



EMPLOYMENT TRIBUNALS

Claimant: Christine Jones

Respondent: Tarsaim and Mandeep Sandhu t/a Station Stores

Heard at: Birmingham (CVP)

On: 30th and 31st August 2023

Before: Employment Judge Amy Smith

Representation

Claimant: Mr Gareth Graham (Counsel)

Respondent: Mr Tarsaim Sandhu (in person)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim of unfair dismissal is well founded and succeeds.
2. The claim of wrongful dismissal is well founded and succeeds.

REASONS

Introduction

1. The claimant was employed by the respondent as a Shop Assistant from 20th February 2013 until her dismissal without notice on 3rd November 2022.
2. The Claimant claims: Unfair dismissal contrary to section 94 and 98 of the Employment Rights Act 1996 and Wrongful dismissal.
3. The respondent contests the claim and argues that the claimant was fairly dismissed for gross misconduct for accessing the banking system in the Post Office till without authorisation on 21st October 2022.
4. I was presented with an agreed bundle of documents reaching 94 pages. I was then served with a further bundle of 6 pages, which included evidence of the claimant's new employment.

5. The claimant was represented by Mr Graham of Counsel. Mr Sandhu represented the respondent. He also gave evidence for the Respondent along with Mrs Sandhu.
6. All the witnesses, except for Jaswat Singh, were cross examined. Mr Singh did not attend the hearing. Each party summed up their case at the conclusion.
7. In relation to Mr Singh, both parties confirmed that they were content for me to read the statement and I would hear submissions at the end of the hearing in relation to how much weight I would apply to that statement.

Preliminary matters

8. At the start of the hearing Mr Sandhu raised the following preliminary issues:
 - a. He did not feel that the claimant had been honest in her statement and schedule of loss, as it had now been confirmed that the claimant had obtained new employment.
 - i. The claimant had not disclosed evidence in relation to this new employment.
 - ii. The without prejudice communications between the parties were not conducted honestly as a result of the above.
 - b. The document at page 60 of the bundle was not genuine. Mr Sandhu had spoken to the author of the document who confirmed that it had been produced by her, at her home, not being from the business. The letterhead was different to the normal correspondence of the Golf Club.
9. In relation to the disclosure point, I gave Mr Graham time to take some instructions. As a result of that, I was provided with a small bundle containing a letter of appointment and wage slips relating to the claimant's new employment. I informed the respondent that they could raise the honesty point in relation to these documents with the claimant in cross examination. The respondent confirmed they were willing to proceed in relation to the new documents.
10. Toward the end of the hearing, the respondent raised the disclosure issue again. The respondent was unhappy with the lateness of the disclosure. I informed the respondent that we had proceeded with the documents with their consent, and that I would take them into account. Further, the respondent was informed that they could make submissions on the credibility of the claimant's evidence if they so wished. The respondent stated that they would be doing so.
11. In relation to the without prejudice point, I explained to the respondent that without the claimant's consent there would need to be a hearing about whether to open up the communications to the Tribunal. This would require evidence and then potentially a separate Judge to hear the final hearing on a separate occasion. I gave the respondent some time to consider their position. They confirmed, after a break, that they did not want to pursue this point.
12. In relation to page 60, I informed the respondent that they were making a serious allegation without, it appeared, any evidence before me. Mr Graham made arguments that raising this matter could be seen as unreasonable conduct. I therefore explained to the respondent that Mr Graham was indicating that he may seek costs against the respondent if they continued to make this point. I gave the respondent some time to consider their position. On their return the respondent confirmed that this point would not be pursued.

13. At the start of the hearing, I was informed that there were two short CCTV clips the parties wished me to see. There were various technological issues with the Judge being able to view this footage. Both parties were content to continue with the evidence without the Judge having seen the clips. However, prior to concluding the hearing the Judge was able to view the clips. The parties were content with this.

Issues

14. I discussed the issues for determination with the parties at the start of the hearing. The parties were reminded of the list at various stages throughout the hearing.

