



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Jacqueline Longstaff

**Respondent:** Continental Contracting (CCL) Ltd

## RESERVED JUDGMENT

**Heard at:** North Shields (in private)      **On:** 7<sup>th</sup> October 2019

**Before:** Employment Judge Sweeney (sitting alone)

### Representation:

For the claimant: Mr Paul Lott, solicitor

For the respondent: Mr Brian Campbell, Managing Director of the Respondent

The Judgment of the Tribunal is as follows:

1. **The claim of unfair dismissal is well founded and succeeds.** The Respondent is ordered to pay the Claimant:
  - 1.1 A Basic Award of **£1,703.03**
  - 1.2 A Compensatory Award of **£2,334.72**
2. **The claim of wrongful dismissal (notice pay) is well founded and succeeds.** The Respondent is ordered to pay the Claimant damages for breach of contract of **£1,370.37**.
3. **The claim under regulation 30 Working Time Regulations in respect of outstanding holiday pay is well founded and succeeds.** The Respondent is ordered to pay the Claimant the sum of **£274.08**.
4. **The claim of unlawful deduction of wages in respect of pay from 21 January – 01 February 2019 fails and is dismissed.**
5. **The employer's contract claim is not well founded and is dismissed.**
6. The total amount of the above awards due to the Claimant is **£5,682.20**. An explanation of the calculation is set out in the Reasons at paragraphs 104 to 111 of the reasons. The Prescribed Element is **£2,034.72** payment of which must be held

back until the value of any state benefits subject to the Recoupment Regulations is known. The remainder of the award, **£3,647.48** is payable to the Claimant immediately.

## **REASONS**

### **The Claimant's claims**

1. By a Claim form presented on 24<sup>th</sup> April 2019, the Claimant brought claims of unfair dismissal arising out of what she maintains was her summary dismissal on 01 February 2019; wrongful dismissal/breach of contract in respect of 5 week's notice pay of £1,096.30; a claim of unlawful deductions in respect of wages from the period 21 January 2019 to 01 February 2019 and a claim under regulation 30 Working Time Regulations 1998 that the Respondent had failed to pay her £109.63 in respect of 2 days' accrued but untaken holiday due to her under regulation 14(2) of those Regulations.
2. The Respondent denied the claims. It denied that the Claimant was dismissed. It contended that she resigned of her own volition after a meeting on 21 January 2019. The Respondent presented a counterclaim against the Claimant, seeking damages of breach of contract on the basis that the Claimant stole money from the Respondent when working as a barmaid in its pub, the New Ship Inn.

### **The Hearing**

3. The claimant was represented by Mr Lott, solicitor. The Respondent was represented by its managing director, Mr Brian Campbell. The parties had prepared an agreed bundle consisting of 423 pages.
4. The Respondent called three witnesses:
  - (1) Mr Brian Campbell, managing director
  - (2) Ms Laura Featherstone, bar manager
  - (3) Ms Patricia Scurfield, Payroll manager
5. The Respondent also handed up a signed but undated witness statement from Ethel Wester. It was said that Ms Wester could not attend as she was an elderly lady. Mr Lott had no objection to the statement being presented but observed that little weight should be given to it in the circumstances.
6. The Claimant gave evidence on her own behalf.

### **The issues**

7. The Tribunal discussed the issues with the parties at the outset of the hearing. The issues were as follows.

#### **Unfair dismissal**

8. In relation to the claim of unfair dismissal:

8.1 Was the Claimant dismissed (and if so when) or did she resign (and if so when)?

8.2 If the claimant resigned, did she resign in response to a fundamental breach of contract by the Respondent? (constructive dismissal)

8.3 If so, was R in fundamental breach of contract?

8.4 Did C resign in response to the breach and if so when?

8.5 Did she affirm the contract?

8.6 If C was constructively dismissed can R show a potentially fair reason for the dismissal?

8.7 If C was dismissed by R, can R show that it had a potentially fair reason for dismissal?

8.8 If so, did R act reasonably in treating the reason as a sufficient reason for terminating C's contract within the meaning of section 98(4) ERA?

8.8.1 Did R genuinely believe that C had committed an act of misconduct?

8.8.2 Did R have reasonable grounds for its belief?

8.8.3 Did R carry out a reasonable investigation?

8.8.4 Did R follow a fair procedure?

8.8.5 Was the sanction a reasonable sanction?

8.9 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? See: **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

8.10 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent

8.11 Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

8.12 Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a

maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (“section 207A”)?

**Wrongful dismissal**

9. In relation to the claim of wrongful dismissal:

9.1 What was C’s notice entitlement?

9.2 Can R show that C was in fundamental breach of contract so that it was entitled to terminate her employment without notice?

**Holiday pay claim**

10. When the claimant’s employment came to an end was she paid all of the compensation she was entitled to under regulation 14(2) of the Working Time Regulations 1998?

**Unlawful deduction of wages claim?**

11. Did the Respondent make a deduction from wages of the Claimant by not paying her wages in respect of the period 21 January 2019 to 01 February 2019? In particular, what wages were properly payable to the Claimant in respect of this period?

**Employer’s contract claim**

12. Can R show that C acted in breach of contract by dishonestly taking money from the till register?

13. If so, what losses did R sustain as a result of C’s breach of contract? (R is claiming between £2,000 and £2,500 by way of damages for breach of contract. The calculation is set out on page **33** of the bundle).

