



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Narine Chacaturian

v

Whitbread Group plc

Heard at: Watford by CVP

On: 28 January & 1 February 2021

Before: Employment Judge Alliot (sitting alone)

Appearances

For the Claimant: In person (Mr B Moore, supporter)

For the Respondent: Mr Mark Foster, Solicitor

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

JUDGMENT

The judgment of the tribunal is that:

1. The respondent is ordered to pay the claimant the sum of £5,163.

REASONS

1. Introduction

- 1.1 The claimant was employed on 13 June 2014. Initially she was employed as a barrista, gaining promotion to barrista maestro and then promoted to assistant manager on 27 June 2016. She was dismissed for gross misconduct on 22 August 2018.

- 1.2 By a claim form presented on 4 January 2019 the claimant complains of unfair dismissal.
- 1.3 The proceedings were served on the respondent's registered office. However, no response was presented.
- 1.4 Accordingly, on 15 April 2019 Employment Judge Lewis entered judgment for the claimant as follows:-

“The claimant's claim of unfair dismissal succeeds.”

- 1.5 The respondent made an application on the basis that the claim form had not been received, that Costa Ltd was the correct respondent and seeking an extension of time to present a response. The matter came before Employment Judge Jack on 10 October 2019. The application for a reconsideration of the judgment of 15 April 2019 was refused as was the respondent's application for an extension of time for serving its ET3.
- 1.6 The decision of 10 October 2019 has not been appealed. Consequently there is a judgment that the claimant was unfairly dismissed and that is against Whitbread plc as employer. I cannot go behind that decision.
- 1.7 At the conclusion of that hearing Employment Judge Jack effectively gave permission for the respondent to appear at the final hearing on remedy and directed that the hearing on remedy should include issues of contributory fault.
- 1.8 Thus it is that, although this has been listed as a remedy hearing, I have de facto had to hear the entirety of the respondent's case on gross misconduct.

2. The issues

- 2.1 Although listed for a remedy hearing, issues relating to “Polkey” and contribution are relevant.
- 2.2 As regards any compensatory award, section 123(4) requires me to apply the same rule concerning the duty to mitigate as applies under the common law.

3. The law

- 3.1 The claimant has a finding that her claim for unfair dismissal succeeds. Given that the judgment was entered in default of a response, so I have no findings of fact as to the basis on which her claim of unfair dismissal has been successful.

3.2 As far as the compensatory award is concerned, s.123 ERA 1996 provides as follows:-

“123 Compensatory Award

(1) Subject to the provisions of this section and sections 124, 124A and 126, 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 insofar as that loss is attributable to action taken by the employer.”

3.3 Obviously enough, the compensatory award is intended to reflect the actual losses that the employee suffers as a consequence of being unfairly dismissed.

3.4 As far as contribution is concerned s.123 ERA 1996 provides as follows:-

“(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.”

3.5 S.122(2) provides for the reduction of a basic award on just and equitable grounds as a result of any conduct of the claimant prior to dismissal.

3.6 In his closing submissions Mr Foster has highlighted two cases in relation to contributory conduct. These are as follows:-

3.6.1 In Nelson v BBC(No 2) [1979] IRLR 346 the Court of Appeal set out three factors that must be present for the contributory award to be reduced. Three factors must be present for a reduction of the compensatory award for contributory fault:

- (a) The claimant’s conduct must be culpable or blameworthy.
- (b) It must have actually caused or contributed to the dismissal.
- (c) The reduction must be just and equitable.

In Steen v ASP Packaging Ltd UK EAT/23/11 the EAT held that an employment tribunal must consider the following four questions:

- (d) What was the conduct which was said to give rise to possible contributory fault?
- (e) Was that conduct blameworthy, irrespective of the employer’s view of the matter?
- (f) For the purposes of s.123(6), did the blameworthy conduct cause or contribute to the dismissal?
- (g) If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

4. The evidence

4.1 I have been provided with a hearing bundle running to 534 pages. In addition I was provided with witness statements and heard oral evidence from the following:-

4.1.2 Mr Vikram Patel, a Costa Ltd store manager at Paddington, the dismissing manager;

4.1.3 Mr Paul Turner, the claimant's area manager;

4.1.4 Mr Luke Daines, area manager for East Kent, who heard the appeal.

4.1.5 The claimant.

5. The claimant's evidence

5.1 The claimant's witness statement consists of 11 short paragraphs barely covering one page. As far as remedy is concerned only two paragraphs are relevant. In one the claimant just asserts that she made every attempt to mitigate her losses and in another she states that she is relying on her schedule of loss.

