissal.
- 17 The Tribunal had to also consider whether there was any breach of the ACAS Code of Conduct on the part of either the claimant or the respondent.

- 18 **Findings of fact**

- 18.1 The claimant was working at the second respondent when his employment terminated. The first respondent is the parent company of the second respondent. Both respondent companies manage caravan parks in the North East of England.
- 18.2 The first respondent is owned by Mr David Allison, who is the majority shareholder. He is the common law partner of Karen Hague (the claimant's mother). Karen Hague and David Allison have been together for almost 20 years. The claimant indicated that the relationship was difficult. Both the claimant and his brother have been employed by the first respondent for many years. In the claimant's case, he commenced employment with the first respondent shortly after leaving school.
- 18.3 The claimant undertook various jobs with the respondents during the course of his employment. He undertook the role of groundsman, he undertook some plumbing and moving/siting of caravans, he also was involved in developing sites. By 2012 he was responsible for sales at one of the respondent's parks – Witton Castle. He was by that stage working as a salesperson. In 2013 he was promoted to general manager at Witton Castle site. He continued to undertake a sales role at the same time during 2013 and 2014.
- 18.4 The claimant's contract of employment is in the respondent's bundle at pages 1-7. This relates to his role at Witton Castle when he was employed as sales executive. The contract has been issued by the first respondent. No further contract of employment is in the bundle before the Tribunal relating to any changes to the claimant's role with the respondent company. There is a reference to a bonus scheme which indicates that details will be provided each year to the employee, but can be reviewed and will not be payable if the employee's employment is terminated during the period of the bonus scheme (page 2 of the bundle).
- 18.5 The claimant says that in February 2014, he was told by his mother that David Allison was cheating on her. He said that his relationship with David Allison deteriorated after that period. David Allison effectively oversaw the site at Witton Castle.
- 18.6 The claimant says that as a result of his deteriorating relationship with David Allison, he was moved to Percy Wood Caravan Park – the second respondent's site – to replace his brother Thomas. The claimant became general manager there from 2015. The claimant said that David Allison would not visit Witton Castle while he was there due to the deterioration in their relationship.
- 18.7 Mr Paul Allison, the brother of Mr David Allison, says that the claimant was moved to Percy Wood because of a number of issues with him. Mr Paul Allison refers to an issue relating to the purchase/sale of the claimant's wife's (then girlfriend's) family caravan and he also refers to an incident raised in October 2014 regarding an anonymous complaint. Mr Paul Allison says that the claimant was moved to Percy Wood site so that Mr Richard Roberts, a director, could more closely supervise the claimant. Mr Roberts did not actually take up the post at Percy Wood until a few

weeks after the claimant was moved to that site. Mr Roberts was responsible for a number of caravan sites within the first respondent group and would only visit Percy Wood once or twice a week.

- 18.8 The respondents allege that there were a number of issues with the claimant. They refer to a complaint made by a Mr Grieve who visited the site and complained about the attitude of the claimant. This incident was in 2014. The claimant said that he was asked about the incident but that no action was taken against him. He assumed that the matter had been dropped. The claimant said that he was also asked about another matter when an anonymous complaint was made in or around October 2014. He said that part of this complaint showed some graffiti above the gates of the site which referred to "Adam's coke den". The claimant said that he believed that this anonymous complaint was made by a disgruntled former employee and that there was no substance to the complaint. The documents relating to those complaints are at pages 16-20 of the bundle. The claimant said that he was also asked by Mr David Allison and his mother about the purchase and sale of his girlfriend's caravan. He said that he and his girlfriend (now wife) agreed to pay some additional money, albeit he said they had not done anything wrong.
- 18.9 The respondents allege the claimant did not have a clean disciplinary record. However they concede that there was no informal or formal disciplinary action ever taken against him regarding any of these matters, nor was the claimant ever subject to any disciplinary sanction during the course of his employment.
- 18.20 The respondent's company handbook sets out the procedure to follow in cases of disciplinary matters. It is at pages 8-13 of the respondents' bundle.
- 18.21 Under principles on page 8 it states that:-
- "Apart from an informal verbal warning, you have the following rights in relation to disciplinary action:-
- To be informed of the allegations of misconduct to be addressed at any disciplinary hearing.
- To be accompanied by a work colleague or an accredited trade union official.
- To appeal against any disciplinary action".
- 18.22 Dismissal is dealt with at page 9 of the bundle. The policy refers to conduct at work and outside normal working hours. It states at page 10 that:-
- "Normally the company has no jurisdiction over employee activity outside working hours. Behaviour outside working hours will only become an issue if the activities adversely affect the company".
- It refers to adverse publicity bringing the company into disrepute resulting in a loss of business or loss of faith in the integrity of the individual resulting in the disciplinary procedures being instigated.

18.23 As one would expect the employee handbook refers to gross misconduct. This is at page 10 of the bundle. It states that:-

“It is normal industrial relations practice that gross misconduct will result in summary dismissal.”

It sets out a list which is not intended to be exhaustive of examples of gross misconduct which includes:-

A deliberate failure to comply with the published rules of the company including those covering security and health and safety; fighting or assaulting another person; making yourself unfit to work by drinking alcohol or taking illegal substances; and behaviour likely to bring the company into disrepute.

