



EMPLOYMENT TRIBUNALS

Claimant: Mr R Hibbitt
Respondent: The Catmose Club acting by its Elected Officials and Committee

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On: 15 January 2020
Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr M Bloom, solicitor
For the respondent: Mr R Ryan, Counsel

LIABILITY JUDGMENT

The Tribunal concludes that

1. The respondent wrongfully dismissed the claimant;
2. The respondent
 - 2.1. unfairly dismissed the claimant;
 - 2.2. there should be no reduction to the claimant's compensation under the rule in **Polkey**;
 - 2.3. there should be no reduction to the claimant's compensation under the principle of contributory conduct;
 - 2.4. compensation should be uplifted by 17.5% to reflect the respondent's failure to follow the relevant ACAS code of practice;
3. Remedy will be determined at a further hearing.

REASONS

Introduction

1. By a claim form received by the employment tribunal on 11 September 2019, following early conciliation between 19 July 2019 and 30 August

2019, the claimant, Mr Hibbitt, brings claims for unfair dismissal and wrongful dismissal.

2. Mr Hibbitt was a steward at the respondent, The Catmose Club, in Oakham, Rutland. The club summarily dismissed him on 2 June 2019 paying him a week's pay. It is this dismissal that he alleges is wrongful and unfair.
3. The Catmose Club conceded the dismissal was unfair. However, the club asserts that any award of compensation should be reduced to reflect the fact that he would have been dismissed in any event had a fair procedure been followed. The club also says that Mr Hibbitt contributed to his dismissal by his own conduct. The club has cited several things that they say shows he was doing his job to an unsatisfactory standard. However, the main issue for The club is that they believe he was being paid for working hours that he in fact did not work. Because it was Mr Hibbitt who provided the hours worked to the accountants for the purposes of doing the payroll, The Catmose Club believes Mr Hibbitt has committed fraud and that this amounts to gross misconduct. Therefore, the club denies that it has wrongfully dismissed Mr Hibbitt.

Hearing

4. Mr M Bloom, solicitor, represented Mr Hibbitt.
5. Mr R Ryan, Counsel, represented The Catmose Club.
6. With the parties' agreement, I decided to deal with liability issues first. It was agreed that these would include "**Polkey**" reductions (i.e. reductions to reflect the possibility he may have been dismissed even if a fair procedure had been followed), any reductions for Mr Hibbitt's contributory fault and any uplift for alleged failure to follow the ACAS code of practice on dismissals.
7. I heard oral evidence from Mr Hibbitt on his own behalf and on the club's behalf from Mr P Williamson, the club's chairman, Mr G Cameron, the club's secretary, and Mr S Nicholl, a member of the club's current committee in his role as treasurer and a member of the committee at the time it decided to end Mr Hibbitt's employment.
8. Each witness had prepared a statement and adopted that as their evidence. Each witness was cross-examined. I asked questions of some witnesses. Some were re-examined also.
9. Mr Hibbitt also relied on a statement from Mr A Rawlings. He was the club's secretary from 2008 to February 2019. Mr Rawlings had signed it. He did not attend the hearing and so was not available for the club to ask him questions about it.
10. I have considered the evidence each witness has given when coming to my conclusions, and in relation to Mr Rawlings I have taken into account he was not there to answer questions about his evidence.
11. There was a slim agreed bundle of documents. When coming to my conclusions, I have considered those documents to which the parties referred me.
12. Each party made oral closing submissions.

13. Mr Ryan had also prepared detailed written submissions that refer to significant amounts of case law which might potentially be relevant. I have taken those written submissions into account but in this judgment, I will refer only to those points and cases which I believe are necessary to explain my conclusions.
14. I would like to thank the witnesses for giving their evidence and the representatives for their helpful submissions.
15. Unfortunately, the day's listing was insufficient to complete both evidence and deliver judgment. Therefore, I reserved judgment.
16. We took a break in the morning and in the afternoon. Everyone agreed that we should take a lunch break early to ensure that no-one was part-way through their evidence over lunch.
17. Neither party required any reasonable adjustments.