15. The issues were:

- a. Has the Respondent established that the reason, or principal reason, for the dismissal was misconduct (ERA 1996, section 98(2)(b))?
- b. If so, did the Respondent act reasonably or unreasonably in the circumstances in treating the misconduct as a sufficient reason for dismissing the Claimant, and in particular, was the dismissal within the band of reasonable responses (ERA, s 98(4))?
 - i. the employer must have an honest belief at the time of dismissal that there was a fair reason to dismiss;
 - ii. the employer must have reasonable grounds for holding that belief; and
 - iii. the employer's reasonable grounds must be based on a reasonable investigation.
- c. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.**
- d. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?
- e. Did the claimant, by her blameworthy or culpable conduct, cause or contribute to her dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?
- f. Did the claimant commit a repudiatory breach of contract which entitled the respondent to dismiss?

Submissions

16. After hearing all the evidence, both parties made submissions. I was provided with a document setting out the respondent's submissions and then Mr Sandhu made oral submissions to supplement the document. Mr Graham made oral submissions. I took those submissions into account when reaching my conclusions.

17. In summary the claimant stated:

- a. It was self-evident that the reason for the dismissal went far beyond the personal transaction. The respondent believed the claimant was up to no good well before the CCTV footage.
- b. The respondent was looking for a smoking gun.
- c. The errors in the claimant's statement should have no bearing on this case. The Schedule presented to the Tribunal accounts for the new earnings. There are no issues relating to credibility.
- d. There are issues regarding the respondent's evidence: they insist the reason for dismissal was the October incident, but the evidence shows otherwise.
- e. There was no investigation.
- f. There was no warning.
- g. There is no evidence the claimant was trained not to do personal transactions on the PO Till.
- h. It should have been a capability issue.
- i. If a process had been carried out fairly the claimant would have, at most, received training.
- j. The claimant did not do anything wrong.
- k. There is no evidence the claimant committed an act of gross misconduct.
- l. The failures were in the training, not in the conduct of the claimant.
- m. Even if there is a reduction for contributory fault, it ought to be a very minor reduction.

18. In summary, the respondent stated that:

- a. The dismissal was reasonable and that, just because there are no documents, did not mean that there was no training provided to the claimant. It was argued that it was strange for the claimant to say she had been trained not to do personal transactions on one till but not the other.
- b. The claimant's testimony had been created to fit around the truth. The respondent stated that they take their role as a Post Office franchise very seriously.
- c. Their first impression of the losses was that something seriously wrong was going on.
- d. The claimant had done it more than once, and it was therefore not a one-off mistake. She could have waited for someone to do the transaction for her, and it was not an innocent mistake. It also weighed heavily on their mind that someone could have come in and witnessed the claimant doing her own transaction.

- e. They accepted that they had not followed correct procedures, but even if they had she would have been dismissed in any event.
- f. The claimant was not an honest person and she had demonstrated a brazen disregard for established procedures.
- g. The claimant's credibility was called into question by the late disclosure of evidence and not including new earnings or a signature on her witness statement.
- h. What was the benefit to the respondent in sacking the claimant? The only people who paid the price was the respondent.

Findings of fact

Credibility

- 19. It has been argued by the respondent that the claimant has not been honest to the Tribunal in her evidence. In support of this submission the respondent argued:
 - a. That the claimant was late in disclosing documents about her new employment.
 - b. That the claimant provided a witness statement and schedule of loss which did not account for the wages in the new employment.
 - c. The claimant's witness statement was not signed and dated.
 - d. That she continued to say there was no reason why the personal transaction rule was in place.
- 20. The matters were put to the claimant in cross examination.
- 21. She stated that she did not know why the documents had been disclosed late. She also stated that she believed she had written the statement prior to obtaining new employment but was not aware of when it was sent to the respondent.
- 22. I have carefully considered the respondent's arguments. I am dissatisfied with the disclosure being late, but I do not find that it affects the claimant's credibility. The disclosure was completed by the claimant's solicitor, and it is unfortunately not uncommon for there to be late disclosure in litigation.
- 23. I also do not find that the absence of new earnings in the schedule of loss and the witness statement affects the claimant's credibility. A later updated schedule of loss was provided giving credit for those earnings. Further, I accept that the claimant wrote the statement with her solicitor prior to obtaining new employment. It is unfortunate that the statement was sent after the claimant got her new job without it being amended, but I do not consider that this indicates dishonesty.
- 24. Witness statements are unfortunately often not signed. But the claimant swore an oath and confirmed her statement to be true.
- 25. Finally, whilst I make findings below about the surprising nature of the claimant's refusal to accept that there was a reason for the personal transaction rule to be in place, I do not make the finding that she is being dishonest. Rather I conclude that she is mistaken and has not reasonably thought the matter through.
- 26. I also do not conclude that the respondent's witnesses have been dishonest. I conclude that they were doing their best to assist the Tribunal and have mistakenly, but unsuccessfully, tried to separate matters out in their minds.

