Case No: 6005372/2024

EMPLOYMENT TRIBUNALS

Claimant: Esbon Riley

Respondent: St Pancras Hotel Services Ltd

Heard at: London Central (by video) **On:** 5, 6 November 2024

Before: Tribunal Judge Andrew Jack, acting as an Employment Judge

Representation
Claimant: In person
Respondent: Ms Darlow Stearn, counsel.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. The complaint of wrongful dismissal is not well-founded and is dismissed.

REASONS

Claim and Procedure

1. The claimant was dismissed on 21 March 2024. Early conciliation took place from 8 May 2024 to 29 May 2024. The claim, which is for unfair dismissal and wrongful dismissal, was presented on 8 July 2024.

2. There was a bundle of 187 pages, which included witness statements from the claimant, Ms E Bonomo (Director of Operations at the respondent) and Mr Megaro (CEO of the respondent). All three gave evidence. I was also provided with a copy of CCTV footage of the event that the respondent says led to the claimant's dismissal. Ms Darlow Stearn had provided a copy of her closing submissions to the claimant before the hearing. She referred to them in her oral closing submissions, and the claimant then made his closing submissions.

3. At the start of the hearing the parties agreed the following list of issues:

1. UNFAIR DISMISSAL (S.94(1) ERA 1996)

1.1. Was the Claimant dismissed? This is conceded by the Respondent.

1.2. Has the Respondent shown a potentially fair reason for dismissing the Claimant? The Respondents will say that they dismissed the Claimant for gross misconduct, comprising the following two acts on 20 March 2024:

1.2.1. the Claimant failed to adhere to a reasonable management instruction when Vito Fanara requested that he wash up two trays; and/or

1.2.2. the Claimant used inappropriate and offensive language towards his line manager, Mr Denilson Da Costa Silva Salvanini, including telling him to 'fuck off';

1.3. If so, in all the circumstances of the case, including the size and administrative resources of the Respondent, was dismissal for this reason within the range of reasonable responses available to a reasonable employer, in accordance with equity and the substantial merits of the case, pursuant to s.98(4) ERA? The tribunal will consider whether:

1.3.1. there were reasonable grounds, following a reasonable investigation, for concluding that the Claimant had committed gross misconduct;

1.3.2. the procedure used fell within the band of reasonable responses;

1.3.3. the sanction of dismissal for this reason fell within the band of reasonable responses.

2. WRONGFUL DISMISSAL

2.1. The Claimant has failed to particularise his claim for wrongful dismissal.[1]

2.2. If the Claimant's claim is for lack of notice pay, the Respondent accepts that if notice had been given it would have amounted to 4 weeks' worth which would be £2,046.85 (net). The issue for any such claim would simply be:

2.2.1. whether the Claimant had committed any repudiatory breach of contract that would deprive him of such notice. The Respondent will

[1] In fact, the claimant's schedule of loss particularises his claim for wrongful dismissal.

say that by acting as above at para 1.2, the Claimant committed acts of gross misconduct, justifying the summary dismissal.

3. REMEDY

3.1. If there is a basic award, how much should it be?

3.1.1. would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal?

3.1.2. if so, to what extent?

3.2. If there is a compensatory award, how much should it be? The tribunal will decide what compensation is just and equitable in all the circumstances, having regard to the following:

3.2.1. what financial losses has the Claimant sustained in consequence of the dismissal?

3.2.2. has the Claimant failed to take reasonable steps to mitigate his losses and if so, should his award be reduced and by how much?

3.2.3. what is the chance the Claimant would have been fairly dismissed in any event and when would this have occurred (the "Polkey / just and equitable deduction" issue)?

3.2.4. was the dismissal caused or contributed to by any action/s of the Claimant and if so by what just and equitable proportion should the award be reduced (the "contributory fault" issue)?

3.2.5. Did the Respondents and/or Claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

3.2.6. If so, is it just and equitable to increase or decrease any award payable to the Claimant and by what proportion, up to 25%?

3.2.7. Does the award after any reductions already made exceed the statutory cap of 52 weeks' worth of pay (the "statutory cap" issue)?

Findings of Fact

4. The claimant was employed as a kitchen porter from 14 May 2021. His job description stated that his responsibilities included washing all pots, pans and kitchen equipment and ensuring that all kitchen items are clean and

ready for use, collaborating as part of a team and working with chefs and assisting them.

5. His contract of employment provided that he was expected to undertake his work diligently and to maintain a good standard of conduct at all times. It also provided that in the event of his being found to have committed gross misconduct, he may be dismissed summarily without notice or pay in lieu of notice.

