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EMPLOYMENT TRIBUNALS

Claimant: Mrs Maureen Blankson
Respondent: Engie Services Limited
Heard at: East London Hearing Centre
On: 24 October 2019
Before: Employment Judge Hallen

Representation

Claimant: Mr I Khawari (Free Representation Unit)
Respondent: Mr B Jones (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's claim for unfair dismissal is unfounded and is dismissed.
2. The Claimant's claim for five days holiday pay is well founded and she is awarded £463.49 in respect of 5.5 days holiday pay accrued up to the effective date of dismissal.
3. The Claimant's claim for wrongful dismissal in respect of one months' notice pay is unfounded and is dismissed as the Respondent was entitled to dismiss the Claimant for gross misconduct without notice.
4. The Respondent's counter claim against the Claimant for an overpayment arising after the termination of her employment is unfounded and is dismissed as the Tribunal does not have jurisdiction to consider it.

REASONS

Background

1 In her Claim Form received by the Tribunal on 6 May 2019, the Claimant who was employed as the Duty Manager by the Respondent between 17 March 2014 and 8 February 2019 claimed unfair dismissal, notice pay of one month, holiday pay of 5.5 days and compensation in respect of section 10 of the Employment Relations Act 1999, asserting that she was not permitted to have a colleague or representative attend to represent her during the disciplinary hearing. At the Tribunal hearing, the Claimant withdrew this part of her claim which was dismissed upon withdrawal. As a consequence of this withdrawal, the full Tribunal panel that was arranged to hear the case became upon the parties consent a Tribunal constituted of a Judge sitting alone.

2 The Respondent in its Response Form disputed that the Claimant was unfairly dismissed and asserted that she was dismissed fairly by reason of gross misconduct. It asserted that the Claimant was not entitled to receive payment in lieu of notice due to this gross misconduct. The Respondent stated that the Claimant was not entitled to holiday pay accrued but untaken at the time of the termination of her employment. The Respondent asserted that the Claimant was entitled to 33 days holiday per annum calculated from 1 January each year. For the period 1 January 2019 to 8 February 2019, the Claimant had accrued 3 days holiday entitlement and not 5.5 days as asserted by the Claimant. The Respondent in its Response Form made a counterclaim against the Claimant in respect of £1,138.83 being an overpayment of wages from the date of the Claimant's dismissal on 8 February 2019 until 28 February 2019 stating that the Claimant was not entitled to this payment as the effective date of termination was 8 February 2019 and not 28 February 2019.

3 In response to the employers contract claim, the Claimant on 5 September 2019 submitted that since the payment by the Respondent was not made until 28 February 2019, 20 days after the date on which the employee's contract of employment was terminated, the claim did not arise or become outstanding on the termination of the employment as required by paragraph 4 of the Extension of Jurisdiction Order 1994 and therefore the Employment Tribunal did not have jurisdiction to deal with the matter.

4 At the hearing, the list of issues for the Tribunal to consider was as follows: –

Unfair dismissal

5 What was the Respondent's principal reason for dismissing the Claimant under section 98 of the Employment Rights Act 1996? The Claimant contended that the principal reason was not misconduct but was capability. As a consequence, the Respondent had not proved the reason for dismissal and did not follow the correct procedure to dismiss the Claimant so the Claimant was unfairly dismissed. The Respondent contended that the Claimant's dismissal was for gross misconduct and the Claimant's assertion that her dismissal was for capability was an invitation for the Tribunal to enter the substitution trap and was misconceived. The Tribunal had to ascertain the principal reason for dismissal and consider whether they Respondent acted reasonably in all the circumstances in treating misconduct as a sufficient reason for dismissing the employee? In particular: –

- 5.1 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds?
- 5.2 Did the Respondent undertake a reasonable investigation?
- 5.3 Was dismissal within the range of reasonable responses?

Wrongful dismissal

6 Was the Respondent entitled to terminate the Claimant's contract of employment without giving the Claimant one month's notice? Did the Claimant commit a repudiatory breach of contract by reason of gross misconduct so as to entitle the Respondent to dismiss the Claimant without notice?