Roles

27. The claimant commenced employment with the respondent as a Shop Assistant on 20th February 2013. Prior to this, the claimant had worked alongside Mrs Sandhu for the Co-op.
28. The respondent operates a local shop which sells various items such as sweets, sandwiches and small goods via a till ("the Shop Till"). The respondent also has a Post Office till through which a customer can insert their card into a card reader, and the Shop Assistant can view their account on a screen ("The PO Till"). The Shop Assistant can add money to the customer's account, take money out and check the balance.
29. The claimant's role involved working on both tills, opening and closing the shop, cleaning, re-stocking and checking stock.
30. Originally the claimant worked 30 hours per week. From 27th July 2022 the claimant hours were reduced by the respondent to 20 hours per week.

Systems

31. The Shop Till operated initially on a simple basis. If a customer purchased something the till would simply record how much money was going in the till. A new system was introduced in 2022 for the shop till whereby the item would be scanned and the system would know what stock had been purchased and when.
32. The PO Till operated on a system called Horizon. This was a system created and provided by the Post Office for their franchises. This system allowed the Shop Assistant to, once the bank card had been inserted and pin entered into the reader, view the balance of an account, insert money and remove money up to the value of £5000.
33. The respondent's evidence was that they took their responsibilities as a Post Office franchise very seriously, and I accept that.
34. The respondent had a sheet which was required to be filled in at the start and end of the day. An example of this sheet is on page 88 of the bundle. The sheet is printed but is filled in by hand. The information on the sheet shows what money is in the till on each day and in what denominations.
35. The PO Till also provides a summary report which is printed at the end of the day. It shows what money should be in the till according to the transactions that took place, and in what denominations. It will therefore show if there is a difference between what should be in the till and what is.
36. Mr and Mrs Sandhu accepted in their evidence that, on occasion, Mr Sandhu would take some money from the shop to give to their other shop. They stated that this money was returned. I accept the claimant's unchallenged evidence that no notes were left to confirm what had been taken and when until after 28th July 2022.
37. I also accept the claimant's unchallenged evidence that there were times when Mrs Sandhu made mistakes on the tills and that the claimant had previously made errors. This is likely to happen occasionally in a busy shop.
38. I find that the systems in place at the respondent were insufficient. It is impossible to tell from the systems in place whether missing money is the result of an error, and if so on what transaction(s).

