



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Pritchard

**Respondent:** Russell Magor for and on behalf of the  
Management Committee of Pontnewydd  
Working Men's Club

**Heard at:** Cardiff      **On:** 16 and 17 November 2021

**Before:** Employment Judge Brace

### Representation

**Claimant:** Ms K Green (HR Consultant)  
**Respondent:** Mr Perry (Counsel)

## RESERVED JUDGMENT

The claim of unfair dismissal is well founded and succeeds. A separate hearing on remedy will be listed for one day.

## WRITTEN REASONS

### Introduction

1. Claim number 1602735/2020, issued by the Claimant was originally part of a multiple with a claim brought by Ms Amy Bowen (1602735/2020) and Ms Kelly Woolvin (1602736/2020).
2. Claim number 1602742/202 was a single claim issued by the Claimant on the same day. For reasons set out in my direction of 29 October 2021, which is incorporated by reference into these written reasons, the single claim was joined with and heard at the same time as the claim issued as part of the multiple [275].
3. The final merits hearing on all the claims brought by all claimants had been listed as a hybrid hearing with the Judge, clerk, Respondent's Counsel and

Respondent witnesses in person, and the Claimants and the Claimant's representative on video (CVP).

4. On the morning of the first day of this hearing, the Tribunal was informed that the claimant Ms Amy Bowen, was unable to speak having some form of throat infection that prevented her from doing so and claimant Ms Kelly Woolvin's camera was not working and, despite having made several attempts to join the CVP room, had been unsuccessful in getting any image relayed. She was unable to attend the venue in person within a short time-frame as she did not drive and had to use public transport.
5. At the outset of the final merits hearing on 16 November 2021, there was a case management discussion regarding the practicability of whether the preliminary issue on time / jurisdiction on the cases of Ms Bowen and Ms Woolvin, arising as a consequences of the early conciliation issues, and reflected in the earlier case management order in this case of 21 September 2021 and subsequent email correspondence, could be dealt with in the time allowed particularly taking into account the following:
  - a. those claimants had not been directed to undertake, and had not undertaken, any disclosure and/or prepared any witness statement evidence in relation to time arising in the preliminary issue;
  - b. Ms Bowen's inability to give live oral evidence and Ms Woolvin's camera issues.
6. Counsel for the Respondent accepted that as there was no issue of dispute or issue in relation to early conciliation ("EC") and/or the EC number having been included in claim number 1602742/2020 brought by Ms Pritchard, that claim could proceed in accordance with my direction sent to the parties by the Tribunal of 29 October 2021.
7. Ms Green, HR Consultant and representative for all three claimants, also confirmed that Ms Bowen and Ms Woolvin were not giving evidence to support Ms Pritchard and the practical difficulties affecting those two claimants would not impact on the claim being brought by Ms Pritchard as a result.
8. A decision was therefore made by consent of the parties that:
  - a. the claim for Ms Pritchard would be separated from the claims brought by Ms Bowen and Ms Woolvin;
  - b. The claim for Ms Pritchard would continue to be heard over the course of 16 and 17 November 2021; and
  - c. The claims brought by Ms Bowen and Ms Woolvin would proceed to a separate preliminary hearing on time / jurisdiction at a later date.
9. A separate case management order has been made in relation to those claims.

## The Claim and Response

10. The claim before me is one of unfair dismissal only arising from the dismissal of Ms J Pritchard (the "Claimant"). The ET1 Claim form was issued on 23 December 2020 [2] following early conciliation that had commenced on 27 November 2020 and had ended on 22 December 2020 [1].
11. The details of the claim set out at Box 8.2 were brief [8]. Whilst the ET3 Response Form Box 5.3 [14] indicated that the Claimant had been summarily dismissed for gross misconduct, it was unclear from the ET3 Grounds of Resistance [22] the specific misconduct conduct the Respondent had relied on as the reason for dismissing the Claimant.

## The issues

12. The issues for determination had been discussed and agreed at the case management hearing on 21 September 2020 and were applicable to the Claimant as follows:
  - a. What were the dates of employment of the Claimant?
  - b. Was the Claimant dismissed?
  - c. If the Claimant was dismissed, what was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.
  - d. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:
    - i. there were reasonable grounds for that belief;
    - ii. at the time the belief was formed the Respondent had carried out a reasonable investigation;
    - iii. the Respondent otherwise acted in a procedurally fair manner;
    - iv. dismissal was within the range of reasonable responses.
  - e. The Claimant's challenge to fairness include:
    - i. The Claimant asserts that the reason or principal reason for the dismissal is not their conduct, but is for a reason related to bullying allegations involving the Claimant;
    - ii. Inequality of treatment as other employees have engaged in similar conduct, both before and after the incident in question, and have not been dismissed;

- iii. Only one of the Claimants dismissed was on duty on the night of the incident (Ms Woolvin). The Claimant and Ms Bowen were attending the Club as patrons not employees.
  - iv. Unfairness in the constitution of the appeal panel. A complaint of bullying had been brought by the Claimant against Mr Wittington who sat on the appeal panel.
- f. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

## **Evidence**

13. The Tribunal heard from the following witnesses on behalf of the Respondents:

- a. Mr Russel Magor, Club Secretary of the committee of Pontnewydd Working Men's Club (the "Club") from June/July 2020;
- b. Mr Mike Partridge, member of the Club; and
- c. Mr Robert Telfer, member of the Club and since summer 2020, member of the Committee of the Club ("Club Committee").

14. The Tribunal also heard evidence from the Claimant and on her behalf, from Mr Chris Mooney.

15. Both parties sought to rely on statements that had been prepared in addition to those exchanged as follows:

- a. An application was made to rely on a supplementary witness statement of Mr Magor, which related to the statement of Mr Mooney and addressed some additional disclosure provided by the Claimants. Permission was granted to rely on §1-9 in relation to the contents of the response to the evidence of Mr Mooney but not §1016 in relation to documents that had been already disclosed prior to exchange of witness statements. This could be addressed by the Respondent's counsel on re-examination if necessary; and
- b. An application was also made by the Claimant to include a witness statement dated 9 November 2021 within the Bundle, of a Mr Bernard Bancroft who was not attending to give live evidence. The Claimant's representative was informed that she should understand that the Tribunal may place little or no weight on the statement of a witness who does not attend the hearing in person to give that evidence orally and be available for questioning under oath. The Respondent did not object and this was included in the Bundle [278] although it transpired that was not referred to by either party in cross examination or summing up.

