



# EMPLOYMENT TRIBUNALS

**Claimant**

**AND**

**Respondent**

Ms E Agoaoa

The Park Tower Hotel Ltd

**Heard at:** London Central

**On:** 5 and 6 January 2017

**Before:** Employment Judge H Grewal (sitting alone)

## **Representation**

**For the Claimant:** Ms S Southam, Friend

**For the Respondent:** Mr J Bennett, Advisor

## **REASONS**

1 In a claim form presented on 22 September 2016 the Claimant complained of unfair dismissal. The Respondent contended that the reason for the dismissal was related to conduct and that the Claimant had been fairly dismissed.

### **The Law**

2 The onus is on the employer to prove that the reason or the principal reason for the dismissal was a reason relating to the conduct of the employee (section 98(1) and (2) of the Employment Rights act 1996 ("ERA 1996"). If the employer establishes that, the Tribunal then has to consider whether dismissal is fair within the meaning of Section 98(4), in other words, whether the employer acted reasonably or unreasonably in all the circumstances of the case in treating that reason as a sufficient reason for dismissing the employee.

3 The well-established authority of **British Home Stores Ltd v Burchell[1978] IRLR 379** provides that in a conduct dismissal case the Tribunal has to ask itself the following three questions:

- (i) Did the employer believe that the employee was guilty of misconduct?
- (ii) Did he have in his mind reasonable grounds upon which to sustain that belief? and
- (iii) At the stage which he formed that belief on those grounds had he carried out as much investigation into the matter as was reasonable in the circumstances of the case?

4 In determining the issue of fairness the Tribunal also has to consider whether there were any flaws in the procedure which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case. In judging reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. The function of the Tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827**).

### **Evidence**

5 The claimant gave evidence in support of her claim. Charl Oberholster (Food and Beverage Manager) and Marjolien Verhoeven (HR Manager) gave evidence on behalf of the Respondent. Having considered all the oral and documentary evidence, I made the following findings of fact.

### **Findings of Fact**

6 The Claimant worked as an Evening Room Attendant and the Respondent's Park Tower Hotel in Knightsbridge. She had worked for the Respondent in that role since January 1997. Her duties in the role involved in going into the guests' rooms in the evening and closing the curtains, turning down beds, replenishing toiletries in the bathroom and wiping down the bath and sink if that was necessary. Those duties required the Claimant to spend 10 to 15 minutes in each room.

7 The Claimant was familiar with all the Respondent's rules, policies and procedures in respect of entering guests' rooms. Access to the guests' room could only be gained by using a registered key card. These were issued to staff who needed to access the rooms and to the guests. Each key card was issued with a distinct identification code. Every entry into a room is recorded on a system that records the time of the entry and the key card that was used to effect that entry. The rules were clear that an employee should never use his or her card to open doors for anyone else, and that included both other employees and guests. The Lost and Found procedure stipulated that any item found in a vacant guest room by the room attendant should be taken to the Housekeeping Office and placed in the lost property box in a bag with a sticker on it. If the item was valuable, Security should be informed and the item should be logged on to the system.

8 On 20 June 2016 the Respondent received two reports of missing items from guests' rooms.

9 At about 10 o'clock that morning the switchboard informed the Duty Security Officer, Razvan Nitulescu, that the occupant of room 1510, who had left the previous day, had called from Pakistan to say that they had accidentally left behind a diamond ring in the safe. The Duty Security Officer and the Senior Housekeeper searched the room with the permission of the guest who was staying in the room at that time having checked in an hour earlier. They did not find the ring. The Duty

Security Officer called the guest in Pakistan and requested further details. The guest told him that about 3.00 pm on the previous day, prior to checking out, he had retrieved the passports and money from the safe. However, when they had returned home to Pakistan his wife had asked him about her gold diamond ring. He had not removed that from the safe and was certain that it had been left behind in the safe which had been left open.

