



EMPLOYMENT TRIBUNALS

Claimant: Ms Ewelina Malowana

Respondent: Cribben Southampton Limited

Heard at: Bristol (via VHS)

On: 11th & 12th October 2022

Before: Employment Judge David Hughes

Representation

Claimant: Joel Nicholson, SARC Ltd.

Respondent: Martin Nicholson, Pro-Action HR Consultancy

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is well-founded and is upheld.
2. The Respondent failed to comply with its duty under s38 of the Employment Act 2002.
3. The Claimant's claim in respect of a failure to provide payslips is not well-founded and is dismissed.
4. The Respondent is ordered to pay the Claimant the following compensation:
 - (a) Basic award £285.12;
 - (b) £250 in compensation for loss of statutory rights;
 - (c) £3,348.02 in respect of lost earnings, representing 26 weeks' earnings from the date of the Claimant's termination (30th June 2021) @ £128 per week net;
 - (d) £285.12 pursuant to s38(3) of the Employment Act 2002
5. The total sum payable to the Claimant (before recoupment of any benefits paid to her subject to recoupment) is therefore £4,168, of which £3,348.02 represents the prescribed element pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996/2349 and £820.24 represents the balance of the award.

REASONS

Introduction

1. In this case, the Claimant brings claims in respect of unfair dismissal, a failure to provide payslips and a failure to provide a statement of written particulars.
2. It is not in dispute that the Claimant was employed by the Respondent as a waitress from 01.02.2019 to 30.06.2021. On that latter date, she was dismissed for gross misconduct.
3. The case was listed for a hearing on 11th and 12th October 2022, via Video Hearing System. Shortly before the hearing, the Claimant contacted the Tribunal, to check that her representative had asked for a Polish interpreter for the hearing. He had not. It was too late to obtain a Polish interpreter for the first day, but it was possible to obtain one for 12th October. That made it possible to hear the evidence and submissions. It was not possible for me to give a decision, however, on that day, and so I had to reserve my decision.
4. Another potentially complicating factor was that Mr Cribben, the only witness for the Respondent, had included in his statement – which I did not see until the morning of 12th October – details of offers made by the Claimant in the ACAS early conciliation process.
5. The Employment Tribunals Act 1996, s18(7) reads as follows;

(7) Anything communicated to a conciliation officer in connection with the performance of his functions under any of sections 18A to 18C shall not be admissible in evidence in any proceedings before an employment tribunal, except with the consent of the person who communicated it to that officer.
6. The information regarding the Claimant's offer should not have been included in Mr Cribben's statement. Because neither of the representatives had brought its inclusion to my attention, I saw it when reading the statement, although I stopped reading it when I appreciated what it was. I told the parties and their representatives that I had seen this information, which should not have been before me. Both parties were content that I should continue to hear the case, and I have put the inadmissible information out of my mind when considering the case and making my decision.

Issues

7. I canvassed with the parties the issues in the case, and they were agreed to be as follows:

- (a) Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?
- (b) Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
- (c) Did the Respondent adopt a fair procedure?
- (d) If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?
- (e) If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.
- (f) What basic award is payable to the Claimant, if any?
- (g) Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- (h) If there is a compensatory award, how much should it be? The Tribunal will decide:
 - (i) What financial losses has the dismissal caused the Claimant?
 - (ii) Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - (iii) If not, for what period of loss should the Claimant be compensated?
 - (iv) Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- (i) When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?
- (j) If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
- (k) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
- (l) Would it be just and equitable to award four weeks' pay?

What happened

8. Tim's Bistro is a small restaurant in central Southampton. It is the creation of Tim Cribben, who is the chef and lives in a flat above the premises. It opened in February 2019. Mr Cribben had previously operated two other businesses of a similar nature, I was told with some success.
9. When the restaurant opened, the Claimant was the sole employee, I take it other than Mr Cribben. Mr Cribben said in his statement, and I accept, that she was a pleasant worker who was popular with customers. As the business developed, other employees were taken on.
10. During the covid-19 lockdown period, Mr Cribben said that he had time to review the restaurant's financial situation and to go through the records of each day's takings.

11. Mr Cribben explained the process he went through. He would record in his diary which staff worked on particular days, and their shift times. He would record the takings each day after reconciling cash in the till with receipts.
12. Mr Cribben came to believe that money was being stolen from the till. As he said in his statement;

“I did a full review of the period I had been open and found some areas of concern. On a number of days, the till was down a small but round figure of cash. I looked at every alternative explanation for this recurring drop in takings. On further review, I identified that the only member of staff who was working on all the days of takings being down was the Claimant. I was shocked and disappointed at this evidence as EM had been with me from the opening, she was well liked by customers and had been helpful in the early months of business.”

13. In his statement, Mr Cribben also said that the Claimant had seemed less happy after he introduced other staff, but this did not play a part in the events that concern the Tribunal.
14. Mr Cribben says that he took advice from a PR consultancy, and identified that a disciplinary hearing would be required.
15. On 28.06.2021, the Claimant was handed a letter in the following terms:

“Following our conversation of Monday 28th June, I must now inform you that, as a result of some significant concerns that have come to light, you are suspended on full pay with immediate effect. This suspension is in order to allow further investigation to be conducted impartially and fairly and is, in no way, a form of disciplinary sanction against you.

Concerns and Allegations under investigation

I have a number of concerns, the most serious of those being alleged repeated theft of money from the business. Other areas of continuing concern centre around continued behaviour and performance shortfalls, poor timekeeping and unauthorised absences.

The suspension on full pay will not be long term but will be in place during the period of investigation and you will be informed should that change. Once the investigation is complete, I will contact you further to arrange a meeting.

You are requested to remain available within reason should I need to contact you.

Unless you have my prior written consent, you should not, at this stage, access the workplace nor contact any of our customers, suppliers or your work colleagues [or save for your union representative for the purpose of obtaining advice]. Any attempt to influence colleagues involved in the investigation will be dealt with an additional disciplinary issue.

In the meantime, should you have any information that might be of assistance to the investigation or you wish to discuss anything or have any questions, please contact me or my HR Consultant, Brigitte Symes, at the following email address:

brigitte@proaction-hr.co.uk

Disciplinary meeting

16. On 30.06.2021, a disciplinary meeting took place at the Respondent's premises. At the meeting, Mr Cribben was present, together with Brigitte Symes, a HR consultant.
17. At the meeting, a table of allegations was put to the Claimant. I have not included incidents of alleged shortfall that had a line through them on the table that was shown to me in the hearing, and the line-through was said to indicate that they were not considered by Mr Cribben;

Date of shift	Shortfall	Staff on shift
27/04/2019	£20	Claimant and Heather
08/06/2019	£20	Claimant and Heather
21/08/2019	£20	Claimant and Heather
01/10/2019	£10	Claimant and Char
02/10/2019	£20	Claimant and Chloe
14/09/2020	£10	Claimant and Char
25/09/2020	£5	Claimant and Char
07/12/2020	£5	Claimant and Char
03/06/2021	£10	Claimant and Char
04/06/2021	£10	Claimant and Char
08/06/2021	£10	Claimant and Char

18. Mr Cribben put a table containing the above allegations to the Claimant. He discounted some other instances of alleged shortfall, because, he told me, the cashing-up reflected more than one shift. Mr Cribben asked the Claimant if she could offer any explanation as to how the till could be wrong. In his statement, Mr Cribben said that the Claimant "...calmly started talking about the till being temperamental and that other waiting staff put in wrong amounts all the time. She confirmed she had told them to leave money on the Bar so that she could ring it in correctly, but they didn't. At that point, I did point out to EM that I had spoken to her on previous occasions about the risk of leaving money on the bar as that was the walkway through to the customer toilets. She was unable to explain why the amounts missing were always exact amounts or that the missing money always and only coincided with when she was working". He said that the Claimant had also complained that she had repeatedly asked to be allowed to count the float, which Mr Cribben considered to be his responsibility.

19. In her statement, the Claimant said that the only evidence of her stealing money was that money was missing from the till. She said that the restaurant was ran in a chaotic and disorganised way, a consideration she put to Mr Cribben in the disciplinary meeting. She said that she had told Mr Cribben that it wasn't normal to keep losing money, but that he would not give the Claimant more time on shift to count the float. She mentions a time when money was stolen from the workplace, when the culprit was a relative of the Claimant who did not work in the restaurant.
20. In her evidence before me, the Claimant went into greater detail into the alternative explanations she offered at the meeting. She said that there were constant errors on the till, that money was taken out for shopping, for example to buy alcohol for customers, and that, after particularly busy days, Mr Cribben would give the staff extra money to reward good work. She said that the till takings were not always counted promptly at the end of her shift. She generally worked daytime shifts, only rarely evenings, and when she left to collect her child from school, sometimes the takings were not being counted.
21. In his evidence, Mr Cribben said that he discussed with Ms Symes whether a different employee could have been responsible for the missing money, but that no-one else matched up. Ruling out mistakes on the till, he felt that the only conclusion was that the Claimant was taking the money.
22. One matter to which Mr Cribben seems to have attached considerable weight was that the Claimant's demeanour during the meeting was calm, save for a time towards the end when, he said, she had become angry and used obscenities towards him. He felt that her calmness was suspicious, and said that, had he been wrongly accused of something, he'd have been very angry and insulted. He told me that he did not consider for a moment that her calmness might be related to a wish to keep her job.
23. Mr Cribben said that he had spoken to other staff before the investigation into the missing monies, and made them aware that money had been going missing. He sent a letter to each staff member on the subject, but he did not think it necessary to speak to Chloe or Char in the course of the investigation itself.
24. It was put to Mr Cribben that diary entries indicating that he had deducted an equal amount from staff on shift to make up a shortfall showed that, at the time of the entry, he was not confident that the Claimant had been the culprit. Mr Cribben accepted that this was so.

Dismissal

25. Following the disciplinary meeting, the Respondent – in effect, Mr Cribben – decided to dismiss the Claimant.
26. The dismissal letter that was given to the Claimant on 06.07.2021 says that she was given the right to be accompanied by a work colleague, but chose to attend alone. That may be misleading. The Claimant had wanted

to be accompanied by a former colleague, but the Respondent had refused to allow this.

27. The dismissal letter went on as follows;

The Allegations

As you are aware, this hearing was held in relation to a number of concerns and allegations relating to:

- > the more serious allegation of potential gross misconduct of theft of money from the till connected to dates of your shifts only. (Information of dates, missing amounts and rota was provided including dates where you were the only employee on shift)*
- > ongoing poor performance and timekeeping and unauthorised absence*

The Investigation and Disciplinary Hearing

We discussed the matter fully at the hearing. The allegations were identified during a general investigation into ongoing financial position of the business and ongoing concerns around your general poor performance.

During the discussion we considered all the evidence we had and has taken your

explanations and alternative suggestions into account. You denied any involvement re the missing money, offered no alternative suggestions on how the money shortfalls could have happened.

As owner of the business, chef and your manager, I am well placed to give feedback and observations on employees' delivery. I gave clear examples of continued poor performance and behaviour, but you refused to accept them.

The Outcome decision

I can confirm after considering your responses and all alternative explanations, I feel with reasonable satisfaction that you have committed gross misconduct. The discrepancies in money within the till, the dates these discrepancies happened and the circumstances of you being the only employee on rota on those dates strongly suggests that it is reasonable to assume your involvement in the missing money.

There were no mitigating factors raised during the hearing. This letter therefore gives formal confirmation of the termination of your employment for gross misconduct.

The termination of your employment was immediate, and your last working day was Wednesday 30 June 2021. Despite the gross misconduct dismissal, I am willing to make you a payment in lieu of your notice period of two weeks which has already been paid into your account.

Right to appeal

You have the right to appeal against the decision to dismiss you. If you wish to appeal, you should do so in writing within five working days from the date at the top of this letter to Brigitte Symes at brigitte@proaction-hr.co.uk, stating the reasons and grounds for your appeal in that communication.

28. The reference to the Claimant being accompanied was not addressed at the hearing, and I have not considered it in making my decision. It was, however, not the only misleading thing about the dismissal letter. In the hearing, Mr Cribben was clear that the reason for the Claimant's dismissal was his belief that she was stealing money from his business, not any other issues that he may have had with her.

Appeal

29. The Claimant emailed Ms Symes on 06/07/2021, indicating her wish to appeal. In her appeal email, she raised the following points:

- (a) That allegations of theft going back to 2019 had not been raised with her previously;
- (b) That she had frequently raised concerns about the need to check the float before and after her shift, but that Mr Cribben had dismissed these concerns, principally because of time considerations;
- (c) That Mr Cribben was often drunk in the evenings, which contributed to her lack of trust and her concerns about checking the float;
- (d) That Mr Cribben had complained about a relative stealing money from him;
- (e) That Mr Cribben had treated other staff members unfairly, including dismissing a colleague who was pregnant.

30. The appeal was considered by Maria Bristol. She emailed the Claimant on 09/07/2021, the substance of her email reading as follows:

I have been asked to review your appeal and am acknowledging receipt of your email dated 6 July 2021.

Having reviewed the content of your appeal, I am writing to confirm the status.