**The facts**

14. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following facts.

15. The Respondent is a limited company. It is one of number of companies under a holding company called BC ventures Ltd – the letters ‘BC’ being the initials of Brian Campbell, the managing director of the respondent. Mr Campbell also has an interest in a number of other companies: CamKing Properties Ltd, Campbells Fruit and Veg Ltd, Vigilant Ltd and New Ship Inn Ltd. About 25-30 employees are employed across the companies.

16. The Respondent has two pubs, the New Ship Inn and The Vigilant Inn. The Claimant was employed as a barmaid at the New Ship Inn from 14 August 2013.

She earned a gross weekly wage of £227.07 (net £219.26) as at the end of January 2019.

17. The Respondent's holiday year ran from 01 January to 31 December. It was agreed by Ms Scurfield that, as of 01 February 2019, the Claimant had not taken any holiday in the 2019 holiday year and that she had accrued two days holiday by the date of termination. There was no dispute as to the figures stated in the Claimant's witness statement or schedule of loss.
18. Ms Laura Featherstone took over the role of manager of the New Ship Inn in about October 2017. Shortly after she took over, Ms Featherstone began to notice a shortfall in takings of around £30 a week. There are two tills in the pub, one at either end of the bar. A till check is carried out at the beginning of the shift and at the end of the shift. On each till check, Ms Featherstone checks to see if there any 'no sales'. Where a 'no sale' is entered this will appear on the till receipt.
19. Ms Featherstone noticed that the number of 'no sales' appeared to be increasing. At one point she explained to the staff that only she could void items off and that staff were not to use the 'no sales' key on the till. Ms Featherstone generally used 'no sales' in order to take change from the till to fill up the 'money bag'. The money bag is a bag of coins which is set aside for customers who require change in order to play pool or other games. She would also use the 'no sales' function if she wanted to pay a bill, for example a window cleaner's bill. She would press 'no sales', take the money for the window cleaner from the till and put the window cleaner's receipt in the till.
20. Ms Featherstone took it upon herself to replace the shortfalls out of her own pocket. She did this because she was concerned that Mr Campbell might look upon her management of the bar critically and she did not wish to jeopardise her own position by revealing the losses to him. She started replacing the money from about the end of October 2017. She estimated she was putting back in something in the region of £30 a week.
21. The bar operated a rule whereby if there was a shortfall of over £2.50 those employees on shift were required to pay the shortfall out of their own pockets. The claimant herself had been asked in the past to contribute to shortfalls and had done so when asked, as had other staff.
22. Ms Featherstone was paying money back even though she might not have worked the shift. Ms Featherstone covered the majority of shortfalls right up to about August 2018. Ms Featherstone said to the Tribunal that she noticed a pattern, which was that there was a shortfall when the claimant was working on shift alone. Ms Featherstone in time came to suspect the claimant of taking money. In August 2018 she mentioned to Mr Campbell that she suspected the and that this had been going on for some time. Ms Featherstone did not mention at that point that she had been making good the shortfalls. She did not undertake any investigation during that period of time. At no point did she ever raise her

suspicious with the claimant directly. She simply took no action. She did not retain copies of any till receipts (I was told that the original paper faded after a short period of time so as to be illegible). She did not carry out any analysis of the till receipts.

23. When asked by Mr Lott why she had not raised the matter earlier, Ms Featherstone said that in her eyes it was theft and she did not want the claimant to lose her job.
24. It is not entirely clear when Ms Featherstone first mentioned what she regarded as theft to Mr Campbell. In her witness statement she refers to August 2018. In evidence she said she must have mentioned it to him in July. In any event, when she did raise the matter with Mr Campbell she told him that she suspected the claimant; that the till appeared to be correct when the claimant was on holiday and down when she was working alone. Mr Campbell told Ms Featherstone to monitor the situation to see who was responsible and how it was happening. All that seemed to happen from then was that Ms Featherstone would check on CCTV and keep an eye on the claimant. The pub had a number of CCTV cameras which had been there for some time. However, upon viewing the footage Ms Featherstone found nothing of any note, other than saying that she once saw the claimant serve a customer and walk away without taking payment.
25. Ms Featherstone told Mr Campbell that she believed money to be missing from the 'tip jar' as well as the till again only after the claimant had been working alone. She told him this on 12<sup>th</sup> October 2018.
26. From 31<sup>st</sup> October 2018 Ms Featherstone swapped the claimant's shift so that she would no longer be working on Tuesday evenings. Instead she was to work on Wednesday evenings. Oddly, this was nothing to do with the suspected theft by the Claimant. It was done because of difficulties another member of staff had in working on the Wednesday evening. This meant that Ms Featherstone would be working alongside the Claimant, whereas previously she had not. Ms Featherstone regarded this as an opportunity to keep an eye on the claimant.
27. However, Ms Featherstone found no evidence against the claimant and did not see the Claimant take any money. Yet Ms Featherstone said that she continued to encounter till shortages. On 28<sup>th</sup> November 2018, following Ms Featherstone reporting that the 'no sales' key had been utilised 16 times in a 4 x hours shift, the respondent arranged for a new GoPro camera to be installed above the till. This was a hidden camera. The claimant was unaware of it. This did not reveal any evidence that the claimant was taking money or hitting the 'no sales' key when she should not be.
28. In December 2018 Mr Campbell contacted 'Brulines' – this is a company that operates the cellar recording equipment in the pub. Mr Campbell explained that the Brulines recording system enabled him to see the times at which beer and the quantity of that beer was being dispensed through the pumps. Brulines

allowed him to have instant access within an hour of the beers being dispensed (up until this point he could only see what had been dispensed on any day after a period of two weeks). He showed Ms Featherstone how to use and read the Bruline reports for monitoring the dispensing of the draught products pulled through the lines. Ms Featherstone told him that her main concern was Wednesday (when she was on break leaving the claimant alone) and Saturday evening, when the claimant was working alone.