16. There was a Tribunal bundle of approximately 267 pages. Various additional documents were handed up during the course of the hearing and permitted to be added to the Bundle as follows:

- a. The handwritten notes of Mr Mike Partridge, a member of the disciplinary hearing panel. Counsel for the Respondent had been handed the original notes on the morning of the hearing by Mr Partridge and quite properly had brought this to my attention and sought to include copies within the Bundle. Whilst it was accepted that such a document was potentially relevant, no adequate explanation could be provided by the Respondent's representative as no explanation could be given by Mr Partridge as to why such a document had not been disclosed by him as part of the standard disclosure exercise. The Claimant objected on the basis of late disclosure and the fact that a note-taker's handwritten notes were already contained in the Bundle. Due to its potential relevance, permission was given for it to be included in the Bundle, time was provided for the Claimant to consider the document and additional time on cross-examination given for the Claimant's representative to cross-examine Mr Partridge on its contents [279-286];
  - b. Copies of the ACAS Code of Practice were included with the consent of the parties as the Claimant's representative wished to cross-examine some of the Respondent's witnesses on the contents of the Code [287-288]; and
  - c. Copies of extracts from the Respondent's Staff Handbook: Section 12.0 Behaviour outside work [289] and Section 16.0 Disciplinary Rules and procedures [290-293], as well as extract from the Club Constitution, Section 19: Powers of Committee [294], were also included in the Bundle with the consent of the parties after questioning from the Tribunal as to why they were not included when potentially relevant documents.
17. The parties were informed that unless the Tribunal was taken to a document in the Bundle, they should assume that it would not be read.
18. Neither party considered that any reasonable adjustments needed to be made in relation to witness evidence but regular breaks were provided. I expressed concern regarding whether any additional or specific reasonable adjustments were required for Mr Partridge as a result of a diagnosis he informed me he had recently received, but it was confirmed that this was not necessary
19. Whilst it had been anticipated that the hearing could be readily completed during the two days timetabled, due to the case management, evidence did not commence until the afternoon of the first day.
20. The hearing proceeded without further technical difficulty. One of the witnesses for the Respondent had to be reminded on a number of occasions not to interject when another witness or the Judge was speaking and this was appropriately addressed with him by the Respondent's representative. The Claimant's representative was allowed longer than had been

anticipated and originally time-tabled for cross-examining the Respondent's witnesses, as account was taken of the fact that Mr Partridge's notes had been provided exceptionally late in the proceedings and time was given for her to address this with the witness. Counsel for the Respondent confirmed that he did not require further time to cross-examine the Claimant and her witness which could be and was completed during the afternoon of the second day.

21. Due to the lateness of the completion of evidence and summing up, a reserved decision was given.

### **Facts**

22. The Respondent is the Committee of the Pontnewydd Working Men's Club (the "Club"), a social club whereby members pay an annual membership which enables them to use the Club which includes a lounge and licenced bar which, prior to the Covid-19 pandemic, operated 7 days a week and employed 12 members of staff including the Claimant.
23. At the time of the termination of her employment the Claimant was 42 years' old and was employed as the Bar Manager, a position she had held since 2012, having been employed by the Respondent as part of the bar staff since 30 September 1999.
24. She was employed on terms and conditions pre-dating her employment as Bar Manager [72] and worked 40 hours per week.
25. The Claimant was also the designated premises licence holder for the supply of alcohol and the premise licence summary contained in the Bundle indicated and the licences authorised the sale of alcohol to 12.00 midnight on a Sunday [204].
26. When Covid-19 restrictions were eased in the summer of 2020, to allow establishments such as the Club to re-open, the ongoing restrictions applicable in Wales at that time did not impact or alter the licencing hours of the Club (which remained to 12.00 midnight on a Sunday,) or impose a restriction on the Club's closing times. This was confirmed by Torfaen Borough Council [220].
27. The Club re-opened on 11 August 2020. Prior to re-opening, the Club Committee had held several meetings to decide on the hours that the Club would open following the ending of the restrictions and, on re-opening, the Committee decided that the Club's opening and closing hours would be varied from the standard hours that had operated prior to the national lockdown [143 and 144]. The Claimant was not part of the Committee and was not involved in any such meetings.
28. The Claimant did however know that the Club's bar closing time on a Sunday on re-opening was 11.00pm on the following basis:

- a. Whilst a notice, indicating the opening and closing times, had been pinned on the Club's notice board which indicated that operating times were subject to change and would be reviewed as and when needed by the Committee, the Claimant did not know of and had not seen this notice [145].
  - b. In cross-examination however, the Claimant accepted that she knew, despite not having seen the notice, that as at 23 August 2020 the Club bar closing time on a Sunday was 11.00pm, having been informed of this by Russell Magor.
29. Whilst the Claimant was aware that the closing time for the bar for a Sunday night was 11.00pm, what was less clear was what discretion, if any, bar staff had at this point in time to keep the bar open beyond the opening hours. The Claimant later raised this to the Club Committee by way of letter dated 13 September 2020 [180].
30. On cross-examination Mr Magor accepted that this had been past practice but that this practice had stopped due to the pandemic. Beyond Mr Magor's live evidence given in these proceedings, there was no other evidence of the Club Committee having made such a decision to stop this practice and no evidence at all, even from Mr Magor in live evidence, that such a decision had been communicated in any way to the Claimant.
31. As such, I found that there had been a long-standing practice and decision of the Committee to keep the bar open beyond allocated closing times if patrons were present, provided that licensing hours were not exceeded. I also found that that even if the Committee had determined that this practice would cease due to the pandemic, it was more likely than not that this determination had not been communicated to the Claimant on or before the 23 August 2020, or at all.

Incident.

32. On the afternoon of 23 August 2020, the Claimant attended the Club to celebrate her birthday. Whilst she had been working earlier in the day, having stepped in to provide sickness cover, she had worked only briefly in the morning. She had returned to the Club later that afternoon at around 1.30pm, not returning to work but to use the Club as a patron, to drink and socialise with family and friends. The group included:
- a. The Claimant, her nephew, husband and son (who was also employed by the Club but not working that day);
  - b. Amy Bowen, Assistant Bar Manager, but who was also not working that day and Amy Bowen's partner; and
  - c. another member of the bar staff, who was also off duty and not working.
33. At some point in the evening the group moved from the lounge to the bar area of the Club, with Kelly Woolvin serving behind the bar.

34. Mr Magor was also in the Club that night calling the Bingo, popular with the older members of the Club. He thought the group to be loud, using bad language and was unhappy with the Claimant's conduct which he considered was '*a bit more than celebrating .. she was drunk*' as he termed it on cross-examination. He considered that the group had caused disruption and had sought to address the issue with the Claimant's husband and son.

