EMPLOYMENT TRIBUNALS
BETWEEN

Claimant	**AND**	**Respondent**
Mr D Tudball		Fousert Limited

HELD AT: Wrexham **ON:** 10 January 2020

EMPLOYMENT JUDGE N W Beard (Sitting Alone)
Representation:

For the claimant: In Person
For the respondent: Mr G Fousert (Director)

JUDGMENT

The judgment of the tribunal is:

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The claimant's claim of unlawful deduction of wages is well founded.
3. The claimant's claim of wrongful dismissal is well founded.
4. The respondent is ordered to pay to the claimant the sum of £830.68 in compensation as calculated below.

REASONS

1. This is a judgment in four parts. The first part is an introduction which deals with preliminary matters; the second part sets out the facts; the third part sets out the law and the fourth part is my analysis of the application of the law to the facts.

Part 1 - The Preliminaries

2. The claimant claims unfair dismissal, wrongful dismissal and unlawful deduction of wages. The respondent admits that it dismissed the claimant but denies the dismissal was unfair, argues that the claimant was dismissed for gross misconduct and, therefore, that the breach of contract claim for notice pay cannot succeed. The respondent also argues that it was entitled to deduct wages from the claimant's pay according to his contract of employment.

3. I was provided with a bundle of documents by each party. I also watched agreed video extracts

4. I heard oral evidence from the claimant on his own behalf.

5. The respondent called 3 witnesses to give oral evidence: Miss Atkinson the claimant's line manager, and Mr and Mrs Fousert, directors of the respondent.

Part 2 - The Facts

6. The claimant was employed as a sales assistant at the respondent's store in Rhyl. The respondent is a small company with only two off licence stores operating under the Bargain Booze franchise, the Rhyl branch having only five employees. Miss Atkinson was the store manager and the two directors formed the only management above her. The claimant commenced employment in September 2015 and was dismissed on 25 June 2018, he had two full years of employment. At the end of his employment the claimant was earning £172.26 per week.

7. The claimant signed a document at the outset of his employment headed contract of employment. In clause 5 of the document the following is set out "*the employer may make deductions from your pay to compensate for cash shortages and stock deficiencies during shifts worked by you, whether or not these can be attributed to you personally"*. A short time after the commencement his employment the claimant signed a further document, headed memo, which indicated that the respondent would be enforcing the above clause and that where losses could not be identified to one individual would be deducted equally amongst employees.

8. On 26 May Miss Atkinson, who was not working that weekend, was contacted by an employee who indicated that £200 was short from the takings the previous day. The system in place for cash handling was as follows. Items sold and their price were recorded through a till by the sales assistant, the till was subject to CCTV surveillance. There was an in-premises safe, this safe could not be accessed by the claimant to empty but he could make deposits via a drop drawer. The sales assistant operating the till would remove money from the till and deposit it in the safe at intervals. These intervals would usually occur when £200 could be put in the safe; the £200 would be wrapped and bagged with a till receipt. The safe would be emptied the following morning by Miss Atkinson or two other employees with authorisation to do so. The bags would be taken into an office where the money would be counted and checked.

9. Miss Atkinson watched many hours of CCTV footage. Miss Atkinson sent an excerpt of CCTV footage to Mrs Fousert (the footage which I have seen) dated 25 May 2018. She asked for advice from Mrs Fousert. Mrs Fousert, in turn showed the footage to Mr Fousert. It was discovered that £200 was short from takings on 26 May 2018. A decision was made to reclaim that sum from the claimant's wages based on a breach of procedure. It was also decided to commence an investigation into the missing money. The investigation was to be carried out by Miss Atkinson. Mrs Fousert decided this because she believed, that Mr Fousert would need to carry out any disciplinary hearing that arose, and that if there were to be an appeal Mrs Fousert could conduct that.

