EMPLOYMENT TRIBUNALS

Claimant: **Janet Fisher**

Respondent: **Bakers Arms 2019 Limited**

Heard at:

Southampton
On: 10 December 2020

Before:

Employment Judge Dawson

Appearances
For the claimant: Mr Williams, friend
For the respondent: Mr Hine, solicitor

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Issues

1. By her claim form, the claimant brings claims of unfair dismissal, for a redundancy payment and for notice pay. The claimant had worked at a public house called the Bakers Arms until she was dismissed. The respondent says that she was dismissed because it believed that she was guilty of gross misconduct. The claimant does not accept that and says that she was dismissed because she complained about a reduction in her hours following a transfer of undertaking, pursuant to which her contract of employment transferred to the respondent.

2. I discussed the issues with the parties at the outset of the hearing and although the issues had been identified at a hearing on 23 April 2020, it became clear that further clarification of the claimant's case was necessary.

3. At the outset of the hearing, Mr Williams, who represented her, explained that part of the claimant's claim of breach of contract is that prior to the transfer of undertaking referred to, she worked for 31.5 hours per week and, following the transfer, the number of hours was reduced to 21.5. He says that by custom and practice, a term was implied into the contract that the claimant would be offered at least 31.5 hours work each week. Thus, he says, there was a breach of contract in that the claimant's hours were reduced and the claimant sought damages in that respect. He also argues that if the claimant was offered more than 21.5 hours work each week, she was offered it at times which were inconvenient to her and at which the respondent could not require her to work.

4. The claim for a redundancy payment was not clear and upon discussion with Mr Williams his position was that if the claimant had not been unfairly dismissed a redundancy situation would have existed and, therefore, the claimant would be entitled to a redundancy payment. I discussed with him that the difficulty with that analysis is that, normally, for a redundancy payment to be payable there must be a dismissal because of redundancy but Mr Williams' express case on behalf of the claimant is that the dismissal to which the unfair dismissal claim relates (on 4 July 2019) was not a dismissal by reason of redundancy. He simply asserts that a redundancy dismissal would have occurred in the future. It is not suggested that the provisions in the Employment Rights Act 1996 which relate to layoff and short time apply in this case.

5. I am satisfied that the above matters were sufficiently presented within the claim form to warrant consideration by me at this hearing.

6. Following those discussions with the parties at the outset of the hearing, the issues which I must determine are as follows.

7. In respect of the claim of unfair dismissal:

    a. what was the reason for the dismissal- the respondent says that it was conduct,

    b. did the dismissing officer have a genuine belief in the misconduct based on reasonable grounds and following a sufficient investigation,

    c. was the decision to dismiss within the band of reasonable responses,

    d. if the dismissal was unfair, should compensation be reduced either on the basis that a fair procedure would have resulted in the same outcome of the claimant contributed her dismissal.

8. In respect of the claim of breach of contract following the transfer of undertaking:

    a. was there a transfer of undertaking to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply (the respondent admits there was),

b. did the claimant have a contractual entitlement to work 31.5 hours per week or to work those hours at any particular time before the transfer,

c. did the respondent reduce the hours it was willing to give to the claimant to 21.5 hours per week or require the claimant to work more hours than that at a time which it was not permitted to under her contract of employment,

d. if so did that amount to a consensual variation of the contract of employment or a breach of contract,

e. if there was a consensual variation, was the sole or principal reason for the variation the transfer,

f. was the sole or principal reason for the variation an economical, technical or organisational reason entailing changes in the workforce which was agreed or permitted by the contract,

g. if there was a breach of contract (including the situation where any contractual variation was void by reason of TUPE) what loss has the claimant suffered.

9. In respect of the claim of breach of contract for notice pay, it is admitted that the respondent did not pay the claimant's notice pay to which she was entitled and, therefore, the question is whether the claimant was in repudiatory breach of contract so that it did not need to.

10. In respect of the claim for a redundancy payment, the issue is whether there was a dismissal by reason of redundancy as defined within the Employment Rights Act 1996 (it is not suggested that the claimant was eligible for a redundancy payment by reason of being laid off or kept on short time).