Those examples are at pages 10 and 11 of the bundle.

18.24 The appeal procedure is set out at page 11.

18.25 The claimant said that by 2016 the respondent had limited his ability to earn commission on sales.

18.26 The claimant said in evidence that there had been some issues with Paul Hepplewhite and another member of the sales team around drinking and their attendance or non attendance at work. The claimant said that both Mr Mick Smailes, the sales manager, himself and Mr Richard Roberts had spoken to Paul Hepplewhite and the other member of staff about those issues.

18.27 The claimant lived 60 miles from Percy Wood Caravan Park. He would on occasion stay on the site and a caravan was provided for him accordingly. The license agreement is at pages 26-27 of the respondent's bundle. At clause 1C it states that the claimant should not do or permit or allow anything to be done which may cause a nuisance or annoyance to the employer or occupiers of any nearby accommodation.

18.28 The claimant said in evidence to the Tribunal that, from the beginning of his employment, he and his brother Thomas agreed to be emergency contact numbers for anyone on their respective sites. The claimant said that he was not provided with a company mobile phone, but gave out details of his own personal mobile telephone as an emergency contact number. There was nothing in the claimant's contract of employment requiring him to provide any such cover. The claimant's mobile telephone number is cited as an emergency contact. The claimant said that the list of emergency contacts was put in the window of the site office at the Park (page 30 of the bundle). The claimant said that there had previously been a security guard on site, but that he had not been replaced.

18.29 The claimant said that in November 2016 he made it clear to Paul Allison, Richard Roberts and his mother that he was not prepared to carry on being the emergency contact, and that he and Richard Roberts were looking for a solution to the problem. His e-mail to Paul Allison and the others is at page 14 of the claimant's bundle. In the e-mail he says that he had offered to be the point of contact when the park security/warden left his post in May 2015. He says that he was not prepared to be responsible for covering the out of hours park emergency contact any longer and that

he and Richard are looking towards a solution. He goes on to say he will however be continuing to accept the out of hours calls to the best of his ability until they had something else in place. On 23 January 2017 the claimant had sent a further e-mail indicating that he and Richard were planning on taking someone on as a night time warden, but in the meantime Sebastian the groundsman who stays on the park was available for any call outs during the night – page 15 of the claimant's bundle. In evidence before the Tribunal, the claimant said that he and Richard Roberts had been looking for someone to come in. He had placed an advert in February or March 2017, but no one had been appointed at that stage.

- 18.30 An incident arose on 3 March 2017. The claimant decided to stay on the site in his caravan that evening. He was due to work the following day. He said that he and Paul Hepplewhite decided to have a drink in the claimant's caravan. He said that Paul Hepplewhite arrived at about 6:00pm in the evening and they drank vodka, gin and a Polish liqueur called soplico. The claimant said that none of those bottles were full except possibly the Polish liqueur. The claimant said that he did not have anything to eat that evening. In evidence to the Tribunal, the claimant said he did not know how much he had drunk that evening. In answer to questions, he said that he did not think he would have been fit to drive and that he drank more than three drinks but not more than 12. All of the drinks were spirits, but the claimant said that two of the bottles were only half full. He also said in evidence to the Tribunal that he did not know what time he went to bed. He said he did not think that it was after midnight. He acknowledged that he would not have been able to drive, but said he would have been able to deal with an emergency. He said that Paul Hepplewhite woke him up and came back to his caravan at about 3 o'clock in the morning with a cut to his head. He put a plaster on it and walked Paul Hepplewhite back to his caravan and stayed with him for a bit.
- 18.31 In evidence to the Tribunal, the claimant said that the next morning he did not feel well. He did not go into work. He said that he had diarrhoea and sickness. He said that there had been a bug at work earlier that week. He texted Mr Mick Smailes, the sales manager, in the morning and asked him to check up on Paul Hepplewhite.
- 18.32 Mr Smailes submitted a witness statement as part of the internal investigation into the incident, which is at pages 37-38 of the bundle. In his statement, Mr Smailes said that he went to check on Paul Hepplewhite who had a cut to his head and seemed drunk. Mr Smailes said in the statement that Paul Hepplewhite had said he had been in the Cook and Barker which was a nearby public house. Mr Smailes said that he then returned to the office and informed Richard Roberts about the incident. Mr Roberts was in the office that day. The claimant says that Mr Smailes texted him to say that Mr Hepplewhite had to go.
- 18.33 Mr Smailes then checked the position regarding the Cook and Barker and was told that Mr Hepplewhite had not been there.



- 18.34 Richard Roberts said in evidence before the Tribunal, as is confirmed in Mr Smailes' written statement, that Mr Smailes then went back to see Mr Hepplewhite at around midday. Mr Roberts asked Mr Smailes to suspend Mr Hepplewhite at that stage.
- 18.35 The claimant said that Mr Roberts contacted him around midday. He told Mr Roberts that he was not coming in. Mr Roberts then asked if he could come and see the claimant, but the claimant told him that he was not feeling well enough.
- 18.36 Mr Smailes in his written statement to the internal investigation said that, when he told Mr Hepplewhite he had gone to the Cook and Barker and been told that he had not been there, Mr Hepplewhite had pointed at his face and suggested that the claimant had hit him. Mr Smailes suggests this conversation took place on Sunday morning, although it appears that the conversation may have taken place on the second visit when Mr Smailes went back to see Mr Hepplewhite that afternoon on Saturday, 5 March. In his evidence before the Tribunal, Mr Roberts stated that Mr Smailes had told him that effectively Mr Hepplewhite had changed his story to indicate that he had been hit by the claimant. Mick Smailes sent an e-mail to Sam Sutcliffe who was the HR adviser assisting Mr Paul Allison, on 7 March 2017 about this issue. That email is at page 41 of the bundle. In that e-mail Mr Smailes suggests that the further conversation with Paul Hepplewhite took place on the Sunday morning when he asked him who had really hit him, "Mr Hepplewhite had shrugged his shoulders, pointed at his face and said who do you think".
- 18.37 Mr Hepplewhite texted the claimant on Saturday afternoon to tell the claimant that he had been sacked and told to leave the park by Monday. That text is at page 11 of the claimant's bundle.
- 18.38 On Sunday morning, Mr Hepplewhite resigned from his employment. His letter of resignation is at page 39 of the respondent's bundle.
- 18.39 On Sunday morning 5 March 2017, the claimant returned to work. The claimant said that he asked Mick Smailes why Paul Hepplewhite had been sacked. He said that Mick Smailes told him that it was because Mr Hepplewhite had been drunk on Saturday morning and he had been told to suspend him.
- 18.40 Mr Roberts asked the claimant to go into a meeting with him that morning. Mr Roberts said that he made contemporaneous notes in the form of a statement regarding his investigation into the incident which notes are at pages 34-35 of the bundle. He said that when he saw the claimant on the Sunday morning the claimant had bruising on his knuckles and a cut to his hand.
- 18.41 Both the claimant and Mr Roberts agreed in their evidence that the claimant was asked about the incident on Friday evening at that meeting with Mr Roberts.
- 18.42 In his statement, at page 35, Mr Roberts said that the claimant had said that Mr Hepplewhite had come to his caravan and that they had been drinking vodka to excess and that things got out of hand following an argument. He said that the claimant had said that he was so drunk that he

did not know whether he had hit Mr Hepplewhite or not, but that it was only himself and Mr Hepplewhite who were in the caravan. Mr Roberts then said in his statement that Mr Smailes had then checked again on Mr Hepplewhite on Sunday morning and that Mr Hepplewhite's statement had changed to indicate that he was hit by the claimant pointing to his head. Mr Roberts also said that Mr Smailes said that Mr Hepplewhite would not be involved in any investigation.

- 18.43 The claimant said in evidence to the Tribunal that Mr Roberts had asked him if he had hit Mr Hepplewhite and that Paul Hepplewhite had said that he, the claimant, had hit him. The claimant said that, in that meeting, he told Mr Roberts that he had not hit Mr Hepplewhite but that Paul had told him that he had, but he had not done so. He said that he told Mr Roberts that he actually cleaned up Mr Hepplewhite's cut, put a plaster on it, and walked Mr Hepplewhite back to his caravan. The claimant denied that he had told Mr Roberts that he had been drinking vodka to excess, or that things had got out of hand, or that there was any argument. The claimant said that he had told Mr Roberts that he had not come into work on Saturday morning, because he had been unwell, but not because he had been drinking. The claimant said that Mr Roberts then left the meeting and went to speak to someone else. The claimant said that he went into the kitchen, and spoke to Mr Smailes who told him that he thought that the respondents were looking for a reason to get rid of the claimant.
- 18.44 In evidence before the Tribunal, Mr Roberts said that he had called head office and spoken to Mr Paul Allison who had told him to suspend the claimant. In evidence before the Tribunal, Mr Allison said that he was responsible for HR matters within the respondent company and was assisted by Sam Sutcliffe. He denied that he had spoken to Mr Roberts and said that it must have been Mr Sutcliffe who spoke to Mr Roberts. However, He admitted that Mr Sutcliffe did not work on Sundays, so Paul Allison thought that Mr Roberts must have spoken to someone else either Mr David Allison or Mr Neil Wilson, his boss.
- 18.45 The claimant said that Mr Roberts then came back into the meeting and suspended the claimant. The claimant said that Mr Roberts said that he would not be dealing with his suspension, which would be dealt with by head office.
- 18.46 In evidence before the Tribunal, the claimant said that he called Paul Hepplewhite on Saturday and told him that he too had been suspended. The claimant said that when he spoke to Mr Hepplewhite he told the claimant that he was not serious when he had been suggesting that the claimant might have hit him. He did not think he would be taken seriously. The claimant said that Mr Hepplewhite told him that he had fallen over and that he was quite drunk. He told the claimant that he was quite happy to clear up the matter and would give a statement effectively to that effect.
- 18.47 On Monday, 6 March 2017, the claimant telephoned Mr Roberts to ask him the reasons why he was suspended. A note of that telephone conversation is at page 1 of the claimant's bundle. In evidence before the Tribunal, Mr Roberts acknowledged that he had been called by the claimant and had been asked by the claimant for the reasons why he was

suspended. He had told the claimant that it was because of an allegation of affray and that he could not discuss the matter further. The claimant says that during that telephone call, he also told Mr Roberts that he had spoken to Mr Hepplewhite who had told him that he had cut his head after leaving the claimant's caravan on Friday night. Mr Roberts did not deny that discussion took place.