Holiday pay

7 How much annual leave had the Claimant accrued at the time of her dismissal?

8 The Claimant contended that under clause 8.2 of the terms of employment, holiday was accrued at the beginning of each month in equal proportions of the leave year. The Respondent contended that the calculation prescribed in regulation 14 of the Working Time Regulations should apply. The Claimant submitted that the relevant provisions of clause 8 of the Claimant's terms of employment should be interpreted to read as stated "your holiday accrued on a monthly basis". In this regard the Claimant contended that the holiday owed to the Claimant accrued for the entirety of January and February 2019 and should be at the rate of 5.5 days. The Respondent asserted that Regulation 14 should apply and that the entitlement was three days holiday pay.

Respondents contract claim

9 Did the overpayment by the Respondent on 28 February arise or become outstanding on the termination of employment on 8 February within the meaning of regulation 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994? This was a question of fact and if the tribunal found that the payment arose after the effective date of termination, it would not have jurisdiction to hear the Respondent's counterclaim.

10 At the hearing, the Tribunal had the benefit of an agreed bundle of documents. The Tribunal heard first from the Respondent's witnesses being Ms Miriam Flynn, the dismissing officer and Mr Mark Cooper the Appeal Officer. The Tribunal thereafter heard from the Claimant and her witness, Mr Mohammed Mudhir. All of these witnesses produced witness statements. The Claimant produced witness statements from Diana Lambert and Sharon Blake who did not attend to give evidence or be cross examined. Although the Tribunal read the statements it placed a little weight upon them.

Facts

11 The Respondent employs approximately 14,000 employees in the United Kingdom and provides outsourced services to customers at over 1000 sites in the United Kingdom. The Respondent is a leading energy and services company which focuses on three key activities: production and supply of energy, facilities management and regeneration. One

of the Respondent's flagship contracts is its works at the Queen Elizabeth Olympic Park (the Olympic Park). As well as maintaining other buildings and facilities at the Olympic Park, the Respondent is responsible for operating the ArcelorMittal Orbit (the AMO), the landmark structure and visitor attraction commemorating the 2012 Olympic games.

12 The Claimant was employed as a Visitor Experience Manager at the AMO. The Claimant's effective date of dismissal was 8 February 2019 by reason of gross misconduct. The Claimant accepted in evidence that she had a position of trust and had managerial responsibilities. In such a position, the Respondent had a reasonable expectation that the Claimant would report any incidents of misconduct on the part of its staff and/or employees that she managed. Her contract of employment was at page 58K of the bundle. At clause 8.2 of the contract (page 58L) it is stated that your holiday accrues on a monthly basis. The Claimant was entitled to 33 days holiday each year beginning 1 January. At the effective date of termination the Claimant had accrued 5.5 days holiday pay based on the formula in clause 8.2 of her contract of employment. The Claimant did not receive this payment.

13 On 31 December 2018, a New Year's Eve event organised by Bennyboy Events (BBE) was held at the AMO. BBE supplied goody bags which were to be given out to its VIP ticket holders at the end of the event. The items in the goody bags comprised haircare, health and beauty products. At the end of the event on 1 January 2019, the surplus products were put into Sainsbury's bags and brown boxes and placed in a 6 feet cage to await collection by BBE on 2 January 2019. The cage did not contain any goody bags and did not have a locking device. At the end of the event, Alan Waterhouse (Head of Visitor Operations) and Gaetan Shamashang (of BBE) moved the cage from the gift shop to the lower platform kitchen at AMO.

14 Due to lift failures at AMO and road closures in the Olympic Park on 2 January 2019, BBE did not arrive to collect their surplus products until 3 January 2019. BBE informed Mr Waterhouse that they could not find all of their surplus stock. A search was undertaken and the Claimant was one of the people requested to look for the missing stock by Mr Waterhouse on 4 January 2019.

15 On 7 January 2019, BBE met with the Respondent and again raised their concerns regarding their missing stock which they estimated was worth approximately £2000. The Respondent agreed to carry out a full investigation regarding the missing stock including reviewing CCTV footage for the period 1 to 3 January 2019.

