



EMPLOYMENT TRIBUNALS

Claimant: Ms Danielle Aggar

Respondent: South Central Clothing Limited

Heard at: Southampton On: 3 October 2018

Before: Employment Judge Gardiner

Representation:

Claimant: In person

Respondent: Mr V Walters, Store Manager

JUDGMENT was sent to the parties on 24 October 2018, and a request for Written Reasons was received within the relevant time limit, the following Written Reasons are provided.

WRITTEN REASONS

1. On 19 March 2018, Danielle Aggar was told that she would be dismissed from her role as a Shop Assistant with effect from 31 March 2018. There had been a recent theft of items from the Mirage shop in Portsmouth where Ms Aggar worked. CCTV footage showed that Ms Aggar was on duty when the shoplifting occurred. Mr Walters, the Shop Manager, blamed Ms Aggar for not keeping a sufficiently close watch on the individuals responsible.
2. Ms Aggar brings an unfair dismissal claim. She has not brought a wrongful dismissal claim because she was offered the opportunity to work her contractual notice but refused to do so. On being told on 20 March 2018 that she was to be dismissed on notice, Ms Aggar chose to resign with immediate effect.
3. In order for the tribunal to have jurisdiction to consider an unfair dismissal claim, a claimant must show that they have two years continuous employment. In the present case, it is agreed that she started her role on 21 March 2016. She resigned with immediate effect on 20 March 2018. That gives her, just, two

years continuous employment and so enables the Tribunal to consider her unfair dismissal claim on its merits.

Factual findings

4. Ms Aggar was one of a number of Shop Assistants employed to work in the Mirage store in Portsmouth, operated by the Respondent. The store sold fashion clothing and was managed by Mr Vincent Walters. She had previously worked for Mr Walters at another store, and so she had further retail experience above and beyond her experience in the Mirage store.
5. Ms Aggar's employment as a Shop Assistant was subject to Statement of Main Terms and Conditions of Employment signed on 21 March 2016. It cross-referred to a Staff Handbook which Ms Aggar says, and I accept, she never received. There is no direct evidence that she was ever issued with a copy of this Handbook. It has not been put in evidence by either side. According to the Statement of Main Terms and Conditions of Employment, the Staff Handbook contained a Disciplinary Procedure. That Disciplinary Procedure has not been put in evidence.
6. Ms Aggar was entitled to be paid £7.20 per hour for working a 40-hour week. In practice, she tended to work for longer than 40 hours for no additional pay. This was because she was expected to arrive no later than 9.20am, ten minutes before the store opened to customers. She was entitled to half an hour for lunch but was then expected to stay beyond the time at which the store closed at 5.30pm. She would regularly work until 6pm or later, and on occasions worked until 7pm. There was a degree of flexibility in her working hours in that she was allowed to leave the store at times during the working day to go shopping and for other personal reasons.
7. Ms Aggar's timekeeping had not been as punctual as Mr Walters expected, in that she was not always arriving at 9.20am. This caused Mr Walters to raise the issue with her verbally and culminated in a written warning. That written warning has not been produced in evidence and so the Tribunal has not seen the terms in which it was written. As described in the oral evidence, I find that it was not expressed to be a final written warning, but merely a written warning. That was issued around December 2017. Since then there had been no further issues with the time at which Ms Aggar arrived at the start of her shift.
8. In the period leading up to the event that led to Ms Aggar's dismissal, there had been a series of thefts of clothing from the store. There was a more general discussion about this issue on 2 March 2018 when the store's owner, Sam Khatkar, attended with the Warehouse Manager, known as Sean. The following day there was a specific staff meeting held at about 9.10am before the store opened. During this meeting, Mr Walters emphasised the need for staff to remain vigilant and stated that staff were to stop what they were doing when customers were in the store so that they could watch the customers at all times. There were three areas of the store – downstairs, upstairs left and upstairs right and the three staff on duty were told to each assume responsibility for one of these three areas. It is likely that staff were warned in this meeting that if they did not remain vigilant and stock was stolen then they may be dismissed. By

this point shoplifting had become a significant issue and the owner had stepped in personally in order to tackle this problem.

