EMPLOYMENT TRIBUNALS

Claimant:	**Respondent:**
Ms Belita Costa	**YDLS Commercial Cleaning Ltd (sued as Your Dirty Little Secret)**

Heard at: **Leeds** **On: Friday 31 January 2020**

Before: **Employment Judge R S Drake**

Representation

Claimant:	In Person (supported by Ms R Amaranta - Consultant)
Respondent:	Mr G Woodcock (HR Consultant)

JUDGMENT

1 The title of the Respondents is amended so as to describe them as YDLS Commercial Cleaning Ltd.

2 The Claimant's complaint of unfair dismissal succeeds but I find that she contributed by a factor of 100% to her dismissal by her conduct and resulting loss of trust and confidence to the extent that it would not be just and equitable to award compensation beyond the making of a declaration of unfair dismissal.

3 The claim of unlawful withholding of pay fails and is dismissed.

4 Because this decision was given extempore after deliberation and is now promulgated in greater detail, I have decided to exercise my power under Rule 62 to set out Reasons in full as below.

REASONS

Introduction

First, I record my gratitude to the parties for their effective and in some cases disarmingly candid presentation of their respective cases, helpful and co-operative advocacy, and also very helpful preparation of the presentation of documentary evidence and the presentation of final oral submissions.
Second, though I was able on the day of hearing to reach my conclusion on the merits of the substantive case and give brief oral reasons, I reserved the giving of full reasons and my deliberations.
Third, I was conscious of the fact that the Claimant's first language is Portuguese and though she hadn't sought the services of an official interpreter, her representative could assist her as could I, and much of what she had to say in cross examination was uncontested by the Respondents. I was satisfied through her representative that she understood the nature and purpose of the proceedings and could understand all dialogue within the case and the hearing.

Issues

I determined (with the assistance of the parties and thus largely by agreement) that the issues to be examined were agreed as follows: -

1 Unfair Dismissal

1.1 The parties agree that the Claimant was dismissed;

1.2 Was the Claimant dismissed for one of the potentially fair reasons set out in section 98(1) of the Employment Rights Act 1996 ("ERA")? If so, could the Respondents establish what was the reason (or, if more than one, the principal reason) for dismissal? The Respondent asserts their reasons were principally a reason relating to conduct under S.98(2)(b) ERA 1996 and/or (by implication) some other substantial reason under S.98(1)(b) ERA being consequent loss of trust and confidence;

1.3 If a/the reason for the Claimant's dismissal was related to conduct as alleged:

1.3.1 Can the Respondents show - (i) they genuinely believed the Claimant was guilty of misconduct, - (ii) did they have reasonable grounds for such belief and - (iii) had they identified such grounds after undertaking as much investigation as would be carried out by another reasonable employer?

1.3.2 In short, was the decision to dismiss arrived at in accordance with the above three-part test as set out by the EAT in **BHS v Burchell [1978] IRLR 379**;

1.3.3 If so, did the Respondents act fairly and reasonably in dismissing the Claimant on grounds as pleaded of gross misconduct (for the purposes of section 98(4) ERA 1996)?

1.4 The Respondents also allege that in any event the conduct of the Claimant led to a fatal loss of trust and confidence in her amounting to some other substantial reason justifying dismissal

2 Remedy

If the Tribunal is satisfied that the Respondents can demonstrate that they had in mind a potentially fair reason relating to conduct or loss of trust and confidence, but is satisfied the dismissal was nonetheless substantively and/or procedurally unfair, it would have to determine whether the Claimant would have been dismissed fairly in any event if a fair procedure had been adopted, and whether it would be just and equitable to make a Basic Award of compensation and a Compensatory Award for the purposes of Sections 119, 122 and 123 ERA. This became a live issue once I reached my conclusions as set out below, so I started my consideration with an awareness that this may become a live issue.

The Law

3 The relevant law applicable to this case (I have not quoted each part of the section/subsections not relevant to this case) is set out in Section 98 of the Employment Rights Act 1996 ("ERA") which provides: -

"- (1) In determining … whether dismissal of an employee is fair or unfair it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal - and -

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee…." (my emphasis)

"– (2) A reason falls within this subsection if it -

(a) ……..
(b) It relates to conduct … "(my emphasis)

4 If the Respondent satisfies the test set out in Section 98(1) and (2) ERA as above, then the Tribunal must consider subsection (4) which provides as follows:

> "Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –
>
> (a) Depends 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."

5. The Tribunal takes into account the guidance referred to in the EATs decision of **Iceland Frozen Foods –v- Jones [1983]** (as subsequently confirmed in the Court of Appeal in **Foley –v- Post Office** **and** **HSBC Bank –v- Madden [2000]**) which is to consider whether the employer's actions, including its decision to dismiss, fell within the band of responses which a reasonable employer could adopt in the same circumstances, but not substituting the Tribunal's view for that of the employer, rather by judging whether the Employer had taken the correct approach and acted in a manner it would expect another (i.e. literally just one other) reasonable employer to act.

