



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Carter

Respondent: Ramathan Ltd

Heard at: via Cloud Video Platform **On:** 29th October 2021

Before: Employment Judge Pitt

Representation

Claimant: In person

Respondent: Ms Vithanum – Family Member

JUDGMENT

1. The claimant is entitled to a basic award of £967.5
2. The claimant is entitled to a compensatory award of £3856.32
3. The respondent shall pay the claimant the sum of £4823.82
4. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply to this award

REASONS

1. This is a remedy hearing following judgement being entered for liability under Rule 21 of the Employment Tribunals (Constitution And Rules Of Procedure Regulations) 2013, because the respondent failed to present a response within the required time limit. The respondent made an application for reconsideration of that decision and an application for the time for the presentation of its response to be extended. The application was heard by Judge Aspden on 18th May 2021. The application for reconsideration was refused, a remedy hearing was fixed, and the respondent was given permission to participate in the remedy hearing, including calling evidence on the issues which were identified.
2. The claimant, whose date of birth is 11th November 1960, was employed by the respondent and its predecessors from 10th December 2015. She was summarily dismissed by the respondent on 15th November 2020. At the time of her dismissal, she was working as a shop assistant in the respondent store known as Gordon's News. The claimant had made a claim for unfair dismissal and judgment has been entered on her behalf.
3. I had before me a number of documents which included a précis of video footage,

witness statements and submissions on behalf of the respondent. The respondent had video footage in relation to two days, 9th November and 13th November 2020, upon which it wished to rely. At the Preliminary Hearing, Employment Judge Aspden had indicated that the respondent should, as far as possible, present the evidence in a shortened format and limit it to about 30 minutes. I viewed the edited version of the footage during the Hearing in the presence of both parties. Subsequently, during my deliberations, I watched it again. I heard evidence from the claimant; Ms Kimberly Ramsay, a friend of the claimant and a customer of the respondent; Kevin Roke, a friend of the claimant and also a customer of the respondent. I also heard evidence from Mr R Raj, who is the owner of Gordon's news.

4. The CCTV footage originally compiled by the respondent was extensive, covering two of the claimant's shifts at the respondent's shop. It was not practicable to view the whole of the footage. Nor was it proportionate to do so, this being a remedy hearing dealing with sums at the lower end of the scale. The respondent produced approximately 30 minutes of footage which I was told covered the relevant incidents, including those referred to by the claimant. The respondent was unable to locate any footage showing the incident described by the witnesses Ramsey and Roke. This was not challenged and I accept the respondent was unable to locate it.
5. The claimant was employed as a shop assistant. Her duties were to serve customers, sell lottery tickets, replenish stock on the shelves as was necessary and generally oversee the running of the shop. From viewing the video footage, it is clear there are periods when the shop is quiet and periods when it becomes quite busy. She was dismissed summarily on 15th November 2020 for gross misconduct, namely dishonesty, in relation to shortfalls in the till.
6. On 13th November 2020, the video footage shows the claimant on multiple occasions taking scratch cards from the display and playing those cards. She would then either dispose of the card in the bin or present it to what appears to be a barcode reader. When she did that, a slip or docket which confirmed the winnings on that ticket was produced. I accept the evidence of the claimant that she paid for all of the cards that she played. She did this by either physically putting the cash in the till or by using her winnings to buy a new card.
7. The claimant gave evidence to the effect that she probably did this 30 times a day. Mr Raj told me that he had previously told the claimant, sometime in October 2020, she should not be doing this. The claimant denied any such conversation saying to me that if she had been told, she would have ceased her practice because, in fact, it would have saved her money. I accept the claimant's account because, clearly, this was an expensive habit for her.
8. On 13th November, the claimant recollects two issues in relation to her duties which may account for shortfalls in the till. The first issue related to a customer named Jimmy, who queried the price of some items he had purchased. The claimant told me and I accept that she kept the receipt and wrote Jimmy on the back of it so she could raise the matter with Mr Raj when he came into the store that evening. This account is partially corroborated by the CCTV and by Mr Raj, who accepts that such a receipt was found. Mr Raj's view, having watched the CCTV footage, is that there was some dishonesty involved with this incident. I do not accept that the claimant behaved dishonestly in relation to that receipt. The second issue, according to the claimant, was in relation to the till. She claimed it would not open, and she required assistance to open it. This evidence was

corroborated by Mrs Ramsay and Mr Roke; however, the CCTV footage does not show such an incident. I considered both Mrs Ramsay and Mr Roke to be honest witnesses, but it must be that what they saw and did relate to another day or another time.

9. At the conclusion of the day's business, Mr Raj had to reconcile his till. He tells me that it was short by £70. He has not produced any documentary evidence of this, but I have no reason to disbelieve it. Although it is unclear to me the exact sum for which the claimant was held responsible by Mr Raj when he dismissed her.
10. Mr Raj reviewed CCTV footage and concluded that the claimant had stolen from him but was also not being attentive to her duties as a shop assistant.
11. On Sunday 15th of November, the claimant received a phone call from Mr Raj. Having exchanged pleasantries, Mr Raj told the claimant she was finished because she had put £2 into the till, taken a £2 scratchcard and then taken £10 out of the till.
12. Following her employment being terminated, the claimant obtained new employment at a public house on 17th May 2021. Her salary is £142.50 per week, which exceeds her pay with the respondents.
13. When asked about her attempts to obtain new employment the claimant's evidence was, she suffers COPD, and she did not apply for any jobs because she was isolating due to the Covid Pandemic. From November 2020 until 31st March 2021, the country was at times subject to restrictions because of the pandemic. In particular on 6th January 2021, the country entered a third national lockdown which ended on 31st March 2021.
14. The claimant told me that she found it difficult to disclose the reason why she had been dismissed. She considered that had an impact on her ability to obtain new employment. In addition, the lockdown itself prevented her from obtaining employment. Finally, following lockdown ending, restrictions on some of the stores such as public houses limited her search. She did apply around February to her local B&M and on 18th March to her local Home Bargains. She eventually found work in a public house on 17th May 2021.

The Issues

15. The issues were identified at the Preliminary Hearing as follows: –
 1. When was the effective date of termination for the purpose of calculating the basic award? This will either be 15th November 2020 or 13th December 2020, depending on whether the respondent proves that it was entitled to terminate the claimant's contract without notice due to gross misconduct. If the respondent proves that the claimant committed gross misconduct, then the effective date of termination was 15th November. If the respondent does not prove the claimant committed gross misconduct, the effective date of termination is 13th December 2020.
 2. What was the length of the claimant's continuous service at the effective date of termination? The respondent accepts the claimant's employment began 10th December 2015; therefore, the period of continuous employment will be four years or five years depending on the answer to question 1.

3. Was the conduct of the claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and if so to what extent?
4. What loss has the claimant sustained in consequence of the dismissal, so far as that loss is attributable to the respondent? This will include consideration of the following issues
 - a. has the claimant taken reasonable steps to reduce her loss?
 - b. What is the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed?
 - c. did the respondent unreasonably fail to follow the ACAS Code Of Practice on Discipline and Grievances? If so, is it just and equitable to increase any compensatory award, and if so, by how much (up to 25%)?
 - d. did the claimant cause or contribute to her dismissal through blameworthy conduct? If so, and to what extent should the compensatory award be reduced? The respondent's case is the claimant was guilty of gross negligence on 13th November 2020 that she was constantly playing scratchcards and not concentrating on her duties, which included watching customers in-store, The respondents case is the till was short of cash that day and they been unable to rule out theft.
 - e. did the respondent comply with Section 1 The Employment Rights Act 1996 By providing the claimant with particulars of the terms of employment? If not by what amount should the award be increased: two weeks pay (£258) or four weeks pay (£516)

The Law

16. The method for assessing an award for unfair dismissal is contained within Sections 118 – 126 Employment Rights Act 1996.

Section 119 sets out how a Basic Award is to be calculated. A Tribunal must determine the period ending with the effective date of termination during which the employee has been employed, reckoning backwards from the end of that calculate the number of full years the employee has been employed. The number of years of employment falling within that period and allowing the appropriate amount for each of those years of employment. As the claimant is above 41 years of age, she is entitled to recover 1 ½ weeks pay for each year of employment.

17. Section 122 of the Act permits tribunal to reduce a basic award where it considers any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the basic award.
18. Section 123 deals with the compensatory award. 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.

Under Section 123 (6), where the tribunal finds 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.

Section 124 of the Act limits the amount of any compensatory award to the lower of £89,493 or 52 multiplied by a week's pay of the person concerned.

Section 207A of the Trade Union And Labour Relations (Consolidation) Act 1992 relates to the effect of the failure to comply with the ACAS code of practice on Discipline and Grievance at work. Where it appears to the tribunal an employer has failed to comply with the code, and the failure was unreasonable, the tribunal may if it considers it just and equitable in all the circumstances to increase any award (that is, compensatory award) by up to 25%.

Section 38 Employment Act 2002 requires a Tribunal where certain claims are upheld, including unfair dismissal, to increase the award by a minimum equal to two weeks wages to a maximum of 4 weeks.

Submissions

19. The claimant's case is she had done nothing wrong and should not have been dismissed. The respondent's case is that the claimant was guilty of gross misconduct. There were shortfalls in the till and it was entitled to summarily dismiss her.

Discussion and Conclusions

20. Despite some of the inconsistencies in the evidence, I concluded that the claimant was an honest witness who genuinely believed the account she gave me. I accept her evidence that she did not steal from the till. I concluded, therefore, that the respondent was not entitled to summarily dismiss her on 15th November 2020 and the effective date of termination of her employment was 13th December 2020. She has five years of continuous employment, and as she is over 41 years of age, she is entitled to recover a basic award of seven and a half weeks wages. This is £967.50.
21. I have considered whether it is just and equitable under section 122 of the Act to reduce that sum because of the conduct of the claimant before her dismissal. Whilst Mr Raj told me that he had advised the claimant not to play scratchcards at work and the playing of the cards was ill-advised, I do not consider that even if Mr Raj had told her not to do this, that this behaviour is such that it is just and equitable to reduce the basic award.
22. On the evidence I have heard, I am not satisfied that the claimant acted unreasonably in her efforts to secure new employment. She suffers from COPD, and although she was at work in November 2020, this was an environment she was familiar with in a small shop. I am satisfied that given her ill health, it was reasonable for her to delay seeking new employment until the pandemic situation appeared to be subsiding. The claimant obtained new employment on 17th May 2021 and now earns slightly more than in the respondent's employment. Having been dismissed on 15th November 2020 she is entitled to recover 26 weeks loss of earnings.
23. I considered whether, if the respondent had followed a proper procedure, the claimant would have been dismissed. This is not a clear cut case, and whilst I have seen no evidence of the claimant stealing, it may be that following a proper procedure, the respondent may have lawfully dismissed her. I assess this chance at 10%. Accordingly, the compensatory award will be reduced by that sum.
24. I have to consider whether the respondent unreasonably failed to follow the ACAS

Code of Practice for Disciplinary and Grievance Procedures. There was no procedure carried out, and no proper explanation was given. I, therefore, increase the award by 20%.

25. The claimant did not have any terms and conditions of employment. Having been unfairly dismissed, I am required to award her a further sum. I note that the respondent had taken over the claimants employment when it purchased the shop. I, therefore, limit that award to 2 weeks wages.

26. Basic Award

7.5 x£129 **£967.5**

Compensatory Award

Loss of Earnings 26 weeks x £129	3354
Less 10% Polkey Reduction: £355.4	2998.6
Uplift for failure to follow ACAS code 20%: £599.72	3598.32
Uplift for failure to supply terms and conditions of employment: Two weeks: £258	3856.32
Total Compensatory Award	£3856.32
Total Award	£4823.82

Employment Judge AE Pitt.

3rd December 2021