EMPLOYMENT TRIBUNALS

Claimants: Mrs M Baxter
Mrs J Foster

Respondent: B&M Retail Limited

HELD AT: Sheffield **ON:** 14 May 2019
15 May 2019
16 May 2019

BEFORE: Employment Judge Little

REPRESENTATION:

Claimant: In Person
Respondent: Mr I Steel, Solicitor (Bury & Walkers Llp)

JUDGMENT

1. The complaint of each claimant that they had suffered an unauthorised deduction from wages succeeds.

2. The complaint that both claimants had been unfairly dismissed also succeeds.

3. The claimants contributed to their dismissals to the extent of twenty-five percent.

4. The tribunal has not been required to adjudicate in respect of remedy because the parties were able to come to terms and those terms are recorded in an ACAS agreement.

REASONS

1. These reasons are given at the request of Mrs Baxter, the request being made at the hearing.

The complaints

2. Both claimants complained that they had suffered an unlawful deduction from wages and that they had been unfairly dismissed.

3. Concession with regard to the unauthorised deductions from complaint.

   During the course of the hearing Mr Steel acknowledged that both claimants were entitled to a further payment in respect of the last period of their employment. They had not been paid beyond 31 July 2018 however, they were not notified that they had been dismissed until they received letters of dismissal on 9 August 2018. It was agreed that they were entitled to payment in respect of such shifts as they would otherwise have worked in the nine day period in question.

The unfair Dismissal Complaint

4. Both claimants had been dismissed for what the respondent regarded as gross misconduct. The claimants had sold some items of food and drink on a day when the respondent had taken steps, ineffective in my judgment, to ensure that members of the public/customers did not purchase such items because of a rodent infestation in the respondent's warehouse.

The Issues

5. These were defined at a case management hearing which I conducted on 22 January 2019. The essential issues were whether the respondent had been inconsistent in its approach to disciplinary action against eight employees, including the claimants, who on 17 or 18 July 2018, had permitted consumable items to be sold. The other significant issue was whether the respondent had taken into account mitigating factors and so whether any reasonable employer could have imposed the sanction of dismissal in the prevailing circumstances.

The Evidence

6. Both claimants have given evidence. The respondent's evidence has been given by Ms D Abbott, the Manager of the respondent's Castleford store. She was the Investigating Officer; Mr S R Burrell, Manager of the respondent's Doncaster store (where both the claimants were employed) and who was the Dismissing Officer in respect of Mrs Baxter; Mr B Fullerton, Manager of the respondent's Armthorpe Store and who was the Dismissing Officer in respect of Mrs Foster and Mrs A Dodd, Manager of the respondent's Friar Gate store Doncaster who was the Appeal Officer.

Documents

7. The trial bundle before me ran to 196 pages but during the course of the hearing further documents were added such as papers which purported to be correspondence about the claimants' statement of main terms and conditions of employment and a copy of that document.

The Facts

8. I find the following facts:

   (1) At the material time both claimants were employed by the respondent as Customer Service Supervisors. Mrs Foster was originally employed by another retailer and that employment commenced on 13 February 2002. She was subsequently transferred to the respondent under the provisions of the Transfer of Undertakings Regulations. Mrs Baxter's employment with the respondent commenced on 10 March 2014.

   (2) At the beginning of the hearing there was no contractual document before me in relation to the claimants' employment. There was a specimen contract but that was not either of the claimants' contracts they told me. Further documents were put in during the course of the hearing which purported to relate to Mrs Baxter but she said these had not been received by her.

   (3) However, it is not in dispute that the claimants' role was in each case as Customer Service Supervisor. As the job title suggests, that involved a supervisory if not strictly managerial role. It was employment at a higher grade than a general assistant or till operator.

   (4) On 17 July 2018 an environment health officer visited the respondent's Doncaster store and was concerned that there appeared to be an infestation of rats in the warehouse. The respondent is a general retailer and that includes food and soft and alcoholic drinks. Although I have not seen any documentation which might have been issued by the environment health officer, the respondent was, unsurprisingly, advised not to sell any consumable items until the infestation had been dealt with.