29. By January 2019, having looked at the Brulines recordings and timesheets, Mr Campbell felt that he was in a position to confront the claimant. In evidence he said that when he started looking at timesheets he saw a pattern that was easy to follow; he had not wanted to act earlier because he did not want to believe the claimant had been stealing; he wanted 'hard evidence' which is what he said he got from Brulines. I find that Mr Campbell believed he had incontrovertible evidence of the claimant's guilt and that he saw this as an open and shut case, so to speak. By the time he came to confront her he had already concluded her guilt.
30. On Sunday 20<sup>th</sup> January 2019, Ms Featherstone carried out a till check. She noticed that the till seemed to be £17 down. She asked the claimant about the deficit who said she did not know how it had happened. The claimant made good the shortfall, as she had before, and as others have done when told of till deficits.
31. When Ms Featherstone reported this to Mr Campbell on 20<sup>th</sup> January she was instructed to tell the claimant that she was to meet with Mr Campbell the following day. The claimant was not told the reason for the meeting, only that Mr Campbell wished to speak to her the following morning at about 11.15am. Ms Featherstone was instructed to have all the documentation ready for the meeting.
32. Unbeknown to the Claimant, Ms Featherstone and Mr Campbell wished to speak to the Claimant about money which they believed to have been stolen from the till by the Claimant and to present her with the Bruline documentation, timesheets and till receipts.

### **Meeting of 21 January 2019**

33. The claimant arrived late that morning. Ms Featherstone called to ask where she was. She explained that she would be there shortly. She lived some five minutes away. When she did arrive the three of them met in the pool room. Mr Campbell confronted the claimant with the information. There is some dispute as to what happened at the meeting.
34. It is accepted by all that there reference was made to the police at that meeting. Mr Campbell says that when he presented the claimant with the information he asked her what she would do if she were him and that she said she would sack the person involved. Mr Campbell said that he told the claimant he was reluctant to do this as it would affect her benefits. He says that the claimant responded that

she would resign immediately. Mr Campbell said in evidence to me that he then said that if she did resign he would resist from reporting any theft to the DSS and the police. He said that the claimant replied that her resignation would be with him by the end of the day.

35. The claimant says that Mr Campbell told her that if she did not put her notice in he would have to call the police. She said she was upset about what she considered to be false accusations and that she maintained her innocence. She was concerned that it was her word against that of Ms Featherstone and Mr Campbell and that she asked what she would have to do if she needed to hand in her notice, to which Mr Campbell said she would have to give him a letter by the end of the day. Both parties agreed that the meeting ended with a handshake. It was not a heated meeting.
36. At that meeting Mr Campbell presented the Claimant with the paperwork and told her that it proved she had been pulling pints but not accounting for the money in the till. Although he denies it, I conclude that Mr Campbell told the claimant that if she did not put in her notice he would be obliged to call the police. The claimant said to Mr Campbell in answer to his question what she would do in his position, that if she had evidence that someone was stealing she would sack them and call the police. However, that was not an acceptance of her guilt, merely a direct answer to the question put to her. The Claimant's account of what happened at the meeting is consistent with the exchange of texts and correspondence which followed the meeting.
37. Even if I had accepted Mr Campbell's version of events that the Claimant had resigned on 21 January 2019, I would have concluded that the pressure on the claimant and the clear message given to her was one of 'resign or be dismissed and face the police and run the risk of losing benefits' – and therefore that she was effectively dismissed on that day.
38. I would not have accepted that the claimant made anything like a free and considered decision to resign her employment at that meeting. She clearly did not. I am fortified in my conclusion by the text exchange at pages **399 – 400** (for which see below).

### **Events following the meeting of 21 January 2019**

39. The Claimant left the pub after the meeting. She was due to work later that day (from 4.50pm). She did not turn up for her shift. The claimant said that she was called by a customer, Nigel Pescod, just ahead of starting the shift who asked why she wasn't working and he mentioned that Alfie (Mr Campbell's son) was behind the bar. The claimant said she did not turn up for work because she believed she would be sent home. Mr Campbell said in evidence that Alfie had not been working that night. Mr Campbell questioned the claimant about what she had been told about Alfie being behind the bar. He asked her why she did



not simply come to the pub to find out for herself if Alfie was working. She replied 'I had just been accused of stealing, I didn't see the point'.

40. I do not accept that the reason the claimant failed to turn up for work was because Alfie had been working in her place. If that was the implication of her evidence I reject it. The claimant did not turn up for work because of what had taken place earlier in the day and because she had been accused of theft.

41. When the Claimant said in evidence that she had been accused of stealing and could not see the point of turning up for work later that day, Mr Campbell put to her that he had never accused her of stealing; he had said he told her at the meeting only that he had evidence of stealing and asked her what she would do in his situation. I reject Mr Campbell's evidence that he did not accuse the Claimant of stealing – he clearly did and it is disingenuous to suggest that he did not.

42. The claimant had without question been accused of a sustained theft and was told that if she did not resign Mr Campbell would have to call the police. As I have found, at the very least, serious pressure was put on her to submit her resignation. In those circumstances, the claimant did not turn up for work later that day – understandably. The Claimant contends that the Respondent made an unlawful deduction of wages in respect of that week on the basis that she was ready and willing to work. However, she was not ready and willing to work, nor had Alfie taken her place in the bar as she maintained. She simply was not prepared to come in to work over that period because of what happened at the meeting. She did not present herself for work and was not entitled to any payment in the absence of presenting herself from work. Despite the difficult circumstances she was not in fact told that she could not work that shift or the further shifts in that week prior to her employment being terminated on 01 February 2019.

43. On 22<sup>nd</sup> January 2019, the claimant texted Mr Campbell as follows [399 – 400]:

*"Hi it is Jackie I have thought about what was said at the meeting. I have done nothing wrong, I feel like you are forcing me out. So I am not resigning, you can sack me or phone the police it is up to you."*

44. Mr Campbell replied as follows:

*"Jackie, if we go to the police with the information and proof that we have, they will go back years and years and you will not only have to repay it all, you will also have our defence costs to pay, and a criminal record. But as I said at the meeting, the choice is yours, and as you said in the meeting, you would do the same if in my shoes. You have until Friday morning to make your decision or I call in the police for fraud. Regards Brian."*

45. This clearly demonstrates that the claimant had not resigned at the meeting on 21<sup>st</sup> January. It further demonstrates that Mr Campbell did not regard her as having resigned and also supports her account that he threatened to call the police at the meeting. He says 'you have until Friday morning to make your decision'. That is entirely inconsistent with the case he ran before the Tribunal which was that the claimant had in fact resigned on 21<sup>st</sup> January 2019.
46. It may be that Mr Campbell meant no more than that the claimant, at the meeting on 21<sup>st</sup> January, had indicated that she would resign by the end of the day. I have considered this above. I have concluded that the Claimant was faced with an ultimatum 'resign or we call the police' – which is consistent with the text; that any intimation she gave that she would resign was done so in the face of pressure of circumstances and the forceful way in which, I have no doubt, Mr Campbell put his case to the claimant.
47. The claimant wrote to Mr Campbell on 28<sup>th</sup> January 2019 (page **401** of the bundle). She had not been into work since the meeting on 21<sup>st</sup> January. In the letter she maintained her innocence and urged Mr Campbell to involve the police to prove her innocence. She said again she was not resigning. She asked three questions:
- (1) Whether Mr Campbell had reported the matter to the police and if so what their response was;
  - (2) What was her current employment status – in particular whether her employment had been terminated;
  - (3) Whether Mr Campbell was to pay her wages (due on 25<sup>th</sup> January 2019) of £262.30 net for 33.5 hours worked from 14<sup>th</sup> to 20<sup>th</sup> January.

**Letter of 01 February 2019 – the Claimant's dismissal**

48. These questions were answered in an indirect way in a letter dated 01 February 2019 [page **402-403**]. The questions were not answered directly as specific responses but the answers can be deduced from the letter. Essentially, Mr Campbell said:
- (1) The police had not been contacted but the respondent reserves the right to do so;
  - (2) If the claimant has changed her mind and is not going to resign, the company 'will be forced to issue you with a dismissal letter, terminating your employment immediately for Gross Misconduct';
  - (3) The payment for the week's work (as well as any outstanding holiday pay) will be released on receipt of a letter of resignation.

49. Other than contact through ACAS following commencement of the early conciliation process, there was no further communication between the claimant and the respondent regarding her employment position.

### **The Brulines records**

50. Before the Tribunal Mr Campbell placed great store on the Brullines records as being incontrovertible evidence that the Claimant had not accounted in the till for alcohol that had been dispensed through the pumps. It is important therefore that I address the evidence which he relied on.

51. Mr Campbell maintained that the Brulines records show to a tenth of a pint how much beer had dispensed during a particular shift and that, when you compared this to the till receipts, you would see that the claimant had not put that money through the till. The Brulines reports must be looked at in conjunction with the time sheets and the till receipts for the particular shift. According to Mr Campbell the time sheets show that the Claimant worked a particular shift; you can then look to the Brulines report how much beer was dispensed through the pumps on that shift. You can then check the till receipt to see how much was accounted for.

52. Mr Campbell cross-examined the claimant on these reports. He took her to page **190**. This, he said, shows (to a tenth of a pint) what was dispensed through the pumps on 14 November 2018 from 5pm to 11pm. The claimant's timesheet on page **175** shows that she worked that day from 5pm to 11pm. Mr Campbell took the claimant to those pages to demonstrate how the time-sheet had to be considered in conjunction with the Brulines record. Beyond that, this proved nothing other than that the claimant worked that shift and the Brulines report produced certain figures purporting to show how much beer of the brands described on the report were dispensed. There was no till receipt for that shift, thus nothing to show that anything was unaccounted for on that day.

