Appeal No. UKEAT/0010/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 June 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MISS P DIBBLE — APPELLANT

MR R FALZON AND MRS S FALZON t/a THE ANNE ARMS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBIN ROBISON (of Counsel) Free Representation Unit
For the Respondents	MR ALFRED WEISS (of Counsel) Instructed by: Bhayani HR & Employment Law 59 Shoreham Street Sheffield S1 4SB

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

UNFAIR DISMISSAL - Reasonableness of dismissal

The Claimant, a long-standing pub worker, was dismissed after an investigation and disciplinary hearing based on an allegation of theft. The Employment Judge did not set out the reason for dismissal given by the employer at the time in the dismissal letter or make a finding of what was the reason for dismissal. It was not in dispute that the Claimant took money from the till. The issue was whether the Claimant had been dishonest. Further, the Employment Judge erred in failing to consider and give reasons for the decision that the Respondents' investigation and decision to dismiss was reasonable notwithstanding that there was evidence available to the Respondents that the takings in the till were up and not down and that they considered that takings being down as important. Appeal allowed. Claim remitted for hearing before a different Employment Tribunal.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Miss Dibble ("the Claimant") appeals from the dismissal by decision of Employment Judge Keevash with Reasons sent to the parties on 19 January 2017 of her claim for unfair dismissal against Mr and Mrs Falzon trading as The Anne Arms.

2. The Claimant was employed from 13 January 2003 as a bar/waiting staff at a pub, The Anne Arms. The Respondents took over the management of the pub in about May 2015 and the employment of the Claimant transferred to them. There was no evidence of any complaint against the Claimant until events on 28 March 2016.

Outline Facts Taken from the Judgment of the Employment Judge

3. On 28 March 2016, when cashing a customer's tab, an incorrect amount was put into the card payment machine. The Respondents believed the Claimant had made a genuine mistake in doing this. The Claimant denied she had made an error. Mr Falzon decided to watch the CCTV footage of the bar that evening to attempt to resolve matters. On 1 April 2016, Mr Falzon and his daughter watched the CCTV footage which covered the till and a section of the bar area. The Employment Judge recorded that Mr Falzon contacted the police to report what he had seen. The Employment Judge does not record the evidence of what exactly Mr Falzon and his daughter had seen.

4. The police attended the premises on 3 April 2016 and viewed the CCTV for different purposes. Mr Falzon took a video on his phone of part of the CCTV footage, some two minutes' worth. Having spoken to police, the Employment Judge recorded that Mr Falzon said that they had suggested that he ask the Claimant to explain her behaviour. Although, again, that behaviour

was not set out by the Employment Judge in his decision. He recorded that, after speaking to the British Institute of Innkeepers, Mr Falzon decided to suspend the Claimant. The Employment Judge found that, on 7 April 2016, Mr and Mrs Falzon gave the Claimant a letter suspending her with immediate effect. The Employment Judge did not set out the contents of that letter of suspension, but recorded that the Respondents explained the allegation of theft and dishonesty without the Employment Judge specifying what that allegation constituted.

5. At paragraph 5.6, the Employment Judge held that during a meeting on 7 April attended by the Claimant she gave several inconsistent explanations for what had happened. Mr Falzon told her to go home because he thought her mind was muddled and he suggested that she thought about the matter and return next day to the resumed meeting. At the meeting on 7 April, at which the Claimant was given the letter of suspension, the Employment Judge records that the Claimant, accompanied by Mrs Whyte, her friend and a co-worker, watched the CCTV footage on Mr Falzon's mobile phone on several occasions.

6. At paragraph 5.7 of his Judgment, the Employment Judge held that on 8 April the Claimant attended a meeting with Mr and Mrs Falzon. Again, she was accompanied by Mrs Whyte. They again watched the footage of the CCTV clip. The Tribunal Judge records evidence that the meeting became heated and the Claimant left. The Employment Judge makes no findings of fact as to what was said at the meeting of 8 April 2016.

7. The Employment Judge records that, by letter of 13 April 2016, the Respondents invited the Claimant to attend a disciplinary hearing. The Employment Judge fails to set out the disciplinary charge which the Claimant faced in that letter, if indeed a charge was formulated in the letter of 13 April.