Issues

18. The parties had agreed a list of issues. In light of the concession that the dismissal was procedurally unfair, I believe that the issues I must decide are these:
 - 18.1. Has the Catmose Club proven that the reason for dismissal was a potentially fair one?
 - 18.2. If the Catmose Club had followed a fair procedure what is the chance that the club would have dismissed Mr Hibbitt in any event?
 - 18.3. Has Mr Hibbitt conducted himself in a way that is culpable or blameworthy that means it is just and equitable to reduce his
 - 18.3.1. basic award? and/or
 - 18.3.2. compensatory award?
 - 18.4. Is Mr Hibbitt guilty of gross misconduct?
 - 18.5. Has there been a failure to follow the ACAS code of practice? And if so should there be an adjustment to any compensation to reflect that failure?

Facts

19. Before I set out my findings of fact, I should firstly say I believe each witness has done his best to tell me what he believes the truth to be.
20. What follows represents my relevant findings of fact.

The club

21. The club is a members' club based in Oakham, Rutland. It has approximately 400 members. It employs four people. It is run by a committee. The committee is made up of volunteers drawn from the membership. The committee members are not paid for the work that they do. The club does not have access to human resources advice.
22. All witnesses commented that the club's membership is declining and that the club's finances are fraught. Mr Cameron's evidence was that the club

is losing between £1,000 and £1,200 per month, and is relying on its cash reserves to keep going. While I did not see financial records, it is clear that its present and its future are precarious.

Mr Hibbett's employment

23. The club employed Mr Hibbett as a steward. His employment commenced on 15 September 2007. I have come to that conclusion because that is the date provided for in his contract of employment and which he signed on 12 June 2008.
24. The contract of employment said that Mr Hibbett was entitled to receive one weeks' notice of termination.
25. The contract of employment said the following about discipline:
"if you are dissatisfied with any disciplinary decision which affects you or your employment you should appeal in the first instance to the secretary. This appeal will be accepted only if it is made in writing."
26. Under the heading "Disciplinary Procedure" the contract says:
"A stage 1 - First Written Warning: if your conduct or performance is unsatisfactory, you will be given a first written warning. The warning will be disregarded after six months satisfactory service.
"B stage 2 - Final Written Warning: if your conduct or performance is still unsatisfactory, a final written warning will be given, making it clear that any recurrence of the offence or other serious misconduct within a period of six months result in dismissal.
"C stage 3 - Dismissal: if there is no satisfactory improvement or if further serious misconduct occurs, you will be dismissed. You'll receive a written statement setting out why the company has decided to take disciplinary action. You will attend a meeting at which you may be accompanied. You will be given the right to appeal against the company's decision."
27. Under the heading "Gross Misconduct" the contract says:
"if, after investigation, it is confirmed that you have committed one of the following offences (the list is not exhaustive), you will normally be dismissed:
"
"..."
"Fraud
"
"..."
"While alleged gross misconduct is being investigated, you may be suspended, during which time the normal hourly rate will be paid. A decision to dismiss will be taken by your employer only after a full investigation."
28. There was no staff handbook and no staff rules setting out what the club expected of its employees beyond that in the contract.
29. Mr Nicholl accepted that that of the list of offences that may count as gross misconduct, only "fraud" was relevant to the allegations against Mr Hibbett. That is why I have not set out the other items in the list.

