



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4106418/2019**

**Hearing held in Dundee on 10 December 2019**

**Employment Judge A Kemp**

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**Mr D Neave**

**Claimant  
Represented by  
Miss L Campbell  
Solicitor**

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**N & C Pubs Limited (in liquidation)**

**Respondent  
No appearance**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**1. The claimant was unfairly dismissed by the respondent.**

**2. He is awarded the sum of TEN THOUSAND FOUR HUNDRED AND FORTY POUNDS (£10,440) payable by the respondent.**

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**3. For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:**

**(i) The monetary award is Ten Thousand Four Hundred and Forty Pounds (£10,440).**

**(ii) The prescribed element is Nine Thousand, Three Hundred and Sixty Pounds (£9,360).**

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- (iii) The date to which the prescribed element relates is 3 March 2020, and the prescribed period is that from 8 February 2019.
- (iv) The amount by which the monetary award exceeds the prescribed element is One Thousand and Eighty Pounds (£1,080).

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## REASONS

### 10 Introduction

1. The claimant pursued a claim of unfair dismissal. It was not defended by the respondent, which did not enter a Response Form. The case called for a Final Hearing. The respondent did not appear at it.
2. The claimant was represented by Miss Campbell.
- 15 3. Towards the end of the hearing the clerk came into the room with a print out from Companies House in relation to the respondent, she having been unable to do so earlier when I had requested it as the internet service at the Tribunal was not working. It indicated that the respondent may be in liquidation. I therefore asked Miss Campbell to investigate that, and seek  
20 either consent or a court order for the pursuit of these proceedings if that were necessary.
4. Ms Campbell has obtained an interlocutor from Dundee Sheriff Court dated 19 February 2020 in which the court granted the application under section 130(2) of the Insolvency Act 1986 to proceed with the claim made  
25 to this Tribunal. The interim liquidator of the respondent was noted as having consented to the application.
5. Having regard to the terms of the overriding objective within Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 I considered that in the circumstances it was  
30 appropriate to proceed to Judgment based on the evidence I had heard at the Final Hearing, and not to require that to be presented again. No

practical purpose would be served by that, it would involve unnecessary expense and delay, and it would not be just in all the circumstances.

### **The Issues**

6. The issues before the Tribunal were –

- 5 1. What was the reason for the claimant's dismissal?
2. If potentially fair, was the dismissal unfair under section 98(4) of the Employment Rights Act 1996?
3. In the event of any finding in favour of the claimant what remedy should be given to the claimant?

### 10 **The Evidence**

7. The claimant had prepared a bundle of documents. He gave evidence himself. He was given an opportunity to provide details of his pension entitlement, if any, but failed to do so to his solicitor, such that no evidence on that issue was before me.

### 15 **The facts**

8. I make the following findings in fact:

9. The claimant is Mr Douglas Neave. His date of birth is 29 December 1961.

10. He was employed by the respondent from 10 December 2014 as a kitchen porter. He worked in premises known as Nicholls Bar and Restaurant in  
20 Dundee.

11. He had no prior disciplinary history.

12. On 26 January 2019 he mistakenly thought that he was on holiday for that day, and the period from that date to 7 February, having had holidays approved earlier. In fact the holiday was due to start on 27 January 2019  
25 and he was on the rota for 26 January 2019. As he thought that he was on holiday he did not attend for work or call in on 26 January 2019.

13. On 8 February 2019 the claimant returned to work, and was informed that he was dismissed for gross misconduct. He was asked to return later to collect a letter to confirm that.

14. A letter dated 8 February 2019 was provided to him with two alleged earlier warnings, neither of which he had seen before.
15. The decision to dismiss him was made without the respondent calling him to a disciplinary hearing and give him the opportunity of responding to the allegations.
16. The claimant appealed the decision by letter dated 13 February 2019. No response was received to that letter and there was no appeal hearing.
17. The claimant worked about 25 hours per week for the respondent. His net earnings were on average £180 per week.
18. The claimant has not worked since his dismissal. He is in receipt of universal credit. He has attempted to find work by contacting the Job Centre and searching online job sites. He has followed the requirements to seek work as a condition of receipt of universal credit.
19. It is likely that he will continue to be unemployed for a period of at least a further two months.

### **Claimant's submissions**

20. Miss Campbell made a brief submission arguing that the respondent had been unfairly dismissed. No reason for dismissal had been proved as the respondent had not appeared to do that, and in any event there was a complete failure to follow the ACAS Code of Practice either by holding a disciplinary hearing, or by holding an appeal. She therefore sought a finding of unfair dismissal, and an award for a total period of one year from dismissal. She did not have with her pay slips to establish the exact earnings, or pension contributions that were sought, and provided that by email later, at my invitation.

