



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Kowalczyk

Respondent: Mint Facility Services Limited

HEARD AT: BURY ST EDMUNDS ET **ON:** 12th & 13th June 2017

BEFORE: Employment Judge Postle

REPRESENTATION

For the Claimant: Mr Werenows, Solicitor.

For the Respondent: Mr S Jagpal, Consultant at Peninsula.

Interpreter for the Claimant: Mrs M Dubiel, Polish Interpreter.

JUDGMENT

1. The Claimant's dismissal was procedurally unfair.
2. Had there been a fair procedure under 'Polkey' there was a 100% chance that the Claimant would have been dismissed in any event.
3. The Claimant contributed to her dismissal under Section 123(6) of the Employment Rights Act 1996 and any compensation would have been reduced by 100%.
4. The Tribunal does order a basic award in the sum of £1,120.
5. The Tribunal makes a declaration the Claimant suffered unlawful deduction of wages in the sum of £1,052 which the Respondent accepts is due to the Claimant.
6. The Respondents are also ordered to pay the Claimant's Issue and Setting Down Fee totaling £1,200.

REASONS

1. The Claimant brings three claims to the Tribunal; one for unfair dismissal, one in respect of unlawful deduction of wages and a notice pay claim.
2. In respect of the unfair dismissal claim, this is advanced on the basis that the dismissal was procedurally and substantively unfair. The Respondent resists the claim and the potentially fair reason advanced by the Respondent is gross misconduct and/or in the alternative some other substantial reason.
3. In respect of the unlawful deduction of wages claim it is accepted by the Respondent the sum of £1,052 is due to the Claimant.
4. In this Tribunal we have had the benefit of a Polish Interpreter for the aid of the Claimant whose native language is Polish. The Claimant gave evidence through a prepared witness statement, there was an additional witness statement on behalf of the Claimant from a Tina Henry but she was not called. The Respondent's owner Mrs McAuley with the agreement of all parties gave her evidence through a telephone Skype to avoid a postponement of this hearing as she needed to care for her husband following recent surgery. She gave her evidence through a prepared witness statement. The Tribunal also had the benefit of a bundle of documents consisting of 196 pages.
5. The facts of this case show the Respondent provides cleaning services for businesses within the UK. The Claimant had been employed as a cleaner from September 2011 and had been a supervisor for some period of time during the course of her employment. Now whilst the Claimant was a Supervisor she also carried out cleaning tasks, and was employed to clean a bar known as 'Revolution Vodka Bar' in Ipswich. The Respondent currently has a contract for 28 of those bars within the inventive leisure group. As a cleaner the Claimant worked 19 hours per week over 6 days and had an exemplary record and Mrs McAuley freely admitted in her evidence she was a good worker and had previously no issues with her.
6. The Claimant was paid by the hour and her tasks were to work with a small team of cleaners, and their duties included sweeping, mopping, buffing the floors etc keeping the Revolution Vodka Bar clean. There were no issues in the manner in which they cleaned it. The Claimant as supervisor was also required to carry out cleaning duties. The only additional duty she was required to do was the signing off of the cleaners' timesheets and order stock which could have been completed on site within her contracted hours. There was no requirement for the above to be completed at home, and there was no agreement to do so. Furthermore the Claimant during the course of this Tribunal provided no

clear evidence when she did these administrative tasks how long they took, what they were or what they consisted of. In fact as a supervisor there was I repeat little or no administrative tasks for her to carry out in any event.

7. In August 2016 approximately the Manager of the bar in Ipswich, an Adam Cousins indicated that he wanted to reduce the number of cleaning hours in the bar. His primary concern was that the number of overtime hours that the cleaning staff were submitting was excessive. He was concerned there were 30 hours per week more in the bar in Ipswich than the one he had previously worked in at Loughborough. He wanted to ensure to quote his words “neither of us were being done out of hours” and that was reference to an email to Mrs McAuley.
8. Mr Cousins requested copies of timesheets and it is clear from his email of the 29th September 2016 that he wasn't sure that the staff were again “working the hours that either of us were paying for” and that's at page 78 of the bundle. On 1st October 2016 Mrs McAuley received another email from Mr Cousins where he had reviewed the hours that the staff were working and had monitored extensive amounts of CCTV footage. He was of the view that some staff had been falsifying the payroll documents an example he provided where he set out a breakdown of his findings by reference to dates and times and the amount of time that had been overstated on timesheets. He asked for the Claimant to be removed from the bar as soon as possible, see pages 75 and 76. This email was presented to the Claimant on the 5th October 2016, namely that she had completed timesheets on behalf of the staff, and the fact that some staff had been underpaid, and some overpaid. Indeed some staff originally wrote statements claiming that they did not know the Claimant was falsifying the timesheets as she completed them on their behalf. One example of such a statement is found in the bundle at page 71a.
9. On the 5th October 2016 as I have said Mrs McAuley met with the Claimant and during that meeting the Claimant effectively admitted that she was not completing the timesheets correctly, because what she said was “I work quicker than the shift times and had claimed the full shift even though I hadn't worked the full shift”. Mrs McAuley explained to her that she was having a meeting with Mr Cousins and that he wanted her removed from the bar. As a result of that meeting the Claimant was suspended and written to on that date to confirm the suspension, see pages 72 and 73. The dates provided in respect of the allegations it is true are incorrect.
10. On the 6th October Mrs McAuley wrote to the Claimant inviting her to a disciplinary hearing. The acts of misconduct were set out, namely falsifying timesheets, it is true that the dates were incorrect given as August and intended to relate to September. She pointed out that if those acts of misconduct were proven they would amount to a gross

breach of trust and gross misconduct for which dismissal would be an outcome or may be an outcome.

11. The Claimant was also sent the email from Mr Cousins which set out his findings and a letter from another member of staff, a cleaner setting out that the Claimant was completing the timesheets. Also in that letter there was an extract from the company handbook dealing with the Disciplinary Procedure and we see that at pages 69 and 71A.
12. It is true at that stage the supporting CCTV evidence was in the Revolution Vodka Bar's possession and that could only be viewed at the premises.
13. It is also true that the letter inviting the Claimant to the Disciplinary Hearing was sent by email on 7th October, the Disciplinary Hearing had been originally arranged for the 11th October, on the 10th October the Claimant sent an email stating she wasn't able to attend the Disciplinary Hearing on the 11th October as she alleged had only received the invite letter on the 10th October. She may well it is true have only received the postal letter on that date, but I am satisfied she would have received the email version earlier which we see at page 68. The Claimant also said that she needed more time to read the paperwork and wanted to make arrangements for a translator.
14. The Claimant sent a further email to say that she couldn't find anyone to effectively accompany her and wanted the Hearing postponed to another day. As a result of that Mrs McAuley did postpone the meeting and re-arranged it to take place on the 13th October and we see that at page 67.
15. On the 11th October the Claimant again emailed Mrs McAuley saying she was happy to participate in the Disciplinary Hearing on the 13th October at 9am but was uncomfortable and felt unable to provide a proper response to the allegations in English, and she asked if Mrs McAuley could provide the interpreter and we see that at page 66. Mrs McAuley replied on the 12th October informing the Claimant that it was not the Respondent's responsibility to provide a translator, and asked if the Claimant would be attending the hearing. The Claimant replied on the same day that the responsibility to provide a translator in her view was the Respondents as they had called the meeting, page 64. Later that day the Claimant sent another email to say that she would be attending the hearing and would be accompanied by a Mr Kuczkowiak, she also stated she felt she was at a disadvantage by not having an interpreter and had not been sent all the evidence, page 63.
16. The Respondents had not sent the CCTV evidence before because it was in the possession of a third party, and could only be viewed on the premises. The Claimant had already been provided with a copy of the Employee's Handbook when she first joined the company, I am satisfied that she had signed for it. Mrs McAuley replied to say that they could have time at the Disciplinary Hearing to view the CCTV, and if she

needed further time to view the CCTV further time could be provided and at that stage adjourned for another day. The time has now changed to 2pm because that was the only time the third party could accommodate viewing of the CCTV. The Claimant again replied to raise her concerns about the time of the hearing being altered with little notice and her companion's ability to attend now at the Tribunal's revised time. She requested that the hearing be postponed. Mrs McAuley thought having received that email that the Claimant was not going to attend the Disciplinary Hearing on the 13th October and as Mrs McAuley had a 4 hour drive from her base decided not to attend the hearing.

17. On the 13th October the Claimant did attend the hearing in the absence of the Respondents in the belief that the Claimant wasn't attending Mrs McAuley proceeded to make a decision from the evidence she had and the timesheets, and the CCTV Footage and the email from Mr Cousins of Revolution Vodka Bar setting out his findings. She therefore wrote to the Claimant to communicate her decision that the Claimant was to be summarily dismissed and we see that at pages 58 and 59.
18. Now it is important at this stage to consider what it was that Mrs McAuley had viewed from the CCTV footage, and that was on the 19th September the Claimant's timesheet showed that she'd commenced work at 7.45am, finished at 10.15am working a total of 2.5 hours. The CCTV footage showed the Claimant arrives at 7.45am, sitting at a table outside smoking and has not commenced work. At 8.01am she gets up and proceeds to enter the premises and starts working around 8.03am, by 9.32am she has her jacket on and proceeds outside having completed work, at 9.56am she is seen outside the premises smoking.
19. On the 20th September the Claimant has recorded a start and finish of 7.45am to 10.15am, 2.5 hours. The CCTV footage showed that she had arrived at 7.31am, at 7.39am the Claimant went back outside for a cigarette break, at 8.02am she gets up to go back inside to commence work, at 8.13am is talking on her mobile phone, the Claimant walked outside, remained outside on her phone until 8.17am. At 9.40am the Claimant was seen putting on her jacket and goes outside to sit at a table smoking cigarettes, she leaves at 9.50am the premises completely.
20. On the 24th September the Claimant records herself as having commenced work at 7.45am and finishing at 10.45am, 4 hours. However the CCTV footage showed that the Claimant arrived at 6.33am, at 6.46am she is seen removing an item from her bag, at 6.46am she goes to the outside seating area, 6.49am the Claimant is still outside smoking and has not yet commenced work. At 7.01am she leaves her seat and heads inside, 7.02am she is in conversation with another colleague and has still not commenced work. At 7.10am she is on her mobile phone, 7.13am she is in a conversation with a colleague thereafter she commences work, at 7.38am the Claimant is sitting down looking at her mobile phone, at 7.40am she is in fact engaging in a

conversation with another colleague, at 7.42am she goes back to the table at which she is sitting and speaks to another colleague who's talking on a mobile phone. At 8.00am the Claimant is once again seated at the table reviewing something on her mobile phone, at 8.01am the Claimant can be seen putting on her fleece and at 8.02am she heads outside, 8.03am she is seated in the outside area smoking, she appears to have a drink with her, at 8.07am she is joined by another person, at 8.38am she is back inside sitting down and not working, at 8.42am which is contrary to her pleadings alleging that she was not provided with any desk and therefore had to undertake paperwork at home she appears to be reviewing paperwork. At 9.15am she is reviewing paperwork and by 9.20am she is seen working sweeping outside, by 9.21am she is putting the brush away and appears to be finishing. At 9.23am she is placing items in her bag and puts on her fleece and at 9.24am she heads to the door and 9.30am she can be seen smoking outside, by 9.32am she has completely left the premises approximately 43 minutes before her recorded finish time. The Claimant had claimed for hours worked on her timesheet and can be seen from the CCTV evidence of doing little work within that time.

21. This is the evidence that Mrs McAuley viewed and indeed Mr Cousins had viewed and the basis upon which Mrs McAuley took the decision to dismiss. She did not believe that a final written warning or any other sanction would have restored the trust that she now felt had been lost given the Claimant's position as a supervisor.
22. Now dealing with the Law, the Employment Rights Act 1996, Section 98(2) provides a potentially fair reasons to dismiss, two of those are conduct and some other substantial reason. One then has to go on to consider in determining whether the dismissal is fair or unfair the matters set out in Section 98(4), and in doing so one has to have regard to the well trodden guidance of the case known as *British Home Stores v Burchell* and what that says is:-

"The employer must show that it believed the employee was guilty of misconduct, it had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances."

That means that the employer need not have conclusive direct proof of the employee's misconduct. They only need a genuine and reasonable belief, reasonably tested. And when one gets to that stage one then has to decide whether the sanction of dismissal was or is within the band of reasonable response of a reasonable employer, and in deciding that I remind myself that it is not for me to substitute my own view, but whether that sanction reasonably looked at on the evidence could amount to a dismissal. One also has to look at the question of whether a fair procedure has been followed, and if it hasn't then the Tribunal is required to predict whether if a fair procedure had been adopted and in

doing so regard to all the relevant evidence including that of the employee what she could have said in this case had the Disciplinary Hearing actually taken place.

CONCLUSIONS

23. Mrs McAuley clearly believed in the Claimant's misconduct, she had viewed CCTV evidence and that clearly showed on three occasions in September the Claimant was claiming for hours on her timesheet she was not working. Yes it is true that when the allegation was originally set out in the letter inviting the Claimant to the disciplinary it referred to August, had the Claimant come to the Disciplinary Hearing she would have said, it can't relate to August I'm on holiday in Poland and at that point I have no doubt Mrs McAuley would have confirmed that the times alleged were clearly September as evidenced by the timesheet and CCTV.
24. Mrs McAuley identifies clearly the misconduct as set out in paragraphs 25 of the witness statement. The Claimant's hours where she clearly was not providing the function of a cleaner and working. So Mrs McAuley clearly had in her mind reasonable grounds upon which to sustain the belief, and had at that stage carried out as much investigation as was reasonable it does not have to be a counsel of perfection, it has to be reasonable and she had the CCTV evidence not only viewed by her but also Mr Cousins the Manager of the Revolution Vodka Bar.
25. And I repeat it need not have to be conclusive proof, there were in this case it is true procedural flaws, namely the misunderstanding as to whether or not the Claimant would attend the Disciplinary Hearing and it is true that more effort should have been made by Mrs McAuley to establish the position clearly as to whether or not the Claimant was going to attend. It is not for Mrs McAuley to arrange the Claimant's companion or translator, that is a matter for an employee.
26. However, I am satisfied that had there been a Disciplinary Hearing the outcome would be the same dismissal. What could the Claimant have said? Certainly on one occasion that Claimant doesn't deny that the CCTV points to her, on the other occasions she says "well I can't confirm" but she doesn't advance that that CCTV points to anybody else i.e. the cleaners on the premises. She would have also said that she was away in Poland in August, and I repeat, it is at that point the error on the dates would have been spotted and the Claimant would have been told the duties relates to September of which clearly there could have been no dispute. She would have also said "well actually the reason I take some time off is because I am doing administrative tasks" but Mrs McAuley would have quite properly enquired what were they, who agreed them, how long, where are your records, do you need to carry out these tasks and the answer is no.

27. So, on the evidence before me taking into account what the Claimant would have said, it is clear to me on the Polkey principles that there was 100% chance that had a Disciplinary Hearing taken place Mrs McAuley would have dismissed in any event. Even if I was wrong there, claiming hours that you haven't worked does amount to blameworthy and culpable conduct, and under Section 123(6) of the Employment Rights Act 1996 any compensation should be just and equitable and I am entitled to deduct any sum for what is clearly blameworthy or culpable conduct. Given the nature of conduct falsifying timesheets I would have reduced the compensation by 100%. So, although the dismissal is procedurally unfair on the Polkey principles compensatory award would be nil and on contribution it would be nil.
28. Clearly the dismissal is given the reasons for dismissal within the band of a reasonable response of a reasonable employer and thus substantively fair.
29. I do award a basic award and I simply do that in this case because of the misunderstanding and perhaps more effort should have been made by Mrs McAuley to establish the facts as to whether the Claimant was going to attend. So the Basic award is £1,120.
30. We've also dealt with the unlawful deduction of wages in respect of the fact that Mr Jagpal on behalf of the Respondents has conceded that the sum is due of £1,052.
31. The Respondents are also ordered to pay the Claimant's Issue and Setting Down Fee totaling £1,200.

Employment Judge Postle, Bury St Edmunds.
Date: 10 July 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS