



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A M Coletta

**Respondent:** Bath Hill Court (Bournemouth) Management Company Limited

**Heard at:** Southampton                      **On:** 27 November 2017

**Before:** Employment Judge Gardiner

## Representation:

**Claimant:** Mr Willshire, Solicitor  
**Respondent:** Mr Green, Counsel

# JUDGMENT

1. The Claimant's unfair dismissal claim under Section 94 of the Employment Rights Act 1996 is dismissed.

# REASONS

1. Since February 2000, the Claimant has been employed by the Respondent as a porter at the block of flats at Bath Hill Court. Since 2002 he shared the responsibility of Head Porter with a colleague. From 2006 onwards until his dismissal on 24 April 2016, he was the sole Head Porter, managing a team of three or four other porters. He was summarily dismissed for gross misconduct namely claiming on 41 occasions over a 10 year period that he had been working overtime to cover for a colleague,

when he had not been working at all; and on three occasions claiming to be entitled to be paid at overtime rates for working a standard shift. As a result, he has been overpaid by more than £6,600 compared to the pay he should have received for the hours he actually worked.

2. Mr Coletta contends that this dismissal was unfair. He challenges the stated reason for the dismissal. He contends that the real reason for the dismissal was the fact that he had raised a complaint about failure to pay him the national minimum wage for the hours that he was on call overnight. That complaint later led to employment tribunal proceedings which were ultimately successful. He says that the Respondent used his mistakes in relation to the timesheets to punish him for bringing a complaint against the Respondent under the National Minimum Wage legislation. This was, he argues, the assertion of a statutory right, and therefore his dismissal was automatically unfair contrary to Section 104A of the Employment Rights Act.
3. Alternatively, he alleges that this was an ordinary unfair dismissal, and criticises the dismissal in the respects summarised by Employment Judge Livesey in his Case Management Order dated 26 January 2016.
4. In his closing submissions, Mr Willshire, who appears for the Claimant, sought to allege that the dismissal was also automatically unfair contrary to Section 103A Employment Rights Act 1996, as the dismissal decision was taken for making a protected disclosure. This issue was not an issue raised before Employment Judge Livesey in January 2016 at a hearing at which Mr Willshire appeared; nor in the subsequent case management hearing on 13 July 2017 conducted by Acting Regional Employment Judge Harper. She stated that the issues that fell to be determined remained as identified in the case management summary of the January 2016 preliminary hearing. Finally, this protected disclosure issue was not raised at the start of the hearing when I discussed the issues with the parties and at that point it was common ground that the issues were those identified in the case management summary from January 2016. In short, I decided that it was too late for Mr Willshire to seek to raise the issue of protected disclosures in his closing submissions, whatever the position may have been in the original ET1.

### **Factual findings**

5. It was part of Mr Coletta's duties as Head Porter to complete timesheets for himself and the other porters on a monthly basis, and send them to a management company, Bourne Estates. This was not a task that was expressly set out in any contractual documentation. However it was a task that Mr Coletta had been doing since 2002 when he became the joint Head Porter, and shared this responsibility with his colleague.
6. Timesheets had to be submitted to Bourne Estates by the 20<sup>th</sup> day of each month so that the information could be inputted into the payroll system to generate payments and payslips for the end of the month. This required a degree of prediction as to the hours that would be worked for the remainder of the month. However, this was not an onerous task because the rotas were drawn up well in advance and so ordinarily it was or ought to have been clear from the diary the hours that each porter would be

working until the end of the month. If there was a last minute change to the shifts, then there was an opportunity to amend the records in time for this to be reflected on the next payslips.

7. When Bourne Estates received a monthly timesheet form, recording the days worked by each of the porters, it had no means of verifying that the information on the timesheets accurately reflected the hours actually worked. This was because their staff were not present on site, and did not have access to the diary recording the hours worked and any call outs that the porters had undertaken when on call.
8. Mr Coletta accepts that there were errors in the information he provided. There is no dispute that in total there were 44 errors, that all of the errors were in his favour, and that as a result of the errors he benefited to the extent of over £6,600. His contention is that these errors were inadvertent, and the result of the stress he was under given the duties he was required to perform and his long hours, as well as his lack of ability at administrative tasks.

### **Relevant law**

9. The test for a misconduct dismissal, as set out in *British Home Stores v Burchell* [1980] ICR 303 has three parts :
  - a. Did the employer believe that the employee's conduct constituted misconduct ?
  - b. Did the employer have in mind reasonable grounds on which to sustain that belief ?
  - c. At the stage at which he formed that belief, had the employer carried out as much investigation as was reasonable in all the circumstances of the case ?
10. I then have to consider whether a decision to dismiss falls within the band of reasonable responses, given the gravity of the misconduct. I am not to substitute my own view of whether dismissal was justified, but rather to consider whether on the evidence that had reasonably been gathered as a result of the Respondent's investigation, the Respondent was acting as a reasonable employer would act in deciding to dismiss.

