



EMPLOYMENT TRIBUNALS

Claimant: Miss Z Pauliukaite

Respondent: Compass Group UK & Ireland Limited

Heard at: Watford Tribunal (by CVP) **On:** 11 and 12 March 2021

Before: Employment Judge Cowen

Representation

Claimant: Mr Akpan- Inwang (Consultant)

Respondent: Mr Byrne (In- house HR representative)

RESERVED JUDGMENT

1. The claimant's claims for unfair dismissal, wrongful dismissal and breach of the right to be accompanied under s. 10 ERA 1999 are upheld.
2. The respondent shall pay the claimant **£2,230.33**

REASONS

The Claim

1. In an ET1 dated 2 June 2019, the Claimant brings a case of Unfair Dismissal, Wrongful Dismissal and Breach of statutory entitlement or Breach of Contract, arising from her employment by the Respondent as a Supervisor of a café unit at ASDA Living, Tottenham, London.
2. The claim was due to be heard on 6 May 2020, but had to be postponed due to the Covid-19 pandemic. All parties were able to access the final merits hearing via CVP on 11 and 12 March 2021. Written submissions were provided by the parties by 26 March 2021.
3. The parties provided an electronic joint bundle of documents of 348 pages. The Claimant provided witness statements for herself and Mr Simeon Doherty. The respondent provided statements for Mr Stephen Taylor, Mrs Dawn Lombardo and Mr Adam Patten. The respondent also provided a written skeleton argument, all of which were considered. Oral evidence was

heard from all those who provided a witness statement.

4. After the hearing, on 24 March 2021, the claimant made an application for further evidence to be relied upon, in the form of a voice recording. It was said that this application had been agreed by the parties on 12 March. The respondent objected to the application in an email dated 25 March, indicating that there was no such agreement at the time. Given that no application was made during the hearing and that the evidence was said by the claimant to have been a recording taken on 6 March 2019, it ought to have been disclosed prior to the hearing and in accordance with the case management orders which set out disclosure. No reason, beyond Mr Doherty having technical difficulties was provided for its' late disclosure. Furthermore, given that the recording relates to matters of Mr Doherty's behaviour at the appeal hearing, it is not decisive as to whether the dismissal was fair, nor did it assist in the claim for breach of the right to be accompanied. The evidence is therefore not admitted and not considered in this judgment.

The Facts

5. The Claimant started as a customer service assistant at the café unit in ASDA Living, but was promoted to supervisor. The respondent runs cafés within stores across the country. The claimant's role included running the café outlet, sometimes on her own, as well as cashing up, ordering stock and setting out the display.
6. The claimant was provided with a number of policies during her employment, which included those relating to the operation of the till. The claimant signed these policies to acknowledge that breach of them could result in disciplinary action being taken.
7. The respondent noted that the profit of the unit in which the claimant worked was not as good as others and decided to send mystery shoppers to the unit to review how the unit was being run. This occurred on 5, 7 and 10 December 2018. The results of their report, led the respondent to analyse the till records from the same occasions, in order to understand whether the till records matched the actions which were observed.
8. Mr Stephen Taylor was asked to investigate the matters which arose from the mystery shopper visits on 7 and 10 December and the records showing that the cashing up of the till was happening far earlier than the unit's stated closing time.
9. The mystery shoppers reported that although they were served and charged the right amount, they observed that the claimant stopped serving customers around 4.30pm/5pm and did not put all transactions through the till. Where items did not scan properly she scanned alternative items of the same value and not all customers were asked whether they were eating in or out, nor were they all given receipts.
10. A financial audit of the unit indicated that both the number of transactions and the value of those transactions was significantly lower than average, leading the respondent to believe that something was amiss.

