



EMPLOYMENT TRIBUNALS

Claimant
Mr M Kaffo

v

Respondent
Heathrow Hotel Limited

Heard: At Reading and by CVP

On: 21 and 22 July 2022 and
in private on 25 July 2022

Before: Employment Judge Hawksworth
Mrs J Hancock
Mrs I Sood

Appearances

For the Claimant: In person

For the Respondent: Mr S Mayberry (solicitor)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal fails and is dismissed.
2. The claimant's complaint of direct race discrimination fails and is dismissed.
3. The claimant's complaints of unauthorised deduction from wages in respect of holiday pay fails and is dismissed.
4. The claimant's complaint of wrongful dismissal in respect of notice fails and is dismissed.

REASONS

Claim, hearing and evidence

1. The respondent is a company which operates a hotel near Heathrow. The claimant, Mr Kaffo, was employed as a night manager (reception) for the respondent from 3 May 2016 until his dismissal on 27 February 2019.
2. The claim form was presented on 24 April 2019 after Acas early conciliation from 12 April to 24 April 2019. Mr Kaffo was legally represented at the time he presented his claim. He claimed detriment and automatic unfair dismissal for health and safety reasons, automatic unfair dismissal for assertion of a statutory right, race discrimination, notice pay, arrears of pay and breach of the Working Time Regulations 1998.

3. The respondent presented its response on 7 June 2019. The respondent defended the claim and said Mr Kaffo was fairly dismissed for gross misconduct. The respondent said that the pleading of the claim was unclear.
4. There were four preliminary hearings to clarify the complaints. Mr Kaffo was ordered to provide further particulars on two occasions.
5. A complaint under regulation 6 of the Working Time Regulations was the subject of a deposit order. It was subsequently dismissed in an order dated 14 August 2020, as the deposit was not paid.
6. The final hearing took place on 21 and 22 July 2022. The final hearing was scheduled to take place over three days, on 20, 21 and 22 July, but for judicial resourcing reasons the allocation had to be reduced to two days. Mr Kaffo and the judge were present in person at Reading employment tribunal. The respondent's representative and witnesses, and the tribunal members attended by video (CVP).
7. We heard evidence from the respondent's witnesses first because Ms Davey was only available on 21 July 2022. We heard from Ms Davey on 21 July and Mr Mendonca on 22 July 2022. We then heard evidence from Mr Kaffo. All the witnesses had exchanged witness statements.
8. The respondent had also served a witness statement for Mr Jetwani but he was not able to attend for medical reasons. We told the parties that we would consider how much weight should be attached to Mr Jetwani's statement given that he had not attended to be questioned. In the event, we relied on the contemporaneous documentation completed by and about Mr Jetwani, and not on his witness statement.
9. Both parties made closing comments at the end of the hearing.
10. There was an agreed bundle of 416 pages. On the last day of the hearing, the respondent provided late disclosure of 3 pages showing the clock-in record for the claimant. We allowed this as it was of central relevance to the unauthorised deductions claim, it was a short document, and the respondent had not been aware of how the claimant was putting his unauthorised deductions claim until after exchange of statements. We gave the claimant the opportunity to comment on the document.
11. As there was insufficient time for deliberation and judgment on 22 July 2022 the tribunal reserved judgment and met in private on 25 July 2022 for deliberation.

The Issues

12. Although there were four preliminary hearings to clarify the claim, at the start of the hearing before us there was no final list setting out the issues we have to decide. We discussed the issues with the parties at the start of the hearing.
13. We noted that there had been some initial identification of the issues at the first two preliminary hearings. There had also been narrowing of the issues

by agreement at a preliminary hearing on 21 January 2022. The case management summary of that hearing recorded that complaints of ordinary unfair dismissal, direct race discrimination and unauthorised deduction from wages in respect of holiday pay were continuing. It recorded that the complaints of detriment, automatic unfair dismissal and a claim for personal injury were no longer being pursued. Further details were provided of the direct race discrimination complaint which had been set out at the preliminary hearing of 18 May 2020.

14. At the start of the hearing before us, the judge asked the parties whether the breach of contract claim in respect of notice pay was still being pursued. The respondent's representative accepted that this complaint had not been withdrawn at the hearing on 21 January 2022 and he did not object to it being dealt with at the hearing, as the evidence required would be the same as the evidence for the complaint of ordinary unfair dismissal.

15. Following this discussion, we asked the respondent's representative to prepare a summary list of issues. The list said that the issues for us to decide are:

15.1 Ordinary Unfair Dismissal.

15.2 Direct Race Discrimination:

a. At the interview and 15/02/2019, did Anne Davey and a Director of the Respondent ask the Claimant 'why did you come back' and if so was this because of the Claimant's race/ethnic origin?

b. The Respondent made the Claimant work alone;

c. The Respondent made the Claimant undertake 2/3 people's jobs in unsafe conditions without training/promotion;

d. The Respondent dismissed the Claimant, noting that the Claimant contends that the decision to discipline him was because of his race and the alleged instruction to him not to contact the Police was because of his race.

e. The Respondent called the Claimant 'Kalu'.