5.2 Employment Judge Loy made case management orders on 2 September 2020 which included a requirement that the claimant provide an updated schedule of loss by 7 October 2020 and a witness statement in support of her claim for remedy by 25 November 2020. In actual fact the claimant only provided an updated schedule the night before this hearing began on 27 January 2021. The claimant has not put in a witness statement in support of her claim for remedy. Mr Moore sought to explain that on the basis that there had been incomplete disclosure from the respondent. However, as far as all the claimant's alleged losses (perhaps with the exception of a pension loss) such a statement would not have been dependent upon the respondent's disclosure as the matters would have been wholly within the claimant's knowledge. Consequently, I record that for the purposes of this remedy hearing I have had precious little evidence from the claimant on the issue of remedy.

6. The facts

6.1 The claimant was employed by Costa Ltd on 13 June 2014 as a barrista at Greenford. I have one page of her contract of employment which, as found by Employment Judge Jack, records that it was a fixed term contract terminating on 12 September 2014.

6.2 The decision of Employment Judge Jack states:-

"There was never any subsequent contract issued either by Costa Ltd or by Whitbread Group plc."

6.3 Employment Judge Jack indicates that every other document in evidence had Whitbread Group plc as the employer, including payslips, the pension scheme and the P45. I have in my bundle a one page document offering the claimant the position of assistant manager at Greenford starting on 27 June 2016 giving a rate of pay and hours. The Costa logo is at the foot of that document. The claimant has signed confirming that she has read the statement of terms and conditions of employment (above and overleaf). I do not have the overleaf. It does not appear that that document was in front of Employment Judge Jack. It has, of course, been the respondent's case all along that the claimant was employed by Costa Ltd.

6.4 Doing the best I can to make sense of the documents put before me and the judgment of Employment Judge Jack, I must assume that there was a transfer of the claimant's employment from Costa Ltd to the respondent on the expiry of her fixed term contract on 12 September 2014 and that her continuity of employment was preserved.

6.5 The bundle contains both the Costa Team Member Handbook, which includes the disciplinary policy, and the Whitbread disciplinary policy. The two policies are very similar and set out that an initial investigation would usually be looked at by the individual's line manager and the examples of gross misconduct include:-

“Gross negligence which causes unacceptable loss or damage.”

6.6 In addition I have the Costa “Policy Manual All Employees”. Section 2 is the Costa “Policy Manual Management” which recites that it is the manager's responsibility to ensure that all members of the management team have read and fully understand all aspects of the Costa Policy Manual before beginning their duties. The management team includes assistant managers.

6.7 The section on Cash Collection provides as follows:-

“

- All monies & the large section of the bank slip must be placed in the inner bag and this MUST be checked and verified by two team members of staff before sealing the bag.

...

- Stores MUST ensure the banking details are recorded on the cash collection log sheet (please see your Compliance Logbook) at the point of cash up and that two team members check and sign this for accuracy.”

6.8 The claimant moved to the Uxbridge branch of Costa in about May 2017.

6.9 The claimant gave evidence that she was trained in the system for dealing with cash at the Greenford store. The system was that you

had to have two people counting the cash, both would initial the logbook and the cash would be put into a bag and sealed. The claimant readily accepted that she had been trained in the system and was well aware of it.

6.10 The claimant stated that when she moved to Uxbridge in May 2017 she became aware that the banking was done differently. It was common ground between the parties that the respondent also had a cash banking procedure known as “walk to bank” or “WTB”. The respondent kept compliance logbooks at the store. The compliance logbook was divided up into a number of periods with a variety of sections for daily completion to record functions done. The entries for various weeks in March 2018 indicate that the cash collection log sheet requiring two signatures was not applicable to the WTB which was then operating. It was common ground that the WTB procedure only required one signature.

