EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss E. Die	**v**	**H2C Gelati Ltd t/a Amorino**

Heard at: London Central (by video) **On**: 11 June 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: in person

For the Respondent: Mr H. Attali, managing director

JUDGMENT having been sent to the parties on 11 June 2021 and written reasons having been requested by the respondent, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Delay with providing written reasons

1. Due to some confusion in relation to the request for written reasons, for which I apologise to the parties, I was unaware that written reasons had been requested until 27 November 2021, when the respondent's follow up email dated 24 November 2021 was passed to me.

2. I asked the tribunal staff to write to the parties with my apologies and to say that written reason will be provided shortly and the respondent will then have 14 days from the date written reasons were sent to them to make an application for reconsideration of my judgment.

3. I repeat my apologies for the delay in providing written reasons.

Background and Issues

4. By a claim form presented on 15 July 2020, the claimant brought complaints of unfair dismissal, breach of contract (notice pay) and unlawful deduction from wages with respect to arrears of pay and holiday pay.

5. The respondent presented a response denying all the claims and making a counterclaim for breach of contract. The respondent's counterclaim is for £3,129.85, being the amount, the respondent claims it could have saved if the claimant had reported the problem with the freezer earlier.

6. The case was heard at an open full merits hearing on 11 June 2021 by video. The claimant represented herself and Mr Attali, the respondent's managing director, appeared for the respondent.

7. I heard evidence from the claimant, Mr Attali and Ms Along, the respondent's business development manager. I was referred to various documents in a bundle of documents of 64 pages, prepared by the respondent. I also had in front of me the claimant's claim form and the respondent's response.

8. At the end of the hearing, I gave my oral judgment for the claimant and dismissed the respondent's counterclaim. Mr Attali asked me whether he could appeal the judgement. I explained that with the judgment he should receive an information sheet explaining available appeal options.

9. I also said that the parties could ask for written reasons within 14 days of the date when the judgment was sent to them. My records indicate that neither party requested written reasons at the hearing. However, the footnote of my judgment states that the respondent requested written reasons.

Findings of Fact

10. The claimant was employed by the respondent, a food store/cafe, as a store manager from 18 February 2020 until 6 July 2020, when she was summarily dismissed. Her hourly rate of pay was £9.50.

11. Her contract of employment contained the following relevant terms:

    1.2 Pay*: Your rate of pay is stated on the summary page. You are paid monthly on or around the 5th of the following month, unless this falls on a weekend or public holiday when the date will be brought forward. You will be paid by credit transfer into a UK bank or building society of your choice. You are paid for the actual hours you have worked during the previous month.*

    1.3 Working hours*: You are expected to work any day between Monday and Sunday inclusive, with typical 9 hours shift. This excludes an unpaid*

break of 30 minutes it you work in excess of six hours on any one shift. Your store leader will discuss the shifts applicable to your position. You may be requested to work reasonable overtime hours according to the needs of the business. Your agreement to these hours should not be unreasonably withheld. Your position entitles you to receive payment for overtime worked at your agreed hourly rate of pay.

Your working hours may be varied where such changes are necessary according to the needs of the business. Reasonable notice of any changes will be given where possible.

***1.5 Notice period**: During your first month of work, the notice period is one week until the end of your first month. On completion of your first month, you are required to give two weeks' notice of your intention to leave. H2C Gelati Limited will give further notice in line with our statutory requirements, based on your length of service*.

***1 .8 Termination of employment:** In cases of summary dismissal for gross misconduct or where the employee ceases to be entitled to work m the UK. in accordance with the Asylum and Immigration Act 1996. H2C Gelati Limited is entitled to forego the above period of notice and to withhold any notice pay. H2C Gelati Limited reserves the right to make payment in lieu of notice where this is considered to be in the interests of the business or the employee.*

***1.9 Holiday Entitlement**: The holiday year runs from 1st April to 31st March. In each annual holiday year, you are entitled to take 25 days paid leave, including the eight statutory holidays, where one day equals one fifth of your normal working week.*

Holiday accrues at 1/12th of your annual entitlement for each completed month of service. Details of entitlements are found in your employee handbook. All holiday pay is paid at normal basic rate.