Training

39. The claimant accepted in evidence that she had been instructed not to use the Shop Till for her own purchases alone. She was instructed that Mr or Mrs Sandhu would have to be present and do the transaction for her.
40. The claimant also accepted that, in her previous role for the Co-op, she was instructed that Shop Assistants could not put their own purchases through their own till. The transaction would need to be done by another member of staff.
41. However, the claimant denied that she was told that she could not use the PO Till for her own transactions without Mr or Mrs Sandhu being present to do the transaction for her.
42. Mr and Mrs Sandhu both gave evidence that she had been instructed that she must inform them if she wanted to do a transaction for herself on the PO Till and that they would do it for her.
43. The claimant was cross examined by Mr Sandhu extensively on this point. The claimant accepted that she had received training on the PO Till but denied being told about the restriction of a personal transaction. Mr Sandhu put it to the claimant that being able to do such transactions on account required a high level of honesty and trustworthiness. The claimant accepted this but could not accept that there would be a reason for the personal transaction restriction.
44. I find this to be surprising. It would be apparent to any employee that having the ability to add and remove money from a bank account would necessitate such a restriction.
45. The claimant said she had done this type of transaction on the PO Till around four times.
46. However, the claimant accepted that on several occasions she had wanted to purchase something via the Shop Till and that she had waited for Mr or Mrs Sandhu to come and do the transaction for her.
47. It was accepted by the respondent that the personal transaction rule was not written in any document or policy. Indeed, there were no policies for the claimant's employment.
48. I find that the claimant was provided training on aspects of the PO Till system, which were continuing packages of training, however, these did not repeat the personal transaction rule.
49. There is a warning that pops up whenever someone logs on the Horizon system. It is screenshotted at page 64. However, this is a general warning and does not specifically state the personal transaction rule.
50. There is a photograph of the PO Till in the bundle (65). The card reader is on the customer side and the computer screen is on the service side. There is a plexiglass screen between the two with a large hole through which money and items can be passed. The reader rotates to 90 degrees. In the CCTV footage the claimant reaches through the hole and puts her card in the reader. I do not accept the respondent's case that the physical set up makes it obvious that someone ought not to be doing their own transactions. It is simply the set up that works best for customer to assistant interactions.

51. Taking the above into account, I conclude that the claimant was told about the personal transaction restriction on the PO Till at the start of the system's set up. I also find, however, that this rule was not repeatedly told to her, and it is likely that she forgot about the rule and/or the seriousness of it.

Events prior to 28th July 2022

52. During the months March to July in 2022 Mrs Sandhu noticed that there were significant losses on the PO Till. These amounted to £3,244.97. The respondent has to make up for any losses to the Post Office.
53. Mrs Sandhu spoke to Mr Sandhu about the losses. It is the evidence of Mr Sandhu that he did not want to believe that the claimant was stealing. It is notable that this was viewed as a possibility for the respondent at this early stage.
54. As a result of their conversation, Mr Sandhu and Mrs Sandhu commenced a review.
55. The review included looking at the paperwork to confirm that all transactions were being properly logged. Further, Mr Sandhu looked at the paperwork to try and ascertain from where the losses were coming.
56. The review was concluded in August 2022. I accepted the respondent's evidence that there was nothing to be found on the paperwork, but this is likely to be because the paperwork did not contain large amounts of information.
57. The respondent's evidence is that the losses were generally occurring on Mondays, when the claimant worked alone. I accept this evidence.
58. Mr and Mrs Sandhu made the decision on the basis of this review to change the claimant's shifts, to remove her from Monday and reduce her hours.
59. Mr Sandhu's evidence was that it was his approach to not accuse the claimant of being responsible for the losses as he had no definitive evidence. Whilst the Tribunal understands that he might have found it difficult to speak to the claimant about these losses, the result is that the respondent was suspicious of the claimant being a thief and they acted accordingly in removing her from Monday, but they did not put their suspicions to her directly for her to challenge them.
60. The consequence of this is that the claimant remained under suspicion without the ability to correct or challenge this. Indeed, there are several potential reasons for the errors other than theft: errors made by the claimant, errors made by customers, errors in the computing system, errors in the paperwork, errors made by the Sandhu's. Due to the decision to not speak to the claimant about their suspicions, all of these options remained possibilities.
61. On 1st August 2022 Mrs Sandhu spoke to the claimant about their decision to take her off the Monday shift. There is a document in the bundle on 48 to 49 which was written by Mr Sandhu as communicated to him by Mrs Sandhu. This document is part meeting note for 1st August, and part letter to the claimant.
62. It is clear that the meeting became heated, with the claimant swearing at Mrs Sandhu. Whilst this is not something that is acceptable behaviour from a member of staff, the claimant's upset is understandable. Her hours were being unilaterally reduced to a significant degree. Further, whilst I accept that Mr and Mrs Sandhu made it clear to the claimant that they were not accusing her of stealing, there is no other real conclusion when your employer is telling you that there is money missing and that they are taking you off one of your shifts as a result.