### **Conclusions**

#### *What was the reason for the dismissal ?*

11. The reason for Mr Coletta's dismissal was his conduct, namely the extent of the errors made when completing timesheets. He was not dismissed as a punishment for complaining about the pay he had received for time spent on call and in particular his assertion that the Respondent was in breach of its obligations under the National Minimum Wage legislation.
12. Disciplinary action started several months after the Claimant first complained about his pay for being on call. It resulted from the discovering, whilst compiling documents for the National Minimum Wage claim, numerous discrepancies between the timesheets and the hours that

Mr Coletta actually worked, and the fact that these errors appeared to be always in the Claimant's favour.

*Did the Respondent hold a genuine belief in the Claimant's misconduct ?*

13. The Respondent did genuinely believe that the Claimant was guilty of misconduct. The Claimant admitted each of the errors identified, and did not put forward any clear and compelling explanation to justify how these errors came to be made. In those circumstances, the Respondent reached the conclusion that the errors were a deliberate attempt to increase the Claimant's pay by claiming for hours that he had not worked.
14. I reject the contention that the Respondent could not have had a genuine belief that the Claimant was guilty of dishonesty in this way because it had previously regarded him as honest and because particular residents had been impressed by the manner in which he had fulfilled his responsibilities. The discovery of numerous errors on the timesheets caused the Respondent to re-evaluate its previous assessment of the Claimant's honesty. This conclusion is not inconsistent with the Respondent continuing to allow him access to the residents' flats and continuing to allow him access to the petty cash in the short period between the disciplinary hearing and the date on which the Management Board took the decision to dismiss him. Until he was dismissed, he remained the Head Porter. These were important aspects of his role. There was no evidence he had ever previously stolen the petty cash or taken items from residents' flats. He was subject to disciplinary proceedings and so his actions were subject to close scrutiny. Even if the Respondent believed he had overpaid himself, there was no reason to think he would now start stealing from petty cash or from the residents.
15. The Claimant's work ethic is not inconsistent with his acting dishonestly, as is argued on his behalf. If he worked additional shifts, he received additional payment. If he was called out on an emergency call, he was paid for this. Working hard to get higher pay is not by itself evidence he would not seek to enhance his pay further by wrongly completing his timesheets.

*Was this belief a reasonable belief reached following a reasonable investigation?*

16. The Respondent commissioned an external HR consultancy, Healey HR LLP, to carry out an investigation. That investigation was extensive, including detailed interviews with Mr Coletta and his colleague Mr Connor, as well as a detailed examination of the timesheets and the relevant diary entries. The resulting report extended over 32 pages. In evidence, Mr Coletta did not seek to suggest that there were any particular further investigations that Healey HR LLP should have carried out. Their conclusion was that there was sufficient evidence to merit a disciplinary hearing to consider whether to dismiss for gross misconduct. In the circumstances, there was a reasonable investigation and the Respondent's belief in the Claimant's guilt at the end of the process was a reasonable one.
17. In particular, the Respondent was entitled to have regard to the following features in the evidence gathered in the course of the investigation :

- a. that all of the errors were errors in the Claimant's favour;
  - b. that they all related to claims made for working on days when Mr Connor was also working, rather than other types of mistake;
  - c. that Mr Coletta ought to have been able to remember the days when he was working and those when he was off or ought to have been able to discover that from the diaries kept at reception;
  - d. that Mr Coletta had not provided a convincing explanation for the errors during the course of the disciplinary hearing or the subsequent appeal;
  - e. that Bourne Estates could not discover the discrepancies without access to the diaries showing the days worked, and that these were kept by the porters, so providing the Claimant with the opportunity to overclaim payment in this way without detection; and
  - f. that the errors stopped around May 2014 at the point in time when the rotas changed so that Mr Connor and Mr Coletta no longer covered for each other.
18. Further, the fact that the procedure for completing timesheets was changed is not evidence it was flawed at the time, so that it would be unreasonable to conclude that the errors were deliberate. The only flaw in the original process was that there was no second check on the accuracy of the information, thus risking financial loss in the event that the person completing the information was not acting honestly.
19. The Claimant himself accepted that in the disciplinary hearing that anyone looking at the evidence would conclude he had taken money to which he was not entitled.