11. On 19 December 2018 the claimant was told by her manager that she would be interviewed the next day. Mr Taylor arrived with a note taker and spoke to the claimant about a number of issues. During that conversation, Mr Taylor asked if she was cashing up before 6pm. The claimant admitted that she had on occasion closed the unit before its official closing time of 6pm. He showed her records indicating that she had cashed up at 4.30pm and that mystery shoppers had said she told them she was closed from 5pm, as well as turning customers away at that time. The claimant did not deny this, but indicated that she worked alone and so it was difficult for her to do everything. She said that she had told her manager when she had closed early and had told the regional manager Mr Patten that she was working alone a lot of the time. Mr Taylor informed the claimant that she was supposed to keep the unit open until 6pm and that if she worked beyond that time as a result of being alone, she would be paid for her extra time. The claimant had not been aware of this previously and it was not contained in any written policy. The claimant also told Mr Taylor that she felt bullied by customers and was unaware of the company's 'speak up' helpline.
12. Mr Taylor showed the claimant documentation from the till records under the claimant's log in number and mystery shopper reports, suggesting that she had not accurately rung through the till some items which the mystery shopper had observed being sold. She also admitted that she had taken money from the till, amounting to approximately £9.
13. As a result of her admissions, Mr Taylor suspended the claimant in line with the respondent's disciplinary procedure. A letter setting out the terms of the suspension was handed to the claimant. It was not on company notepaper as Mr Taylor printed the letter whilst at the unit, having spoken to the claimant first.
14. No CCTV evidence or other evidence of the time of the claimant's departure from the store was obtained by Mr Taylor. Nor were there any timesheets produced to the claimant.
15. No further evidence to prove that there were amounts missing from the till was obtained.
16. The claimant was invited to attend a disciplinary hearing on 10 January 2019. At her request the hearing was put back to the 17 January 2019, in order that her Trade Union Representative could attend. The claimant was informed that the allegations were;
 - a. Gross Misconduct – theft of company cash highlighted on 10/12/2018 by a mystery shopper,
 - b. Theft of company cash by failing to work hours which you were paid for over the last 4 months
 - c. Breach of company cash handling procedures by failing to accurately record customer orders correctly through the till,
 - d. Falsification of company time sheet by signing out and leaving early on numerous occasions,
 - e. Loss of trust and confidence.
17. At the disciplinary hearing the claimant denied the allegations, saying that the wrong buttons were pressed on the till and there was no evidence to support the allegation that she went home early. Ms Lombardo, who chaired

the disciplinary hearing listened to the claimant's version of events. No CCTV or other evidence to show the time when the claimant left the premises was shown to her.

18. Ms Lombardo alleged that the actions of Mr Doherty during the disciplinary hearing, in responding to questions on behalf of the claimant made her less inclined to believe the claimant's denial that she had done anything wrong.
19. Ms Lombardo took the decision to dismiss the claimant. She did so having taken advice from the HR department during a telephone call. The claimant was told this at the end of the meeting and sent a letter dated 18 January 2019, which says that it records the reasons for reaching the conclusion, but does not do so.
20. Ms Lombardo did not consider any alternative sanction to dismissal.
21. At the conclusion of the disciplinary meeting the claimant's trade union representative, Mr Simeon Doherty made a speech, suggesting that the claimant had been sexually harassed by those who had interviewed her. He also outlined that the ACAS code for disciplinary procedures had not been followed. Mr Doherty asserted that evidence had not been produced to prove that the claimant had done what was alleged.
22. The claimant requested further time to appeal as she was on holiday when the deadline passed. The respondent extended the deadline and the claimant wrote to appeal her dismissal on 11 February 2019. She was invited to an appeal meeting on 26 February 2019 held by Mr Patten.
23. Once again the claimant was accompanied by her union representative, Mr Doherty. The notes of the meeting show that it was adjourned twice by Mr Patten on the grounds that the union representative was acting aggressively. Ultimately the meeting was abandoned due to the way Mr Patten perceived that Mr Doherty was acting. There was a dispute between Mr Patten and Mr Doherty about the extent of Mr Doherty's role. As a result, the claimant's appeal was not heard.
24. The meeting was reconvened on 6 March. The claimant was asked to bring an alternative representative. The claimant perceived this to be bias on the part of Mr Patten. She did not consider that Mr Doherty had done anything wrong and wrote to Mr Patten to say so. It appears that the letter was drafted with the assistance of Mr Doherty. It stated that she would attend the appeal with her choice of representative.
25. The claimant therefore attended the appeal meeting with Mr Doherty. As a result of which, Mr Patten was not prepared to undertake the meeting and told the claimant he would make the appeal decision based upon the information he had. At no point was the claimant allowed to spell out the reasons she requested an appeal.
26. Mr Patten sent a letter on the same day detailing the outcome of the appeal. He upheld the dismissal, saying that Ms Lombardo had considered the evidence before her. A further letter dated 18 March 2019 was also sent to the claimant as an outcome letter to her appeal.

The Law

1. The Tribunal must consider whether the dismissal was unfair. In doing so they consider the following issues in accordance with s.98 Employment Rights Act 1996 and *BHS v Burchell* [1978] ICR 303;
 - a. What was the principal reason for the dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996? The respondent asserts that it was a reason relating to the claimant's conduct.
 - b. Was the dismissal fair in all the circumstances in accordance with equity and the substantial merits of the case (and section 94 of the Employment Rights Act 1996)?
 - c. Did the respondent have a genuine belief in the misconduct which was the reason for dismissal?
 - d. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?
 - e. Did the respondent carry out a reasonable investigation in all the circumstances?
 - f. It is also contended by the claimant that an unfair procedure was followed,
2. In accordance with *Iceland Frozen Food v Jones* [1982] IRLR 439 whether the decision to dismiss was a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer.
3. It is not necessary to consider whether the appeal was a review or a rehearing as *Taylor v OCS Group Limited* [2006] IRLR 613, CA indicated that what is important is that the procedure was fair overall. It also sets out that an appeal can correct any defect in the initial investigation or procedure.
4. If the dismissal was unfair, the Tribunal must consider whether the claimant caused or contributed to the dismissal by any blameworthy or culpable conduct and, if so, to what extent? A deduction under s. 123 must be considered if blameworthy conduct is found and may be made under s.122 if it is just and equitable to do so.
5. The Tribunal should also consider if the dismissal was procedurally unfair, whether an adjustment should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? *Polkey v AE Dayton Services* [1987] UKHL 8.
6. The claim for wrongful dismissal is one for notice pay, based on the claimant's entitlement to contractual notice pay. This is a claim in common law. The tribunal is entitled to consider whether there has been a breach of contract, in failing to pay notice pay, or whether, due to the claimant's actions, the contract has terminated by her breach. In doing so the tribunal is entitled to consider the evidence and their view of whether there has been a breach of contract by the claimant, which led to the actions of the respondent.

The claimant also claims damages for breach of the right to be accompanied during a disciplinary meeting contrary to s.10 Employment Relations Act 1999;

10 Right to be accompanied

(1) *This section applies where a worker—*

(a) *is required or invited by his employer to attend a disciplinary or grievance hearing, and*

(b) *reasonably requests to be accompanied at the hearing.*

2A) *Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—*

(a) *is chosen by the worker; and*

(b) *is within subsection (3).*

(2B) *The employer must permit the worker's companion to—*

(a) *address the hearing in order to do any or all of the following—*

(i) *put the worker's case;*

(ii) *sum up that case;*

(iii) *respond on the worker's behalf to any view expressed at the hearing;*

(b) *confer with the worker during the hearing.*

(2C) *Subsection (2B) does not require the employer to permit the worker's companion to—*

(a) *answer questions on behalf of the worker;*

(b) *address the hearing if the worker indicates at it that he does not wish his companion to do so; or*

(c) *use the powers conferred by that subsection in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.]*

(3) *A person is within this subsection if he is—*

(a) *employed by a trade union of which he is an official within the meaning of [sections 1](#) and [119](#) of the Trade Union and Labour Relations (Consolidation) Act 1992,*

(b) *an official of a trade union (within that meaning) whom the union has reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings, or*

(c) *another of the employer's workers.*

7. The leading case is *Toal v GB Oils Ltd* [\[2013\] IRLR 696](#) which sets out that provided that the proposed companion is a fellow worker, or a lay or paid union official within the statutory definitions, the worker is entitled to his or her choice of companion: there is no additional requirement that the companion be reasonably chosen.

8. An employee is entitled not to be subject to a detriment as a result of their choice of companion; s. 12 ERA 1999-

s.12 Detriment and dismissal

(1) *A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he—*

(a) exercised or sought to exercise the right under section [10(2A), (2B)] or (4), or.....

