EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108060/2022

Final Hearing Held at Dundee on 3 – 5 April 2023

Employment Judge A Kemp

Ms Morna Gunn	**Claimant** **In person**
Star International Enterprises Ltd **t/a Auchingarrich Wildlife Park**	**Respondent** **Represented by:** **Ms Alexa Reid** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed and she is awarded the sum of TWO THOUSAND ONE HUNDRED AND EIGHTY SIX POUNDS AND NINETY THREE PENCE (£2,186.93) in compensation, payable by the respondent.

REASONS

Introduction

1. This was a Final Hearing of the claim of unfair dismissal made by the claimant against the respondent, held in person at the Dundee Tribunal.

Issues

2. I identified the issues for determination during the preliminary discussions at the start of the hearing. The issues are:

(i) What was the reason, or principal reason, for the claimant's dismissal?

(ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

(iii) If the claim is successful, to what remedy is the claimant entitled?

3. On the last day of evidence the claimant produced her Early Conciliation Certificate, which had not been in the Bundle of Documents. On the basis of that I required to consider whether the claim was within the jurisdiction of the Tribunal, as the answer to the point was not immediately obvious. That and the other issues are addressed below.

Evidence

4. Evidence was given by the respondent first, commencing with that of Ms Alexa Reid the appeal officer, then Mr Kevin Campbell. The dismissing officer Mr Rob Matthews did not give evidence. The evidence of a witness for the claimant, Mrs Maxine Scott, was heard first as she was not able to attend on the third day of the hearing, then the claimant gave her evidence, followed by Ms Shona Coutts.

5. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. At the commencement of the hearing Ms Reid objected to two documents, the first being a list of staff and the second being transcripts of conversations that had been recorded which she considered to be slightly misleading where comments had been added. She indicated that she wished to play parts of the recordings to show what had happened, and the claimant did not oppose that. As it transpired the claimant played some of the recordings during her cross examination of Ms Reid. I considered that it was appropriate under Rules 41 and 2 to allow the documents to be received, and address any points in relation to them in the course of evidence.

6. The claimant also provided a Schedule of Loss which was received and added to the Bundle at the start of the hearing. It sought an award of around £15,000.

7. Neither party was legally represented, and the claimant had no experience of such hearings. Ms Reid said that she did have some experience of doing so. Before the hearing commenced I explained about the giving of evidence, the nature of questioning in examination in chief, the role of cross examination being to challenge evidence on fact given by the witness that was disputed and put to the witness evidence he or she was aware of which the other party would give evidence about. I explained about re-examination being for matters raised in cross examination or questions from me, and the need to ensure that all of the evidence is referred to as the scope to introduce new evidence later is very limited indeed. I explained that documents produced in the Bundle should be referred to in oral evidence as otherwise they would not be considered, and also as to the opportunity to make submissions.

8. During the hearing I asked a reasonably large number of questions in order to elicit the facts under Rule 41, and having regard to the overriding objective in Rule 2. Neither party appeared to me to have a full understanding of Tribunal process, which is understandable as neither is legally qualified, and I asked questions that I considered were appropriate, some of which may have favoured the claimant and others the respondent. I sought to do so in an even-handed way.

9. During the claimant's examination in chief she referred to a written statement she had prepared for the purpose of the present claim, which the respondent had objected to. I referred to an email earlier sent on my instruction with regard to that, which in summary said that only oral evidence would be heard. The claimant said she had not received it. The respondent had, and a copy was provided. It appears that it was sent to an old email address of the claimant, which explained why she had not seen it. Presidential Guidance indicates that written witness statements are not the norm in Scotland, and are used only where ordered in an appropriate case. No such order had been made in this case. That was why oral evidence was to be heard, and I explained that to the claimant. The claimant was permitted to read her written statement to check that she had given all oral evidence she wished to, without objection from the

respondent. She did so, and gave a little supplementary evidence after having done so.

Facts

10. There was some evidence given that I considered not relevant to the issues I had to determine. All of it was considered, however. I found the following facts, material to the issues, to have been established:

Parties

11. The claimant is Ms Morna Gunn. Her date of birth is 16 September 1982.

12. The respondent is Star International Enterprises Limited. It trades as Auchingarrich Wildlife Centre.

13. The claimant had continuous service with the respondent as an employee with effect from 10 March 2020. She was employed as an Animal Keeper at Auchingarrich Wildlife Centre, Comrie, Perthshire ("the Centre"). She worked on Saturdays and Sundays only, commencing work between 10am and 10.30am and working to between 5pm and 5.30pm. The reason for those days of work is that the claimant operated another business primarily during weekdays. She carried out work caring for horses early on weekend mornings.

14. Her employment transferred to the respondent after it purchased the Centre on or around 16 April 2022 from its previous owners, Mr Andrew Scott and Mrs Maxine Scott ("the previous owners"). About eight other employees transferred to the respondent at the same time.

15. The respondent has about 12 employees, about half of whom work part-time. It has two directors, Ms Alexa Reid and Mr Robert Matthews.

The Wildlife Centre

16. Ms Reid has been granted a Zoo Licence to operate the Centre by Perth and Kinross Council under the Zoo Licencing Act 1981. It is subject to conditions. The Centre is subject to regular inspections. The last such inspection had been on 23 January 2018. A number of matters had been noted. The Centre also operates under the National Farm Attractions

Guidelines, which includes a requirement for practical control measures, including the provision of signage to control entry to areas to staff only

17. It has a variety of domestic and wild animals, including category one animals, being short claw otters and Scottish wildcats, who could pose a risk to visitors. Control measures were put in place, including as to areas that the public do not have access to. That is achieved by signage stating "do not enter" or "staff only" with a no-entry sign, and locks on doors. Within the area to which the public did not have access was a medical room, which contained drugs, needles, and other equipment to treat animals, and a feed barn storing animal feed where there was also an office area. With barn in a separate area from the feed and office Ms Reid stored personal items including furniture. The house in which she and Mr Matthews lived was situated on the opposite side of a courtyard from the medical room and feed barn.

18. Visitors attending the Centre normally parked at a car park, and attended at the reception area. They would be given a sticker once they had paid. Those attending who were not charged, such as former staff, were given a different sticker. All such visitors, including former staff, signed a visitor's book.