Concerns raised about Mr Hibbitt

30. The club had concerns over many years about whether Mr Hibbitt was discharging his duties to a satisfactory standard. These are evidenced by minutes of committee meetings as follows:
 - 30.1. On 17 April 2009 there was a committee meeting. Mr Williamson was present at that meeting, as was Mr Rawlings. One of the items raised was “13) Cleaning not up to standard was raised. This to be taken up with the Steward.”
 - 30.2. On 12th of July 2011 there was another committee meeting. Both Mr Williamson and Mr Rawlings were present. One of the items raised was “12) It was reported that the upstairs kitchen was not clean last weekend. The secretary to talk to the Steward.”
 - 30.3. On 14 August 2012 there is a committee meeting at which both Mr Rawlings and Mr Williamson were present. One of the items raised was “16) Issue of staff playing bandit in working time was raised.”
 - 30.4. On 13 November 2012 there was a committee meeting again at which both Mr Rawlings and Mr Williamson were present. One of the items raised was “12) It was raised again about staff playing the bandit.”
 - 30.5. On 13 October 2015 there was another committee meeting at which Mr Rawlings and Mr Williamson were present. Item 16 of the minutes record “There was a report of the kitchen being dirty for a function, no precise details on the Steward to be seen. There has been issues with a dance class cancelling late.”
 - 30.6. On Tuesday, 8 March 2016 there is another committee meeting at which both Mr Rawlings and Mr Williamson were present. Item 13 of the minutes recorded “The smell of smoke was reported in the club. To speak to steward about it.”
31. On each occasion, the member of staff referred to anonymously was Mr Hibbitt. The Club also believed it was Mr Hibbitt who smoked on the club’s premises. The club’s witnesses were clear about this. Mr Hibbitt presented no credible explanation about who else they could be referring to.
32. I conclude that on each occasion a committee member raised the matter with Mr Hibbitt. That is inherently plausible. It is less plausible that someone would raise the matter at committee and after discussion that it would go no further. In addition, in some entries it is clearly stated that the committee agreed that someone would speak to Mr Hibbitt. It is not plausible the committee would form this intention but take it no further.
33. However, I am satisfied that they were raise once only on each occasion and in the most informal way possible. The club accepts that Mr Hibbitt was never subjected to any disciplinary process or sanction (either as provided in the contract or otherwise), nor that they subjected him to a performance improvement programme.

34. I am also satisfied that the club was generally satisfied with Mr Hibbitt's work. The complaints are few and stretch over a long period of time with long gaps in between. The subject matter of the complaints cannot have been that bad at the time for the committee to have allowed matters to continue that such a long period of time. I do not believe the club would have allowed matters to continue like that for so long without any action if Mr Hibbitt's performance was not satisfactory to the degree now alleged.

Payments to Ms C McKay

35. On 14 June 2017 there was another committee meeting at which both Mr Rawlings and Mr Williamson are present. A Mr I Bain had also been present at this meeting (he had been present at other meetings as well that that is not relevant to this claim). Mr Bain is the brother-in-law of Mr Hibbitt. He was also the accountant for the Catmose Club. Mr Hibbitt provided to him details of hours worked by each employee, and Mr Bain then processed the payroll and told Mr Hibbitt how much to pay to each employee and himself.
36. The minutes record at item 14 the following "A question was asked about how one member of staff was being paid."
37. The "member of staff" to whom the minutes referred is Ms C McKay. Ms McKay received Social Security benefits. If she worked more than a certain number of hours her entitlement to the benefits would cease. A scheme developed by which Mr Hibbitt's wife, who was also an employee of the club, would be paid for more hours than she worked. She would then pass the extra to Ms McKay. Whatever the legalities of this arrangement, I find the fact that the club's management knew and approved of this arrangement. Mr Williamson in his evidence confirmed that this was discussed at that meeting on 14 June, that the minutes are accurate about the fact the discussion took place, that Mr Bain said that the arrangement would be fine and as a result the committee approved it. This also tallies with the evidence of Mr Rawlings about the matter. It also tallies with Mr Hibbitt's evidence.
38. Because Mr Hibbitt provided the hours of work to the accountant for the payroll processing. Mr Hibbitt was therefore clearly involved in this arrangement. Whether it amounts to benefit fraud, it is not fraud of the club. This is because the club knew of, understood and approved the arrangement.
39. I find as a fact that, while this arrangement was of concern to the new committee, it was not a reason for Mr Hibbitt's dismissal. That tallies with Mr Nicholl's own evidence. Indeed because of the club's connivance it could not properly be a reason for dismissal in any event.

Mr Hibbitt's potential retirement

40. There was a committee meeting on 8 November 2017 where is recorded that the committee believed that Mr Hibbitt is considering retiring next year. Mr Hibbitt confirmed that he had considered retiring in late 2019. Therefore, since there seem to be an intention of resigning in the near future and of the similarity between Mr Hibbitt's admitted intention recorded in the minutes, I find as a fact that he had expressed his intention to retire to someone on the committee.

Letter of 14 March 2019

41. On 14 March 2019 a Ms C McCarthy wrote a letter raising various complaints about cleanliness, smoking on the premises, failure of Mr Hibbitt to chase up bookings, make notes of any bookings in the diary and playing on the gambling machines.