Findings of Fact

11. References to page numbers below are to the hearing bundle except where stated.

12. The claimant worked at the Bakers Arms public house in Winchester. She started working there on the 26 November 1995. She states that her main duties over 10 years had been cleaning the pub, shopping and preparation work for the kitchen and helping out in the bar. She states that most of her work was done before the pub opened at 10 a.m.. I accept that evidence. She states, and I accept, that for a period until shortly before her dismissal (her witness statement does not disclose the dates) she started work at 6:15 a.m. Monday to Friday, and finished at 11 a.m. on Tuesday, Wednesday and Friday and at 2:15 p.m. on Monday and Thursday.

13. I find that the landlord who the claimant worked for until 2019, Mr Sinker, decided to retire. At that time the Bakers Arms was being moved from the Lease/Tenant part of E.I.Group to Craft Union and being refitted. After Mr Sinker's retirement, the claimant's employment transferred to Haskew Leisure Ltd. It is not disputed that the claimant was engaged by Haskew Leisure Ltd on the same terms she had been employed by Mr Sinker.

14. At the end of April 2019, Mrs Robinson was contacted by the Craft Union area manager in relation to a proposal of her taking over the running of the premises from Haskew Leisure Ltd. That led to the respondent taking on the pub and, pursuant to TUPE, the claimant's employment.

15. The claimant had a written contract dated 26 November 1995. In respect of "hours of work" the contract provides "your hours of work are those required to carry out your duties to the satisfaction of the company and as necessitated by the needs of the business." There were no set hours.

16. At page 31 of the bundle is a "New Starter Form". Regrettably it is not dated but gives the hourly rate is £7.80 per hour. The claimant say she was paid the national minimum wage which suggests that the period in which it was completed was the year up to 31 March 2019. On that form, in answer to the question "number of core hours per week" somebody has written by hand "31.5". It is not known who wrote that or when. Although the evidence is not wholly clear, I find that the new starter form was completed when the claimant became employed by Haskew Leisure Ltd - between working under the retiring landlord and the respondent taking over the running of the premises.

17. There is a further New Employee Form at p31a of the bundle which is dated 25 May 2019 and relates to the transfer of the claimant's employment to the respondent. That form is silent on the number of hours worked.

18. The respondent is a small employer, it only operates the Bakers Arms public house (according to the ET 3) and only employs 4 people who appear to be the staff at the pub. Its directors are Mr and Mrs Robinson who, as I will set out below, very properly have relied upon their HR consultants for a significant amount of advice in this case. This is not a business with layers of management, in essence Mr and Mrs Robinson are the only managers of the staff and there is nobody more senior to them.

19. Following the transfer of the undertaking, the respondent had decided that the pub would no longer serve food, therefore there was no longer a kitchen to clean or food to be purchased. That would mean that the claimant's duties would only take 21.5 hours per week instead of 31.5 hours. I find that the respondent offered to make those hours up by offering the claimant work at evenings or weekends but I do not accept Mrs Robinson's evidence that the claimant was offered the opportunity to make up her hours at the end of her existing shifts. That evidence was given for the first time during her statement; it was not referred to either in the grievance appeal outcome or the ET 3.

20. The claimant was unhappy with that change and, according to a letter dated 6 June 2019 at page 65, raised a verbal appeal. The claimant was invited to an appeal hearing which was conducted by "Face2Face"- which the letter describes as being a "Consultant from Peninsular"- on 10th of June 2019. Although this was described as an appeal, in fact there had been no decision at an earlier stage of a grievance process.

21. The appeal outcome was not sent until 16 July 2019 at which point it was held that there had been no fundamental change to the claimant's duties (Page 138).

22. On 11 June 2019, the claimant was working on the bar with her colleague Tamara Petch. During the shift an issue arose about the claimant using Ms Petch's till to ring up a transaction. As a result, Ms Petch contacted Mrs Robinson. Ms Petch's witness statement was not challenged and states "I then informed June that Jan had used my till (Till2) so that she knew I was not the only person…, who had accessed my till (Till 2). I asked June to check the CCTV so that she could verify that Jan had used my till (Till 2) for a transaction as I was and still am liable and responsible for any discrepancies in that Till as are all staff."

23. I find that as a consequence of that report, Mrs Robinson did check the CCTV. In the section of footage that is material for the purposes of this judgment, it showed a customer leaving a pile of coins on the bar, having won on the fruit machine. It is not in dispute that the customer had bought a drink for a friend and, being served by the claimant, told the claimant to have one for herself. He then left the bar.