35. As a consequence of his own concerns regarding the behaviour of the group, Mr Magor submitted a written complaint dated 24 August 2020 which he handed in to the Committee of the Club on 1 September 2020 at the Committee meeting of that date. The letter complained of the conduct of some of the members and patrons that had been in the bar of the Club on 23 August 2020, including the Claimant's group [146 and 162]. He complained that the Club's lounge and bar had been

*'crowded, there was no social distancing taking place, [the Claimant] was evidently having her birthday party in the bar and lounge, there was foul language being used.....'*

36. He complained of the reaction of the Claimant's husband and nephew when he had asked them to calm down as the older members had wanted to play Bingo, with the nephew having told him that he had put £100 behind the bar. With regard to the Claimant specifically, he also complained that as Bar Manager, the Claimant '*should know better*' and that '*something needs to be said to her*'. He confirmed that he had left the Club at around 10.00pm and informed that he felt the Committee had let the older members down.

37. Despite that complaint, it appears that no decision was made at that meeting on 1 September 2020 by the Committee on what action, if any, would be taken about that complaint.

38. That the Claimant's group had stayed in the Club beyond 11.00pm, came to Mr Magor's attention when he viewed some CCTV video footage of the bar on around the 6 September 2020. His unchallenged evidence, which I accepted, was that there had been an incident at the Club on the night of 22 August 2020 and that he had, as part of his investigation into that incident, accidentally reviewed the CCTV footage for the night of 23 August 2020 instead.

39. The further evidence of Mr Magor, which I also accepted, was that a Club Committee meeting took place on 8 September 2020 when the Committee discussed the events of 23 August 2020. This evidence was also reflected in the handwritten minutes, which although very brief [166] recorded the following:

*It was discussed again about Joanne etc drinking until after midnight on 23.8.20 and voted that Joanne, Amy & Kelly be suspended pending investigation on full pay.'*



40. The details of the discussion was not in evidence before me and I did not make findings as to what was discussed at that meeting.

### Suspension

41. Letters were sent to the Claimant, as well as Amy Bowen and Kelly Woolvin, dated 7 September 2020 i.e. one day before the Committee meeting, informed them that they were suspended. No issue was raised during the hearing regarding these dates and I found that it was more likely than not that this was simply an error within the letters.

42. The letters were all in similar format and contained the following:

*'It has come to our attention that on the evening of 23/08/2020 the Club remained open beyond its proper closing time and that drinks were served with no payments taken.*

*This is a cause of concern such that an investigation will be carried out in accordance with ACAS guidelines on these matters, in order for a decision to be made on whether or not there is a case to answer as a Disciplinary matter.'*

43. The letter also informed the Claimant that Russell Magor and Peter Dix would carry out the investigation to establish facts and to reach a conclusion on what did or did not happen and that the investigation was to 'advise on whether or not there is a case to answer. The Claimant was informed that she may be called to participate in such a meeting and that she was suspended with immediate effect [167].

### Investigation

44. I heard evidence from Mr Magor as to the scope of his investigation. This was limited to:

- a. his viewing the CCTV footage of the 23 August 2020;
- b. noting down specific times of certain events that he considered to be significant as reflected in his handwritten documents which were included in the Bundle [154 and 158] and noted times when the last payment was taken, times when drinks were pulled and the time that the Claimant, Ms Bowen and Ms Woolvin and others left the Club, as well as comments on behaviour; and
- c. reviewing the till receipt, which showed that the last transaction was 11.01pm [161].

45. A letter from the cleaner dated 24 August 2020 [157] was also considered by Mr Magor, in which she complained about the mess left from the night before.

46. Mr Magor concluded that he did not need to interview the Claimant, or indeed Ms Bowen and Ms Woolvin, to gather any further evidence.

47. Whilst this was not recorded on the handwritten minutes provided in the Bundle (and indeed the minutes provided [166] move from the meeting of 6 September 2020 to the meeting of 8 September 2020 without referencing any meeting when the Committee determined that the Claimant would be invited to a disciplinary meeting,) I accepted Mr Magor's evidence that the Committee as a whole at some point determined to discipline the Claimant, Ms Bowen and Ms Woolvin and invite them all to disciplinary hearings.

Invite to Disciplinary

48. On 10 September 2020, the Club Committee wrote again to the Claimant [170] (and indeed in similar terms to Ms Bowen and Ms Woolvin [171/172]) as follows:

*'CCTV footage shows that on 23/08/2020 you were present when the Club remained open and alcohol continued to be supplied beyond the designated closing time 11pm.*

*As a consequence, the Club is considering taking Disciplinary Action against you which could be Dismissal for Gross Misconduct.'*

49. The disciplinary hearing for the Claimant was convened for 15 September 2020 at 9.30am at the Club and the Claimant was informed that she was entitled to be accompanied by a friend or trade union official.

50. Prior to the disciplinary hearings, the Club Committee received correspondence regarding the ongoing action:

- a. from Ms Bowen and Ms Woolvin [175 and 176] requesting copies of the evidence against them including CCTV footage for their disciplinary hearings;
- b. from a member of the Club, Mr Bernard Bancroft, regarding conduct of one of the investigating officers, Mr Dix, who had been accused of complaining about the level of the Claimant's wages was also received [173]. Mr Dix has not provided any evidence before this Tribunal. Mr Magor was unconcerned about Mr Dix's conduct in relation to the fairness of the investigation into the Claimant as the investigation had been completed by him, not Mr Dix.
- c. from previous Committee members [181 -182] regarding the Committee's practice of continuing to serve after closing time if patrons were present.

51. The Claimant also wrote on 13 September 2020, complaining that another member of staff, Rhian Byard, had also been serving alcohol after closing time of 11.00pm on the night of 30 August 2020 [180]. She stated the following:

*'Upon starting my employment as Manager, I was told by the then committee, that as long as there are sufficient patrons we are allowed to continue serving beyond the advised closing times but not past the licensing hours.*

*We were also told that if it was quiet, we should close the bars and allow staff to finish early.*

*This practice is still adhered to today, however the current committee-seemed to have altered this without notification and have suspended staff for this.'*

52. The Claimant confirmed that she hadn't take action against Rhian Byard at the time, due to the Club Committee ruling that the Club could stay open, but that Rhian Byard too should be suspended with immediate effect and an investigation undertaken on the same basis that she and Ms Bowen and Ms Woolvin had been suspended.

53. There was no reference to this correspondence in the minutes of the Committee but, in his own evidence, Mr Magor had stated that *'the committee had concluded that this too was designed to intimidate and dissuade the committee from taking action against [the Claimant]'*. On that basis, I found that it was more likely than not that Mr Magor and the Committee took no action in relation to this correspondence and did not provide this information to the disciplinary panel.

#### Disciplinary Hearing

54. Three members of the Club, who were not Club Committee members, were asked to sit on the disciplinary panel. These were Mr Mike Partridge, Mr Steve Phelps and Mr Malcolm Griffiths and evidence was heard during these proceedings from Mr Mike Partridge.