Meeting of 8 May 2019

42. There was a committee meeting on 8 May 2019. This was a meeting of the new committee of whom Mr Williamson, Mr Cameron and Mr Nicoll are members. Mr Rawlings was no longer a member. The new committee wanted to try to revitalise the club. It cannot however be described as akin to a takeover because it is made up from existing members and some who were previous committee members.
43. The letter of 14 March led to a significant discussion about Mr Hibbitt.
44. Item 4 of the minutes records as follows:
“Dissatisfaction was expressed re condition of club concerning cleanliness of bar, seller toilets and remainder of club premises. Diary not being kept up-to-date and enquiries of use of club room not followed up by steward. Lack of interest in running club as required by committee. Lack of time hours being worked by steward but still claiming 50 hours worked per week. Only seen in club on Saturdays, Sundays and Mondays will stop cleaning as it was seen to be being carried out by bar staff. Left a secretary and treasurer to look into all matters on decision of committee.”

Hours worked

45. At the meeting Mr Nicholl presented a spreadsheet. In it he recorded the number of hours each week for which Mr Hibbett (and others) had been paid, and compared that to hours worked. The former derived from the payroll data. However, since 2012 the club had abandoned the use of timesheets and did not use a clocking on procedure either. Therefore, other than the hours for which the employees had been paid, there was no contemporaneous data of the hours actually worked.
46. To resolve this Mr Nicholl used the hours that he believed the club had been open each day of the week, considered the days Mr Hibbitt would have worked and compared them to the hours claimed. He accepts that he did not interview any member of staff to see if they agreed or disagreed with the assumptions nor did he ask them to see if they agreed or disagreed with the figures. There is no evidence there was any job analysis either to see whether the hours claimed compared to the duties assigned to the employee was inherently plausible or implausible.
47. Mr Nicholl’s analysis is superficially plausible. I conclude it would have been reasonable to launch an investigation based on what it shows. However, without more, it comes down to testing unexplored assumptions against the past contemporary data used to calculate the wages. In addition, the calculations went back to 2013. I find it inherently implausible that during that time no-one appears to have raised the allegation that Mr Hibbitt was claiming payment or more hours than he worked if that were the case. The

club and its committee controlled the finances. They would have had access to its financial data. They had an accountant throughout.

48. The club did rely on the fact the cleaning, in its opinion, was not being done and that when some of the witnesses had popped they did not see Mr Hibbitt. Poor performance, if that is correct, does not mean he was not at work or did not work at all when there. Snapshots from visits do not persuade me that there is any plausibility to Mr Nicholl's conclusions.
49. In summary, there is nothing contemporaneous to support Mr Nicholl's conclusion that Mr Hibbitt was being paid for working more hours than he claimed.
50. As to the hours he worked, I accept Mr Hibbitt's evidence and find as follows
 - 50.1. Mr Hibbitt's contract of employment provided that he was to work a total of 50 hours each week. As set out in the contract many of these hours of fixed because they were the hours that the club was open. The contract also provides that 14 hours of cleaning were to be done on top of those fixed hours. In cross examination Mr Nicholl conceded that those 14 hours also included stocktaking, cleaning the pipes, liaising with the brewery, managing bookings and the like. Although Mr Nicholl suggested that Mr Hibbitt only had to undertake 10 hours of extra work I have concluded it was 14 hours because that is what the contract says. I therefore conclude in this period he worked 50 hours per week and he was therefore paid no more than he was entitled to.
 - 50.2. In September 2017 there was a change to Mr Hibbitt's hours of work because the club employed Ms C McCarthy. However, Mr Hibbitt said he still had to work 50 hours per week in total. There is a disagreement between the parties about whether Mr Hibbitt worked on Sundays between 1530 and 1830. Mr Nicholl's evidence was that the club was closed during those hours. Mr Hibbitt's evidence is that he was nonetheless working during those hours and that the club was open. I have concluded that Mr Hibbitt did work between 1530 and 1830 on Sundays during this period. Mr Hibbitt's recollection is clear. As I have noted the club has no timesheets to show what hours employees were working and has produced no documents that otherwise show the opening hours on the Sunday. There was no direct evidence from members or committee members to show that the club closed and that staff were sent home. It seems inherently plausible that it would remain open all day on Sunday. Even if I am wrong about that it seems inherently plausible that there would still be work for Mr Hibbitt to do during those three hours.
51. There were queries raised about some hours for which Mr Hibbitt was paid but which he admitted he was not present. However close analysis shows that the pay was holiday pay, and he confirmed he was on holiday. He was also asked about other occasions when hours may be more than expected.