53. He then took the Claimant to page **367**, which is a timesheet showing that the claimant worked on 20<sup>th</sup> January 2019, She worked a split shift from 11.30am-3.30pm and 7.30pm-11pm. At page **389** is the Brulines report for 20<sup>th</sup> January 2019 from 11am-11pm (although the box showing the hour 17:00 was inexplicably not ticked). Mr Campbell referred to lines 11 and 12 (cask ale 1 and cask ale 2) recording that 17.3 pints of cask ale (9.6 and 7.7 pints respectively) had been dispensed.

54. He then referred to the till receipt for that day at page **388**. He pointed to the fact that the till receipt shows that only 6 pints and 3 half pints of cask ale (7.5 in total) were rung through the till, thus demonstrating that the claimant had not accounted for about 10 pints. Mr Campbell pointed out that the time on the receipt was incorrect (as the clock was wrong) - it showed a time of 00:24. However, the day was, he said, correct.

55. In evidence the claimant thought that the till receipt did not seem to equate with her experience. She said that Sunday was quiz night and very busy. The receipt showed 13 pints and 2 half pints of Carling. She said that she knows that more pints of carling would be sold on quiz night.
56. I had difficulty in accepting the statement by Mr Campbell that the Brulines and the till receipts showed beyond any argument that the claimant was guilty of theft. My difficulty arose from an examination of some of the very few till receipts that were in the bundle. The Brulines do not match up to the receipts. When Mr Campbell questioned the claimant he maintained that the fact that the till receipt showed fewer drinks being rung through the till than were dispensed, showed that the claimant was keeping the money for those drinks for herself.
57. However, he was unable clearly to explain what on the face of things looked like fairly obvious discrepancies – in particular, when the receipt showed more of a particular beer being rung through the till than appeared from the Brulines report to have been dispensed. Take the 19<sup>th</sup> January 2019 as an example. The Brulines report is at page **387**. Mr Campbell identified lines 11 and 12 (Cask ale 1 and Cask ale 2) as examples. He said that the report shows definitively that 6.7 pints of cask ale had been dispensed through the pumps. He then referred to the receipt at page **385**. This shows that 12 pints of cask beer had been rung through the till. That is more than the 6.7 pints registered on the Brulines report.
58. On the same Brulines report on page **387**, it shows a total of 15.7 pints of Carling as having been dispensed. Yet the receipt on page **385** shows a sale of 51 pints of Carling being run through the till.
59. Similarly, page **387** records that 15.3 pints of Fosters were dispensed, whereas the receipt on page **385** shows that 19 pints and 2 half pints were rung through the till. Page **387** shows 4 pints of McEwans, whereas the receipt on page **385** records 5 pints being accounted for.
60. Mr Campbell said that these differences did not matter and that the barmaid (i.e. the claimant) must have put through a drink as a cask ale when it was not a cask ale or another drink as a Fosters when it wasn't a Fosters and so on. However, he accepted that the claimant was an experienced barmaid and would know which key to hit for which beer. He had no evidence whatsoever that the claimant had incorrectly (innocently or otherwise) rung through a particular beer through as a cask ale.
61. When asked whether anyone saw the Claimant take any money, the answer was no. Ms Featherstone believed (and Mr Campbell adopted the point) that the Claimant had either secreted the money on her person or more likely placed it in a discrete part of the till, and then removed the money from the till when the till drawer was taken downstairs and was out of sight of the cameras. This was supposition.

62. I conclude that the evidence which Mr Campbell advanced as being overwhelming was in fact unreliable and did not demonstrate that the claimant had stolen from the respondent by pilfering money for drinks dispensed. At the very least, Mr Campbell was unable, by reference to evidence and to my satisfaction, to explain these discrepancies.
63. He was accusing the claimant of a very serious matter – theft. Mr Campbell has never called the police to investigate what he regards as a theft (and breach of trust) of something in the region of £2,500 over a sustained period of time. He had no evidence as to the reliability of the Brulines records (save for his own opinion) and no evidence of the reliability of the till (which he said was an old till and which at the very least had a faulty clock).
64. By the date of termination of her employment the Claimant had taken no annual leave in the relevant holiday year. She had accrued two days holiday by 01 February 2019.

### **Relevant law**

#### **Unfair dismissal**

65. The claimant maintains that she was dismissed by the Respondent. The burden is on her to establish that she was in fact dismissed. If she shows that she was dismissed, section 98(1) requires the respondent to show the reason or, if more than one, the principal reason for the dismissal and that the reason falls within section 98(2) or was a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held ('SOSR'). In this case, the Respondent (whilst denying that the claimant was dismissed) says in the event that the claimant was dismissed, the reason for the dismissal was one relating to conduct.

#### **Dismissal**

66. In cases where the fact of dismissal is in dispute it is for the Claimant to establish that he or she was in fact dismissed by the employer. If an employee is effectively faced with a situation of 'resign or be dismissed', and he/she resigns in the face of this pressure, not having made a free and informed choice, then the employer may be taken to have terminated the contract of employment: **East Sussex County Council v Walker** [1972] 7 ITR, 280, NIRC.
67. If the Claimant shows they have been dismissed, the employer must show what the reason for dismissal was and that it was a potentially fair reason. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. A reason related to conduct is a potentially fair reason for dismissal under the Employment Rights Act 1996.

