



EMPLOYMENT TRIBUNALS

Claimant: Mr A Gopal

Respondent: London Underground Limited

Heard at: London Central

On: 5 August 2019

Before: Employment Judge Wisby (Sitting Alone)

Representation

Claimant: In person

Respondent: Miss I Ferber

JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

Evidence before the Tribunal

1. The tribunal was presented with:
 - 1.1. An agreed bundle;
 - 1.2. For the respondent: a witness statement and oral evidence from Mr Khan (Area Manager for the Victoria Area who chaired the disciplinary panel); and
 - 1.3. For the claimant: a witness statement and oral evidence from the claimant.

Issues

2. Breach of Contract:
 - 2.1. It is not in dispute that the respondent dismissed the claimant without notice.
 - 2.2. Does the respondent prove it was entitled to dismiss the claimant without notice. NB This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed gross misconduct.
 - 2.3. It is not in dispute that the claimant's contractual entitlement was to 4 week's notice.

The Law

Wrongful Dismissal

3. Section 3 of The Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that proceedings may be brought before an Industrial Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if amongst other matters the claim arises or is outstanding on the termination of the employee's employment.
4. For there to be a fundamental breach of contract by the employee there must be conduct that "so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment" - Neary and another v Dean of Westminster [1999] IRLR 288.
5. In Adesoken v Sainsbury's Supermarkets [2017] I.C.R. 590 Elias LJ set out that "Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence." In the latter case, the question is whether the negligent dereliction of duty was "so grave and weighty" as to amount to a justification for summary dismissal.

Findings of Fact

6. The claimant commenced work as a customer service assistant ("CSA") with the respondent on 6 February 2017.

Contract and job description

7. The claimant's contract sets out that in the first five years of service the respondent will give him 4 weeks' notice that his employment is being terminated. The contract additionally sets out that the respondent has the right to dismiss without notice any employee guilty of gross misconduct in accordance with the discipline standard and discipline at work procedure. The contract goes on to state

that the respondent has a number of policies and procedures and that if the claimant failed to comply with the policies and procedures the respondent may take disciplinary action, which could result in dismissal. Clause 25.3 of the contract sets out that it is particularly important to be aware of certain specified procedures and standards, these included the code of conduct and business ethics standard.

8. The discipline standard sets out that cases of gross misconduct may lead to dismissal without notice. Examples of gross misconduct include, deliberate or negligent contravention of any rules or procedures and, failure to follow rules and procedures on the handling of, or accounting for, company cash, goods, or assets.
9. The claimant's job description sets out that part of his key accountability is float, service and consolidate cash from ticket machines where directed and although he did not have budgetary responsibility, he would be required to handle cash and other assets responsibly and in accordance with the appropriate procedures.

Allegation of gross misconduct

10. On 30 May 2018 following an investigation, which included fact finding meetings on 5 April 2018 and 3 May 2018, the claimant was invited to a disciplinary interview, the charge being set as one of gross misconduct.
11. The disciplinary interview invitation letter sets out that the alleged conduct was contrary to the following standards:

Business ethics section 3.2.1

Employees must ensure that any operational records and accounts for which they are responsible are truthful complete and up-to-date and comply with legal and operational standards, regulations and standing orders; and that they are suitable to be a proper basis for informed management decisions.

Business ethics section 3.2.2

Employees are required to observe all accounting and other relevant instructions when dealing with money, credit cards and so on, or handling of items of potential value such as tickets and lost property.

Business ethics section 3.2.3

Employees must account for all revenue received and/or issued on behalf of London Underground Ltd

Code of conduct 3.1.1

Employees are required to comply with all LUL policies, standards and supporting guidelines, working procedures and safety instructions relevant to their job.

12. The specific allegation of gross misconduct was that whilst performing his duties at King's Cross Underground station, the claimant failed to account for £7060 on the dates set out below:

- 12.1. Wednesday, 31 January 2018 (£400);
- 12.2. Thursday, 1 February 2018 (£705);
- 12.3. Saturday 10 February 2018 (£2075);
- 12.4. Friday 23 February 2018 (£2035); and
- 12.5. Saturday, 24 February 2018 (£1845).

