Case No: 2300784/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr M Z Molnar

Respondent: Cattle Grid Restaurant Ltd

Heard at: London South (Croydon) **On: 18 January 2019**

Before: Employment Judge John Crosfill

Representation

Claimant: In Person

Respondent: Mr Steven Novak a Director

RESERVED JUDGMENT

1. The Claimant's claim for his final instalment of wages brought under Section 23 of the Employment Rights Act 1996 is well founded.

2. The Respondent is ordered to pay the Claimant the sum of **£480.77** in wages.

3. The Claimant's claim for wrongful dismissal brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is well founded.

4. The Respondent is ordered to pay the Claimant the sum of **£1596.48** by way of damages.

5. The Respondent is ordered to pay an uplift under Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 of 20% of the sums at paragraphs 2 and 4 above. That is £480.77 + £1,596.48 x 20% = **£415.45**

6. For the avoidance of doubt, the Respondent is ordered to pay the Claimant each of the sums set out under paragraphs 2, 4 and 5 above.

7. The Recoupment regulations do not apply to the said awards.

REASONS

1. The Respondent is a company which owns and operates restaurants including a branch in Balham, London. Between 6 November 2017 and 8 January 2018 the Claimant was employed by the Respondent as a General Manager. The circumstances upon which his employment terminated are disputed. The Respondent says that the Claimant resigned in circumstances where he had 'committed theft'. The Claimant says that he was summarily dismissed. He has brought claims for is final week's wages and seeks damages for wrongful dismissal.

The hearing

2. The parties had been sent the standard directions applicable to wages act claims whereby they were directed to prepare witness statements in advance of the hearing. Neither party had complied in full with those directions. The Claimant had prepared a witness statement from his former colleague Mr Nasser-Eddine Ghobrini but, mistakenly believing that he was not a 'witness', had not prepared a witness statement for himself. He had prepared a bundle of documents for use by the Tribunal. Mr Steven Novak, a Director of the Respondent appeared on its behalf along with a colleague Matthew Haworth. They said that they had learned of the hearing only the previous day. They had taken no steps to prepare for the hearing.

3. I noted from the Tribunal file that the Respondent had been properly served with the ET1 and ET2 both at its registered office and at a business address in London. As such the Respondent did have formal notice of hearing albeit the notice of hearing was only served at its registered office. Any failure to note the hearing date was therefore an administrative failure by the Respondent rather than the Employment Tribunal service. I noted that the value of the claim taken at its highest was less than £3000. Neither party formally applied for an adjournment. I considered that justice could be done in this case by permitting both parties sufficient time to write witness statements and have them copied and exchanged before starting to hear the evidence. I therefore put the matter back until 2 PM to enable this to happen.

4. In the course of the evidence the Respondent indicated that it had various till reports held electronically on Mr Haworth's mobile telephone. I asked for those to be emailed to the Employment Tribunal and copies were provided to both parties. The Claimant made no complaint about the late disclosure.

5. I heard evidence from Mr Novak, Mr Haworth, the Claimant and from Mr Nasser-Eddine Ghobrini. Each witness was cross examined by the opposing party. The level of distrust between the parties was very apparent.

6. Because of the delays caused by the lack of preparation by all parties there was insufficient time for me to give a reasoned judgement and I therefore reserved my decision.

The issues

7. I enquired from the Respondent whether it had paid the Claimant's final instalment of wages. Mr Novak informed me that it had not as it regarded the Claimant as a thief who owed the company money. As the Claimant's claim was clearly one brought under Part II of the Employment Rights Act 1996 it would have been necessary for the Respondent to demonstrate that it had a lawful basis for making any deduction from wages. The Respondent was unaware of this and the written contract of employment between the parties made no provision for deductions from pay.

8. In respect of the claim for notice pay there appeared to be two issues. Firstly, a question of whether the Claimant had resigned and secondly a question of whether he was guilty of gross misconduct entitling the Respondent to dismiss him without notice or pay in lieu of notice.

9. On exploring the question of whether there had been a resignation the Respondent accepted that no express words of resignation had been used. On that basis I decided to hear evidence from the Respondent first.