55. Despite the Claimant asserting her belief that the members of the panel had been chosen due to their relationship with Gary Wittington and that these three were in the group of members who, together with Gary Wittington were *'out to get'* her, I did not consider that this had been proven on balance of probabilities for the following reasons:

- a. Whilst the Claimant's complaints regarding Mr Wittington had not been dealt with, which could have led me to draw some adverse inference from that, the Respondent's witnesses were not challenged on the decision to appoint these three members to sit on the disciplinary panel beyond asking why members of the Club who did not sit on the Club Committee had been selected;
- b. Whilst I accepted that the Claimant's representative was not legally qualified, she was a CIPD qualified representative and had articulated the challenges to fairness during the preliminary hearing when the issues were identified. Rather than question the

Respondent's witnesses on their relationship with Gary Wittington and whether there was an agenda to remove the Claimant due to Mr Wittington's views on the Claimant, as the Claimant had asserted, the focus of the Claimant's representative's questioning related to the issue of why members rather than Club Committee sat on the disciplinary hearing; and

- c. Mr Partridge's evidence given in cross examination, that he did not know anyone else who was asked to sit on the disciplinary panel.

56. Whilst the letter suspending the Claimant had referred to '*the Club remained open beyond its proper closing time and that drinks were served and no payment taken*', the letter inviting the Claimant to the disciplinary hearing referred only to the Claimant being '*present when the Club remained open and alcohol continued to be supplied beyond the designated closing time 11pm*' [170]. However in response to a question from me, Mr Partridge's evidence, which I accepted, was that he had not seen either letter either before or during the disciplinary hearing.

57. In relation to the allegations being considered by that panel, Mr Partridge's statement was vague as to what allegations he had been asked to consider by the Committee, his statement confirming only that '*the committee explained that the Claimants had been seen on the CCTV breaking club rules*'<sup>1</sup>. Later in his statement he confirmed he had viewed

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the CCTV stills which he said had '*showed drinking and serving alcohol without payment; failing to social distance and the till receipt showing that no payments weren't taken*'.

58. I therefore sought to clarify what Mr Partridge believed were the specific allegations he had been asked to consider at that panel and, in response to a question from me as to what the allegations were that he believed he was considering at the hearing, he responded as follows:

*'Drinks having been pulled without monies taken and the actions of Jo and licensing hours of the Club'*.

59. When I asked him to clarify what he meant by '*..the actions of Jo..*', he responded

*'Taking alcohol from the Club without paying for it.....but mostly the rules were 11pm. Breaking the rules of the Club knowing that other persons had been dismissed for similar actions'*.

60. Following those responses, I asked the Respondent's Counsel what the Respondent's case was, as to the misconduct relied on as the reason or principal reason for the Claimant's dismissal. After checking the ET3, Mr

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<sup>1</sup> Mike Partridge WS§10

Perry said *'What Mr Partridge gives as his answer. It is for you to make findings as to the reason for dismissal'*.

61. Following my questioning the Respondent's Counsel, and in response to a question from me, as to whether he drew a distinction between closing time and licencing hours, Mr Partridge responded that it was up to the Club as to what hours they chose and sought to qualify his response to his earlier responses by telling me that he wanted to add that *'just because I said about dishonesty, that didn't come into my decision – it didn't come into it at all ..... Nothing to do with the money and the dishonesty'*.
62. What findings I made regarding the reason for dismissal is dealt with later in these written reasons.
63. With regard to the evidence that the panel were provided during the course of the cross-examination of Mr Partridge, it also become clear that the disciplinary panel had been provided with a copy of the CCTV video of the 23 August 2020 only. No other documents, including the letter inviting the Claimant to the disciplinary, were provided to them. Mr Partridge confirmed this in live evidence, also confirming that he had personally created a number of still images from the CCTV video which he labelled Exhibit Nos 1-10.
64. The Claimant attended the disciplinary hearing on 15 September 2020, accompanied by a friend, Rebecca Jones. Russell Magor also attended, but left after introducing the three Club members that formed the disciplinary panel.
65. The Claimant asked for a note-taker and one was provided by the Club, Emma Birden. Mr Partidge's own notes had in part been prepared by him prior to the hearing and he took took some handwritten notes [279-286]. These were not of great assistance to me as they were illegible for the most part. I was not taken to them save for the references to the images contained in the bundle which Mr Partridge had labelled as Exhibit Nos 110 [147-152].
66. It was accepted by the Respondent that prior to the disciplinary hearing, the Claimant had not been invited to an investigation meeting and had not been provided with any of the evidence that the Respondent had relied on.
67. Indeed it is accepted that the Claimant was only shown a copy of the still images that had been created by Mr Partridge during the disciplinary hearing and been asked a series of questions in relation to those stills as reflected in the handwritten notes. She was not given copies to retain and was only provided with copies as part of the disclosure process in this litigation.
68. At no time, either before or during her disciplinary hearing, was the Claimant shown the CCTV video. Indeed it is accepted by the Respondent that the Claimant was only provided with a copy of the CCTV video when disclosed for the purposes of this litigation. Whilst the Index to the Bundle indicated

that a copy of the CCTV footage was included as document numbered 46, this was not in the electronic bundle before me and did not form part of the evidence that was considered in the hearing.

69. Emma Birden's handwritten notes are contained in the Bundle [97-105]. The notes were signed by the Claimant as well as Mike Partridge, albeit as 'not read'. From those notes and from the Claimant's evidence which I accepted, I concluded that it was more likely than not that the following was discussed:
- a. During the disciplinary hearing which commenced at 9.30am and ended at around 11.00am, the Claimant informed the disciplinary panel that the terms of the Club licence had been followed.
  - b. She also pointed out the timing discrepancy on the CCTV clock. It was agreed during this Tribunal hearing that the CCTV clock was running some 17 minutes fast;
  - c. In relation to the stills shown to her, the Claimant confirmed that she could see certain individuals at the bar including Kelly Woolvin. She accepted that the images showed pints on the bar, and drinks on the tables, but not alcohol. She accepted that Kelly Woolvin was shown behind the bar.
  - d. The Claimant asked the disciplinary panel to clarify the allegations as Mr Partridge told her he was unsure of the allegations, a matter the Claimant had also confirmed in her witness statement. I accepted the Claimant's evidence, particularly as when I asked Mr Partridge to clarify what he understood the allegations to be, he had difficulty answering, responding '*Drinks having been pulled without monies taken and the actions of Jo and licencing hours of the Club*'. When I asked again what he meant by '*actions of Jo*', he responded '*taking alcohol from the Club without paying for it*' and later '*mostly the rules were 11.00pm, breaking the rules of the Club knowing that other persons had been dismissed for similar actions*'. Whilst Mr Partridge sought to qualify his response later by telling me that dishonesty did not form part of the panel's decision, I did not accept that. Rather, I accepted his first response which was clear and unequivocal. I did not consider the witness to be confused as had been submitted by the Respondent's Counsel.
  - e. The Claimant told the panel that the Club's licensing hours were until midnight with a 30 minute drinking up time. She told them that that she was not working and did not know whether she had drunk any alcohol after the Club's closing time as she had been too intoxicated to recall. She told them that there was a half hour drinking up time and the licence allowed alcohol to be served and sold up to midnight.
  - f. Mike Partridge confirmed to the Claimant that he would seek clarification of the allegation against her with Russell Magor at the end of the disciplinary meeting.