6.11 The claimant’s evidence was that the system changed in May 2018. Her evidence was:

“We were just informed that the store would change from walk to bank to cash collection. We were given times that the collectors would come in and collect the money and take it away. We were informed by my manager Irisz.”

6.12 The change in system is borne out by the documents in the bundle. The cash collection sheet for week 11, 10-16 May 2018 shows the cash collection log sheet being filled in rather than the WTB section. Indeed, the first initials on 10 May are the claimant’s. It would appear that the store manager, Irisz K, countersigned on each of the days. The claimant stated that she did not think that the countersignature had occurred when it should have occurred, namely witnessing the counting up of cash each day, as she did not recall her manager being present and her manager generally was not present at the end of the trading day.

6.13 On the following week it looks as if the second signature was applied in relation to three days and that there was no second signature on about another three days.

6.14 On the following week there does not appear to be any second signature recorded. That week in fact runs on to 31 May, probably because the book had run out and a new Costa Compliance Logbook had not arrived. I say this as the figures for takings up to 30 May 2018 have been copied into a new cash collection banking form from 28 May to 3 June 2018. That form has got initials in both the first and second signature columns but they are all the same. The last second signature actually has a date of 8 June 2018 next to it which rather suggests that that is when it was all copied in and does not reflect the practice that actually happened. The cash collection log for 4-11 June 2018 only has a second signature for 11 June.

- 6.15 The cash collection log for 12-18 June 2018 has no second signatures.
- 6.16 The cash collection log for 19-29 June 2018 only has one second signature. During that week it would appear that three members of staff cashed up, namely the claimant, BL and PC.
- 6.17 The system for cashing up was as follows. Customers would pay using either cash or debit cards. The till would record how much cash had been taken. At the end of the day the cash was taken from the till to be counted. The area where the claimant counted the cash and placed it into a bag was covered by CCTV. Having placed the cash in the bag it was sealed in a tamper proof way. Thereafter it was placed in the safe and once a week all the inner bags were placed into an outer bag and removed by a security company to be taken to the bank.
- 6.18 On 27 June 2018 the claimant completed bank slip no. 265 and recorded the cash takings as £945.85. She entered those details on the cash collection log and recorded the unique serial number from the inner bag. The claimant was recorded on CCTV doing this. Mr Patel told me that he had viewed the CCTV and it showed the claimant as the only person counting the money, filling in the banking book slip and putting the money in the plastic bag. The parties were unsure if the claimant could be seen to be sealing the inner bag on the CCTV. The claimant then said that she went to the safe to put the sealed inner bag in it. It is a shortfall of £600 in this day's takings that lead to the claimant's dismissal.
- 6.19 The cash collection log states that the week's takings were collected on 2 July 2018.
- 6.20 For the next two weeks in July until the 15th the two cash collections logs show that there were no second signatures entered on the form. The two cash collection logs from 16-28 July all have second signatures recorded. The claimant suggests that the second signatures for the week 16-22 July have been retrospectively entered as they are "KF". "KF" had not begun working at the store as of that date.
- 6.21 Thus it is clear and I find that the claimant had been trained in the correct procedure for cashing up, namely requiring a second individual to witness the counting of the cash, it being sealed in the inner bag and countersigning the cash collection log. I find that the claimant was aware that that procedure should have been followed as from May 2018. I find that as assistant manager and the most senior person on duty at closing time, the claimant was responsible for ensuring that the correct procedure was followed. I find that following the introduction of the new system, even if the countersignatures on the first sheet were made following Irisz witnessing the cash being

counted and sealed, which I doubt, thereafter there was little or no attempt to get a second signature.

6.22 I find that the requirement for a second witness during cashing up was routinely disregarded and that in all probability second signatures were often applied retrospectively so that the form looked correct. No doubt at the end of the trading day the staff on duty wanted to get their tasks done as quickly as possible to get away home. Two people cashing up might delay them.