He could explain to my mind satisfactorily when he did extra hours or did or did not work at Christmastide.

52. I conclude that the hours for which Mr Hibbitt was paid by the club were the hours that he worked (with occasional holiday pay). He was therefore paid no more than he was entitled to.

Disciplinary process

53. As noted, Mr Nicholl did not interview Mr Hibbitt or anyone else to verify the concerns raised in his spread sheet.
54. The club's committee was persuaded by the spread sheet that Mr Hibbitt had been claiming payment for more hours than he worked. They considered this fraud and therefore gross misconduct. They decided to dismiss him.
55. Mr Hibbitt suggested he was dismissed for other reasons connected with the club's financial difficulties rather than anything else even they knew he was considering retirement. I found no evidence to support that, and reject that suggestion.
56. Mr Nicholl has had experience of employment relations matters from his professional life. He accepted the need to follow a fair procedure. He accepted that the ACAS code of practice represented what might be described as common sense. However unfortunately his experience did not influence how the club dealt with this matter.
57. The committee agreed that Mr Cameron would speak to Mr Hibbitt and dismiss him. However, the club needed to find a replacement steward because without one the club could not function. Therefore, the club kept Mr Hibbitt on as an employee for about one month without telling him anything about his imminent sacking or why. Mr Hibbitt was not suspended. He was allowed to continue to work as he had been doing without restriction and claim payment for hours without supervision or checking.
58. The club found a new steward and agreed he would start one week after Mr Hibbitt was dismissed.
59. On the date of dismissal, Mr Cameron took Mr Hibbitt to one side and told him he was dismissed summarily. He was to be paid one week's wages in lieu of notice (though in my mind nothing turns on that). Mr Hibbitt was given no notice of the meeting or of the allegation against him. He was not advised of his right to be accompanied. There was no disciplinary meeting of any kind. There was no opportunity for Mr Hibbitt to put his side of the story. At no time did Mr Cameron step back and consider if there had been misconduct or if the sanction of summary dismissal was justified. Mr Cameron had gone to that meeting with Mr Hibbitt knowing what the outcome would be and without being open to changing his mind.
60. The club did not set out the reasons for dismissal in writing. It did not advise Mr Hibbitt in writing of his right to appeal.
61. Shortly afterwards, Mr Hibbitt instructed solicitors who wrote to the club. They did not ask the club to consider an appeal.

Law

Unfair dismissal

62. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal
63. **Employment Rights Act 1996 section 98** provides (so far as relevant)
- “(1) In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show—
- “(a) the reason (or, if more than one, the principal reason) for the dismissal, and
- “(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- “(2) A reason falls within this subsection if it—
- “ ...
- “(b) relates to the conduct of the employee,
- “ ...
- “(4) Where the employer has fulfilled the requirements of subsection (1), 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.
- “ ...”
64. The employer bears the burden of proving on the balance of probabilities that the claimant was dismissed for misconduct. If the if the employer fails to persuade the tribunal that had a genuine belief in the employee's misconduct, then the dismissal is unfair.
65. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.
66. The tribunal has had particular regard to **British Home Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Foley v Post Office [2000] IRLR 82 CA and Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA.**
67. The tribunal understands of the effect of these cases is as follows:
- 67.1. Was there a reasonable basis for the respondent's belief?
- 67.2. Was that based upon a reasonable investigation?

