



EMPLOYMENT TRIBUNALS

Claimant: Miss P Pathmaraja

Respondent: Sir Toby's Beers Limited

Heard at: Norwich Employment Tribunal

On: 21 and 22 October 2024

Before: Employment Judge M Magee

Representation

Claimant: In Person

Respondent: Mr T Westgarth (director)

JUDGMENT having been sent to the parties on 6 December 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Ms Pathmaraja ("The Claimant") brought claims of unfair dismissal and wrongful dismissal against her former employer, Sir Toby's Beers Limited ("The Respondent").

The Hearing

2. I heard the Claim on 21 and 22 October 2024. The Claimant represented herself and Mr Westgarth (director) represented the company. The Respondent called 4 witnesses, Mr J Plant, Mr L Stott, Mr D Burke and Mr T Westgarth. The Claimant gave evidence. All witnesses had prepared written statements, in addition I read a bundle consisting of 64 pages. References in these reasons to pages in the bundle are shown in (brackets).

Issues

3. The Respondent conceded that the dismissal was procedurally unfair.

4. 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?

5. 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? The Respondent submitted that the award should be reduced by 100%.

6. 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)? The Respondent said that the compensation should be reduced by 100%.

7. Given the Respondent's failure to follow a relevant requirement of the ACAS Code of Practice on Disciplinary and Grievance Procedures, whether an adjustment, and if so in what amount, should be made to the compensatory award under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992. The parties have agreed that an uplift of 10% is appropriate.

8. Whether the Respondent has shown that the Claimant fundamentally breached her contract of employment by committing an act of gross misconduct entitling it to dismiss her without notice. It is accepted by the parties that the Claimant's notice entitlement would otherwise have been 3 weeks.

Findings of Fact

9. The Respondent is a small company selling craft beers from Norwich Market and owning a craft beer public house in Lowestoft.

10. The Claimant commenced employment with the Respondent on 9 Aug 2019 as a barmaid, having previously worked with Mr Burke, a director of the Respondent, in other hospitality roles in other businesses. She started working part time but gradually built up her hours until she was working full time for the Respondent by 2022.

11. In March 2022 the Claimant asked the Respondent if they were happy for her to carry out social media work for another business. The Respondent indicated that they were content for her to do so providing that it was on her own time.

12. At a meeting in January 2023 the Claimant was offered an increase in salary to £23,200 with increased responsibilities for social media. At that meeting there were discussions about the timeliness of some of the Claimant's marketing work. It was recognised that the Claimant had to fit her social media work around her bar work.

13. In April 2023 the Respondent noted (11) the Claimant's improved performance in delivery of newsletters and social media content, recognised her working late and increased her salary to 24,500.

14. On 3 November 2023 (9) the Claimant missed a portion of a shift where the rota did not match an oral instruction. The matter was dealt with by way of an email exchange between the Respondent and the Claimant.

15. On 24 Nov 2023 the Claimant went on holiday. There was an issue about the scheduling of posts (8). The Claimant gave an explanation and the matter was resolved by way of email exchange.

16. The Respondent had an issue with a new year 2024 post C had made (39). The Claimant raised the issue of admin time to support the making of posts. There was an email exchange and the Respondent indicated that they would look after the social media post.

17. The Claimant had had no warnings or disciplinary hearings in relation to her performance. The matters that had been raised hitherto had all been resolved by email exchange without any further action.

18. Mr Plant, who worked with the Claimant on the stall, told Mr Stott, her that the Claimant had been carrying out work for other clients whilst working on the stall. Mr Stott reported it to the directors, who spoke to Mr Plant about it. There is no record produced of the results of any discussions with Mr Plant, prior to the Claimant's dismissal. The only

records available are from the February letter drafted for Mr Plant and his witness statement that replicates that letter.

19. Mr Stott who was the Claimant's manager and who also worked with her did not see or know of her acting for paid clients during her time working for the Respondent prior to Mr Plant speaking to him.

20. There was no formal gathering of evidence. None was shown to the Tribunal. There was no investigatory meeting and no opportunity for the Claimant to understand the allegations and give her account.

21. The Claimant was called to a meeting, without warning on 18 January 2024. She was summarily dismissed from that day. In fact, due to a payroll error, she was paid up until 31 January 2024.

22. A letter of dismissal was sent to the Claimant dated 11 Feb 24 (3) due to the Respondent concluding that she had been covertly conducting paid work for clients whilst on shift.

23. The Respondent obtained written statements from Jake Plant on 25 Feb 24 and Luke Stott on 29 Feb 24. A director typed up Mr Plant's statement.

24. Mr Plant in his statement and letter alleged that C would regularly go to take photographs for her paid clients. Further in early December he stated he saw C create an Instagram post for other businesses on her laptop at the Respondent's stall. The Claimant's evidence was that she had to carry out her marketing work for R whilst working. Her laptop would have a number of tabs open, but she only worked for the Respondent. She would take photos sometimes during her breaks.