12. The respondent’s House Rules for staff contained a clause giving the respondent the right to deduct from the claimant’s pay “*any money due from you, including holiday paid but not accrued at the date of termination of your employment, the cost of uniform, money due to the respondent to reimburse for misuse of company telephone, faxes, emails, internet, credit cards or similar, any shortage relating to a till for which you had responsibility*.”

13. The circumstances of the claimant’s dismissal were as follows.

14. The store had a walk-in freezer where ice-cream and other similar products were stored. For the products to be stored correctly the temperature in the freezer must be between -17C and -20C. If the temperature raises higher it means, there is a potential problem with the functioning of the freezer.

15. It appears the freezer had developed a malfunction at some point in time before 24 June 2020.

16. On 23 June 2020 another store manager, Ms Ortega, at the end of her shift reported to the Area Manager, Mr Arzeo, that the temperature in the freezer was -13.1C on the outside thermometer, but -20C on the insider thermometer.

17. Ms Ortega left the shop at approximately 23:30. Mr Arzeo asked her to return to the shop to check the temperature again, which she did. The temperature was -14.4C at 23:43 and -15.6C at 23:46. Mr Arzeo told Ms Ortega that she could go home, because he had concluded that the raise in the temperature was due to the freezer self-defrosting.

18. The following morning, on 24 June 2020, Ms Bauzyte, who was working the day shift, recorded the temperature in the freezer as -19.5C. However, at about 17:00 it raised to -15C. Ms Bauzyte called the claimant, who told Ms Bauzyte to check the temperature on the inside thermometer. It was -19C. The claimant said it was fine.

19. On 24 June 2020, the claimant started her shift at approximately 19:00. She took over Ms. Bauzyte. The claimant did not check the temperature in the freezer until just before the end of her shift at 23:17. The temperature was -12.1C.

20. She reported the high temperature in the freezer to Mr Arzeo. Mr Arzeo asked the claimant to wait until the temperature dropped to -16C.

21. At 23:37 the claimant reported that the temperature was -13C. Mr Arzeo said that he was coming to the shop.

22. At 23:33 the claimant reported that the temperature was -9.8C. Mr Arzeo asked the claimant to send a picture of the temperature controller and check that the door was closed. She did and confirmed that the door was closed.

23. At 23:38 the claimant again reported that the temperature was -9.8C. Mr Arzeo said that an engineer had been called out and was on his way to the shop. He asked the claimant to switch off the freezer for a minute and turn it back on.

24. At 23:42 Mr Atteli called the claimant to explain how to switch off the freezer and put it back on.

25. At 23:46 the claimant called Ms Bauzyte. They talked about the situation with the freezer on that day.

26. At 23:59 Mr Arzeo arrived at the shop and told the claimant that she could go home. The claimant left the shop.

27. On 25 June 2020 at 00:10, Mr Attali called the claimant and asked her why she had not informed Mr Arzeo about the raising temperature earlier. The conversation was heated. Mr Attali shouted at the claimant. He said that he had lost £10,000 because of the claimant and that she was fired.

28. As a result of the freezer not holding the correct temperature, the respondent had to move the products from the freezer to its other store. The respondent incurred costs of a hire van: £29, a call out engineer charge of £175.20 and an emergency after hours call out charge of £149.94. The respondent paid for 3 hours overtime to three of its staff, Mr Di Pasquali (£30.4), Mr Arzeo (£31.6) and Mr Cokaj (£28.5), who were helping with moving the products.

29. The engineer found that the freezer's compressor had failed and needed replacement. The cost of replacement was £4,099.26

30. On 25 June 2020 the claimant was suspended from duties pending the disciplinary investigation. The letter of suspension stated: "*Please note suspension does not constitute disciplinary action, and should not be viewed as a punishment, or implication of guilt*".

31. Mr Oukari, HR manager of the respondent, conducted the investigation. He interviewed Mr Attali and Mr Arzeo. He did not interview the claimant.

32. On 6 July 2020 there was a disciplinary meeting chaired by Ms. Pistone, the respondent's Operations Manager. The claimant attended without a representative. Mr Oukari was a note taker.

33. The disciplinary hearing was called to discuss the following allegations:

    - *Failure to communicate to the Area Manager on duty, that there was an issue with the -20c freezer on the 24th June 2020.*
    - *Unethical behaviour in trying to hide evidence that the -20C freezer was not functioning properly on the 24th June 2020*.