- 67.3. Was the procedure that the employer followed within the “range of reasonable responses” open to the employer?
- 67.4. Was the decision to dismiss summarily within the “range of reasonable responses” open to the employer?
68. The Tribunal is not entitled to substitute its own view for that of the employer.
69. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** sets out the basic requirements for fairness applicable in most conduct cases.
70. The code identifies the following key steps in any disciplinary procedure:
- 70.1. carry out an investigation to establish the facts of each case;
 - 70.2. inform the employee of the problem;
 - 70.3. hold a meeting with the employee to discuss the problem;
 - 70.4. allow the employee to be accompanied at the meeting;
 - 70.5. decide on appropriate action; and
 - 70.6. provide employees with an opportunity to appeal.
71. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** requires a Tribunal to have regard to the code for reasons explored below.
72. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA.**

Gross misconduct

73. Dismissal without notice (or with inadequate notice) is wrongful unless the employer can show that summary dismissal was justified because of the employee’s repudiatory breach of contract, or that it had a contractual right to make a payment in lieu of notice.
74. Gross misconduct is conduct that
‘must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment’. See **Briscoe v Lubrizol Ltd 2002 IRLR 607 CA.**
75. Put another way, the employee’s behaviour must disclose a deliberate intention to disregard the essential requirements of the contract: **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698 CA.**
76. Unlike unfair dismissal, the Tribunal must be satisfied that there is actual gross misconduct, and can consider all the evidence available, including that which comes to light after dismissal: **Williams v Leeds United Football Club 2015 IRLR 383, QBD, Boston Deep Sea Fishing and Ice Co v Ansell 1888 39 ChD 339, CA.**

77. The employee's conduct must be viewed objectively, so he might commit gross misconduct even without an intention to do so: **Briscoe v Lubrizol Ltd 2002 IRLR 607 CA.**
78. When assessing the conduct, factors such the nature of the employment and the employee's past conduct will be relevant: **Pepper v Webb 1969 1 WLR 514 CA, Wilson v Racher 1974 ICR 428 CA.**
79. Motive for dismissing for gross misconduct is irrelevant: **Williams v Leeds United Football Club 2015 IRLR 383 QBD.**
80. If there is gross misconduct of which the employer is aware, then the employer must decide whether to dismiss or not promptly after becoming aware of it. If they delay unduly, do not act, or act in a manner that is inconsistent with seeking to end the contract, then the tribunal may conclude they affirmed it: **Williams v Leeds United Football Club 2015 IRLR 383, QBD; McCormack v Hamilton Academical Football club [2012] IRLR 108 CSIH.**

Dishonesty

81. Where a question arises as to whether conduct is dishonest, the Tribunal must
 - 81.1. first ascertain the actual state of the individual's knowledge or belief as to the facts?
 - 81.2. Then ask itself whether the conduct in light of that belief was honest or dishonest by applying the objective standards of ordinary decent people.

Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club) [2018] AC 391 UKSC.
82. In my opinion fraud, dishonesty and such terms have dishonesty at their core, and therefore the test in **Ivey** is a key issue to resolve whatever the label that is used for alleged fraudulent misconduct.

Compensatory award

83. The Tribunal awards compensation by reference to a basic award and compensatory award.
84. The **Employment Tribunals Act 1996 section 119** sets out how to calculate the basic award.
85. The **Employment Rights Act 1996 section 123** empowers a Tribunal to award compensation that is "just and equitable" in the circumstances.
86. The awards are to be calculated later, but potential reductions are properly considered now as part of the liability stage.

Reduction to compensatory awards under the rule in Polkey v AE Dayton Services Ltd [1988] AC 344 UKHL

87. The rule in **Polkey** requires a Tribunal to consider the prospect that an employee might have been dismissed in any event.
88. The approach to the assessment is set out in **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT:**

“The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed.”

89. Furthermore, in **Hill v Governing Body of Great Tey Primary School [2013] ICR 691 EAT**, the Tribunal said

“[24] A ‘Polkey deduction’ has these particular features. “First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.”

90. The assessment may be that a dismissal would have occurred by a fixed date or that there was a percentage chance it may have happened at some point.