9. The events in relation to Ms Aggar's dismissal relate to what happened in the Mirage store on 14 March 2018. This was Mr Walters' day off. Three shop assistants were on duty – Ms Aggar and two others. None of them were designated as the supervisor or given authority to manage the others. Ms Aggar was not the longest serving employee but was the oldest, and so regarded by Mr Walter as the most senior employee on shift.
10. On 14 March 2018 about five items of clothing worth almost £500 were stolen from the Mirage store by three youths. The theft took place at about 5.15pm in the evening. The staff were alerted to theft when the security alarm sounded as the thieves exited the front of the store with the security labels still attached to the items. When Ms Aggar realised that the items had been taken by the three youths she left the store herself in an attempt to catch them but was unable to do so.
11. On the following day, Ms Aggar spoke to Mr Walters to explain what had happened. At that point, Mr Walters said little by way of response. On the same day she offered to reimburse the cost of the stolen goods to the store owner. This was because she felt responsible for what had happened because she was the most senior Shop Assistant on duty.
12. CCTV footage recorded what was happening in the store at the time of the theft. That footage was viewed by Mr Walters on Monday 19th March 2018. Based on what he had seen he decided that the staff who were on duty would have to be dismissed. They were asked to attend work early on 20th March 2018 when they were shown the CCTV footage. Mr Walters was angry and swore as the footage was being played to the staff members.
13. He asked the staff members for an explanation as to how this had happened. Once they had provided their explanation, he said to each of them "*1, 2, 3 you are all sacked. Your employment ends on 31 March 2018*". Each of the employees tried to ask Mr Walters to be allowed to keep their job but this was refused. The Claimant stated "*If you are going to fire me, then I'm leaving now*" to which Mr Walters replied : "*If that's what you want to do, Dani, I can't stop you*". At that point, Ms Aggar picked up her personal items said goodbye to the others and left.
14. She subsequently asked for a written statement of the reasons for her dismissal by writing to the owner, in a letter handed to Mr Walters. She says, and I accept, that she never received any response to that letter. As a result, she has never been sent a statement of the reasons for her dismissal, nor has she been offered the opportunity to appeal against the dismissal decision.

Legal principles

15. So far as a claim for unfair dismissal is concerned, the Tribunal must consider whether conduct was the reason for the Claimant's dismissal. It is common ground that it was.
16. The Tribunal must then consider whether the Respondent had reasonable grounds for believing that the Claimant was guilty of gross misconduct and had reached that belief after a reasonable investigation. This means asking whether the extent of investigation fell within a band of reasonable investigations given the nature of the misconduct and the extent of the evidence potentially available.
17. The Tribunal must then consider whether dismissal was a reasonable sanction. It is not for the Tribunal to substitute its own view as whether the alleged misconduct justified dismissal. Rather in order to determine whether the sanction was a reasonable one, it must consider whether it was sufficiently serious that a reasonable employer could dismiss for the alleged misconduct. That requires a consideration as to whether dismissal was within the band of reasonable responses, based on the Respondent's view of the gravity of the misconduct.
18. If the dismissal was unfair as a result of any procedural unfairness, then the Tribunal must consider the extent to which a fair procedure may have led to a different outcome. This is often referred to as the *Polkey* question, after the House of Lords case in which this issue was discussed.
19. The Tribunal must consider whether there was any conduct on the part of the Claimant which was morally culpable and which contributed to the decision to dismiss the Claimant. If so, then this must be reflected in the award that is to be made.
20. Finally, if the ACAS Code of Conduct on Disciplinary Procedures has not been followed, then the Tribunal has a discretion, by reason of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 to adjust the level of compensation by a percentage up to 25% to reflect the extent to which the employer has failed to comply with the relevant procedure.

Conclusions

(1) Unfair dismissal

21. The Respondent genuinely believed that Ms Aggar was at fault in relation to the circumstances of the theft. It was reasonable for Mr Walters to have such a belief based on the evidence he viewed, namely the CCTV footage. That appeared to show that the Claimant was engaged in other activities whilst the youths were in the store and so was not showing the vigilance that had been expected.
22. However, that belief was not reached after a reasonable investigation. It was reached after viewing the CCTV footage on Monday 19 March but before speaking to the staff members concerned, including the Claimant. Although the Claimant had spoken to Mr Walters on 15 March 2018, I do not find that this

amounted to a fact-finding discussion for the purposes of a reasonable investigation, nor was it treated as such.