Terms of employment

19. The claimant received a statement of terms and conditions of employment from the previous owners on 10 May 2020. It stated that she worked 16 hours per week, on "Saturday and Sunday, with flexible hours agreed". The statement referred to disciplinary rules in a Staff Handbook, which also contained a grievance procedure.

20. On 11 April 2021 it was agreed that the claimant would start work at 10am to 10.30am, so that her hours of work would reduce to 12 – 14 hours per week. The previous owners agreed to that in writing.

21. The Appendix to the Handbook included General Notices, one of which was on Security which stated –

> "All employees must be constantly vigilant against breaches of our security. It is the duty of all employees to report any unauthorised

> persons seen on the premises. Security of property in all areas of the Centre is the responsibility of every employee, and any areas of danger or doubt from a security point of view should be discussed immediately with the owners. It is the wish of the owner to ensure the security and safety of everyone on the premises, including visitors, guests, and all our employees at all times, and every effort to improve conditions in this respect will be made. "

22. In practice, the previous owners considered former members of staff they knew not to be an unauthorised person for that provision.

23. Kevin Campbell commenced employment with the respondent at the end of April 2022.

June 2022

24. On 4 June 2022 Mrs Maxine Scott emailed Ms Reid about sheep she had left at the centre for a period. She said that she had ordered tags, being ear tags required to be attached to the sheep before being moved, and wondered if they had been sent to the centre.

25. The claimant and Ms Reid had a meeting on Saturday 25 June 2022, at which Ms Reid brought up her concern that the claimant was not acting as a part of the team, as she did not start work until 10am or later, which was after a team meeting at 8.30, and that the claimant had ceased to be a member of a WhatsApp group of staff. The claimant said that she had withdrawn from the group as she had a data limit, and much of the detail of it was irrelevant. She said that she had started work at 10am or later with agreement of the previous owners. Ms Reid did not know that there was such an agreement on starting work at 10 – 10.30am with the previous owners, as that agreement had not been shown to her. Ms Reid said words to the effect that the claimant would be let go if matters did not improve, which the claimant heard as that she had been let go.

26. The claimant exchanged messages around lunchtime on 26 June 2022 with a former colleague Sharon Coutts regarding her visiting the park later that day. Ms Coutts had been employed by the previous owners initially as Animal Keeper and latterly as Head Keeper, and had left employment

in February 2022. She had been working in another role, not for the previous owners, in Mallaig, and returned to her parents' home in Crieff for that weekend. The claimant asked if Ms Coutts was still planning to come up that day, and when it was confirmed that she was the claimant indicated that she would have her lunch break when she was there. Ms Coutts indicated that she would arrive around 1.30pm.

27. Ms Coutts parked her car in the car park around 1.30pm. She walked northwards, passing a gate with a no entry sign, past a field where donkeys were located. At around that time Mr Campbell passed her driving a motorised buggy. Ms Coutts continued to walk northwards.

28. The claimant later met Ms Coutts in the feed barn. The feed barn is a large building in an open plan arrangement which has food stored in large bins, as well as an office area which has a desk and filing cabinet. It is accessed through a door that has a "staff only" sign on it, and is locked. Another employee was at the desk in that feed barn, looking at the computer, and speaking to Ms Coutts, whom he knew. Mr Campbell entered the barn and saw the claimant and Ms Coutts there, with Mr Leitch.

29. Mr Campbell later called Ms Reid to alert her to a concern that Ms Coutts was in the barn, and he thought that she and the claimant were looking at papers. Ms Reid directed him to speak to Mr Matthew who was in the café area. Mr Campbell did so, and was told to ask Ms Coutts to leave. He sought to find her, but when he could not returned to his duties.

30. No one from the respondent spoke to the claimant about the visit of Ms Coutts that day. The claimant sent messages to Mr Matthews that day, including ones around 4 and 5pm, and he did not raise a concern with her when replying.

31. Mr Campbell later that day wrote out a statement that same day which included that he "had seen them both in our vet medicine room, stock room, feeding stating and looking through paperwork at the desk where Callum was busy searching on Zims, noticed a lot of laughter between them whilst going through our documents, Shona had been in the park at least 2 hours with Morna…….". Zims is a computer programme showing animals that might be acquired by zoos and similar facilities.

32. Mrs Scott sent a message to Ms Reid on 27 June 2022 with regard to visiting the centre to tag sheep before moving them, and added "can you please leave the movement book out for me or give it to Denise and there are pedigrees in the filing cabinet for the Valais lambs I will need as well….."

33. Ms Reid thought that that message may have related to Ms Coutts' visit on the day before. There was a dispute over ownership of the Valais sheep between the respondent and Mrs Scott, which she raised with her solicitor.

34. The respondent took advice from an HR consultant with regard to how to handle the allegations in relation to Ms Coutts attending the centre and being with the claimant there [the consultant was not identified in the evidence].

35. On 29 June 2022 Ms Reid sent a message to the claimant by WhatsApp stating –

> "I have just learnt that you allowed a member of the public (albeit an ex member of staff) to entire into our private property and look through filing cabinets and the medical room and cabinet….On your part, if this is correct it would be an act of gross misconduct. I would therefore like to invite you to a disciplinary meeting on Saturday at 9.00am. I must warn you that the outcome of the meeting may result in the termination of your contract with immediate effect. In accordance with Acas, you have the right to bring a witness to the meeting and this witness may be a work colleague or trade union rep. Please confirm your attendance."

36. No investigation report was prepared, nor was any written evidence submitted to the claimant.

37. On or around 25 June 2022 Callum Leitch attended a disciplinary hearing, in respect of an allegation to the effect that he had not raised the issue of a non-staff member, Ms Coutts, being present in the feed barn. The hearing took place with Mr Matthews, who dismissed him. Mr Leitch appealed, and his appeal was later heard by Ms Reid, who refused it on 3 August 2022.

38. On or about 30 June 2022 Mr Campbell was promoted to Park Manager.

Grievance

39. On 1 July 2022 the claimant raised a grievance regarding the meeting on 25 June 2022 alleging that she had been told of an intent to let her go, and in relation to the disciplinary hearing. She asked for a five day extension to arrange a union representative. Ms Reid acknowledged it that day, and confirmed that the meeting would be re-scheduled. A formal reply was sent on 7 July 2022 stating that Mr Matthews would hear the grievance.