   (5) The respondent chose not to take the step of closing the store. Instead it endeavoured to partition off the areas of the shop which had the shelves with the consumable items on it. This was done by stacking up pallets to form a barrier. I was told that notices were put on the barriers explaining to the general public that the areas were closed off due to refurbishment or a refit. I was told that this erroneous statement was to "protect the brand". I have not been shown a copy of such a notice.

   (6) The respondent failed to issue written instructions to its staff that no consumables were to be sold. Accordingly, there was no notice in the staff room or in the area where employees would clock on. Nor was any notice put on the till area.

(7) There is within the bundle at page 122 a copy of a notice/signature form which the respondent says was placed on the warehouse door. However, I was given varying accounts by the respondent's witnesses as to what this related to. It appeared that the notice could have been wholly unrelated to the rat infestation problem. Alternatively, it could have applied to employees who worked in or would go to the warehouse and it is common ground that that did not apply to either of the claimants. In any event, the notice gives no explanation for its injunction that "under no circumstances is any product to go from the back door onto the shop floor via the warehouse or any fire door" other than that "is in relation to food safety".

(8) Rather than issue any written instructions the management at the store decided to use what has been described as a cascade method for this information to be passed on.

(9) On 17 July 2018 both claimants were working the afternoon/evening shift and when they arrived found the store in what the respondent concedes was a chaotic state. The temporary measures referred to above would have been put into effect since approximately 10.00am on that day which is when the inspector called. During the shift Mrs Foster spent most, if not all of her time at a till whereas Mrs Baxter, who primarily worked in the cash office but provided cover to the tills, only worked for approximately an hour on the till. Initially, whilst on the tills both claimants followed instructions that they had been given orally not to allow customers to purchase consumable items. This proved to be a difficult task because despite the respondent's attempts to partition off the shelves containing the food stock and drink, it was clear that customers were either moving the barriers out of the way so that they could put food items or drink items in their trolleys and in some cases they were being assisted in that process by members of staff passing food over the barriers to them. Mrs Foster told me that during her shift she had filled four trolleys worth of "confiscated" food stock – that is items which she did not permit customers to purchase.

(10) Both claimants were also subjected to abuse by customers and, in Mrs Baxter's case, assault as a customer threw a loaf of bread at her.

(11) At some point during their shifts the claimants understood that a change in the no consumables instruction had been made. It was in those circumstances that Mrs Baxter permitted the sale of some San Miguel beer to one customer and some ice pops (Kwenchies). Mrs Foster allowed the sale of two bottles of wine to one customer and four bottles of mineral water to another.

(12) Six other till staff also breached the ban on consumable sales, either on 17 or 18 July. Three of those, who did not have two years continuous employment, were summarily dismissed by Mrs Abbott who had been brought in from another store to investigate the matter. Another two employees were not dismissed because Mrs Abbott concluded that a floor manager had failed to have a "huddle" with them and so they had been unaware of the instruction. The remaining employee was not dismissed in less clear circumstances. That employee was Mia Clark-Hall. In Mrs Abbott's witness statement (paragraph 27) she says that Ms Clark-Hall was

not dismissed because she had not sold any consumable stock. However, when Ms Clark-Hall was interviewed on 21 July 2018, (see page 114) she said that initially she had known about not selling food but had not known the ban extended to drink. She explained that she was only told about drinks after she had been on the till for a while. She was then asked what she did once she was informed about drink to which she replied she didn't sell it. Mrs Abbott concluded that Ms Clark-hall had been vigilant against food and had stopped selling pop/alcohol once Caroline (Burn) had told her. I find that this analysis of Mr Clark-Hall's case underlines the confusion during these two days in July at the respondent's store.

(13) On 19 July 2018 Mrs Abbott interviewed Mrs Baxter and the notes of that meeting begin at page 73. Mrs Baxter explained that she had only heard about the ban on consumable sales by hearsay from other people. She subsequently confirmed that she had been told this by Elise Ingham who was also a Customer Service Supervisor and that this would have been when Ms Ingham handed over to Mrs Baxter at the end of her shift. Mrs Baxter went on to say that subsequently she had been told by someone that it was alright to sell alcohol. She could not remember who that was, but it could have been Mrs Foster. At the end of that meeting Mrs Baxter was suspended.