63. There is a dispute about what precisely was said in this meeting. The precise words stated and by whom is not relevant to the issues. What is relevant is that the respondent contends that a final verbal warning was given to the claimant as a result of her outburst.
64. There is no reference to a warning on the document on 48-49. Further, the claimant was adamant in her evidence that no warning had been given. Mr Sandhu could not be clear about the wording of the warning.
65. I conclude that on the balance of probabilities no such warning was given. I consider that the contemporaneous documentary evidence supports this conclusion.
66. I do find, however, that the claimant was on notice that the respondent had suspicions about her.

Aftermath

67. As a result of the claimant's conduct in swearing at Mrs Sandhu and how she had spoken to Mr Sandhu, Mr Sandhu requested that a review of the CCTV was carried out. I find that this was further evidence of a continuing suspicion against the claimant. Again, she is not given an opportunity to respond.
68. Mrs Sandhu reviewed the CCTV as requested and, I accept, found instances of the claimant leaving the shop unmanned.
69. I also accept that, after the claimant was removed from Mondays, the losses ceased.

Stock

70. In September 2022 Mr and Mrs Sandhu became concerned about the cigarette stock. The orders of cigarettes exceeded the numbers sold.
71. As a result, Mrs Sandhu decided to regularly view CCTV. On the CCTV she saw the claimant accessing the security room, which is where the cigarettes were stored. There was nothing on the CCTV showing the claimant removing any cigarettes.
72. The evidence of Mrs Sandhu was that the claimant had no reason to access the security room on those occasions. Again, this matter was not put the claimant for her side.
73. In October 2022, because her suspicions of the claimant were growing, Mrs Sandhu reviewed some old CCTV footage. The August CCTV showed the claimant taking/or being given some sandwiches from the sandwich delivery man and some oatcakes from the oatcake delivery man. The goods were then taken by the claimant to her car.
74. Upon showing the CCTV to her husband, they both concluded that the claimant had stolen the goods. They intended to speak to the delivery drivers before speaking to the claimant.
75. Mrs Sandhu continued reviewing CCTV and witnessed the claimant making a personal transaction on the PO till on 21st October 2022. The claimant took a card from her purse, leaned through the gap of the counter, turned the card reader 90

degrees, placed her card in the reader and carried out two transactions. She then took a note(s) from the till. It was not clear from the footage what the transactions were.

76. Mrs Sandhu requested that her husband review the footage. They both agreed that this was a “clear violation of the rules around accessing the system”. They concluded that they could no longer trust the claimant.

Dismissal

77. Mr Sandhu stated in evidence that it was his decision to dismiss the claimant. Whilst I accept it was his decision, I find that it was heavily influenced by his wife’s findings and conclusions.
78. A meeting was arranged with the claimant and Mr Sandhu wrote the letter of dismissal prior to that meeting.
79. I find that the respondent decided to dismiss the claimant after viewing the footage. This was prior to speaking to the claimant.
80. The claimant was not given prior notice of the purpose of the meeting or informed of her right to be represented.
81. During the meeting, the claimant stated that she had taken money from her own account. Mr Sandhu’s response was that it did not matter and asked her “why she was so stupid to do something like that when she knows full well what would happen if we found out”.
82. She was asked to hand over her keys and was dismissed.

After the dismissal

83. Mr Sandhu’s evidence is that, after the claimant’s dismissal, he reviewed the paperwork for the day of the claimant’s withdrawal and the till was down £23.85. He states that he would have dismissed the claimant for theft had he known this prior to the dismissal.
84. After the claimant was dismissed Mrs Sandhu spoke to the two delivery drivers. They confirmed to her that the claimant had asked for the goods.
85. The claimant states that, in relation to the oatcakes, she had a conversation with the delivery driver, and that she told him that she was charged a certain amount for the oatcakes from Mrs Sandhu. The delivery driver told her that they cost less than the price she was charged. He stated to her that, if she wanted some oatcakes, to just ask him and he would give her some. She asked for a packet, and he gave her the packet. She placed the packet in her car and did not pay for them.
86. Due to the limited systems in place, it is not clear whether they were charged to the respondent or someone else.
87. In relation to the sandwiches, the claimant gave evidence about two occasions. The first was a delivery driver asking if she was hungry and wanted some breakfast. She said yes and he gave her two breakfast sandwiches. She ate one and placed the other in the fridge.

88. She did not pay for those sandwiches. Again, it is unclear who was charged for them.
89. In relation to the second sandwich incident, the claimant witnessed the delivery driver throwing away out of date sandwiches.
90. In the respondent's shop, if a sandwich is out of date, the delivery driver picks them up and the respondent is reimbursed for the product.
91. The claimant stopped him and asked if she could have a sandwich, which he then gave to her. She put it in her car. She did not pay for the sandwich. Again, it is unclear who was charged for them.
92. The claimant accepted in evidence that she had previously been warned verbally by Mrs Singh not to accept gifts.
93. I have read a witness statement from Jaswat Singh, one of the delivery drivers. He states that the claimant asked him to leave one of the out-of-date sandwiches. He says he assumed she would pay the respondent for it and therefore the respondent was not given a credit for that sandwich.
94. Mr Singh was not present for cross-examination. I place an extremely limited amount of weight on his statement.
95. I accept the claimant's factual account of those events. Her evidence was detailed and provided in cross-examination under oath.

The relevant law

Unfair dismissal

96. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. The right is enforced by way of complaint to the Tribunal under section 111 ERA.
97. It is for the employee to prove that they were dismissed by the respondent (section 95 ERA).
98. Section 98 ERA provides that the dismissal must be fair and has two stages:
 - a. The employer must show a potentially fair reason for the dismissal within section 98(2) ERA.
 - b. Whether the respondent acted fairly or unfairly in dismissing the claimant (there is a neutral burden on this limb of the test).
99. The leading case of *British Home Stores v Burchell* [1978] IRLR 379 sets out guidelines for the approach in cases of misconduct:
 - a. Did the employer have a genuine belief in the employee's misconduct?
 - b. Was this based on reasonable grounds?
 - c. Was there a reasonable investigation?
100. Under s98(4) the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR

101. The ACAS Code of Practice on disciplinary and grievance sets out six key elements to handling disciplinary issues in the workforce. They are as follows:
- a. Establish the facts of each case;
 - b. Inform the employee of the problems;
 - c. Hold a meeting with the employee to discuss the problem;
 - d. Allow the employee to be accompanied at the meeting;
 - e. Decide on the appropriate action; and
 - f. Right to appeal.
102. As per *Polkey v AE Dayton Services Ltd 1988 ICR 142* the Tribunal can consider whether it would be just and equitable to reduce compensation, if there was a chance that the dismissal could and would have been done fairly at some point.
103. The Tribunal is required to reduce compensation if it finds that the dismissal was to any extent caused or contributed to by any action of the complainant. And it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (s123(6) Employment Rights Act 1996). The conduct must have the characteristic of culpability or blameworthiness (*Nelson v BBC (No.2) 1980 ICR 110*).
104. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (*Steen v ASP Packaging Ltd 2014 ICR 56*).
105. The fact that an employee does not know that what he or she has done is wrong will not necessarily prevent a finding of contributory conduct (*Allen v Hammett 1982 ICR 227*).
106. In relation to the basic award, the language is slightly different, and the Tribunal has a wider discretion to reduce the basic award due to any conduct of the claimant prior to the dismissal (s122(2) ERA, *Optikinetics Ltd v Whooley 1999 ICR 984*).

Wrongful dismissal

107. In order for an employer to dismiss summarily, the employee needs to have committed a repudiatory or fundamental breach of contract.

Conclusions

Reason for dismissal

108. The respondent contends that the reason for the dismissal was gross misconduct. The respondent asserted in evidence that the reason was the claimant's breach of the personal transaction rule on the PO Till on 21st October 2022.
109. The claimant contends that the reason for the dismissal was the respondent's increasing suspicions regarding the claimant for which they had no

evidence, and the transaction on 21st October 2022 was used as an opportunity to dismiss her.