My findings of Facts and my Reasons

6. I made the following findings of fact based upon evidence which I heard from the Claimant herself and the Respondents' witness Ms Kully Bhatoa who is a Managing Director and was the dismissing officer. Each was thoroughly cross-examined in that where the Claimant had difficulty framing her questions, I framed them for her in the interest of ensuring equality of arms and raised the questions she needed to ask in order to test the oral testimony with which she took issue. I commend both sides for giving candid and frank evidence even where they perceived that in parts it damaged their own positions. I also considered not only the written statements of the above-mentioned witnesses, but also, when attention was drawn to it, the contents of a combined documents bundle comprising over 95 pages. Lastly, time was allowed at the conclusion of oral testimony to enable both sides to express Final Submissions which were also considered in detail.

7. Using abbreviations of "C" and "R" for Claimant and Respondent respectively and referring to witnesses by their initials (**BC** and **KB**) and the documents in bold type page numbers in the Evidence Bundle (**P1 to P95**) or paragraphs in

witness statements, the findings of fact relevant to the Tribunal's decision are as follows: -

7.1 C was employed by R at their client contract locations in Leeds namely Marshall's Mill and Elmwood, and at the time of the termination of her employment by them had been engaged by them since 21 June 2015 (**P4 – ET1)**. At the time of dismissal with immediate effect on 29 May 2019, she held the post of part-time cleaner. Events occurred in May 2019 which gave rise to R calling C to a disciplinary meeting which took place on 28 May 2019. C was given a concise description of the reason for the meeting but only at the meeting and not before.

9.1 There are some conflicts of evidence in the documentary and oral evidence before me. I find the accounts of what happened, and the chronology of events described by R in particular to be persuasive and cogent. Furthermore, I find KB's account of what she learned and what she observed was candid and therefore convincing to the required standard of proof being a balance of probabilities. I do not find any aspect of her testimony, or anything said by C, who took considerable issue with the order of her account of events, to be such as to impeach KB's credibility. The fact that KB's account of the chronology was damaging to her case I found was compelling evidence of its credibility.

9.2 The chronology of main events is as follows but with my further findings about them duly added: -

9.2.1 At some point during the week commencing 20 May 2019 KB was informed by the daughter have another employee called Silvana to say that C and one of her colleagues were not working there proper hours (P69);

9.2.2 K be prepared a letter dated 24 May 2019 (P28) and writes "I am sorry to say that you can no longer work in Marshalls mill anymore the reason for this is because you have not been cleaning the showers which is 2.1/2 hours per day Monday to Friday - at the most you have been cleaning just over half an hour per day - also you have stopped signing in and out of the signing book which you know has to be signed in case of a fire - this is gross misconduct - your last day of work is Friday 24 May 2019";

9.2.3 This letter (P28) is written before any observation of what was happening on site, before any investigation discussion with C and before any disciplinary meeting with C; though KB asserts that the letter was written as a contingency in case it might be needed, I find it clearly shows that she had reached a conclusion to dismiss at this point As no other

alternative contingency letter (such as imposing a lesser outcome than dismissal) was prepared at the same time;

9.2.4 KB attended on site on the afternoon of Friday 24 May 2019 and did not inform her staff that she would be attending. She checked the signing in books and noted that neither C nor her colleague had been signing in since 27 September 2018 which she thought was strange as there is no good reason for this and because all other of her employees who worked on that site had been signing in and out ;

9.2.5 On further examining the signing in book, KB saw that up to 27 September 2018 C would either sign in from 5:30 pm to 8:00 pm or 6:00 pm to 8:30 PM and that this was in line with the total hours she was contracted to work; There existed no written contract as such but it was common ground between the parties that there existed an oral contract requiring see to be on site between the hours mentioned above;

9.2.6 KB noted that on 24 May 2019 both C and her colleague arrived at 5:17pm and CCTV footage disclosed that they were witnessed both leaving site at 6:27pm but did not return before KB herself left site at 8:45pm; Can be found that at no point did see or her colleague tell her that they could not work before shift or ask for reduced or changed hours, so KB concluded that the 2 ladies had not worked their contracted hours but were still claiming wages for the full contracted hours each month without properly working them;

9.2.7 C and her colleague had indeed not worked their full hours at Marshalls Mill and though they said did they had gone to another location, they had not returned to finish their work at Marshalls Mill as alleged; KB's conclusion about this and that C had been paid for working full hours despite not working them was a reasonable conclusion to reach

9.2.8 KB sent a text message to see and her colleague to attend a meeting with her on 28 May 2019 but did not disclose the subject; What amounted to a disciplinary meeting took place on that date at which time KB put to see that she had been not signing in as required and had not been working her full contracted hours;

9.2.9 C's response was that there was nowhere for her to sign in at out but this was unacceptable to KB as she had seen that other employees had been able to do so without difficulty and C had not in the last 8 months complained there was nowhere for her to sign in and out; KB did not find sees response acceptable and did not accept that she

had returned later to work at Marshalls mill having herself been on site until 8:45 PM that day and there is no evidence that C and her colleague had returned at all;

9.2.10 Therefore, KB's original decision to dismiss was confirmed in her own mind at this point in time and she handed over the letter 24 May 2019 (P28) confirming dismissal as of that date as is also confirmed by C's P45;

9.2.11 In one of her final payslips, C could show that though she was entitled to receive the sum of £640.38 payable on 30 April 2019, she didn't receive this as a single payment but by instalments finally discharging this sum by 9 May 2019.