(14) Mrs Foster's disciplinary interview also took place on 19 July 2018 and the notes begin at page 79. Mrs Abbott also conducted that meeting. Mrs Foster said that she had been briefly told by Caroline Burn about not selling consumables but she went on to say that subsequently she was told that alcohol could be sold. She said that it was Wendy who had told her that. She could not offer an explanation as to why she had sold bottled water (as well as the two bottles of wine) other than to say that she must have just lost it and it was a lapse in concentration. She said however, she had been stopping people all day. Mrs Foster was also suspended.

(15) On 24 July 2018, a Vicky Wilkinson, Human Resources Advisor with the respondent, wrote to each claimant confirming the suspensions and inviting them to a disciplinary hearing. The matter of concern was described as:

> "It is alleged that on Tuesday 17 July 2018 you served food and drink items to customers after being instructed not to do so by environmental health officers".

(16) The letter to Mrs Baxter is at pages 123 – 124 and to Mrs Foster at 125 – 126. In fact it is common ground that the environmental health officer had not given any instruction at all to either claimant. The claimants had not been in the store when the health officer visited. Mrs Baxter pointed this out at her disciplinary hearing but Mr Burrell who chaired the meeting dismissed the objection as being "semantics". Clearly, it was not just semantics. It may well have been a more serious charge or possibly a criminal offence if the claimants had disobeyed a direct instruction from an environmental health officer. Unfortunately, and apparently because of some disconnect, the letters being prepared by HR, this error was perpetuated in the dismissal outcome letter.

(17) Mrs Baxter's disciplinary hearing took place before Mr Burrell on 31 July 2018 and the notes begin at page 128. Mrs Baxter reiterated that at some point she had been told that alcohol could be sold but could not remember who had told her this , other than that it was a cashier. Although she had been told initially not to sell food or any drink, Mrs Baxter queried whether Elise, who had told her this, was 'management'. She said that Elise did not tell her her role or vice versa. She expressed the view that she felt that on the day managers were more interested in customers not knowing what was going on than in taking appropriate steps to mitigate the problem as far as the staff were concerned. Mrs Baxter gave as the explanation for selling the Kwenchy ice pops that they were in a box and so she thought that would be alright. She pointed out that customers were not being told before they entered the store that food and drink could not be purchased. Mr Burrell did not make a decision on the day. Instead on 7 August 2018 he wrote to the claimant informing her that she had been dismissed because of gross misconduct. The letter is at pages 150 – 151. The letter says that the claimant's final pay would be up to the date of leaving, 31 July 2018 but the claimant did not know she had been dismissed until she received the letter on 9 August 2018, signed on behalf of Mr Burrell.

(18) In relation to Mrs Foster's disciplinary hearing, there was an abortive and brief hearing before Mr Burrell when Mrs Foster alleged that Mr Burrell, having been in store on the day in question, was not impartial. It was in those circumstances that another Manager was brought in, Mr Fullerton, and he heard the disciplinary case on 3 August 2018. The notes are on page 137. Mrs Foster accepted that Caroline Burn had waved over to her when she arrived in the store, telling the environmental health officer was in and not to sell consumables. An explanation for not being able to sell such items was to be left to the discretion of the till operator. She conceded that she had sold some mineral water and felt that she had been so busy that she had lost concentration. Mrs Foster went on to explain that a colleague, Wendy Grant, had taken all spirits off the shelves and had put them in a box near Mrs Foster's till. However, Ms Grant then told Mrs Foster that she had been instructed to put them back on the shelf and that they could be sold to customers. Mrs Foster took this to be a relaxation of the ban so that alcoholic drinks could be sold, hence her two bottles of wine. Mrs Foster was accompanied at this meeting by Mr A McCarthy of USDAW. He had accompanied Mrs Baxter at her meeting as well. During the course of Mrs Foster's disciplinary hearing Mr McCarthy asked why a sign had not been prepared to alleviate confusion; why there had been no description of what a consumable item was and why no statement had been taken from Wendy Grant. Mrs Foster went on to suggest that Wendy had also told her that it was alright to sell bottles with screw tops. That applied to the two bottles of wine.

(19) Mr Fullerton reserved his decision but a letter was then sent to Mrs Foster dated 8 August 2018 (pages 152 – 153) notifying her that she had been dismissed. The letter was signed on behalf of Mr Fullerton.