110. I conclude that the reason for dismissal was misconduct, which is a potentially fair reason.

111. But, for reasons that are relevant for later assessments, I conclude that the factual reason for dismissal was a combination of all the events: the losses occurring on a Monday, the fact that a customer came in on a Monday that did a large transaction was friendly with the claimant, leaving the shop unmanned, cigarette sales not matching purchases, the claimant going into the security room, the sandwich and oatcakes incidents, and the personal transaction.

Honest belief

112. The first question I need to ask myself is whether or not the dismissing officer had an honest belief in the misconduct.

113. The dismissing individual was Mr Sandhu, heavily influenced by the conclusions of Mrs Sandhu.

114. Mr Sandhu accepted that they did not have clear evidence that the claimant was responsible for the losses. I find that he had little to no evidence that it was theft that was responsible for the financial losses or the cigarettes.

115. Mr Sandhu did have the CCTV footage showing the oatcakes and the sandwich incidents. But prior to dismissal he did not have any information from the claimant or the delivery men.

116. In relation to the personal transaction, Mr Sandhu had the CCTV. He did not look at the horizon system and did not know at the time of dismissal that the till was down.

117. I also take into account that Mr Sandhu insisted in his evidence that the only reason for the dismissal was the personal transaction. Whilst this could be taken as infecting the honesty of his belief in what I have found to be the real reason for the dismissal, I find that he is mistaken. I find that the respondent was strongly influenced by the other suspicions, and whilst they may have tried to eliminate those from their minds, they did not successfully do so.

118. I conclude on the balance of probabilities, and taking into account the number of aspects causing concern, that Mr Sandhu did have an honest belief in the misconduct.

Reasonable grounds

119. Reminding myself that it is not for me to put myself in the shoes of the employer, I conclude as follows.

120. In relation to the cigarettes, the respondent had a discrepancy in the numbers of bought and purchased cigarettes and CCTV showing the claimant entering the security room, which, Mrs Sandhu felt, there was no reason for. The claimant was never asked why she had entered the security room. The claimant was never asked if she had taken cigarettes. The paperwork did not assist in concluding where the losses had occurred. A reasonable employer would have made those further enquires which could have cleared the claimant or produced mitigating factors.

121. In relation to the oatcakes and sandwich, the respondent had CCTV showing the items being handed to the claimant and her putting them in her car. The respondent never asked the claimant why she had done so. The respondent did not speak to the delivery drivers before dismissing the claimant. A reasonable employer would have made those further enquires which could have cleared the claimant or produced mitigating factors.
122. In relation to the personal transaction, the respondent had the CCTV of the transaction and the knowledge that he had informed the claimant several years ago verbally of the personal transaction rule. The respondent did not speak to the claimant about the transaction before making the decision to dismiss. A reasonable employer would have done so which could have cleared the claimant or produced mitigating factors.
123. Taking all of the above into account, I conclude that Mr Sandhu did not have reasonable grounds for concluding that the claimant had committed misconduct.

Reasonable investigation

124. The failure to make the enquiries above render the investigation unreasonable.
125. Most importantly, the claimant was invited to a meeting to dismiss her without being aware of the allegations or being able to put her side across. Considering the serious nature of the suspicions, this on its own would have rendered the investigation unreasonable.
126. The claimant was not informed of her right to a representative or given the right of appeal.
127. As a result, and as accepted by the respondent in evidence, no reasonable employer would have conducted the investigation in this way.

Band of reasonable responses

128. It is not for me to decide whether the respondent was right or wrong in dismissing the claimant. I am to consider whether the dismissal was within a band of reasonable responses.
129. I take into account the size of the respondent when reaching this conclusion. They are a very small employer with no HR support.
130. Taking into account the fact that the claimant was only told of the personal transaction rule once at the start of her employment, that it was not repeated, that she was not told of the potential consequences of breaking that rule and that it was not contained within any written documents indicating the seriousness of it, that it was outside the band of reasonable responses to dismiss the claimant.
131. I also consider, because of the factors identified above, that it was outside the band of reasonable responses to dismiss for the oatcakes, the sandwich and the cigarettes.