24. The claimant's version of events of what happened, as put to Mrs Robinson in cross examination, is that she had her till fob in her left hand and picked up some coins for the price of the drink so that they were also in her left hand. She then put her left hand into her right hand trouser pocket and released the till fob into her pocket but kept the coins in her hand. She then moved her hand back to the top of the bar and put other coins into her hand and carried on with the transaction.

25. On viewing that CCTV footage Mrs Robinson says that she formed the view that the claimant had pocketed (and thereby stolen) coins from the customer.

26. As a consequence the claimant was invited to an investigatory meeting and, beforehand, given the CCTV footage on a memory stick. I accept that the claimant could not use that memory stick to view the CCTV footage (in the sense that she did not have the technical knowledge) but that she gave it to her sister who had viewed it and who attended at the investigatory meeting with her, which took place on 18 June 2019.

27. I accept that there was some resistance to the claimant's sister joining the claimant in the investigatory meeting by Mrs Fisher (and her husband) but that was, ultimately, permitted.

28. On 18 June 2019, the claimant was invited to a disciplinary meeting. The allegation was set out in the letter inviting her to the meeting, namely that she had picked up and placed in her pocket, money that belonged to a customer and she was told that if she was unable to provide a satisfactory explanation her employment may be terminated without notice. She was sent the CCTV footage again, the notes from the investigatory meeting and a statement which had been taken from Ms Petch. At that point it was intended that Mrs Robinson would conduct the hearing. The claimant was told that she could bring a colleague.

29. Mr Williams, who represented the claimant at this hearing and was, at the time, an elected lay representative of a trade union, then contacted Mrs Robinson to say that he would represent Mrs Fisher but that it was not appropriate for her to chair the disciplinary hearing because she had conducted the investigation. As a consequence Mrs Robinson contacted her HR advice provider, Peninsula, who told her that it would be acceptable for her to continue to conduct the hearing or, if she did not want to, they could do it for her.

30. Mrs Robinson chose the latter course of action and the disciplinary hearing was conducted on 20 June 2019. Neither Mr nor Mrs Robinson were at the meeting. It was conducted by a person who described himself as a Face2Face consultant. I have not heard evidence from him.

31. Despite Mr Williams and the claimant asking the person conducting the hearing to look at the CCTV footage in the meeting with them, he did not do so. Had he done so, I am satisfied that Mr Williams would have taken him through the CCTV footage in a great deal of detail, as he did with the person who heard the appeal and as he did in cross examination of Mrs Robinson at this hearing.

32. I break the chronology for a moment to observe that Mr Williams' central argument throughout these proceedings has been that although it may look like Mrs Fisher had pocketed the coins, in fact the CCTV footage showed that after she had put her hand in her pocket, the coins remained in her hand. He had taken stills from the CCTV footage which he supplied to the Face2Face consultant conducting the disciplinary hearing which he says showed that. If they are the same stills which I have seen they do not show the full period of the transaction, but only a moment in time when Mrs Fisher's hand is on the bar, apparently with coins in it. When being cross examined, Mrs Robinson would not accept that the stills which Mr Williams had produced immediately followed the moment when Mrs Fisher had put her hand in her pocket, she said there was a gap of time.

33. Following the meeting, the Face2Face consultant produced a report which appears at page 75. His report states that he had spoken to Mrs Robinson as part of the disciplinary procedure. He did not record what had been discussed between them and there are no minutes of that meeting. He states, at paragraph 12 of his report, that he viewed the security video in the presence of Mrs Robinson when it was played at normal speed and also with the speed slowed down.

34. Following the meeting he made recommendations. He stated that he recommended that the allegation was upheld and "as there has been a gross breach of trust amounting to gross misconduct, the appropriate sanction is summary dismissal, and this is my recommendation." He also stated that it was a matter for the company to decide whether it wished to accept his recommendations (see page 79).

35. That report was not sent to the claimant for her comment and on 4 July 2019 Mrs Robinson wrote to the claimant including the report and stating "it is my decision to summarily dismiss you for the following reasons: on review of the CCTV it is clear that you removed money from the bar belonging to a

customer and your denying it gives me a reasonable belief you did not have the authority to do so." The claimant was dismissed without notice (page 110).

36. The claimant was given a right of appeal which she exercised on 6 July 2019 (page 111); in her letter of appeal she made the point that the person conducting the disciplinary meeting had declined to view the CCTV with her.