#### **Reasonableness**

68. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the Tribunal to substitute its view for that of the employer. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Where the reason relied on is the conduct of the employee, in accordance with **British Home Stores Limited v Burchell 1980 ICR 303**:

- a. The respondent must have believed that the employee was guilty of misconduct;
- b. The respondent must have had in mind reasonable grounds upon which to sustain that belief; and
- c. At the stage at which that belief was formed on those grounds, the respondent should have carried out as much investigation into the matter as was reasonable in the circumstances.

69. Procedural fairness is an integral part of a fair dismissal: **Polkey v AE Dayton Services Limited 1988 ICR 142, HL**, When assessing whether the employer adopted a reasonable procedure, the Tribunal should use the range of reasonable responses test: **Sainsbury plc v Hitt 2003 ICR 111, CA**

70. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the ACAS Code on Disciplinary and Grievance Procedures (the “Code”). The Code is relevant to liability and is considered when determining the reasonableness of the dismissal. If a dismissal is unfair, the Tribunal can increase an award of compensation by up to 25% from unreasonable failure to follow the Code if it considers it just and equitable to do so.

71. The Code sets out the basic requirements for fairness that will be applicable in most conduct cases. It is intended to provide a standard of reasonable behaviour in most instances. The Code sets out the steps employers must normally follow namely:

- 71.1 Carry out an investigation to establish the facts of the case;
- 71.2 Inform the employee of the problem;
- 71.3 Hold a meeting with the employee to discuss the problem;
- 71.4 Allow the employee to be accompanied at the meeting;
- 71.5 Decide on appropriate action;

- 71.6 Provide employees with an opportunity to appeal.
72. The Code acknowledges that sometimes it may not be practicable for all employers to take all the steps set out in the Code. Dismissal may still be reasonable. Conversely if all the steps have been followed, a dismissal may be unfair.
73. The Code provides that “where practicable, different people should carry out the investigation and the disciplinary hearing”. It is not always possible in small organisations for functions to be separated. Where there is a limited number of people available it is not necessarily unfair for the same people to be involved in the early stages of the disciplinary process and in the decision to dismiss (**Barlow v Clifford & Co (Sidcup) Ltd EAT 0910/04**).

### **Polkey reductions**

74. What is known as ‘the Polkey principle’ (**Polkey v AD Dayton Services** [1988] I.C.R. 142,HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such 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 in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly then or at a later stage or if a proper and fair procedure had been followed. Thus the ‘Polkey’ exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.
75. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

### **Contributory conduct**

76. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). Langstaff J offered

tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

77. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal...was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

### **Breach of contract/wrongful dismissal**

78. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

### **Unlawful deduction of wages, section 13 Employment Rights Act 1996**

79. Section 13(3) ERA provides that 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 work 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.

### **Holiday pay claims**

80. Under regulation 14(1) and (2) Working Time Regulations 1998, a worker is entitled to payment in lieu where:

(a) His or her employment is terminated during the course of the leave year, and

(b) On the termination date, the proportion of statutory annual leave he or she has taken under regulations 13 and 13A is less than the proportion of the leave year that has expired;

### **Employer's breach of contract**

81. An employer may present a complaint of breach of contract. It is for the employer to establish that the employee breached the contract and that it sustained loss



as a result of the breach. In these proceedings, the Respondent must establish that the claimant stole the money claimed.

## **Conclusions**

### **Was the Claimant dismissed or did she resign?**

82. The claimant was summarily dismissed on 01 February 2019. She did not resign at the meeting of 21<sup>st</sup> January although she was considering whether to do so following the events of that day. I accept the Claimant's evidence that she did not resign at that meeting. Her account is entirely consistent with the events that followed: she did not submit any resignation later in writing; she responded to the threats made by Mr Campbell regarding the police and benefits by saying that if that is what he had to do he should do it and she asked in writing for him to explain her employment position. The text exchange and the written correspondence is entirely consistent with a person who was put under undue pressure but who had not resigned her employment.

83. The letter of 01 February 2019 was, I conclude, a letter of dismissal. Mr Campbell was frustrated that the claimant had not resigned in the face of what he regarded as overwhelming evidence of her guilt. The letter of 01 February 2019 brought an end to the relationship. It was a direct 'resign or be dismissed'. The claimant did not resign and the dismissal took effect with immediate effect as provided for in the letter.

84. Even if I were wrong about that and that the Claimant's employment in fact terminated on 21 January 2019 (as the Respondent maintains), I would have found that this was in effect a dismissal – a forced and pressurised resignation is in effect a dismissal in that, in reality, it is the employer who terminates the contract.

### **What was the reason for dismissal?**

85. Having concluded that the Claimant was dismissed, the next question is what was the reason for the dismissal. It is clear that the respondent dismissed the claimant for a reason relating to conduct, namely theft.

### **Did the respondent genuinely believe that the claimant committed an act of misconduct?**

86. Mr Campbell genuinely believed that the claimant had stolen money from the respondent. Indeed that was his pre-determined mindset before the Claimant met with him and Ms Featherstone on 21 January 2019.

### **Did the Respondent have reasonable grounds for its belief?**

87. The Respondent did not carry out a reasonable investigation. It failed to retain till receipts during the lengthy period of time it suspected the claimant to have taken

money from the till. It failed to carry out any critical analysis of those till receipts which it retained. It delayed unreasonably in carrying out any kind of investigation. It did not critically analyse the till receipts nor did it consider what were on the face of the receipts discrepancies between them and the Brullines records. The Claimant's fate was pre-determined even before Mr Campbell spoke to her.

88. The Respondent could have arranged for someone other than Mr Campbell to investigate the allegations. For example, he could have asked Mrs Scurfield to do it. Alternatively, Ms Featherstone could have carried out an investigation. Mr Campbell involved himself in the investigation to such an extent that he had decided in the claimant's guilt prior to meeting with her on 21<sup>st</sup> January 2019.
89. In light of the failure to carry out a reasonable investigation I conclude that the respondent did not have reasonable grounds on which to sustain its belief that the claimant had committed theft over a sustained period of time.

**Did R follow a fair procedure?**

90. The respondent did not follow anything like a fair procedure prior to dismissing the claimant. Mr Campbell had entirely pre-determined the claimant's guilt. There was no attempt to comply with the ACAS Code of practice. Of the matters listed in paragraph 71 above, only 71.3 could be said to have taken place. However, that meeting was in effect an ambush. The Claimant was given no pre-warning and had no inkling of what she was walking into.
91. At no point was the claimant invited to an investigation or fact finding meeting. She was not provided with any reasonable opportunity to address the allegations. She was not afforded any time to understand the nature of the evidence against her. She was not given copies of the till receipts or Bruline records for her to read and consider outside the pressure of the meeting on 21<sup>st</sup> January. She was not afforded the right to be accompanied. She was pressured into a resign or be dismissed situation, with the added pressure of a police investigation and a threat that she would lose any benefits if sacked.
92. Therefore, not only did the Respondent fail to carry out a reasonable investigation, it came nowhere near to conducting what any reasonable employer would regard as a fair hearing. The Respondent does not even accept that the meeting of 21<sup>st</sup> January was a disciplinary meeting. However, it was undoubtedly a meeting at which the claimant was faced with very serious criminal allegations and was facing dismissal. The claimant was not afforded a right of appeal. The Respondent acted outside a range of reasonable responses. No reasonable employer would have ambushed the claimant on 21<sup>st</sup> January, pressuring her into a resignation. No reasonable employer would have followed up the text threatening to call the police if she did not resign. The reality of the situation is that Mr Campbell, believing that he had caught the Claimant 'red handed' hoped that she would fall on her sword once she was confronted with what he regarded as incontrovertible evidence of a sustained theft.

93. In light of the unreasonable failures of the respondent's investigation into the allegations and the wholly unreasonable way in which the Claimant was confronted with matters, it follows that the Respondent did not act reasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. The Claimant was unfairly dismissed

### **Polkey**

94. I have considered whether, had a fair procedure been followed, the claimant might have been fairly dismissed for a reason relating to conduct. There is at the very least an evidential burden on the employer to show that the dismissal might have occurred had a fair procedure been followed.

95. In accordance with **Software 2000 v Andrews**, I have asked myself whether I can make any assessment with sufficient confidence as to what is likely to have happened using common sense, experience and a sense of justice.

96. The procedural failures of the Respondent are so significant – and the apparent discrepancies between the Brullines records and the receipts are so apparent - that I cannot say that on the balance of probabilities the Claimant would have been dismissed. However, Polkey does not require an 'all or nothing' approach. There was some limited evidence on which I can realistically say that – had fair procedures been followed – the employer might have fairly dismissed. That evidence is the evidence of Ms Featherstone regarding the shortfalls during the Claimant's shifts. Further, I must allow for the possibility that a fair hearing and a reasonable investigation might have enabled an explanation for the discrepancies between the Brullines records and the few till receipts that the Respondent produced. This was a difficult exercise and I came close to making no Polkey reduction at all in light of the seriousness of the failures. However, I must recognise that, had the Respondent acted reasonably and fairly it would still have had the evidence of Ms Featherstone and might have been able to more coherently explain the discrepancies between the till receipts and the Brullines records.

97. Therefore, doing the best I can on the available evidence I consider that the compensatory award should be reduced by 20% to allow for the possibility that the Respondent might fairly have dismissed the Claimant.

### **Contributory conduct**

98. The Respondent must establish on the evidence that the Claimant, by blameworthy or culpable conduct, contributed to her own dismissal. On the evidence before me the Respondent has not established that the Claimant stole any money from the Respondent. Nor has it established that she had done any other culpable or blameworthy act which would warrant a reduction in the compensatory award. Therefore, I make no reduction in respect of the compensatory award. There is no requirement for any causal link between the

blameworthy conduct when it comes to considering a reduction of the basic award. However, I make no reduction of the basic award as I conclude that the Respondent has failed to establish blameworthy conduct.

### **Wrongful dismissal**

99. The respondent must prove that the claimant repudiated the contract of employment. The respondent contends that the claimant stole a significant sum of money. It must satisfy the tribunal on the balance of probabilities that she stole some or all of that money. It has not shown that the claimant stole any money. The claimant was entitled to 5 weeks' notice of termination. Accordingly, her summary dismissal was in breach of contract. For the same reason the Respondent's employer contract claim against the Claimant fails. It must prove that the Claimant repudiated the contract as alleged – i.e. by stealing from the Respondent. It has failed to do so. It has further failed to establish any amount which it claims to have lost as a result of any alleged theft by the Claimant.

### **Holiday pay**

100. It is accepted that the claimant took no annual leave by the date of termination, 01 February 2019. It is accepted that she had accrued two days holiday by that date. Therefore, she is entitled to a payment in lieu of that untaken holiday. There is no dispute about the figures set out in the schedule of loss.

### **Unlawful deduction of wages**

101. I reject the Claimant's claim for unlawful deduction of wages. Whilst she was understandably concerned for her future following the meeting of 21 January 2019, nevertheless the simple fact is that she did not present herself for work. I do not accept her assertion that she was prevented from working – that was inconsistent with her evidence. At no point did she attempt to speak to Mr Campbell or Ms Featherstone regarding her shift on the 21 January 2019 or thereafter. She simply did not present herself for work. No wages were properly payable in respect of that work quite simply because the Claimant did not work. She did not present a sick note and there was no contractual obligation on the Respondent to pay the Claimant.

### **ACAS uplift**

102. The respondent made no attempt to comply with the ACAS Code. If anything, its actions showed a total disregard for the most basic elements of the Code and a misunderstanding of the basic concepts of fairness. I conclude that the respondent unreasonably failed to comply with the following parts of the Code:

- Paragraph 5: it unreasonably delayed in establishing the facts of the case; it failed to hold an investigatory meeting with the Claimant
- Paragraph 6: It unreasonably failed to ensure that different people carried out the investigation and disciplinary meeting. Ms Featherstone or Ms Scurfield could have carried out an investigation;
- Paragraph 9: it unreasonably failed to notify the Claimant of the allegations in writing depriving the Claimant of the opportunity to prepare answer the case at a disciplinary meeting;
- Paragraph 10 & 13: it unreasonably failed to give the Claimant details of the time and venue for a disciplinary meeting and failed to advise the Claimant of her right to be accompanied at the disciplinary meeting;
- Paragraph 11: it unreasonably failed to allow the Claimant time to prepare her case;
- Paragraph 26; it unreasonably failed to afford the Claimant any opportunity to appeal the decision to terminate her employment.

103. Mr Campbell has been in business for some time and is a director of a number of companies. The failures were serious and unreasonable. In all the circumstances I consider it just and equitable to increase the basic and compensatory awards, the damages for breach of contract and the money due in respect of holiday pay by 25% in accordance with section 207A Trade Union & Labour Relations Act 1992.

#### **Employer's contract claim**

104. I refer to my findings in paragraphs 62 and 98. The Respondent has claimed a significant sum of money against the Claimant yet it has adduced no evidence save for Ms Featherstone's assessment of what she believed was short in support of its claim. The till receipts do not show that the Claimant stole any money from the Respondent, nor do the Brullines reports either of themselves or in conjunction with those receipts. The Respondent has not satisfied me on the balance of probabilities that the Claimant stole money. Therefore, I reject the Respondent's counter claim.

#### **REMEDY**

105. The figures set out in the Claimant's witness statement and schedule of loss were not disputed.

#### **Wrongful Dismissal**

106. The Claimant was entitled to 5 weeks' notice of termination from 01 February 2019 expiring on 08 March 2019. Her net pay for that period was £1,096.30 which is increased by 25% in accordance with section 207A Trade Union & Labour Relations Act 1992 leaving a net amount due to the Claimant of **£1,370.37**.

#### **Holiday pay**

107. The gross amount of holiday pay due to the Claimant for the two days accrued but untaken was £109.63 x 2 (£219.26). Increased by 25% under section 207A leaves a gross figure due to the Claimant of **£274.08**.

#### **Unfair Dismissal**

108. The Basic Award is not subject to any uplift under section 207A. It is calculated as per the Claimant's schedule of loss as **£1,703.03**. There is no reduction for contributory conduct.

109. The Compensatory Award is calculated according to the Claimant's net income. There is no challenge to her attempts to mitigate her loss. No losses are claimed beyond the 31 May 2019. I have calculated the Claimant's losses from the 09 March 2019 which is the day after her notice would have expired had the Respondent terminated her employment by giving her five weeks notice on 01 February 2019.

110. The Claimant's immediate loss of earnings were as follows:

110.1 09 March 2019 - 31 March 2019 = 3 weeks x £219.26 (**£657.78**)

110.2 01 April 2019 – 31 May 2019 = 6 weeks x £229.49 (**£1,376.94**)

Total loss of earnings = £2,034.72 which is to be reduced to £1,627.77 by 20% to reflect the chances that the Claimant would have been fairly dismissed ('Polkey').

The figure of £1,627.77 is increased by 25% in accordance with section 207A Trade Union and Labour Relations (Consolidation) Act 1992 = **£2,034.72**

111. I award the Claimant the sum of £300 for loss of statutory rights reduced to by 20% by reason of Polkey leaves £240. This too is to be increased by 25% leaving a sum of **£300**.

112. The recoupment provisions apply to the award of immediate loss of earnings but not to the award for loss of statutory rights. The Prescribed Element is therefore **£2,034.72**. The Prescribed Period is 09 March 2019 to the date judgment was sent to the parties. The total amount under the above awards is **£5,682.20**

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**Employment Judge Sweeney**

Date: 14 November 2019