8. At paragraph 5.11, the Employment Judge found that on 18 April the Claimant attended a disciplinary hearing which was conducted by Mr Falzon. Again, the Claimant was accompanied by Mrs Whyte, and a note-taker was present. The Employment Judge does not refer to any note of the meeting, nor the content of that meeting. All that the Employment Judge held of the disciplinary meeting was as follows in paragraph 5.11:

> **"5.11. … Once again the footage was shown from Mr Falzon's phone. Amongst other matters the Claimant said that she could not remember why she had taken six one pound coins. During this meeting the Claimant handed in a statement which she and Mrs Whyte signed. Mr Falzon adjourned the meeting and subsequently decided to dismiss the Claimant."**

9. At paragraph 5.12 the Employment Judge held that by letter dated 18 April 2016 Mr Falzon informed the Claimant that he had decided to dismiss the Claimant with immediate effect because of gross misconduct. Once again, the Employment Judge did not set out any part of the text of the letter of dismissal.

10. The Claimant appealed by letter of 27 April. Mr Falzon, who had conducted the disciplinary hearing and who had decided to dismiss the Claimant, heard the appeal on 29 April 2016. The Employment Judge does not make any findings of fact as to what was said at the appeal hearing.

11. By letter of 30 April 2016, Mr Falzon informed the Claimant that he had decided to uphold the earlier decision to dismiss. Once again, the Employment Judge does not set out the reasons given in the letter for the decision.

The Reasoning of the Employment Judge

12. In paragraph 9, the Employment Judge accepted the evidence of Mr Falzon. He found that Mr Falzon genuinely believed that the Claimant had committed an act of misconduct on 28

March 2016. He had watched the CCTV footage and it appeared to him and his daughter that the Claimant had taken money out of the till without reason. She was not serving a customer and she put the money in her apron. The CCTV footage did not show the Claimant handing the money to anyone before she completed her shift. In reaching this conclusion, the Employment Judge accepted that the footage that was shown in the disciplinary hearing was an accurate part of the CCTV evidence which was recorded onto Mr Falzon's mobile phone. Insofar as his consideration of whether there were reasonable grounds for the belief in gross misconduct, the Employment Judge found as follows:

> **"10. The Tribunal found and decided that Mr Falzon had reasonable grounds for his belief. He gave the Claimant several opportunities to watch the CCTV footage. She gave him several inconsistent explanations for her conduct. First she stated that she was getting change for a customer. Then she stated that she took money for her taxi. Then she stated that she had changed money over because the float bag was not downstairs. Finally she stated that she had changed the £10 note into two £5 notes for Mrs Falzon. Mr Falzon then gave the Claimant another opportunity to explain the next day. During that discussion the Claimant gave no explanation whatsoever for why she had taken the six pound coins. The Employment Judge decided that Mr Falzon was entitled to disbelieve and doubt the Claimant's account of her actions. Mr Falzon was entitled to rely on his wife's account to support his belief that the Claimant had taken money for her own use during that shift."**

13. Insofar as his consideration of whether the Respondents had carried out a reasonable investigation, the Employment Judge held at paragraph 11 that:

> **"11. The Respondent conducted an investigation meeting, disciplinary hearing and appeal hearing. Mr Falzon did show the footage to the Claimant on several occasions and she was accompanied by a colleague. She was given a reasonable opportunity to explain her conduct. He properly asked his wife to explain what had happened on 28 March 2016. In the circumstances the Employment Judge decided that the investigation was reasonable."**

14. As for sanction, the Employment Judge concluded at paragraph 12 that:

> **"12. … Where an employee is handling cash as a key part of his or her role, theft or misappropriation of money, however small the amount, must be regarded as an extremely serious matter. Employers need to be able to trust staff who are employed in such a situation. In those circumstances the Employment Judge decided that the Respondent acted reasonably in treating the Claimant's conduct as a sufficient reason for dismissal having regard to all the matters set out in section 98(4) of the 1996 Act."**

The Grounds of Appeal

15. By amended ground of appeal 2(a), it is contended:

> **"The Employment Tribunal failed to address or make any reference to the Claimant's evidence that the till was £5.73 up on 28 March 2016, contrary to the Respondent's case that it was down by £30."**

16. Mr Robison, representative for the Claimant, submitted that this failure was a fundamental defect. The Claimant was dismissed for theft. Mr Robison contends that where, as in this case, a belief in theft is based on a deficiency in money in a till, it is highly material for the Employment Tribunal to consider and decide whether an employer is acting reasonably on the evidence available to him in concluding that the employee is guilty of the serious allegation of theft. It was said that, in this case, the electronic printout of takings obtained in the disclosure exercise after proceedings were launched in the Employment Tribunal - which was before the Employment Tribunal - showed that there was a surplus of over £5 and not a deficiency of about £30.