16 On 16 January 2019 Mr Waterhouse was granted access to review the CCTV footage. The CCTV footage from 2 January 2019 showed Mohammed Mudhir and Diana Lambert taking goody bags and a large quantity of the goody bag stock from the lower platform kitchen at AMO over to the welcome building/ticket office. The CCTV footage also showed Mr Mudhir and Ms Lambert leaving the site with several bags and it also showed the Claimant assisting them with the bags.

17 On 16 January 2019, the Claimant was informed by Charlotte Conroy (Partnership Director) that she was being suspended on full pay whilst an investigation was conducted into the missing BBE stock which had gone missing when she was on duty (Letter of suspension pages 77-78 bundle).

18 On 18 January 2019, Phil Whitehead (Security Manager) issued a letter to the Claimant confirming her suspension and requesting her to attend a fact-finding investigation on 23 January 2019 in line with the Respondents disciplinary procedures. The Claimant was advised that she could be accompanied to the meeting by a fellow employee or trade union representative.

19 On 23 January 2019 the Claimant attended the fact finding meeting which was heard by Mr Whitehead and Wendy Grant also attended as a note taker. The Claimant was not accompanied to this meeting. The Claimant explained that before she left for the day on 2 January, she went to see Mr Mudhir and Ms Lambert in the Welcome building to remind them to lock up. All three of them left together. The Claimant noticed that Mr Mudhir and Ms Lambert were carrying several bags as well as their jackets. Ms Lambert had a rucksack and carrier bags and the Claimant helped to carry some of Ms Lambert's bags. The Claimant said that she did not think there was anything unusual about the number of bags Mr Mudhir and Ms Lambert had and did not question them. The Claimant was shown several CCTV still photographs, one of which showed Mr Mudhir handing an item to the Claimant. When asked what the item was, the Claimant confirmed that Mr Mudhir had given her a brush and that she did not ask him where he had gotten it. The Claimant admitted that it was wrong of her to take the brush from Mr Mudhir and that she should have asked him where he had obtained it.

20 When asked by Mr. Whitehead if it was standard practice for staff to help themselves to items, the Claimant replied that it was not unless a manager had said they could do so. The Claimant said that she had overheard Mr Waterhouse say that staff could have a goody bag. This was said in an open office and not in a meeting or briefing. When asked if staff could take items which were not in a goody bag and put those items into bags themselves, the Claimant replied "no". The Claimant said that she thought that Nicky O'Brien (Director of Attraction) had informed her on 3 January 2019 that BBE were returning to AMO to collect their products. The Claimant said that her understanding of what happened with goods which were left after an event was that staff do not take them unless they are told that they can do so or they are given to the staff. Any valuables which were left behind were put into a cage which was moved into an office so that it was secure (Notes of the Claimants investigation interview were at pages 97-100).

21 On 31 January 2019, having interviewed the Claimant, four other employees and corresponded with Mr Shamashang from BBE, Mr Whitehead determined that the Claimant, together with Mr Mudhir and Ms Lambert needed to be referred to a disciplinary hearing under the Respondent's disciplinary procedure as there was sufficient evidence of misconduct (Investigation report was at pages 109-112).

22 On the 1 February 2019 a letter was sent to the Claimant by Miriam Flynn the designated disciplinary officer (Senior Health and Safety Manager) inviting the Claimant to a disciplinary hearing on 8 February 2019. The purpose of the meeting was stated to consider the question of disciplinary action against the Claimant in relation to theft and bringing the Respondent into serious disrepute. The letter enclosed a copy of the evidence gathered during the investigation by the Respondent and notes of the investigation meeting on 23 January 2019. The Claimant was informed that she was entitled to be accompanied to the disciplinary meeting by a colleague or a trade union representative.

23 On 8 February 2019, the Claimant attended a disciplinary hearing conducted by Ms Flynn. In attendance was also Alison Rogers (Administration Manager) as note taker. The Claimant chose not to be accompanied to the hearing (notes of disciplinary meeting were at pages 133-137).