6. His written contract of employment referred to the employee handbook, saying that the handbook contains important procedures, although they do not form part of the claimant's contract of employment. The employee handbook outlines the disciplinary procedure that will be followed in most cases, although also states that the process may be adapted and amended depending on the circumstances of the disciplinary issue. The procedure involves a fact finding investigation before a decision is made whether to take formal action. If the respondent suspects that an employee has committed an act of misconduct, they will notify the employee of the allegations in writing, the employee will be provided with copies of all relevant statements or information, and the employee will be invited to a disciplinary meeting to discuss the allegations and the employee will be given reasonable notice of this meeting. The policy also states that after the employee has had the opportunity to respond to the allegations and state their case, the disciplining manager will adjourn the meeting to consider the facts. After the meeting the manager will then inform the employee of the decision made and the outcome of the disciplinary meeting.

7. The handbook gives examples of behaviour normally regarded as gross misconduct, which include foul or abusive language and failure to adhere to a reasonable management instruction. The handbook also states that for offences of gross misconduct an employee may be dismissed.

8. On 20 March 2024, just before 14:30, Mr Vito Fanara brought the claimant two metal trays to empty and clean from a different section of the kitchen. The claimant was immediately agitated and upset. The porter from the other section of the kitchen had recently ended his shift and the claimant was upset that the trays had not been cleaned when the other porter was still on shift. Mr Fanara attempted to calm the claimant, but ultimately Mr Fanara slammed one of the trays down onto a bench.

9. Mr Denilson Salvanini, the claimant's line manager, emptied the trays into a bin and put them next to the sink for the claimant to wash. He asked the claimant why he was upset and said that Mr Fanara was just asking him to do his job. Mr Salvanini gestured towards the door and said something along the lines of if you don't like doing your job, then there is the door. Mr Salvanini's said something along the lines of I am your boss and you need to do whatever I say. The claimant considered this to be disrespectful, and responded by telling Mr Salvanini to fuck off.

10. The claimant says that he did not explicitly say "I am not doing it" or use words to that effect when asked to clean and wash the two trays. I accept that. But I find that he did make very clear that he was upset at being asked to do something that he considered someone else should have

done earlier. His behaviour made clear that he did not want to wash the two trays, which is why Mr Salvanini asked the claimant why he was upset and said that Mr Fanara was just asking him to do his job, and ultimately emphasised that the claimant needed to perform the tasks he was asked to. In other words, the claimant refused to wash the two trays.

11. The claimant accepted in evidence that he had said either “fuck off” or “fuck you” to Mr Salvanini. Mr Salvanini was clear when giving his account on both 20 March 2024 and 21 March 2024 that the claimant had told him to “fuck off”. This is the basis for my finding that the claimant told Mr Salvanini to fuck off.

12. Mr Salvanini gestured towards the door a number of times, and said do not ever tell me to fuck off like that again and if you are not happy with your job, then there is the door.

13. During this incident, as I have found, Mr Salvanini emptied the contents of the metal trays into a bin himself. The claimant did wash the trays after about six minutes. However the claimant continued to be agitated for some ten minutes in total. Mr Darren Williams tried to calm him down about ten minutes after the incident had started. The claimant subsequently left the kitchen to go to another of the respondent’s kitchens, to perform his responsibilities there.

14. At the time of the incident, the claimant had been working since 4 am in the morning. This was not his usual shift pattern, and he was trialling a new work pattern (from 4 am to 4 pm) which he had negotiated with the respondent after asking if he could work full time but be at home in the evenings. He was committed to his job, and it was not unusual for him not to take a break, and to eat while working. He had not taken a break during his shift on 20 March 2024.

15. Mr Fanara emailed Ms Bonomo at 4:37 pm on 20 March 2024 regarding the incident, and Mr Salvanini emailed her at 4:42 pm the same day. Each gave their account of the incident. Mr Salvanini said he was willing to have a one to one with the claimant the next day, and to give him a final warning.

16. Ms Bonomo regarded Mr Fanara’s email as a written statement.

17. Mr Salvanini came to Ms Bonomo’s office. He was quite pale and clearly distressed, and Ms Bonomo took a verbal statement from him.

18. Ms Bonomo then went to the kitchen, where she spoke with Mr Williams. She returned to her office where she checked the CCTV footage: the camera had recorded the incident but did not record sound.

19. Ms Bonomo replied to Mr Fanara at 20:22 on 20 March 2024. She said that she had discussed the incident with Mr Salvanini and that the claimant would be disciplined. She and Mr Salvanini had agreed to reflect over night with the final decision to be reached on 21 March 2024 as to what steps would be taken next.

20. At 12:10 on 21 March 2024 Ms Bonomo emailed Mr Salvanini asking him to pop in to speak to her to reach a decision on how he thought it best to move forward from the incident.

21. Ms Bonomo emailed the claimant at 12:39 on 21 March 2024 to invite the claimant to a disciplinary meeting at 3 pm the same day. In her attached letter she said that purpose of the meeting was to address reports of an altercation between the claimant and Mr Fanara which escalated into an untasteful exchange with Mr Salvanini. Her letter also said that he had the right to be accompanied by a colleague or trade union representative, asking him to say who he had selected prior the meeting. She also said that he was entitled to introduce into evidence witnesses or statements in support of his case. The letter stated that if he was found to have committed an act of gross misconduct he may be dismissed without notice or pay in lieu of notice.

22. The disciplinary meeting was then brought forward. The claimant was aware of the meeting and of its timing because Mr Williams came to him, while he was working, to tell him about the meeting. The claimant's work does not involve checking emails and he would not otherwise have been aware that there was to be a disciplinary meeting. Although the claimant did see Ms Bonomo's email and letter later that evening, he did not see them prior to the meeting.

23. The disciplinary meeting commenced at 1:53 pm, a little over one hour after the invitation to the meeting was sent. It was attended by Ms Bonomo, the claimant, Mr Salvanini, Mr Williams, and Ms Sienna Boulton (an HR assistant who attended for training purposes only).

24. The purpose of the meeting was to hear the claimant's version of events, as Ms Bonomo did not at this stage know whether or not the claimant accepted what Mr Salvanini and Mr Williams had told her. Had the claimant disputed their version of events, she had invited Mr Salvanini and Mr Williams so that any possible mediation could occur. This was not however explained to the claimant at the time.

25. Ms Bonomo started the meeting by asking the claimant what he thought the reason for the meeting was, rather than outlining the allegations against him or the outcome of her initial investigations. She did not ask if he had seen her letter, or if he wanted time to prepare or to organise for someone to accompany him. The claimant had not been provided with any statements or information. In particular he was not provided with a copy of the emails sent by Mr Fanara and Mr Salvanini setting out their accounts of the incident.

26. During the course of the meeting the claimant accepted swearing at Mr Salvanini and apologised.

27. Towards the end of the meeting Ms Bonomo dismissed the claimant. She said that she could not accept one employee swearing at another and that such swearing was "even worse in the circumstances in which it occurred yesterday". She dismissed the claimant, saying that as he was being dismissed for gross misconduct the respondent would not be giving him notice.

28. Ms Bonomo wrote to the claimant on 23 March 2024 confirming that he had been dismissed for gross misconduct. The letter gives what are said to be the reason for dismissal. In summary, these are said to be that the claimant had admitted using foul language, and also unconstructive and unproductive behaviour related to his duties as a kitchen porter.

29. On 28 March 2024 the claimant appealed against his dismissal on eight grounds. These included (in brief): the short notice given of the disciplinary meeting; the failure to provide him with notes of any investigation; the failure prior to the meeting to provide him with information about what conduct might constitute gross misconduct; the failure to consider an alternative sanction; the background to the incident at about 2 pm, which was that this was the first day of his trialling a 4am to 4pm shift pattern, and he had not had a single break.

30. The claimant attended an appeal meeting on 11 April 2024. It was attended by Mr Megaro and the claimant. During the appeal meeting the claimant felt that he was treated with respect by Mr Megaro, felt comfortable, and was able to present his view of things.

31. Mr Megaro sent the claimant the outcome of the appeal on 30 April 2024. Each of the eight grounds of appeal were addressed in the outcome letter. In particular, Mr Megaro said that he could not accept tiredness as a valid excuse for his swearing at his line manager.

32. The claimant had been sent a copy of the staff handbook on 15 May 2021, at the start of his employment with the respondent.

33. The claimant had been issued with a verbal warning in 2022 by his then line manager, Chef Manuele Bazzoni, regarding an incident in which the claimant was confrontational and insubordinate. The claimant had not however sworn at Chef Bazzoni.

34. The respondent is a small company, employing just over 100 staff.

The Law

Unfair dismissal

35. An employee has the right not to be unfairly dismissed by his employer: s. 94(1) Employment Rights Act 1996 (ERA).

36. An employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice): s. 95(1)(a) ERA.

37. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal: s. 98(1) ERA.

38. The burden is also on the employer to show that the reason is a potentially fair reason, such as a reason that relates to the conduct of the employee: 98(2)(b) ERA.