Accounting process

13. The alleged failure to account arose from the fact that as part of his duties the claimant, as a CSA, removes money from the passenger operated ticket machines known as POMs. The money is fed by the CSA into a counting machine (the cash handling device), which prints a receipt for the amount counted, that amount is then logged. Discrepancies were identified when data from the POMs serviced by the claimant showed that more money had been taken from those machines than had been logged by the claimant after being counted by the cash handling device.
14. The claimant only needed to open a POM if there was a problem with the machine, to service the machine (which means removing the money from the money vault within the machine) or floating the machine which means putting change into it.
15. When a CSA, such as the claimant opens a POM, the CSA needs to sign in to the POM with a unique number which identifies the CSA, this way the respondent can track when a CSA has opened any particular POM.
16. As set out above after removing money from a POM the CSA must count it and then enter the amount identified by the cash handling device (which automatically counts the money) into an accounting system known as SAF (station accounts facility).
17. The software from the POM and from the SAF “speak to each other”. This means if there is a difference between the sum of money that the POM has logged as having been taken by the machine and the amount logged in to the SAF after it has been counted, there is a prompt for the CSA to check and count the money again. If recounting the money does not rectify the issue, the SAF system will ask the CSA to ‘dump’ the machine (or part of the machine). ‘Dumping’ involves totally emptying the machine of money (coins, notes or both as appropriate). The CSA then counts all of the money and enters the amount into the SAF.
18. There is also a ticket seller’s daily account, which records the money transactions that a CSA undertakes. If that account shows less money has been recorded by the CSA than the POM data shows was taken from the relevant machine this is referred to as money being “under declared”.
19. There is a final reconciliation process within the station’s accounts, which compares the total amount of cash recorded from ticket purchase transactions and the total amount of cash that has been banked by station staff. This level of reconciliation can take between two and eight weeks. If concerns are flagged at that stage an investigation takes place. This is what happened in respect of the discrepancies identified above that led to disciplinary action being taken against the claimant.

Disciplinary hearing

20. The disciplinary hearing was held on 26 June 2018. The outcome letter was sent to the claimant on 7 August 2018, signed by Mr Khan chair of the disciplinary panel.
21. As part of the disciplinary investigation, in response to matters raised by the claimant and his representative, the respondent investigated whether there had been any anomalies or discrepancies during the shifts either side of the incidents involving the claimant. No relevant incidents were identified. The respondent was also asked to see if there were other similar discrepancies at King's Cross station. The respondent identified that there had been one other case resulting a large accounting discrepancy. In relation to that instance the individual resigned after being interviewed and suspended.
22. The claimant raised as part of the disciplinary process that the technology was not flawless as he had experiences of doing two services in a row, the first one showing less money, the second more money. The respondent acknowledged that this can happen however pointed out that processes ensure that the amount of cash and the amount recorded as received on the POMs is reconciled in such situations - the balances cancel each other out and result in nothing being unaccounted for. The issue in relation to the incidents put to the claimant was that the sums identified could not be reconciled and were unaccounted for.
23. The claimant raised as part of the process that it was not possible for him to declare sums that were not in the POMs to start with. The respondent's response was that the POMs accurately record the amount of money that is paid into them. The Respondent pointed out that there is no evidence that the machines routinely default and that the only link between the specific POMs that are alleged to have defaulted and the times when the discrepancies happened was the claimant.
24. The claimant raised that discrepancies with the King's Cross POMs do occur. The respondent acknowledged that this was the case but stated the reason for the discrepancies in most cases is identified. In respect of the incidents highlighted involving the claimant no reason for the discrepancies could be identified and the sums remained unaccounted for.
25. The respondent as part of its investigations contacted Cubic which is the company that maintains the POM machines. CSAs contact Cubic for technical advice or to arrange for an engineer visit. The records do not identify any requests for engineers to attend the POM machines involved in the accounting discrepancies relevant to this case. Reboots may have taken place on the days in question, however the tribunal was informed and accepts that a reboot does not impact data in respect of unaccounted money. Cubic, when asked, could identify no faults with the applicable machines that could account for the financial discrepancies. The respondent also checked the fault registry kept on site at King's Cross station where the claimant worked, which recorded that no jobs had been booked with Cubic on the 1st, 10th or 24th February 2018. On 23rd February one job was booked by a different CSA, as a result of a fault on a ticket handling unit. There were therefore no records in that register of jobs being booked with Cubic by the

claimant.