Contributory conduct

91. The **Employment Rights Act 1996 section 126(3)** compels the Tribunal to consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the part of the employee relating to the unfair dismissal. This is so regardless of whether the issue was raised by the parties: **Swallow Security Services Ltd v Millicent UKEAT/0297/08 EAT**.
92. The focus can be only on the employee’s conduct before dismissal and not that of others: **Parker Foundry Ltd v Slack 1992 ICR 302, CA; Mullinger v Department for Work and Pensions 2007 EWCA Civ 1334, CA**.
93. Before any reduction can be made, the Tribunal must be satisfied that the relevant conduct is “culpable and blameworthy”: **Nelson v BBC (No2) [1980] ICR 110 CA**. It includes foolish or “bloody minded” conduct (as described in **Nelson**) as much as conduct that is properly described as tortious or misconduct warranting a disciplinary sanction.
94. It is not necessarily the case the employee should know the conduct is culpable or blameworthy. The Tribunal can also consider the employee ought to have known it was culpable or blameworthy: **Allen v Hammett [1982] ICR 227 EAT; Department for Work and Pensions v Coulson UKEAT/0572/12 EAT**.

95. There should only be a reduction if it is just and equitable to reduce compensation because of the relevant conduct.
96. A failure to appeal is not relevant because it occurs after the dismissal and so cannot have contributed to it: **Hoover Ltd v Forde [1980] ICR 239 EAT**.
97. The basic award and compensatory award can be reduced by different amounts, but normally it should be the same amount: **G McFall and Co Ltd v Curran [1981] IRLR 455 NICA**.

Unreasonable failures to follow the ACAS codes of practice

98. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** applies to proceedings for unfair dismissal. It provides (so far as relevant)

“ ...

“(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

“(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

“(b) the employer has failed to comply with that Code in relation to that matter, and

“(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

“(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

“(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

“(b) the employee has failed to comply with that Code in relation to that matter, and

“(c) that failure was unreasonable,

“the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

“(4) In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

“ ... ”

99. Therefore, the uplift is discretionary and can follow only if the employer’s failure is unreasonable. It is also compensatory and not punitive.
100. In **Lawless v Print Plus (Debarred), UKEAT/0333/09, 27 April 2010, EAT** (decided under the predecessor former statutory provisions), the EAT suggested the following factors may be relevant to consider when deciding if to award an uplift and if so by how much:

- 100.1. whether the procedures were applied to some extent or were ignored altogether
 - 100.2. whether the failure to comply with the procedures was deliberate or inadvertent, and
 - 100.3. whether there were circumstances that mitigated the blameworthiness of the failure to comply.
 - 100.4. the size and resources of the employer, noting that failures by small businesses were always to be regarded as “venial”.
101. The Tribunal can also consider the size of the remedy when deciding on an uplift and that the maximum should apply only to the most exceptional cases: **Abbey National plc and anor v Chagger 2010 ICR 397, CA** (decided under the predecessor former provisions).
102. Any uplift must be related to the employment relationship and circumstances related to the unreasonable failure to comply with the code.

Conclusions

Gross misconduct

Was Mr Hibbitt guilty of fraud?

103. Fundamental to fraud is dishonesty. Mr Hibbitt was paid for the hours he worked and no more. Applying the test in **Ivey**:
- 103.1. He honestly believed he worked the hours for which he claimed;
 - 103.2. No reasonable person would consider him dishonest.
104. Therefore, he is not fraudulent.

Was Mr Hibbitt guilty of gross misconduct?

105. The reason for summary dismissal was the alleged fraud about his working hours. He had not committed this alleged fraud however. None of the other allegations could be said objectively either individually or taken together to so undermine the trust and confidence between Mr Hibbitt and the club. Therefore he was not guilty of gross misconduct.

If so, had the club affirmed the contract?

106. Even if I am wrong about that, the decision to keep Mr Hibbitt employed while they sourced a replacement amounts to affirmation. It shows that notwithstanding the alleged repudiatory breach of contract, the club had decided nonetheless to continue to employ him. I do not accept it is not affirmation to keep on an employee in fundamental breach of contract without any changes to his role while sourcing his replacement. It is objectively inconsistent with accepting the alleged repudiatory breach. Therefore, the club had affirmed the contract.

Conclusion on gross misconduct

107. The club wrongfully dismissed Mr Hibbitt. They had paid him one week's pay in lieu of notice. Therefore, they owe him pay equal to the notice he is entitled to under the **Employment Rights Act 1996 section 86**.