- g. The Claimant raised that the proceedings were unfair as other employees had done the same on different dates
70. The Claimant also complained that she had not been provided with information or evidence for the disciplinary meeting and was informed that the Club was not prepared to give her that evidence at that moment in time. The Claimant also raised concerns that there had been no action in relation to the complaints that she had raised of bullying and harassment or her concerns set out in her letter of 12 September 2020 in relation to GDPR.
71. The disciplinary hearing was adjourned briefly for Mike Partridge to leave room to check what was referred to as 'the drinking times' within the notes, when it appears that he went to check the notice board, and on return confirmed to the Claimant that there would be further investigation. The Claimant asked for a copy of the notes of the meeting.
72. The Claimant informed the panel that she had 21 years of employment and no disciplinary record; that she loved her role and did not wish to lose it.
73. The notes reflect, and I found, that Mr Partridge confirmed that he would '*pass the information onto the Club to make a decision*' and that the Claimant was informed that the panel were 'information gathering'. Mr Partridge also gave live evidence that he had also taken into account a previous case involving the disciplinary of the previous Bar Manager who had also been dismissed and that he believed had also been dismissed for '*exactly the same*'. He was challenged by the Claimant's representative that this individual had been disciplined and had left the Club's employment because he had served alcohol outside of licensing hours, not closing hours. This was not accepted by Mr Partridge but, having considered the documentation in the Bundle relating to that separate issue [68], I found that action had been taken following an allegation that the individual had served alcohol where no money had been taken and served outside of licencing hours, not outside of closing time but within licencing hours.

#### Dismissal decision

74. The evidence in relation to the status of the disciplinary hearing, whether that panel then made the decision to dismiss the Claimant, and why the Claimant was dismissed was confused.
75. Mr Magor had given evidence within his written statement (§18) that the Committee had sought advice and decided to allocate specific roles in the investigation and disciplinary to seek to ensure fairness and it was decided that whilst he and Peter Dix would undertake the investigation, Club members would be on the disciplinary panel to ensure fairness and that the Committee 'reserved' Robert Telfer, Yvonne Davies, Gary Whittington and Alan Magor for the appeal panel, members of the Club Committee.
76. Mr Partridge as part of the disciplinary panel went to Mr Magor to discuss their findings and told him that none of the employees including the Claimant

had '*denied their guilt*' but had argued that the Club was allowed open until midnight and 30 minutes drinking time.

77. Mike Partridge also reported back that after contacting Torfaen Borough Council, the Club's licencing hours were until 12 midnight and that the Club could set its own hours as long as they did not exceed the licencing hours but that he did not consider that licencing hours to 12 midnight was '*a defence to the allegations*'. The disciplinary panel recommended dismissal and Mr Magor agreed.
78. Whilst Mr Partridge had given live evidence that it had been the disciplinary panel that had made the decision to dismiss, and despite both Mr Magor and Mr Telfer giving evidence that the Club Committee had worked to have separation of decision-making within the Committee, on cross-examination Robert Telfer, the Club Committee member who had also formed part of the appeal panel was emphatic, if not adamant, in his evidence that the full Club Committee made the decision by way of vote to dismiss the Claimant, referring back to the Club Constitution [294] and that only the Club Committee had power to dismiss. He also gave evidence that those voting had included Russell Magor, Alan Magor, Yvonne Davies, Gary Wittington, Robert Viner and himself.
79. I did not consider the lack of a Club Committee minute recording that decision as persuasive or significant insofar as other decisions that had been made were also not recorded.
80. The Respondent's Counsel fairly submitted that he struggled to 'square the circle' on such evidence and invited me to find that the witness was confused. I did not consider Mr Telfer to be confused and accepted the live evidence that Mr Telfer gave and found that the Committee met and that the Club Committee, not the disciplinary panel of Mr Partridge, Mr Phelps and Mr Griffiths, determined to dismiss the Claimant.
81. I then considered what were the reasons for dismissal which required me to consider the mental processes of the people who made that decision, people who included Mr Magor and Mr Telfer, who I did hear evidence from.
82. Whilst I was persuaded that the Claimant being present in the Club after designated closing time of 11pm when alcohol continued to be supplied, formed part of the reason for the Respondent's dismissal of the Claimant, I was not satisfied that this was the only reason for her dismissal.
83. Rather, I found that the decision also included reasons related to the belief that the Claimant had taken and/or had allowed drinks to be taken without payment of the same, had been drunk and had not complied with Covid-19 guidelines.
84. This was despite such reasons not being referred to in the letter to the Claimant inviting her to a disciplinary meeting, or indeed the termination letter, but on the basis of the following:



- a. The allegation that drinks had been served with no payment being taken had been included in the letter suspending the Claimant [167];
- b. There was a lack of specificity in the Respondent's letter of termination [183];
- c. Mr Magor's evidence, in relation to his review of the CCTV, which repeatedly referred to no money being taken for drinks and that the potentially criminal conduct allegations i.e. non payment of drinks, would be a decision on the disciplinary allegations for the Club to make and not the police<sup>2</sup>. In cross-examination, Mr Magor also referred to the Claimant's general drunken behaviour on the night in question, as did his own personal letter of complaint to the Committee;
- d. Mr Partridge's statement was vague as to what allegations he had been asked to consider by the Committee, and again I reflect on the responses he gave to a question from me as to what the allegations were that he believed he was considering at the hearing, as set out at §69(d) above.
- e. The ET3 did not specify the actual misconduct relied on. When following that questioning of Mr Partridge, when I asked Mr Perry what did the Respondent say was the reason for the Claimant's dismissal, after checking the ET3, Mr Perry indicated '*What Mr Partridge gives as his answer. It is for you to make findings as to the reason for dismissal*'.
- f. Whilst in follow up, Mr Partridge did qualify earlier response telling me that '*dishonesty ..didn't come into my decision – it didn't come into it at all ..... Nothing to do with the money and the dishonesty.*'

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I did not accept this evidence taking into account his earlier response and indeed the evidence of both Mr Magor, set out above and indeed the evidence of Mr Telfer. In any event, I did not find that it was Mr Partridge's decision to dismiss. Rather, that the decision-maker had been the Club Committee as a whole which included Mr Telfer;

- g. Evidence of Mr Telfer, in which he stated that:
  - i. there were '*financial concerns in respect of free drinks, health and safety concerns in respect of Covid-19 risk and compliance with local government guidelines and there was a potential breach of our licencing rules*';
  - ii. that '*not paying for drinks was a serious breach of the Club's rules*';

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<sup>2</sup> Russell Magor WS§13, 99d and §19d, 20, 21 and 35

- iii. that *'she broke the Club's rules, in particular rules made for the purposes of safeguarding health and safety of the Club's members and rules on paying for drinks'*; and
- iv. on cross-examination that *'drinking after hours was the main one contrary to Covid rules'* and that she was *'more or less paralytic, didn't have a leg to stand on... might have been a patron but enough was enough and it was time to go home'*.