26. The claimant was unclear as to whether he had in fact called Cubic to report faults on the machines on the days in question.
27. Having considered all the evidence the disciplinary panel found the charge of failure to account proven and on the basis that in each comparator case the panel reviewed the sanction had been summary dismissal the disciplinary panel applied that sanction to the claimant.
28. The claimant stated during the hearing that discrepancies are not uncommon and the sums involved did not overly concern him.
29. It is not disputed by the respondent that the claimant informed his supervisor of the cash discrepancies nor that on the day in question, or the day after, the claimant in accordance with procedure informed the ticketing and revenue champion for the station that discrepancies had arisen. The respondent explained discrepancies can occur but these are reconciled later, for example if there is a machine fault on one person's shift that means the full sums cannot be dumped there will be an under declared amount but once the engineer has been, perhaps in the next CSA's shift there will be an excess sum declared and the overall sums will tally. This situation did not happen on the dates in question.
30. The claimant confirmed to the respondent that he had never given his unique identification card or PIN number to anyone else. At no time did the claimant suggest that he was not aware of the correct processes and he accepted that he was individually responsible for the correct accounting of the money taken from the POM machines.
31. The records show no other CSAs accessed the relevant machines during the relevant periods.
32. The respondent's records also show that similar financial discrepancies did not arise in respect of the relevant POM machines when other CSAs were on shift using them.
33. The claimant's explanation for the financial discrepancies is that at the time the POMs were changing to the new £10 notes and the issues were caused by faults with the POMs machines or data, in particular he highlighted that the machines are repaired with recycled parts. The claimant explained he had carried out appropriate actions in respect of discrepancies by logging the discrepancy in the ticket office log book, contacting the on duty customer service supervisor and sending an email to the customer service manager responsible for managing the ticketing portfolio.
34. There was dispute as to whether calling Cubic to inform them the amount of money removed from a POM did not tally with the amount counted by the cash handling machine was a required step, the respondent's view being it was a reasonable step to take since the responsibility for accounting for all monies relating to a POM that CSA is signed onto is that CSA's sole responsibility. In the circumstances of no clear technical fault and the sums involved being so large the tribunal finds that expecting the CSA to contact Cubic to raise a specific concern is

reasonable.

35. The respondent gave evidence that ticket sales and purchases are the basis of the respondent's business, the integrity of the data from the POMs in their multi-million pound revenue stream is therefore of utmost importance to its business. The tribunal accepts this is the case.
36. In respect of the claimant's suggestion that USB cables could be undone allowing access to the banknote unit in the POMs, the tribunal accepts the respondent's evidence that if the unit was unscrewed for the USB cable to be unplugged, the unit could not dispense or receive notes. If money was taken from the vault within the POM this would not register but the POM would retain the details of the amount of money that the machine had received before it went off-line and a fault would register. On the dates in question there were no entries in the fault registry therefore the vault cannot have gone off-line on those dates. Additionally the CSA user would need to be logged on to access the POM in the first place. The respondent pointing out that if undoing cables allowed unrecorded access in the way suggested this would be a major security loophole and that disconnecting cables, taking the POM offline does not affect the data concerning the sums the machine has taken.
37. The issue for the respondent was not that the claimant had failed to log and inform people of the discrepancies but that the missing sums themselves could not be accounted for. The respondent pointed out that if a CSA could simply tell their manager there was a discrepancy and no further action would then be taken there would be nothing to stop CSAs simply logging that sums were down and stealing the difference. Accountability was therefore wider than just stating the accounts did not reconcile.

Discussion and Conclusions

38. On the basis that:
 - 38.1. Cubic has no record of relevant issues, in connection with the applicable POMs, being logged with them on the relevant dates;
 - 38.2. Cubic could identify no issues that would account for the financial discrepancies;
 - 38.3. even if the machines were reset/rebooted it would not affect the software that recorded how much money had been paid into the machines;
 - 38.4. there were no recorded issues with the machines prior to the claimant accessing them on the dates in question;
 - 38.5. large discrepancies can occur but when sums are down on one shift due, for example, to a fault preventing the machine from being 'dumped' the sums tally when the problem with the POM is resolved in the following shift (meaning that sums overall are reconciled) such that unreconciled sums of the magnitude in issue required formal investigation and on other occasions such discrepancies have led to have led to disciplinary action; and,
 - 38.6. the only common denominator between the unaccounted for significant sums, the times which those discrepancies occurred and the POMs affected was the claimant,

the tribunal concludes on the balance of probabilities (the tribunal specifically

notes that the test applied is not the criminal test of beyond all reasonable doubt) that, as a result of the claimant's failure to account for the monies identified by the POM machines during the shifts on the relevant days identified, the respondent has shown conduct on behalf of the claimant that so undermined the trust and confidence which is inherent in the particular contract of employment that the respondent was no longer required to retain the claimant in its employment. The respondent accordingly was entitled to dismiss the claimant without providing 4 weeks' notice.

39. The claimant's suggestion that the issue was caused by faulty machines/software does not explain why the specific POM machines only identified the large discrepancies when the claimant had logged onto them and not when other CSA's were logged on at other times and on other days.
40. In light of the findings above the claimant's complaint in respect of notice pay fails and is dismissed.

Employment Judge Wisby

Date: 06th Sept 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

06/09/2019

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FOR THE TRIBUNAL OFFICE