EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Claimant	Mr R Carstairs
Respondent	Park Tower Hotel Ltd (The)
Employment Judge:	Mr J S Burns

Representation	
Claimant:	In person
Respondent	Ms G Churchhouse (Counsel)

Heard by CVP on 16 and 17 December 2020

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent with 25% contributory fault.
2. The Respondent must pay the Claimant £10789.88 compensation in 14 days (that is by 1st January 2021).

REASONS

1. This was a claim for ordinary unfair dismissal.

2. I heard evidence from the Respondent's witnesses Jack McCarthy (Head of Concierge and Butler Services) who was the Claimant's line manager and investigator; Marina Krasnobrizhaya (Director of Operations) – who dismissed the Claimant and Sue Finlay (General Manager) who dismissed his appeal; and then from the Claimant.

3. There was not much of a factual dispute but, where the evidence disagreed, I preferred that of the Claimant.

4. The documents were in a bundle of 130 pages plus some unpaginated pages from the Claimant at the end of the bundle. I was provided with a chronology and cast list and a skeleton argument from Ms Churchhouse. At my request during the hearing Mr McCarthy emailed me 6 photographs of the concierge desk; three of these were part of the evidence during the Claimant's disciplinary proceedings and three were taken on 16/12/20 to better illustrate the lay-out of the relevant area. Ms Churchhouse agreed that the photos would be downloaded and retained by the Respondent's solicitor as part of the evidence bundle. I was not shown the CCTV footage which was heavily relied on during the internal disciplinary process, and I have had to rely on the witnesses' descriptions of what it showed.

5. The hearing before me was conducted by CVP. There were no technical problems.

Main findings of fact.

6. The Claimant was employed by the Respondent (which runs a large 5-star hotel in London) from 9/2/2004 until 17/1/2020, when he was summarily dismissed on the grounds of gross misconduct. At the time of his dismissal he was employed as Head Night Concierge – working 12-hour night shifts usually with one or two night concierge/porters, whom the Claimant was responsible for supervising.

7. The main work-place was the concierge desk in the main hotel lobby area. The night concierges were not part of the main fire prevention team but had a secondary role to support that team if the need arose.

8. Immediately adjoining the concierge desk is door-less alcove (housing musical equipment and a computer screen and a printer on an alcove desk) which is so arranged that part at least of a person standing in the alcove and in front of the alcove desk would be still be visible (although unobtrusively so) from some of the public vantage points within the lobby, but the alcove desk and anything on it would be out of sight.

9. This was not recorded in any written document, but the Claimant and his co-workers were each entitled to 2 x 30 minute breaks during a single 12 hour night shift. It was accepted practice for many years that the two 30 minute breaks during the night shift were taken together as a one hour break.

10. In September 2019 Mr McCarthy (who did not work nights) noticed that one night-concierge was taking an extended rest break of about 90 minutes and he discussed this with the Claimant. The Claimant told Mr McCarthy that he understood that the day shift concierges were entitled to two 15 minute tea breaks in addition to 2 x 30 minutes breaks during any 12 hour day shift and hence that the night shift should also be allowed a 90 minute break. In addition, the Claimant said that, as they could not take all their allocated breaks during busy times, especially during the Summer months, they were carrying over the unused break time to the quieter night shifts. Mr McCarthy did not challenge this in any way. His response was to say "*OK*" and then walk off. As a result, the Claimant after September 2019 thought that taking a single break of up to 90 minutes was acceptable.

11. When taking a break, the night-concierges would go to the kitchen on an upper floor to get food which was made available for them at about 3am and then go to the canteen on a lower floor to eat it. Sofas were also available in the canteen where they could rest during their breaks.

12. The Claimant was in the habit, on some occasions when he needed to be on duty at the desk late at night, of going to the kitchen to get his meal and bringing it back to the concierge desk. He would carry his plate into the aforementioned alcove and place it on the desk out of sight of the vantage points in the public area. He would then eat his meal while standing in the alcove. In this way he could eat his meal while still being available at short notice if some work task became necessary at the desk. While so standing in the alcove, he would have been in a very unobtrusive and shielded position but the fact that he was eating might have been apparent to a member of the public stationed at some limited vantage points in the public lobby, if that person watched very carefully from an oblique angle (and through Perspex screens which intersected much of the already limited view) to see what the Claimant was doing.

13. For about 7 years the Claimant had eaten his food as described in the previous paragraph to the knowledge of and without complaint or correction by all of the Head Concierges (ie the Claimant's line managers) including Andrew Robinson, Miguel Serra and Jack McCarthy and others.

14. I accept the Claimant's evidence that on Friday afternoons for years before the Claimant was disciplined and up to that time, a regular guest of the hotel sent usually 5 boxes of food from a Lebanese restaurant across the street from the hotel, as a gift to the staff, and upon receiving the food at the concierge desk normally around lunchtime, many different staff members would either eat in the same general lobby area or carry the divided food away to their work stations. The Claimant knew that this happened because he was told by other staff and he would find the empty food boxes in his work area when he came on shift on Friday evenings.

15. In December 2020 the Respondent's Loss Prevention Manager investigated a separate matter. This involved the Manager reviewing CCTV footage of different areas of the hotel. The manager observed members of the Night Concierge team (including the Claimant) taking extended breaks, using an area of the staff canteen that was dark/private for prolonged rest during their shift. In the Claimant case the duration of his break times were as follows (per page 61 and 62 of the bundle) ; 4/12/2019 2hrs 6 minutes; 8/12/2019 1hr 22 minutes; 9/12/2019 1hr 28 minutes; 10/12/2019 1hr 32 minutes; 11/12/2019 2 hours 15 minutes; 12/12/2019 1 hour 50 minutes; 16/12/2019 1 hour 22 minutes; 17/12/2019 0 hours 56 minutes; 1/1/2020 1 hour 32 minutes; 2/1/20 1 hour 20 minutes; 3/1/2020 1 hour 25 minutes and 4/1/20 1 hour 28 minutes.

16. Thus the Claimant had taken numerous breaks in excess of one hour and, on 5 nights out of 12, he had taken in excess of 90 minutes, and on two of these, in excess of two hours. Even on the basis of his exchange with Mr McCarthy in September 2019, the Claimant knew that he was not allowed to take more than 90 minutes as a break at any one time, and he agreed in the subsequent investigation and indeed during the tribunal hearing that he was wrong to have taken these prolonged breaks – which he attributed to poor time-keeping .

17. The CCTV film of 12/12/2019, during which night the Claimant took a break of 1 hour 50 minutes, shows him sitting on a sofa during that period, in a slumped position, and motionless for fairly long periods of up to 20 minutes, during which however the light from his mobile phone would go on and off intermittently. The CCTV did not show his face so did not reveal whether or not his eyes were shut during that period.

18. The Claimant was sitting in a darkened area of the canteen. It was dark because the lighting in the canteen in that area is controlled by motion sensitive switches and the lights turn off if no-one moves for some time. Hence the Claimant had not switched off the lights but was sitting in the dark because, for whatever reason, he had not moved for a while.

19. The CCTV also showed on most nights, the Claimant eating in the alcove, as described above.

20. The CCTV also showed two other night concierges on different occasions, (not in the presence of the Claimant) lying down sleeping on the sofas in the canteen.

21. The Respondent defines sleeping on duty as gross misconduct in its disciplinary procedure. The Respondent also took the view that as the Claimant's and the night-concierges rest breaks were paid, it followed that they were on duty during the rest breaks and hence they should not sleep during them. Again this is not properly explained in any policy, but in his evidence the Claimant accepted that he knew that he and his fellow night concierges were not allowed to sleep during their breaks because they were still on duty during them.

22. The Claimant was invited to an investigation meeting on 9 January 2020. to discuss *"prolong(ed) breaks and negligence of duties*" The points for discussion were (i) sleeping on duty – on 12/12/2019 - which the Claimant denied (ii) eating in the concierge alcove which the Claimant admitted but explained by saying that guests could not see him and that he was doing it so he could cover his duties while eating and (iii) taking excessive breaks which the Claimant sought to justify on the basis that he was entitled to 1 hr 30 minutes and did not realise that he was taking more on those occasions when he had done so. Mr McCarthy and an HR manager questioned the Claimant.

23. When recording the discussion about sleeping on duty the transcript of the investigatory meeting runs thus:

    "JM: can you please confirm what are you doing in that time?

    RC watching videos, I am on my phone

    JM Are you sleeping in this period of time?

    RC Not with intent, I am maybe a fatigue (sic)

    Do you think you could fall asleep?

    I will say NO

    JM. We have CCTV evidence that shows you sleeping within your break On the video you can see that your body is not moving for some period of time. Appears as a lack of movement.

    RC I am not sleeping on duties. To my knowledge I am not sleeping."

24. In cross examination and in submissions the Respondent suggested that this exchange was not a bare denial of sleeping and was an admission that the Claimant may have been sleeping, even if he was unaware of it.

25. I find that it is impossible for a person to effectively admit a fact of which he is unaware.

26. The Claimant was asked about the sleeping allegation subsequently. I do not agree with the submission that he gave 6 different excuses or versions. The Claimant is not a particularly eloquent or assertive person and he was doing his best to put across his honest belief about the matter. He did not believe he had been sleeping and he called for clear evidence that he was, if that existed, namely footage of his face showing his eyes closed, which however the Respondent did not have.

27. There was no mention during the investigatory meeting or in the subsequent disciplinary hearing or appeal of the potentially significant fact that the CCTV showed that the Claimant's phone light was going on and off during the time that he was accused to be sleeping on 12/12/19.

28. Mr McCarthy decided to refer the matter to a disciplinary hearing and also suspended the Claimant in the interim.

29. The Claimant attended a disciplinary hearing which took place on 17 January 2020. The hearing was chaired by Ms Krasnobrizhaya. At the outset of the meeting, Ms Krasnobrizhaya asked the Claimant if he wished to postpone the meeting, as he stated that he had not received the invitation letter in good time. The Claimant was reminded several times that the hearing could be postponed either to give him additional time to prepare or to accommodate a representative; but he declined and stated that he wished the meeting to proceed. It therefore went ahead with his agreement.

30. The meeting started at 16.30 The first quarter of the transcript records the discussion about whether or not the hearing should go ahead. After that the discussion about the substantive matters was brief and the record of it covers three fairly sparse pages of transcript. It would seem likely that the actual discussion about the three multifaceted charges took no longer than about 18 minutes. 24 minutes after the hearing started it was adjourned for a decision which was then announced 20 minutes later. Hence the decision to end the Claimant's nearly 16 year career at the hotel was taken in about 45 minutes.

31. Earlier on 17/1/2020 Ms Krasnobrizhaya had conducted separate disciplinary hearings against the two night-concierges who had been caught lying down sleeping on sofas in the canteen. She had dismissed those employees. Before she did so, they had told her (so I was told by Ms Krasnobrizhaya in her oral evidence) that the Claimant had "*made them feel comfortable sleeping on duty and taking excessive breaks*". This was an important part of the reason why she decided later that the Claimant had to be dismissed. The Claimant was not present when these things were said during the earlier hearings and the record of his subsequent disciplinary hearing shows that these damning suggestions from his co-workers were not put to him so he could comment on them.

32. The Claimant denied that he had slept at the relevant time when he had been filmed by the CCTV sitting on the sofa on 12/12/19.

33. In relation to the eating-in-the-alcove point, Ms Krasnobrizhaya raised a new "*computer safety"* point which had not been suggested or raised before namely "*the area you are eating is full of cable*" and then asked the Claimant "*do you understand that eating at the guest area is strictly prohibited?*" (page 78) The Claimants first answer was "*OK*" (page 78). Ms Krasnobrizhaya then asked "*Do you agree?.* The Claimants next answer was "*No, we don't have a slot for break, for food…*"

34. There was no reference to or discussion of the Claimant's long service or the fact that he had a previous unblemished record.

35. Ms Krasnobrizhaya decided to summarily dismiss the Claimant. He was told this when the meeting resumed 20 minute later. His response was "*I am not sleeping …this is an absolute joke"*

36. The dismissal letter claimed that during the disciplinary hearing the Claimant had "*agreed that eating in the guest areas was strictly prohibited"*. In fact, as referred to above, he had done nothing of the kind, although earlier during the investigatory meeting he had agreed it was inappropriate, without conceding that the alcove was part of the guest area.

37. The Claimant appealed against his dismissal. He raised some procedural points and then commented about the substantive matters. He wrote that he admitted to prolonged breaks but denied that he "*was eating by the music system*". He denied neglect of his duties and maintained his denial that he had been sleeping. He wrote "*Sitting still for 20 minutes doesn't show that I was asleep'*

38. An appeal manager, Sue Finlay (General Manager), was appointed to consider the appeal which took placed on 11 February 2020. The Claimant was given the right to be accompanied and he was accompanied by a union representative.

39. Ms Finlay covered the points raised by the Appellant but then raised a new source of criticism namely that the Claimant had not reported to his manager the fact that radios which were used for communication between the concierge desk and other staff at night were sometimes found by the Claimant to be uncharged when he came on shift. There was a wide-ranging discussion about this new topic which (according to Ms Finlay's evidence in her witness statement) she found "*very alarming*" – and in her oral evidence she stated it was a significant factor for her in deciding not to allow the appeal. However confusingly, in re-examination Ms Finlay then stated that she was unsure what category of punishment (in the range - first written warning to dismissal (as per the disciplinary policy)) would have been appropriate for such an infraction.

40. Failing to report radio undercharging was not a matter for which the Claimant had been dismissed and the Claimant and his representative were not there to deal with this new allegation which had not been properly investigated.

41. As the matter was never investigated (apart from the extempore unplanned discussion during the appeal) it is far from clear that the Claimant was responsible or primarily responsible for any shortcomings in this regard. If radios were routinely inadequately charged at the end of the day shifts, that is a matter which it seems likely would or should have been known to a number of persons including the day shift employees and managers against whom no disciplinary action has apparently been taken in this regard. Furthermore during his evidence at the tribunal the Claimant stated that he thought he had in fact previously raised the radio charging issue at a concierge meeting.

42. Ms Finlay did consider the Claimant's long service, but only as a point against him, stating in the letter dismissing the appeal that as a result of his long service he should be fully aware of the procedures and values of the hotel.

43. The Claimant had been told by colleagues that the hotel (before the onset of the lockdowns caused by the Covid 9 epidemic) had planned to close during Summer 2020, and he

suggested in his ET1 that his dismissal was simply a ploy to avoid paying him, as a long-standing employee, a redundancy payment.

44. The Respondent has not closed the hotel, (it now being December 2020).

45. Ms Finlay told me that, before the onset of Covid 19 in March 2020, the Respondent had decided not to replace the Claimant following his dismissal because his role was "*not needed"*. Only one of the two night concierges who had been dismissed for sleeping had been replaced. Ms Finlay then suggested that the Claimant and the second dismissed night concierges had had not been replaced *"because the Respondent could not find applicants or suitable quality*", which was a different and inconsistent explanation.

46. One of the two night concierges who had been dismissed for sleeping had 24 years' service with the Respondent and the other 6 years'.

The law

47. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under section Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends upon 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.'

48. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.

49. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.

50. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588

Conclusions

Sleeping on duty

51. The Claimant was found guilty of was sleeping on duty on 12/12/2020. The main evidence used to reach that conclusion was that the Claimant did not move for 20 minutes or so while sitting on a sofa. As the Claimant himself pointed out, this was an inadequate premise to support the conclusion, because a seated person can remain immobile even if they are not sleeping.

52. I have also considered in context and as a whole what the Claimant said about this allegation in the investigation and during the disciplinary process. I reject the submission that this provides any reasonable corroboration of the allegation.

53. The fact that the Claimant was sitting in a darkened room was insignificant because of the light switching arrangements discussed above

54. There was strong counter evidence which was wholly or completely ignored – certainly it was not referred to - namely that he was not lying down on the sofa which there was room on which he could have lain down to sleep if he so wished, but rather was sitting up; and secondly, that the light on his phone was showing intermittently as it would if he had been watching videos, and as he said he had been doing during that time.

55. The Respondent did not have reasonable grounds for its finding that the Claimant had slept on duty.

Eating in the concierge alcove

56. Again there was no policy or written instruction telling staff clearly where they should not eat.

57. The alcove is a reasonably discrete and unobtrusive place to eat and it was something he had been doing for years without criticism or previous direction from his line managers.

58. I do not accept that clause 23 of the Claimant's employment contract (which states in general terms that the Claimant was expected to conduct himself at all times in a manner befitting a luxury hotel) is a sufficient instruction about this or that the Respondent can rely on eating in the alcove as a breach of contract in the circumstances.

59. Furthermore, as food was brought from the Lebanese restaurant into and divided and eaten or carried away in the hotel lobby area on Friday afternoons it is absurd to suggest that the Claimant was guilty of misconduct because he discretely ate food in the alcove at 3am in the morning.

60. These points made it unfair for the Respondent to have treated the Claimant's eating in the alcove as a misconduct offence.

Prolonged breaks

61. The Claimant accepted during the investigatory meeting and subsequently that he had taken some excessively long breaks. An examination of the record (which was undisputed) showed that on 5 nights out of 12 he had exceeded the 90 minutes (which was the outside

limit of what he was justified in thinking would be acceptable) and on 2 nights he had taken in excess of 2 hours.

62. There was a reasonable basis for concluding that the Claimant was guilty of misconduct in this regard.

63. However, there was substantial obvious mitigation -namely there was a lack of any written instruction stating clearly what breaks the Claimant was entitled to, which caused confusion and misunderstanding, compounded by Mr McCarthy's failure to tackle the issue and give clear instructions in September.

64. The disciplinary procedure was partially flawed.

65. The disciplinary hearing was far too short and superficial and Ms Krasnobrizhaya had already formed a negative view against the `Claimant in advance based on what she had been told by the other night concierges whose views however she did not allow the Claimant to comment on.

66. The Respondent took the view that the Claimant was to blame for allowing the night concierges to sleep but there was no evidence that he knew they were sleeping. If he was on duty at the time when the sleepers were sleeping they were doing so in the canteen while the Claimant was busy elsewhere at the concierge desk. It was put to him that he should have stayed in touch with the concierges during their breaks to make sure they were not sleeping but the custom and practice of the hotel was that persons on their breaks were not to be routinely contacted as they were supposed to be allowed to rest.

67. The appeal introduced a new charge (concerned with the charging of radios) which had not been investigated or prepared for by the Claimant and his representative. In these circumstances, acting reasonably Ms Finlay was not entitled to treat this issue as corroborating the guilty verdict on the earlier charges which had quite different specific subject matter.

68. There was a failure throughout to give any or any proper consideration to the fact that the Claimant was a long-standing employee with a previous unblemished record.

69. Acting reasonably the Respondent should have found the Claimant guilty of taking excessively long breaks only, against a strongly mitigating background of equivocal signals from Mr McCarthy in September and a lack of clear written instructions throughout.

70. I was taken to other examples of gross misconduct set out in the Respondent's definition. I do not agree that what the Claimant should have been found guilty of, was gross misconduct and in any event the law requires an employer to consider misconduct on its substance and not by reference to definitions.

71. The Respondent's response to the situation was significantly outside a range of reasonable responses. The maximum reasonable response would have been a first written warning explaining to the Claimant clearly that he was to take only an hour's break and no more and warning him to comply in future.

72. As the Respondent had decided to suddenly clamp down on his eating in the alcove, it should have simply asked him to stop. If the Respondent wanted the Claimant to monitor his co-workers during their breaks in the canteen it should have given him an instruction to change the previous practice and start doing routine checks during their breaks.

73. I have no doubt that had these sensible steps been taken at the proper time the Claimant would have readily complied. Instead the Respondent carried out a full blown and disproportionate disciplinary procedure with a draconian outcome.

74. I am left in doubt about the Respondent's true reasons for dismissing the Claimant. However, in the light of all the evidence I accept on a balance of probabilities that the real reason for the dismissal was misconduct and not a disguised redundancy.

75. However, I find that the dismissal was procedurally and substantively unfair.

76. I find that there was 25% contributory fault on the Claimant's part and that no Polkey reduction is appropriate.

REMEDY

77. I was assisted by the Respondent's solicitor Mrs A Morris who had provided a carefully drawn counterschedule in which, to her credit, she had revised upwards the Claimant's incorrectly calculated basic award.

78. I find that over the last 5 months of his employment the Claimant's average gross weekly pay was £497 and his net pay was £391. He was 48 years of age at termination and had 15 years' service. Hence the basic award is 15 x 497 x multiplier = £9194.50.

79. I award £500 for loss of statutory rights.

80. The counterschedule indicated that between the date of termination and the hearing the Claimant had lost earnings of £18377 but had earned £14829.07 from alternative employment. Therefore the Respondent submitted that the mitigated net loss figure and compensatory award should be £3547.93.

81. The Claimant told me that he obtained another job with much the same pay on 21/4/20, and he limited his compensatory award to the period up to that date. That period also co-incided approximately with the period of statutory notice which the Claimant was entitled to on being dismissed by the Respondent, the loss of which he had suffered because of his unfair summary dismissal. A Claimant does not have to mitigate a claim for damages for failing to pay notice pay.

82. I accordingly decided to award the Claimant 12 weeks net pay as his compensatory award ie 12 x £391 = £4692 rather than the lower figure proposed in the counterschedule.

83. To calculate the final sum payable I then applied a 25% discount for contributory fault to all the above amounts as I regard it appropriate to do so under sections 122 and 123 ERA 96.

84. Thus £9194.50 + £500 + £4692 = £14386.50 – 25% = £10789.88

J S Burns Employment Judge
London Central
17/12/2020
For Secretary of the Tribunals

date sent to the Parties – 15/01/2021