### **The law**

#### *(i) The reason*

21. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

22. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

(ii) *Fairness*

5 23. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

10 “depends on whether in the circumstances.....the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.”

15 24. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

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25. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

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- (i) Did the respondent have in fact a belief as to conduct?
  - (ii) Was that belief reasonable?
  - (iii) Was it based on a reasonable investigation?

26. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

30 “in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; the function of the Industrial Tribunal, as an industrial jury, 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. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.”

10 27. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and summarised by the Court of Appeal in **Tayeh v Barchester Healthcare Ltd [2013] IRLR 387**.

15 28. Lord Bridge in **Polkey v AE Dayton Services [1988] ICR 142**, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

20 “in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation.”

29. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

25 “4.3(4) Employers should carry out any necessary investigations to establish the facts of the case.

30 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification...

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence....

[Under the heading - Provide employees with an opportunity to appeal]

5 26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

10 27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.”

30. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428***. The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13***. If the employer’s view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. But a finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

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31. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that a failure to permit an employee to exercise a contractual right of appeal was of itself capable of rendering a fair dismissal unfair and that employers must act fairly in relation to the whole of the dismissal procedures.

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(iii) *Remedy*

32. In the event of a finding of unfair dismissal, the tribunal requires to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal.

5 33. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. The amount of the compensatory award is determined under section 123 and is “such amount as the tribunal considers just and equitable in all the circumstances having regard to the  
10 loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”.

### **Observations on the evidence**

34. Mr Neave was I considered an entirely credible and reliable witness.

### **Discussion**

15 (a) *Reason*

35. The respondent has not established that the reason for the dismissal was a potentially fair one. No evidence was led by the respondent. It follows that the dismissal was unfair.

(b) *Fairness*

20 34. Even if I had accepted that the reason for dismissal was conduct, in not reporting for work on 26 February 2019, I would have held the dismissal to be unfair. It was procedurally inept. No disciplinary hearing of any kind was held. An appeal was made, but ignored such that no appeal hearing was held. The terms of the ACAS Code of Practice were materially  
25 breached.

### **Remedy**

36. The claimant has mitigated his loss, in that he has sought to find new employment without success. His earnings were £180 per week.



37. The basic award is a function of age, years of service and earnings, and is £1,080.

38. The compensatory award I am satisfied is appropriately calculated on the basis of a total of one year's loss of earnings, which is the sum of £9,360  
5 in the period from dismissal to the date of the hearing. Whilst his losses are likely to continue thereafter that is the maximum sum that can be awarded, such that no award can be made for loss of statutory rights.

### **Recoupment**

39. The claimant stated in evidence that he did receive benefits after the  
10 dismissal. The Employment Protection (Recoupment of Benefits) Regulations 1996 therefore apply to the award. For the purposes of those Regulations:

- (i) The monetary award is £10,440
- (ii) The prescribed element is £9,360
- 15 (iii) The date to which the prescribed element relates is 3 March 2020, and the prescribed period is that from 8 February 2019
- (iv) The amount by which the monetary award exceeds prescribed element is £1,080.

40. The effect of the Regulations is that the sum of £1,080 is now payable.  
20 There is a period of 21 days after this Judgment is sent to the parties for the service on the parties of a Recoupment Notice, which sets out the amount if any that must be deducted from the prescribed element and paid to the Department for Work and Pensions. The balance of the monetary award, being the prescribed element of £9,360, is then payable to the  
25 claimant. If there is no Recoupment Notice served within that time, the full amount of the prescribed element is payable to the claimant save where there are sufficient reasons for any delay in serving such a notice.

### **Penalty**

41. Employment Tribunals have a discretionary power in certain  
30 circumstances to order employers who lose a claim to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A. This power was granted to tribunals, according to the

Explanatory Notes, 'to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law'. It is exercisable where a tribunal, when determining a claim involving an employer and a worker, both concludes that the employer has breached any of the worker's rights to which the claim relates, and is of the opinion that the breach has one or more aggravating features; in such circumstances, the tribunal may order a penalty to be paid regardless of whether or not it also makes a financial award.

42. In light of the complete failure to follow the ACAS Code of Practice, the tribunal would ordinarily have considered making such an award, but in light of the position that the respondent is in liquidation it does not appear practicable to do so, and therefore no penalty is imposed.

### **Conclusion**

43. The claimant was unfairly dismissed.
44. He is awarded the sums set out above.

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30	<b>Employment Judge:</b>	<b>Alexander Kemp</b>
	<b>Date of Judgment:</b>	<b>03 March 2020</b>
	<b>Date sent to parties:</b>	<b>04 March 2020</b>