17. Mr Falzon gave evidence before the Employment Tribunal explaining his calculation of takings which were based on credit card slips and not on the automatic printout which showed that there was a surplus rather than a deficiency in takings. The credit card slips were not produced to the Employment Tribunal, but Mr Falzon said that cashiers can make mistakes and press the wrong button and therefore there can be inaccuracy in the electronic printout.

18. Mr Robison submitted that the Judgment of the Employment Judge was seriously deficient in that the Employment Judge failed to consider and decide whether it was reasonable for the Respondents to conclude that the Claimant had been guilty of theft when evidence was available to the employer which undermined the express basis of their conclusion that the Claimant was guilty of theft, namely that the takings were down by £30. To say, as the

Employment Judge did at paragraph 9, that he accepted the evidence of Mr Falzon is insufficient examination of the material which was available to the Respondents at the time of their decision in deciding whether they had acted reasonably in concluding that the Claimant was guilty of theft.

19. Mr Weiss, counsel for the Respondents, submitted that the failure of the Employment Judge to make reference to the competing contentions before him, as to whether the till was up or down on the day, was a peripheral issue. The Claimant had not stated at the investigatory or disciplinary meetings that she did not accept that takings were down on the day. Counsel pointed out that the issue was only raised by the Claimant when she obtained the printouts of takings in the course of disclosure for the purpose of the Employment Tribunal proceedings. When the issue was raised in the Employment Tribunal hearing, Mr Weiss contended that the Employment Judge was entitled to accept Mr Falzon's explanation that the difference between the electronic printout and his calculation was accounted for by human error in pressing the wrong button for Visa and MasterCard. The description of takings under Visa and MasterCard from the handheld devices is called the PDQ. The PDQ credit card slips on which Mr Falzon based his calculation were not before the Tribunal, nor was there any evidence as to how frequently the cash in the till was found to be under or over what was expected.

20. In my judgment, the problem with this decision is that there is no express finding on the first question in an unfair dismissal claim: has the employer established the reason for dismissal and that it fell within the statutorily permissible reasons? It is very concerning that the Employment Judge does not set out the reason for dismissal given by the employer at the time. Relevant documentary evidence of that was before the Employment Tribunal and is before this Employment Appeal Tribunal.

21. Whilst this Employment Appeal Tribunal makes no findings of fact, neither party sought to challenge the statement in the letter of dismissal sent by the Respondents to the Claimant on 18 April 2016, in which the Respondents stated:

> **"Our decision is to dismiss you with immediate effect with no notice for gross misconduct as we have a reasonable belief that you stole at least £16 as on the day in question the till was down by £30."**

22. It is also stated in the letter of dismissal that:

> **"At the disciplinary hearing on 18/04/2016 you handed over a written statement for your actions shown on the CCTV on 28/03/2016. However what you said during the disciplinary hearing contradicts what you have written in your statement.**
>
> **You state that Mrs S Falzon gave you a £10 note and asked you to change it for two £5 notes. Mrs S Falzon has no recollection of this, however Mrs S Falzon did give you a £10 note to pay her bill of £9.75.**
>
> **Another statement you made in your letter was that Mrs S Falzon left the bar to use the toilets however the CCTV footage does not support your statement as Mrs S Falzon is shown not to leave her seat at the bar at any time.**
>
> **You also stated in your letter that you kept the money in your hand as Mrs S Falzon was absent from the bar and that you eventually put it in your apron pockets as Mrs S Falzon hadn't returned. Again your statement is not supported by CCTV as it is shown that Mrs S Falzon is sat at the bar while you had the money in your hand and when you put the money in your apron pocket. CCTV also shows that at no point do you attempt to hand the money over to Mrs S Falzon."**

23. Whilst the background of different explanations advanced by the Claimant for her actions was in the mind of Mr Falzon when dismissing, the dismissal letter concludes by saying that the reasonable belief that the Claimant stole at least £16 was because the till was down by £30. In light of both matters being mentioned in the letter, although much greater emphasis being placed on the latter, it was or would have been particularly material for the Employment Judge to make a decision as to the reason for dismissal of the Claimant by Mr Falzon. This he failed to do.

24. It was not in dispute that the Claimant had taken money from the till. The issue before the Respondents, and also an issue for the Tribunal, was, if the Respondents did so conclude, whether they were reasonable in concluding that the taking of the money was dishonest and whether, in reaching that conclusion, the Respondents had carried out an adequate investigation.