24 Ms Flynn went through the matters raised by Mr. Whitehead in his investigation. Ms Flynn reminded the Claimant that the CCTV footage showed that Mr Mudhir and Ms Lambert carrying a number of Sainsbury's shopping bags and event goody bags. The Claimant was asked if, as a manager, she felt it was appropriate to question what Mr Mudhir and Ms Lambert were carrying and where the products came from. The Claimant responded "no" and said that she was not told that the BBE stock was kept in bags and that nothing was said about stolen goods until 2 January 2019.

25 Ms Flynn referred to the CCTV footage which showed Mr Mudhir and Ms Lambert sorting out these bags by a cash point in the Claimant's presence and asked the Claimant whether, as a manager, she felt it was appropriate to question Mr Mudhir and Ms Lambert as to what they were carrying and where the products came from. The Claimant responded that she did not question them and maybe she should have. The Claimant confirmed that Mr Mudhir had given her a makeup brush. Ms Flynn asked the Claimant whether, as a manager, she felt it was appropriate to question what he was carrying on where the products came from. The Claimant responded that Mr. Mudhir had told her that it was from an event and that the organiser had given it out.

26 Ms Flynn referred to the CCTV footage which showed the Claimant carrying a Sainsbury's bag and walking with Mr Mudhir and Ms Lambert. The Claimant was asked again whether, as a manager, she felt it was appropriate to question Mr Mudhir and Ms Lambert as to what they were carrying, the amount and where the products came from. The Claimant responded that she did not think about it. She stated that she was not aware of any allegation of missing goods so did not think to question it. The Claimant said that she did not realise that the items were goody bags from the BBE event.

27 Ms Flynn informed the Claimant that from the other statements especially that of Mr. Waterhouse, it was clear that no permission had been given to take the leftover goods following the BBE event on 31 December 2018. Ms Flynn asked the Claimant whether it was correct that on 3 January 2019, the day after the Claimant had assisted Ms Lambert with her bags and had accepted a brush from Mr Mudhir, the Claimant was asked by Mr Waterhouse to look for the missing surplus stock. The Claimant denied that Mr Waterhouse had asked her to search for the BBE stock. This was in spite of Mr Waterhouse's statement taken as part of the investigation confirming that he had asked the Claimant to help with the search. The Claimant said that a member of her team, Sharon Blake (Visitor Experience Host), had informed her that BBE had said it was okay to give out the goody bags and that Mr Waterhouse was present when BBE said this. The Claimant said that Mr Waterhouse had said that BBE said that the staff could take the bags but that he had not specified that it was on the night of the event. The Claimant confirmed she had not informed Mr Waterhouse of the actions of Mr Mudhir and Ms Lambert on the evening of 2 January 2019 even though Mr Waterhouse had asked her on 4 January to look for the missing items; nor had she informed him that Mr Mudhir had given her a makeup brush. The Claimant said that had she known that the Sainsbury's bags contained items from the BBE event she would have questioned it. The Claimant also stated that she could see from the CCTV footage that there were a lot of bags but, on the night, she did not realise

how much stuff Mr Mudhir and Ms Lambert had with them. The Claimant said that she realised that it did not look right but she did not know that the BBE surplus stock was kept in Sainsbury's bags. She admitted that having been shown the evidence, she ought to have either questioned Mr Mudhir and Ms Lambert or brought their actions to the attention of a senior member of staff, saying, 'I should have said something.'

28 Ms Flynn stated that by 4 January 2019 all staff knew that the BBE surplus stock items were missing and that, as a manager, it was the Claimant's responsibility to question staff. The Claimant admitted that she should have brought the issue to the attention of Mr Waterhouse and Ms O'Brien. The Claimant said that she was probably naive and did not think anything suspicious about the number of bags Mr Mudhir and Ms Lambert had taken out on 2 January 2019. The Claimant said that if she had had the description of the goody bags and knew that they were kept in Sainsbury's bags or what was in the bags carried by Mr Mudhir and Ms Lambert, she would have brought it to the attention of Mr Waterhouse and Ms O'Brien.