25. I preferred the evidence of the Claimant. The timing of the production and nature of Mr Plant's letter some 6 weeks after the Claimant's dismissal undermines its reliability. Mr Stott, her manager did not believe she was conducting work in her own time. No contemporaneous document was produced showing the extent of any enquiries made with Mr Plant. Mr Plant's evidence lacked any particularity and spoke only in general terms about the Claimant. It provided no detailed evidence of the occasions and circumstances from which it could be concluded that the Claimant was working for others in the Respondent's time, outside her scheduled breaks. It was accepted that the Claimant had to carry out her marketing work for the Respondent whilst working in the stall and therefore she would have to have her computer open whilst working there. I found the Claimant's evidence credible as to the circumstances of her carrying out work within the scope she had previously agreed with the Respondent in March 2022.

26. The Claimant carried on with her social media work and sought to build her own business on the base of existing clients following her dismissal.

Law and conclusions

27. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

28. The Respondent dismissed the Claimant because it believed she was guilty of misconduct, namely working on her own freelance social media work during time she was employed to work for the Respondent. Conduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

29. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

30. In misconduct dismissals, there is well-established guidance on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, 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 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **LondonAmbulance Service NHS Trust v Small 2009 IRLR 563**).

31. The Respondent dismissed the Claimant for misconduct. It was apparent that the Respondent genuinely believed that the Claimant was guilty of misconduct.

32. The Respondent has conceded that the dismissal was unfair. This is an appropriate concession. Notwithstanding the small size of the Respondent, the investigation was inadequate and outside that which a reasonable employer would carry out. The investigation only revealed vague allegations, without any detail and lacking particularity. Nothing was documented prior to the Claimant's dismissal. The statement that was gathered from Mr Plant was taken long after the Claimant was dismissed. There was no opportunity for the Claimant to address those allegations as they were never put to her at all. It was only at the Tribunal where she was able to address them for the first time.

33. I will have to consider whether the Respondent could have fairly dismissed the Claimant after a fair procedure. Had the Respondent conducted a proper investigation and put the allegations to the Claimant at the time, I find that she would not have been dismissed due to her providing explanations to the allegations raised and the allegations being vague and unparticularised.

34. Had there been performance issues which had been raised formally, then her response in January to April 2023, indicates that she would have responded to any criticism and would have been likely to remain.

35. Given my finding above that the Claimant did not carry out work for others at times when she was supposed to be working for the Respondent, I find that the Claimant did not contribute to her dismissal as her conduct was not blameworthy. There is therefore no deduction for contributory fault.

36. The parties have agreed that an ACAS uplift of 10% is appropriate.

37. I find that the Claimant was unfairly dismissed.

Wrongful dismissal

38. Unlike for the claimant's claim of unfair dismissal, where the focus is on the reasonableness of management's decisions, and it is immaterial what decision I would myself have made, for the breach of contract claim, I am required to decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

39. For Wrongful dismissal I need to consider whether in fact the Claimant had committed act gross misconduct.

40. Given my findings above that the Claimant did not conduct work for others on the Respondent's time, I find that the Claimant has not committed an act of gross misconduct and the Respondent was not entitled to dismiss her summarily.

41. The Claimant's claim for wrongful dismissal is well founded and succeeds.

Remedy

42. The Burden of proof on the Respondent to show that the Claimant has acted unreasonably in not mitigating her losses.

43. It was reasonable for the Claimant to seek to build up her existing Client base to seek to establish her own business. The Respondent has not established that it was unreasonable for her to seek to mitigate her losses in this way. It was not appropriate for the Claimant to seek to reclaim business expenses.

44. C was aged 29 at date of dismissal had had 3 years' service

Gross annual Salary £24,500 = £471.15 per week

Basic award 3x £471.15 =

£1,413.45

COMPENSATORY

Net monthly £1593.55

Net weekly £367.74

Wrongful

EDT 18 Jan notice 3 weeks

Outstanding 8 days

8/7 x 367.74

£420.27

Compensatory

9 Feb 24 until 22 Oct 24 = 256 days = 36.6 weeks

Employer pension contribution (42) 42.40 pm = £9.78 per week

Net weekly £367.74

Pension £9.78

TOTAL £377.52

TOTAL TO DATE HEARING £13,817.23

Claimant's money received from self employment

1 Feb – 26 Jul £3890

Aug £1330

Sep £830

Oct £830

£500 from client Cheryl Cade

RECEIVED £7,380

LOSS TO DATE OF HEARING £6,437.23

Loss statutory rights **£400**

Expect earning by 13 weeks extinguish losses

$830 + 350 + 100 = 1280$ pcm

295.38 per week

Net weekly loss $£377.52 - 295.38 = £82.14$ per week

Future loss **£1067.82**

TOTAL COMPENSATORY AWARD £7,905.05

ACAS UPLIFT 10% **£8,695.55**

TOTAL AWARD £10,529.27

Approved by:

Employment Judge **M Magee**

Date. 17 February 2025

Reasons SENT TO THE PARTIES ON

19 February 2025

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FOR THE TRIBUNAL OFFICE

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/>