Your dismissal is based on gross misconduct in relation to theft of money from the till connected to dates of your shifts only and ongoing poor performance, timekeeping and unauthorized absence.

In your email, you make some very serious allegations against the owner without giving any specific evidence or witness information and this does not relate to your dismissal in any way.

The basis of your appeal is to give more information and/or evidence in relation to the reason for your dismissal for review.

I would be very happy to review this again, but you should provide new evidence related to the dismissal for me to do this.

If you wish to provide evidence, then please do so within 5 working days of this email.

31. Mr Cribben had sent a very short response to the Claimant's appeal points on 07/07/2021. It read:

Hi B

Many thanks.

Sure, the point's are irrelevant, especially buying 2 bottles of wine every evening I would be dead. I am also the license holder, drive my car, so hardly going to do that. Also I absolutely did not sack Heather.

...

The email goes on to acknowledge that a relative had stayed with him for a few months in the first lockdown, had stolen money but had done it from "upstairs" i.e. the flat above the restaurant.

32. It is right to say that the relative, whose responsibility for theft from Mr Cribben was asserted in the hearing without contradiction, did not give evidence and was not a party to these proceedings.
33. There was no meeting to consider the appeal. Instead, Ms Bristol emailed the Claimant her conclusion on the appeal on 15/07/2021. Her email read as follows:

I refer to the emails from you in response to your appeal against your dismissal,

which was communicated to you by letter dated 6 July 2021.

In my last email to you, I requested that you submit new evidence to support your appeal.

You have responded with several personal statements which do not give me any further new evidence. However, I have conducted a careful review of the previous evidence to help me to decide in relation to your appeal. I have outlined this below.

Theft

The evidence indicates that money was missing from the till when you were on shift and you being the only employee on rota on each of the dates. Based on this, it is regrettable, but reasonable to assume your involvement.

As a separate matter, you raised a matter of the owner's son stealing. This was a separate matter and was dealt with at the time. It is not linked to the dates and thefts raised with you.

Absences

Although there is no formal policy for this, you have been told that absences must be approved in advance with the owner. You were warned that you should not assume that it is ok to just put these in the diary. You were warned regarding this in writing on 5 September 2020 and you were included in the communication to all staff on 10 June 2021 about this and therefore not treated any differently.

Other Performance Issues

You have been warned on more than one occasion about your timekeeping and the following of business procedures in writing on 5 September 2020. At this time, the owner also acknowledged that he valued you as a staff member but had to raise these issues with you because they could not continue to happen. In addition to this, there is evidence to support the fact that the owner has tried to resolve these matters with you on several occasions in different ways. A business owner is entitled to do this. At no time can I see any evidence to say that you were not hard-working as you state in your email. The following of

business policy and adhering to working hours are a very reasonable request from the business.

Companion

You raised a matter of not being able to bring a companion with you to the hearing.

In fact, you wanted to bring an ex-employee which is not in-line with policy. You were advised that you could bring a current employee such as Chloe with you to the meeting, but you declined. You also stated that Heather was sacked by the owner.

Heather was about to start maternity leave and told the owner she was leaving and, therefore, not dismissed per your allegation.

Based on the above, I feel that with reasonable satisfaction that you did commit gross misconduct, and, therefore, I am not upholding your appeal. Your dismissal will be effective from the original date communicated to you in the dismissal letter.

There is no further appeal against this decision.

Subsequent matters

34. The Claimant said that, after losing her job, she was upset and that her self-confidence was badly impacted. She saw a therapist, and I was shown a letter from the therapist, saying that she had seen the Claimant from July 2021 to February 2022. She described the Claimant as suffering from depression as well as anxiety. This letter was not advanced, I understand, as evidence of a formal diagnosis of any condition, but rather to provide some support for what the Claimant said. I accept that the Claimant was indeed upset at the loss of her job, and that this did indeed impact on her self-confidence.
35. The Claimant was asked about her efforts to find work. She said that she sent out CVs, and went to the job centre. She obtained one interview and attended one trial shift, in a hotel. She told me that only night shifts were available, which were not suitable for the Claimant because of the need to care for her son.
36. In her statement, the Claimant said that, in November 2021, she started up a business as a beautician, fitting hair extensions. She said in her statement that in September 2022, she had made about £500 to £600. In previous months, she had made no more than £300 to £400, and had been relying on Universal Credit. In her evidence before me, she said that she had registered as self-employed in November or December 2021, but had commenced training in her new line of work in March 2022. She said that she did not do this sooner because of her “*mental health*”.
37. The Claimant said that she had been concerned about being able to get a reference, having been sacked for theft, and that is why she concentrated on self-employment.
38. The Claimant told me that, before the hearing, she received a call from Mr Cribben, and a series of messages, which she felt were intimidating and unprofessional. She said that he sounded drunk in the call. He said that he wanted to attend at the Claimant’s home, to deliver her some paperwork relating to the case. The Claimant said that she felt intimidated by this. Mr Cribben accepted in cross-examination that he had sent some text