Unfair dismissal

108. The club conceded he was unfairly dismissed but I set out my conclusions on relevant key matters here.

Reason for dismissal and honest belief

109. Based on the evidence that I have heard the club had an honest belief that Mr Hibbitt was guilty of misconduct. This is the reason for dismissal.

Reasonable investigation

110. There was no investigation to speak of. There was a wholesale failure to take the obvious next step and check that their assumptions stood up to potential scrutiny and could therefore safely be treated as facts.

Reasonable belief

111. It follows therefore that there was not a reasonable belief that Mr Hibbitt was guilty of misconduct.

112. Furthermore there was no opportunity for Mr Hibbitt to give his side of the story, to present mitigation, to be accompanied, to appeal nor any consideration of alternative, lesser sanctions.

Polkey reduction

113. I do not accept the club's contention that I can conclude that there was a chance that Mr Hibbert would have been dismissed in any event had a fair procedure been followed.

114. The argument very much turns on the fact that there had been repeated concerns about Mr Hibbitt's performance, that nothing appeared to change and that the new committee represented a fresh beginning (akin to a company boardroom takeover when people bring in new executives). The club says he would quite likely have kept in his ways and so would have had to go in any event.

115. The problem is that there is simply nothing to back this up. But for the most informal of occasional chats there is nothing to show he would resist or refuse change. No attempt had been made to instigate a formal or informal performance improvement programme nor to instigate a disciplinary process on the basis he refused wilfully to do his job to a satisfactory standard. The new committee is not a wholesale change comparable to a corporate takeover. It features members from previous iterations of the committee and it drawn from the club's existing membership.

116. I do not have sufficient information to allow me to predict how the club might have acted fairly because the premise on which he may have been dismissed has never been explored by it.

Contributory conduct

117. Because I have concluded the issues raised were considered minimal given the lack of action by the club over a long period of time, I do not consider that they could be described fairly as culpable or blameworthy conduct.

118. The arrangement in respect of Mrs McKay's pay cannot be culpable or blameworthy because the club connived in it and Mr Hibbitt did no more than what the club agreed to him doing.
119. Because Mr Hibbitt was only paid for hours he was entitled to be paid for I see no culpable or blameworthy conduct there.
120. His failure to appeal is not relevant. In any case the club never told him of his right to appeal as they are required to do so.
121. There is nothing otherwise in Mr Hibbitt's conduct which is culpable or blameworthy.

ACAS code

122. I recognise the club is a small organisation with few employees, limited resources and is run by volunteers. It is unreasonable to expect the same degree of formality and thoroughness that might be expected of a large employer.
123. I also recognise that the case law and codes of practice are guidance and not statute law.
124. However, the inevitable conclusion must be that this is a wholesale failure to follow procedure. As Mr Nicholl accepted, the ACAS code is common sense. He had experience of such matters so the club cannot sensibly argue it was completely ignorant. I take judicial note of the fact the code and guidance is available from ACAS and is on its website. Its requirements are simple and easily adaptable to even very small businesses.
125. There was no investigation to speak of, no disciplinary process of any kind, the decision to dismiss was made before the employee even knew his employment was at risk, there was no notice of the right to be accompanied, no consideration of mitigating factors or of lesser sanctions, and no offer of an appeal.
126. The demands of the ACAS code are simple to apply and demand little financial resource on the employee's part.
127. The size and resources of the club do not in my mind justify the wholesale failure to implement a fair procedure or even follow the code in part.
128. I conclude that the failure to follow them was inadvertent to this extent: Despite Mr Nicholl's experience there was some general ignorance of employment rights. However, the club made no effort to stop to think how it might deal with the matter fairly or to find out how it might do so.
129. Mr Hibbitt was dismissed in the most summary manner without warning after many years working at the club.
130. However, this was not an action on a complete whim. The club had done some analysis, albeit flawed, and honestly, if wrongly and unjustifiably, believed Mr Hibbitt to be guilty of misconduct.
131. Balancing these factors, the failure to follow the code was unreasonable, it is appropriate to award an uplift and, in my judgment, an uplift of 17.5% would be appropriate in this case.

Employment Judge Adkinson

Date: 20 January 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments 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 Mr Hibbitt(s) and respondent(s) in a case.