Conclusion

132. I find therefore that the claimants claim for unfair dismissal under section 94 and section 98 is well founded and therefore succeeds.

Polkey

133. In order to assess whether it is just and equitable to reduce compensation under this head, I need to consider if the claimant could have been dismissed fairly and if so, what are the chances of such a dismissal.
134. I take into account that the investigation errors are multiple and considerable and go to the heart of the fairness of the process.
135. I also take into account that the claimant has provided an explanation to the Tribunal of the events, which she is likely to have given the employer had they followed a reasonable process.
136. Due to the significant level of procedural errors, even taking into account the matters discovered after dismissal, I cannot find what would have happened had they not occurred. It is too speculative.
137. As a result, I do not make a Polkey reduction.

Contributory Fault

138. I am also to consider whether it is just and equitable to reduce compensation under this heading.
139. The conduct that I am to consider as is as follows:
- a. the losses occurring on a Monday and the fact that a customer came in on a Monday that did a large transaction was friendly with the claimant,
 - b. leaving the shop unmanned,
 - c. cigarette sales not matching purchases and the claimant going into the security room,
 - d. the sandwich and oatcakes incidents, and
 - e. the personal transaction.
140. In relation to the first and third, I conclude that there is insufficient evidence for me to conclude that the losses were anything other than errors. For the avoidance of doubt, I do not find that the claimant stole any items or money.
141. In relation to the second, I consider this to be a minor issue that was resolved upon the claimant being spoken to. This does not amount to blameworthy or culpable conduct.
142. In relation to the fourth, I do have concerns about the nature of this conduct. And despite the respondent's case, I have concluded as above that this conduct contributed to the dismissal. Further, the claimant had been warned not to do so previously by Mrs Singh.
143. The claimant ought to have known that someone was going to have to pay for the items, and it was likely to be her employer. I conclude that taking items from delivery drivers, even if offered as a gift, is blameworthy.
144. I do not consider it to be a significant contribution to the dismissal, and there were multiple other factors which caused the respondent to become suspicious of the claimant.

145. In relation to the last aspect, I take into account that the claimant was informed of the rule years before the event. I also take into account that she abided by the rule for the Shop Till. I also factor in that the claimant previously worked in another service job, whereby the rule applied. I also accept that it is commonplace for shop employers to implement this rule for good reason. It reduces the chance of theft, but also reduces the chance of an employee being accused of theft. Further, it is clear that an employee ought to have known that there were good reasons for such a rule.
146. I therefore conclude that it was blameworthy for the claimant to have performed a personal transaction at the PO Till. I also conclude that it contributed to her dismissal.
147. Taking the above into account I therefore reduce the basic and compensatory award by 20%.

Wrongful dismissal

148. The question for the Tribunal is whether the claimant committed a repudiatory or fundamental breach of contract.
149. The reason for the dismissal factually is, as stated above, the losses occurring on a Monday, the fact that a customer came in on a Monday that did a large transaction was friendly with the claimant, leaving the shop unmanned, cigarette sales not matching purchases, the claimant going into the security room, the sandwich and oatcakes incidents, and the personal transaction.
150. In relation to the events leading up to the personal transaction, I conclude that those actions were not capable of amounting to a repudiatory breach of contract. Indeed, the respondent originally stated that they did not dismiss the claimant for those aspects as they did not have the evidence.
151. In relation to the personal transaction contrary to a previously stated rule, I conclude that such acts were not repudiatory. I take into account that the claimant was only informed once of the rule, many years prior, it had not been repeated, the consequences of breaking such a rule were not made clear and it was not set out in writing.
152. For the avoidance of doubt, I do not find that the claimant stole any items or money.
153. I find therefore that the claimant's claim for wrongful dismissal is well founded and therefore succeeds.

Employment Judge A.J. Smith

2 September 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.