6.23 The compliance logbook has a section entitled "Area Manager Monthly Compliance Audit & Safe Check". It would appear that such a monthly audit took place on 19 June 2018, 8 days before the day the cash went missing. One of the questions asked is:-

"Has change log sheets been completed correctly and all collection receipts attached to the correct and filled in bank slip?" – The answer given is "Y(es)"

6.24 I was told that this relates to the completion of the cash collection log. The audit has been signed off by Irisz K, as store manager, and Pranav Bhakai, as area manager (In fact he was acting up at the behest of Mr Turner). I find that it is highly unlikely that those two conducting a proper monthly audit, principally checking the entries in the compliance log, would have missed the fact that on a routine basis the second signature on the cash collection log was not being entered. They either failed to do the audit properly or overlooked the absence of a second signature as not important. Either way they failed in their managerial responsibility. This is especially so if the procedure was of such importance that a breach of it constituted gross misconduct.

6.25 On 21 July 2018 Mr Turner offered the claimant secondment to the role of store manager at Uxbridge. At that time Mr Turner was unaware of the alleged shortfall of £600 from 27 June 2018.

6.26 On or about 7 August 2018 the respondent was notified that there was a shortfall of £600 in the cash received by the bank for the 27 June 2018. The email exchanges indicate that the sealed inner bag had £345.85 in it against the £945.85 recorded as being remitted. Apparently the information from the bank was to the effect that the bag was untampered with and only contained £345.85.

6.27 Pranav Bhakai was instructed to undertake an investigation. Mr Bhakai no longer works for the respondent. Apparently he resigned at a time when he was being investigated for dishonesty. This was the evidence given by Mr Daines. I stress I had no details about this` and make no findings concerning Mr Bhakai.

6.28 On 12 August 2018 the claimant was suspended on full pay. The letter suspending her states:-

“I write to confirm that you have been suspended from work on full pay... pending the outcome of an investigation into allegations of:

- Not following correct banking procedure by not having two people witnessing signing and sealing the bag leading to missing £600 of banking

A thorough investigation will be carried out during the period of your suspension and once this is completed I will be in touch to advise you of the next stage in the procedure.”

6.29 Also on 12 August 2018, Mr Bhakai wrote to the claimant inviting her to attend an investigation meeting with him on 14 August 2018.

6.30 I have the investigation notes of the meeting on 14 August 2018 which have been signed by the claimant as accurate.

6.31 The claimant was invited to explain the correct end of day banking procedure. She describes what she did, ending with saying:

“... then I put the bag in the safe and fill up the logbook. The reason I didn't ask second person to count because the system showed me the right amount of cash to be done.”

6.32 The notes go on as follows:-

“Mr Bhakai: Do you know that you suppose to count with two people?

Claimant: Yes

Mr Bhakai: Why were you not doing it?

Claimant: I don't know, because the banking was usual. I didn't see any variance, and then I can't blame to others coz of she was cleaning and I have to clean the bar and do banking, not enough time to count two people coz we don't have time.”

6.33 Later, the following exchanges took place:-

“Mr Bhakai: What does the policy say regarding banking?

Claimant: Two people counting, two people signing logbook.

Mr Bhakai: Did you do that?

Claimant: No

Mr Bhakai: Then who is accountable for that money?

Claimant: I guess I am

...

Mr Bhakai: Let's summarise. You know the procedure

Claimant: Yes

Mr Bhakai: You chose not to follow it

Claimant: Yes”

6.34 At the end of the meeting the claimant was asked if there was anything else she wished to add and replied no.

6.35 On 16 August 2018 Mr Bhakai prepared an investigation outcome report. The findings were:-

“Preparation of banking policy not followed”

6.36 The conclusion is as follows:-

“It is my finding that the company’s preparation of banking policy has not been followed.

Narine signed and sealed the banking on her own and second countersignatory is missing, this is a regular process in the store.

During the investigation meeting Narine had clearly described how to complete correct banking preparation procedure, she has not been getting countersigned as there isn’t enough time but she would get it countersigned if there is any discrepancies in money.”