10 The Duty Security Officer obtained a lock read of Room 1510. He was informed by reception that the guests had checked out shortly after 4.00 pm. The lock read showed that the Housekeeping Porter had entered the room at 16.44 and that thereafter the Claimant had entered it on seven occasions between 17.29 and 19.06. It had thereafter been entered once again by the Housekeeping Porter and the Senior Housekeeper.

11 At about 2 p.m. on the same day the Senior Housekeeper reported to the Duty Security Officer that the guest Room 1512 had reported that her ring was missing. A door lock read had been obtained 1.21. The Duty Security Officer tried to speak to the guest on the same day but she had gone out for the day, and he did not get to speak to her until the following day. She said that on 19 June she had had a massage at about 5 p.m. and had left the room at about 7.00-7.30 p.m. to go for a walk or run in Hyde Park. Before she left the room she had placed her Cartier gold ring and two other rings together with her watch on the vanity unit, the flat surface by the sink). The rings were enclosed by the watch. She had returned to her room shortly after 10.00 pm and had subsequently discovered that the Cartier ring was missing. She was asked whether anybody had visited her during her stay in the room and she said that no one had. She also made it clear that she did not wish to involve the police.

12 The lock read from room 1512 showed that on 19 June the guest had entered about 16.50, the Claimant had entered it at 20.56 and the guest had entered it again at 22.04. The only person, other than the guest, who had entered the room between 22.04 on 19 June and 14.00 on 20 June had been the Senior Housekeeper who had entered at 12.20.

13 The Claimant was not rostered to work on 21 and 22 June 2016. When she returned to work on 23 June she was interviewed by Mark Burrows, Security Director, and Razvan Nitulescu. They told her that they wanted to ask her questions about property missing from rooms 1510 and 1512. In respect of room 1510 the Claimant said that she had seen that the door was open at about 4.45 p.m. and had drawn this to the attention of the Senior Housekeeper. She had looked inside and seen that the room was very dirty and that the safety box was empty. She had asked Constantin Calugarescu, the Housekeeping Porter, to look in to the room to observe how dirty it was. She had asked him not to use key to enter the room. She was asked whether she had checked the safety box and she replied that it was open and she. She was asked whether she had found anything in the safe and she replied, "Only rubbish. Receipts from Harrods. I picked them up and threw them in the bin." The Senior Housekeeper had closed the door. She had not touched anything in the room at that time. She had gone to have her dinner before she returned to the room. She was then informed that the guest had said that he had forgotten a ring in the safe. She said that she had checked under

the mat in the safe and in the drawer under the safe but all that she had found were the small pieces of paper. She was asked whether it was possible that the ring might have got tangled up with the papers that she had thrown away and she said that it was not as the papers were very small and straight.

14 She was then told that there was also an allegation about missing property from room 1512. She said she had gone into the room to do the turn down. The guests had had a massage and gone out. The Claimant said in evidence before me that the guest had had the massage in the room and it appeared not to be disputed between the parties that that was in fact the case and that the Claimant was aware it. The guest had returned later while the Claimant was still there and had apologised for the number of dirty towels. The Claimant was told that the property missing from that room was a ring as well. The Claimant said that she had not touched anything and had just dried the sink. She was asked whether she had noticed if there was any jewellery on the vanity unit in the bathroom and she said she did not remember because she had not touched the sink and she had focused on the shower and the towels. When she was asked about the bathroom and the sink she said she had not touched anything and she had just dried the sink. She was sure that the guest had used her own key to enter the room. She was told that she was the only person who had been in the room and that the guest was very specific about what had happened.

15 At the end of that interview Mr Burrows suspended the Claimant of full pay until 27 June while the matter was investigated further. Notes were made of that meeting.