85. Whilst I found that the Respondent dismissed the Claimant for more than one reason, I am obliged to identify the principal reason. I am not obliged however to restrict myself to finding either that the reason relied on by the employer or that argued for by the employee, is the principal reason.

86. Whilst I accepted that the Respondent's did include being in the bar after closing time was a reason, it was not the principal reason for dismissal. On the basis of the same evidence as set out above, I found that the principal reason for dismissal was the belief that the Claimant had not paid for drinks that had been served and/or had allowed drinks not to be paid for.

#### Dismissal Letter

87. The Claimant was informed by way of letter dated 18 September 2020 that her employment was terminated with immediate effect, the letter confirming that the disciplinary panel had concluded that her actions *'participating in the out of hours event held on 23/08/2020...'* constituted gross misconduct [183].

88. By way of letter dated 20 September 2020 [186], Mr Magor also wrote to the Claimant confirming the outcome of his separate investigation into her complaint that Rhian Byard had served alcohol after closing time, confirming that he had found that takeaway bottles had been sold at 11.08pm and that no alcohol had been served from the pumps or optics and that after 11.00pm the Club was permitted to serve take-away until drinking up time, which was 15 minutes. Whilst I heard evidence from Mr Mooney that he had been served drinks at 11.10pm, I did not consider this to persuade me that it was more likely not that others had been served beyond closing time.

89. The Committee did not consider this matter to be relevant. Mr Magor said as much in his evidence that these letters, including that from the Claimant *'were designed to intimidate and dissuade the committee from taking action against Joanne.'*

#### Appeal

90. By way of letter dated 22 September 2020, the Claimant appealed the dismissal [189] complaining that the decision was harsh and not sufficient to warrant instant dismissal. She complained that:

- a. She had not been invited to an investigation meeting;

- b. The investigation had been carried out by a general member of the Club
- c. The disciplinary panel had been unable to confirm to her the 'permitted hours';
- d. The still images that she had been shown did not show her committing the action she was accused of;
- e. The disciplinary hearing was conducted by non-Committee members, which she considered to be unfair;
- f. That the meeting was confusing as the disciplinary panel had contradicted itself on process;
- g. The disciplinary panel had advised that they would be discussing the findings with the Management Committee before a decision was made
- h. Other members of staff had conducted the same behaviour and had not been disciplined
- i. She was not a member of staff on the night, but had been at the Club as a patron; and
- j. There were other members of staff, not on duty, who were not being investigated for breach of Club rules.

91. The Claimant was invited to attend an appeal meeting on 9 October 2020 [202]. The Claimant was again accompanied by her friend.

92. On that day Mr Telfer attended with Gary Whittington with Russell Magor in attendance on behalf of the Club as reflected in the notes of that meeting [203]. The Claimant objected to the Club's Chairman, Gary Whittington being on the appeal panel due to her complaints against him and the meeting was adjourned and reconvened on 12 October 2020.

93. The handwritten notes of that reconvened meeting contained in the Bundle [208] reflect Mr Telfer attended that not only with Allan Magor, Russell Magor's brother, but also Yvonne Davies, a further Club Committee member. Again Russell Magor also attended on behalf of the Club Committee. Gary Whittington also attended in a note-taking capacity. Handwritten notes were included in the Bundle which were signed by the Claimant but neither party referred to them in cross-examination [208]. The notes reflect that the Claimant's appeal letter was discussed and the panel concluded that the Claimant had not been entitled to an investigation meeting, the licencing hours was not relevant as closing hours had been clearly stated. The notes also reflect that the appeal panel concluded that the Claimant had showed a disregard for her responsibilities as a manager or the health and safety of those attending. They did not consider that the Claimant had brought any new factors for consideration and that she should be dismissed as the trust and confidence in her as a manager had gone.

94. Mr Telfer gave evidence at this hearing he was only prepared to consider 'new evidence'. He did not review the CCTV or the stills despite giving evidence that the Claimant was drinking after time and was '*more or less paralytic*'. That was not evidence that formed part of the Claimant's appeal

and was part of the disciplinary. He did not consider or respond to the points raised in the Claimant's appeal letter.

95. The appeal panel concluded that the original dismissal decision had been right and that *'Joanne was in a position of trust and she broke the Club's rules, in particular rules made for the purposes of safeguarding the health and safety of the Club's members and rules on paying for drinks.*
96. The Claimant subsequently contacted ACAS on 27 November 2020 which ended on 22 December 2020 and issued her ET1 claim forms on 23 December 2020 [2].

### Issues and Law

97. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 18 September 2020.
98. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.
99. In this case the Respondent asserts that it dismissed the Claimant because it believed she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one of the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).
100. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
101. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. When considering the

fairness of the disciplinary process as a whole, I also considered the employer's reason for dismissal as the two impacted on each other (**Taylor v OCS Group Ltd 2006 ICR 1602 CA**).

102. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).
103. If I concluded that the dismissal was procedurally unfair, I should consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR**.
104. I also agreed with the parties that if the Claimant had been unfairly dismissed, I would address the issue of contributory fault, which inevitably arises on the facts of this case.
105. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:
- Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.*
106. Section 123(6) then provides that: 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.

107. Counsel for the Respondent referred me to two authorities of **Nelson v BBC (No 2) [1979] IRLR 346 and Steen v ASP Packaging Ltd 2014 ICR 56** in relation to the concept of 'blameworthy' conduct capable of reducing compensation.