10. Miss Atkinson's view of the CCTV footage was that the claimant having removed £200 on three occasions from the till did not deposit the first of those immediately. However, it was accepted that he could not do so because a customer had approached the counter. However, she considered that he should have made the deposit immediately after dealing with the customer. She indicates that he removed

money on two further occasions and that she saw him place these under the counter but then remove them and put them in the safe. She considered that he later removed the first money and pocketed it, she bases this on an image of the claimant putting his hand near that part of the counter where the money had been placed at one point. When answering questions, she accepted that it was possible that the money could have gone missing when handled by those emptying the safe on 26 May 2018. However, she discounted this possibility indicating that the till records showed that this was the money that was missing. I rejected her evidence on that final point because the claimant's evidence was that the till records, in terms of the till receipt put with the money, was not printing out from the till at that time and he was required to handwrite the receipt. I accepted the claimant's evidence because I saw him write the receipt on the CCTV footage I was shown which supported his account. She interviewed the claimant and the fellow employee who had emptied the till the following morning.

11. I saw the CCTV footage. My observation was that the claimant removed the money from the till, wrote out the receipt and placed the money beneath the counter because a customer approached. Having dealt with the customer he did not return to the money but began looking at his mobile phone for some time. I drew the conclusion that, having been interrupted, he simply forgot to place the money in the till. I also saw the footage where Miss Atkinson drew the conclusion that he had picked up and pocketed money, I am afraid that on my observation it was not possible to see the claimant's hand at all and I was not able to view him place something in his pocket.

12. Mr Fousert invited the claimant to attend a disciplinary hearing. The complaints against the claimant were of responsibility for the loss of the money on 25 May 2018 by not following cash handling procedures, discussing the issue with a colleague and in front of customers when he should have kept the matter confidential creating a difficult atmosphere, accessing CCTV footage (where the claimant was examining the footage after the investigation) and excessive use of his mobile phone. The dates included in the letter were wrong, however the claimant was under no disadvantage as he knew the incidents referred to and was aware the dates were incorrect.

13. There were some difficulties arranging a time and date but eventually the hearing took place on 17 June 2018. Miss Atkinson was present and took notes, however. The claimant was asked about placing his hand under the counter when it was suspected he had put the money in his pocket. He said he could not remember but thought it was "probably" to get his tobacco, Mr Fousert considered this to be different to an explanation during the investigation that he was probably reaching for a wage slip or cigarette. Mr Fousert considered that the claimant was defensive in his answers on the cash issue, firstly by attempting to say that the business was wrong to allow assistants to deal with money, referring to the practice in large stores and then became monosyllabic in his answers.

14. Mr Fousert concluded that all four matters had been proven against the claimant and he dismissed him with immediate effect. However, during questions Mr Fousert indicated that it was the breach of the cash procedures that was of most importance and had the other complaints stood alone he probably would not have dismissed the claimant. He also indicated that he considered that each of the individual matters

were made more serious because of their connection with the cash handling breach e.g. the use of the mobile phone at a time when the claimant should have been placing the cash raised from the till in the safe. In actual fact Mr Fousert believed that the claimant had stolen the money. It is also clear that, whatever was in the charges, the claimant was aware this is what he was being accused of and defended himself on that basis.

15. On 27 June the claimant wrote to the respondent indicating that he would appeal the dismissal. On 3 July the claimant wrote setting out grounds of appeal. Some of the grounds related to the dates provided in the letter as to events. He argued that he had not breached the cash handling procedure, but indicated that he may have "forgot" about the money placed under the counter. He complained that he had never been informed of the mobile phone policy and that others used their mobile phones at work, he complains that he was entitled to be upset at work and discuss issues given what he had been accused of, and he argued that he did not breach any rule in viewing the CCTV footage. The respondent, through Mrs Fousert did not hold an appeal hearing, but dealt with these matters in writing. The appeal was not upheld (1) because the claimant, even in his appeal letter, admits the breach of procedure by forgetting about the money (2) the claimant was referred to a document he signed at the outset of his employment about the restrictions on the use of mobile phones, that the claimant had admitted anger when he should not have been discussing matters in store and that the claimant required permission to view CCTV footage which he did not have.