*Was the decision to dismiss a fair sanction ?*

20. The misconduct established against Mr Coletta was deliberately claiming to be working on shifts when he knew or ought to have known he was not working in order to claim sums he was not entitled to receive, to the Respondent's financial detriment. This had continued for a period of around 10 years and caused a loss of over £6,500.
21. As Head Porter, he was in a position of considerable trust. He was trusted to complete accurate timesheets. He was also trusted with keys to each of the resident's properties. Having concluded that he had acted dishonestly it was open to a reasonable employer to take the view that dismissal was the only appropriate sanction. It was not an unreasonably harsh sanction for the misconduct that the Respondent considered had been proved, particularly given the nature of his role.
22. The mitigation advanced by the Claimant does not render a decision to dismiss outside the band of reasonable responses to the misconduct. Although the Claimant had not previously been subject to any disciplinary action, this was because he had not been caught. On the Respondent's

findings, he had been guilty of theft of money belonging to the Respondent over a period of almost ten years. If he had taken the money deliberately, it is no answer that some residents thought highly of him, that he was working long hours, or that he had not been provided with specific training in how to fill in a timesheet. Such features do not mitigate the dishonesty of claiming sums to which the Respondent considered he knew he was not entitled to receive.

23. It is telling that the Claimant himself, in cross-examination, accepted that it would be open to the Respondent to have dismissed him for gross negligence, given the extent of the errors in the timesheets. It was reasonable for the Respondent to have regarded this as a conduct issue, rather than a capability issue.

*Was a fair procedure followed ?*

24. The only respect in which the fairness of the procedure is criticised is that Mr Shieldhouse, the Chairman of the Directors of the Respondent company, conducted the appeal hearing even though he had been involved in obtaining the timesheet documents and the decision to instigate a disciplinary investigation. He had also been party to the decision to instigate disciplinary action in the light of the contents of the independent investigation, and had voted for the Claimant's dismissal following the disciplinary hearing.
25. On the Claimant's behalf, it is said that the appeal should have been delegated to another independent HR company. They should have been asked not just to conduct the appeal hearing, but also to make a decision on the outcome of the appeal. It is also said that Mr Boyd, another one of the directors who had not been involved previously in the disciplinary process, should have been asked to conduct the appeal. He was asked to conduct the appeal hearing but declined. In those circumstances, the only Directors who were sufficiently able to conduct the appeal hearing were Mr Shieldhouse or Mr Blumenthal. Mr Blumenthal spent a considerable part of the year living abroad, which is where he was at the time of the appeal hearing, and so it was not necessary for a reasonable employer to wait to hold the appeal until he had returned to this country.
26. The range of reasonable responses approach applies just as much to the procedure that should be followed as to the sanction that should be applied. I have to consider whether the procedure that was followed fell within the band of reasonable procedures. I have to decide whether it was outside the band of reasonable procedures for Mr Shieldhouse to conduct the appeal hearing and for the decision on the appeal to be taken by the Board of Directors as a whole.
27. The procedure that a reasonable employer will follow depends on the size and resources of the employer. Here, there were only four or five employees of which the Claimant was the most senior. His line manager, Mr Taylor, was employed by Bourne Estates, rather than the Respondent. The Directors of the Respondent were all residents, who fulfilled the role of Director in a voluntary capacity. In some cases they were advanced in years and not in good health.

28. The ACAS Code of Conduct recognises it is permissible at a small employer for the same person or panel to take the dismissal decision and also to conduct the resulting appeal. This was a small employer in which the Claimant was the most senior employee. In those circumstances, it was within the band of reasonable responses for the appeal to be conducted in the way that the Respondent chose to do so.

*What would have happened if a fair procedure had been followed ?*

29. Given my conclusion on the fairness of the procedure that was followed, it is not necessary for me to consider this issue. However, in case it should arise hereafter, I have chosen to do so.

30. Had a person other than Mr Shieldhouse conducted the appeal hearing, that person would still have worked their way through Mr Coletta's thirty six grounds of appeal. Mr Coletta's answers would have been the same. That would not have provided a different decision maker with any different basis for making a different decision. The appeal outcome would have certainly been the same, namely that the Claimant's appeal should have been rejected and the dismissal upheld. There was no chance that a different panel would have reached a different decision on the evidence before the Tribunal.

*What reduction should be made for contributory fault ?*

31. Given my rejection of the unfair dismissal claim, I do need to form my own view as to whether the Claimant was guilty of the misconduct for which he was dismissed, namely dishonestly claiming earnings to which he was not entitled, by submitting inaccurate timesheets.

32. I have seen no written confirmation whether a decision has been made that the Claimant should face prosecution in relation to the evidence which led to his dismissal. In circumstances where a prosecution might still take place and it is not necessary to address the issue of contributory fault, I have taken the view that it would not be appropriate to make findings as to whether the Claimant acted dishonestly.

33. If it subsequently becomes necessary for this issue to be determined, it would be appropriate to do so by way of an application for reconsideration.

Employment Judge Gardiner

Date 27 November 2017

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE