



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr R Sallam

v

R Chace HRS LLP

Heard at: Watford

On: 30 and 31 March 2017

Before: Employment Judge Smail

Appearances:

For the Claimant: In person

For the Respondent: Mr J Brotherton – Non practising solicitor

JUDGMENT having been sent to the parties on 4 April 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 24 November 2016 the Claimant claims unfair dismissal and breach of contract in the form of failure to pay notice pay. The Claimant was employed by the Respondent hotel between 2 June 2014 and 24 August 2016. For the last year of his employment the Claimant was the Restaurant Manager. He was summarily dismissed on 24 August 2016 ostensibly for gross misconduct. The gross misconduct took the alleged form of failure to conform to rules/procedures relating to the taking, handling and recording of cash and till security procedures.

Issues and law

2. The tribunal has had regard to s.98 of the Employment Rights Act 1996.
3. Unfair dismissal
 - 3.1 By s.98 ss.1 it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason.
 - 3.2 By s.98 ss.4 where the employer has fulfilled the requirements of ss.1 the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer:
 - (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 it as a sufficient reason for dismissing the employee.

- (b) Shall be determined in accordance with equity and the substantial merits of the case.

3.3 This has been interpreted by the seminal case of British Homes Stores v Burchell [1978] IRLR 379 EAT as involving the following questions;

- (a) Was there a genuine belief in misconduct?
- (b) Were there reasonable grounds for that belief?
- (c) Was there a fair investigation and procedure?
- (d) Was dismissal a reasonable sanction open to a reasonable employer?

3.4 I have reminded myself of the guidance in Sainsbury's Supermarkets v Hitt [2003] IRLR 23 Court of Appeal that at all stages of the enquiry the tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer, bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 EAT to the effect that the starting point should always be the words of s.98 ss.4 themselves. That in applying this section an employment tribunal must consider the reasonableness of the employer's conduct not simply whether it, the employment tribunal, considers the dismissal to be fair. In judging the reasonableness of the employer's conduct and employment tribunal must not substitute its decision as to what was the right course 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 whilst another, quite reasonably, take another. The function of the Employment 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. If the dismissal falls within the band the dismissal is fair. If the dismissal is outside the band, it is unfair.

4 Wrongful dismissal

4.1 An employee is entitled to notice of dismissal and compensation in lieu unless, as a matter of fact as determined objectively by the tribunal, on the balance of probability, the employee committed a repudiatory breach of contract entitling the employee to dismiss without notice by way of acceptance of the breach. The burden is on the employer to prove this.

Findings of fact

- 5 Mr Breese, the Managing Director, found the following as facts after the disciplinary hearing that took place on 24 August 2016:
 - 5.1 On 10 August 2016 the Claimant failed to count his float at the beginning of the shift. He left a bill wallet with cash in it on top of the Meet and Greet Stand unattended for 20 minutes. He allowed the till drawer to be left on the back of the till station, something he admitted happened on a regular basis even when he was on duty, for no apparent reason, found Mr Breese, other than to be off CCTV camera. He then dumped the till drawer with the Duty Manager, having taken it via a staircase, knowing this was not procedure.
 - 5.2 Secondly, this 'complacency', as Mr Breese described it, resulted in the company losing £30. Reviewing the recent tills' 'unders and overs' in both the bar and the restaurant it was determined that the Claimant was responsible for this 'complacency' which Mr Breese found was regular. He upheld a charge that the Claimant had failed to follow cash handling procedures in breach of the Respondent's cash handling and disciplinary procedures.
 - 5.3 Thirdly, the Claimant removed the service charge from a transaction, replacing it with a cash tip, and then failed fairly to distribute the cash tip of £10. He upheld a charge that this was premeditated for the Claimant to benefit himself at the expense of the fair system in place which was meant to benefit the wider team responsible for delivering food and beverages by pooling the money paid for service.
 - 5.4 Lastly, the Claimant had taken the £1 coin that the Night Manager had put on the side of the till in payment for crisps sold after the Kings Bar had closed while he went to get change from his float. The Claimant having seen the £1 coin thought it was a tip intended for the young woman who worked in the bar, but took it for himself and did not give it to the young woman, although he had the opportunity to give it to the woman.
- 6 So, putting all those matters together, Mr Breese found that there was gross misconduct and that the appropriate sanction was dismissal.
- 7 There was a background to this matter in that for at least two and a half months, possibly more, there had been a pattern of 'unders and overs' in the takings of the bar and restaurant. I have seen a table of this at page 50 in the bundle. Mostly the discrepancies would not be of any significant amount but the fact that regularly there were discrepancies had caused management a certain amount of disquiet.
- 8 On 11 August 2016 the Income Auditor informed management that in the shift on 10 August, the dinner shift, there was a cash shortfall of £29.50. It was also said that the Claimant had contributed £10 of his own money to reduce the shortfall. The shortfall was significant in that, on that night, there was only one cash transaction of £130, so it seemed that this one cash transaction was £29.50 short. It should be said that most of the