16 Mr Razvan filled out Security Incident reports in respect of both matters. The one relating to room 1512 has his electronic signature on it but is not dated. It appears that it was completed on 21 June because he states in it that he offered a thorough room check which the guest accepted and that that was arranged for the following day, 22 June. The one relating to room 1510 is neither dated nor signed. It appears that that one was completed on 23 June because it sets out what the Claimant said in her interview. It also states that Senior Housekeeper had confirmed that the door to Room 1510 had been left open after the guest had checked out. Mr Nitulescu states in that report that he made another phone call to the guest who had said that he wanted the matter reported to the police by the following day at the latest if the ring had not been found.

17 On 24 June the Claimant was invited to an investigation meeting on 27 June. She was told that the meeting was to investigate allegations of theft from rooms 1510 and 1512 on 19 June and that she would be asked questions based on the door lock reads from the two rooms. She was warned that theft was classified as gross misconduct and that the outcome of meeting could be disciplinary action up to and including dismissal. She was advised of her right to be accompanied by a worker, colleague or a trade union representative. She was sent a copy of the Respondent's disciplinary procedure.

18 The investigation meeting was conducted by Murray Scott, Front Office Manager. Ms Verhoeven, HR Manager, was present as a note taker and the Claimant attended alone. She repeated what she had said at the previous

interview in respect of room 1510. She was asked further questions about room 1512. She was told had a report from security and the lock read which they could let her look at. She was told that the lock read showed her going into the room at 20.55. She repeated that the guest had come in while she was in the room and had her used key to enter the room. She was told that other than the guest the only key that had been used to enter the room had been hers. She was asked whether it was possible that she had not closed the door behind her, and she replied she was sure that she had closed the door. She was asked whether she had seen the watch and the rings. She replied that as the guest had not touched anything in the sink she had gone straight to the shower. The question was repeated and her reply was that she did not remember anything. It was pointed out to her that she had entered a 20.56 and the guest had entered at 22.04 and that no one else had entered in between. She was shown the lock read. She was not shown the security incident report. She was asked how the ring could have gone missing in a few hours when she was the only person who had entered the room. She said that she did not know. Mr Scott told her at the end of the meeting that he would be recommending that the matter precede to a disciplinary hearing. Ms Verhoeven typed notes of the meeting on her laptop. The notes were printed at the end of the meeting and all those present, including the Claimant, signed the first page of the notes.

19 On 29 June Ms Verhoeven invited the Claimant to attend a disciplinary hearing on 1 July to answer to allegations of theft from rooms 1510 and 1512 on 19 June. The notes of the investigatory interview with the Claimant on 27 June were sent to her with that invitation letter. She was not sent any other evidence upon which the Respondent was relying. She was told that Mr Oberholster would be conducting the meeting and, again, she was advised of her right to be accompanied by a work colleague or a trade union representative.

20 Between 29 June and 1 July, it would appear at Mr Oberholster's request, further statements were obtained. Razvan Nitulescu made a statement on 29 June. He said that on 20 June he had interviewed Constantin, the Housekeeping Porter, at about 3.00 pm about the missing property from room 1510. The Housekeeping Porter had said that the Claimant had asked him to have a look inside the room and to see how dirty it was. He had gone in, had a look and left a few seconds later. The Senior Housekeeper, Katarzyna Gorak, also made a statement which she signed but which was not dated. That also related room 1510. She said that she had seen the door open; at that stage the guests had still been in the room and she had knocked and stepped into the room. A little while later she had seen the Claimant who was about to enter the room. She could not recall whether the Claimant had told her that the door had been left open. Constantin Calugarescu, the Housekeeping Porter, made a statement which again is signed but not dated. He repeated what Mr Nitulescu said that he had told him on 20 June. In addition, he made it clear that regardless what the Claimant had said he had used his own key to enter the room. Mr Nitulescu made a further statement which again was signed but not dated. He said that he checked with the Front Office who had confirmed that the guest in 1512 had checked in on 19 June and checked out on 1 July. He confirmed that the guest had stated to him that she had found the Claimant inside her room when she had returned from Hyde Park at around 22.00 hours.

21 The Respondent's Disciplinary Procedure states that it is essential to investigate any allegation or incident which may potentially lead to disciplinary action. It states very clearly,

*"All those who witnessed the relevant act/omission/event should provide written signed and dated accounts of what happened. If any witness is unable or unwilling to provide a written statement the investigator should discuss the matter with them and make a note of his/her conversation"*

The procedure also provides that, if appropriate, information gathered can be provided to an employee on request. However, there is no requirement to provide witness statements to the employee. The procedure states,

*"You are required to inform the employee of the alleged conduct, which will be the subject of the disciplinary meeting and to provide details of any circumstances which lead you to believe that disciplinary action may be necessary. This means that managers can use their discretion to decide whether witness statements should be released, or whether a summary should be provided of all the evidence against a particular employee. The essential thing is for employees to be aware of the case against them before they are called to a disciplinary meeting, so that they are prepared to put their own case. Summary statements would be an acceptable way of providing them with details of the case against them."*

The Procedure provides that all employees have the right to be accompanied by their shop steward, a work colleague, a lay trade union officer or work place representatives who have been certified.

22 The disciplinary hearing took place on 1 July. Ms Verhoeven again took the notes. The Claimant was not accompanied. In respect of room 1510 the Claimant said that the safe was inside the wardrobe on the right hand side of the room when you walk in and she maintained that she had noticed when she had walked in that the safety box was open and the ring was not in it. She said she knew what the policy was relating to items found in the room but notwithstanding that had thrown the pieces of paper away because she had thought it was rubbish. In respect of room 1512 she was shown the lock read and the times when she and the guest entered the room and was asked to explain what she had done in the room between 20.56 and 22.04 when the guest entered. The Claimant was adamant that she had not been in the room for that long. Mr Oberholster told her that after the interview with her on 27 June, security had again spoken to the guest on 28 June and she had confirmed that the Claimant was in the room when she returned shortly after 10 o'clock. The Claimant said again that she had not seen the watch and the ring because she had not looked at the sink because it was clean. She was reminded that at the interview with security on 23 June she had said that she had dried the sink. She initially said she was referring to the other sink. When questioned how many sinks there were in the room, she confirmed there was one and then said she must have been referring to another room. Mr Oberholster told her that the guest had had a massage, left the ring and watch and had gone out for a walk and that the ring had gone missing and the Claimant was the only person in

the room and he asked her whether she could explain that. She said that she could not.

23 Mr Oberholster adjourned the meeting for about half an hour to consider the matter and gave his decision orally at the end of the adjournment. He concluded that the Claimant had not followed the hotel procedure in respect of the items that had been found in the safe in room 1510 and in asking the porter to enter that room. However, because of the number people who had entered the room he could not reach any conclusion about the missing ring. The position was different with room 1512. They had checked the u-bend of the drain to see whether the ring had accidentally fallen down the sink, but had not found anything. The guest had not reason to have made it up. The Claimant was the only person who had entered the room between the guest leaving the room and reporting the ring missing. He, therefore, concluded that she had taken the ring and that notwithstanding her length of service and her previous good disciplinary record, he had no option but to dismiss her immediately.

24 A letter confirming the dismissal was sent on 7 July. In that letter Mr Oberholster set out in some detail his thought process. He said that he had considered the possibility that the rings had been lost or that the guests in question had falsely claimed that they had gone missing and set out his reasons for rejecting those possibilities. He was satisfied in both cases that the rings in the room had been taken. He again set out in detail why he had come to the conclusions that there was not sufficient evidence to demonstrate that the Claimant had taken the ring in Room 1510. He said the position in relation to Room 1512 had been clearer. The guest had left the rings in the room when she went out. Between that time and guest reporting it missing to the senior housekeeping the following day the Claimant was the only person who had entered the room. Mr Oberholster's evidence to me was that the ring had been reported missing to the senior housekeeper when she had entered the room at 12.20 next day. He also found that the Claimant's explanations about not having looked at the sink area were not plausible or credible. The Claimant was advised of her right to appeal.