34. Ms Pistone found that the claimant had failed to tell the Area Manager about the problem with the freezer earlier, and as a result of the claimant informing the area manager about the problem only at 23:17 the matter had to be dealt with during the night which resulted in the respondent incurring extra costs, which could have been prevented if the claimant had informed the Area Manager earlier.

35. Ms Pistone also found that she "believed" that the claimant had called Ms Bauzyte and had asked her not to tell the management that she had noticed earlier in the day that the freezer temperature was higher than the norm. Ms Pistone found that the claimant had tried to hide the fact that the freezer had not been working properly from earlier on that day.

36. Ms Pistone decided that the claimant was guilty of gross misconduct and the appropriate sanction was dismissal with immediate effect.

37. On 7 July 2020 the claimant wrote to Ms Pistone saying that she did not agree with the decision and raised various other matters concerning Universal Credits, charge for the uniform, pay for the period of suspension and for accrued holidays.

38. On 16 July 2020, Ms Pistone replied confirming that the claimant had accrued 3.49 days of holiday which would be paid in the July payroll, asking her to return the uniform, and advising that if the claimant wished to appeal the dismissal, she had to present her appeal by 11am the following day.

39. The claimant did not present her appeal and did not return the uniform.

40. The respondent paid the claimant for 3.49 days of the accrued holiday. It did not pay the respondent for the time when she was on suspension.

The Law and Conclusions

Unfair dismissal

41. Section 94 of the Employment Rights Act 1996 ("ERA") gives employees the right not to be unfairly dismissed by their employer. However, S.108(1) ERE states that section 94 ERA does not apply to employees with less than two years of continuous service ending on the effective date of termination, subject to certain limited exceptions.

42. At the effective date of termination 6 July 2020, the claimant did not have the required two years of continuous services with the respondent, and none of the exceptions apply in her case. Therefore, she does not have the right to claim unfair dismissal. Accordingly, her complaint of unfair dismissal is struck out.

Breach of Contract (Notice Pay)

43. Under the claimant's contract of employment (clause 1.5) she was entitled to receive one week's notice of termination. The respondent dismissed her without notice or pay in lieu because the respondent had decided that the claimant was guilty of gross misconduct and therefore it was entitled to dismiss her without notice.

44. Any dismissal by the employer in breach of contract will give rise to an action for wrongful dismissal at common law. The most common types of wrongful dismissal is dismissal with no notice or inadequate notice where summary dismissal is not justifiable.

45. For summary dismissal to be justifiable the employer must show that the employee was in a repudiatory (fundamental) breach of contract. That is

when the term of the contract breached goes to '*the root of the contract*', or when the party's words or conduct indicate that he or she does not intend to honour future obligations under the contract.

46. "*[O]ne act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason [….] the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions*." per Lord Justice Evershed, then Master of the Rolls in Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA.

47. Cases involving repudiatory breaches by employees typically rely on serious misconduct by the employee, such as dishonesty, intentional disobedience or negligence. They often speak of 'gross misconduct' and 'gross negligence', but the underlying legal test to be applied by courts and tribunals is not whether the employee's negligence or misconduct is worthy of the epithet 'gross', but whether it amounts to repudiation of the whole contract. This is a question of fact, and the test is objective.

48. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

49. In justifying summary dismissal, the respondent relies on two matters:

    (i) the claimant not telling the Area Manager before 23:17 that there was a problem with the freezer when she knew or should have known and should have checked the temperature earlier, and

    (ii) the claimant trying to hide the matter by asking her colleague to lie to the respondent that the freezer had been working properly during the day.

50. Dealing with each matter in turn.

51. Assuming the problem with the freezer had indeed occurred earlier than the end of the claimant's shift, (it appears that at the start of her shift the freezer was working fine and showing the correct temperature and the problem could have developed at any time between 19:00 and 23:17, when the claimant noticed it) I accept that she could have noticed it earlier and notified the Area Manager accordingly.

52. The freezer was in close proximity to the claimant's work station. Even if the shop was busy, and she was alone in the shop and had to attend on many customers, there would have been a moment for her to look at the temperature controller on the door of the freezer.