40. A disciplinary policy was sent to the claimant on 7 July 2022 (despite her having raised a grievance, but after the allegation of gross misconduct had been made), which included the following under "Formal Action" –

> **"Investigation**
>
> A full investigation will be carried out and an investigatory report compiled of all the facts gathered. In some cases, this may include an investigatory meeting before proceeding to a disciplinary hearing. You will be informed of the allegations against you and why this is unacceptable, together with a copy of the evidence gathered.
>
> **Hearing**
>
> You will be invited to a hearing to discuss the matter in detail and to give you an opportunity to state your case before decisions are reached. You will be informed of the allegations against you and why this is unacceptable, together with a copy of the evidence gathered. In misconduct cases, a different person will carry out the investigation and disciplinary hearing, wherever possible. The person chairing the hearing will listen to your version of events in good faith, and the issues will not be pre-judged…….
>
> **Notification**

> After the hearing, consideration will be given to what disciplinary action, if any, should be taken, and you will be notified in writing of both the decision and right of appeal as soon as possible……..
>
> **Appeal**
>
> You have the right to appeal any decision at each stage of the procedure, including dismissal. You must notify the appropriate manager in writing if you wish to appeal a decision within 5 working days of receipt of that decision……"

41. Mr Matthews did not hear the grievance, as arrangements were made for it to be heard by Samantha Morris. The claimant met her on 17 July 2022. The claimant sent a document on 22 July 2022 with her comments on Ms Reid's statement.

42. Ms Morris emailed her decision on 1 August 2022. She did not uphold the grievance, and did not address the disciplinary issue as that was to be addressed separately.

43. On 5 August 2022 the claimant emailed Ms Reid to state that she would not appeal the grievance outcome given its terms, but that her position had not changed.

Disciplinary Hearing

44. Ms Reid acknowledged the email of 5 August 2022 that same day and referred to the disciplinary hearing. She stated that that would be on 7 August 2022 at 5pm.

45. The disciplinary hearing took place before Mr Matthews. A transcript of it is a reasonably accurate record of the same [in so far as it does not contain comments by the claimant as to how she perceived matters]. At the hearing Mr Matthews referred to the statement from Mr Campbell, but did not hand it to her. The claimant provided a statement from herself, a statement from Ms Coutts and a statement from Ms Mae Mackay a former staff member. During the course of the meeting another staff member was called in to join it as the claimant felt intimidated by Mr Matthews.

46. Following the meeting Mr Matthews spoke to Mr Campbell and Mr Leitch. No notes of those discussions were produced.

47. On 27 August 2022 the meeting resumed. A transcript of the meeting is a reasonably accurate record of it. Mr Matthews stated that the statement submitted by Mr Campbell was correct, that it constituted gross misconduct and that her employment was terminated immediately. He stated "I will follow up everything [with]in writing to you today, I'll give you all the documents I have."

48. Mr Matthews did not confirm the dismissal in writing. He did not send her any documents. He prepared notes of the meetings, wrongly dated 24 July 2022, and not differentiating those of 7 and 27 August 2022. At that time they were not sent to the claimant.

49. The claimant requested those documents on a number of occasions, commencing on 30 August 2022.

Appeal

50. On 31 August 2022 the claimant emailed Ms Reid to appeal her dismissal. Ms Reid replied on 2 September 2022 asking her to wait for the process to conclude, and explaining that Mr Matthews would send a "formal response and supporting documentation to you in the next couple of days". He did not.

51. On 23 September 2022 the claimant emailed Ms Reid to confirm that she had not received that, and referring to the ACAS Code of Practice.

52. On 3 October 2022 Mr Matthews attempted to email the claimant sending her notes of their meeting. That email did not reach the claimant as it was incorrectly addressed. On 31 October 2022 Mr Matthews sent it to Ms Reid, who then sent it to the claimant on 7 November 2022, together with Mr Campbell's handwritten statement and stating that she could appeal within five days. The claimant did so, and an appeal hearing was arranged for 27 November 2022.

53. The claimant provided a number of documents for the appeal hearing, including written statements from Ms Maxine Scott, Ms Coutts, Mr Leitch,

a statement from the claimant, a statement from her, and separately Ms Coutts, responding to Mr Campbell's written statement, and transcripts of the meetings with Mr Matthews. She also provided points for discussion at the appeal, a response to Mr Matthews' notes, and a timeline.

54. A transcript of the appeal hearing is a reasonably accurate record of the same. Following the appeal, Ms Reid undertook further investigations of her own. She emailed Ms Coutts asking questions, but she did not reply. She emailed Ms Scott asking questions, but she did not reply. She met Mr Campbell on 14 January 2023, and took a more detailed statement from him. She then reviewed the position, including the documents provided to her by the claimant, and decided to refuse the appeal. She did so by email with a letter attached on 24 January 2023.

Financial and other matters

55. The claimant was dismissed with immediate effect on 27 August 2022. Prior to her dismissal the claimant had a gross weekly wage of £133.00 and a net weekly wage of £132.47.

56. The claimant did not seek employment after dismissal during the weekends. She concentrated on seeking to appeal, and progressing the appeal itself, thereafter with preparation for the present hearing. She continued with her existing other business, which included dog walking and caring for horses.

57. The claimant did not derive any additional income from any work on her other business beyond that she had received when employed by the respondent.

58. Mr Campbell had a profile online that under the heading "Work" had an entry "Park Manager at [the Centre] 5 March 2022 to present".

59. The claimant commenced early conciliation in relation to the respondent on 6 October 2022. The Certificate in relation to the same was issued on 17 November 2022. The present claim was presented to the Tribunal on 19 December 2022.

Submissions for respondent

60. The following is a summary. Ms Reid's understanding was that if the claimant and Ms Coutts had been in the medical room, and going through the filing cabinet in the feed barn, that was gross misconduct. The ear tags were in the medical room, and movement books in the cabinet. A new staff member with no axe to grind had witnessed what had happened. The issue of the sheep had been raised on 4 June 2022. It was accepted that the disciplinary investigation and hearing had not been carried out correctly, but she had undertaken a full investigation, reviewing all the evidence, and she had believed Mr Campbell. She did not send the information to the claimant in advance of the decision which was a misunderstanding by her and not wilful. If she had sent it, that would not have changed the outcome.