Email from Costa banking states that banking slip no 43017960263 was short by £600, Narine was the only one whom signed the banking Bag and it was collect by contract security collection along with entire weeks collection at the banking sorting office they have the exact same serial no and sealed bag but money was short, the Negligence in following the procedure by Narine has lead to unacceptable loss.

Company policy is there to protect both the company and the employee.

Allegation is upheld.

In summary

I have summarised my findings in detail to enable clarity.

In summary Narine has not followed the correct costa banking preparation procedure thus leading to the unacceptable loss to the company and this is a gross misconduct so it should lead to disciplinary.

My recommendations are as follows;

Management team to follow the correct procedure to protect themselves as well the company.”

6.37 Hence the report made a finding of gross misconduct and recommended disciplinary proceedings.

6.38 For the avoidance of doubt, since this is a public document, I make clear that the Respondent's case has never been that the claimant took the money, just that she failed to follow the correct procedure.

6.39 Although the investigation report outcome recommends disciplinary action, it was in fact Mr Bhakai who wrote to the claimant on 16 August 2018 requiring her to attend a disciplinary hearing on 20 August 2018. The purpose of the hearing was to discuss allegations of:

“1. Gross negligence which caused unacceptable loss by not following the correct banking procedure which resulted in £600 loss.”

6.40 Various documents were enclosed which the claimant acknowledged she received.

6.41 I find that the investigation report and recommendation by Mr. Bhakai are unfair and do not constitute a reasonable investigation. On 19 June 2018, just 8 days before the day on which the money went missing, Mr. Bhakai as acting area manager had audited the cash collection logs and either didn't bother to look at the logs or, if he did, did not consider the routine failure to have a second signature as important. And yet here he is characterising the claimant's conduct as gross misconduct. He even comments that it is “a regular process in the store”. His own responsibility is overlooked. I find that a reasonable investigation would have dealt with the issue with an informal warning to comply with the procedure in the future.

6.42 Mr Patel gave evidence that he was requested by Mr Bhakai to undertake the disciplinary hearing. This took place on 20 August 2018. The notes of the hearing have been signed by the claimant as accurate. The claimant was asked “What is the policy on cash collection?” Including in her response is the following:-

“Mr Patel: What else is important?

Claimant: Date of collections, in a bag, signed by two people etc (she mentioned everything)

Mr Patel: Is there anyone else need to be there when you seal the inner bag and signed as you have the correct money?

Claimant: Yes, should be

Mr Patel: Do you always follow the procedure?

Claimant: No

Mr Patel: Why?

Claimant: I know the procedure, I taught by the procedure but I don't why I did not followed. Maybe I tried to save time or I knew the banking is fine. If the till or amount wouldn't be fine, I would ask someone to count it with me.”

And

“Mr Patel: Who prepared the banking?

Claimant: Myself

Mr Patel: Who put the second person initial?

Claimant: No-one, it should be empty.

Mr Patel: Why did you not ask anyone to sign it on that day?

Claimant: I didn't followed the procedure. If I close I don't put their initial because they don't count it.

Mr Patel: Why the policy says that you have to have a second person to count it?

Claimant: As I was working there, there were only one initial, so I thought I will follow the crowd."

6.43 Mr. Patel made the decision to dismiss the claimant for gross misconduct and this was communicated to the claimant in a letter dated 21 August 2018. He found the charge proved and made findings that:

- Narine has confirmed in interview that she never followed banking procedure assuming all should be fine and only concern if there is any high variance and she did not took this as a very serious.
- Narine also said I always did banking by herself and never asked another team member to verify and sign in log book which was gross misconduct in costa Policy.
- Dismissed for Gross Negligence which caused unacceptable loss by not following correct banking procedure which resulted in £600 loss. This has been classed as Gross misconduct in costa banking P&P.

6.44 The claimant appealed, although I do not have details of her appeal. The Costa appeal policy has a right to be accompanied by a colleague or TU representative, echoing the ACAS code. The appeal was scheduled for 6 November 2018 but the claimant wanted to be accompanied by someone who was neither a colleague nor a TU representative and the respondent would not allow this. The claimant's position was that as she had been dismissed she did not have a work colleague and did not have a TU representative. Consequently, on 30 October 2018 the claimant stated she would not attend the appeal.