messages, describing himself as “*extremely silly*”. I saw some text messages and WhatsApp messages, which did not seem to me to be particularly helpful to me in deciding the issues before me.

Law

39. S98 of the Employment Rights Act 1996 provides as follows:

98.— General.

(1) In determining for the purposes of this Part whether the 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 holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability” , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications” , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), 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. There was no dispute in this case that the Claimant was an employee of the Respondent, or that she was dismissed. Although performance issues were mentioned in the dismissal letter, in his evidence before me Mr Cribben made clear that the sole reason for the Claimant’s dismissal was gross misconduct. There was no dispute that that is a potentially fair reason within s98(2)(b).

41. In a conduct dismissal, the issues are those identified (and agreed by the parties) in paragraph 7 above - see J Sainsbury PLC -v- Hitt [2002] EWCA Civ 1588 [2003] ICR 111 repeating earlier authority.

42. The Claimant's claim includes a claim in respect of a failure to provide written particulars. S38 of the Employment Act 2002 reads as follows:

(1) *This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.*

(2) *If in the case of proceedings to which this section applies—*

(a) *the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and*

(b) *when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change) or (in the case of a claim by an employee) 4 under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),*

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) *If in the case of proceedings to which this section applies—*

(a) *the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and*

(b) *when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an worker) under section 41B or 41C of that Act,*

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) *In subsections (2) and (3)—*

(a) *references to the minimum amount are to an amount equal to two weeks' pay, and*

(b) *references to the higher amount are to an amount equal to four weeks' pay.*

(5) *The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*

(6) *The amount of a week's pay of a worker shall—*

(a) *be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and*

(b) *not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).*

(6A) *The provisions referred to in subsection (6) shall apply for the purposes of that subsection—*

(a) *as if a reference to an employee were a reference to a worker; and*

(b) *as if a reference to an employee's contract of employment were a reference to a worker's contract of employment or other worker's contract.*

(7) *For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be—*

(a) *if the worker was employed by the employer on the date the proceedings were begun, that date, and*

(b) if he was not, in the case of an employee, the effective date of termination as defined by section 97 of that Act or in the case of all other workers the date on which the termination takes effect.

43. A claim for unfair dismissal is a claim to which s38 applies.

44. S1(1) of the Employment Rights Act provides as follows:

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) Subject to sections 2(2) to (4)—

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker,

(b) the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work including any terms and conditions relating to—

(i) normal working hours,

(ii) the days of the week the worker is required to work, and

(iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay,

(iia) any other paid leave, and

(iii) pensions and pension schemes,

(da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,

(e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga) any probationary period, including any conditions and its duration,

- (h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,
 - (j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,
 - (k) where the worker is required to work outside the United Kingdom for a period of more than one month—
 - (i) the period for which he is to work outside the United Kingdom,
 - (ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,
 - (iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and
 - (iv) any terms and conditions relating to his return to the United Kingdom
 - (l) any training entitlement provided by the employer,
 - (m) any part of that training entitlement which the employer requires the worker to complete, and
 - (n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.
- (5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—
- (a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and
 - (b) any such provision requires the body or authority to give to a new worker information concerning the [worker's]¹⁸ pension rights or the determination of questions affecting those rights.
- (6) In this section "probationary period" means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—
- (a) commences at the beginning of the employment, and
 - (b) is intended to enable the employer to assess the worker's suitability for the employment.

45. S119 Employment Rights Act 1996 reads as follows:

119.— Basic award.

- (1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—
- (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
 - (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
 - (c) allowing the appropriate amount for each of those years of employment.
- (2) In subsection (1)(c) "the appropriate amount" means—
- (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
 - (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
 - (c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

46. I have considered ss120-122 and 126, but do not set them out here as they are not relevant to this case.

47. The Employment Protection (Recoupment of Benefits) Regulations 1996/2349 may be of relevance. Reg 3 provides that the Regulations apply to payments described in column 1 of the Schedule to the Regulations. A payment under s112(4) of the Employment Rights Act 1996 – an order for compensation where no order for reinstatement or re-engagement is made – is included as item 7 in the Schedule.