15.3 Unlawful deduction from wages – relative to holiday pay and an alleged unlawful deduction of £736.11.

15.4 Breach of contract – relative to three months' notice pay.

16. At about lunchtime on the first day of the hearing, the claimant said that a complaint of breach of regulation 12 of the Working Time Regulations (rest breaks) had been omitted from the list. The respondent said this complaint had been withdrawn at the hearing on 21 January 2022. We had to decide this dispute between the parties as to the scope of the claim. We thought about this very carefully. We gave our decision on the morning of 21 July 2022. For reasons given at the hearing, we decided that the regulation 12 complaint had been withdrawn and could not now be allowed to proceed. In

short, although the case management summary did not expressly say that the regulation 12 complaint had been withdrawn, it was not included in the list of complaints that were still being pursued. Also, an order had been made for the parties to inform the tribunal if the case management summary was inaccurate or incomplete in any important way. Mr Kaffo was represented at the time and his representatives had not said that a regulation 12 complaint was still being pursued. We decided that the complaint had been withdrawn. We did not think it would be fair to allow that complaint to be reinstated. By the time of the hearing before us, the claimant had not provided any specific information about a regulation 12 complaint (for example the dates he was complaining about), despite having been given a last opportunity to clarify his complaints in July 2021. A postponement would be required if this complaint were allowed to proceed as it was not fully particularised and had not been dealt with in the documents and witness statements. We decided that the regulation 12 complaint could not now be allowed to proceed.

17. We therefore heard evidence, made findings of fact and reached conclusions on the issues set out in the summary list of issues set out above.

Findings of fact

18. We make the following findings of fact about what happened. Where there is a dispute between the parties about what happened, we decide what we think is most likely to have happened, based on the evidence we heard and documents we read.

Introduction

19. Mr Kaffo worked as a night manager (reception) at the Heathrow Hotel Lodge from 3 May 2016. The hotel is managed by a company called Heathrow Hotel Limited, which is part of the Arora group of companies. One of the Arora group companies is Arora Management Services Limited ('AMS'). AMS provides services to Arora group companies, including HR services.
20. Mr Kaffo had previously worked at the hotel from 21 July 2014 to 1 January 2015 as a receptionist (page 44).
21. Mr Kaffo's contract said that his duties and responsibilities would be as directed by his manager. It said that the employee:

"Must devote the whole of your time, attention and abilities during your hours of work to performing your duties for the Company".
22. Night managers were not permitted to sleep while on duty.
23. The contract also said that the company was entitled to dismiss an employee without notice or payment in lieu of notice if the employer is:

"(a)...guilty of any gross misconduct affecting the business of the Company or any Group Company;

(b)...commit any serious or repeated breach of your obligations as an employee; or any serious or repeated non-observance of any of the provisions of this agreement or refuse or neglect to comply with any reasonable and lawful directions of the company.”

Events of the 14 February 2019

24. At about 6.10 in the morning of 14 February 2019, Kishan Jetwani, the manager of the hotel, received a call from the hotel minibus driver. The driver told Mr Jetwani that when he arrived at the hotel for work, the minibus and the minibus keys were missing (page 127). Mr Jetwani went to the hotel and arrived at about 6.30am.
25. The claimant was the night manager on duty on the night of 13/14 February 2019. He was working alone. When Mr Jetwani arrived at the hotel he spoke to the claimant who confirmed that the minibus was there at the start of his shift (10.00pm on 13 February 2019). Mr Jetwani and the claimant looked at the CCTV together. The CCTV showed a man taking some chocolates from a charity display on the front desk. The CCTV also showed the minibus keys being stolen, at about 3.18am. Two men jumped over the front desk, tried to open the cash drawer which they found locked, went to the drawer with the minibus key, which was open, took the minibus key, ran out of the main door and drove off in the minibus (page 127). The CCTV also showed that Mr Kaffo was not at the reception desk from about 1.30am and 4.30am. When he went to make wake-up calls at 4.45am he did not notice that the minibus was no longer parked in the bay outside the front door (page 128).
26. Mr Jetwani reported the matter to Anne Davey, the Talent and Culture Director of AMS.
27. Mr Kaffo left the hotel at 8.00am on 14 February 2019 when his shift ended. Mr Jetwani reported the theft to the police.