7. Conclusions

7.1 The claimant was unfairly dismissed.

7.2 The claimant contributed to her dismissal by not applying the correct banking procedure as assistant manager. In my assessment her conduct was culpable and it would be just and equitable to reduce her basic and compensatory awards by 25%

7.3 I find that there was no breach of the ACAS code by the respondent. I find that the claimant's failure to pursue her appeal was not unreasonable and it would not be just and equitable to reduce her awards.

7.4 I find that there was no failure to provide the claimant with written terms and conditions of employment.

8. Remedy

- 8.1 In her first schedule of loss the claimant sets out that her gross weekly earnings figure is £474.02. In the respondent's counter-schedule, for reasons I cannot understand, the respondent states that the claimant's gross weekly earnings are £536.77, net £427.56. However, the pleaded statutory cap of £24,649.04 is based on £474.02 gross per week. The claimant adopts those weekly figures in her final schedule of loss.
- 8.2 The pay slips for 2018 show that in the 5 months to 23 August 2018 the claimant earned a total of £10,372.03 Gross, £8,433.43 Net. Divided by 5 and multiplied by 12, that gives an annual figure of £24,892.87 Gross, £20,240.23 Net, or £478.71 Gross / £351.35 Net weekly. I shall work from these figures, which are in line with the claimant's first schedule.
- 8.3 The claimant obtained employment with Pret a Manger on 1 November 2018. She asserts that she was unemployed for 10 weeks 1 day and claims loss of earnings at the full rate. She merely states she made every attempt to mitigate her loss. I have absolutely no evidence as to what attempts she made to obtain alternative employment during that time. In evidence she stated that she had worked for a couple of weeks for a company in South London and earned around £400. It was suggested in closing that she had forgotten this work. Had this been disclosed, as it should have been, I would expect the respondent to have required further disclosure of bank accounts etc. Whilst the duty to mitigate is not an onerous one, I find that the claimant has failed to demonstrate that she did make reasonable efforts to obtain alternative earnings during this time. I am prepared to accept that she had a period of unemployment but will only allow 5 weeks.
- 8.4 From 8 November 2018 to 4 April 2019 the claimant earned £6,635.95 Net. In the financial year to 4 April 2020 she earned £18,270.22 Net.
- 8.5 5 weeks unemployment at £351.35 per week = £1,756.75.
- 8.6 I do not award anything for the rest of the period before starting work for Pret a Manger as the claimant failed to mitigate her loss. I have disregarded the £400 earned.
- 8.7 For the 21 weeks to 4/4/19 the claimant would have earned £7,378.35 Net. Less the £6,635.95 Net actually earned her loss is £742.40.
- 8.8 For the year to 4/4/20 the claimant would have earned £20,240.23 Net. Less the £18,270.22 Net actually earned her loss is £1,970.01.
- 8.9 I have not deducted the employee's pension contribution in calculating the claimant's net earnings. No information has been placed before me to calculate the lost employer's contribution so I award nothing for this.

8.10 No information has been placed before me as to what has happened to the claimant's employment during the pandemic lock down. I do note that the claimant achieved fairly rapid promotion whilst working for the respondent. In the circumstances and given the uncertainties in my judgment it would be just and equitable to treat the 4 April 2020 as a cut off for the claimant's continuing losses.

8.11 Basic award:

4 x £478.71 = £1,914.84

Compensatory award:

Total loss of earnings: £4,469.16

Loss of statutory rights: £ 500.00

Reduction for contribution

Total award: £6,884 x 25% less = £5,163.

9. Recoupment:

Total monetary Award £5,163.00

Prescribed element £3,351.87

Period to which the prescribed element relates: 22 August 2018 – 4 April 2020

Amount by which the total monetary award exceeds the prescribed element: £1,811.13

Employment Judge Alliot
1st April 2021

Date:

19 April 2021

Sent to the parties on:

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For the Tribunal Office