29 The disciplinary hearing was adjourned to allow Ms Flynn to review the evidence and to consider the Claimant's statements. On recommencing the disciplinary hearing, Ms Flynn informed the Claimant that she was being summarily dismissed on the grounds of serious misconduct as her actions had caused the Respondent to lose faith and trust in her and it brought the Respondent into serious disrepute. When leaving the meeting, the Claimant left on the desk a black box containing a makeup brush. In Ms. Flynn's view the CCTV footage showed Mr Mudhir, Ms Lambert and the Claimant carrying out the missing stock from the Respondent's premises. As a manager responsible for these employees, Ms Flynn expected the Claimant to ask them where they had got the items from particularly given the volume of the items being carried. Furthermore, as of 4 January, when Mr Waterhouse had informed the Claimant that the items were missing and asked her to look for them, she had no good reason not to tell him of her actions on 2 January assisting Mr Mudhir and Ms Lambert remove the items. Given the level of trust placed on the Claimant in her role as Visitor Experience Manager such as handling cash, managing client property and supervising security staff, Ms Flynn formed the genuine belief that the Claimant's actions amounted to gross misconduct and warranted the sanction of dismissal without notice. The Claimant had effectively assisted in taking expensive client products off site, resulting in BBE speaking to the Respondent to ask for reimbursement. This had damaged the relationship between the Respondent and BBE.

30 On 11 February 2019, Ms Flynn wrote to the Claimant confirming the outcome of the disciplinary hearing and informing her that if she wished to appeal, she should do so within five working days of receipt of the letter. The outcome letter was at pages 139-140 of the bundle.

31 On 12 February 2019 the Claimant sent an email to Ms Flynn setting out the grounds of her appeal and stated that she wanted to be accompanied to the appeal meeting. The Claimant's grounds of appeal were that: – (A) evidence was not obtained from relevant people; (B) insufficient investigation was conducted; and (C) insufficient account was not taken of evidence put forward by the Claimant.

32 On 5 March 2019 the appeal hearing was conducted by Mr Mark Cooper, the Assistant Account Manager for the Estate Facilities Management contract at Queen Elizabeth Olympic Park. The Claimant was accompanied by Jamila Cunningham, a work colleague. The appeal notes were at 159-161.

33 The Claimant stated that there had been insufficient investigation. The Claimant said that when she returned to work on 2 January 2019, she had received a handover from Jamie Dawson (Visitor Experience Manager) but she was not made aware of any BBE stock being on the premises. The Claimant said that no one had informed her that any items were missing. The Claimant stated that she was asked to take a statement from hosts and security about a fight that had occurred. The Claimant stated that Mr Waterhouse had not asked her about the missing BBE surplus stock and that she did not ask any of her team to look for those items. The Claimant said that on 2 January 2019, Mr Waterhouse had spoken to her about a DJ set and the Claimant asked her to team to help her move the item. This was the only conversation that she said she had with Mr Waterhouse.

34 The Claimant stated that with regards to Mr Mudhir's investigation meeting notes, he offered the Claimant a makeup brush, not a brush. The Claimant stated that Mr Mudhir said that she was at the BBE event and that the Claimant had given him permission to take the goods, the Claimant stated that this was not correct and she had not attended the BBE event.

35 The Claimant stated that Sharon Blake (Visitor Experience Host) and Jamila Cunningham (Groups Coordinator) had not been interviewed. The Claimant also asked why Ms Dawson was not questioned and why she did not tell the Claimant about the surplus products.

36 Mr Cooper, the Appeal Officer, asked the Claimant about the remaining two grounds of her appeal these being evidence from relevant people and sufficient account not been taking of her evidence. The Claimant responded with her appeal ground relating to insufficient investigation. Mr Cooper asked the Claimant what evidence she was referring to in respect of the remaining two grounds of appeal. The Claimant responded that she was referring to evidence of her speaking to Ms Blake and to CCTV footage of the Claimant looking for the surplus stock.