18.48 On Monday morning 6 March 2017, Mr Roberts asked Mr Smailes to go to Mr Hepplewhite's caravan to ask him for a statement. Mr Roberts acknowledged in evidence that he had made no attempt at any stage to obtain a statement from Mr Hepplewhite himself. He had simply relied on the information given to him by Mr Smailes. He was unable to explain in evidence why he did not go and ask for a statement or try and see Mr Hepplewhite himself as he was on the site at that time. Mr Roberts said that Mr Smailes had told him that Mr Hepplewhite had refused to give a statement but that he had told Mr Smailes that he had hurt himself on the decking at the claimant's caravan.

18.49 The claimant says that Paul Hepplewhite had acknowledged to him that he had been warned about his drinking before. He told the claimant that he had been asked by Mick Smailes to write a letter of resignation, which he did. He then left the caravan site on Monday.

18.50 The claimant says that after the meeting with Mr Roberts, he had called Mr Hepplewhite and told him about his suspension on the grounds of affray. Mr Hepplewhite had told the claimant that he would give him a statement.

18.51 On 6 March 2017, the respondent wrote a letter to the claimant suspending him. That letter is at page 40 of the respondent's bundle. The letter is purportedly written by Mr Roberts. In evidence before the Tribunal Mr Roberts said that he did not write that letter and that it was drafted for him by Mr Paul Allison. Mr Paul Allison said in evidence that part of his role was to liaise with the respondent's employment law consultants. He said that he did not draft the letter and thought it must have been drafted by Mr Sutcliffe, who he acknowledged might have discussed it with him.

18.52 The letter states that the claimant is suspended on full pay with effect from 5 March pending investigations into the following allegations:-

An allegation of making yourself unfit for work due to drinking alcohol and allegedly fighting with another member of staff.

It states that the allegations are potentially acts of gross misconduct. It also states that the claimant should not contact any other members of staff during the course of the investigation.

18.53 The claimant says that Mr Roberts then telephoned him on 7 March to invite him to an investigatory meeting for the following morning. In the telephone conversation the claimant said that he told Mr Roberts that he had not received any letter regarding his suspension or the reasons for it. In evidence before the Tribunal, Mr Roberts acknowledged that the claimant did indicate that he had not received a suspension letter at that stage. A note of the telephone call is at page 2 of the claimant's bundle.

- 18.54 On 7 March 2017, Mr Sutcliffe sent an e-mail to Mr Smailes asking for some further information regarding a number of matters. A response to that request was sent by Mr Smailes on the same day. In that e-mail Mr Smailes states that the first discussion with Mr Hepplewhite was brief. He did not mention any altercation or the timing of it and that the only other thing he said was that he had been drinking heavily in the claimant's van for most of the evening. That e-mail is at page 42 of the respondent's bundle.
- 18.55 The claimant says that before the investigatory meeting, he contacted Mr Hepplewhite who prepared a statement for him to take to the investigatory meeting. That statement is by way of an e-mail from Mr Hepplewhite to the claimant. It is dated 7 March 2017. The e-mail is at page 43 of the respondent's bundle.
- 18.56 In the e-mail Mr Hepplewhite states that he would like to clarify exactly what happened on the Friday evening. He says that, following drinking with the claimant in the caravan, he got up to leave to return back to his caravan and says that unfortunately he managed to lose his footing and tripped over on the way and that he then returned to the claimant's caravan and woke him up. He says that he joked with the claimant when he asked him what had happened and he claimed that the claimant had done it but that was not the case. He says that the claimant then dressed his wound and escorted him back to his caravan. He also confirms that there was no alleged affray.
- 18.57 An investigatory meeting took place on 8 March 2017. Mr Richard Roberts conducted an investigatory meeting with the claimant. The claimant attended alone. Notes of that meeting are at pages 49-50 of the bundle.
- 18.58 In evidence before the Tribunal Mr Roberts acknowledged that he did not tell the claimant what the investigation was about. He says that he simply asked the claimant for his version of what had happened on the night of 4 March 2017. Mr Roberts had made a list of questions that he wanted to ask the claimant which is at pages 8f-8g of the claimant's bundle.
- 18.59 The claimant did not sign the notes for the meeting which is at pages 49-50 of the respondent's bundle and says that he did not agree to what was contained in those notes.
- 18.60 In the notes of the meeting, it is noted that the claimant said that Mr Hepplewhite woke him up with a cut on his head and that he asked Mr Hepplewhite what had happened and that Mr Hepplewhite had said in a jokey way, "Can't you remember, you did it". The claimant said that he did not believe that he had done it. He said that he had then cleaned up Mr Hepplewhite's wound and walked him back to his caravan and stayed with him. In the notes, it also suggests that the claimant said that he was drunk on Friday evening, but the claimant denied that he said that as well. The claimant said that he did not indicate that he had drunk to excess and that things got out of hand or that there was any argument. In evidence before the Tribunal, the claimant denied that he had suggested that he had had any argument with Mr Hepplewhite or that things had got out of hand or that he was drunk. The claimant said that he did acknowledge

that he felt that he had let Mr Roberts down and that they had had a good relationship before that. During the course of the meeting the claimant also acknowledged that he did apologise about the situation.