The Law

Deductions from wages

10. The right not to suffer unlawful deductions from wages is found in section 13 of the Employment Rights Act 1996. The material parts are as follows:

> 13 Right not to suffer unauthorised deductions.
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> > (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> >
> > (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> > (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
> >
> > (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) ……(7)

11. Section 14 of the Employment Rights Act 1996 contains various exceptions to Section 13 but none which were of relevance in the present case. Sections 17 – 22 of the Employment Rights Act 1996 set out a special regime where deductions from pay are made from employees in retail employment on account of cash shortages and stock deficiencies. Those sections do not make it lawful to make deductions on account of such cash shortages or stock deficiencies unless the contract of employment permits it or the right to do so has been agreed in writing in advance of the deduction being made. The provisions are in addition to and do not diminish the general protection given by Section 13.

Breach of contract – wrongful dismissal

12. It is unlawful for a party to a contract of employment to terminate that agreement other than in accordance with the terms of the agreement (generally by giving notice in accordance with the terms of the contract) unless it is entitled to terminate the agreement summarily because the other party is in serious breach of contract. Such a claim is usually referred to as a 'wrongful dismissal' claim and may be brought in the Employment Tribunal pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

13. In order to bring a claim of wrongful dismissal the employee must establish that the employer has terminated the contract. If the employee establishes that the contract has been terminated without agreed contractual notice being given then, in order to avoid a finding of wrongful dismissal, the burden of proof is on the employer to show that there has been a serious breach of contract by the employee.

14. The appropriate test for what amounts to a serious breach of contract by the employee is that set out in ***Neary v Dean of Westminster*** **[1999] IRLR 288** where it was said that the conduct 'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'. There is no doubt that theft is conduct that would ordinarily justify a summary dismissal.

15. The issue of whether the employer or employee terminated the contract is a question of fact to be determined having regard to all of the circumstances. A resignation by the employee simply to avoid a dismissal may in fact be a dismissal see ***Sandhu v Jan de Rijk Transport Ltd*** **[2007] IRLR 519, CA**. The Claimant's case was that there was an express dismissal by Mr Novak on 8 January 2018. On my findings below it is unnecessary to set out the law in respect of termination in any further detail.

The claim for the final installment of wages

16. This matter was explored with the Respondent in advance of hearing any evidence. The Claimant was entitled to a salary of £25,000 and was paid weekly. It was common ground that the Respondent had not paid the Claimant the sum of £480.77 (gross) for his final week's work.

17. The parties agreed that the only contractual document relevant to this issue was the contract of employment signed by the Claimant and Mr Haworth on 6 December 2017.

18. The contract of employment had no provision within it permitting the Respondent to deduct or withhold wages where there were cash or stock shortages.

19. Under the contract of employment, the Claimant is entitled to his salary until the contract is terminated. The fact that there might be a claim against him because of any dishonesty might at common law provide the Respondent with a counterclaim but it does not permit the Respondent to make a deduction from wages. Indeed, the effect of doing so has the consequence of extinguishing any such counterclaim to the extent of the unlawful deduction.

20. The Claimant is entitled to a declaration that there has been an unlawful deduction of wages from his final installment of pay in the sum of £480.77. That should be paid through the Respondent's payroll in the usual way.

Wrongful dismissal

21. In order to determine this claim I have made the general findings of fact set out below. I make further specific findings of fact in my discussion and conclusions.

22. The Respondent operates a restaurant in Balham. It has a simple menu aimed as its name suggests at meat eaters. The Claimant was employed from early November 2017 as a General Manager. He has worked for some years in the restaurant business. He has never previously faced allegations of dishonesty.

23. The restaurant operates the following system for placing orders. A waiter attends to the customers at their table. A physical note is taken of the order. That order is then entered onto the till which generates a note of what is required for the kitchen and also prepares a draft bill.

24. Where an item is removed from the order it shows up on a till report as a 'void'. There are many perfectly good reasons why an item might be removed from any order. When an item is removed the person operating the till is given an option to set out the reason. In the till reports submitted by the Respondent three reasons may be identified (a) the customer changing their mind (b) a quality issue and (c) a user error. These three reasons are self-explanatory.

25. The till reports provided by the Respondent showed that there was a marked difference in the number of voided transactions between October (before the Claimant started) and during the period which the Claimant worked. A further pattern was notable in that on evenings where the two more experienced waiting staff worked alone there were few if any voided transactions.

26. When Matthew Haworth gave evidence he told me and I accept that cash transactions make up only about 20% of the total sales at the restaurant.

27. The Claimant says, and I accept, that in his short tenure as General Manager he endeavored to tighten up some aspects of the restaurant process. In particular, he introduced a system designed to make the allocation of gratuities more transparent. He also introduced a clampdown on staff having free food at

the restaurant by imposing limits. These matters were evidenced by WhatsApp messages between the staff members.