Decision

9. The respondent's decision to investigate the claimant's actions in cashing up at 4.30pm arose from the data provided by the till. They sent mystery shoppers to observe the claimant in order to establish what was happening. This type of covert surveillance is carried out by many retail companies in order to assess the 'customer experience'. The results of the mystery shopping gave rise to evidence of the claimant failing to work her full contractual hours and potentially failing to charge customers the full amount for products. These are issues which may amount to misconduct with reference to the Respondent's own policies and therefore a potentially lawful reason for dismissal under s.98(2) ERA.
10. In considering whether Ms Lombardo and Mr Patten had a genuine belief in the claimant's misconduct, I have considered their views of the evidence which they relied upon.
11. Ms Lombardo was provided with the evidence collated by Mr Taylor; the audit documentation, the reports of the mystery shoppers and the interview with the claimant. Mr Patten also had this evidence to hand when he considered the appeal.
12. There is no evidence to suggest that they had in mind any other matters when considering the misconduct of the claimant and therefore their belief was genuine. However, in order for the dismissal to be fair, the belief must be based on a reasonable investigation in all the circumstances and be a decision which lies within the band of reasonable responses.
13. Considering firstly whether the investigation was reasonable; Mr Taylor spoke to the claimant and asked her about the issues raised by the mystery shoppers and the till audit. The claimant told him she found difficulty in working alone, as this meant that if she were to continue accepting customers until 6pm as instructed, she would have to remain at work to cash up and lock up beyond her paid working hours. She therefore took it upon herself to cash up early, in order that she could leave early. She indicated that she had discussed this with her line manager. Mr Taylor did not take any formal statement from the line manager, nor consider whether the claimant as a 'lone worker' was placed in a difficult position with regard to the cashing up process.
14. Mr Taylor asserted to the claimant and in evidence to the tribunal, that if the claimant were to work beyond her contractual hours in order to cash up and clean up, she would be paid for that time. Nothing in the documents provided to the claimant or placed before Ms Lombardo or Mr Patten gave that indication. If Mr Taylor were correct, then it was contradictory for him to recommend disciplining the claimant for her actions. I find that the expectation of the respondent was for the claimant to cash up within the last 15 minutes of her working hours (i.e. approximately 5.45pm) and that if she could not do so, she was expected to carry out this task in her own time. Mr Taylor's comments to the claimant was misleading to her. Furthermore,

there was a failure on his part to investigate the timing of the claimant's departure from her workplace as he accepted her admission without enquiring of any of the details.

15. The claimant was taken by surprise by Mr Taylor during the investigatory interview. This caused the claimant stress which, together with the responsibility of working alone and the feeling that she was unsupported, led to the claimant admitting in the interview to taking money from the till. Her motivation for doing so was not for financial gain as such, but in retribution for leaving her to work alone without support. Mr Taylor made no attempt to identify the full extent of the financial loss to the respondent with regard to time which had been lost, or money taken from the till. This may have been reasonable given the admissions made by the claimant in interview.
16. However, the investigation could and reasonably should have been more extensive. At the point in the disciplinary hearing where the claimant denied that she had left early or taken money Ms Lombardo ought to have stopped the hearing and undertaken further investigation. She did not do so. This may be in part due to her lack of training in disciplinary procedure and her lack of familiarity with the ACAS Code of Practice for disciplinary procedures.
17. Ms Lombardo's failure to call for evidence of the misconduct beyond the admission, meant that the respondent did not provide the claimant with evidence of early closure or departure from the store. Reference was made at the disciplinary to CCTV, but in oral evidence Ms Lombardo acknowledged that there was no such evidence before her at the time of her decision to dismiss.
18. Similarly the respondent did not provide the claimant with any evidence of theft of money from the till. There was no evidence that the till did not balance when cashed up. This was based only on the evidence of a mystery shopper who said they saw the claimant take money but not ring it through the till.
19. At the disciplinary hearing, Ms Lombardo failed to identify the lack of evidence to support the allegations. Her decision making was based on an investigation which was not reasonable in all the circumstances, as other evidence was required to support the allegations beyond the mere acceptance by the claimant of the general propositions. She failed to ensure that all reasonable investigation had been carried out before she considered the allegations.
20. Likewise, Mr Patten also failed to consider the lack of independent evidence to support the allegations of leaving early or theft of money from the till. His appeal hearing was overshadowed by his concern about the behaviour of Mr Doherty. This should not have led him to fail to give the issues his full consideration.
21. I must also consider whether the procedure used by the respondent was fair, including the fact that Ms Lombardo failed to take into account the unsupported lone working of the claimant, the lack of payment for any overtime and the lack of independent evidence of early departure by the

claimant.

22. Ms Lombardo also admitted in oral evidence that not all of the documents were sent to the claimant in advance of the disciplinary hearing and that some were shown to her for the first time at the hearing. She acknowledged that this placed the claimant at a disadvantage. Being unfamiliar with the ACAS guidelines on disciplinary process, she did not consider whether to stop the hearing and allow time for the claimant to consider the documents.
23. The respondent placed great emphasis on the disruptive behaviour of Mr Doherty during the disciplinary hearing and the fact that an appeal hearing could not be carried out due to his presence. I will return to this later.
24. When considering whether the decision to dismiss was within a band of reasonable responses I have taken into account that Ms Lombardo also admitted in evidence that she did not consider any alternative to dismissal, including a written warning. Nor did she take into account the claimant's length of service, or her previously good disciplinary record. I have also noted that Mr Patten, in his appeal decision, failed to take account, as had Ms Lombardo, of the relatively small amount of money involved in the theft. It was acknowledged by the Respondent that a sum of £7.60 was unaccounted for. Whilst theft by an employee from their employer is often a matter of gross misconduct, that does not mean that summary dismissal is within the band of reasonable responses on every occasion. It was assumed by both Ms Lombardo and Mr Patten that this was the inevitable outcome given the decision that misconduct had occurred. This too was a failure to follow a reasonable process.
25. Due to the incomplete investigation and consequent lack of evidence, the decision that the claimant was guilty of misconduct was procedurally unfair. The decision to dismiss was not concluded appropriately, but the decision overall lay in the band of reasonable responses. I find that the dismissal of the claimant was unfair for procedural reasons.
26. I find that had the respondent carried out a more thorough investigation, the evidence of the claimant's early departure and theft of money would have been forthcoming and that a decision to dismiss after considering alternative sanctions, would have followed. In order to have completed the process appropriately the respondent would have taken a further 14 days.
27. I do not consider that Ms Lombardo was instructed by HR, or by anyone else to dismiss the claimant. She did so because she genuinely believed the claimant had taken money and left her post early and that this amounted to a loss of trust and confidence. However, her conduct of the process was not fair to the claimant.
28. I am also obliged to consider the extent to which the claimant's actions contributed to her dismissal. The claimant made admissions to leaving work early and taking company money. Both of these are blameworthy actions amounting to serious misconduct and could amount to reasonable grounds for dismissal. Without the claimant's actions, it is highly unlikely that this process would have been embarked upon and there would have been no reason to enquire. The deduction to the claimant's basic and compensatory

award is assessed as 80%. No loss of statutory rights is payable where the claimant would have been dismissed in any event.

29. An award of

Basic Award (6.5 x £253.85) = 1,650.03

Compensatory award = (2 x £238.62) = 477.24

Less 80%

TOTAL =£425.45

30. In relation to the claim for wrongful dismissal for failure to pay notice pay; the claimant's contract states she is entitled to notice pay unless the claimant is dismissed for a reason which is a fundamental breach of the contract. In this situation the claimant admitted both leaving work early and taking money from the till. The employee's obligation under any contract of employment is to work for the employer during the hours set out in the contract. In return the employee is paid for those hours of her time. Where the employee has not worked the hours, but claims the payment, there is a fundamental breach of contract. However, in order to be able to do so, natural justice indicates that there should be evidence of the wrongdoing. On the basis that the respondent was not able to provide evidence of the claimant leaving the premises prior to the time set out in her contract, they have not proved the fundamental breach. The claimant is therefore entitled to her notice pay.

31. The claimant had worked for the respondent for six years at the date of her dismissal and turned 41 years old on 13 December 2017. She is therefore entitled to 6.5 weeks of net salary in compensation for failure to pay notice pay. This amounts to **£1,551.03** (6.5 x £238.62 net pay per week).

32. In relation to the failure to allow the claimant to be accompanied, under s. 10 ERA 1999, there is a clear difference of perception between the parties. The claimant was allowed to attend with Mr Doherty at both the disciplinary and appeal hearings. The respondent did not want Mr Doherty to attend the appeal and made that very clear, but this did not stop the claimant. However, it did stop the meeting from taking place on 26 February 2019 as Mr Doherty was disruptive. She was given a second opportunity and was asked to bring a different representative. When she insisted on bringing Mr Doherty, the respondent refused to hold the meeting. The claimant therefore did not have the opportunity to discuss with Mr Patten the issues set out in her appeal letter. Nor was she given the opportunity to make written submissions to him in the alternative.

33. The claimant was therefore placed at a disadvantage by not being given her appeal hearing. This was due to the fact that she was accompanied by her chosen union representative. If the notes of the disciplinary hearing are accurate (and I have no reason to believe they are not) Mr Doherty was vociferous and was seen by the Respondent as domineering of the hearing.

34. At the first attempt to hold the appeal hearing he also caused problems with the running of the hearing. Mr Patten failed to appreciate that Mr Doherty was speaking on behalf of the claimant, which he was allowed to do. By refusing to hold the meeting on the second occasion Mr Patten breached the claimant's statutory right. The damages for this breach are reduced to reflect the fact that Mr Doherty's initial behaviour led to this problem and this

was not the responsibility of the respondent. The claimant is therefore awarded one week of wages at **£253.85** (one week of gross pay)

Employment Judge Cowen

Date 28/07/2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....28/07/2021.....

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FOR EMPLOYMENT TRIBUNALS