- 18.61 Pictures were subsequently taken of the decking of the claimant's caravan (pages 44-48 of the respondent's bundle). In evidence before the Tribunal Mr Roberts said that he did not undertake any further investigation into the incident following his meeting with the claimant on 8 March 2017. In his evidence, Mr Roberts said that he did not take the pictures or ask for them to be taken. He said that Mr Paul Allison must have taken the pictures, but Mr Paul Allison denied that he had taken those pictures and also denied that he had asked for them to be taken.
- 18.62 When the claimant returned home following the investigatory meeting, he received the suspension letter. He had not seen it before he attended the investigatory meeting.
- 18.63 In evidence before the Tribunal, Mr Roberts said that he believed the incident should be properly investigated by the company and made that recommendation to Mr Paul Allison. He indicated in evidence that he did not suggest that the matter proceed to a disciplinary hearing and he understood that the decision to proceed to a disciplinary hearing must have been made by Mr Paul Allison. Mr Paul Allison denied in evidence that he had made the decision to proceed to a disciplinary hearing. On the evidence it was unclear who had actually made that decision. Both Mr Roberts and Mr Paul Allison appear to deny having made the decision to proceed to a disciplinary hearing.
- 18.64 On 10 March 2017, the respondents wrote to the claimant to invite him to a disciplinary hearing. The letter has been sent by Mr Alan Cremins, who was appointed to conduct the disciplinary hearing. In evidence before the Tribunal, Mr Cremins indicated that he had not drafted the invite to the disciplinary hearing, but that it had been drafted by Mr Paul Allison. Mr Paul Allison denied that he had drafted the letter. In answer to questions he suggested that the letter must have been drafted by Mr Sutcliffe. He subsequently indicated that he recalled some conversation that he was aware of between Mr Sutcliffe and Mr Neil Wilson, who was Mr Paul Allison's boss, about the emergency contact issue.
- 18.65 The letter is at page 51 of the respondent's bundle. It invites the claimant to a disciplinary hearing on 14 March and refers to three allegations:-
- An allegation of making himself unfit for work due to drinking alcohol;
  - Allegedly fighting or assaulting another member of staff;
  - Allegedly being drunk on 3 and 4 March on Percy Wood site when he was the emergency point of contact on the park as listed in the emergency telephone numbers form and the responsible and senior person present on park.

The letter indicates that the matters constitute potential gross misconduct. Documents are enclosed which do not include the e-mail statement from Mr Paul Hepplewhite nor the e-mail of 17 November 2016 or any other

documents dealing with the emergency contact issue other than the emergency contact list.

- 18.66 The disciplinary hearing took place on 14 March. The claimant was given the opportunity to be accompanied, but he attended alone.
- 18.67 The claimant said that he attended the disciplinary hearing with a written statement which is at pages 13a and 13b of the claimant's bundle. In relation to the allegation about making himself unfit for work due to alcohol the claimant said that he had diarrhoea and sickness. He referred to various text messages which he had sent regarding the matter which are at pages 9-11 of the claimant's bundle. He also denied fighting with Mr Hepplewhite and referred to Mr Hepplewhite's statement at page 43 of the respondent's bundle. Finally the claimant denied that he was the emergency contact point and referred to the e-mail which he had sent to Mr Paul Allison dated 17 November 2016 which is at page 14 of the claimant's bundle.
- 18.68 Notes were made of the disciplinary hearing. Those notes are at pages 54-56 of the respondent's bundle. The handwritten notes of the disciplinary hearing are at pages 16a-16d of the claimant's bundle.
- 18.69 During the course of the disciplinary hearing, the claimant explained to Mr Cremins that he did not agree with part of Mr Roberts' statement. He denied that he had said he had drunk to excess, or that he had said that he and Mr Hepplewhite had had an argument. During the disciplinary hearing, the claimant said that he did not know how much he had drunk but he thought it was a lot. During the course of the disciplinary hearing, the claimant made it clear that Mr Hepplewhite would provide a statement.
- 18.70 It was at that stage that Mr Cremins said that he was going to adjourn the disciplinary hearing and take advice. He called Mr Paul Allison who admitted that he gave advice to Mr Cremins during the disciplinary hearing. Mr Cremins was advised he could adjourn the meeting to make further enquiries. The notes of the disciplinary hearing at page 56 note that, in the light of what was discussed, namely the reference to the statement of Mr Hepplewhite, Mr Cremins was going to adjourn the meeting to take some advice. The meeting was then reconvened ten minutes later. Mr Cremins then is noted as saying in those notes of the disciplinary hearing at page 56, that, as he had a lot of conflicting evidence, he would need to investigate matters further, so he would adjourn the disciplinary hearing and write to the claimant with a time and date when it could be reconvened. The handwritten notes of the disciplinary hearing note (at page 16d of the claimant's bundle), that after the reference to Paul Hepplewhite giving a statement if requested, in the light of what has been said, Mr Cremins adjourned the meeting. It was then noted that when the meeting is reconvened, the notes record that evidence is missing, and "need a statement from that person" and then it goes on to say that the evidence is conflicting.
- 18.71 The claimant said that he understood that the meeting had been adjourned for Mr Cremins to obtain a statement from Paul Hepplewhite and the meeting would then be reconvened.