48. Reg 4 provides as follows:

(1) Where these Regulations apply, no regard shall be had, in assessing the amount of a monetary award, to the amount of any jobseeker's allowance, income-related employment and support allowance, universal credit or any income support which may have been paid to or claimed by the employee for a period which coincides with any part of a period to which the prescribed element is attributable.

(2) Where the employment tribunal in arriving at a monetary award makes a reduction on account of the employee's contributory fault or on account of any limit imposed by or under the 1992 Act or 1996 Act, a proportionate reduction shall be made in arriving at the amount of the prescribed element.

(3) Subject to the following provisions of this Regulation it shall be the duty of the employment tribunal to set out in any decision which includes a monetary award the following particulars—

(a) the monetary award;

(b) the amount of the prescribed element, if any;

(c) the dates of the period to which the prescribed element is attributable;

(d) the amount, if any, by which the monetary award exceeds the prescribed element.

(4) Where the employment tribunal at the hearing announces to the parties the effect of a decision which includes a monetary award it shall inform those parties at the same time of the amount of any prescribed element included in the monetary award and shall explain the effect of Regulations 7 and 8 below in relation to the prescribed element.

(5) Where the employment tribunal has made such an announcement as is described in paragraph (4) above the Secretary of the Tribunals shall forthwith notify the Secretary of State that the tribunal has decided to make a monetary award including a prescribed element and shall notify him of the particulars set out in paragraph (3) above.

(6) As soon as reasonably practicable after the Secretary of the Tribunals has sent a copy of a decision containing the particulars set out in paragraph (3) above to the parties he shall send a copy of that decision to the Secretary of State.

(7) *In addition to containing the particulars required under paragraph (3) above, any such decision as is mentioned in that paragraph shall contain a statement explaining the effect of Regulations 7 and 8 below in relation to the prescribed element.*

(8) *The requirements of paragraphs (3) to (7) above do not apply where the tribunal is satisfied that in respect of each day falling within the period to which the prescribed element relates the employee has neither received nor claimed jobseeker's allowance, income-related employment and support allowance, universal credit or income support.*

Findings on the issues

49. I am satisfied that Mr Cribben – who was the relevant decision maker – had a genuine belief that the Claimant was indeed guilty of stealing money from the Respondent. Indeed, the Claimant's representative did not challenge this at the hearing. This was, he told me, the only reason why she was dismissed, and I make no findings on the other matters mentioned in the dismissal letter.

50. If that belief were based on reasonable grounds, and arrived at following as reasonable investigation as was warranted in the circumstances, I would have no difficulty in finding that dismissal was within the range of reasonable options open to the Respondent.

51. The first real issue I have to decide is, whether the belief was based on reasonable grounds and whether it was arrived at following as reasonable an investigation as was warranted in the circumstances. Although these are separate questions, they are in this case very closely related.

52. Pages from diaries kept by Mr Cribben were disclosed in this case. The diaries were used by Mr Cribben to create the table that was put to the Claimant in the disciplinary meeting. 7 pages were produced before me, showing the following:

(a) On Monday 27 July, there is an entry with "*till down £20 cash*". The year is not given, but 27 July was a Monday in 2020;

(b) On Friday (it appears – it is difficult to make out the day on the image provided to me) 28 August, there is an entry saying "*£30 DOWN AGAIN!!*". 28th August was a Friday in 2020;

(c) An entry for 9th September records "*TILL £10 CASH DOWN TUESDAY*". The note indicates that £5 was deducted from both the Claimant and Chloe. The day of the week of the entry appears to be Wednesday, which is consistent with the reference to Tuesday in the note, and 9th September 2020 was a Wednesday;

(d) An entry for an unspecified date records "*£319 (-£25) WTF*";

(e) An entry for Monday 5th October – consistent with the year being 2020 – records "*£335(-£15)*";

(f) Another unspecified entry records "*£20 TILL DOWN*";

