THE EMPLOYMENT TRIBUNALS

Claimant **Mr M Matos**

Respondent **Glendola Leisure Limited**

HELD AT: **London Central**

ON: **10 and 12 October 2018**

EMPLOYMENT JUDGE: **Mr J Tayler**

Appearances

For Claimant: **In Person**
For Respondent: **Mr J Brotherton, Consultant**

1. By a Judgment sent to the parties on 19 November 2018 I held that:

    1.1 The Claimant was unfairly dismissed.

    1.2 The Claimant is entitled to a basic award that was reduced by 60% for contributory conduct to £958.00.

    1.3 The Claimant was awarded no compensatory award.

    1.4 The Claimant was wrongfully dismissed. The Claimant was awarded £3,205.130.

2. By email dated 19 November 2018 the Claimant requested written reasons.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 10 May 2018 the Claimant brought complaints of unfair dismissal and breach of contract.

Issues

2. The issues for determination were

Unfair Dismissal

2.1 What was the reason for the dismissal of the Claimant? The Respondent relied on conduct.

2.2 Did the Respondent have a genuine belief that the Claimant was guilty of the conduct found against him?

2.3 Was any such belief formed on reasonable grounds?

2.4 Did the Respondent conduct a reasonable investigation?

2.5 Was the dismissal of the Claimant within the band of reasonable responses?

Wrongful Dismissal

2.6 Did the Respondent breach the Claimant's contract of employment by failing to pay notice monies?

Evidence

3. The Respondents called:

3.1 Luisa Salussolia, Operations Manager

3.2 James Urquhart, HR Manager

3.3 Nick Salussolia, Operations Manager

4. The Claimant gave evidence on his own behalf and called:

4.1 Ilona Szczepanik, Assistant Manager

5. I was provided with an agreed bundle of documents.

Findings of fact

6. The Claimant commenced employment working at the Lansdowne Pub on 20 August 2012. The Claimant became General Manager in 2015.

7. In September 2017, the Respondent purchased the company by which the Claimant was employed and took over the running the Lansdowne Pub. There were a number of difficulties in the aftermath of the purchase. The Claimant had been used to a great deal of autonomy in the way in which he managed the pub before the takeover. The Respondent brought in a greater level of supervision and had a dedicated HR function.

8. There were a number of problems in integration of the Lansdowne into the Respondent's business, particularly in respect of the way the computer systems operated.

9. A system was operated at the Lansdowne whereby there were two forms of gratuity. There was a service charge that was payable through credit and debit cards, and occasionally there were cash tips. Cash tips were collected, stored in the safe and then distributed on a points system amongst staff in cash. Payment of service charge was made through payroll

10. On 12 October 2017 the Claimant sent an email explaining that he was having difficulty in gaining access to payslips. He was concerned that there was a failure to distribute service charge through payroll.

11. On 21 October 2017, £66.46, was recorded to be paid out from the till for service charge. As a result of an error with the settings on the till, rather than transferring the service charge to the bank to be paid through payroll in the normal way, the sum was shown at a cash sum for payment out.

12. On 22 October 2017 the Claimant sent an email to James Johnston copying in Ms Salussolia, stating:

> "I came across something rather odd.
>
> Service charge pay out and in cash???".

13. I accept that the Claimant was confused about why this was occurring.

14. There was some delay in the query being dealt with. On 2 December 2017, Zonal, the company that operated the till system, stated by emails that the entry had been created as a result of someone logging out from the system. Previously, logging in and logging out on the tills had not been used as a method timekeeping.

15. On 4 December 2017 the Claimant's assistant sent a spreadsheet with a calculation on the points system that had been previously operated of how the service charge should be distributed amongst staff members. The Respondent was introducing a new system with a tronc calculation of their own. However, that was not yet available.

16. It was agreed with Saroj Virdee, Payroll Supervisor, that the old system would be operated with the service charge to be paid through payroll.

17. On 7 December 2017 the Claimant wrote to Ms Salussolia, stating that he was surprised how long the issue of cash payments out had taken to investigate. He stated:

> "My question 2 is. The service charge has been paid out with last payroll. Now when we clocked in and out on Zonal, the service charges is being paid out again in cash.
>
> Louisa, please can you please get straight on this and let us know how much I need to pay back in"

18. There had been a conversation between a Saroj Virdeeher and Ilona Szczepanik on or about 29 November 2017 in which they discussed the tronc system and agreed any payment out in cash would be paid back into the bank. The service charge had already been paid out to staff members through payroll before the payment back was made.

19. On 9 December 2017, there was a payment out from the till system of £2,228.61. On 11 December 2017 the Claimant paid £2,300into the bank.

20. At the end of November 2017 it had been agreed that the Claimant and his assistant would attend head office a receive training about how the service charge was to be dealt with. The training had been fixed for 20 December 2017.

21. Before the training took place substantial sums of money had been built up in the safe because money continued to be paid out through the till system. A sum of approximately £3,500 had built up. The Claimant states that he paid the money in cash payments to the staff of the Lansdowne from about 20 December to 26 December 2017.

22. By the time the Claimant attended the training with Ms Virdee on 20 December 2017 the first payments had been made. I do not accept his evidence that he told Ms Virdee that the payments had been made.

23. On 8 January 2018, the Claimant attended an investigation meeting with James Urquhart, HR manager in relation to the fact that he had closed the Lansdowne Park without prior authorisation early one afternoon. The Claimant attended a disciplinary hearing in respect of that matter on 17 January 2018. On 18 January 2018 he was issued first written warning in respect of that conduct. He did not appeal against that decision. The Claimant has not suggested, or put forward evidence to suggest, that there was anything improper about that warning being issued.

24. During January 2018 it came to light that substantial cash payments had been made to staff by the Claimant. On 1 January 2018 Ms Salussolia sent an email asking for details of training. She referred to the possibility of an investigation and a possible disciplinary hearing. The Claimant alleges that this shows that the matter had be pre-judged. I consider it indicates no more than that there

was a serious matter to be investigated, which might, if established, result in a disciplinary meeting.

25. On 1 February 2018 at Ms Virdee responded to email queries and set out her version of the conversation on 27 November 2017 and in respect of the training on 20 December 2018

26. On the Claimant's return from holiday, he was called to a an investigatory meeting on 14 February 2018, held by Sally Allen, HR Manager. The Claimant has subsequently complained about the manner in which the investigation was conducted. During the meeting the Claimant raised numerous issues about the problems that had occurred since the takeover of the business, but accepted that he had made cash payments to staff by putting cash in envelopes. This had the consequence that the payments were made without deduction of PAYE and also put into question the arrangement under which such payments could be made without deduction of National Insurance. It also resulted in there being a failure deduct the administration charge for processing the payments.

27. The Claimant was suspended from employment on 14 February 2018.

28. On15 February 2018, the Claimant lodged a grievance dealing with various concerns that he had about the changes in the way the business was run since it had been taken over, and raising a complaint that Ms Allen had acted aggressively at the disciplinary investigation meeting.

29. The Claimant suggested in the investigation meeting that Ms Salussolia told him when he raised a query about service charge that he should do what he thought best. In an email of 16 February 2018 Ms Salussolia denied that was case.

30. On 17 February 2018 the disciplinary hearing was put on hold because there was some limited overlap between the disciplinary process and the grievance; i.e. the issue about the way in which Ms Allen had conducted the investigatory meeting.

31. The Claimant attended a grievance hearing on 19 February 2018 held by Nick Salussolia, the Operations Manager. On 20 February 2018, the Claimant's grievance was dismissed. He appealed against that outcome on 22 February 2018. By letter dated 22 February 2018 the Claimant was given notice of a grievance appeal hearing for 27 February 2018. On 27 February 2018 the Claimant sent an email stating that he was unable to attend the appeal but was happy for the matter to proceed in his absence. On 1 March 2018 the Claimant answered written questions in respect of his grievance. The grievance appeal was held on 1 March 2018. On 2 March 2018 the grievance was dismissed.

32. On 6 March 2018 a disciplinary hearing was held before Mr Urquhart. The Claimant raised the problems he had after money started to be paid out through the till in respect of service charge. He stated that he had understood that 100% service charge was to be paid to staff and that did so by operating a points system. He stated that for all the time he had worked at the pub service charge had been paid through payroll. He gave a much less clear explanation of the reason why he paid the money in cash. He said that it was partly

because it was Christmas period. When he was asked whether he had received authorisation to do so, he stated that he had not needed to seek permission before because service charge had always been paid through payroll. The Claimant stated that he thought the monies should be treated as cash tips. He stated that he thought the payments were similar to the envelopes of money the previous owner had given staff at Christmas. He stated that he thought that the payment out through the till was a new way of dealing with the service charge and that it should now be paid out in cash.

33. On 7 March 2018 Ms Virdee provided answers to written questions about dealing with service charge. She stated that she had a discussion with the Claimant on 27 November 2017 which had lasted over an hour. She stated that her assistant had overheard the conversation. The assistant was asked about this. It was established that there had been a discussion, although it was for a period considerably less than an hour.

34. On 9 March 2018 the Claimant was informed that he was to be summarily dismissed. Mr Urquhart decided that the Claimant had appreciated when the money was paid out in November 2017 that it should be banked. There was no good reason for him failing to bank it in December 2017 or seek management instruction about what was to be done with the monies that had built up in the safe. Mr Urquhart stated that he did not take any account of the previous warning in deciding to dismiss the Claimant.

35. The Claimant appealed against dismissal on 9 March 2018. Further slightly different versions of the appeal letter were produced on 10 and 12 March 2018. The appeal hearing took place on 21 March 2018 before Nick Salussolia. The Claimant challenged the introduction of the 5% administration fee. He said his understanding was that 100% of the charge should go to employees. He stated that by the time he attended training at head office some of the money had already been paid out. He stated “I distributed the service charges as staff were putting pressure on me. Saroj never replied to my emails. Saroj said I had to wait again. Staff were getting aggressive and obviously it was being thought that service charges was being struck off”.

36. The appeal outcome was sent by letter on 28 March 2018. Mr Salussolia held that the Claimant had understood how to distribute service charge but had failed to do so and improperly distributed sums of money in cash. The appeal was dismissed.

The Law

Unfair Dismissal

37. Pursuant to s.94 of the Employment Rights Act 1996 (“ERA”) an employee has the right not to be unfairly dismissed. It is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98(2)(b) ERA, a reason which relates to the conduct of the employee.

38. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This 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. This is to be determined in accordance with equity and the substantial merits of the case.

39. In considering dismissal for misconduct the Tribunal is guided by the principles set out in **British Home Stores v Burchell** [1978] IRLR 379, taking into account the neutral burden of proof that now applies in considering the fairness of the dismissal. The Tribunal considers whether at the time of the dismissal the Respondent had a genuine belief in the misconduct alleged, whether the Respondent had reasonable grounds for believing the Claimant was guilty of that misconduct and, at the time it held the belief, whether the Respondent had carried out as much investigation as was reasonable in all the circumstances.

40. The Tribunal will go on to consider whether the dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.

41. It is not for the Tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank plc v Madden** [2000] IRLR 827.

42. The band of reasonable responses test applies to the decision to dismiss and the investigation that took place: **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23.

43. The Tribunal must consider whether the investigation was reasonable, not whether it itself would have chosen some alternative reasonable process to that adopted by the Respondent.

44. The more serious the allegations and more far reaching the effect on the employee of dismissal, the more rigour will be expected of the employer: **A v B** [2003] IRLR 405. It is particularly important that employers take their responsibility seriously where dismissal is likely to have a serious effect on the employee's reputation or ability to work in his or her chosen field: **Crawford & another v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402.

45. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

46. Section 122(2) ERA provides for a reduction of the basic award where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it.

47. There are two stages at which the Tribunal has regard to justice and equity in considering the compensatory award. Pursuant to Section 123(1) ERA the Tribunal should award compensation of such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as the

loss is attributable to the action taken by the employer. Section 123(6) ERA provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion that it considers just and equitable having regard to that finding.

48. The equivalent provision to Section 123(1) ERA also founded what is referred to as a **Polkey**[1] reduction where it is decided that there is a chance that had a fair procedure been operated the employee would have been dismissed in any event. Again, that cannot have affected the dismissal but may still result in it being appropriate to reduce compensation because the loss has not been sustained by the employee entirely by reason of the action of the employer, because dismissal might have occurred in any event. At page 364H Lord Keith held that if taking the appropriate steps which the employer failed to take before dismissing the employee would not have affected the outcome this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation.

49. In a case where the conduct of the employee occurred prior to the dismissal and was causally connected to the dismissal the compensatory award may be reduced under Section 123(6). If the unfairness had a causal effect on the dismissal a finding of 100% contribution may not be made. The causal connection between the conduct and the dismissal is not required under Section 122(2) or 123(1).

50. It has been observed in the Employment Appeal Tribunal that 100% reductions in compensation are rare, although permissible, and that, therefore, they require justification by evidence and must be supported by reasons: **Moreland v David Newton (T/A) Aden Castings** (22nd July 1994): EAT/435/92 and **Lemonious v Church Commissioners** UKEAT/0253/12/KN.

51. In considering **Polkey**, contribution and just and equitable compensation the Tribunal has to make its own factual findings about what would have happened had a fair procedure been applied and/or whether the misconduct did in fact take place. That is a very different approach to that in determining whether the dismissal was fair or unfair which turns on the question of whether the respondent's decision, on the evidence that it considered, was one that was open to a reasonable employer.

Wrongful Dismissal

52. Dismissal of an employee without giving notice is unlawful unless the employee is guilty of a fundamental breach of contract which permits the employer to dismiss immediately because it goes to the root of the contract and shows that the employee no longer considers himself to be bound to comply with the terms of the contract.

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[1] **Polkey v AE Dayton Services** [1987] IRLR

Analysis

53. In a claim of unfair dismissal, I must first consider what was the reason for dismissal. I accept that it was a reason that related to the Claimant's conduct; specifically, that he had paid out sums of money in cash to staff in December 2017 without permission.

54. While the Respondent's disciplinary procedure includes failure to follow written cash handling procedures as potential gross misconduct, there were no written cash handling policies.

55. I accpet that the Respondent genuinely believed that the Claimant was guilty of the conduct alleged in against him. I accept that there was a reasonable investigation. The Respondent concluded that under the previous owner service charge payments to staff were made through payroll. They concluded that there was an error in the settings on the tills that resulted in service charge being paid out in cash. After a payment was made to staff through payroll in November 2018 the Claimant had repaid the monies into the bank. The Respondent reasonably believed that the Claimant understood that the cash that built up in the safe as a result of further payments out from the till system should have been paid into the bank. They reasonably concluded that he had failed in his duties by not doing so, but instead paying the money to staff in cash. This meant that there was a failure to apply PAYE, to deduct administration fees, and put in question the appropriateness of the payments being made without deduction of national insurance.

56. It was also clear that there had been a great deal of confusion caused by the erroneous setting up of the cash tills system which resulted in the payments being made. The Respondent accepted that the Claimant had not acted dishonestly. They concluded that he failed to follow instructions and made the payments without permission.

57. Was the payment of the sums so serious as to amount to gross misconduct? Gross misconduct is conduct that is so serious that it is a fundamental breach of contract, which entitles that an employer to determine the contract immediately without payment of notice monies. The most common examples of gross misconduct involve dishonesty. There may also be circumstances in which gross negligence, if sufficiently serious, might amount to gross misconduct. However, care should be taken before concluding that honest conduct is so serious that it constitutes gross misconduct.

58. In this case I conclude that no reasonable employer could have concluded that the Claimant's conduct was so serious as to amount to gross misconduct. There was no question of him acting dishonestly. He himself brought the matter to management's attention. He suggested a manner in which the problem could be corrected by the payments being treated in as an advance. He was working in a stressful situation, it being the busiest time of the year. He was having to deal with an incorrect setting on the cash tills. Taking into account all those matters, and the fact that the there was no cash handling a policy, I do not consider that any reasonable employer would have treated this as so

serious as to constitute gross misconduct. I do not consider any reasonable employer would have dismissed the Claimant for this conduct alone.

59. I consider that the Respondent was entitled to decide that the Claimant was guilty of misconduct. He had previously paid cash, paid out as a result of the erroneous setting on the tills, into the bank for the previous month's service charge. He had an opportunity at the training on 20 November 2017 to check how such payments should be dealt with. He could have waited for the training before making any payments. He could have stopped making payments after the training and explained the mistake he had made. The Respondent was entitled to treat his actions as serious misconduct.

60. The Respondent stated that they specifically decided not to take into account the previous written warning in their decision to dismiss. They stated that they relied only on the Claimant's cash payments to staff. In circumstances in which that conduct was not so serious as to amount to gross misconduct I consider that the dismissal was unfair. The cash payments alone, in the circumstances of this case, was not so serious that a reasonable employer would dismiss in circumstances in which they decided to ignore the Claimant's previous warning.

61. However, I do consider that the Claimant was guilty of blameworthy conduct that resulted in his dismissal. I consider it is appropriate to reduce the basic award by 60%.

62. I also consider that the Respondent could fairly have taken the prior written warning into account. The Claimant was subject to a first written warning for closing the pub without authorisation. In circumstances in which a key element of the further offence was a failure to seek management guidance before taking the decision to make the payments in cash, the Respondent could have fairly dismissed on the basis that the payment out was serious misconduct following on from written warning. In those circumstances I consider that it is inevitable that the Claimant would have been dismissed at the date on which he was dismissed had a fair process been operated.

63. Accordingly, in respect of the claim of unfair dismissal, the Claimant is entitled only to 40% of the basic award.

64. On my analysis of the evidence, I do not consider that the Claimant's action, for which he was, in fact, dismissed, i.e. making the cash payments to staff, was sufficiently serious to constitute gross misconduct. I do not consider that his action were of so serious a nature as to fundamentally breach the contract of employment, so as to entitle the Respondent to dismiss without notice. The Claimant was wrongfully dismissed and is entitled to recover his notice monies

Employment Judge Tayler

7 February 2019

Judgment and Reasons sent to the parties on 12 Feb. 19