- 18.72 On 14 March 2017, the claimant sent an e-mail to Mr Cremins asking for a copy of the typed notes from the disciplinary meeting as he could not read the handwritten notes. That e-mail is at page 17a of the claimant's bundle. In that e-mail, the claimant also asked for the reason why the meeting was adjourned.
- 18.73 Mr Cremins sent a reply to that e-mail on 15 March, and said that the request was noted and that Paul Allison would action it.
- 18.74 Mr Cremins said that he did not undertake any further investigation with Mr Hepplewhite. He said that the further investigation which he undertook was with Mr Richard Roberts, as the evidence from the claimant and Mr Roberts was conflicting. It is not actually clear if it was Mr Cremins or Mr Paul Allison who did this further investigation, as the e-mail sent from Mr Roberts confirming his statement was true, was sent to Mr Paul Allison and copied to Mr Cremins (page 59 of the bundle).
- 18.75 Mr Cremins was not able to explain to the Tribunal why he did not go and get a further statement from Mr Hepplewhite, other than to indicate that Mr Hepplewhite had given different versions of events at different times and it was not clear which version was true.
- 18.76 Mr Cremins then said that he set out his findings which are at page 57 of the respondent's bundle. There is no handwritten version of this document. Mr Cremins thought he drafted the document on the computer. In evidence before the Tribunal, Mr Cremins said that he concluded that the claimant had committed an act of gross misconduct. He took the view that the second allegation probably did not amount to gross misconduct on its own.
- 18.77 In evidence before the Tribunal, Mr Cremins admitted that he did not draft the letter confirming the claimant's dismissal. He said it was drafted by Mr Paul Allison who confirmed in evidence that he had drafted the letter. He said he had drafted it based on Mr Cremin's findings.
- 18.78 The letter of dismissal is at page 60-62 of the bundle. The claimant was dismissed for gross misconduct. The letter does not make any reference to any further investigations.
- 18.79 The claimant said that he understood that the disciplinary meeting was to be reconvened and was surprised to receive a letter dismissing him from his employment before the meeting was reconvened.
- 18.80 In evidence before the Tribunal, Mr Cremins was not able to explain why he had not reconvened the meeting, before dismissing the claimant. He said that he took advice from Mr Paul Allison, who denied giving Mr Cremins any advice about that issue.
- 18.81 The claimant was advised of his right to appeal. He appealed against the decision to Mr Paul Allison, who was cited as the contact for any appeal.
- 18.82 The letter of appeal is at page 63 of the bundle. In that letter, the claimant also asked what further investigation took place following the disciplinary hearing.

- 18.83 The appeal hearing took place on 3 April 2017. It was conducted by Mr Paul Allison. Mr Sam Sutcliffe was present to take notes. Mr Allison said that Mr Neil Wilson, his boss, instructed him to do the appeal. In evidence to the Tribunal, Mr Allison indicated that Mr Wilson did not get involved in appeals but that he dealt with things at a much higher level as he was more senior to him. He acknowledged that Mr Wilson might have been the most independent person to deal with the appeal as he had not been involved in the matter, although it was at that stage Mr Allison then referred to the issue with regard to whether it was Mr Wilson, who had raised the third allegation.
- 18.84 The notes of the appeal hearing are at pages 66-73 of the respondent's bundle. The claimant said that he was not asked to read or sign the notes, but he did subsequently sign them but not at the time.
- 18.85 In his written evidence to the Tribunal, Mr Allison confirmed that he was aware of the decision by Mr Cremins to dismiss the claimant, but he does not refer to the fact that he drafted the letter of dismissal.
- 18.86 In evidence to the Tribunal, Mr Allison did not indicate in his written statement or indeed on cross-examination that he had looked at the statement from Mr Paul Hepplewhite obtained by the claimant in advance of the disciplinary hearing. He also does not refer to reviewing the statement produced by the claimant for the disciplinary hearing.
- 18.87 Mr Paul Allison wrote to the claimant to dismiss the claimant's appeal and upheld the decision to dismiss the claimant.
- 18.88 By the time of his dismissal, the claimant was earning £572.92 net a week. He is claiming a gross weekly amount for his basic award of £479. Neither of those figures were disputed by the respondents.
- 18.89 The claimant indicated during the course of his evidence that he had been entitled to a bonus. He did not provide any details relating to the bonus scheme. He acknowledged that he was not entitled to a bonus, if he left his employment before the end of the bonus period, which he indicated was the end of December. He was also unsure of how the bonus would be calculated, or what it might amount to. The respondent said that the claimant was not entitled to any bonus.
- 18.90 After the claimant's employment terminated, he obtained temporary employment with his father-in-law. It was unclear exactly when this was begun but the claimant thought in retrospect that it was probably about a week after his employment ended. He said that he had certainly commenced his employment by 3 April, when he attended the appeal hearing as he had to ask for the day off.
- 18.91 In his temporary employment the claimant was earning more over that period in total than he would have earned with the respondents. He worked in this employment until the end of May and earned £2,400 net pay in April, £3,200 net pay in May.
- 18.92 The claimant said that he had decided to go into business with his father-in-law and acquire a caravan park to run. He said that his father-in-law would be funding the venture. He would be managing the business. He



said that he had looked at entering into this venture before his employment terminated and indeed some months beforehand. He had in fact looked at a caravan park earlier in the year. However, he said that he was not intending to terminate his employment with the respondent when he commenced this venture.