39. Section 98(4) ERA provides that where an employer has shown the reason for the dismissal and that the reason is a potentially fair reason, the

determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

40. In the case of a misconduct dismissal, there is a three stage test, as set out in *British Home Stores Ltd v Burchell* 1980 ICR 303 (EAT), at paragraph 2:

> What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ….. entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must he established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly … that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

41. *British Leyland (UK) Ltd v Swift* 1981 IRLR 91 (CA), at paragraph 11, is clear that the test that is not whether a reasonable employer might have decided not to dismiss the employee. Rather:

> The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

42. *Taylor v OCS Group Ltd* 2006 ICR 1602 (CA), at paragraph 47, requires the Tribunal to consider the fairness of the whole of the disciplinary process. The overall process may be fair, even if an early stage of the process was defective and unfair in some way.

Wrongful dismissal

43. The claimant was dismissed summarily. Such a dismissal was wrongful unless the employer can prove that the claimant had committed a

sufficiently serious breach of contract to justify his dismissal without notice: *A v B* [2010] I.R.L.R. 844 (EAT), at paragraph 42.

44. The Court of Appeal in *Dunn & Anr v AAH Ltd* 2010 IRLR 709, confirmed at paragraph 6 that "conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment". The Court also confirmed, at paragraph 7, that "To draw a distinction between gross misconduct and repudiatory conduct evincing an intention no longer to be bound by the contract is in my judgment to make a distinction without a real difference. It may be more common in employment cases to deal with gross misconduct, but that is essentially a form of repudiatory conduct".

Conclusions

Unfair dismissal

45. The claimant was dismissed on 21 March 2024 at the disciplinary meeting.

46. The reason for the dismissal was that the claimant had sworn at Mr Salvanini, in the context of the claimant having objected to being asked to clean and wash two metal trays by Mr Fanara, and then being told by Mr Salvanini that Mr Fanara was just asking him to do his job. The reason for the dismissal was that the claimant had responded fuck off to his line manager, who was asking him to do his job.

47. The reason was conduct, a potentially fair reason.

48. The respondent genuinely believed that the clamant had committed misconduct, and had reasonable grounds for that belief. Ms Bonomo had received emails from Mr Fanara and Mr Salvanini, had spoken to Mr Salvanini and had reviewed the CCTV footage which confirmed their version of events. The claimant disputed refusing to do his job, and I have accepted that he did not at any point say words to the effect of "I am not doing that". However he accepted in the disciplinary meeting that he had complained about being asked to clean and wash the two trays, which he considered should have been done earlier by another porter, and that he had sworn at Mr Salvanini and had said "fuck off".

49. At the time that the belief was formed, the respondent had caried out a reasonable investigation. Ms Bonomo received emails from Mr Fanara and Mr Salvanini, spoke to Mr Salvanini, and reviewed the CCTV footage. The claimant was also given an opportunity to give his version of events, but had accepted that he had complained about being asked to clean and wash the two trays and that he had sworn at Mr Salvanini and had said "fuck off.

50. I do *not* consider that the respondent acted in a procedurally fair manner in respect of the disciplinary meeting. The meeting was called at short notice, and then brought forward so that there was a little over an hour between the invitation being emailed and the meeting taking place. The claimant was not given reasonable notice of the meeting. He was not provided with

a copy of all relevant information: he was not provided with a copy of the two emails. No reasonable employer would have proceeded in this way.

51. The claimant was sent a letter which outlined the allegations against him, but this was sent to his personal email account, when he was at work in a role that does not involve checking his emails, a little over an hour before the meeting took place. Realistically, he had no time to prepare, take advice, or arrange to be accompanied. No reasonable employer would have proceeded in this way.

52. Despite all this, he was not asked at the start of the meeting if he had received the letter and understood that one potential outcome was summary dismissal for gross misconduct. He was not asked if he was happy to proceed. The respondent emphasises that he did not raise any objections at the start of the meeting, but his failure to object carries little weight given the lack of reasonable notice of the meeting. In the circumstances as I have just outlined them, no reasonable employer would have proceeded without clarifying these matters at the start of the disciplinary meeting.

53. So, to a large extent, I accept the claimant's submissions regarding these procedural failings. I do not however accept his submission that the decision to dismiss him was predetermined. Ms Bonomo emailed Mr Fanara at 20:22 on 20 March 2024 and said that the claimant would be disciplined. However Mr Salvanini had said he was willing to have a one to one with the claimant the next day and to give him a final warning, and the decision to hold a disciplinary meeting was not taken until the morning of 20 March 2024.

54. As I have said, I do not consider that the respondent acted in a procedurally fair manner in respect of the disciplinary meeting. However the claimant accepted in the disciplinary meeting that he had complained about being asked to clean and wash the two trays and that he had sworn at Mr Salvanini. Further, all of his grounds of appeal were carefully considered by Mr Megaro during the subsequent appeal, as is clear from the appeal outcome letter. During the appeal meeting the claimant felt that he was treated with respect by Mr Megaro, felt comfortable, and was able to present his view of things. Looking at the procedure as a whole, and taking into account the reasons for the dismissal, my assessment is that the procedure was fair overall.

55. The claimant objects that he should not have been dismissed. He says that he was tired at the time of the incident as a result of his long shift and not having taken a break. However the respondent's view that tiredness as a valid excuse for his swearing at his line manager is within the band of reasonableness. It cannot be said that it is a view that no reasonable employer would have taken.

56. The claimant also points out that on 20 March 2024 Mr Salvanini said in his email that he was willing to have a one to one with the claimant the next day and give him a final warning. However the question is not whether a different course was open to the respondent or to a reasonable employer. The question is whether the sanction of dismissal was open to a reasonable employer. In my view, it was. Taking account of all the relevant

circumstances, it cannot be said that no reasonable employer would have dismissed the claimant in these circumstances. The respondent acted reasonably in treating its reason as a sufficient reason to dismiss the claimant.

57. The claim for unfair dismissal therefore fails.

Wrongful dismissal

58. The claimant was immediately agitated and upset when Mr Fanara brought him two metal trays to clean.

59. I have found that the claimant refused to wash the two trays. He did ultimately wash them, some six minutes after having been asked.

60. I have also found that the claimant told Mr Salvanini to fuck off.

61. Factually, these were two parts of a single incident, and it was the refusal to wash the two trays which led to Mr Salvanini's insistence that he was only being asked to do his job, and his further insistence that the claimant needed to do whatever his line manager asked of him. Although Mr Salvanini's point may ultimately have been bluntly put, he was expressing the true position – the claimant needed to adhere to reasonable management instructions. It was in response to what the claimant considered to be this lack of respect that led the claimant to respond by saying "fuck off".

62. The incident continued for ten minutes, in that the claimant continued to be agitated for some ten minutes in total. Mr Darren Williams tried to calm him down about ten minutes after the incident had started.

63. The claimant subsequently left the kitchen to go to another of the respondent's kitchens, to perform his responsibilities there.

64. The claimant was employed as a kitchen porter. His job description stated that his responsibilities included washing all pots, pans and kitchen equipment and ensuring that all kitchen items are clean and ready for use, collaborating as part of a team and working with chefs and assisting them. His contract of employment provided that he was expected to undertake his work diligently and to maintain a good standard of conduct at all times. It also provided that in the event of his being found to have committed gross misconduct, he could be dismissed summarily without notice or pay in lieu of notice.

65. The staff handbook gives examples of behaviour normally regarded as gross misconduct, which include foul or abusive language and failure to adhere to a reasonable management instruction.

66. Even allowing for the fact that the claimant ultimately washed the two relevant metal trays, his misconduct was seriously incompatible with his duty to wash and keep clean kitchen items, to undertake his work diligently and to maintain a good standard of conduct. He failed to adhere to reasonable management instructions, and used abusive language towards his line manager in the context of a discussion about the need for him to do his job.

67. Although Mr Salvanini's initial view in response to the incident was to say that he was willing to have a one to one with the claimant the next day and give him a final warning, the respondent ultimately took the view that the claimant should be summarily dismissed for gross misconduct. My view is that the claimant's behaviour undermined the trust and confidence which was inherent in his contract of employment so that the respondent was no longer required to retain him in his employment. His conduct was repudiatory, so as to deprive him of the right to notice.

68. In reaching that conclusion I have taken into account the fact that the claimant had apologise in the disciplinary meeting and also said that it would not happen again, as he had learnt his lesson. That might be thought to undermine the conclusion that the claimant's conduct was repudiatory and evinced an intention no longer to be bound by the contract. However at the time of the disciplinary meeting, the claimant did not consider that he had done anything wrong (as he said in his evidence) When asked by Ms Darlow Stearn if there was nothing wrong with saying "fuck you" or "fuck off" to a line manager, the claimant said that the reason that he swore was the way Mr Salvanini conducted himself. In other words, at the time that the claimant was dismissed the claimant did not consider that he had done anything wrong and considered that the fault for his swearing lay with Mr Salvanini. His conduct on 20 March 2024 was repudiatory conduct evincing an intention no longer to be bound by the contract, and his own views regarding his conduct do not undermine that assessment.

69. The claim for wrongful dismissal therefore fails.

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Employment Judge Andrew Jack

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4 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12 December 2024

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FOR EMPLOYMENT TRIBUNALS