25 On the same day the Claimant asked Ms Verhoeven to send her a number documents. She appealed on 12 July. One of her grounds of appeal was that English was not her first language and as a result she had not understood much of what had been said to her in the investigatory meetings. She asked the Respondent to exercise its discretion to allow her to bring a friend, who she identified at that stage, as being somebody called Mrs Aurelia Tomago, to the appeal hearing. It appears from that that she wanted somebody who could help her with translation. She also said that her preferred language was Tagalog.

26 On 13 July Ms Verhoeven sent the Claimant certain documents. These included copies of the interview that she had had with Mr Burrows, the interview with Murray Scott and the notes that were taken at the disciplinary hearing. She also sent her the statements that had been taken between 29 June and 1 July and the security officer's incident reports and the lock reads in respect of both rooms.

27 On 13 July the Claimant was invited to an appeal hearing on 20 July. She was informed that unfortunately the Respondent could not allow a friend to accompany

her and they could only allow a fellow colleague or a trade union representative. However, in light of what she had said about her difficulties understanding and the need for someone to translate, they would arrange for an interpreter to be present at the hearing to assist her.

28 On 18 July the Claimant wrote to the Respondent saying that she could not attend that meeting because she was ill with flu. The Respondent agreed to re-arrange the meeting when the Claimant was better and asked her to give them at least a week's notice so that they could ensure the attendance of an interpreter.

29 On 30 July Mr Southam who has represented the Claimant at the hearing before me, wrote a detailed letter in support of the Claimant's appeal to the Respondent. Having received that letter and realising that the Claimant was now ready to pursue the appeal, on 18 August she was invited to attend an appeal hearing on 26 August. Again, it was confirmed that an interpreter would be present at the hearing and she was advised of her right to be accompanied by a work colleague or a trade union representative. That meeting was due to take place on Friday 26 August at 4.00 pm.

30 On 24 August Mr Southam wrote to Ms Finlay, who was to hear the appeal, that the Claimant had made it clear that he was the only person she would be confident to have accompanying her to the meeting. That letter was not received by the Respondent prior to the hearing on 26 August. The Claimant did not attend the appeal hearing on 26 August. The Respondent's case was that even if that letter had been received prior to the hearing, its position would have been the same as before, namely that only a trade union representative or a work colleague could accompany her. As the Claimant did not attend, the appeal hearing did not proceed.

### **Conclusions**

31 The Respondent has satisfied me that the reason for the dismissal was that it concluded that the Claimant stolen the Cartier ring from Room 1512 on 19 June 2016. That is a reason that relates to conduct and is a potentially fair reason. The real issue for me in this case was whether the Respondent had acted reasonably in all the circumstances as treating that as a sufficient reason for dismissing the Claimant and, in particular, whether it had conducted as much investigation as was reasonable, whether it had reasonable grounds on which to conclude that the Claimant had taken the ring, and whether there were procedural flaws such as to render the dismissal unfair.

32 I considered firstly the investigation. I focussed for the purposes of this part of the hearing on room 1512 because it is that for which the Claimant was dismissed. In respect of investigating the theft from that room, the Duty Security Officer had spoken to the guest in question and had set out what she had told him in the security incident report he compiled. The Respondent had checked the lock read for the period between when the guest said she left the ring in the room at 7 o'clock the night before until the time shortly after 12 o'clock noon the following day when she reported it missing. It was clear from that evidence that other than the guest the Claimant was the only person who had been in the room at the relevant



time. The investigation that has to be carried out has to be reasonable in all the circumstances. The employer is not obliged to go down every possible avenue and look at every possible aspect of a case. The facts in respect of room 1512 were relatively straightforward and it is difficult to see what further investigation could have been conducted.