37 The appeal hearing was adjourned and when it was reconvened, Mr Cooper informed the Claimant that after due consideration he had decided not to uphold the Claimant's appeal against dismissal. Mr Cooper concluded that the decision to dismiss the Claimant had been fair and reasonable. She was an experienced and senior member of staff and ought to have been suspicious and intervened in circumstances where she saw other members of staff leaving the premises with a large amount of promotional items. His expectation was that the Claimant would either have challenged them or removed herself from the situation and reported the matter to a member of her management.

38 On 7 March 2019, Mr Cooper wrote to the Claimant confirming the outcome of the appeal hearing and responded to the Claimants grounds of appeal as follows: –

39 Evidence not obtained from relevant people - Mr Cooper concluded that a thorough investigation had been conducted and all relevant individuals were interviewed. M. Cooper's view was that the witness statements, evidence and interviews provided a complete and comprehensive review of the allegations made against the Claimant and the course of events that had happened.

40 Insufficient investigation - Mr Cooper concluded that the investigation conducted was comprehensive, extensive and gave a clear understanding of the events surrounding the allegations.

41 Sufficient account not being taken of evidence the Claimant had put forward - Mr Cooper concluded that all items raised by the Claimant during the investigation meeting were considered and dealt with in a comprehensive manner. The appeal outcome letter was at pages 163-164.

42 The Claimant was summarily dismissed for gross misconduct on 8 February 2019. Mr Cooper concluded that as the Claimant was dismissed for serious misconduct pursuant to the Respondent's disciplinary procedure she was not entitled to receive notice or be paid in lieu of notice.

43 The Claimant in such circumstances should have been paid up to 8 February 2019 along with any accrued holiday pay. However the Respondent in error paid the Claimant her full salary up to and including 28 February 2019 which resulted in an overpayment of £1,138.83. This payment was paid 20 days after the effective date of dismissal on 8 February 2019.

Law

44 Section 98(1) ERA provides that it is for the employer to show the reason or principal reason for dismissal of the employee and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. If the Respondent fails to do so the dismissal will be unfair.

45 If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

46 Section 98(4) ERA provides:-

“the determination of the question whether the dismissal is fair or unfair (having regards to the reason 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.”

47 In the case of **Robinson –v- Combat Stress** (2014) UKEAT-0310–14, guidance was given in respect of section 98 (1) (a) the reason for dismissal. It was confirmed that the reason for dismissal is a set of facts, which the employer actually had for making the dismissal which occurred when it occurred. The section requires identification of that reason, not whether there might have been a good reason for dismissal which in fact occurred. The determination thus has to have regard to the reason. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is reference to the actual reason. All must depend upon the employer's evidence and the Tribunals approach to it. But that approach must be to ask first what the reason was for dismissal and to deal with whether the employer acted reasonably or

unreasonably by having regard to that reason: that is the totality of the reason which the employer gives.

48 In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band it is unfair.

49 In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

50 The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

51 In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

52 With regard to paragraph 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment tribunal in respect of a claim of an employer for recovery of damages if –

(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made.

Tribunal's Conclusions

53 In this case, the Claimant argued that the reason for dismissal was capability and that the Respondent did not prove that was the reason for dismissal. Therefore, it was submitted that the dismissal was unfair both because the reason was not proven by the Respondent and the procedure followed to dismiss the Claimant was not the procedure that was appropriate for a capability dismissal. The Tribunal did not accept this submission. It was clear from the case of **Robinson** cited in the legal section of this judgment that the reason for dismissal is a set of facts which the employer actually had for making the dismissal which occurred when it occurred. The Tribunal is required to identify that reason based upon the facts that the employer relied upon. In this case, the reason for dismissal was serious misconduct pursuant to the Respondent's disciplinary

procedures which permitted the Respondent to terminate the Claimant's employment without notice if the serious misconduct was found proven.