Submissions by claimant

61. The following is again a summary. On 25 June 2022 Ms Reid had summoned her to a meeting and said that she was being let go. She raised a grievance on 1 July 2022. On 26 June 2022 she had not acted as alleged. Ex-staff were allowed to go into staff only areas. There was no security threat or danger. She had always denied going with Ms Coutts into the medicine room or looking through the filing cabinet, and her evidence was supported by Ms Coutts. The evidence of Mr Campbell was different between the handwritten statement and typewritten notes. There had been fabrication of the detail, and collusion between Ms Reid and Mr Campbell. He had admitted lying under oath. He had not asked Ms Coutts to leave immediately he saw her. He was not disciplined, but promoted. Ms Reid could not evidence inconsistencies in the statements she had provided. Mr Campbell's first statement had not mentioned the filing cabinet at all. The second statement had not mentioned the desk, or the Valais sheep issue. The final statement referred to "dogs" and he said that he had read that. It suggested that the words had been written for him. He had said that there were rumours about the sheep on 19 June 2022, but that had not started until 27 June 2022. The reasons given for termination in the ET3 differed to those given at the meeting on 27 August 2022. The disciplinary procedure had been breached, with allegations

invented to support claims of gross misconduct. There had been delay of 58 days to the appeal decision, and the procedure said 5 days (that being the initial procedure in the handbook not that sent to the claimant on 7 July 2022). She had an unblemished record. She was not guilty of gross misconduct. When asked if there was any point she wished to make about mitigation of loss, she said that she did not.

Law

(i) The reason for dismissal

62. 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"). In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

63. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

64. 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. Fair reasons include conduct.

(ii) Fairness

65. 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

> "(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 [that reason] as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

66. The terms of sub-section (4) were 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.

67. 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

(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?

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

> "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."

69. 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:

> "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."

70. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497***, that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."

71. 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 the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***. What is required is consideration of that which is reasonable in all the circumstances, as explained in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.*** In ***Sharkey v Lloyds Bank plc UKEATS/0005/15*** the EAT explained further that

> "…procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

72. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In

London Ambulance Service v Small [2009] IRLR 563 Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

73. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

74. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

75. 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. It includes the following provisions :

> "4. Employers should carry out any necessary investigations to establish the facts of the case…..
> 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…
> 12. …….. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee

> should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this…….
>
> 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…."

76. 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. 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. The law in this area was reviewed recently in ***Hope v British Medical Association [2021] EA-2021-000187***.

(iv) Appeal

77. 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 employers must act fairly in relation to the whole of the dismissal procedures***.*** The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** being a conduct dismissal case, in which it was held that a fairly heard and

conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall.

(v) Remedy

78. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

79. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, 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. 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 loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". 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.

80. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** When assessing the amount of loss, account should be taken of the requirement to mitigate loss. The tribunal should decide when the employee would have found work and take into account any income which the tribunal then considers she would have received from that other source (***Peara v Enderlin Ltd [1979] ICR 804*; *Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*).** The issues that arise are: (a) what steps were reasonable for the claimant to have to take to mitigate their loss; (b) did the claimant take reasonable steps to mitigate their loss; and (c) to what extent would the claimant have mitigated their loss had they taken those steps? That approach was confirmed by the EAT in ***Savage v Saxena [1998] IRLR 182*** and ***Hakim v Scottish Trades Unions Congress UKEATS/0047/19.***

81. In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case

of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

82. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** If a contribution deduction is made as well as one for ***Polkey*** the Tribunal should consider whether there is an overlap between them and adjust accordingly (***Lenlyn UK Ltd v Kular UKEAT/0108/16).***

83. If there is a breach of the ACAS Code the Tribunal may consider an increase in compensation. It is found in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, as follows:

> "**207A Effect of failure to comply with Code: adjustment of awards**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (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……."

(vi) Jurisdiction

84. Section 111 of the 1996 Act provides for a time-bar provision, with a requirement to commence a claim within three months of the effective date of termination, which in the present case is 27 August 2022. There are provisions to extend the period for timebar in sections 207(B)(3) and (4) of the 1996 Act. In summary section 207B(3) adds on to the ordinary three-month limitation period the specific amount of time that has been devoted to early conciliation and section 207B(4) ensures that all claimants that engage in conciliation towards the end of the ordinary three-month limitation period have at least one month to submit the Claim Form from the day on which the Early Conciliation period ends.

Observations on the evidence

85. My assessment of each of the witnesses who gave evidence is as follows:

Alexa Reid

86. I was satisfied that Ms Reid was attempting to give honest evidence. She was incorrect on some points of detail, such as the date of the meeting with the claimant which she had noted as 26 June 2022 when it was the day before, but that was I considered a minor matter. I formed the impression that Ms Reid had a less than full appreciation of the duties of an employer. She had a tendency to rush to judgment. That was shown in the meeting on 25 June 2022, when (on her own account) she effectively accused the claimant of releasing an otter without authority, and of not attending work when she should, for morning meetings. A reasonable employer would have raised the issues more thoughtfully, making enquiries first of all before embarking on any meeting, when an issue of prospective termination of employment was raised. Ms Reid later accepted that another member of staff had decided to release the otter, and that the claimant had a document confirming the later start time. The circumstances of that meeting were challenged, and are addressed further below.

87. Ms Reid had a limited understanding of the terms of the disciplinary procedure sent to the claimant on 7 July 2022, and neither she nor Mr Matthews appeared to have attempted to follow it. There were a series of basic procedural flaws, as I address below. Ms Reid was the appeal officer. The dismissing officer was not called to give evidence at all. Ms Reid explained that she thought that he had not handled matters fully and that she sought to correct them herself. I did not consider that she had done so, and I considered that the procedural flaws were many and serious. I address them more fully below.

Kevin Campbell

88. I considered that when Mr Campbell gave his evidence he appeared to be a credible and reliable witness. He was candid in his answers to questions. He said that he was clear in his recollection as to what he had seen on 26 June 2022. There were some differences between the timings given in his handwritten statement that day given the terms of WhatsApp messages between the claimant and Ms Coutts which indicated that

Ms Coutts was to arrive shortly before about 1.30pm that day, but the timings were not in my view unduly significant, and the difference in that regard marginal. I also noted that the handwritten statement did not refer to the filing cabinet being open, but it did refer to paperwork being looked at, which is in some senses the crucial matter. Mr Campbell maintained his position in cross examination, and I could not see any obviously good reason for him to make up such an allegation. An issue about an online posting being wrong was raised, addressed below.

Maxine Scott

89. Mrs Scott gave fairly brief evidence which I regarded as credible and reliable with regard to how she had permitted ex members of staff she or others knew to return to the Centre, and that they could go past gates with staff only signs as she trusted them. She said that they did not have keys to locked enclosures or areas, and would not have been permitted in the medical room which was kept locked. They and the public might have had access to the feed barn area, as that was occasionally used for viewings of lambings and similar events.

Morna Gunn

90. The claimant gave what appeared to me to be clear and convincing evidence. She became upset on occasion in her evidence in chief, and a break was taken. She denied that the allegations by Mr Campbell as to being in the medicine room with Ms Coutts, or having paperwork in her hand from the filing cabinet in the feed barn, was correct. She gave a detailed description of how the day had unfolded, and alleged that she had spoken to Mr Campbell in the feed barn when he had come in to dry his dog. It was clear that she had done little to seek to mitigate her loss, as she was concentrating on the present claim. It was also clear that she honestly believed that she had done nothing wrong, and that there had been an attempt to remove her from her position from 25 June 2022. She strenuously denied being in the medicine room with Ms Coutts at all, or that she had held paperwork beside an open filing cabinet in the feed barn, with Mr Leitch present. She thought that Mr Campbell had colluded with

Ms Reid to remove her, although she had not put that specific allegation to either of them in cross-examination.

Shona Coutts

91. Ms Coutts gave I consider clear and candid evidence. She was not employed by the previous owners at the time of the events on 26 June 2022. Her description of the events that day was reasonably detailed, and given in a convincing manner. She was clear in her own evidence that she had not been in the medicine room, and had not either looked at or seen the claimant with any paperwork from a filing cabinet in the feed barn. She also said that Mr Campbell had come into the feed barn when they were there to dry his dog, and that they had spoken. Her account included some matters that I comment on below which had not been put to Mr Campbell.

Discussion

92. The first point I required to consider was jurisdiction, as without it I was not able to make any decision. It appeared to me that section 207B(3) was engaged in this case, with the period of conciliation being such that the Claim Form was submitted timeously (although not exactly as the claimant had been informed by ACAS, as she stated in evidence).

93. I address each of the issues that were identified above:

(i) What was the reason, or principal reason, for the claimant's dismissal?

94. The respondent argued that the sole reason for the dismissal was conduct, in that there was a belief that the claimant was guilty of gross misconduct. Although Mr Matthews did not give evidence, I was satisfied that he did have such a belief, as that is provided in the transcript of the meeting. The precise reasons for that are less clear, as I shall come to. The position as to the reason was supported by Ms Reid's evidence. I did not consider it likely that there had been collusion, a matter I address below. I considered that the respondent had discharged the onus in this regard notwithstanding the failure to call the decision-maker to the dismissal.

(ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

95. Firstly I find that there was a genuine belief in gross misconduct having taken place. That was the evidence of Ms Reid, which I accepted on this point, and the transcript of the meeting on 27 August 2022.

96. Secondly I considered that there had not been a reasonable investigation at the disciplinary hearing stage. Ms Reid in effect conceded that. It was not entirely clear what investigation there had been, beyond the receiving a one page document from Mr Campbell. The procedure suggested that there would be an investigation report, and that the evidence would be provided to the employee. Neither was done. Not even the one page message from Mr Campbell was given to the claimant at that time. Mr Matthews alleged in the subsequent meeting to have spoken to Mr Campbell again, but no notes of that were produced before me, or sent to the claimant, and importantly Mr Campbell denied that such a discussion had taken place. Mr Matthews in that second meeting also alleged that he had spoken to Ms Morris, but again no note of that was produced, and given Mr Campbell's evidence, which in this respect I accept, together with the fact that Mr Matthew did not give evidence, I am not satisfied that such enquiries were made. The ACAS Code refers to evidence normally being submitted to the employee prior to the disciplinary hearing, and this is I consider such a normal case. There was written evidence from Mr Campbell, and all reasonable employers would have provided it to the employee in advance of the hearing.

97. There is more that all reasonable employers would have done, in my opinion. They would in the circumstances of the present case have held an investigation meeting with the claimant, to ask her for her comments on the allegations, and then follow up on that by speaking to others such as Mr Leitch, who at that time was still an employee, and other former employees of the former owners whose employment had transferred. Whilst Ms Coutts and Ms Scott were not employees, attempts to speak to them could have been attempted. It was attempted at the appeal stage. An investigation report setting out the detail of what had been investigated, what had been found, and what conclusions were made from that, would then have been prepared, or at least the written evidence obtained disclosed to the claimant.

98. Thirdly, I considered that there had not been a reasonable belief formed as to gross misconduct, given the evidence before the dismissing officer. Mr Matthews does not appear to have properly considered the evidence the claimant provided, or to have appreciated what that was. He appears from the transcript to have proceeded on the basis that a non-member of staff being in an area that the public should not access and not reporting that immediately was itself gross misconduct. That was the explanation for dismissal given orally at the end of the meeting on 27 August 2022, and also appears to have been the basis on which Mr Leitch had been dismissed earlier. I consider that such a view is not one that fell within the band of reasonable responses. There was evidence that former staff members who were known to them were permitted by the previous owners to attend the Centre including areas marked staff only. If the respondent as the new owners of the Centre wished to change that practice that required to have been communicated clearly.

99. There was no evidence before Mr Matthews I am aware of that indicated that that had been. There had been a discussion about members of the public not paying, but that was a different matter, and in any event it was not clear that that had been communicated to the claimant. These were not matters that appeared to have been in the mind of the decision-maker, who on the face of the transcript (and having regard to the earlier decision made as to Mr Leitch) believed that the failure to report the present of someone not a current staff member was itself gross misconduct, but in any event he was not a witness before me, and that was not a matter that could therefore be explored in evidence.