23. The manner in which the events were discussed with the Claimant was not a fair opportunity for her to provide her explanation such as would have been provided by a reasonable employer. Mr Walters was not acting as a reasonable employer when he discussed the details with the Claimant. He was angry and abusive as the CCTV video was played to the Claimant and her colleagues. His request that they provide an explanation was not asked as part of a genuine enquiry, but in order to embarrass them and to justify the dismissal decision he had already taken.
24. It was not a proper opportunity for the Claimant to provide her explanation of events in the store. She was not being interviewed separately but was being asked for her explanation in a group meeting with the other staff members present. This was done at a point where Mr Walters had just shown them the CCTV video played through only once, where she did not have the opportunity to stop the video and explain what they were doing at particular points in time.
25. Given the failure to make a proper enquiry as to the Claimant's conduct during the events in question, the sanction of dismissal was not one which was within the band of reasonable sanctions that could have been taken based on the limited evidence available to Mr Walters. This is because a reasonable employer would have needed to assess the likelihood in the light of all the circumstances that the theft would have been avoided had the Claimant being showing the vigilance that was reasonable to expect. A reasonable employer would have also considered any mitigating circumstances that needed to be taken into account in assessing the gravity of the fault. Neither factor was investigated here.
26. The Claimant's dismissal was therefore an unfair dismissal.

(2) What would have happened if a fair procedure had been followed (Polkey) ?

27. So far as what would have happened if a fair process had been followed, it is necessary at this point to record the Claimant's evidence as to the manner in which the theft occurred.

Shoplifters were near the changing room about 10 metres away. I was moving some stock around at the time. The first person asked me to be able to use the changing room and as he went in I carried on doing what I was doing. As I turned away, maybe 2 or 3 minutes after, he had a friend who was passing him something to try on. He did this once after that as well. They seem to have been putting in on underneath their clothing so as not to raise suspicion.

There was a moment where one of them asked me to show him an item that was on the rail where the size indication was and asked me to check for a size. We had a procedure that if one of us had to go to the till on the right-hand side of the upstairs the other colleague then comes over the left-hand side. Then we swap back over once I had consulted the computer screen.

Then I told him what was available and he asked me to get it from the other store. I swapped over to get the items to be brought over and then swapped over again and whilst waiting for this they carried on the task.

The third member of the gang is downstairs with the other member of staff. The one downstairs comes back upstairs and they all conferred with each other and the person who was in the changing room came out. I went over to check the changing room and I needed to check that no hangers were in the changing room, there was a hanger in the hook on the changing room. One of the items I had got for the gentlemen to try on was missing.

It dawned on me what had happened and then the alarm goes as they are exiting the store. I went around to speak to Ash and then spoke to Chey and as I was going downstairs I went out onto the street. I did not realise what had happened, [thinking it was] only one item of clothing.

I am not sure that I could have stopped it happening – there were clothes underneath clothes. I feel like I could have been paying more attention rather than doing the stuff on the rail. I could have been looking at them. If I had started to confront them then not sure I could have stopped it – they could have had weapons. Definitely should have paid more attention.

28. In the light of this evidence I consider that there was only a 20% chance that a reasonable employer carrying out a reasonable investigation would have come to the conclusion that the circumstances warranted dismissal.

29. I reach this assessment balancing the following features tending towards dismissal:

- (1) The Claimant had been told to be vigilant at a specific meeting held less a fortnight before the incident in question, and warned that action may have to be taken against staff that were not vigilant
- (2) In particular, she had been told that she needed to stop what she was doing whilst customers were in the store so that she could watch them closely;
- (3) The Claimant accepted that she was at fault in failing to show the vigilance that was expected of her;
- (4) This was not the first occasion where she had been on duty when items had been stolen whilst she was on duty, where there was potential fault on her part;
- (5) At the time of the incident, the Claimant was already on a written warning, albeit for different reasons, which was still current.

30. I also take into account the following weightier features suggesting that dismissal would have been too harsh a sanction :

- (1) The thieves deployed a degree of sophistication in the manner in which they stole the goods, apparently putting on clothes under their existing clothes whilst hidden in the changing rooms and potentially hiding coathangers. Those coathangers may have indicated how many items they had taken off the shelves, in that only one appeared to be visible. They had also interacted with Ms Aggar in asking her questions about the sizes in stock. This required her to leave the area to use the computer terminal, and potentially enabled them to take items without being noticed;
- (2) I have not been shown the CCTV footage which was relied upon by the Respondent as the justification for dismissal. In circumstances where that footage could have been produced to the Tribunal, I need to give the Claimant the benefit of the doubt in terms of any evidential dispute as to the precise circumstances in which the theft occurred;
- (3) Based on the Claimant's version of events, which I accept, then if she had been as vigilant as possible, it is quite likely that the thieves would still have attempted to steal the items and would have been successful in doing so;
- (4) Ms Aggar was not the manager or even a supervisor and had not been asked to be in charge of the shift. Whilst she was the oldest, this is not a reason to hold her more to blame than the other Shop Assistants for what went on. All had been held sufficiently to blame to justify dismissal, regardless of their experience or seniority;
- (5) Ms Aggar had not received any written instructions as to what to do in order to apprehend potential shoplifters, not any specific training beyond the need to be vigilant. She was not a security guard and should not be expected to show the same levels of skills as if she was;
- (6) There is no evidence before the Tribunal as to how failing to detect and apprehend shoplifters was treated in the Respondent's Disciplinary Procedure and whether this was specifically named as an instance of gross misconduct, or of less misconduct.