33 My concern with the investigation was not so much the investigation that was carried out but the way in which it was documented and recorded. There was no witness statement from the Senior Housekeeper to whom the guest had first reported the ring missing. There was evidence, which I accepted, that a search of the room had been carried out including the u-bend in the sink drainage system but again that evidence was not recorded in a witness statement from anybody. The Respondent's procedure makes it clear that matters such as that should be recorded in witness statements that are signed and dated and that should have been done. That having been said, I am satisfied that those matters occurred as they say. Similarly, I can understand that the Respondent did not wish to ask its guest to make a witness statement. It is common for those in the service industry not to take witness statements from service users who make complaints. However, it is very important in those circumstances, that those complaints are recorded either in notes made contemporaneously at the meeting with the service user or very shortly thereafter. Although we have an incident report from Mr Nitulescu there are no notes of the interviews which he had with the guest. I am concerned about the way in which matters were documented and I hope that the Respondent address those concerns. It is very important in these cases that there is a clear paper trail so that everybody can see it. That having been said, as I said, the issues were narrow and I am satisfied that the Respondent carried out as much investigation into the matter as was reasonable in all the circumstances.

34 I then considered whether Mr Oberholster had reasonable grounds upon which to reach the conclusions that he did. As I have already said, what was clear from the evidence was that other than the guest the only person who had been in the room was the Claimant. There were three possibilities - firstly, that the guest was for some ulterior motive making up the fact that her ring had gone missing when in fact it had not; secondly, that the ring was somewhere else in the room or had accidentally fallen down the sink and thirdly, that the Claimant had taken it. Mr Oberholster considered the first two possibilities and for reasons that are particularly reasonable rejected those possibilities. That having been done, the only option left was the third possibility. In addition to that, he did not find the Claimant's account to be plausible in respect of what she had seen or not seen in the bathroom near the sink area and her lack of explanation for the amount of time she had spent in the room. I am satisfied that he had reasonable grounds on which to reach the conclusion that he did.

35 My primary concern in this case was that the evidence which was available to Mr Oberholster (all the documents he sets out in paragraph 14 of his statement) were not made available to the Claimant before the disciplinary hearing. I accept that the Respondent's procedure says that it is acceptable to do that but it does also make it clear that when that happens a summary of the evidence upon which the Respondent is relying should be provided. It is good practice and generally desirable in most cases, especially when dealing with serious

allegations, that all the evidence that all the evidence which is available to the decision maker is disclosed in advance to the employee affected. As it happens the Claimant was dismissed only for the theft from room 1512 but she was facing allegation in respect of both 1510 and 1512. None of the evidence in respect of room 1510 was shown to her. That is not acceptable. That having been said, I accept that the primary evidence in respect of room 1512 was the lock read and that was shown to the Claimant at the investigatory meeting and again at the disciplinary hearing. There were two main entries which were the focus of concern and both of those were shown and their significance made clear to the Claimant. The incident security report was not shown to the Claimant at the investigatory hearing but the account given by the guest was relayed to the Claimant.

36 In considering whether the failure to give the Claimant that evidence made the dismissal unfair, I took into account firstly, as I have said, that the issues relating to Room 1512 were relatively straightforward and that she had been shown the lock read and had been told what the guest had said. More importantly, all the evidence was made available to the Claimant prior to the appeal hearing. She had had the opportunity, as indeed had Mr Southam who wrote a letter in support of her, to raise in the appeal any points that arose as a result of that evidence being made available. It is significant that the Claimant did not either in support of her appeal or indeed before me raise some matter which she could and would have advanced at the original hearing had she had the relevant documentary evidence. To the extent that that was a defect of the original hearing it was, in my view, rectified at the appeal stage. I accept that the Claimant did not in fact ultimately attend the appeal hearing. However, I am satisfied that she was given opportunities by the Respondent to do so and the fact that she did not exercise her right of appeal was her decision not to.

37 I also accept that there was no reason why she could not have attended either by herself or with a work colleague. Therefore, the failure to permit Mr Southam to accompany her did not cause any unfairness. Having considered all those matters, although I have expressed some concerns about certain aspects of the procedure. I am satisfied that the dismissal was fair.

**Employment Judge Grewal  
13 March 2017**