37. The appeal hearing was conducted by another Face2Face consultant.

38. The CCTV was viewed in that hearing and Mr Williams was able to make the points about the coins still being in Mrs Fisher's hand. The claimant's case (made through Mr Wiliams at this hearing) is that the person hearing the appeal accepted Mrs Fisher's version of events and, therefore, it was a surprise (and something which makes the dismissal unfair) when she upheld the decision to dismiss. The transcript of that meeting shows that the person conducting the appeal was listening to what was being said and engaging in what was being said. She repeated back to Mr Williams certain points that he was making. She asked intelligent questions. She did not dispute anything which Mr Williams was saying in that meeting (or that Mrs Fisher was saying). The following exchange appears in the minutes:

> SW: Now I'm concerned that I couldn't persuade Robert that this was the evidence and the important evidence. If you're happy that you can take on board what I'm saying and what Jan is saying.
>
> **Yeah the critical moment about allegedly the fob going in the pocket as opposed to coins. I think that's the critical part which we've gone through a few times.**
>
> SW: Yeah exactly. Just that couple of seconds on the CCTV. I mean we can probably zoom in a bit more and get it clearer, but if you're happy that there are coins there then that's fine. That's the important thing to us obviously. You know it's been-, it's getting emotional for me to be honest because we've had such a job. You know Janet is quite adamant, she's worked here so long and she's so honest and you know this situation. She's well known in Winchester. She's got all her regular customers that are stopping her in the street saying why aren't you working. It's just been so emotional. I'm just relieved that I seemed to have convinced you.
>
> **Okay, what happens now is that I'll put up a report with my recommendations on the grounds of appeal as to whether they're substantiated or not and the report goes out to the employer and the employer will write to you in due course with their decision.**
>
> SW: They make the decision, yeah.
>
> **Because they're the employers. You've got my card if you need anything in the meantime.**

39. It is that exchange which Mr Williams relies upon. In my judgement, whilst I can understand why Mr Williams might take the view that he has, it is not a fair analysis of the exchange to say that the consultant has accepted Mr Williams' case. He put her under some pressure to concede that he was right, particularly in the penultimate section of his dialogue where he states "I'm just relieved that I seem to have convinced you" but the consultant does not go as far as saying that she has been convinced. She simply states that she will put up a report with her recommendations as to whether the grounds of appeal are substantiated or not. In my view she avoids the question that she is being asked. I do not think that it was inappropriate of her to do so, she was entitled to take time to consider her decision following the hearing.

40. At paragraph 15 of the report sent following that meeting, the consultant records that she had spoken with June Robinson as part of the disciplinary appeal procedure. In fact it is clear from page 164 that she spoke to Mrs

Robinson after the meeting with the claimant. She extracted some further information from her, such as a statement that Mrs Robinson had been asked by both Tamara and another member of staff not to share a till with the claimant because a previous employer's money had gone missing from the tills. The claimant was never asked to comment on those matters, indeed prior to the report being sent to the claimant (after the decision on the appeal had been made) I find that she was not even aware that Mrs Robinson had been spoken to.

41. In his closing submissions Mr Williams made the point, which I consider to be well founded, that in the recorded interview with Mrs Robinson, the consultant has not put the claimant's main defence to the respondent- that CCTV shows the coins in hand after the time of the alleged theft. She has not shown the respondent the freeze frames provided by the claimant in evidence and has not provided the said freeze frames with her case report and recommendations.

42. The report written by consultant following the hearing concludes at paragraph 42 with the statement "Having given full and thorough consideration to the information presented, I recommend that the grounds of appeal are not upheld as they are not well founded and the finding of termination of employment letter is upheld. The original sanction of dismissal should remain." It goes on at paragraph 46 to state "it is for the company to decide if it wishes to accept the recommendations contained within this report."

43. On 12 August 2019 the report was sent to the claimant and, in the same letter Mr and Mrs Robinson wrote "having carefully considered the report of their findings and recommendations, it is our decision to uphold the original decision of dismissal for the following reasons". The letter then sets out extracts from the report.

44. Whilst I accept that the decision maker in this case was, ultimately, Mrs Robinson (probably in discussion with her husband) the reports from Face2Face are surprising in the lengths they go to influence the decision maker. Whilst they both state that it is up to the company to decide whether to accept their recommendations or not, the statement in the report sent following the disciplinary meeting that "as there has been a gross breach of trust amounting to gross misconduct, the appropriate sanction is summary dismissal, and this is my recommendation" is striking for its directive nature as is the statement in the appeal report that "The original sanction of dismissal should remain".

45. Mrs Robinson is, in my judgment, somebody who was concerned to do the right thing in terms of employment law procedure but clearly not well versed in employment law. That is why she engaged her HR advisers. She was bound to put a very large amount of weight on the recommendations that she was given by her HR consultants and was likely to be significantly influenced by their report.

46. Having said that, I do accept Mrs Robinson's evidence that she had and has repeatedly looked at the video footage and reached a very firm conclusion that it shows the claimant putting coins into her pocket. She could not be

shifted from that view in cross examination and had she conducted the disciplinary meetings I am confident that she would not have been shifted from that view in those meetings. To put the matter bluntly, she has seen the CCTV and there is nothing that the claimant could have said which would have changed her mind. That is not to say that I find that she was acting unreasonably, but she believed and believes that the CCTV footage shows the claimant putting coins into her pocket which do not belong to her.

47. In respect of the claim of breach of contract, I must reach my own conclusion as to whether the claimant was guilty of theft or not. I have not been provided with the CCTV footage to view, I have only seen the stills which Mr Williams has produced and certain other stills which the respondent has produced but which I was not taken to in evidence. It is impossible to reach any conclusions from those stills. I have not been able to form a view as to whether Mr Williams or Mrs Robinson is right about whether there is a gap between the time when Mrs Fisher put her hand in her pocket (which is not shown on the stills) and the time when the stills show that she had coins in her hand.

48. Without seeing the CCTV footage for myself I am not willing to accept the respondent's case that the claimant was guilty of theft. Whilst there may well be grounds for the respondent to believe that the claimant was guilty of theft (especially given the claimant's explanation of a somewhat tricky movement where she has both a fob and coins in her left hand which she then moves to her right pocket and then only releases the fob but not the coins), the evidence which has been produced to this tribunal has not satisfied me that Mrs Fisher was guilty of theft. I do not know why the respondent has not played the CCTV footage to me but, ultimately, I am faced with Mrs Robinson on the one hand saying "I have seen the footage and it shows theft" and Mrs Fisher saying that she, too, has seen the footage and it does not show theft. The stills have no probative value without knowing when they were taken by reference to the moment when Mrs Fisher put her hand in her pocket. The cross examination of Mrs Fisher amounted to no more than an assertion that she was guilty of theft and a denial by her. I did not form the view that Mrs Fisher was obviously lying and I am not satisfied on the balance of probabilities that she stole money on the day in question.

The law

Unfair Dismissal

49. Section 98 Employment Rights Act 1996 provides that it is for the respondent to show the reason for dismissal and that it is a potentially fair reason.

50. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

51. In considering a dismissal for misconduct the tribunal must have regard to the test in BHS v Burchell that "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 his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

52. In *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 the Court of Appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision.

53. In *Ramphal v Department for Transport* [2015] IRLR 985, a dismissing officer changed his mind as to the culpability of an employee following the involvement of human resource advisers. In the EAT, HHJ Serota QC stated

> "[55] In my opinion, an investigating officer is entitled to call for advice from human resources; but human resources must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability in so far as the advice went beyond addressing issues of consistency. It was not for human resources to advise whether the finding should be one of simple misconduct or gross misconduct…
>
> [56]… I consider that an employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them, and also given notice of representations made by others to the dismissing officer that go beyond legal advice, and advice on matter of process and procedure".

54. In *A v B [2003] IRLR 405* the EAT held

> **60** Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.

> **61** This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

55. In *Bugden & Co v C Thomas* [1976] IRLR 174 the EAT held

> "14 The fault of Budgen & Co is that pointed out by the Tribunal: they confused — and, by their argument to this Tribunal, clearly still confuse — two quite different things. One is the process of investigating the complaint; the other is the process of deciding whether or not dismissal is the right penalty. Very often, those separate functions will be undertaken by the same person or body, and, when that happens, there is no problem. But if, as here, the investigation of what happened is undertaken as a separate exercise, then whatever the outcome of that investigation, and however serious the offence disclosed, it is still necessary, when a decision is being taken whether dismissal is to follow, for the employee to have an opportunity to say whatever he or she wishes to say to the person who will take the decision. It is not possible or desirable to elaborate that at greater length. The Tribunal put it admirably in a single sentence which is short, pithy and correct: 'A statement to a security officer is not a substitute for an interview with the management who will eventually dismiss.' [Para. 11.] That really is what this case is all about.

56. In respect of the compensatory award, s123 ERA 1996 provides

> (1)Subject to the provisions of this section and sections … , 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.
>
> ...
>
> (6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Breach of Contract

57. Generally a party cannot seek to imply a term into a contract which is inconsistent with or contradicts an express term. Harvey on Industrial Relations (Division AII para 37.01) states “The second problem is the extent to which custom and practice can be relied on where the other side argues that the matter is already covered by an express term with which the alleged custom is inconsistent. Short of arguing that the 'custom' in fact constituted or was evidence of a formal variation of the original express term, the starting point in orthodox contract law is that the express term must take precedence. If however, it can be shown that the express term is ambiguous there may well be a proper role for custom in interpreting it, in which case it may well be the custom that in fact prevails.”

Transfer of Undertakings

58. Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 “Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee2”

59. Regulation 4(4) provides that any purported variation of a contract of employment is void if the sole or principal reason for the variation is the transfer.

Redundancy

60. Section 135 Employment Rights Act 1996 provides that an employer shall pay a redundancy payment to an employee who is dismissed by reason of redundancy or is eligible for a redundancy payment by reason of being laid off or kept on short time.

Conclusions

61. I am satisfied that the decision to dismiss was made by Mrs Robinson. I am also satisfied that at the point when she decided to dismiss the claimant she genuinely believed that the claimant was guilty of misconduct and that was the reason for the dismissal. I do not find that the real reason for the dismissal was that the claimant had complained about her status following the transfer of the undertaking.

62. I am also satisfied that there were reasonable grounds for the belief of Mrs Robinson. It is clear that the CCTV footage did show the claimant’s hand moving to her pocket at a time when there were coins in it. I have already set out Mrs Fisher's explanation in that respect but there were reasonable grounds for not accepting that explanation; it is not a very compelling explanation of what happened (albeit that it may be true).

63. The most difficult question in this case is whether the respondent carried out a satisfactory investigation. I remind myself that I must have regard to the size and administrative resources of the respondent and also that the question is always whether the respondent’s procedure fell within the band

of reasonable responses. A respondent is not required to conduct a judicial inquiry.

64. There are a number of parts of the procedure that in this case are unsatisfactory.

65. The first is that by reference to the case of *Ramphal,* the consultants from Face2Face overstepped their remit. They clearly strayed into areas of culpability and advised on what the appropriate sanction was. Given that they are professional advisers who, presumably, hold themselves out as being able to conduct these types of hearing, it is a surprise that they went that far. Their views would have significantly influenced Mrs Robinson in the circumstances of this case.

66. The second unsatisfactory feature of this case is that both at the disciplinary level and at the appeal level, the Face2Face consultants spoke to Mrs Robinson without allowing the claimant the opportunity to comment on what Mrs Robinson had said, but took account of what she had said when making their reports.

67. That is particularly surprising at the appeal level where the conversation was detailed enough to take a minute. The claimant had no opportunity to address the statement that Mrs Robinson had been asked by both Tamara and another member of staff not to share a till with the claimant because a previous employer's money had gone missing from the tills.

68. Precisely what was discussed with Mrs Robinson at the time of the disciplinary hearing is less clear. Mrs Robinson stated that all she did was show the video to the consultant, but the failure to take any minute of that meeting means that ambiguity remains in circumstances where the consultant who conducted the disciplinary meeting states, in paragraph 18 of his report, that he spoke to Mrs Robinson as part of the disciplinary procedure. He does not simply say that he viewed the video footage in her presence.

69. The 3rd unsatisfactory feature of this case is that the decision-maker was Mrs Robinson but the claimant had no opportunity to address her immediately prior to her making the decision to dismiss. Whilst it is right to say that the claimant was able to address her at the investigatory meeting, at that time the claimant did not have the opportunity of being represented by Mr Williams (although her sister attended) and the allegations had not been made clear. The claimant had not had the opportunity to go through the CCTV footage in the careful way which Mr Williams did and so she was not able to make representations directly to Mrs Robinson about what the CCTV footage showed. Whilst those representations were recorded at the appellate level, I do not consider that Mrs Fisher had the same opportunity to get her views over to Mrs Robinson as if she had explained them directly to her. There is a significant difference between a dismissing officer reading a transcript of an interview and them having a discussion with the accused whilst viewing the CCTV together. The claimant also did not have a chance to address Mrs Robinson on her understanding that a previous employer's money had gone missing from the tills.

70. In my judgment it was also unsatisfactory that the claimant was not able to view the CCTV footage with the consultant who conducted the disciplinary hearing and make representations to him. It is unsatisfactory that the person who made the finding that there had been a gross breach of trust amounting to gross misconduct had not watched the video in the presence of the claimant and her representative.

71. I have a large degree of sympathy for the respondent in this case. It is a small employer, no doubt with limited administrative resources. Mrs Robinson did go the extra mile in attempting to ensure that she followed a proper procedure in that she engaged an external human resources consultant. The failures which I have identified appear to be failures of those consultants. Nevertheless, they are failures which I find, mean that the decision to dismiss was unfair having regard to equity and the substantial merits of the case.

72. Having said that and having regard to my findings set out above, there is no doubt that, had those procedural defects not occurred, the claimant would still have been dismissed. There is nothing which the claimant could have said to Mrs Robinson which would have caused her to change her mind about the CCTV footage. The claimant should have had the opportunity to make those points to Mrs Robinson but Mrs Robinson was not obliged to accept them and she would not have done so. Although I find it likely that Mrs Robinson did place a substantial degree of reliance upon the Face2Face consultants, had those consultants simply outlined options to Mrs Robinson, I have no doubt that she would still have chosen to dismiss the claimant. Such a dismissal would have been well within the band of reasonable responses. A fair procedure would also have taken place in the same time-frame as the actual procedure.

73. In those circumstances it is appropriate to reduce the compensatory award to nil because the failures by the respondent did not result in any different outcome to that which would have occurred in any event.

74. For the reasons I have given above I am not satisfied that the claimant contributed to her dismissal and, therefore, the basic award is not reduced in this case.

75. It follows, from the fact that I am not satisfied that the claimant was guilty of theft, that I am not satisfied the respondent was entitled to dismiss the claimant without notice. It may be that had the respondent showed me the CCTV footage I would have reached a different conclusion on that point, but is not for me to speculate. The claimant's claim for notice pay succeeds in those circumstances.

76. In respect of the breach of contract claim following the transfer, I do not accept the claimant's arguments that by custom and practice her hours of work had changed. "Custom and practice" is a means by which terms are implied into a contract. However those implied terms cannot contradict express terms of the contract. Where, as here, a contract expressly states that the number of hours to be worked are those which are required to carry out duties to the satisfaction of the company as necessitated by the needs of the business, it is clear that those hours are variable.

77. The claimant may have a stronger argument that there had been a variation of contract at some time prior to the transfer so that the claimant had a fixed number of hours of 31.5 per week as is evidenced by the earlier new starter form. However, in my judgment the new starter form of itself is not sufficient evidence of such a variation. It is equally consistent with a statement that the number of hours that the claimant was working at the time it was completed was 31.5, but that her contractual entitlement was to do such hours as were necessitated by the needs of the business.

78. Even if there were such a variation there is no evidence that there was any contractual term as to when the hours would be worked. I have found that after the transfer the claimant was offered 31.5 hours per week, it was simply that she was offered them at evenings and weekends which she found unsatisfactory.

79. In those circumstances even if there had been a variation of the number of hours to a guaranteed 31.5 per week before the respondent took over the business, there was no breach of contract after the transfer of the undertaking to the respondent because the claimant was still offered 31.5 hours.

80. It follows that I do not find that there was any variation of contract after the transfer to the respondent. The respondent was simply applying the contract as it had always existed.

81. On the question of redundancy, there was no dismissal by reason of redundancy in this case. The dismissal was because of a genuinely held view that the claimant was guilty of misconduct. In those circumstances the redundancy claim must fail.

82. In summary, therefore, the claimant is entitled to a finding that she was unfairly dismissed, a basic award and an award of the amount of pay which she would have earned in her notice period had she not been dismissed summarily.

Employment Judge Dawson
Date: 15 February 2021

Reasons sent to the parties: 19 February 2021

FOR THE TRIBUNAL OFFICE