### Conclusions

108. In applying my findings to the issues identified at the outset, I needed to initially consider the reason or principal reason for dismissal and whether it was potentially a fair reason for dismissal.
109. The Respondent's representative invited me to find that the reasons for the dismissal were as set out in the termination letter of 18 September 2020 [183] of '*participating in the out of hours event*', and the invite to the disciplinary letter [170], of being '*present when the Club remained open*'. He also submitted that serving and buying drinks was a factor and that the previous bar manager had been dismissed for a similar offence, an issue that was not referred to in either letter.
110. The Claimant's case was that the reason that she had been dismissed was related to the Claimant's bullying allegations against Gary Whittington. She asserted that the reason why she was dismissed was because Mr Gary Whittington, a Club Committee member had '*got it in for [her]*' and had wanted her '*gone*' relying on complaints she had made to the Club Chairman in November 2019 and repeated in February 2020 of harassment and slanderous remarks from Mr Whittington, had not been dealt with. The Claimant's representative submitted that the disciplinary panel had been part of a group of people who had not been 'quiet' that they had been unhappy with the Claimant, as she put it.
111. The Respondent's witnesses were unable to comment on why such complaints had not been dealt with, Mr Magor indicating that he had not been on the Committee when the complaints had been made and did not know how these had been resolved. Whilst there was a lack of clarity as to why the Claimant's complaints had not been dealt with, this did not persuade me to conclude that this had been the real reason or principal reason for the Claimant's dismissal. I also took into account my finding that Mr Partridge did not know the others on the disciplinary panel when forming this conclusion.
112. Whilst I was persuaded that the Claimant being present in the Club after designated closing time of 11pm when alcohol continued to be supplied, did form part of the decision-making and was one of the reasons for the Respondent's dismissal of the Claimant, I was not satisfied that this was the only conduct that formed the reason, or principal reason for her dismissal. Rather, I concluded that the belief that the Claimant had taken and/or had allowed drinks to be taken

without payment of the same, had been drunk and had not complied with Covid-19 guidelines, had also been part of the decision making, despite not being referred to in the letter to the Claimant inviting her to a disciplinary meeting or dismissal letter.

113. My further conclusion was, that the principal reason for the dismissal was the belief of the Club Committee (and indeed the disciplinary panel) that the Claimant had failed to pay for drinks. I was satisfied that this reason related to the Claimant's conduct and was a potentially fair reason for dismissal.
114. Moving on to assessment of overall fairness, in considering the section 98(4) test in the context of BHS v Burchell requirements outlined earlier, I deal with these in reverse order, dealing first with the investigation before moving on to the grounds and the belief.
115. The Respondent has invited me to find that there was a reasonable investigation as in reality only a limited investigation was needed and what was done clearly uncovered misconduct in that the CCTV stills showed drinks being served and the departure time of around 12.20 (accounting for the 17 minute discrepancy on the CCTV clock), the till receipts showing no payments taken after 11.02, that drinks were then served and not paid for.
116. With regard to the investigation, the range of reasonable responses test applies to the scope of the investigation undertaken by the employer, as it does to the dismissal decision as established in **Sainsbury plc v Hitt**.
117. Whilst the Respondent is not a large corporate employer, I was not satisfied that the investigation, in terms of the overall processes adopted by the Respondent, fell within the range of reasonable responses.
118. Whilst Mr Magor decided that questioning the Claimant, or indeed anyone who had attended the Club bar in that group, was unnecessary in the light of the investigation which he had carried out and evidence which had emerged, namely the CCTV and the till transactions, it was not reasonable for Mr Magor to take the view, as he did, that interviewing the Claimant would not have added anything taking into account the multiple reasons that fed into the decision to dismiss.
119. Had he done so, the extent of the allegations and concerns held could have been articulated to her and some form of explanation could have been provided by the Claimant, whether relating to drinks that had been purchased earlier in the day by patrons putting a drink 'behind the bar for her', or otherwise.

120. I concluded that this also led to a confusion and lack of clarity on the allegations against the Claimant from the outset, a lack of clarity that continued throughout the disciplinary hearing before Mr Partridge, and indeed this hearing. Coupled with the failure to provide the Claimant with any evidence obtained against her in advance of the disciplinary hearing, and the provision of only limited information during the disciplinary meeting, namely the stills (which I also found failed to demonstrate anything beyond people being in the bar after 11.00pm,) I concluded that the Respondent had failed to inform the Claimant fully of the charges against her.
121. This was also reflected in:
- a. the changing allegations from the suspension letter to the invite to the disciplinary to the termination letter;
  - b. from the Claimant's own questioning of Mr Partridge at the disciplinary hearing, a question which I found Mr Partridge was unable to answer to the Claimant; and
  - c. in the evidence from the Respondent's witnesses evidence as reflected in my findings (§56-62 above).
122. Matters relating to taking drinks without paying for them was not reflected in the correspondence sent to the Claimant inviting her to the disciplinary, and the Claimant was not questioned on this allegation at any stage. Even if it could be said that the purpose of the disciplinary panel was to continue the investigation (which is not how it was in fact argued by the Respondent,) the disciplinary panel did not take the opportunity to question the Claimant during her disciplinary hearing regarding payment for drinks.
123. Essentially, this was potentially a serious criminal allegation, one which the Club did subsequently report to the police. I was not satisfied that either Mr Magor's investigation, or Mr Partridge's enquiries with the Claimant, put any focus on evidence that might have pointed to the Claimant's innocence.
124. Where matters relating to dishonesty are under investigation, I did not consider it sufficiently thorough to undertake just a simple review of CCTV and of the timing of the last till transaction. As the ACAS Guide emphasises, the more serious the allegation, the more the investigation conducted by the employer ought to be (page 17). This, in essence, resulted in unfairness in the investigation, whether at the point Mr Magor looked into the conduct, or at the point that the disciplinary panel considered the conduct at the hearing later in September.
125. It was suggested to the Claimant on cross-examination that she had not told the disciplinary panel, that as it was her birthday other Club members were buying her drinks throughout the course of the day which had been 'put' behind the bar for her as and when she wanted



to use them. She was also challenged that it had not formed part of her appeal, suggesting to the Claimant that she had not mentioned this as she knew the drinks had not been paid for.

126. The Claimant responded that an allegation that she had not paid for drinks had not been put to her as part of the case that she had been called to answer, the allegations in the letter inviting her to the disciplinary referring to the Club being open and alcohol continuing to be supplied beyond the designated opening time only [170].
127. I reject any suggestion that it was for the Claimant to have raised this herself, when she had not had such an allegation communicated to her, and served to further support my conclusion that the allegation of not paying for drinks had not been put to the Claimant and had formed the reason to dismiss.
128. Issues relating to lack of social distancing/health and safety and being drunk, all reasons that I found formed the multiple reasons that led to the decision to dismiss, were not set out in the written communications.
129. I concluded that the Respondent failed to communicate the allegations to the Claimant with sufficient particularity or at all and that this led to unfairness in the dismissal of the Claimant.
130. The Respondent also failed to address the Claimant's position, as set out in her letter of 13 September 2020, and repeated during the disciplinary hearing, that there was discretion to keep the bar open beyond closing time provided the licensing hours were complied with. I did not accept that this was designed to 'sow confusion' as had been submitted. Rather, it was a relevant factor that should have been taken into account, but was dismissed by Mr Magor, as not just irrelevant but designed to dissuade the Committee from taking action. The failure to take this into account, either as part of his investigation or to communicate this to the disciplinary panel, or to consider this at the appeal, led to unfairness in the dismissal.
131. In addition, whilst Mr Partridge did investigate the case involving the previous bar manager, not only did he fail to take into account the allegation against that individual differed to that of the Claimant in that he had been accused of serving after licensing hours, he also adopted this as a rationale for why the Claimant should also be dismissed. This too led to unfairness for the Claimant.
132. In terms of the disciplinary hearing:
  - a. there was a failure to explain the complaint against the employee, although I did conclude that some attempt was made to go through some of the evidence i.e. the stills that Mr Partridge had created; and

