EMPLOYMENT TRIBUNALS

Claimant: Mrs S Newton

Respondent: Aramark Ltd

Heard at: **Bristol** **On:** **13 March 2019**

Before: **Employment Judge Livesey**

Representation
Claimant: In person
Respondent: Mr Chaudhry

JUDGMENT having been sent to the parties on 14 March 2019 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claim

1.1 By a Claim Form dated 24 September 2018, the Claimant brought one complaint of unfair dismissal.

2. The evidence

2.1 On behalf of the Respondent, Mr Parker, a Director, and Mrs Jones, a General Manager, both gave evidence. The Claimant also gave evidence in support of her claim.

2.2 The following documentary evidence was also produced;
- C1 a small bundle of documents relating to the Claimant's appeal;
- R1 a hearing bundle;
- R2 the Respondent's representative's written submissions.

3. The issues

3.1 The issues in the case were discussed at the start of the hearing.

3.2 The Claimant accepted that the reason for her dismissal had related to her conduct, but she challenged its fairness on several grounds under s. 98 (4). In relation to the *Burchell* test, she did not accept that the Respondent had reasonable grounds upon which to believe that she had been guilty of the misconduct alleged because she considered that Mr Stenner had not

followed protocol by removing her till tray. She also criticised the disciplinary process because she was not afforded a right of appeal and she believed that the sanction of dismissal had fallen outside the band of responses available to a reasonable employer. The Claimant had been in breach of two previous warnings but she asserted bad faith in respect of the first warning.

3.3 The Respondent ran arguments under the principle in *Polkey* and of contributory conduct under ss. 122 (2) and 123 (6) of the Act.

4. The facts

4.1 I reached factual findings on the balance of probabilities. I attempted to confine those findings to matters which were relevant to a determination of the issues.

4.2 Any pages referred to within these Reasons are to pages within the hearing bundle, R1, unless otherwise stated and have been cited in square brackets.

4.3 The Respondent runs food services operations and outlets across the UK and employs approximately 7,000 people. It operates a retail shop and restaurant on the premises of Swindon College where the Claimant was employed from October 2007 as a shop assistant. It appeared that she may have been employed by a previous business, but her employment transferred to the Respondent in August 2015.

4.4 On 12 May 2017, the Claimant alleged that employees of Swindon College accused her of 'pocketing money' from the tills. There had been a conversation over the cost of some cakes; the Claimant had said that they were not reduced but the customers expressed the belief that they ought to have been and that she would actually have pocketed half of the value of their sale. Even on the Claimant's subsequent account, it seemed to have been something of a throwaway comment [53].

4.5 Swindon College investigated the complaint which the Claimant raised against the employees who were interviewed (although one did not sign his account because he went on leave [51-2]). Ultimately, the complaint was rejected, but the Respondent then took the view that it had tarnished its reputation with the College and the Claimant's conduct was therefore investigated by them.

4.6 She was interviewed by Mr Stenner, the Catering Manager [53-4] and then invited to a disciplinary hearing [55-6] which took place on 8 June before Mr Harding, a General Manager [59-64]. At the hearing, the Claimant accused the College's employees of lying, but Mr Harding rejected her account on the basis that the witnesses had been interviewed independently and their accounts had corroborated one another. The Claimant was issued with a written warning which was to have lasted for 12 months [65-6].

4.7 She appealed and attended an appeal hearing on 27 June 2017 before Mr Parker, the Director of Operations [69-79]. He heard her account and considered his decision but, later that day, he rejected the appeal in

writing [80-2]. It was a detailed letter in which he expressed preference for the College's statements on the basis of their cross-corroboration.

4.8 On 31 August 2017, the Claimant was involved in another incident. She had been responsible for closing the store at 3.00 pm but the Respondent's case was that she started closing early and was dismantling the coffee machine when a customer was attempting to use it. It was alleged that she also attempted to close the shutters and was rude.

4.9 A further investigation followed and a statement was provided by the Claimant's colleague that day, Ms Furkins [83], who was of the opinion that the Claimant had been rude to the customer. The Claimant was interviewed and accepted that she had tried to close early, but she denied having been rude [84].

4.10 The Claimant was invited to a further disciplinary hearing on 21 September [85-6] which took place before Ms Barker on the 25th [87-90]. Following an exploration of the issues, a final written warning was issued on 26 September which was to have lasted for 12 months [91-2]. Again, the Claimant appealed but Mr Parker rejected her arguments, following a hearing that took place on 9 October [96-106].

4.11 In 2018, on 21 June, Mr Stenner discovered that 2 calculators were unaccounted for within the store. Upon further investigation, he found that one had been sold, but one was still unaccounted for and theft was suspected. The incident caused him to remind the Claimant not to leave the store unattended, particularly if she went to the stockroom.

4.12 The next day, Mr Stenner noticed the Claimant *had* gone to get stock whilst the shop was unattended. He therefore took the cash tray out of her till in her absence to highlight her negligence. When she returned, it was the Respondent's case that she was angry and repeatedly said "*very fucking funny*" to Mr Stenner when she realised what he had done, despite him asking her not to swear. The Claimant accepted that she swore at him but claimed that she stopped after he had asked her to. Mr Stenner provided a statement of the events [110].

4.13 A few days later, on the 27th, Mr Stenner discovered that a customer had complained about the Claimant's conduct towards another employee. She was reported to have accused her colleague of "*fucking nicking*" her stock, a complaint that was made *to* the customer. The precise words were set out in the complainant's statement [111]. He said that he was "*a tad taken back by her aggressive manner*" particularly to a colleague who he had always found to have been "*incredibly kind and friendly*".

4.14 Both of those issues were explored at a further investigatory meeting which took place on 24 June [112-9] during which the Claimant admitted to having left the shop unattended and having been '*fuming*' about the lesson Mr Stenner had taught her. She thought that there may have been customers present when she had spoken to him. With regards the events 27 June, she admitted her foul language that day in front of the customer;

> "*Yes I do, some time when I am really angry but I don't want to do on front of customers but it may come out as it make me angry* [sic]."

She accepted that such language would not have been acceptable to her employer [117].

4.15 The Claimant was invited to a disciplinary hearing to face two allegations [120-1]; that she had used unprofessional language whilst serving a customer at the till on 27 June and, secondly, that she had used inappropriate language to Mr Stenner on 22 June. Curiously, she was not charged with any offence in relation to having left the shop unattended.

4.16 The disciplinary hearing took place on 20 July before Mrs Jones, a General Manager [122-4]. Mrs Jones went through the evidence again with the Claimant and, by letter dated 25 June, the Claimant was dismissed [125-6]. The key factors expressed by Mrs Jones were the nature of the Respondent's customer facing business, the Claimant's apparent lack of remorse and the fact that she was in breach of a written and final written warning. She was afforded a right of appeal and she was provided with the name and address of the person to write to in that respect.

4.17 The Claimant maintained that she appealed on 28 July. She said that she wrote to Ms Sileo at the address provided in her dismissal letter. It was a handwritten letter and she did not keep a copy.

4.18 On 3 August, having heard nothing, she emailed HR Shared Services (paragraph 10 of her witness statement). Again, she heard nothing. On 6 August, therefore, she telephoned and spoke to somebody who told her that they were aware of her appeal, that the person dealing with it was on annual leave and that she would be telephoned when they returned. The Claimant emailed again on 3 September and received nothing more.

4.19 There was no positive evidence from the Respondent that the documents which the Claimant to have sent were not actually received. The Respondent certainly accepted that the emails of 3 August and 3 September, produced by the Claimant within C1, appeared to have been sent to a correct email address.

4.20 Given that the Claimant had appealed the previous warnings and in the absence of evidence from the Respondent to gainsay her evidence in respect of this appeal, I concluded that the letter and emails probably were sent and that the Claimant probably also made the telephone call on or around 6 August.

5. Conclusions

5.1 There was no dispute that the Respondent had a fair reason for the Claimant's dismissal which related to her conduct. The arguments which had been raised related to the fairness of that dismissal under s. 98 (4).

5.2 In cases involving dismissals for reasons relating to an employee's conduct, the tribunal had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303;

(i) did the Respondent genuinely believe that the Claimant was guilty of the misconduct alleged;

(ii) was that believe that based upon reasonable grounds;

(iii) was there a reasonable investigation prior to the Respondent reaching that view?

Crucially, it was not for the tribunal to decide whether the employee had actually committed the act complained of.

5.3 Here, the Claimant did not challenge the first or last limb of the *Burchell* test, but she did assert that the grounds for the Respondent's belief in her guilt had been unreasonable. The problem for her, however, was that, in her Claim Form, she appeared to have accepted much of what had been alleged. Further, the issue which she raised in respect of the reasonableness of the Respondent's view did not appear to have been directly relevant to the allegation that she faced.

5.4 The Claimant's case was that Mr Stenner had not followed protocol when he removed the cash tray from her till, but that ignored the fact that she did not face any allegation about the fact that she had left the till and/or shop unattended. Rather, they concerned her rudeness to Mr Stenner and a customer on another occasion, neither of which she disputed when interviewed. Accordingly, I did not consider there to be any merit in those arguments

5.5 The Claimant also challenged the fairness of the sanction that was imposed. To that extent, I was not permitted to impose my own view of the appropriate sanction. Rather, I had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283). Section 98 (4)(b) of the Act required me to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". I was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677).

5.6 It was not usually appropriate for a tribunal to reopen the circumstances which led to an earlier warning which an employee may then have been found to have breached, leading to a dismissal. An employer is entitled to rely upon a final warning provided that it was issued in good faith, that there were at least prima facie grounds for issuing it and that it had not been manifestly inappropriate to do so (*Davies-v-Sandwell MBC* [2013] EWCA Civ 135). I also took account of the six guidelines found in the case of *Wincanton Group-v-Stone* UKEAT/0011/12/1110. There generally needed to have been exceptional circumstances before a tribunal should be prepared to go behind an earlier disciplinary process, but it nevertheless has to consider the issues identified in *Davies* before that decision can be made.

5.7 The Claimant alleged bad faith in respect of the first written warning, not the final written warning. However, no suggestion of bad faith was put to Mr Parker when he was cross-examined and it was not clear to me what bad faith was alleged. What the Claimant really seemed to have been complaining about was the Respondent's decision to prefer the account of the College's three witnesses to that of her own. In reality, that was not an allegation of bad faith.

5.8 It could not have been said that the decision to dismiss fell outside the band of responses available to a reasonable employer in these circumstances in my judgment given the fact of the previous written warning and the final written warning for offences which had not been dissimilar, the nature of the Respondent's business and the Claimant's somewhat robust approach to the allegations of misconduct.

5.9 As to arguments of procedural fairness, the Respondent clearly faced a problem. By failing to deal with the Claimant's appeal, it was in breach of its own policy [43] and the ACAS Code of Practice, paragraph 26. That rendered the dismissal unfair under s. 98 (4) and Mr Chaudhry did not contend otherwise.

5.10 The dismissal was therefore unfair under s. 98 (4).

5.11 Issues under *Polkey* and ss. 122 and 123 then fell to be dealt with.

5.12 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 introduced an approach which required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

5.13 It was for the employer to adduce relevant evidence on the issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty was inevitable and a tribunal should not be reluctant to undertake an examination of such an issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

5.14 I was also invited to consider whether the Claimant's dismissal was caused by or contributed to by her own conduct within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under the section, the conduct needed to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (*Nelson-v-BBC* [1980] ICR 110). I applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56 which required me to;

(i) Indentify the conduct;
(ii) Consider whether it was blameworthy;
(iii) Consider whether it caused or contributed to the dismissal;
(iv) Determined whether it was just and equitable to reduce compensation;
(v) Determined by what level such a reduction was just and equitable.

I also had to consider the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to her dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

5.15 The Claimant's evidence was that her appeal concerned Mr Stenner's taking of her till tray and the lack of instruction that she had received about leaving the shop unattended. Neither of those issues addressed the matters for which she was actually dismissed. Given the fact, therefore, that her appeal concerned matters which were not germane to her dismissal, that she did not dispute the essence of the two factual allegations which led to her dismissal and that she had a live final written warning on her file, there was no reasonable prospect of the appeal succeeding. It was appropriate, in my judgment, for a reduction of 100% under the principle in *Polkey.*

5.16 Further and in any event, the Claimant's misconduct was patent, it clearly caused her dismissal and I was prepared to accede to the Respondent's invitation to reduce compensation by 75% because it was just and equitable to do so under s. 122 (2), although the same would have applied under s. 123 (6) as well but for my previous finding.

6. Remedy

6.1 Compensation was agreed in the sum of £938.96, being 25% of the Claimant's basic award.

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Employment Judge Livesey

Date: 22 March 2019