- 18.93 In evidence to the Tribunal, the claimant said that he and his father-in-law had acquired a caravan park at Strawberry Hill Farm Caravan Park whilst the claimant was working on a temporary basis with his father-in-law. He said that an earlier opportunity had not proceeded, but that they decided to proceed with the Strawberry Hill Farm Caravan Park.
- 18.94 No accounts or details with regard to this venture have been produced by the claimant in evidence to this Tribunal. The only document dealing with this caravan park was produced by the respondents and is the sales particulars for that site. That document is at pages 109-113 of the bundle.
- 18.95 The claimant said in evidence to the Tribunal that, when the Strawberry Hill Farm Caravan Park became available, he ceased temporary employment with his father-in-law. He said that he was not able to seek alternative employment at that stage, as he needed to work to get the business up and running. He said he had to undertake due diligence and put together a business plan, so that the venture could proceed. He said that he was unable to undertake or seek alternative work during that period.
- 18.96 The claimant said that initially he was due to take on the Strawberry Hill Farm Caravan Park in June, but that it was put back to early August 2017. He said that he took a family holiday in early June, and thereafter worked on getting the business up and running until it was finally acquired in early August 2017.
- 18.97 The claimant admitted in evidence before the Tribunal that he did not seek any alternative work, apply for any jobs, or sign on with any job agencies after he left his temporary employment with his father-in-law at the end of May 2017. From then on, he said that he was solely concerned with setting up his business venture. That was what he was doing during that time.
- 18.98 The claimant said that when they acquired Strawberry Hill Farm Caravan Park in August he expected a gross income of £3,000-£5,000 a month, which should give a return of a gross salary of £18,000.
- 18.99 The sales particulars provided by the respondents show that the business was sold as a going concern. The turnover ranged from £30,000 to £61,000 over the last five years, with the average net profit margin being in excess of 60%. The respondents calculated that that would give the claimant a gross salary of between £18,000 to £36,000 a year. The claimant says that he needed to invest in the business to improve the turnover of the business, which was why his gross income was lower at this stage but he accepted that the business had been sold as a going concern.

## **Submissions**

- 19 The respondent's representative filed written submissions. They submitted that the claimant was dismissed for gross misconduct and that the respondents followed a fair process. They submitted in the alternative that if the process was found to be unfair that the claimant would have been dismissed in any event and contributed 100% to his dismissal.
- 20 In relation to remedy the respondents' representative argued that the claimant had no loss because he was earning more in his temporary employment than he earned with the respondents. They further submitted that the claimant did not act reasonably in mitigating his loss until he started his new business venture where they said that he could have been earning the same amount.
- 21 The claimant submitted that his dismissal was unfair. He thought that there was an agenda to dismiss him and that a fair process was not followed. The claimant submitted that he did not contribute to his dismissal.
- 22 The claimant did not make it clear what compensation he was seeking but left it to the discretion of the Tribunal. He said that the temporary employment was temporary and that he then started his own business which was a reasonable approach to adopt as caravanning was the only business he had worked in during his working life.

### **Conclusions**

- 23 This Tribunal finds that the reason for the claimant's dismissal was misconduct.
- 24 Misconduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
- 25 This Tribunal does not consider that the dismissal of the claimant was either substantially or procedurally fair for the following reasons:-
- 25.1 The respondents did not undertake a fair and reasonable investigation into the allegations –
- (a) the allegations were not put to the claimant before he was investigated in relation to them. He did not receive the letter suspending him until after the investigatory meeting. It is noted that this was in fact a breach of the respondent's own policy as the policy made it clear that the claimant should have been provided with as much information as possible which would include before any investigation into any allegations;
  - (b) the investigating officer only undertook some of the investigation and limited himself to interviewing the claimant. He made no attempt to interview the other employee who was involved, Mr Paul Hepplewhite. Instead the investigating officer relied on the hearsay evidence of another employee, even though the investigating officer was on site and could have easily tried to have obtained a statement from Mr Hepplewhite. The tribunal considers that this failure to try investigate the allegations with the only other person who was present at the time of the alleged incident, makes the investigation flawed and wholly inadequate;

- (c) the investigating officer did not undertake all of the investigation. It is not clear who took the photographs but it was not the investigating officer;
- (d) there was no investigation by the investigating officer or indeed any indication of any investigation into the third allegation before the claimant was asked to respond to it at the disciplinary hearing.