9.5 At all relevant stages, C's protestation but she had not left site on the 24 May 2019 when she was observed to have done so, and had indeed returned to site later, was unconvincing and was not in any way compelling. She did not contest what KB told her or what was revealed in the CCTV footage but sought to contest it today not having obtained an order requiring production of that footage. See did not contest the argument that she had been consistently paid in full for the powers prescribed in her oral contract whether or not according to the evidence he had been observed not working those hours and not signing in properly when required to do so.

9.6 C also questioned KB's reasoning as a witness By arguing that by not producing the CCTV footage and by being allegedly wrong about what she had seen, everything else she was saying in her testimony must be a lie or at least be impeachable in full, to the extent that none of her evidence could be taken as being probative. I find this a farfetched and unrealistic argument in this day and age. I find KB's evidence because of its candour to be probative to the required standard.

9.10 Whether or not it can be said that the dismissal letter dated 24 May 2019 which KB handed to see 28 May 2019 was premature in its preparation and shows what KB was thinking at the earlier date, I am satisfied that on the evidence before me accepted by both sides that had that letter not been written at that early stage and had there been a disciplinary hearing of the kind which eventually took place, in any event C would have been dismissed for what I judge another reasonable employer would regard as being gross misconduct.

9.11 That gross misconduct was not working contracted hours combined with not signing in and out for a consistently long period of 8 months, combined with claiming wages for hours not worked, amounts to gross misconduct and I find that another reasonable employer would conclude that such conduct undermines trust and confidence fatally.

Conclusions on Application of Law to Facts

10 I find that R has shown that C was dismissed because of a reason relating to conduct which is the reason they had in mind for dismissal and that they also had in mind the resultant loss of trust and confidence because of such conduct. I find their procedure was imperfect but not so much as to impeach the finding of gross misconduct but sufficient to render the dismissal unfair. I take the law as described in para 3 above as my guidance and my further findings in this respect are as follows: -

10.1 KB reached this conclusion initially but then had a valid basis, on what was proved or accepted subsequently at the meeting 28 May 2019, which confirmed what KB had discovered and seen with her own eyes and thus constituted what another reasonable employer would conclude was good and compelling evidence of misconduct; there was nothing left to investigate when the picture was confirmed to KB by what she was told in the meting;

10.2 KB did not undertake a process of Disciplinary and Appeal hearing but found that C's responses gave her no reason to depart from what I have described above as a premature conclusion; thus, she was justifiably able to draw a conclusion I would expect of another reasonable employer. I find the **Burchell** test described in para 1.3.2 above to be well and truly satisfied;

10.3 KB's conclusion though premature was later supported as being evidentially sound but because it was premature makes it procedurally questionable and potentially unsound. This does not impeach the reliability of all of R's case but does emphasise the importance of my finding they even had procedure been properly carried out, dismissal would have resulted in any event;

10.4 I find that the conclusion KB actually reached to dismiss falls within a band of reasonable responses the Tribunal would expect from another reasonable employer in the same circumstances as a finding of gross misconduct does not preclude a lesser outcome, but it certainly gives a sound foundation for an outcome of dismissal.

10.5 I reach this finding taking account of the case law guidance described in para 5 above. However, procedure was imperfect for the purposes of section 98 full which is what makes this dismissal unfair but what but one in respect of which I find is a dismissal that would have taken place in any event and was contributed to by sea by a factor of 100%

11 A significant test, as in all unfair dismissal cases, is as set out in **Iceland** and is based on what **an** other reasonable employer might do (emphasis added) not what it might not do, nor what many or all employers would do. The outcome of

dismissal was one which in this case and in this Tribunal's finding potentially fell within the bounds of what "an" other reasonable employer would do in the same circumstances.

12 The dismissal was therefore potentially and therefore substantively fair but procedurally unfair by having been concluded before disciplinary procedure being undertaken. I fond however that had such procedure been undertaken, dismissal would have resulted and would have been legally justifiable according to the **Iceland** test

13 Having concluded that the dismissal was substantively fair but procedurally unfair, and concluded that the part played by C contributed to her own dismissal was by a factor of 100% on the basis of the gross misconduct I have found and which I regard another reasonable employer would find, I have to conclude that for the purposes of sections 119 and 120 to 123 ERA, it would not be just and equitable to make either a Basic or a Compensatory award of compensation in this particular case.

14 The delay in R paying C her April wages amounted to an unlawful deduction as at the date it was due which was then subsequently remedied albeit by late payment,. However, as at today/s date that delay has indeed been remedied so C's claim in this respect fails and is dismissed.

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Employment Judge R S Drake

Date: 31 January 2021

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