Investigation

28. Ms Davey conducted an investigation into what had happened. She emailed Mr Kaffo on 14 February 2019 at 5.03pm to ask him to attend a fact-finding meeting the next day, to understand what happened during the early morning when the minibus keys were taken from a drawer in reception and the minibus was driven away (page 120).
29. The investigation meeting with Mr Kaffo took place on 15 February 2019. There was a non-verbatim note taken of the meeting (pages 124 to 126).
30. The meeting was attended by Mr Kaffo, Ms Davey and Sanjay Arora, a director of AMS. In the meeting, Ms Davey asked Mr Kaffo where he was between 3.00am and 4.00am when the two men entered the hotel reception. He replied that he was 'probably in the back office just behind reception'. He said he went through to the back office as the fridge in reception was very noisy. Mr Arora said that the CCTV showed that Mr Kaffo was away from the reception desk from about 1.30am to 4.30am, and asked whether he was in the back office for all this time. Mr Kaffo replied that he is Muslim and so he spends time praying in the back office. Ms

Davey asked whether Mr Kaffo might have nodded off during this time. Mr Kaffo said he was not sure. She asked whether he had thought about locking the door while he was in the back office. Mr Kaffo said:

31. "No, because people staying in the lodge would come to the door and I would have to walk all the way from the back office along the corridor to answer the door".
32. Ms Davey told the claimant that he had a responsibility to lock the drawer where the key to the minibus was kept, and to lock the front door before going to the back office. Mr Kaffo replied, "We never locked the drawer where the key was kept".
33. Mr Kaffo, Ms Davey and Mr Arora watched some of the CCTV footage together. The CCTV showed that two men entered the hotel reception at 3.13am and left at 3.19am. One man took some chocolates from a charity display on the front desk. The CCTV showed that the two men returned at 3.21am, climbed over the front desk, checked the cash drawer which they found locked, checked the drawer with the minibus key, which was open, took the minibus key, left the building at 3.23am and drove off in the minibus (page 126).
34. Ms Davey said to Mr Kaffo that she did not understand why he did not hear any of this in reception, and asked whether he may have fallen asleep. Mr Kaffo replied, 'Yes, I probably had fallen asleep'.
35. At the end of the meeting Ms Davey told Mr Kaffo that he should stay at home while the investigation was in progress. She typed a suspension notice and signed it as 'suspending manager'. Ms Davey told him that he would receive full pay while suspended.
36. Ms Davey sent the note of the investigation meeting to Mr Kaffo on 18 February 2019.
37. Also on 18 February 2019, Ms Davey had an investigatory meeting with Mr Jetwani. He said that the drawer where the minibus key was kept should have been locked, and that he had personally told Mr Kaffo this (page 127). He also said that since 11 February 2019, at Mr Kaffo's request, he had changed the staff to having two night workers.
38. As part of the investigation, Ms Davey obtained a statement from another night worker who said that he had worked with Mr Kaffo on the night of 11 February 2019. That night worker said that he spent most of his time at the reception, and that Mr Kaffo spent time in the back office doing other work and time going between reception and the back office (page 130).

Disciplinary hearing

39. Ms Davey decided that there should be a formal disciplinary hearing. She wrote to Mr Kaffo on 19 February 2019 to invite him a hearing on 20 February 2019 (page 129). Copies of the investigation meeting notes and the respondent's disciplinary policy were enclosed.

40. The invitation letter was sent on Arora group headed paper. It said that the disciplinary hearing would be chaired by Mr Jetwani ('general manager'). Marcelo Mendonca, the group Talent and Culture Manager, would be present to take notes. There were two allegations:
 - Gross negligence - Leaving the reception desk unattended between 1.30am to 4.30am (3 hours) resulting in the theft of company vehicle
 - Gross negligence - Leaving the reception desk drawer unlocked where the key for the company vehicle was kept.
41. The letter said that because of the nature of the allegations, the outcome could include dismissal. The claimant was told of his right to be accompanied.
42. Mr Kaffo replied to the letter. He said he had been through the investigation finding and did not agree with the statements. He did not give any more details of what he did not agree with. He asked for more notice of the hearing so that his legal adviser could attend. Ms Davey rescheduled the hearing to 25 February 2019. She told Mr Kaffo that he could be accompanied by a fellow worker or a trade union representative (page 132).
43. On 21 February 2019 Ms Davey obtained two further statements. The first was from another night manager at the hotel who said that he kept the cash drawer and the drawer with the minibus key locked (page 134). The second was from the minibus driver who said that when he arrived at 6.00am and found the minibus was not there, he asked Mr Kaffo where it was, and Mr Kaffo said that it should be outside (page 135).
44. Also on 21 February 2019, Ms Davey sent the claimant an invitation letter for the rescheduled hearing on 25 February 2019 (page 136). This letter was on 'Heathrow Lodge' headed paper, and referred to Mr Jetwani as the 'Hotel Manager'. Ms Davey asked Mr Kaffo to acknowledge receipt and confirm who would be accompanying him (page 137).
45. During the course of the day on 21 February 2019, Mr Kaffo and Ms Davey exchanged a number of emails. Mr Kaffo said that he had no objection to the date and time of the rescheduled hearing, but said 'a legal clarification is needed prior to me confirming my attendance'. He asked seven questions about the titles and legal roles of various managers, and the legal connection between Heathrow Lodge Hotel, Arora group and AMS (page 144). Ms Davey replied to Mr Kaffo's questions on the same day and asked him to confirm his attendance (page 143). Mr Kaffo replied. He did not confirm his attendance, but said, 'We are now one step forward in the legal clarification'. He asked three further questions about the directors of the various companies (page 143). Ms Davey replied to say that information about directorships was freely available on companies house website. She said, 'We have the relevant delegated authority to deal with this procedure' (page 142).

46. On the following day, not having heard anything back, Ms Davey emailed Mr Kaffo twice to ask him to confirm his attendance and to say who would be accompanying him (page 141 and 147).
47. Mr Kaffo did not attend the hearing on 25 February 2019 and did not contact the respondent to say he would not be attending. Mr Mendonca, providing HR support to Mr Jetwani, advised Mr Jetwani to reschedule the meeting.
48. Ms Davey wrote to Mr Kaffo on 25 January 2019 to invite him to the rescheduled meeting on 27 February 2019 (page 148).
49. The meeting on 27 February was attended by Mr Jetwani and Mr Mendonca. Mr Kaffo did not attend and did not contact the respondent to say he would not be attending or to explain why. Mr Jetwani decided to proceed with the hearing in the claimant's absence.

Dismissal

50. Mr Jetwani made the decision to dismiss the claimant. His decision and the reasons for it are recorded in the note of the hearing (page 149). He reviewed the investigation notes. In respect of the first allegation (leaving the reception desk unattended), Mr Jetwani noted that Mr Kaffo admitted that he was absent from the front desk from 1.30am to 4.30am, and that he may have been asleep in the back office. He noted the statement of Mr Kaffo's colleague in which he said that during the shift of 11 February 2019 Mr Kaffo spent time in the back office.
51. In respect of the second allegation (leaving the desk drawer with the minibus key unlocked), Mr Jetwani noted that Mr Kaffo accepted that he never locked the desk drawer with the minibus keys. Mr Jetwani noted that the cash drawer had been kept locked, and decided that this meant that Mr Kaffo knew that drawers with valuables should be kept locked.
52. Mr Jetwani agreed that both allegations of gross negligence towards company property were made out. He decided that Mr Kaffo should be dismissed for gross misconduct due to gross negligence of his responsibilities as a night manager and of keeping company property safe.
53. Mr Kaffo was dismissed without notice on 27 February 2019.
54. Mr Mendonca wrote to Mr Kaffo to explain the decision to dismiss (page 150). He said that Mr Kaffo had the right to appeal against the decision to dismiss him, and gave an email address and instructions as to how to submit an appeal. Mr Kaffo chose not to appeal.
55. On 2 April 2019, Mr Kaffo obtained a statement from a former colleague which said that the drawer where the minibus key was kept was never locked, and he had not been told to lock that drawer (page 402).

Wrongful dismissal

56. In relation to the complaint of wrongful dismissal, we make the following findings.

57. At the hearing before us, Mr Kaffo said that the respondent's note of the investigation meeting with him on 15 February 2019 was not accurate and did not reflect what he had said. We find that it was an accurate note of the meeting, and that Mr Kaffo said the things which the note records he said. We make this finding for two reasons. First, Mr Kaffo did not challenge the contents of the note at any time prior to the hearing before us. Secondly, the account of the meeting given by Mr Kaffo in his Grounds of Complaint, prepared when he was legally represented, closely reflects the account of the meeting in the respondent's note (pages 24 to 27).
58. We find that in the early hours of 14 February 2019, Mr Kaffo left the reception desk at the hotel unattended from 1.30pm to 4.30pm. At this time he was in the back office. We find that it is likely that he was asleep. During this time, Mr Kaffo had left the front door and the desk drawer with the minibus key unlocked.

Unauthorised deduction from wages

59. In relation to the complaint of unauthorised deduction from wages in respect of holiday pay, we make the following findings.
60. The respondent's holiday year runs from 1 January to 31 December. Mr Kaffo was entitled to 22 days holiday in a full holiday year. His entitlement for the part year from 1 January 2019 to 27 February 2019, the date of his dismissal, was 3.5 days (page 50).
61. Mr Kaffo was absent on holiday from 1 January 2019 to 27 January 2019, a total of 16 working days. We reach this finding on the basis of the clock-in record provided by the respondent which we accept was a genuine record of Mr Kaffo's working hours from 1 November 2018 to 9 February 2019. It was consistent with the pattern of handover notes made by Mr Kaffo; he made no notes between 12 December 2018 and 28 January 2019 (pages 225 and 227).
62. We do not accept that the document on page 393 showed that Mr Kaffo had only had taken 4 days leave from his 2019 entitlement by the time of his dismissal. It did not have Mr Kaffo's name on it, so it was not clear that it was his record. Further, it was not dated, so it was not clear at what point in the year 4 days holiday had been taken.
63. We find therefore that at the time of the termination of his employment, Mr Kaffo had taken 16 days holiday against an accrued entitlement to 3.5 days. We find that the deduction of £736.11 from Mr Kaffo's pay was in respect of the 12.5 days holiday which Mr Kaffo had taken in January 2019 which he had not accrued.
64. In relation to holiday and deductions from wages, Mr Kaffo's contract said:
- "If you have taken more holiday than your accrued entitlement at the date your employment terminates, the Company shall be entitled to deduct from any payments due to you one day's pay for each excess pay." (page 109) and

“Upon termination of your employment or at any other time, the Company shall be entitled to deduct from your salary or any other payments due to you any money which you may owe to the Company.” (page 108).

Race discrimination

65. In relation to the complaints of race discrimination, we make the following findings.
66. Mr Kaffo describes his race/ethnic origin as Black African.
67. Mr Kaffo worked four nights a week. Other staff performed the same role on the remaining three nights each week, and when Mr Kaffo was not there. We find that the responsibilities of the role and the respondent's expectations of the other staff who were performing the night manager role were the same as of Mr Kaffo.
68. Night managers worked alone. It was difficult for them to fulfil their duties when they had to leave the reception to check on guests in their rooms or in other buildings outside the main building. Mr Kaffo raised his concerns about this with the respondent. In response to those concerns, Mr Jetwani agreed to change staffing arrangements so that there would be two workers at night. The respondent was beginning to implement the new arrangement from 11 February 2019 but did not have enough staff to allocate two workers every night that week.
69. In the investigation meeting on 15 February 2019, when discussing Mr Kaffo's previous employment at the hotel, Ms Davey asked Mr Kaffo a question to the effect of, 'Why did you come back?' or 'Why did you come back to work for our company?' (pages 25, 255 and 391).
70. On 20 February 2019 Mr Kaffo emailed Mr Jetwani to ask whether there was any update from the police. Mr Kaffo said that he would be more than happy to assist the police with their investigation (claimant's grounds of complaint, at page 28 of the bundle). Mr Jetwani replied on the same day thanking Mr Kaffo for his email and his willingness to assist. He said the police would contact him if they required assistance (page 29). The police did not contact Mr Kaffo. On 27 July 2021, Mr Kaffo made a report to the police about the theft (page 403).
71. In further information provided to the tribunal by Mr Kaffo on 27 July 2021 (page 256) and 4 February 2022 (page 392), Mr Kaffo said that staff at the hotel called him 'Kalu' which means black man in Hindi. He did not say who said this or when. Ms Davey and Mr Mendonca said that they did not hear anyone saying this. Mr Kaffo did not raise any complaint about this with the respondent at any time prior to his dismissal, and did not mention it in his ET1. In light of the unspecific nature of this complaint, we do not find that this occurred as alleged.

Mr Kaffo's employer

72. Mr Kaffo's two employment contracts named AMS as his employer. He initially brought his claim against AMS.
73. In the grounds of resistance, the respondent said that the naming of AMS as the claimant's employer in his contracts was a clerical error by the respondent, and that his employer was in fact another Arora group company, Heathrow Hotel Limited.
74. At the preliminary hearing on 6 July 2021, the claimant (represented by counsel) accepted that the correct identify of the respondent was Heathrow Hotel Limited; the name of the respondent was amended by the tribunal from AMS to Heathrow Hotel Limited (page 237).
75. The case management summary of 6 July 2021 records that the concession was made on the basis of information provided by the respondent's solicitor. We did not hear any evidence which suggested that the information which had been provided was wrong, or that the claimant should be allowed to withdraw his concession. We have therefore proceeded on the basis as previously agreed that the claimant's employer was Heathrow Hotel Limited. However, we make clear that had the claimant's employer been AMS, our findings and conclusions on the claimant's claim would have been the same.

The Law

Unfair dismissal

76. Section 98(2) of the Employment Rights Act 1996 sets out reasons for dismissal which are potentially fair reasons. These include reasons which "*relate to the conduct of the employee.*"
77. In a complaint of unfair dismissal which the employer says is for conduct reasons, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Guidance set out in the case of British Home Stores v Burchell requires the tribunal to consider the following issues:
 - 77.1 whether, at the time of dismissal, the employer genuinely believed the employee to be guilty of misconduct;
 - 77.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
 - 77.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
78. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996):

"whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a fair reason for dismissal."

79. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer. The tribunal must not substitute its own view of the appropriate penalty for that of the employer.

Breach of contract (notice pay)

80. A dismissal without notice for misconduct is a wrongful dismissal (that is a dismissal in breach of contract) unless the respondent can show that:

- 80.1 the claimant actually committed the misconduct; and
80.2 the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.

81. The approach is not the same as in a complaint of unfair dismissal. It is not sufficient for the employer to demonstrate a reasonable belief that the employee was guilty of gross misconduct. The question of whether the misconduct was sufficiently serious to justify summary dismissal is a matter for the tribunal to decide.

82. The conduct must be a deliberate and wilful contradiction of the contractual terms, or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698 CA. In a case involving an allegation of gross negligence, the question is whether negligent 'dereliction of duty' is 'so grave and weighty' as to amount to justification for summary dismissal (Adesokan v Sainsbury's Supermarkets Ltd [2017] IRLR 346.

Direct discrimination because of race

83. Race is a protected characteristic under sections 4 and 9 of the Equality Act 2010. Race includes ethnic origin.

84. Section 13(1) of the Equality Act provides:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Burden of proof

85. Sub-sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision."

86. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.
87. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Unauthorised deduction of wages and holiday pay

88. Holiday pay is a form of wages for the purposes of section 13 of the Employment Rights Act 1996. Section 13 says:

“An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract.”

89. A relevant provision in a worker’s contract includes a written term of the contract which the employer has given to the work prior to making the deduction in question (section 13(2)(a)).

90. Regulation 14(1) and (2) of the Working Time Regulations 1998 say that:

“(1) Paragraphs (1) to (4) of this regulation apply where -

(a) a worker’s employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

...

(4) A relevant agreement may provide that, where the proportion of leave taken by the work exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.”

91. A relevant agreement includes a legally enforceable agreement in writing between the worker and the employer (regulation 2 of the Working Time Regulations).

Conclusions

Unfair dismissal

92. The employer must show that misconduct was the reason for dismissal, by reference to the three stage test set out in British Home Stores v Burchell.
93. The decision to dismiss the claimant was made by Mr Jetwani. We accept the evidence of Mr Mendonca that although he signed the dismissal letter, he did so in his capacity as HR support to Mr Jetwani, and it was Mr Jetwani who made the decision.
94. At the time he dismissed the claimant on 27 February 2019, Mr Jetwani had a genuine belief that the claimant was guilty of misconduct, namely not being present at the front desk and leaving the drawer with the minibus key unlocked in the early morning of 14 February 2019, resulting in the theft of the company vehicle.
95. Mr Jetwani was aware of the following at the time he made his decision to dismiss:
 - 95.1 There was little factual dispute as to what happened on the night in question.
 - 95.2 Mr Jetwani had seen the CCTV which recorded the theft of the keys and the minibus, and he had seen that the claimant was not present at the front desk for a period of three hours.
 - 95.3 From the notes of the investigation meeting, Mr Jetwani was aware that Mr Kaffo had accepted that he was not present at the front desk between 1.30am and 4.30am, that he was probably in the back office at this time and that he had probably fallen asleep.
 - 95.4 This was consistent with a statement from one of Mr Kaffo's colleagues which Mr Jetwani had seen, which said that on a previous night when they worked together, Mr Kaffo spent time in the back office.
 - 95.5 From the CCTV, Mr Jetwani had seen that the cash drawer was locked but the drawer with the minibus keys was not locked.
 - 95.6 From the notes of the investigation meeting, Mr Jetwani was aware that Mr Kaffo had accepted that he had left the drawer with the minibus key unlocked while he was away from reception for three hours.
 - 95.7 Mr Kaffo's absence from the reception and the failure to lock the drawer with the minibus keys resulted in the theft of the minibus.
96. We conclude that these were reasonable grounds for Mr Jetwani's belief that the claimant was guilty of misconduct.
97. At the time Mr Jetwani formed his belief in the claimant's misconduct, the respondent had carried out as much investigation as was reasonable in the circumstances. Statements were taken from the relevant people and the CCTV of the incident was viewed with Mr Kaffo. Mr Kaffo said in the hearing

before us that the respondent should have viewed the CCTV for the whole week, to see whether other staff kept the drawer with the minibus key locked. However, he did not suggest this to the respondent at the time.

98. We conclude that the respondent has established that the reason for the claimant's dismissal was a reason relating to his conduct. This is a potentially fair reason for dismissal.
99. We next have to consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient grounds to dismiss him (that is, whether dismissal was within the range of reasonable responses). The burden of proof here is neutral.
100. We have considered the circumstances of the claimant's case and reached the following conclusions:
 - 100.1 When it considered the claimant's case, the respondent adopted a procedure which was within the range of reasonable procedures. The respondent made the claimant aware of what was being investigated. A thorough investigation was carried out and the claimant was given opportunities to respond to the allegations. A disciplinary hearing was held and the claimant was provided with copies of the documents which the respondent considered when reaching its decision. The claimant was told of the risk of dismissal and of his right to be accompanied. The claimant was offered an appeal. The claimant chose not to attend either disciplinary hearing and chose not to appeal against his dismissal.
 - 100.2 It was reasonable for the respondent to proceed with the hearing on 27 February 2019 in the claimant's absence. The hearing was rescheduled at the claimant's request, and rescheduled again when the claimant did not attend. This was the second hearing which the claimant had not attended. The respondent had replied to Mr Kaffo's requests for information about the company group and its directors. The claimant had not provided any reason why he had not attended.
 - 100.3 Mr Jetwani was involved with the investigation as well as being the chair of the disciplinary hearing. His involvement with the investigation was that he was the first to view the CCTV with the claimant and he provided a statement about the CCTV, his discovery of the theft and the steps he took on the morning of 14 February to Ms Davey in the course of the investigation. We have concluded that Mr Jetwani being the decision maker after providing a statement in the course of the investigation did not take the decision outside the range of reasonable responses. He did not conduct the investigation himself. He was the manager of the hotel. He was an appropriate person to conduct the disciplinary hearing. Mr Kaffo did not suggest at the time that Mr Jetwani should not conduct the disciplinary hearing. If Mr Kaffo had exercised his right of appeal, his case would have been considered by another manager.

100.4 It was reasonable for the employer to dismiss the claimant without viewing the CCTV for the whole week to see whether other employees kept the drawer with the minibus key locked. The claimant did not suggest that they took this step. The respondent had a statement from one of the claimant's colleagues which said that he kept it locked. The statement obtained by the claimant from another former colleague which said that he had not been told to lock the drawer was not obtained until April 2019 and so was not before Mr Jetwani at the time he made his decision.

100.5 It was reasonable for Mr Jetwani to conclude that the claimant's conduct amounted to a failure to keep company property safe and a failure to comply with his responsibilities as a night manager. It was reasonable for him to decide that the claimant's conduct amounted to gross negligence which was so serious as to amount to gross misconduct.

100.6 The claimant's contract said that the employee would be entitled to dismiss in cases of a serious breach of an employee's obligations, and it was reasonable for the employer to consider that the claimant's conduct in this case was a serious breach of his obligations warranting summary dismissal.

100.7 There was no evidence before the respondent that the claimant was treated inconsistently to any colleague.

101. We have concluded that, in these circumstances, dismissal was within the range of reasonable responses open to the respondent.

102. The claimant's complaint of unfair dismissal therefore fails and is dismissed.

Wrongful dismissal

103. The approach in relation to the claimant's wrongful dismissal complaint is not the same as in the complaint of unfair dismissal. We have to consider whether the claimant actually committed the misconduct; and whether the misconduct was of a sufficiently serious nature to amount to a repudiatory breach justifying summary dismissal.

104. As to what happened, this is not a case in which the claimant denied the treatment that was the subject of the complaint against him. We have found that he accepted that he was not at reception for a period of three hours which included the time when the minibus was stolen. He accepted that he had not locked the drawer with the minibus key (or the front door) during the three hour period when he left reception unattended. We have found that it is likely that he was asleep in the back office at this time. We have found that Mr Kaffo committed the misconduct that he was alleged to have committed.

105. We have considered whether the misconduct was sufficiently serious to justify summary dismissal. Mr Kaffo explained to us some of the difficulties which arose from being a lone worker on reception at night, including

difficulties with locking the front door when leaving the main building to assist hotel guests. He had raised his concerns with Mr Jetwani, who accepted that two workers should be on reception at night but had not fully implemented this at the time of the theft. Mr Kaffo also explained to us that the respondent has since fitted a better lock on the front door. But the lone working issues and the difficulties with the front door lock were not the reasons why the minibus was stolen. The minibus was stolen because the claimant was in the back office, probably asleep, and had left the reception unattended and the minibus key in an unlocked drawer. He was not carrying out his duties at that time.

106. We have concluded that the claimant's conduct left the respondent's reception vulnerable to theft for a lengthy period, when his role as night manager was to ensure that the reception was secure. As such, it was conduct which was so 'grave and weighty' that it amounted to justification for summary dismissal. It was a repudiatory breach of contract and it entitled the employer to dismiss the claimant without notice.
107. The claimant's complaint of wrongful dismissal in respect of notice therefore fails and is dismissed.

Unauthorised deduction from wages in respect of holiday pay

108. Mr Kaffo was employed for part of the holiday year in 2019, not the full holiday year. He was employed for around two months of the holiday year, from 1 January 2019 to 27 February 2019 when he was dismissed. Because this was a part holiday year, not a full holiday year, he was only entitled to a proportion of his annual 22 day entitlement. That proportion was 3.5 days.
109. We have found that Mr Kaffo took 16 days holiday in the part year 2019, in January 2019. That was in excess of the holiday entitlement he had for the year which was 3.5 days.
110. The respondent was entitled by the clause in the claimant's contract about holiday on page 109, and by regulation 14(4) of the Working Time Regulations to recover from Mr Kaffo the holiday pay he had been paid in January 2019 which, after his dismissal, was in excess of the number of days holiday he was entitled to in 2019.
111. The deduction from Mr Kaffo's final salary was in respect of the 12.5 days holiday taken by Mr Kaffo which were over the number of days holiday he had built up in the part year 2019. The respondent was permitted by the clause in the claimant's contract on page 108 to deduct this from the claimant's final salary. The claimant's contract contained a written term permitting the deduction, and the contract had been given to the claimant before the deduction was made.
112. Mr Kaffo said that if he had taken additional holiday, it was in December 2018, and should have been deducted from his pay in January 2019, not from his final pay in February. However, we have found that his holiday was in January 2019, not December 2018. In any event, the respondent would not have been entitled to deduct additional holiday in January 2019, as the

right to do so under regulation 14 of the Working Time Regulations only arises on termination of employment.

113. For these reasons, we have concluded that the respondent was entitled to make a deduction from Mr Kaffo's final salary in respect of 12.5 days holiday, and Mr Kaffo has been properly paid. The claim of unauthorised deduction in respect of holiday pay fails and is dismissed.

Race discrimination

114. Our findings of fact in relation to each of the claimant's allegations of race discrimination are:

114.1 We have not made any findings about anything said in the claimant's interview as we did not hear any evidence about this. We have found that on 15 February 2019 in the investigation meeting, Ms Davey asked the claimant a question to the effect of, 'Why did you come back?' or 'Why did you come back to work for our company?'

114.2 We have found that the claimant, like others performing the role of night manager (reception), worked alone. Mr Jetwani agreed to change this and from 11 February 2019 he was beginning to implement the new arrangement.

114.3 We have not found that the respondent made the claimant undertake 2/3 people's jobs in unsafe conditions without training/promotion. We have found that the responsibilities of the role and the respondent's expectations of the other staff who were performing the night manager role were the same as of Mr Kaffo.

114.4 The respondent did discipline and dismiss the claimant. We have not found that the respondent instructed the claimant not to contact the police. We have found (as recorded in the claimant's grounds of complaint) that Mr Jetwani told Mr Kaffo that the police would contact him if they required assistance. It was a matter for the police whether they chose to contact Mr Kaffo, not the respondent.

114.5 We have not found that the respondent called the claimant 'Kalu'. This complaint fails on the facts.

115. In respect of each of the matters as we have found them, we have gone on to consider whether this was less favourable treatment and if so the reason why the respondent treated the claimant in that way:

115.1 It was not a detriment or less favourable treatment for the claimant to be asked why he had returned to work for the respondent. Even if it had been, the question was not related to Mr Kaffo's race or ethnic origin in any way. We have found that Ms Davey asked the claimant why he had come back to work for the respondent because they were discussing Mr Kaffo's previous employment at the hotel. This was the reason why Ms Davey

- asked the question. This was a non-discriminatory reason. Ms Davey would have asked the question of any returning employee.
- 115.2 We have not found that the claimant was treated less favourably than anyone else in respect of lone working. All night managers worked alone until the respondent planned to change this from 11 February 2019. There was no evidence from which we could conclude that a hypothetical comparator would have been treated any differently.
- 115.3 We have not found that the claimant was treated less favourably than anyone else in respect of the responsibilities of his role and the expectations of him. All night managers were treated the same in this respect. Again, there was no evidence from which we could conclude that a hypothetical comparator would have been treated any differently.
- 115.4 We have found that the claimant was disciplined and dismissed. The reason why the respondent treated the claimant in this way was because the minibus was stolen from the hotel while the claimant was on duty, and the CCTV recording showed that he had left the reception unattended and the drawer with the minibus key unlocked. This was a non-discriminatory reason for the treatment. Any night manager of any race or ethnic origin in the same circumstances would have been subject to discipline and dismissal.
116. We have not found that the claimant was treated less favourably because of his race or ethnic origin. In respect of those allegations which we have found to have occurred and where we have found that the claimant was subjected to treatment which could amount to less favourable treatment, we have found that there was a non-discriminatory reason why the claimant was treated in that way.
117. Stepping back to consider things in the round, we have not found any evidence from which we could conclude that the claimant was subject to direct race discrimination. We have concluded that the burden of proof does not shift to the respondent. If we had found evidence and concluded that the burden did shift, we would have been satisfied that the respondent has demonstrated that the treatment of the claimant was not in any sense because of the claimant's race or ethnic origin.
118. For these reasons, the claimant's complaints of race discrimination fail and are dismissed.

Employment Judge Hawksworth

Date: 26 July 2022

Judgment and Reasons sent to the parties
on: 01 August 2022
For the Tribunal Office