25.2 The process was flawed and unfair:-

- (a) the disciplining officer indicated that the disciplinary meeting was to be reconvened to undertake further investigation. However, he did not appear to undertake any further investigation, but simply proceeded to dismiss the claimant without reconvening the meeting or providing any explanation as to why the meeting was not reconvened or what further investigation was undertaken;
- (b) the appeal hearing was entirely flawed. Mr Paul Allison who undertook the appeal hearing was the brother of the claimant's mother's partner, the owner of the business who was estranged from the claimant. Mr Allison was aware that there was another person more senior to him who had no family connections but Mr Paul Allison still decided to undertake the appeal hearing;
- (c) however, of more concern, Mr Paul Allison appeared to be involved throughout the process before conducting the appeal hearing. His colleagues suggest that he was involved in both drafting the letter of suspension; undertaking further investigations namely taking the photographs that formed part of the investigation; drafting the invite to the disciplinary hearing when a further allegation was added to the allegations; providing advice (which he admitted) during the course of the disciplinary hearing; undertaking further investigations as part of the disciplinary hearing; drafting (again as admitted by him) the letter of dismissal. In that regard, the Tribunal prefers the accounts given by Mr Roberts and Mr Cremins who both frankly admitted that they had been seeking advice from Mr Allison throughout the process.

25.3 This Tribunal considers that the respondents could not have had a reasonable belief that the claimant had committed these acts of gross misconduct, in particular the second allegation as there was no attempt to properly try and investigate this issue. Indeed, on the face of it, there was no substantive evidence to uphold the second allegation. The alleged victim made it clear in his last statement that there had been no assault, so it is difficult to see how the respondents could have concluded otherwise.

25.5 Dismissal was not a reasonable response in the circumstances of this case. The claimant did have a clean disciplinary record, despite inferences from the respondents to the contrary. The respondents had not previously dismissed employees when they were unfit for work due to alcohol. The respondents did not contest the claimant's evidence in that regard in relation to other sales executives. The evidence with regard to the second allegation effectively vindicated the claimant if it had been

properly investigated. Finally the third allegation was not properly investigated by the respondents. They did not consider whether the claimant had any contractual obligation to be an emergency contact nor did they properly consider all the e-mail evidence or make any further enquiries with regard to that aspect of that allegation.

For those reasons this Tribunal finds that the claimant's dismissal was substantially and procedurally unfair.

- 26 As a result of the various substantive and procedural failings in this case, it is difficult for the Tribunal to consider whether a fair process might have resulted in the claimant's dismissal in any event. This is particularly so, because of the involvement of Mr Allison throughout the whole process. For the Tribunal to reach any decision on that matter, it would require a proper and full investigation of the circumstances of each of the allegations. However, this issue does not need to be considered further in the light of the Tribunal's decision on remedy in this case as referred to below.
- 27 This Tribunal does find that the claimant contributed to his dismissal. He was drinking in his caravan with a colleague the evening of the incident. That colleague was unable to attend work the following day, due it appears to his alcohol consumption. The claimant was also unable to attend work the following day. He said this was due to sickness and diarrhoea. It is interesting to note that he did not eat anything that evening. On his own evidence, he could not say how much he had drunk, or what time he went to bed that night. We know that he was drinking spirits and there were 3 bottles – 2 possibly half full and one full bottle. The Tribunal considers that there must be a good chance that, taking account of those facts, the claimant had been drinking substantial alcohol the previous night. However, he knew that he was due to be working the following day. The Tribunal therefore finds that the claimant's conduct in that regard was both culpable and blameworthy. The Tribunal considers that on the facts the claimant was at least as much to blame for his dismissal as the respondents because of his irresponsible behaviour in drinking that much alcohol the night before he was due to attend work the following day. Accordingly, the Tribunal finds that the claimant contributed 50% to his own dismissal by his actions on that evening.
- 28 This Tribunal does not consider that the claimant acted reasonably in mitigating his loss. He did not, on his own admission, seek alternative employment after the end of May 2017. When he did seek alternative employment he obtained temporary employment almost straightaway and was earning more than he earned with the respondent. This Tribunal considers that if the claimant had properly mitigated his loss, he could have continued with his temporary employment and earned as much as he was earning with the respondents, but he chose not to do so that he could start his own business venture.
- 29 This Tribunal considers that it was not unreasonable for the claimant to go into a business venture and acquire a caravan park to run as his own business. This was the only business which he knew. However, the Tribunal is concerned that the claimant did not provide any information relating to his income from this new business venture. The only documents which have been produced show that the business was sold as a going concern and that the claimant could have earned the same salary from that business immediately as he was earning with the

respondents. The only reason he is not able to do so is that he chose to reinvest that money into the business. That is not a loss that could be attributable to the respondents.

- 30 Accordingly this Tribunal finds that the claimant was unfairly dismissed by the first and second respondents and his complaint of unfair dismissal is upheld. He is awarded compensation as follows:-

**Basic Award**

11 years                                      £ 479.00 per week                      £5,269.00

Less contribution at 50%    £2,634.50

**Compensatory Award**

Nil

TOTAL award on compensation for unfair dismissal    £2,634.50

The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE

ON 1 December 2017