(3) Contributory fault

31. So far as contributory fault is concerned, the Claimant accepts that she was at fault in failing to show the vigilance that had been expected of her. I assess that fault in terms of her moral culpability as justifying a reduction in the basic and compensatory awards of 25%.

(4) Failure to follow ACAS Procedure

32. There has been a failure to follow the procedure set out in the ACAS Code of Conduct in the following respects. There was no attempt made to ensure that different people carried out an investigation and the disciplinary hearing (para 6). There was no notification in writing of the misconduct, containing sufficient evidence of the potential misconduct and its potential consequences (para 9). There was no meeting specific to the Claimant's situation (para 11). She was not offered the right to be accompanied at such a meeting (para 12). There was no written outcome letter nor any statement of the reasons why she was being dismissed (para 18). There was no offer of an appeal hearing (para 26). In all

these circumstances it is appropriate for the maximum uplift to apply, namely 25%.

(5) Financial loss

33. So far as the Claimant's financial loss is concerned, I have decided that it would be appropriate to award the Claimant her losses to date, and a further 8 weeks losses to reflect the time it may take her to obtain alternative employment. She has taken reasonable steps to mitigate her loss and the burden of proving otherwise is on the Respondent. The Respondent has failed to discharge that burden.

34. The assessment of a further 8 weeks losses is obviously a rough and ready assessment that reflects that she may obtain some work before then, but not necessarily full replacement of her full-time hours at that point.

(6) Calculation of compensation

35. The Claimant is entitled to a basic award of **£540**. This has been calculated as follows :

- a. The Claimant's weekly gross pay of £288, multiplied by 2, reflecting the Claimant's two years of continuous employment, making £576;
- b. That figure of £576 is then increased by 25% under Section 207A Trade Union and Labour Relations (Consolidation) Act 1992, adjusting the figure to £720;
- c. This figure of £720 is then reduced by 25% for contributory fault, adjusting the figure to £540;

36. The Claimant is entitled to a compensatory award of **£7344.03**. This has been calculated as follows:

- a. Past compensatory award of £5778.69 :
 - i. The Claimant's arithmetical loss in relation to the period from the date of dismissal to the date of the hearing is £260.89 net x 28 weeks = £7304.92, plus an award of £400 for loss of statutory rights, making a total of £7704.92;
 - ii. This arithmetical figure needs to be reduced by 20% for the chance that the Claimant would have been fairly dismissed had a fair procedure been followed. The adjusted figure is £6163.94;
 - iii. That figure is then increased by 25% under Section 207A Trade Union and Labour Relations (Consolidation) Act 1992, adjusting the resulting figure to £7704.92;
 - iv. This figure is to be reduced by 25% for contributory fault, adjusting the figure to £5778.69;
- b. Future compensatory award of £1565.43 :

- i. The Claimant's future arithmetic loss is £2087.12, being eight weeks weekly net pay of £260.89;
 - ii. This figure is to be reduced by 20% for the chance that the Claimant would have been fairly dismissed had a fair procedure been followed. The adjusted figure is £1669.70.
 - iii. That figure is then increased by 25% under Section 207A Trade Union and Labour Relations (Consolidation) Act 1992, adjusting the previous figure to £2087.13.
 - iv. That adjusted figure is then reduced by 25% for contributory fault, adjusting the figure to £1565.34;
- c. The total compensatory award is therefore the sum of the adjusted past and the adjusted future compensatory award figures, being £5778.69 + £1565.34 = **£7344.03**.

37. The figures set out in these Written Reasons correspond to the figures set out in the Judgment. They differ from the precise figures announced in the oral Reasons given at the conclusion of the hearing. This is because of an arithmetical error in the calculations made at the conclusion of the hearing. The error has been corrected by the Tribunal amending the figures by way of Reconsideration under Rule 73 of the ET Rules 2013.

38. For the purposes of the Recoupment Regulations, the protected period is the period from 21 March 2018 to 3 October 2018. The compensatory award in relation to that period is £5778.69.

Employment Judge Gardiner

6 November 2018