54 The Claimant in this case was the Duty Manager responsible for the two security members of staff under her management on 2 January 2019 and by her actions in removing the items in the Respondent's storage area and failing to report them to Mr Waterhouse brought the Respondent into disrepute. There was no obvious justification for the removal of the large quantity of bags and the Claimant did not see fit to ask basic questions of the two members of staff that she was managing as to where the items originated and whether these two staff members had permission to remove those items. The Respondent deemed this to be grossly negligent and a culpable failure on the Claimant's part. Furthermore, when Mr Waterhouse asked the Claimant on 4 January to undertake a search for the missing items belonging to one of its clients, the Claimant did not see fit to report the activities of herself and her two colleagues on 2 January to Mr Waterhouse. In the circumstances, the Respondent deemed the Claimant's actions to amount to serious misconduct and the Tribunal had little difficulty in determining that that was the genuine reason for dismissal and that the Respondent had proven this reason.

55 With regard to the fairness of the dismissal, the Tribunal found that the Respondent had a reasonable belief in the guilt of the Claimant based upon a reasonable investigation. The investigation included a review of CCTV footage and interviewing the relevant officers namely the Claimant, Ms Lambert and Mr Mudhir as well as other relevant individuals. This appeared to the Tribunal to be a fair investigation. The Respondent held a disciplinary meeting with the Claimant after providing her with the investigation report which included all of the relevant witness and CCTV evidence. It considered her response to the allegations and found that response to be unacceptable. Furthermore, the Claimant made admissions at the disciplinary hearing confirming that she should have taken more responsibility as a manager and questioning Mr Mudhir and Ms Lambert as to where the items had originated and whether they had permission to remove them. This admission to the Tribunal indicated that the Claimant was aware of her actions and her responsibilities as the manager. It is telling to the Tribunal that the Claimant had an opportunity to amend the disciplinary hearing notes and did so at pages 108a to 108c but did not at page 100c amend the admissions that she had made during the course of the disciplinary meeting to the effect that she should have done more as a manager to prevent the removal of the goods by the two security officers. It is also interesting to note that the Claimant on 4 January when asked by Mr Waterhouse to undertake a search for the missing items was aware that those items were missing but did nothing to inform Mr Waterhouse of that fact. These actions did not appear to be the actions of an innocent employee.

56 The Tribunal considered whether the penalty of summary dismissal was the appropriate penalty to impose in the circumstances and noted the dismissing officers justification for such action. Ms Flynn came to the conclusion that the Respondent had lost trust and confidence in the Claimant as a manager given her admitted wrongdoing and therefore summary dismissal was the appropriate penalty. This to the tribunal seemed to be a penalty that was within the band of reasonable penalties open to a reasonable employer based upon the facts of this case.

57 The Tribunal noted that Mr Cooper undertook a thorough appeal giving the Claimant a full opportunity to put her case. In essence, his reasons for dismissing the appeal were the same reasons why Ms Flynn dismissed the Claimant. His view was that the Respondent lost trust and confidence in a senior employee who was responsible for

managing staff given her actions in removing property belonging to one of his clients along with two other subordinates. The Claimant said nothing in her appeal that could change to this conclusion reached by the dismissing officer and this was confirmed by the appeal officer. As a consequence, the Tribunal concluded that the Claimant was fairly dismissed.

58 Given the Tribunal's conclusion that the Claimant was guilty of gross misconduct, it follows that the Respondent was justified in dismissing the Claimant without notice or a payment in lieu of notice. The Tribunal after reviewing all of the evidence came to the conclusion that the Claimant was guilty of serious misconduct and therefore her claim for wrongful dismissal was dismissed.

59 With regard to the Claimant's claim for holiday pay, the Tribunal came to the conclusion that clause 8 of the Claimant's contract of employment confirmed that holiday entitlement would accrue on a monthly basis meant that she was entitled to holiday pay for both January and February 2019 for a total of five days. Accordingly, the claimant was awarded £463.49.

60 Finally in respect of the Respondent's contractual claim for repayment of the overpayment made to the Claimant for the period 8 to 28 February 2019 the Tribunal noted that such claim arose 20 days after the termination of the Claimant's employment and pursuant to regulation 4 of the extension of jurisdiction provisions, the Tribunal did not have jurisdiction to hear this claim. As a consequence, the Respondent's counter claim was dismissed.

Employment Judge Hallen
Dated: 18 November 2019