- (g) The final diary page shown to me is for another unspecified date, and does not appear to show any reference to the till being down.
53. Comparing the diary dates with the table that was, so I was told, compiled on them, it is apparent that none of them corresponds with a date included in the table. They also do not correspond with the instances recorded on the table but not considered in deciding to dismiss the Claimant. Asked about this in the hearing, Mr Cribben's answer was that there would be other diary entries from which the table was compiled, and that he was just asked to provide a handful of them.
54. I accept that the Respondent is a very small business, with limited resources to conduct an investigation. But Mr Cribben arrived at the conclusion that the Claimant was responsible for theft based on diary entries. He described that conclusion in the hearing as being obvious from the start, looking at the diary information.
55. I accept that a pattern of missing monies from the till, showing the Claimant to have been the only employee working on all instances when this happened, might well have provided reasonable grounds for an inference that she may have been responsible. But a proper investigation, even in as small a business as that run by the Respondent, required, I consider, that diary entries be checked, and match up with the allegations to be put to the Claimant.
56. That did not happen in this case. On the material before me, allegations of theft were put to the Claimant, supposedly on the basis of diary entries, but which do not appear to be supported by diary entries. I am not satisfied by Mr Cribben's answer that he was asked to produce only some pages from the diary, and that there were other pages which would have supported the allegations in the table.
57. The diary entries are important in another way: Mr Cribben's evidence was that the till reconciliation either never (initially) or rarely (slightly later in the hearing) showed discrepancies of the sort that may arise from, for example, the wrong change being given. Leaving to one side the consideration that this may seem improbable, the diary entries shown to me indicate that, on dates other than those concerning allegations, money was missing from the till. That these entries exist is inconsistent with Mr Cribben's initial evidence that discrepancies never arose, and the emphatic nature of the entries may be thought inconsistent with his later position, that they arose only very rarely.
58. I am not satisfied that the table of allegations put to the Claimant was one reliably prepared with reference to diary entries. I have already indicated that a proper investigation into allegations based on diary entries, should be based on diary entries that exist. I am not satisfied that that was done in this case. I am also satisfied that the material before me – the Claimant's evidence, and the diary entries I have seen – indicates that discrepancies in till reconciliation probably were a more frequent occurrence than Mr Cribben said.

59. In the circumstances, I am not satisfied that the investigation was reasonable. It was based on a table that did not, I find on the material before me, accurately reflect diary entries on which it was said to be based.
60. I am also not satisfied that Mr Cribben's genuinely held belief that the Claimant was responsible for the missing money was based on reasonable grounds. The table that he drew up did not, on the material before me, bear any relation to the diary entries on which it was said to be based. And I accept the Claimant's account of a somewhat chaotic workplace in which till discrepancies were a not-infrequent occurrence. Mr Cribben's belief in the Claimant's guilt was based, in significant part, on a belief that I find to be incorrect – that till discrepancies were a rare occurrence. I make no findings as to her suggestions that Mr Cribben was often drunk. Those suggestions were not given great prominence in the proceedings before me, and may be something of a distraction. The important thing is that, I have found, the workplace was somewhat chaotic. Why it was so does not seem to me to matter.
61. The next issue identified at the outset of the hearing was, did the Respondent adopt a fair procedure? I find that it did not. Allegations were put to the Claimant said to be based on diary entries. I am not satisfied that they were so based. Underlying the allegations put to the Claimant was the suggestion that, save for the occasions in the table, till discrepancies were rare. I am not satisfied that that was so. A fair procedure would have involved taking reasonable steps to ensure that allegations said to be based on diary entries were consistent with the diary entries. It would have involved a proper consideration of whether diary entries supported Mr Cribben's belief that till discrepancies were otherwise a rarity. Neither of those things happened.
62. It follows from what I have said, that I find that the Claimant was unfairly dismissed.
63. The next issue is, would the Claimant have been fairly dismissed in any event? Mr Nicholson addressed me on Polkey¹, saying that, had a further investigation taken place, it was doubtful that any individual would have been conclusively proven to have stolen. The Claimant would have still been dismissed, had no more detail emerged. He did not, however, suggest a figure that he contended should represent any Polkey reduction, should I find in favour of the Claimant.
64. Neither representative addressed me on the law on Polkey. One way that the test in Polkey has been formulated is in the question, what are the chances that, following a reasonable investigation and a fair disciplinary procedure, the employer would have fairly dismissed the Claimant? In the case of Software 2000 Ltd -v- Andrews², it was recognised that the exercise is, to some extent, speculative, but that "*...there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the*

¹ Polkey -v- A.E. Dayton Services Ltd [1988] AC 344.