transactions at the hotel both in the restaurant and bar tend to be by way of credit card for dinner, and much of it pre-paid by corporate clients. So, cash transactions are not the norm. On the contrary, they are significantly rarer, and for that reason it was the belief of management, that they should balance with a greater degree of accuracy than had been the case. The matter was investigated by Pauline Durrell, the Operations Manager, on 17 August 2016 the results of which led to the disciplinary hearing conducted by Mr Breese.

9 What we have, in effect, is a one shift snapshot in the operations of the restaurant and bar. Within that one shift snapshot, these incidents of concern arose, reasonably believed by the Respondent to have occurred:

9.1 First, as to the shortfall, there were a number of irregularities around the journey, as Mr Breese described it, of the till that shift. There should be in the till a float of £100 at the beginning of each shift. The float is meant to be counted by two people and it is the expectation of management that one of those persons is the Duty Manager and the other the Restaurant Manager. It seems that on this occasion the float was not counted either by the Duty Manager or the Restaurant Manager, or a cover for the Restaurant Manager, arranged by the Restaurant Manager. Notwithstanding that, the assumption (reasonably held) of management was that a float of £100 was put in to the till.

9.2 Secondly, the payment of the one cash transaction, the £130, was left by the Claimant in a wallet for an extended period of time in the restaurant area and not placed immediately, or within a reasonable period of time, in the till. The drawer from the till had been left behind the till in a location where CCTV would not be able to monitor what had happened in the till.

9.3 Thirdly, at the end of the shift, the drawer of the till was taken by the Claimant down to the Duty Manager unaccompanied. Correct procedure is that the drawer of the till remains in the till until collected by the Duty Manager at the end of the shift. The Duty Manager has a code in which to enter a transaction which then opens the till and the appropriate monies in the till can then be taken. It is the Respondent's case that these irregularities rendered it possible for a sum of money to be taken from the till, from the original £130 cash payment, and that there was ample opportunity therefore for the £29.50 shortfall to be taken by a member of staff, including the Claimant. More than that, because of the Claimant's responsibility around these procedures, it was management's belief that the Claimant had taken the £29.50 although to be fair to both management and the Claimant they did not charge him with that, they charged him with irregularities.

9.4 The next breach of policy that was discovered in this snapshot related to the Claimant's handling of the service charge. Although the bill had been paid in cash, every bill includes a 10% service charge, with the service charge recorded on the till receipts, and is intended to be distributed across all members of staff who work in the Food and Beverage department, except for the Chef. It is the experience of the

Respondent that this is the fairest way of distributing tips. There is a formula for sharing out the proceeds of the service charge, essentially based on how many shifts the relevant workers worked. Now in this case it seems that the service charge had been cancelled and the service element had nonetheless been paid, in cash, as it would have been had it been the service charge in the first place, but was treated by the Claimant as being a tip entirely for himself. It was the Respondent's position that given that the service element on this cash transaction was going to be paid in cash in any event, that the Claimant was party to engineering the service element to be paid as a tip to him rather than as a service charge for everyone. And certainly, it is difficult to conceive how the Claimant could not have been party to that. Even if a customer had said please take the service charge off, I want to pay it in cash as a tip instead, it would have been down to him, as Restaurant Manager, to ensure that the money was shared equally; it would make no difference to the customer whether it was a service charge or a tip. It was the belief of management, reasonably held, that the Claimant had engineered a benefit to himself at the expense of others.

- 9.5 The last matter, the appropriation of the £1 coin, would really be de minimis were it not for the fact that it was linked to these other matters. It is accepted by the Claimant that the Night Manager had sold a packet of crisps, that packet of crisps costs 70 pence, the bar float had closed for the night, the customer had given a £1 coin, the 30 pence change would then have to be found from the Night Manager's float. The way, perhaps a little clumsily the Night Manager had handled this, was to leave the £1 on the till for later processing. The Claimant seeing the £1, and we have seen this on CCTV, put it in his pocket. He says he thought it was a tip for the young woman who worked in the bar. If that is right, notwithstanding the opportunity to give that £1 to the young woman, he did not do it. I have been keen not to get carried away with this point, it being only a £1 coin lying around, but put alongside the other matters it does have some evidential significance and independence in its own right. As I say, this was a one shift snapshot in to the operations of the restaurant and bar and these irregularities arose.
- 10 The Respondent dismissed in the belief of misconduct. There was an appeal. The appeal was by way of review rather than rehearing. It is open to management to hold appeals by way of review and Mr Nicholas, described as the owner of the business, or a partner in the partnership that employed the Claimant, heard the appeal and on review found that Mr Breese's reasoning was cogent and rejected the appeal.
- 11 What was the reason for dismissal? The reason for dismissal was a belief in misconduct. Was there a fair investigation? Well, Ms Durrell established the primary facts; the Claimant had full opportunity to address the allegations. It is said by the Claimant that a written statement might have been taken from the Duty Manager. In answer to that the Respondent says it had all the information from the Duty Manager. The Claimant says that the young woman in the bar whom he claims removed the till drawer out of the till and put it behind the till, ought to have been fully interviewed. The

Respondent's answer to that is that the young woman worked part-time only for a limited period and worked under the tight control and direction of the Claimant. The Claimant argues that in respect of the £10 tip, that the customer should have been interviewed.

- 12 To my mind, whilst some of these suggestions might have taken place, the management had sufficient information in respect of all these matters to take a fair view. The Claimant had opportunity to address the matters. There are cash handling procedures not all of which apply directly to each one of these three matters, self evidently a £1 coin belonging to someone else, either by way of tips to someone or by way of company property, should not be pocketed. One does not need a procedure for that. One does not need a written procedure to suggest that the till drawer should not be left out behind the till; one does not need a written procedure to say that £130 cash payment should not be left in a wallet for an extended period. I do find that it was custom and practice that if a customer in the restaurant did not want to pay the service charge then it was for the Duty Manager to be called. The Claimant himself had done this on previous occasions but he did not do this on the present occasion. Indeed, he would be unlikely to have sought the Duty Manager if he knew he was getting a £10 tip for his own benefit. It is a fundamental principle under the cash handling rules that if there are any issues obtaining payment from a guest, then the Duty Manager must be called. The Claimant did not call him.
- 13 Was dismissal a fair sanction? On one view, as with the background matter over the two and a half months leading up to this incident, the amounts in question are small. Perhaps that is not a fair description of the £29.50 but put together, this being three incidents over a one shift snapshot, it seems to me that the Respondent had reasonable grounds for thinking that the Claimant was playing fast and loose with procedures and could not be trusted in handling money reliably. As I say, these are small amounts in the scheme of things but put together there were grounds for mistrust and that mistrust went to the heart of the employment relationship and the Respondent in my judgment, had reasonable grounds for terminating the relationship. There certainly were breaches of accepted procedures whereby it was reasonable for management to conclude that the Claimant could not be trusted with money.
- 14 Accordingly, in terms of the unfair dismissal claim, it is my judgment that this dismissal was not unfair. Under the principles of law set out above, the employment tribunal can only intervene where the Respondent acted unreasonably. In my judgment, the Respondent did not act unreasonably.
- 15 As to the breach of contract claim: it is right that the Claimant was dismissed without notice. Was he guilty of a repudiatory breach of contract such that the Respondent is entitled not to pay notice? In my judgment, putting these three incidents together, bearing in mind this is a snapshot into only one shift, the Respondent does show that the Claimant committed a repudiatory breach or breaches of the policy as to compliance with procedures, which was incorporated into the contract of employment, and that the repudiatory breach or breaches went to the heart of the contract and the Respondent was entitled to conclude that trust and confidence had gone.

Conclusions

16 In this snapshot into one shift, the Respondent had reasonable grounds for believing:

(a) that the Claimant had failed to follow cash handling procedures with the consequence that £29.50 had gone missing;

(b) he had engineered a personal tip of £10 when that amount should be shared across the team;

(c) he had appropriated £1 coin which was the Respondent’s property but which the Claimant thought was a tip for another member of staff, but which he pocketed nonetheless.

In all the circumstances, they had reasonable grounds for the belief in misconduct, which they held. There was a reasonable investigation and the procedure followed was fair. Dismissal was a sanction open to a reasonable employer because in that snapshot into the one shift, the Respondent had ample reason for thinking the Claimant could not be trusted with money.

17 Further, I find on the balance of probability the Claimant did commit the misconduct alleged and putting the incidents together, he was in repudiatory breach of contract. He intentionally breached procedures resulting in personal gain. His actions destroyed the Respondent’s trust and confidence in him. They were entitled to bring his contract to an end by accepting his repudiatory breach(es) without paying notice.

Employment Judge Smail

Date: 26 May 2017.....

Judgment sent to the parties on

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For the Tribunal office