(20) Both claimants appealed against dismissal. Mrs Baxter's appeal letter was put in during the course of this hearing and is now at pages 155A and 155B. Mrs Foster's appeal letter begins at page 155.

(21) The appeal hearings were conducted by Mrs A Dodd on 3 September 2018 in respect of both claimants. The notes in respect of Mrs Baxter's appeal hearing are at pages 163 – 172. The claimants had in the meantime obtained a statement from Wendy Grant. Ms Grant was one of the employees who had been summarily dismissed by Mrs Abbott. A copy of Ms Grant's statement is at page 161. In it she explains that on 17 July she had been informed by Elise Ingham to remove bottles of alcohol from the end bay opposite the tills. However, having done that and whilst washing the shelves, she was then given contrary instructions by Darren Burke the Store Manager and Caroline Burn, Deputy Manager. They had told her that the items that she had taken off were not affected and so were to be put back on the shelves. They did not go on to tell her that those items were not to be sold. Ms Grant inferred from this that alcohol was now to be sold and she said that she informed Mrs Foster of that. Hitherto, the only information which the respondent had from Ms Grant was what she had said during the course of her own disciplinary hearing and that had not featured her interaction with Mrs Foster.

(22) The notes of the appeal meeting for Mrs Foster are at pages 173 – 187. It was not until 3 December 2018 that letters were written to the claimants informing them of the appeal outcome. Mrs Dodd could not give an explanation for this three month delay, nor did she seem particularly concerned about it. She had promptly sent her notes to HR and then it was a matter for them she said. The appeals were unsuccessful. Mrs Dodd felt that it had been inappropriate for the claimants to rely upon what they had been told by Wendy Grant because she was a general assistant and the claimants should have sought confirmation from a manager. I should add that the claimants have explained that they found it very difficult to get hold of a manager during their shift because of the "fire fighting" exercise those managers were endeavouring to carry out. There was a dispute as to whether Mrs Foster had repeatedly asked Mr Burrell whether various items could be sold. Mrs Foster said that she only asked on one occasion and Mr Burrell had snapped at her.

Relevant Law

9. The Employment Rights Act 1996 Section 98(1) and (2) sets out the potentially fair reasons for an employer to dismiss an employee. One of those reasons is conduct.

10. As to whether the potentially fair reasons are actually fair in the circumstances of the case, the statutory test of fairness is contained in the Employment Rights Act 1996 Section 98(4). That provides that where the employer has shown a potentially fair reason to dismiss:

> "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)
>
> (a) 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 and

(b) shall be determined in accordance with equity and the substantial merits of the case".

11. In assessing whether a dismissal is fair in a conduct case the tribunal needs to consider whether there has been a reasonable investigation and whether that investigation provided material which supported a decision to dismiss. Tribunals will often consider whether a decision to dismiss comes within a reasonable band. Could any reasonable employer have dismissed in those circumstances? It is not for the tribunal to substitute it's own decision for that of the reasonable employer.

12. An essential element of fairness in cases where more than one employee appears to have committed the same offence is to ensure that there is consistent treatment. However, inconsistent treatment can only be established if there were no material differences in circumstances of the two employees who have allegedly been treated differently.

13. The Employment Rights Act 1996 provides that if a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the employee it is permissible to reduce the amount of the compensatory award by such proportion as the tribunal considers just and equitable having regard to that finding.

Conclusion

Has the respondent shown a potentially fair reason to dismiss?

14. The respondent seeks to show the reason of conduct and because that is within the category of potentially fair reasons I find that a potentially fair reason has been shown.

Was that reason actually fair?

Investigation

15. I find that Mrs Abbott's investigation was insufficient in that no steps were taken to obtain a statement from Wendy Grant. That was something which the claimants had to do for themselves so as to present a statement at the subsequent appeal hearings. It was not appropriate simply to consider what Ms grant had said during the course of her own disciplinary hearing because that was not on the specific point the claimants were raising. Although Ms Grant had at the material time been dismissed, that did not necessarily prevent the respondent from at least trying to make contact with her on that point.