- b. As all the allegations were not put to the Claimant, namely paying for drinks, health and safety issues and being drunk, she was unable as a result to answer all allegations that had been considered.
133. As such, I concluded that the Claimant had not been given a fair chance to refute all the allegations of misconduct and, of greatest significance, had been given no opportunity to refute the allegation that drinks had been taken and not paid for.
134. Whilst the Respondent's witnesses did not appear to have turned their minds to the fact that the conduct complained of, whilst arising in the Claimant's workplace, was not conduct that arose whilst the Claimant was actually working, I did conclude that where an employee is considered to have committed some form of dishonesty in relation to the employer, such as non-payment of drinks, that even where the dishonesty arises during periods when the employee was not working, it would be likely to affect the employee when doing their work, particularly in this instance, where the Claimant was the manager of the bar in question (**Singh v London Country Bus Services Ltd 1976 IRLR EAT**).
135. In turn, whilst I concluded that this arguably could apply to concerns that Covid guidance was not being complied with, I did not consider that this readily applied to the other allegations of misconduct, namely being drunk and being in the bar after closing hours where the Claimant believes that this is permitted. The failure by the Respondent to take into account the fact that the Claimant was not working at the time of the alleged misconduct and/or fail to take into account how the misconduct would likely affect the employee to do their work also led to unfairness.
136. Finally, with regard to the appeal, whilst I did not accept that Mr Whittington formed part of the decision-making process at the appeal stages, I concluded that the appeal process was a sham and was not satisfied that it corrected any issues arising prior. The same individuals that formed the Committee that voted on the decision to dismiss the Claimant, sat on the appeal panel and, I concluded, closed their minds to the issues that the Claimant had raised in her appeal letter and were only prepared to consider 'new evidence'.
137. In conclusion I did not consider that the Respondent had carried out a fair and reasonable investigation which would reach the standard required of a reasonable employer.
138. Turning to the issue of whether the Respondent's belief was held on reasonable grounds, I find that it was not. Whilst it is for the employer with knowledge of their business to make judgment on whether the behaviour constitutes misconduct, in this case, for the reasons already given, I concluded that apart from being in the Club after 11.00pm, the Respondent did not have proof of any misconduct.

Whilst the Respondent may have considered lengthy drinking sessions during a pandemic to be irresponsible, that did not form the allegations against the Claimant and I am not satisfied that reasonable grounds had been made out for the belief in the gross misconduct of not paying for drinks, being drunk and/or not complying with social distancing/health and safety.

139. Whilst I was satisfied that the Respondent's genuinely believed in the guilt of the Claimant of not paying for drinks, to the extent that they also reported matters to the police, I was not satisfied in overall terms that the **BHS v Burchell** test was made out.
140. As regards procedure generally, on the basis of my earlier conclusions, it also follows that the procedure followed was also not reasonable as, whilst the Claimant was notified in a letter in advance of some allegations against her, was advised she could bring a companion and a hearing was held, the detail of the allegations were not put to her. As such, she was unable to put her case.
141. Whilst I acknowledged that this was a Club, run by a Committee, this Club had operated for a number of years and had 12 staff. The Club had been through disciplinary processes historically and had access to and took advice from HR Managers and from organisations including the CIU, the Club and Institute Union, and ACAS. The overall processes adopted by the Respondent was not reasonable.
142. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss? Whilst keeping in mind that it is immaterial what decision I would have made, I concluded that they could not. Whilst I accept that the Respondent held genuine concerns, in the absence of any reasonable investigation, disciplinary hearing or appeal, and without giving the Claimant any real opportunity to answer the allegations against her, I concluded that the Respondent's decision to dismiss the Claimant was outside the bands of reasonable responses to her alleged conduct.
143. With regard to consistency of treatment, I did not conclude that failure to discipline other bar staff, who were not on duty, led to unfairness. The Claimant and Ms Bowen were Bar Managers and this distinguished them from the other bar staff in the group that night. In that regard I accepted the evidence from Mr Magor, given in cross examination, that their position was different. This was not an unreasonable position to take.
144. I also accepted the evidence from Mr Magor, that the position regarding serving takeaway after 11.00pm, was distinguishable from the Claimant's position whereby she remained in the Club after closing hours of 11.00pm and where patrons remained drinking in the bar.

145. In neither case did I conclude that there had been inconsistency of treatment that led to unfairness for the Claimant. The focus is on the reasonableness of the management action in response to the Claimant's conduct and they were entitled to judge the Claimant's conduct on its own merits.
146. In overall terms therefore my conclusion is that the dismissal was unfair, and the claim of unfair dismissal is well founded.

#### Polkey

147. Whilst there were certain aspects of unfairness in this case which can be termed procedural, the most important aspect was substantive, and the dismissal would still have been unfair.
148. The procedural shortcomings were significant and I was not persuaded, on the limited submissions made, that if these had been made good, the Claimant would still have been dismissed. No reduction is therefore appropriate.

#### Contribution

149. The Respondent seeks a 100% contribution. The conduct said to be blameworthy was not articulated, but I took it to be allowing the Club to remain open after closing hours and not paying for drinks. Whilst I accept that the threshold for what is 'blameworthy' is not necessarily that high, I was not persuaded that the Respondent had proven that the Claimant's conduct in that regard was 'blameworthy'.
150. I had found that the Committee had not communicated to the Claimant their decision, that the discretion to keep the bar open after closing time up to licensing hours, no longer operated as a result of the pandemic. There was no evidence before me to find that the Claimant had failed to pay for drinks or allow drinks to be served and not paid for.
151. In those circumstances, I do not find that the Claimant contributed to her dismissal and make no reduction for contributory conduct.

#### Remedy

152. Further consideration of the remedies to which the Claimant is entitled is adjourned to a date to be fixed.
153. No later than 14 days before the date fixed for a Remedy hearing the Claimant is to send to the Tribunal and to the Respondent an updated schedule of loss.

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154. Prior to the hearing, the parties are required to agree Claimant's weekly net and gross earnings at the termination date or explain the basis for any disagreement

Employment Judge R Brace

Date: 8 December 2021

RESERVED  
JUDGMENT REASONS SENT TO THE PARTIES ON  
10 December 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche