



THE EMPLOYMENT TRIBUNALS

Claimant : Mr. B. Ahmed

Respondent : Pizza Hut (UK) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 14th and 15th May 2019

EMPLOYMENT JUDGE: Ms S. Sharma

Appearances:

For the Claimant: Ms. E. Godwins, Consultant

For the Respondent: Mr. M. Foster, Solicitor

JUDGMENT

It is the judgement of this Tribunal that: –

1. The Claimant's claim that he was unfairly dismissed is not well founded. This claim is hereby dismissed.

.2 The Claimant's claim for wrongful dismissal is not well founded. This claim is hereby dismissed.

REASONS OF THE TRIBUNAL

A: BACKGROUND

1. The Claimant was employed by the Respondent from 22 March 2008 (although the Claimant believed the start date was 20th March 2008) until 26th February 2018. He was employed as a customer service assistant at the Respondent's Piccadilly restaurant.
2. The Claimant brought claims against the Respondent for unfair dismissal and breach of contract in that the Respondent allegedly failed to pay him his notice pay and other payments. In relation to the Claimant's complaint that other payments were due to him, this complaint was withdrawn at the Tribunal hearing. His claim form was received by this Tribunal on 11 May 2018, after an early conciliation period which took place between 19 April 2018 and 8 May 2018. The Respondent resisted both claims.
3. I reminded the parties that this hearing would be conducted in line with the overriding objective and their cooperation to further this was sought, which both duly gave.
4. The Claimant gave evidence (by affirming) and submitted his witness statement as his evidence in chief. The following witnesses gave evidence for the Respondent, both and by submitting their witness statements as their evidence in chief; Mr Chris Snell (oral evidence given by affirmation), the disciplinary officer and Mr Daniel Houzego, the appeal's officer (oral evidence given under oath).
5. The Claimant had provided a second witness statement to the Respondent last Thursday, 9 May 2019. The representative for the Respondent, Mr Foster, objected to this being used at the Tribunal hearing. Ms Godwins, the Claimant's representative, submitted that the second witness statement elaborated on matters which were already set out in the minutes of the disciplinary and appeal hearing (included in the bundle of documents). I therefore agreed with the parties that the second witness statement would not be used at the Tribunal hearing but instead Ms Godwins would raise any relevant matters by reliance upon such minutes. The witness statements and the oral evidence were all taken into account in reaching my decision.
6. At the Tribunal hearing and contrary to the letter sent to the parties by the Tribunal on 5th February 2019, both Mr Foster and Ms Godwins confirmed that they were only ready to proceed with this Tribunal hearing based on determining liability only and not remedy. It was therefore agreed that this Tribunal hearing would relate to liability only.
7. I was presented with a bundle of documents comprising 115 pages which I considered in making my decision. (The numbers below refer to the pages of the bundle of documents).
8. At the Tribunal hearing, a CCTV image of the event which took place on 30 January 2018 was played on many occasions. I also played this image whilst in Chambers on many occasions and took this into account in making my decision.
9. It was agreed between the parties and myself that the Respondent's witnesses would give

evidence first at the Tribunal hearing.

B: ISSUES

I agreed with the parties that the following were the issues to be determined as follows: -

B.1 Unfair dismissal

1. Was there a potentially fair reason for the Claimant's dismissal (the Respondent relied upon misconduct)?

1.1 Did the Respondent hold a genuine belief in the Claimant's gross misconduct?

1.2 Did the Respondent have reasonable grounds for that belief?

1.3 Was the Respondent's belief based on a reasonable investigation?

2. Did the Claimant's conduct amount to gross misconduct entitling the Respondent to summarily dismiss the Claimant?

3. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?

4. Did the Respondent follow a fair procedure in taking the decision to dismiss the Claimant?

B2 Wrongful Dismissal

Was the Respondent in breach of contract in its failure to pay to the Claimant notice pay?

C: FINDINGS OF FACT

1. It was not disputed between the parties that prior to the incident of 30 January 2018, the Claimant had a clean disciplinary record. The Claimant was given certificates for delivering outstanding service (44) and for five years' long service (45 and 46).

30 January 2018 Incident

2. The alleged incident which led to the Claimant's dismissal took place on 30th January 2018. There was a CCTV recording of this incident which was the prime evidence relied upon by the Investigating Officer, Mr. Cory Nicholls in referring the Claimant to a disciplinary process. The CCTV recording was also considered by Mr. Snell, as the dismissing officer and Mr. Houzago, as the appeal's officer.

3. According to the Claimant, his shift was from 1700 until 23.00 but he alleged that he was forced to stay until 23.30.

4. According to Mr Nicholls, the general manager for the Piccadilly branch, when cashing up, the cash payments received by a fellow employee, Janita, were short by £50. The presumption therefore was that someone else would be up by £50. Other team members, including the Claimant (who was cashed off by the shift manager, Carmela), were asked to early blind cash off. Mr Snell explained in giving evidence that this is a process whereby employees were asked

to hand over all the money which they held, whether as tips or payment for food and drink to establish whether someone who was short (and it was Janita in this case), had accidentally picked up the missing money. The money was then counted and reconciled with the information contained in the restaurant system to establish whether it was higher or lower than that which an employee would be expected to hold. Mr Snell in evidence stated that this was common practice used when there appears to be a discrepancy.

5. When the Claimant was blind cashed off on 30 January 2018, there was no discrepancy with the sums he held. He was expected to have £290 and he had approximately this sum.

6. It was the Claimant who found the missing £50 note. The Claimant found £50 in the area where juice cartons were stored. The Respondent asserted that the CCTV footage showed that the Claimant may have placed the £50 seconds before finding it. It was the Claimant's case, however, that he was trying to exchange his tip money (from change to notes) in the bar area. He alleged that he saw a £50 note and returned it to Janita.

Investigation Meeting: 31 January 2018

7. Mr Nicholls became suspicious. On 31 Jan 2018, the Claimant was asked to attend an investigation meeting with Mr Nicholls (50-55) on 31 January 2018. During the investigation meeting, the Claimant was shown the CCTV footage and was asked to provide an explanation. The Claimant stated that he had found the £50 note under the juice carton in the bar area. Mr Nicholls asked the Claimant how he thought it got there. The Claimant responded that someone must have dropped it.

Mr Nicholls asked the Claimant what he thought about the CCTV footage which, according to Mr Nicholls, showed the Claimant taking the money from his pocket and putting it where the juice carton was (51/52). The Claimant said no. Mr Nicholls asked the Claimant to explain this. The Claimant responded by saying that this was very embarrassing and said that he was aware that there was a camera there. The Claimant stated that if he has the money in his pocket why would he do this? The Claimant's stated that he did not do this. He was exchanging his tips to notes. Mr Nicholls (53) stated that the CCTV footage showed that the Claimant had taken money from his apron and put it next to the orange juice. The Claimant denied this, stating that he was exchanging his tips, from change to notes.

Mr Nicholls stated that the CCTV footage made it look like the Claimant had taken some notes and fed them into the orange juice holder and then called Janita over. He stated that he had no prejudice on the matter and the Claimant was one of the most senior team members but that he could only say what he saw.

The Claimant stated that it did not look good, but asked why he would take the money and put it in front of a camera. The Claimant asked why would he take the money in an area below the camera when he could take the money elsewhere, where there were no cameras. The Claimant then stated that maybe he took the money and put it in the bar area. He at first knew only that Lina was short and did not know about Janita. Mr Nicholls stated that he informed the Claimant when the Claimant was being blind cashed that the reason for this was because Janita was missing £50. Mr Nicholls stated that what did not sit well was the Claimant declaring approximately £290 and not mentioning having more money on his person. The Claimant denied having more money. Mr Nicholls stated that what did not make sense was that the CCTV footage did not support what the Claimant was saying; it did not seem feasible that the money appeared yet on the CCTV it showed the Claimant leaning into the pigeonhole and it appeared

he was depositing the money next to the orange juice carton. The Claimant responded by stating that he was counting his tips and exchanging the change to cash. Mr Nicholls stated that this did not explain the action of leaning. The Claimant responded (55c):

” Maybe I just leaned in there, bending to check maybe. Because if orange juice and £50 is the same colour. Maybe I was leaning in to check what was in there. Maybe yes that could be the story.”

Mr Nicholls concluded the meeting by stating that it looks like the cash was taken from his pocket/apron and put by the Claimant next to the orange juice carton. He then called Janita and Janita took the £50 to Mr Nicholls to reconcile

After the meeting, Mr Nicholls developed concerns believing that the Claimant may have been intending to steal the £50. Mr Nicholls thus suspended the Claimant with immediate effect, pending the completion of the disciplinary process.

8. At the Tribunal hearing, the Claimant asserted that the investigation interview notes were not fully comprehensive and did not include all matters which he had said. This is so even though he had signed the minutes. Specifically, he referred to page 53 of the manuscript notes which he said was inconsistent with the typed-up note set out on page 55 B. In the typed-up note, there was no initial “CN” against the sentence which commenced “I guess”. The Claimant stated that in relation to Mr Nicholls’ comment that he had informed him when he was being blind cashed that the reason for this was because Janita was missing £50, the Claimant denied that he was told of the missing £50 at the time of being blind cashed. The Claimant asserted at the Tribunal hearing that he had made this comment at the investigation meeting but this had not been recorded in the interview notes.

9. Mr Nicholls also prepared an investigation report (which was reviewed by Mr Snell and Mr Houzgo). The investigation report included the following points: –

(a) The Claimant was alleged to have committed a breach of trust when, with the intention of stealing, he failed to declare monies that belongs to the company and planted monies in the bar area after he realised Mr. Nicholls was investigating the whereabouts of the money;

(b) The remit was to establish whether the Claimant committed an act of theft, specifically of monies and if there was a disciplinary case to be answered;

(c) The interview conducted was that with the Claimant only;

(d) The Claimant denied taking the money and denied planting the money in the bar area. The Claimant was shown the CCTV footage. He alleged that the monies had been dropped by another employee. The CCTV footage showed clearly the Claimant putting the monies into the bar area pigeonhole;

(e) Mr Nicholls finding on this matter was that on a balance of probability, the Claimant took the money with the intention to steal, failed to declare the monies and therefore committed an act of theft. The Claimant’s testimony did not match the events shown on the CCTV footage. The CCTV footage showed the Claimant taking the monies from his apron/pocket and hiding them in the bar area to make it look like the monies had been lost by someone else; and

(f) Mr Nicholls believed that there was a disciplinary case to answer regarding the following: –

“Alleged theft: specifically taking money from the company and failure to declare monies when asked to present the monies.”

10. I make the following findings of fact: –

(a) The CCTV image gave Mr Nicholls a genuine belief that the Claimant had put the money into the bar area pigeonhole with the intention of stealing this;

(b)The CCTV image gave Mr Nicholls reasonable grounds for this belief;

(c) The investigation was a reasonable one. As was made clear in the investigation report, the only interview conducted by Mr Nicholls was that with the Claimant. Ms Godwins submitted that this made the investigation an unreasonable one; other people like Janita should have also been interviewed. I find that the CCTV image alone was sufficient to warrant an interview with the Claimant only. Janita was, during the incident, busy doing other chores and was not observing the Claimant’s actions at the time. It fell within the band of reasonable responses for the Respondent in these circumstances to only interview the Claimant;

(d) In the Claimant’s evidence, he asserted that to accuse someone of theft, it must be established that he dishonestly appropriated property belonging to another with the intention of permanently depriving the other of it. As I explained at the Tribunal hearing, this was not the legal test which I needed to apply for the purposes of determining the issues. It was not a matter for the Respondent to conclusively prove that the Claimant had stolen the money. The Respondent had to demonstrate that it had a genuine belief of the Claimant’s misconduct based on reasonable grounds and a reasonable investigation. I found that this test had been satisfied by the Respondent; and

(e) As will be seen from my summary of the disciplinary hearing and the appeal hearing, the Claimant’s assertion that the minutes of the investigation meeting did not record everything he said was not raised at these further meetings when the Claimant was given an opportunity to raise any other matters.

11. The suspension was confirmed to the Claimant in writing by letter dated 31 January 2018 (58). The Claimant was informed that he was suspended whilst an investigation into the following was being carried out: -

“alleged theft of company property”.

The letter reminded the Claimant that this was a confidential matter between himself and the Respondent. At the Tribunal hearing, the Claimant asserted that he was aggrieved in that Mr Nicholls had not kept the matter confidential. Mr Snell stated that appropriate action in this regard had been taken.

Respondent’s grievance and disciplinary procedures

12. The Respondent disciplinary procedure provided examples of gross misconduct (37). These were behaviours which the Respondent considered to be so serious that these could result in the immediate dismissal, following a disciplinary hearing, without any previous warning. Examples of gross misconduct were misuse of the company’s property or name, theft of property or money or assets and breach of trust. At the Tribunal hearing, the Claimant asserted that he objected to the definition of money which included any form of money, equipment and manuals containing confidential company information on the basis that there would be money

on his person which was not company property.

Disciplinary hearing:

13. By letter dated 5 February 2018 (59), Mr Nicholls notified the Claimant of a disciplinary hearing to be conducted by Mr. Snell, a restaurant general manager of Pizza Hut Baker St to be held on 9 February 2018. The letter informed him that the disciplinary action against him related to: -

“Alleged theft of company property; specifically failing to declare monies belonging to the company when asked, with the intention to steal.”

This letter advised the Claimant of his right to be accompanied and that a possible sanction was summary dismissal. The letter further informed the Claimant that he was entitled to be accompanied. With the letter, notes of the investigation were included. The Claimant was also informed that all sanctions up to and including summary dismissal would be considered.

14. The hearing did not take place on 9 February 2018. On 13 February 2018, the Claimant wrote to the HR business partner, Sharon Finnie, informing her that he had received no correspondence on this matter. The Claimant had changed address.

15. By letter dated 14 February 2018 (65) the disciplinary hearing was rescheduled to 19 Feb 18. The Claimant confirmed receipt of the letter and enclosures on 16 February 2018.

16. The hearing of 19 February 2018 was again postponed to 21 February 2018 at the Claimant’s request (pages 67 to 68).

17. I find that the Respondent had acted reasonably in rearranging the disciplinary hearing at the Claimant’s request.

18. Chris Snell conducted the meeting on 21 February and the note taker was Mr Kunal Patel (69-73).

19. The following key points arose from the disciplinary hearing: –

(a) The Claimant confirmed that he was happy to proceed without a companion;

(b) Mr Snell asked the Claimant that now he had seen the investigation notes, did he have anything to add. The Claimant referred to Mr Nichol’s personal revenge (69);

(c) Mr Snell asked the Claimant why he had stated at the investigation meeting that it did not look good. The Claimant explained that he was standing next to the money and had his apron opened several times so it did not look good;

(d) Mr Snell asked the Claimant why he had signed the minutes of the investigation if they were not correct. The Claimant responded saying that many things were said which had not been included;

(e) When asked when the Claimant was informed that his colleague was down by £50, the Claimant’s stated that he was only told of the missing £50 after he had been blind checked. He was not, the Claimant replied, given an explanation as to why he was being blind checked;

(f) When asked why he was leaning into the orange juice area, the Claimant explained that it was to take the money from the orange juice and put it on the bar surface;

(g) When asked if he had planted the money on the orange juice, the Claimant said he had not; and.

(h) When asked if he had anything to add, the Claimant stated that he wanted to see other CCTV footage that showed he had stolen the money and he also wanted the full definition of company property. He also stated that this matter had not kept been kept confidential by Mr Nicholls.

20. In a telephone conversation of 26 February 2018, Mr. Snell advised the Claimant that he found the allegation against the Claimant proven and had decided to dismiss him.

21. The outcome letter dated 1 March 2018 referred to the following matters: –

(a) It was Mr Snell's belief that the Claimant did not declare all the money he had during the blind cash off and that he had placed a £50 note in the bar area to make it look like he did not have it;

(b) Mr Snell was of the belief that the Claimant knew the note was there before he alerted Janita, with an intention to steal it;

(c) Mr Snell came to this conclusion because of the Claimant leaning into the bar area and not explaining leaning in, the Claimant putting his hand into the area of the orange juice and pulling something out (which was a £50 note), bringing this to the bar and putting this under a bin bag, the note then being unfolded and then being held up as if the Claimant had discovered it, the Claimant stating that the note had been dropped but it was folded as the Claimant had unfolded it;

(d) Mr Snell believed based on the evidence and on a balance of probability, the Claimant had the intention to steal;

(e) Mr Snell did not feel a final written warning was a suitable punishment because the Claimant's behaviour was deliberate and this behaviour was inconsistent with the continuation of his contract of employment;

(f) The Claimant was provided with a full definition of Pizza Hut's company property;

(g) The Claimant's concerns in relation to confidentiality had been passed on to a senior area manager and an investigation would be undertaken; and

(h) The Claimant was informed of his right to appeal.

22. In evidence, Mr Snell stated that prior to the disciplinary hearing, he had read the notes of the investigation meeting, the investigation report, the letter of suspension, the invite to the disciplinary hearing. He had also reviewed the CCTV footage. The CCTV footage was not shown to the Claimant at the disciplinary hearing but Mr Snell had talked the Claimant through what he thought the CCTV footage showed.

23. Mr Snell discussed the issues with HR. He felt that he did not need to make any further enquiries. He felt that the evidence to decide the case was the CCTV footage and the Claimant's explanation of his actions.

24 The Claimant wanted Mr Snell to review other CCTV footage to prove that he stolen the £50 note. Mr Snell did not feel he needed to do so that on the basis that the CCTV footage showed that the Claimant had the £50 note in his possession before finding it.

25 Mr Snell asserted that this incident had brought about a significant cause for concern over issues of trust.

26. Mr Snell was aware of the Claimant's clean disciplinary record but concluded that the offence was of a serious nature because it went to the heart of the trust that the Respondent had to have in all of its employees who work in its restaurants. Mr Snell asserted that he also had considered mitigation. As the Claimant had denied the offence, he did not need to provide any explanation for his actions. Mr Snell asserted that he had considered other penalties but concluded that dismissal was the appropriate sanction.

27 In cross examination, Ms Godwins questioned Mr Snell on his relationship with Mr Nicholls. Mr Snell stated that he had attended meetings with Mr Nicholls. Ms Godwins also questioned Mr Snell's impartiality and that where there was a dispute between a manager and a junior employee, Mr Snell was more likely to believe the manager. Mr Snell stated that this was not the case. Ms Godwins questioned whether Mr Snell was aware how such a serious allegation could affect both the employment and reputation of the Claimant. Mr Snell stated that he was aware. Ms Godwins also questioned Mr Snell on the matter of the Claimant not receiving the company policies. In cross examination of the Claimant by Mr Foster, the Claimant confirmed that he had had access to the company policies. Mr Snell stated that at the disciplinary hearing, the Claimant was given a further opportunity to view the CCTV footage but declined. In relation to viewing other CCTV footage, Mr Snell explained in cross examination that the disciplinary hearing was held more than 14 days after the investigation meeting and therefore other CCTV footage would have been deleted as it automatically deletes after 14 days. Other CCTV footage would not have made a difference to Mr Snell's decision, however he asserted on the basis that the CCTV footage shown had led to Mr Snell's decision based on the Claimant's body language; this was body language of somebody who was not surprised to find the £50 note. In relation to whether Mr Snell had informed the Claimant that a Tribunal case would cost a lot of money, Mr Snell stated that he could not remember.

28. I make the following findings of fact: –

(a) The procedure was fair in that the Claimant was informed of his right to be accompanied but declined this;

(b) The Claimant had been given an opportunity to raise other matters. He had raised the issue of Mr Nicholls personal revenge which was the subject of an investigation. At the Tribunal hearing, the Claimant stated that the notes of the investigation meeting (which he has signed) were not accurate. This point had not been raised at the disciplinary hearing. On a balance of probability, I find that the minutes of the investigation meeting were accurate;

(c) Because the notes of the investigation meeting had recorded the Claimant as being informed of the missing £50 note while he was being blind checked, and no comment by the Claimant

denying this was in the minutes, on a balance of probability, I find that the Claimant, at the point in time of being in the bar area, knew of the missing £50 note;

(d) Looking at the notes of the investigation meeting and the disciplinary meeting, the Claimant had not offered a clear explanation as to why he had leaned into the area of the orange juice carton;

(e) In relation to the Respondent not reviewing other CCTV images, it was not an unreasonable position for Mr Nicholls to feel that the CCTV image reviewed was sufficiently incriminating so as to cause alarm bells and give rise to the disciplinary process;

(f) The interpretation of the CCTV footage by Mr Nicolls and Mr Snell, namely that the Claimant had concealed the £50 and then made out as if he had just seen it yet he had known about it beforehand was, bearing in mind the content of the CCTV footage which I had reviewed on many occasions, not an unreasonable one and is one which a reasonable employer would also have made. Therefore, the Respondent's interpretation of the CCTV footage fell within the band of reasonable responses;

(g) It is unfortunate that the Claimant was dismissed after 10 years of an unblemished service record for an incident which could indeed affect his reputation and resulted in the termination of his employment. The action of dismissing the Claimant, however, because of Mr Snell's genuine belief, based on reasonable grounds and following a reasonable investigation, that the Claimant had had an intention to steal was a reasonable one. This is so particularly because of the Claimant's role of handling money for the Respondent. Mr Snell explained that he no longer had confidence in the Claimant. This is a response which a reasonable employer would have had and therefore fell within the band of reasonable responses;

(h) On the basis that the Claimant had been offered the opportunity to review the CCTV image again at the disciplinary hearing but had declined this offer did not result in unfairness in the procedure;

(i) I did not accept the Claimant's assertion that there was lack of impartiality in the disciplinary hearing because of Mr Snell attending meetings with Mr Nicholls. The conduct of the disciplinary hearing was one which a reasonable employer would have carried out; and

(j) I was satisfied that the Claimant had access to the Respondent's disciplinary procedure, a matter confirmed by the Claimant in cross examination.

Appeal

29. On 12 March 18, the Claimant exercised his right of appeal. The appeal date has been extended at the Claimant's request due to his personal circumstances.

30. The Claimant raised the following grounds of appeal: –

(a) There was a fundamental error of law;

(b) The employee was unfairly treated;

(c) The employer failed to follow a fair procedure in accordance with the ACAS code and

guidance;

(d) The employer failed to comply with the disciplinary procedure; and

(e) The decision had been wrongly concluded.

31. By letter dated 15 March 2018 (86), the Claimant was invited to the appeal meeting to take place on 22 March 2018. The Claimant was asked if he wished to review the CCTV footage prior to the hearing. The Claimant was also informed of his right to be accompanied.

32. Dan Houzego dealt with the appeal on 22 March 2018. Ms Finnie took notes. The Claimant chose not to be accompanied. Amongst others, the following points were made at meeting: -

(a) The Claimant felt that the investigation was personally biased because he had had an argument with Mr Nicholls a week before;

(b) There were a lot of things wrong with the restaurant for example serving alcohol to 17-year-olds, no breaks being offered for over six hours shifts and people having to stay longer. The Claimant was going to complain but was busy;

(c) The Claimant believed that Mr Nicholls had planned everything; and

(d) Why would the Claimant do this in front of the cameras?

33 After the appeal meeting, Mr. Houzego interviewed Mr Nicholls about a conversation which Mr Nicholls had with the Claimant on 17 January 2018 relating to the Claimant wishing to leave early. Mr Houszego asked if Mr Nicholls had investigated the Claimant because of this conversation. Mr Nicholls stated that the investigation was carried out due to missing money and not any prior conversation. In relation to Mr Nicholls not reviewing another CCTV footage, Mr Nicholls stated that he could not review an entire shift but that the CCTV reviewed seemed to clearly show what had happened.

34 Mr Houzego also interviewed Mr Snell and asked why the CCTV image had not been reviewed at the disciplinary meeting. Mr Snell stated that the Claimant was offered the opportunity to watch it again but he had declined to do so.

35. Mr Houzego upheld the decision to dismiss. The Claimant was informed of this in an outcome letter dated 16 April 2018.

Amongst other points, the following points were made in the outcome appeal letter by Mr Houszego: –

(a) Mr Houzego concluded that the conversation of 17th January 2019 did not impact upon the investigation;

(b) the Claimant was not unfairly treated by Mr Nicholls;

(c) In relation to the Claimant's situation being openly discussed, Mr Houzego found this to be unfounded being;

(d) The investigation and disciplinary meetings were conducted fairly and without bias. Janita was not investigated because Mr Nicholls believed the CCTV was evidence enough of what happened with the money; and

(e) the Claimant had been treated fairly and without bias.

36. In his evidence, Mr Houzego asserted that the CCTV footage was central to his decision to uphold the decision to dismiss. From the CCTV image, Mr Houzego concluded that the Claimant already had the money on his person before telling Janita that he had found it. Further Mr Houzego asserted that the Claimant had failed to disclose the money, namely, firstly when he came into possession and secondly when all staff were asked whether they had additional money. Mr Houzego concluded that the Claimant had an intention to keep the money. Because of this, Mr Houzego concluded dismissal was an appropriate sanction for an employment where the position of trust for dealing with money was necessary.

37. In cross examination of Mr Houzego by Ms Godwins, when asked why other CCTV footage was not explored, Mr Houzego stated that the CCTV in question was enough to show that the Claimant was doing something untoward.

38. In relation to the appeal, I make the following findings of fact: -

- (a) The appeal process was one which a reasonable employer would have carried out from agreeing to delay the appeal date, offering for the CCTV recording to be played before the meeting and the reasons for upholding the decision to dismiss; and
- (b) It was not unreasonable for Mr Houzego to conclude that the CCTV image recording was central to his decision to uphold the dismissal.

39. On 26th February 2018, the C was dismissed for gross misconduct.

D: THE LAW

1. S 98 (2) (b), Employment Rights Act 1996 (“ERA”): Conduct is a potentially fair reason for dismissal.
2. **BHS v Burchell**: I applied the principles established in the case of **BHS v Burchell** (**[1980] ICR 303, [1978] IRLR 379**), a case relevant in establishing both the reason for dismissal, but also relevant to the question of whether it was reasonable for the Respondent to treat that reason as a sufficient reason to dismiss in the circumstances under s 98 (4), ERA. Where the employer suspects misconduct, the Burchell test requires an employer to show that: -
 - (i) It had a genuine belief that the employee was guilty of misconduct;
 - (ii) It had in mind reasonable grounds upon which to sustain that belief ; and
 - (iii) At the time of forming that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

I noted the essence of the test; it is not a matter for an employer to conclusively prove the employee's misconduct; it is a matter for the employer to demonstrate that he had reasonable grounds for believing in the guilt.

3. Section 98 (4), ERA: I applied this section to the relevant findings of fact, namely: -

“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.”

In making this determination by applying s 98 (4), ERA, I had in mind the essence of the test to be applied; namely, it is not what the Tribunal believes to be reasonable or unreasonable, but the test is whether the Respondent acted within the band of reasonable responses: **Iceland Frozen Foods v Jones** ([1982], IRLR, 439, EAT), **London Ambulance Service NHS Trust v Small** ([2009] IRLR 563 CA) and **Sarkar v West London Mental health NHS Trust** ([2010] IRLR 508).

4. ACAS Code of Practice Disciplinary and Grievance Procedures 2015

I considered whether this had been complied with and concluded that it had,

E: SUBMISSIONS

In coming to my decision, I considered the helpful submissions of both Ms Godwins and Mr Foster who made the following key points

E1: Ms Godwins' submissions

1. The Investigation was not reasonable.

2. The Respondent had no evidence to show that the Claimant intended to steal money. Dismissal was not within the range of reason responses

3.The Respondent did not act fairly?

4 The investigator must be even handed. This is throughout the disciplinary process. This was not the case here.

5.An allegation of theft affects an employee's job and reputation.

6.The Claimant had been with the Respondent for 10 years. He received congratulations and length of employment and outstanding service recognition. He loved this job.

7.The Claimant raised the issues of bias by Mr. Nicholls.

8. In relation to Mr Snell's decision, he came to his decision based upon the investigation meeting notes and the CCTV footage. Would Mr Snell looking at that CCT footage have come to the same conclusions if Mr. Nicolls had not made these categorical statements.? A fair investigator. would have asked Janita questions and a fair investigator would have looked at earlier footage.

9. The Claimant said this was all about revenge. Mr Snell did not (69) give the Claimant the opportunity to put his case in relation to revenge.

10.. This was a very serious allegation. CCTV for that area could have been retained.

11. Dismissing the Claimant on a 90 second footage which did not show what the Claimant was doing with his hands was unfair.

12. There was nothing in the CCTV to show the conduct was gross misconduct.

For the reasons set out above, I did not accept Ms Godwins' submissions (other than the undisputed factual matters).

E2 Mr Foster's submissions

1. The Respondent admitted that it dismissed the Claimant for misconduct.

2. It was not a credible contention of the Claimant to assert that the investigating manager Mr Nicholls created a situation for which the Claimant could be accused of misconduct. In any event, Mr Nicholls was not the dismissing officer.

3 In relation to fairness, the employer need not have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief, reasonably tested. In applying the Burchell test, it is necessary to consider whether what occurred fell within the range of reasonable responses of a reasonable employer.

4 The penalty of dismissal must be within the range of reasonable responses. The Tribunal must not substitute its own judgement for that of the employer.

For the reasons above, I accepted Mr Foster's submissions.

F: CONCLUSIONS

Unfair Dismissal

1. Was there a potentially fair reason for the Claimant's dismissal (the Respondent relies on misconduct)?

Yes

1.1 Did the Respondent hold a genuine belief in the Claimant's gross misconduct?

Yes

1.2 Did the Respondent have reasonable grounds for that belief?

Yes

1.3 Was the Respondent's belief based on a reasonable investigation?

Yes

2. Did the Claimant's conduct amount to gross misconduct entitling the Respondent to summarily dismiss the Claimant?

Yes

3. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?

Yes

4. Did the Respondent follow a fair procedure in taking the decision to dismiss the Claimant?

Yes

Wrongful Dismissal

Was the Respondent in breach of contract in its failure to pay to the Claimant notice pay?

No

It is for the aforementioned reasons that I made my determination.

Employment Judge Sharma

Dated: 15 May 2019

Judgment and Reasons sent to the parties on:

17 May 2019

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For the Tribunal Office