² [2007] ICR 825.

tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.³

65. I do not consider in this case that there should be a Polkey reduction in the Claimant's compensation. I do not think that I can say with any degree of confidence that this Respondent would have fairly dismissed the Claimant in any event. The question is not whether all doubt could have been resolved as to the Claimant's responsibility for any theft, and I recognise that the exercise is one of prediction and an assessment of the chances of a fair dismissal happening. But the investigation in this case appears to me to have been so poorly done – the failure to match up the allegations made against the Claimant with diary dates is a very basic error, for example – that the exercise of seeking to reconstruct what might have happened is so riddled with uncertainty that no sensible prediction can be made. One simply cannot say with any degree of confidence that, had it done a proper investigation, there was X possibility that this Respondent would have fairly dismissed the Claimant. I therefore decline to make any Polkey reduction.
66. The next issue is, if the dismissal was unfair (which I find that it was), did the Claimant contribute to the dismissal by culpable conduct? The Respondent did not contend that she had, and I find that she did not.
67. The Claimant submitted a schedule of loss. She sought a basic award of £257.54, and a sum of £250 was sought for loss of statutory rights. These amounts were not disputed.
68. There is a potential issue in basing the claim for the basic award on the Claimant's net weekly wages, when the correct basis for the calculation of the basic award is gross wages. The payslip put before me for the period ending 25th June 2021 includes an item described as "2 weeks notice @£8.91 £285.12". It seems that the latter figure represents 2 weeks' gross pay for the Claimant – deductions are shown elsewhere on the payslip – and that is the sum I award.
69. Her schedule of loss sought a sum of £257.54 in lieu of notice. I was told, however, that a payment in lieu of notice had been made, and the Claimant's representative invited me not to consider this.
70. The Claimant did not press her claim insofar as payslips were concerned, and I dismiss that element of her claim.
71. The Claimant sought a compensatory award of £3,348.02. This represented 26 weeks net pay at £128 per week. Although she had told me that her business has more recently generated an income, in her live evidence she said that she did not start trading for it until March 2022. A 26 week period after the end of the Claimant's employment would finish before March 2022.
72. Although the Claimant's evidence could have been fuller, the main thrust of the challenge to it from the Respondent related to why she hadn't

³ Per Elias J @ para 54.

progressed alternative work earlier. I am satisfied that the Claimant was concerned about getting a reference, that she did not pursue the hotel work after a trial shift because of the time of shifts that were available, and that she has behaved reasonably in starting her own business. Her claim covers a period that ends before she was trained for her new line of work, and I find that she probably did not generate any net income in the 26 weeks after she was dismissed, and probably not for a time after that. On the basis of the evidence before me, I think it reasonable to award the Claimant compensation based on 26 weeks' lost earnings. I am aware that the Claimant acknowledges that she was paid in lieu of notice. I take that into account, but it does not change my decision regarding her lost earnings. She appears from the payslips provided to have been paid 2 weeks' pay in lieu of notice. 28 weeks from her dismissal would take one to early January 2022, some time short of when the Claimant started her beautician training.

73. Mr Nicholson for the Claimant touched on the fact that any award I might make to the Claimant in respect of lost earnings may be subject to recoupment. In the Judgment that precedes these reasons, I set out the element of the compensation I award – called the prescribed element – that may be subject to recoupment.
74. The Claimant sought an award under s38 of the Employment Act 2002. It was not contested that no statement of written particulars had been provided to the Claimant. As I have found in her favour, I am obliged by s38(3) of the Employment Act 2002 to make her an award pursuant to that section, unless I find that are exceptional circumstances which would make an award unjust or inequitable. It was not contended on behalf of the Respondent that it would be unjust or inequitable to make an award.
75. The award that I am obliged to make is one of 2 weeks' pay. Although I can award up to 4 weeks' pay, in her schedule of loss the Claimant limited her claim to 2 weeks' net pay.
76. This position unfortunately overlooks the fact that a week's pay for the purposes of s38 is gross pay, not net pay. On the same basis as set out in paragraph 68 above, I award the sum of £285.12 under this heading.
77. The Claimant did not seek any uplift for any failure to follow the ACAS code for disciplinary and grievance procedures.
78. I therefore award the Claimant the following sums:
 - (a) Basic award £285.12
 - (b) Compensation for loss of statutory rights £250
 - (c) Compensation for lost earnings £3,348.02
 - (d) Award pursuant to s38(3) of the Employment Act 2002 £285.12.

Case Number: 1403864/2021

Employment Judge Hughes
Date: 08 November 2022

Reserved Judgment & Reasons sent to the Parties:
15 November 2022

FOR EMPLOYMENT TRIBUNALS