28. In the run-up to Christmas the Claimant needed to take on some additional staff. As such there were a number of new staff members. One of those was Nasser-Eddine Ghobrini who gave evidence before me. The Respondent was aware of that and also aware that some of the staff were being paid cash in hand. However, two of the restaurant waiting staff were experienced as was the chef.

29. At some point around Christmas 2017 the Claimant attended a meeting with Matthew Haworth and Steven Novak at premises away from the restaurant. During this meeting the Claimant was asked why there were a high number of voided transactions on the till roll. At this point in time there was no suggestion that the Claimant was acting in a dishonest manner or that he was personally responsible. Following this meeting he sent a WhatsApp message to the staff members which read as follows:

> *"Hello guys! I just had a serious meeting with the owners! And they are super upset about void/comp/discount. I'll have a sheet printed behind the bar and we must record every action like that, also there is not more discount for staff, all friends until things won't be sorted. All must use your own login, to avoid confusion"*

30. I find that whilst the till was capable of recording which individuals responsible for which transaction it had been commonplace to disregard that and for a number of individuals to use the Claimant's login.

31. On 8 January 2018 Matthew Haworth and Steven Novak attended the restaurant premises. It was their case in the ET3 and in their witness statements that they asked the Claimant whether he wanted them to call the police or just wish to leave. They suggested that he simply left and that this was in effect an admission of guilt. When Steven Novak gave evidence the Claimant put it to him that he was told that he was 'fired'. Steven Novak initially denied that was the case. The Claimant directed him to a transcript of the conversation which was found in his bundle. It was readily apparent to me that the Claimant had recorded the conversation and I asked if that was the case. Once Steven Novak recognised that there might be a recording of the conversation he accepted that the Claimant's record was accurate. He tried to suggest that the fact that the Claimant had made a recording at all was indicative of guilt.

32. Nasser-Eddine Ghobrini had been due to work on 8 January 2018. When he attended he was told that the restaurant was closed due to staff shortages. When he telephoned Mathew Haworth he was told that he was dismissed because he was a friend of the Claimant (who had given him a reference).

33. The Claimant's immediate response after his dismissal was to send a WhatsApp message to the staff in which he made an impassioned denial of any wrongdoing and wished them all the best. Thereafter the Claimant brought a grievance in which he denied any dishonesty and complained that he had not been paid either his salary or his contractual notice pay. Steven Novak simply responded with a suggestion that if the Claimant pursued his threat to take the Respondent to an Employment Tribunal he would call the police. The Claimant

responded asking him to do exactly that. In fact, the matter has never been reported to the police.

34. The Claimant immediately looked for alternative work and secured a position but more than 28 days after his dismissal. He applied for but was not given job seekers allowance.

Discussion and conclusions - wrongful dismissal

35. As identified above, the first issue that I needed to determine was whether or not the Claimant was dismissed by the Respondent. The Respondent's case was that the Claimant had been asked whether he wished to leave to avoid the Police being called. Having heard the evidence, I am satisfied that that was not the sequence of events at all. I accept the Claimant's evidence, effectively conceded by Steve Novak, that he was told that he was fired and could leave or else the police would be called. I do not consider the fact that he left the premises in those circumstances to be indicative of guilt. It was a brutal dismissal and the Claimant had no choice other than to leave. He later invited police involvement.

36. Telling an employee that they are fired amounts to an express dismissal. The fact that the employee leaves the premises thereafter whether under a threat of the police being called or otherwise makes no difference to that conclusion. I am therefore satisfied that the Claimant was dismissed.

37. The Claimant's contract of employment contains an express term that either party may terminate the contract upon 28 days' notice. It is the Respondent's case that they were entitled to summarily dismiss the Claimant by reason of his dishonesty. As set out above the burden of proof falls upon the Respondent to show that the Claimant was dishonest.

38. Both Steven Novak and Matthew Haworth suggested in their evidence voiding transactions after payment permitted a dishonest employee to remove cash from the till leaving the till totals balancing. They both suggested that this was a well-known scam.

39. In his witness statement Matthew Haworth suggested that he had been told by another employee that the Claimant had been seen voiding a transaction after payment had been made. If that were true that would call out for an explanation. I regret to say that I have little confidence in the evidence of either Steven Novak or Matthew Haworth. Both had attempted to say that the Claimant had resigned when in fact he had plainly been dismissed. Both it seems to me had been involved in dismissing both the Claimant and Nasser-Eddine Ghobrini in circumstances which, had they had the right to do so, would have given rise to claims of unfair dismissal. Each dismissal could fairly be described as brutal. There was nothing recognizable as a fair process and neither employee was given a fair opportunity to comment on the evidence against them. They have clearly convinced themselves of the Claimant's guilt. They have slanted one conversation to support their theory and I have no confidence they do not do so when telling me what other staff members might have said. I therefore place little weight on this hearsay evidence.

40. I do accept the Respondent's evidence that there was a marked difference in the number of voided transactions during the Claimant's tenure. I also accept that the number of voids was higher than might be expected.

41. A difficulty for the Respondent's case is that there was no evidence before me that there was any money missing at all. The Respondent estimated that the voided transactions during the Claimant's tenure was between 8 to 10% of the turnover. If that was attributable to cash being withdrawn from the till, then as cash formed only 20% of the turnover the cash takings would have been reduced by something like half. The Respondent had simply ignored this and provided me with no evidence that there was any reduction in the cash takings.

42. The increase in voided transactions need not necessarily be a consequence of dishonesty. A more lenient attitude to customer complaints would increase the number of avoided transactions due to 'quality issues'. It seems to me that in a restaurant which serves steak there is a high possibility of customers complaining about their food. By the same token 'user errors' might well increase with inexperienced staff. I am not at all surprised that the number of voids was significantly less when the two experienced staff were on duty. For these reasons it is quite possible that the number of voids were higher due to reasons other than dishonesty.

43. The next difficulty that the Respondent faces is that even if the voided transactions were a symptom of fraud the only evidence that the Claimant is personally responsible is the fact that the practice was higher during his tenure. Without casting any aspersions at all (as I am not satisfied that anybody was dishonest) I note that the Claimant's tenure ended at the same time as Nasser-Eddine Ghobrini.

44. I take into account the evidence I heard from the Claimant. He had no explanation for the number of voids other than those given in the till reports. He said that the restaurant was busy and the staff inexperienced. I found the Claimant to be a measured and truthful witness. He has been protesting his innocence from the very moment of his dismissal. I take this into account in reaching my conclusion below.

45. As I set out above it is for the Respondent to show that it is more likely than not that the Claimant was dishonest. I find that it has failed to do so. The Respondent's witnesses may be right that there was some suspicious activity at the restaurant during the Claimant's tenure but that is not sufficient to prove the Respondent's case.

46. I find that the Claimant made full and appropriate attempts to mitigate his loss. Damages should be calculated on the basis of his net earnings (given the date of the dismissal). Those are £399.12 per week. I therefor award the Claimant £1596.48 by way of damages for wrongful dismissal.

ACAS Uplift

47. The Claimant raised a grievance both in relation to the failure to pay his wages and in respect of the failure to make a payment in lieu of notice. The response of the Respondent was simply to threaten the Claimant with police action.

48. Section 207A of the Trade Union and Labour Relations (Consolidation) Act this this1992 reads as follows:

> Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3).....(9)

49. The claims brought by the Claimant under Part II of the Employment Rights Act 1996 and the claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 are both claims listed in Schedule A2.

50. The relevant code of practice is the ACAS Code on Discipline and Grievances in the Workplace 2015. That code suggests that where an employee brings a grievance they should be invited to a meeting to discuss it where they have a right to be accompanied by a colleague or trade union representative. The outcome should be in writing and an appeal offered (see paragraphs 33-45). The Respondent took none of these steps but simply offered retaliation if the Claimant proceeded to a Tribunal.

51. I am satisfied that there was a failure to comply with numerous provisions of a relevant code. I ask myself whether those failures were unreasonable. I have some regard for the fact that I accept that Steven Novak and Matthew Haworth genuinely believed that the Claimant had been dishonest. That said, I regard their belief as reckless because they never gave a moment's thought to the possibility that their suspicions were unfounded. That is just the type of situation where a meeting conducted calmly to discuss the matter is essential. I conclude that the failure to hold such a meeting was indeed unreasonable.

52. I note that the Respondent is a relatively small employer. That said basic standards of fairness should not be disregarded. I consider that the breaches of the code were serious. On balance I consider an uplift of 20% on each award is the appropriate amount.

Employment Judge John Crosfill

Date 25 March 2019