16. I deal here with a separate matter out of sequence. The respondent did not investigate an earlier situation where £200 went missing. However, because the claimant was on duty on that occasion and also operating the till the respondent made deductions from the claimant's final pay. The respondent conducted no appropriate investigation into the loss on that occasion. This did not form part of the respondent's decision to dismiss but the respondent deducted this sum along with the £200 related to 25 May 2018 from the claimant's pay.

Part 3 - The Law

17. Section 98 of the Employment Rights Act 1996 provides:

> *(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, the Tribunal shall have regard to—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is ---- a reason falling within subsection (2)".*
>
> *(2) A reason falls within this subsection if it-*
> *(b) relates to the conduct of an employee*
>
> *(4) where the employer has fulfilled the requirements of subsection (1) the determination of the question of*

> *whether the dismissal is fair or unfair (having regard 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".*

18. ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT 0032/09*** and f ***Wilson v Racher [1974] ICR 428*** demonstrate that gross misconduct must be either deliberate wrong doing or gross negligence. It is a question of mixed fact and law upon which the Tribunal must draw its own conclusions.

19. The approach to be taken unfair dismissal, particularly when related to conduct means it is not the subjective view of the Employment Judge that is important, what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision as set out in ***Turner v East Midlands Trains [2013] IRLR 107***. The Judge in Turner said:

> *"For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with the equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the Wednesbury mast".*

20. Guidance has been given to Tribunals in dealing with conduct cases, beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379***. This requires me to consider the following: firstly, whether the respondent has a genuine belief in the misconduct; then whether that belief is sustainable on the basis of the evidence that was before the respondent at the time; thereafter, whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case; finally, I must consider whether the punishment fits the crime, in other words, whether dismissal was a reasonable decision to take given the conduct itself and the evidence upon which it was based. ***Sainsbury's Supermarket v Hitt [2003] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also one of applying the band of reasonable responses.

21. However, my role is to consider the process as a whole in deciding whether or not it is unfair, remembering that in appropriate circumstances poor procedure at one stage may not mean that the process overall is unfair see ***Taylor v OCS Group Limited [2006] IRLR 613.***

22. Section 13 of the Employment Rights Act 1996, so far as is relevant, provides:

> *(1)An employer shall not make a deduction from wages of a worker employed by him unless—*
> *(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.*
> *----------*
> *(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

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23. Section 25 provides*:*

> *(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—*
> *(a)in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13;*

24. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that (subject to certain exclusions which are not applicable here) employment contract claims that can be brought for breach of contract in the County Court may be brought if in the Employment Tribunal if the claim "arises or is outstanding on the termination of the employee's employment".

Part 4 – The Analysis

25. The claimant contends that the respondent had decided guilt at an early stage because it had already decided that money should be deducted. I reject that conclusion. The respondent was entitled to deduct money, under the terms of the contract, whether or not the claimant was guilty of misconduct. This was a small business, margins were tight, the reason for seeking to recoup were on this basis.

26. The respondent conducted a reasonable investigation for this small organisation, it spoke to those it was necessary to speak to and considered the recorded material both visual and in document form. The investigation was within the band of reasonable investigations.

26.1. CCTV footage was reviewed in detail;
26.2. The documents related to banking on that day including till records were examined;
26.3. The staff present at work on the 25 and 26 May 2018 were spoken to as they did the reconciliation for banking.

27. The information provided to the claimant was sufficient for him to understand the case against him:
    27.1. The findings of the investigation were explained to the claimant in detail in the first invitation to a disciplinary meeting;
    27.2. It was further explained to the claimant what he was being accused of.
    27.3. Although incorrect dates were used in the letter inviting the claimant to the disciplinary the claimant was fully aware of the dates in question from his involvement in the investigation and was not disadvantaged by this.
    27.4. Further whatever the position in the written documentation both the claimant and the respondent knew what was being discussed at the disciplinary was the taking of the money in question. The claimant was aware of this and understood that this was what he was being accused of despite it being referred to as a breach of procedure in the documentation when he lodged an appeal.
    27.5. Whilst this might be considered a procedural breach in my judgment it does not amount to one in the circumstances. No-one on either side was under any illusion as to what was being considered.

28. The respondent genuinely believed that the claimant had stolen the money. This belief was, in part, drawn from the claimant's approach to dealing with the disciplinary hearing which was defensive and unhelpful. The conclusions drawn by the respondent from the evidence, that the claimant had breached cash handling procedures and taken the money, had behaved inappropriately in the way he discussed matters with staff, wrongly viewed CCTV footage and had excessive use of his mobile phone were permissible on the evidence that the respondent had gathered. The respondent's decision to dismiss was within the band of reasonable responses because even if the other matters alone would not be worthy of dismissal, the belief that the claimant had taken the money made it so. On that basis the claimant's claim of unfair dismissal is not well founded.

29. Having heard from the claimant and seen the CCTV footage I do not consider that the claimant, on the balance of probabilities, had taken the money. The money could have been taken at the stage where it was being reconciled, there was no footage of that because the CCTV does not cover the office. The CCTV itself does show the claimant reaching down but does not show him retrieving money. It is not clearly shown to me that the claimant only lifted two bundles of money when he did put money in the safe. Beyond that I was impressed with the claimant as a witness and did not doubt his honesty. The claimant was guilty of a breach of the cash handling procedures. This occurred because he was interrupted by a customer in the process of removing cash from the till. He then used his mobile phone. Whilst I accept the respondent had a policy on mobile phone use which the claimant had signed at the outset of his employment, in my judgment this was honoured in the breach more than the observance by a number of staff, and was no subject of rigorous enforcement. In those circumstances I do not consider the claimant's conduct amounts to gross misconduct, misconduct certainly but not at a higher level. On that basis the claimant's claim of wrongful dismissal is well founded. On that basis the claimant is entitled to two weeks wages, that being the notice period both under statute and pursuant to the claimant's contractual terms.

30. Under the terms of the contract of employment the respondent was entitled to make deductions from the claimant's wages. However, that was circumscribed by the respondent's own policy which indicated that if no-one could be identified as

specifically at fault then there would be a shared responsibility amongst staff and deductions would be made from all who could be responsible. In my judgment this has the force of a contractual term. The policy was introduced to enforce cash handling procedures, all staff were made aware of it, no member of staff objected to it as a change of terms. It is suitable for incorporation into the contract as an explanation of the methods of deduction. On this basis the respondent, not having carried out an appropriate investigation into the first loss was not, in my judgment, entitled to apportion that loss to the claimant. This is because it did not, on the basis of an investigation know if another single individual had responsibility. That deduction was unlawful. In respect of the deduction of the £200 from the 25 May 2018, based on my findings, the respondent was entitled to make a deduction. However, that deduction should have been shared because on my findings the person emptying the safe could also have borne a responsibility. On that basis I conclude that the respondent was entitled to deduct half the sum or £100.

31. The respondent conceded that the claimant was entitled to accrued holiday pay and unpaid wages. The sums conceded were £344.52 for unpaid wages and £241.64 for holiday pay.

32. On that basis the claimant is entitled to compensation for two weeks @ £172.26 per week breach of contract notice pay, the conceded sums of £344.52 and £241.64 form which the respondent was entitled to deduct £100.00. A total of £830.68 which the respondent is ordered to pay to the claimant.

Judgment posted to the parties on

7 February 2020

EMPLOYMENT JUDGE N W BEARD

Dated: 7 February 2020

For Secretary of the Tribunals