25. I do not accept the submission of Mr Weiss that because in the disciplinary hearing the Claimant did not contest that the till was down on the day and did not ask for that printout of takings that issue was peripheral. The charge of theft is a serious allegation; it is for the employer to show that they have reasonable grounds for their belief that the employee is guilty of such serious misconduct and that they have carried out a reasonable investigation into that allegation. In this case, the employer based their belief, in large part, on the fact that they considered that takings in the till were down. There was evidence available to the employer that the takings were not down but up. That evidence was before the Employment Judge, yet he made no reference to it nor to the contention by the Claimant before the Employment Tribunal that it showed that the takings in the till were up and not down, and that takings being down was a principal issue relied upon by the employer in dismissing her. The issue of whether the takings were down was regarded as very important by the Respondents. It is submitted by Mr Weiss that the question of whether takings were up or down on the day of 28 March was peripheral to the issues before the Employment Tribunal. I do not accept that submission; it was central to the basis of the decision set out in the dismissal letter, albeit that there had been no finding as to the reason for dismissal or reference to the text of the dismissal letter in the Employment Judge's decision.

26. In my judgment, the decision of the Employment Judge is seriously deficient in failing to address the argument of the Claimant that the takings of the till on 28 March were up and not down, as that appears to have been a material factor in the decision of the Respondents to dismiss the Claimant. It was, in my judgment, also material to the decision as to whether the Respondents were reasonable to reach the conclusion that they did that the Claimant had been guilty of theft, notwithstanding the evidence of the printout. In those circumstances, the Employment Judge should have considered and decided the import of the evidence relied upon respectively by the Claimant and Respondents as to whether the Respondents could reasonably conclude on the

material, not just relied upon by them but available to them at the time, that the Claimant was guilty of theft.

27. I regard the failure of the Employment Judge to consider and give reasons for the decision that the employers were reasonable in deciding to dismiss the Claimant undermines the entire decision of the Employment Judge. This was not a peripheral issue; it was at the very heart of the reasoning that should have been part of the Employment Judge's judgment. The challenge to the decision of the Employment Judge that it is not **Meek** compliant, in that the Employment Judge failed to make a decision on a material issue, is well made and the appeal on ground (a) succeeds.

28. Insofar as ground (b) is concerned, it is contended that:

> **"The Employment Tribunal failed to address or make any reference to the Claimant's evidence that she did not provide the explanations for her conduct on 28 March 2016 which the Respondent alleged she had provided in the course of the disciplinary investigation."**

29. There is reference in the dismissal letter and in the notes made at the time, to the fact that the Claimant gave four different explanations for her conduct in taking money from the till. This is recorded in the decision of the Employment Judge.

30. As for the evidence that was given before the Employment Tribunal on this point, Mr Weiss helpfully provided a typewritten transcription of his handwritten note of the evidence given at the Employment Tribunal. It appears that the Claimant was contending that it was not until 18 April 2016 - at the disciplinary hearing - that she gave the explanation that Mrs Falzon had asked her to change a £10 note into two £5 notes. Mr Weiss very fairly states that the typescript refers to 8 April, but it should be 18 April. The recorded reply of Mrs Falzon was, it was said, on 7 April 2016. There is a summary of evidence recorded by Mr Weiss as follows:

> **"That you accepted having on 7 April 2016 given three different explanations for your conduct. You disagreed with the Respondent saying you had also on 7 April [2016] given a fourth explanation for your conduct whereby you were changing a £10 note into two £5 notes for Mrs Falzon. Your position was that the explanation regarding changing a £10 note into two £5 notes given by you on 18 April 2016."**

31. That appears to summarise the difference between the parties on that issue, although it may well have been that the Claimant said, at some point, that she had not given any explanation at all. The failure, if there is such, in the Tribunal Judge failing to decide whether the fourth explanation was given on 7 April or 18 April (7 April being the investigatory meeting, 18 April being the disciplinary meeting), is a failure of lesser order and consequence than that which is subject to the first ground of appeal. However, it is a point which, no doubt, on a remitted rearing will be explored.

Disposal

32. The appeal is allowed. The claim is remitted for re-hearing before a different Employment Tribunal. There has been a considerable passage of time since the hearing before Employment Judge Keevash which took place on 29 November 2016. Further, it cannot be said that the Employment Judge recorded all relevant evidence.