100. There is a part of the handbook referencing security, and I appreciate that there are conditions as to the Zoo Licence and related matters. But that does not mean that being in the presence of someone who is a former member of staff in what was referred to in evidence as the back area, being the part behind a staff only or similar sign, is gross misconduct, nor that it was reasonable to have such a view. No reasonable employer would I consider have regarded that as gross misconduct in the circumstances known at the time where the former practice had been to treat those who had been known to be employees but had left as not being the general

public for the purposes of security. Even if it had been however there was clear inconsistency in that Mr Campbell accepted that he had seen Ms Coutts early in her visit but had not then reported it. He had only done so later after she was seen in the feed barn. There was no suggestion of disciplinary action for his not taking more immediate action.

101. It also appears to me that the meeting on 7 August 2022 was conducted in such a way as leads me to conclude that Mr Matthews had pre-judged matters. He appears from the words he used to have taken the statement of Mr Campbell at face value, and assumed that it was correct. He did not appear to me to have an open mind. He argued with the claimant, cutting across her, and contradicting her in a manner that was in my view simply inappropriate.

102. Fourthly I considered that the procedures followed were not within the band of reasonable responses. The respondent did not follow its own procedures, being those it had sent the claimant. No investigation report was prepared, and written evidence was not provided to the claimant before the disciplinary hearing. Mr Matthews did not confirm the decision in writing by letter or similar, despite promising to do so. The delay in sending notes of the hearing was pronounced, and wholly unreasonable of itself. The claimant had been summarily dismissed on 27 August 2022, but it was not until 7 November 2022 that she received anything approaching written confirmation of that, and then it was limited. It was not clear why precisely Mr Matthews had decided to dismiss, as no letter or other document to explain the reasons was ever prepared by him and sent to the claimant.

103. The claimant alleged that Mr Matthews had intimidated her. With agreement of Ms Reid parts of the recording of the meeting on 7 August 2022 were played. Ms Reid did not agree that that indicated intimidation, but I do not agree with her. The manner in which he spoke, and appeared to act, was in my view entirely wrong. That he was not called to give evidence means that I do not have his evidence, and the claimant could not cross examine him. I accept her evidence on this point. She did feel intimidated, and was reasonable to have such a feeling given what happened. The meeting was not conducted in a manner that any

reasonable employer would have done. It was well outside the band of reasonable responses.

104. I did consider carefully whether the appeal cured the earlier defects. As the authorities make clear, a good appeal can cure even the most substantial defects at the disciplinary hearing stage. Although Ms Reid did do a far better job than Mr Matthews, her partner, as to which she gave evidence, she accepted that although she had undertaken her own investigation she did not provide the fruits of that to the claimant for her comment before the decision was taken, and that that was not in accordance with the respondent's own disciplinary procedure. That meant that the claimant did not have the opportunity to comment on what had been investigated, in particular the notes of the meeting with Mr Campbell where he gave more detail than his brief handwritten statement.

105. It appeared to me that that was a fundamental failure in process of the appeal, which was outside the band of reasonable responses, particularly where the earlier disciplinary process had been so defective, such that the appeal did not remedy the earlier defects.. That sense is heightened by the time taken to address the appeal, which was initially intimated on 31 August 2022, entirely properly as the dismissal had taken place on 27 August 2022, but not addressed by the respondent until around three months later, with the appeal decision not given until 24 January 2023, which is a total period of nearly five months. I appreciate that businesses can be busy, but that did not explain such an unreasonably long delay. The suggestion that had been made by Ms Reid that the claimant should wait for written confirmation of the decision to be given was at the level of a lay person reasonable, but when it took such an unreasonably long time for that to be done it was, in my view, not reasonable.

106. There were, I concluded, breaches of the ACAS Code of Practice in a number of respects that rendered the dismissal unfair. The investigation referred to in the Code did not take place, nor did the sending of evidence to the claimant (either then or later for the appeal), or a meeting at which the evidence from both respondent and claimant considered in the manner referred to. The appeal considered matters, but without input from the claimant to the far more detailed statement Mr Campbell had given, or the

lack of reply from Ms Coutts or Mrs Scott. It is a Code to take into account, and the issues that I have raised above are I consider evidence of breaches of the Code in these respects.

107. I concluded that the dismissal was unfair under the terms of section 98(4) of the Employment Rights Act 1996.

(iii) If any claim is successful, to what remedy is the claimant entitled?

108. The claimant did not seek re-instatement or re-engagement. The **basic award** is £266, subject to any deduction as to contribution, addressed below.

109. For the **compensatory award** I must first of all assess the extent of loss. I accepted that the claimant had not received any income for the weekends save that which she had already had prior to the dismissal, in the period to the Tribunal hearing.

110. I also require to consider **mitigation of loss**. The claimant did not suggest that she had sought to replace the lost income from the respondent, and accepted that she had been concentrating on the present claim. She had not applied for any new role at the weekends, nor had she undertaken a greater level of weekend work. Her primary concern was her reputation, she explained. She did not seek to justify her position other than by saying that the role with the respondent was done for the love of animals, not for the financial rewards it brought. I can understand that, but the authorities make clear that there is a requirement to take reasonable steps to keep losses to a minimum where a financial award is being sought.

111. If that is not attempted, but should reasonably have been, and if it had been would have been successful, compensation for the period thereafter cannot be awarded. There was an initial period when the respondent failed to set out reasons and provide evidence, and then delays until the appeal decision was issued, during all of which the claimant sought to regain her employment. It appears to me that that delay in addressing the appeal is a factor to consider, but not conclusive on the issue of when mitigation attempts would have succeeded. Given that the role was a weekend one paid at or around minimum wage, it appeared to me that the failure to

mitigate should apply from a date three months after dismissal, which is to say by 27 November 2022. By then, had the claimant sought alternative work for the weekends, she would in my assessment have succeeded, and doing so was reasonably required as mitigation of loss. I therefore limit loss to that three month period.

112. I then considered whether there would have been a fair dismissal under a different procedure, which is usually called the ***Polkey*** deduction after the case of that name referred to above. It is relevant to state that that addresses matters having regard to the authorities above, where the focus is on a fair dismissal where a reasonable employer had conducted a reasonable investigation, held a reasonable belief in gross misconduct, and could impose the penalty of dismissal. The question is what the belief of such an employer would have been, not what had happened on the balance of probabilities, the civil standard, or (as the claimant once referred to) proof beyond a reasonable doubt being the criminal standard.

113. In that regard, I had the evidence from Ms Reid and Mr Campbell, and from the claimant and her witnesses, responding to the evidence Ms Reid had gathered. I did not consider it likely that the investigation had been fabricated, as the claimant suggested. I did not consider it likely that Ms Reid and Mr Campbell had simply come to commit perjury. It seems to me that Ms Reid did attempt to conduct an investigation as she emailed both Mrs Scott and Ms Coutts, for example, which is most unlikely to have been done if there was simply fabrication by her. I also consider it unlikely that Mr Campbell would have said that Mr Matthews had not sought further detail from him if he had been colluding with the respondent, as the answer was to its disadvantage.

114. It is not uncommon for parties who have an entirely different view of what occurred to believe that the other party is lying. I did not consider that that was the case here. It appeared to me that those who attended to give evidence did so believing that what they said was the truth. If there had been collusion between the respondent's witnesses there would not have been a basis for a ***Polkey*** deduction, but where I have concluded that there was not that, I require to consider the position not on the basis of which party was giving reliable evidence on the balance of probabilities,

but whether there could have been a fair dismissal. That test is determined on the band of reasonable responses as described in authority above, with in this respect whether there could have been a reasonable belief, following a reasonable investigation and disciplinary process, in gross misconduct, and whether the penalty of dismissal could have been imposed by a reasonable employer.

115. I consider that had Ms Reid prepared a form of investigation report, or alternatively provided the claimant with the documents comprising the outcome of her investigation and given the claimant a chance to comment on it and lead her own evidence, the same outcome was likely to have occurred, in that she is very likely to have accepted Mr Campbell's evidence. She considered it believable, and that she had no proper basis to doubt it as he was a new employee without any axe to grind, as she put it.. Mr Campbell had, he said to her on 14 January 2023, seen the claimant and Ms Coutts with paperwork in the claimant's hands, with the filing cabinet open. That was the crucial part of the evidence she had before her. If that element had not been present, and if there was only an allegation of being with an ex-member of staff in restricted areas, that would not have been the basis for a reasonable employer to dismiss in my view.

116. It was not disputed by the claimant that looking through a filing cabinet with another person not a staff member could be gross misconduct if it had happened (which of course she denied), and she was right to concede that. It is a matter going directly to the heart of the employment relationship. Mr Campbell was in his mind clear that that is what he had seen, but that was disputed by the claimant and Ms Coutts, as well as by Mr Leitch at least to an extent. Mr Campbell had prepared a handwritten statement on 26 June that was consistent with the notes of the meeting with Ms Reid on 14 January 2023, even if those notes expanded considerably on that initial statement. In addition, Ms Reid had had no responses to her messages to Ms Coutts and Mrs Scott. A reasonable employer would have been entitled to take that into account.

117. I address the facts of what happened further below in the context of contribution, but this is a different question.. In my view a fair process

would have involved writing to the claimant providing her with the documentation, and holding a further appeal hearing to consider matters. That process is likely to have taken to around the end of January 2023. In my view Ms Reid could have dismissed the claimant's appeal as a reasonable employer, in all the circumstances, and that the appeal process would have procured a fair dismissal. It is not certain that she would have, but I conclude that there was a 75% probability that a fair dismissal would have occurred in such a situation, on or around 31 January 2023. That finding operates to limit loss for a period I assess at a little over five months, being from 27 August 2022 to 31 January 2023. As 31 January 2023 is past the date for mitigation of loss, however, these findings do not affect the calculation of the compensatory award further. It is not therefore necessary to calculate what the 75% chance is in financial terms. In the circumstances of this case, the ***Polkey*** principle does not affect the calculation of loss.

118. I then calculated the compensatory award, to be subject to any variation addressed below, on the basis of a compensatable loss for a period of three months. The monthly equivalent of the net weekly wage is £574.04. For five months the figure is £1,722.12. The claimant made a claim for loss of statutory rights. Where this was not the main source of her income, her other role continuing, and where she made no efforts at all to seek alternative employment for the weekends after dismissal, it did not appear to me that such a claim had a financial value that was appropriate to make. I considered that the compensatory award, subject to what follows, was £1,722.12.

119. The next issue is that of **contribution**. The onus of proving contribution falls on the respondent. For that, I required to assess the evidence of Mr Campbell against that of the claimant and Ms Coutts in particular, and to do so on the civil standard of the balance of probabilities. I have considered that Mr Campbell's evidence carefully. I have commented on it above.

120. Against that is the evidence of the claimant and Ms Coutts, and although supported by Mr Leitch's written statement as Mr Leitch did not give evidence before me for this purpose I do not attach any weight to his

statement. The claimant's evidence is also commented on above. The claimant made some points about what happened on the day that is disputed that I considered had some merit. The first is that she was not contacted about the events by anyone that day. That is strange in the circumstances where both Ms Reid and Mr Matthews were told about it, and Ms Reid said that it was so serious a matter as justified dismissal. The second is that Mr Campbell did not verify that Ms Coutts had left, but when he could not see her where he looked went back to his normal role, and did not inform Mr Matthews of that fact. That is also strange in the circumstances, as she could have been within the area of the Centre somewhere, and his concern was that there was the potential for breach of confidentiality or security of documents. An issue arose as to an alleged later meeting with Ms Coutts as I shall come to. The third is that the handwritten statement does not refer to the filing cabinet being open, and refers to the claimant and Ms Coutts being at the desk, whereas it was accepted latterly by him in cross-examination that they were beside the filing cabinet. These factors cast a degree of doubt over the reliability of Mr Campbell's evidence.

121. The claimant was supported in her evidence by Ms Coutts, who stated that they were not in the medicine room nor ever had sight of or possession of paperwork from the filing cabinet. Both the claimant and Ms Coutts were I consider clear and convincing in their evidence. Ms Coutts was visiting her parents, and came to the Centre to see the animals she had cared for. She had left the Centre in February 2022, and was working in Mallaig, not for the previous owners. She spoke about her understanding that she could walk in an area marked staff only despite not being a staff member at that time, and her evidence was consistent with that of Mrs Scott on the point. She explained in detail what had happened during her visit, and where she had gone. Her account was consistent with that of the claimant. The evidence I consider was reliable.

122. The evidence of Ms Reid was to the effect that Ms Coutts had been present to obtain access to ear tags and movement records for the sheep Mrs Scott was seeking, and which was the subject of an email message the following day. It was in effect a suggestion that Ms Coutts was spying

for Mrs Scott. That appeared to me to be inherently unlikely (and was not directly put to Ms Coutts in cross examination). The email Ms Reid founded on was sent the day after the event. Simply because the email followed the events on the Sunday does not mean that the two are connected (*post hoc non ergo propter hoc* is the Latin maxim).

123. There are some other areas in the evidence which require comment. The first two relate to points not put in cross-examination by the claimant. When asked to say why Ms Reid ought not to have believed Mr Campbell, the claimant said in basic summary that the two of them had colluded to remove her, and that Ms Reid did not truly believe that events had happened as alleged by Mr Campbell. The difficulty with that is that that allegation was not put in cross examination to either of them, despite my explaining that principle at the commencement of the hearing. It appeared to me that although that did not exclude the evidence, it was not appropriate for me to consider the allegation of collusion as neither Ms Reid nor Mr Campbell had had the chance to give evidence on that.

124. Ms Coutts said that she had first seen Mr Campbell when walking beside the donkey field shortly after she had arrived, with him coming towards her. His evidence was that he had not recognised her, and that he was moving in the same direction as she was. Ms Coutts said that she had seen him a second time in the feed barn when his dog was very wet. That also accords with the claimant's account. Ms Coutts then said that she had seen him a third time towards the end of her visit when they were both in the feed barn, and had talked with him. He said in evidence that he had not seen her again after the second time Ms Coutts had seen him, and he her, in the feed barn (being the occasion he alleges that the claimant had the paperwork in her hand). He was not challenged on that in cross examination, and in particular that discussion said to have happened on the third occasion was not put to him at all. The claimant is of course a party litigant, but that was a potentially important part of the evidence, and he had not been given an opportunity to comment. It did not appear to me to be appropriate to consider that element of the evidence for the same reason.

125. What was put to Mr Campbell was an online profile entry, that he accepted was not accurate. It was suggested in cross examination that it was a lie, and he accepted that. I did not consider that that undermined his evidence entirely, although the date of the entry showing his promotion on 5 March 2022 is wrong, in that he was not the Park Manager until the end of June 2022, but it is the kind of detail that is sometimes not correct, it was not the kind of detail that had a material impact on the present case, and I did not form the opinion from it that the other evidence he gave was unreliable. I did however take that matter into account.

126. There was an earlier meeting on 25 June 2022, the day before the alleged gross misconduct, when the claimant alleges that she was told by Ms Reid that she was being let go, and raised a grievance about it not long thereafter, where the circumstances are disputed by Ms Reid who said that the word "f" was used, and that she was trying to improve the sense of team-work, to paraphrase. Each of the claimant and Ms Reid have a very different recollection of the events, and each put forward their case in writing fairly shortly afterwards. That was an unusual background, and did have the potential to indicate that there was an intention of some kind to dismiss the claimant, but the evidence as to what happened at that meeting was not clear, as the two accounts were entirely different but without any detail I could decern to identify which of them was likely to be accurate.

127. I came to the conclusion that the evidence for the claimant should be preferred over that of Mr Campbell on the issues of (i) whether the claimant and Ms Coutts were in the medicine room and (ii) whether they were beside the open filing cabinet with the claimant holding paperwork from it. The key reasons for that are firstly that Ms Coutts impressed me in her evidence, and it appeared to me that she was very likely to be both credible and reliable. Her evidence was detailed and consistent on points of detail (such as that the claimant had a sandwich in her hand when in the feed barn, and through which of the two doors each entered and exited). Secondly I regarded it as inherently unlikely that Ms Coutts would seek to do what Ms Reid had assumed, to help Mrs Scott in regard to sheep over which there was a dispute in emails on 27 June 2022, for the

reasons explained above. Thirdly, the lack of challenge of the claimant on 26 June 2022 itself, coupled with the lack of her being suspended, and Mr Campbell not following up with finding Ms Coutts that day after being told by Mr Matthews to have her leave the site, were all factors that were not fully consistent with the respondent's position. That position was to the effect that someone being in a non-public area should be asked to leave, or the issue immediately reported to a manager. Fourthly Mr Campbell's evidence over the incorrectly dated online profile, and the other inconsistencies between his handwritten evidence and oral evidence, were factors that adversely affected the reliability of his evidence.

128. I did not consider that the mere presence of the claimant with Ms Coutts in the non-public or "back" areas was something that amounted to the kind of conduct that merited a deduction for contribution. The practice of permitting former staff to attend was I consider established in the evidence, and there was nothing to put the claimant on notice that that was no longer permitted by the respondent.

129. The onus of proof in this regard fell on the respondent, I held that it had not been discharged, and that the claimant had not acted in such a manner that contributed to her dismissal. The statutory provisions are not the same for the basic award and compensatory award, but in my view the same principle applies given the evidence I heard. I did not make any reduction to the basic or compensatory awards.

130. I finally considered the issue of an **uplift** for the breach of the ACAS Code of Practice. I am entitled, if I consider it appropriate to do so, to increase compensation by up to 25% for that. The claimant sought that in her schedule of loss. The breaches of the Code were many, and significant. The Code itself is a basic document, and can be read and understood by those who employ staff. In my opinion the breaches were unreasonable. I did consider whether to award the full increase. I accept however that the respondent is a small employer. It had access to an HR consultant, who advised it to a small extent, but it had limited people in managerial roles. I take into account all of the circumstances, which include my finding as to the ***Polkey*** potential deduction above, and that the appeal stage was a

great deal better than the disciplinary hearing stage. I consider that in all the circumstances the uplift for breach of the Code should be 10%.

Conclusion

131. In light of the findings made above, I award the following sums as compensation for unfair dismissal –

(i)	Basic award	£266.00
(ii)	Compensatory award -	£1,722.12
(iii)	Sub-total	£1,988.12
(iv)	ACAS uplift (10%)	198.81
(v)	Total	£2,186.93

Employment Judge: A Kemp
Date of Judgment: 11 April 2023
Date sent to parties: 14 April 2023