53. I accept the claimant's evidence that she did not look at the temperature controller until the end of her shift and notified the Area Manager as soon as she noticed that the temperature was higher than it should be. Therefore, I find that she did not deliberately chose not to tell the Area Manager that there was a problem with the freezer until 23:17.

54. The question, however, is whether she should have looked at the temperature controller earlier, and, more importantly, whether her not doing so was a fundamental breach of contract by the claimant.

55. In answering this question, the following circumstances should be considered:

    a. the fluctuating temperature was a recurring and known issue,
    b. on at least two previous occasions her colleagues had been told by the Area Manager that it was due to the freezer de-frosting itself, and all they had to do is to wait and see that the temperature was dropping again to -16C;
    c. on those occasions that what in fact had happened, and the fluctuation in the temperature was attributed to the freezer defrosting itself,
    d. a similar fluctuation had occurred at 17:00 on the day in question, which corrected itself and at the start of the claimant's shift the temperature was in the norm,
    e. the claimant was not given any specific instructions to monitor the temperature of the freezer on a regular basis,
    f. she was not warned by the respondent that the freezer had a technical problem,
    g. the temperature records document in the bundle (Document 6) has only two temperature entries for each day (AM and PM), which indicates that the temperature record must be taken only once in each shift.

56. Considering these circumstances, I do not accept the respondent's contention that by not checking the temperature earlier the claimant committed a breach, let alone a fundamental breach, of her contract.

57. I also do not accept that she was negligent. While she could have been more attentive, that is not the same as to say that her conduct of not checking the temperature earlier fell below the standard expected from a reasonable and competent employee in those circumstances.

58. Absent any specific warnings that the freezer had a technical problem or specific instructions from her employer to check the freezer's temperature regularly, it was reasonable for the claimant to operate under the assumption that the freezer was functioning properly and any fluctuation in the temperature would be due to it going through self-defrosting, and that she just needed to check and record the temperature at the end of her shift.

59. It should also be noted that in addition to the freezer, it appears there were six other cold machinery in the store, which required temperature taking and recording in the log in AM and PM, but not more frequent.

60. The respondent was unable to direct me to any part in the claimant's contract or its House Rules where it is said that the claimant was under a strict obligation to check cold machinery temperatures at a particular interval and a failure to do so will be deemed gross misconduct.

61. Therefore, in my judgment, the claimant did not commit a fundamental breach of contract by not checking the freezer temperature earlier than when she did, or by not telling the Area Manager of the problem earlier than she did.

62. Turning to the second ground. I accept that in principle asking a colleague to lie to your employer to hide your potential misconduct might amount to a breach of the implied duty of trust and confidence.

63. The implied duty of trust and confidence requires that neither party to an employment contract without a proper and reasonable cause conduct itself in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence (see in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL. A breach of the implied duty of trust and confidence will be a fundamental breach of contract (see Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT).

64. However, based on the evidence I heard, on the balance of probabilities, I find that the claimant did not ask Ms Bauzyte to lie to the respondent. The claimant denied that in her evidence, and I have no reasons not to believe her. The respondent did not call Ms Bauzyte to give evidence to the tribunal and did not present any other compelling evidence to show that the claimant indeed had asked Ms Bauzyte to lie to the respondent to cover up her potential misconduct.

65. The respondent relies on the dismissal letter where Ms Pistone states "*I believe that you called Enrika Bauzyté at 11:46pm asking her to state that the -20C freezer was working fine the whole day.*"

66. Even if I were to accept that Ms Pistone believed that was the case, and that she had had reasonable grounds to hold that belief, that is not enough for me to find as a fact, and applying the balance of probabilities test, that the claimant indeed had asked Ms Bauzyte to say that.

67. The respondent did not call Ms Pistone to give evidence to the tribunal. Except for the disciplinary letter, the only other evidence the respondent provided to the tribunal was a screen shot showing that the claimant called Ms Bauzyte on 24 June 2020 at 23:46, which the claimant did not deny.

68. In short, I prefer the claimant's direct evidence that she did not ask Ms Bauzyte to cover up for her and to lie to the respondent about the problem with the freezer.

69. Therefore, I find that the respondent has failed to establish that the claimant had asked Ms Bauzyte to lie to the respondent about the problem with the freezer. It follows that I find that the claimant was not in breach of contract by talking to Ms Bauzyte on 24 June 2020 at 23:46 about the problem with the freezer.

70. For these reasons I find that the claimant was not in fundamental breach of contract and therefore she was entitled to receive one week's notice of dismissal.

71. By dismissing her without notice, the respondent committed a breach of contract and must pay the claimant damages in the amount equivalent to her one week's pay, which I calculate as £328.83 net.

Unlawful deduction from wages – pay during disciplinary suspension

72. At common law an employee who offers his or her services to the employer is entitled to be paid unless a specific term of the contract gives the employer the right to withhold payment.

73. The respondent suspended the claimant pending the disciplinary investigation. It expressly stated that the "*suspension was not a disciplinary action and should not be viewed as a punishment, or implication of guilt*". The claimant remained ready and willing to work.

74. There is nothing in the claimant's contract of employment allowing the respondent to suspend the claimant without pay. The contract states that the claimant will be paid according to the actual hours worked and that she was expected to work any day between Monday and Sunday, with typical 9 hours shift, and any variation of working hours required the respondent to give the claimant reasonable notice of the change.

75. Therefore, I find that, while the respondent was not obliged to give work to the claimant, it was obliged to continue to pay the claimant her regular wages for the period of suspension based on her shift pattern.

76. S.13(1) ERA states that: '*An employer shall not make a deduction from wages of a worker employed by him.*' However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b) ERA.

77. The respondent's House Rules give the respondent the right to deduct certain sums from the claimant's wages in certain limited circumstances, but none of those limited circumstances apply to the claimant's case.

78. Therefore, by failing to pay to the claimant her wages during the suspension period the respondent has made an unauthorised deduction from the claimant's wages and must pay her the gross sum of £648 with respect to the wages unlawfully deducted.

Holiday pay

79. The claimant was entitled to 28 days of holiday in a leave year. She did not take any holidays during the leave year.

80. Using the government online holiday calculator, I find that at the effective date of termination of her employment the claimant has accrued 1.49 weeks of holiday, which translates into 10.43 days.

81. The respondent has paid the claimant only for 3.49 days of accrued holiday. Therefore, by not paying for the balance of 6.94 days the respondent has made an unauthorised deduction from the claimant's wages. Applying the claimant's normal daily working hours and her rate of pay, I find that the respondent must pay the claimant the gross amount £527.44 with respect to her accrued but untaken holidays.

Counterclaim

82. Given my findings that the claimant was not in breach of contract and was not negligent in not checking the freezer temperature and not telling the Area Manager of the problem earlier than she did, it follows that she is not liable to the respondent for the alleged losses.

83. For the sake of completeness, I shall add that I am not satisfied that the losses claimed by the respondent are causally connected to the alleged breach and properly quantified.

84. The respondent assertion that it "*could have saved [£3,129.85] if the issue was communicated on time*" in my judgment is not supported by any reliable evidence.

85. For example, the respondent claims that the products lost 40% its quality and puts a figure of £2,463.61 as the resulting loss. This claim, however, is not supported by any detailed calculations or evidence to show how the 40% loss of quality assessment has been made.

86. Further, it appears that most, if not all, of the losses claimed by the respondent would have been incurred by the respondent even if the claimant had reported the problem earlier.

87. When the claimant started her shift at 19:00 (and at that time the freezer temperature was in the norm), it was already after "normal working hours". Therefore, even assuming the problem had occurred shortly after the start of her shift, the extra charge for the engineer attending the shop would have be payable.

88. The respondent claims £546.99 for the engineer charges, where the invoice for after-hours call out attendance is only for £149.94.

89. The respondent would have still had to hire a van to move the products to its other store.

90. Depending on their shift patterns, when the freezer had actually broken down, and when it would have been decided by the Area Manager that it was broken and not just defrosting itself, most likely the respondent would have still had to pay overtime to its staff involved in moving the products.

91. In any event, as stated above, I find that the claimant was not in breach of contract and therefore the respondent's counterclaim fails and must be dismissed.

Employment Judge P Klimov
5 December 2021

Sent to the parties on:

06/12/2021

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For the Tribunals Office

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