Inconsistency

16. On the material before me I am satisfied that there were differences in the cases of Karen Wilkinson and Maxine Webster (absence of a huddle) although it is significant to note that the mitigating factors in their cases was in respect of the absence of clear instructions. As I have noted above, the circumstances of Ms Clark-Hall are less easy to discern. On the basis of what she said at the disciplinary

hearing and contrary to the evidence given to me by Mrs Abbott, it appears that Ms Clark-Hall had sold alcohol but was given the benefit of the doubt. This again emphasises the lack of clarity in the instructions which were being given to till staff. Initially Ms Clark-Hall thought it was only food she could not sell. It is significant that this was the situation on 18 July by which time the respondent would have had more time to make better contingency arrangements.

Was the sanction of dismissal proportionate?

17. I consider that the question of the level of sanction – whether dismissal was within the reasonable band – is at the heart of both cases before me. I find that a reasonable employer would have taken into account numerous mitigating factors when considering the appropriate level of sanction. Those matters are as follows:

(a) By its own admission, the situation in the store on 17 July 2018 was chaotic.

(b) A reasonable employer would have accepted that it itself had significantly contributed to that chaos by failing to close the store whilst the rat infestation was dealt with, or at least by giving clear written instructions to each member of till staff. Even if that was not deemed possible it should have been possible for a reasonable employer to ensure that all staff arriving for work were greeted by a manager or supervisor and given a clear verbal instruction. There were after all only seven tills in the store and probably no more than ten employees working each shift. Instead the respondent relied upon what it describes as the cascading of a verbal instruction.

(c) It would have been obvious to a reasonable employer that something must have gone wrong with communications if some eight employees had been found to have sold consumables during the material period.

(d) A reasonable employer would have taken more comprehensive steps to ensure that customers could not access food or drink items at all. That would have included instructing shop floor staff not to hand out such goods over the temporary pallet blockade – because it appears that is what was happening.

(e) A reasonable employer would have taken steps to ensure that till staff were not put under pressure and/or threatened or assaulted by frustrated customers – the customers who had managed to locate food and drink items which they were then not allowed to purchase.

(f) A reasonable employer would also have acknowledged that whilst it may have applied the label “cascade” to the method of disseminating the ban on consumables, “hearsay” was perhaps a more accurate description. In those circumstances a reasonable employer would have been less dismissive of what the claimants said they had been told or at least inferred from what they were told by Ms Grant. There is an inherent risk that something that is passed from one person to another by word of mouth may ultimately lose something in translation.

(g) A reasonable employer would also have taken into account that neither claimant had brazenly ignored the instruction. As noted above, Mrs Foster had

filled some four trolleys of confiscated consumables prior to the offending sales of two bottles of wine and four bottles of water.

(h) A reasonable employer would also have taken into account the length of service of both claimants and in particular that Mrs Foster had some sixteen years employment. In both cases the claimants had clear disciplinary records.

18. In all these circumstances I conclude that no reasonable employer would have dismissed either claimant and so both dismissals were unfair.

Did the claimants contribute to their own unfair dismissal?

19. Both claimants did of course sell consumable items, albeit only two items each. They could and probably should have checked that what they were being told by Ms Grant was correct. Both claimants had also given somewhat inconsistent accounts for their reasons for allowing consumable sales during the course of the disciplinary and appeal hearings. They had also put forward a rather questionable logic as to whether the fact that an item had a screw top or was in a box made it safe to sell. I find that a reasonable employer would in these circumstances have imposed a sanction of a written warning for each claimant. As far as my decision goes that translates as a twenty-five percent contribution to their own dismissals.

Remedy

20. My judgment in respect of liability was delivered to the parties at the end of day two of this three day hearing and the intention was that remedy should be dealt with on the third day. I gave some indications of the type of documents which the claimants would need to bring to that hearing. It appears that there had not been any disclosure of their mitigation documents and there was apparently an updated schedule of loss which had not yet been sent to the respondent. In the event at the beginning of day three I was told that the parties were in discussion and that involved ACAS. I allowed the parties time and some two hours later was informed that terms had been agreed in respect of remedy for both claimants. I should add that although Mrs Baxter had previously indicated (at the last hearing) that she might seek the remedy of reinstatement, she had in the meantime obtained fresh employment and so no longer sought that remedy. In the circumstances the parties

were able to confirm that there was an agreement with ACAS and for that reason I have not been required to adjudicate upon the issue of remedy.

Employment Judge Little

Date 19th June 2019