



EMPLOYMENT TRIBUNALS

Claimant Ms V Candiotti Vega
Represented by Ms C Elves of Counsel
Respondent Clearlake Cleaning Ltd
Represented by Mrs A Ralph, Consultant
Employment Judge Ms A Stewart (sitting alone)

Held at: London Central by CVP **on:** 16, 17 & 20 March 2023

JUDGEMENT

1 The Claimant is to be regarded as unfairly dismissed under section 104(i)(b) of the Employment Rights Act 1996 because the principal reason for her dismissal was the assertion of her statutory right not to suffer unlawful deductions from her wages.

2 Further and alternatively the Claimant was unfairly dismissed within the meaning of section 98 of the Employment Rights Act 1996.

3 The Claimant did not contribute, by her own conduct, to her own dismissal.



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REASONS

Introduction:

1 The Claimant complains that on 17 March 2022 she was substantively and procedurally unfairly dismissed from her employment as a cleaner and that she was dismissed because she asserted her statutory right not to suffer unlawful deductions from her wages. She started her employment on 3 October 2017.

2 The Respondent contends that she was fairly dismissed for gross misconduct.

3 The Tribunal heard evidence from the Claimant and from Mr Richard Jackson, the director and business owner. The Tribunal had the benefit of the services of Ms S de Sainte Croix, a Spanish interpreter throughout the hearing.

The Issues

4.1 The issues which the Tribunal has had to determine were as follows:

- (i) What was the reason for dismissal, and in particular was it a reason related to the conduct of the Claimant as the Respondent

contends, or because she had asserted a statutory right, as the Claimant contends?

- (ii) Did the Respondent hold a genuine belief, on reasonable grounds, after a reasonable investigation, in the Claimant misconduct?
- (iii) If so, did the Respondent behave reasonably or unreasonably in treating that reason as sufficient reason for dismissing the Claimant in all the circumstances?
- (iv) If the Claimant is found to be unfairly dismissed then to what extent if any did she contribute by her own actions or conduct to her own dismissal?

The Facts

5 The Claimant was employed as a cleaner at the Wigmore Hall London, initially for 15 hours a week at a monthly wage of £646.00. Her first language is Spanish and her application form and employment contract was in English, Spanish and Portuguese. However, the second page, which set out the disciplinary and grievance procedures and additional terms and conditions was solely in English, although the parties signed both pages. The Handbook was also in English only.

6 The Claimant's understanding of English is poor and insufficient to understand anything of importance or complexity. Her grasp of cleaning and building vocabulary, for the purposes of her job, is probably of a slightly better standard, although she habitually uses the Google Translate service on her mobile phone or involves her partner Cesar to translate in any conversation in English, beyond the very basic.

7 On 26 February 2020 the Claimant was issued with a Final Written Warning, to expire after 18 months, for non-attendance at work on 3 days without informing the Respondent, for logging out after half an hour and going home unwell without informing the supervisor and for not being found onsite by Mr Jackson, after she had been logged in. The Claimant stated that she knew what the warning was about but did not understand any of the procedural material offering her a right to appeal and had not had it translated.

8 During the Covid period, from October to December 2021 the timesheets show that the Claimant often worked a very large number of hours, for example 84 in one 5 day week, as 'cover and overtime'. During this period her partner Cesar was the supervisor responsible for filling in the timesheets. The Claimant said that she did these hours in order to help out because no one else could be found to do it, that she was covering other peoples' jobs and the concerts in the evenings. Mr Jackson in October 2021 offered her the role of cleaning supervisor. She therefore had a set of keys to the building.

9 During January 2022 Mr Jackson informed the Claimant that things would have to go back to pre-covid normal, with hours being reduced to normal, as the recent situation had been 'budget-busting', and with her role as supervisor being removed. However, she stated that she was asked by Mario, another supervisor, who also had keys, to keep her own set, to unlock all of the buildings doors, as she usually arrived first. This she continued to do with the Respondent's knowledge.

10 On 21 January 2022 the Claimant sent a detailed email to Mr Jackson replying to his news, in which she complained about Mario's laziness at work, which she was making good, and saying that she had worked tirelessly throughout the covid period when the Respondent had really needed someone and that she now felt cast aside and unhappy.

11 On 28 February 2022 the Claimant raised a series of under-payment issues with Mr Jackson by text message; non-payment for the Christmas party on 14 December 2021, part of her January and February earnings and 16 days unpaid leave for 2021. These sums amounted to £394.37 and £538.34 for holiday untaken. Mr Jackson did not reply.

12 On 14 March 2022 the Claimant set out these payment issues in detail in an email, asking him to put things right as they had been owing since December. Mr Jackson did not reply. The Claimant consulted her Trades Union representative.

13 On 16 March the Claimant sent another text to Mr Jackson asking for an answer to her queries as soon as possible, given the end of the fiscal year in early April. Mr Jackson replied by text asking why she was not at work and why she had been in the downstairs toilets and saying he would be there the following morning to discuss her texts and emails.

14 The crucial meeting took place at between 7am and 7.32am on 17 March 2022 on the second floor of the Wigmore hall and there is a stark dispute of facts about what occurred at that meeting. The Claimant states that she raised the pay issue and said she would use her union representative's help in recovering her unpaid wages; that at this, Mr Jackson got upset and angry and told her that she was fired with immediate effect; she was unsure whether she had understood correctly and used Google translate, that Mr Jackson typed in "you are fired" and it translated this into Spanish; she states that she felt distressed and humiliated and when Mr Jackson demanded the return of her keys, she initially refused because she was afraid that if she hadn't been paid whilst employed, she stood even less chance of being paid after being dismissed, and also that Mr Jackson might later deny that she had returned the keys and demand a lost keys payment of £250.00, as had happened to another colleague. She then called Cesar on her mobile and told him what had happened, and while on this call, she made her way to leave the building, feeling intimidated, although Mr Jackson tried to block her exit. After leaving she continued to speak with Cesar and 15 minutes later, after calming down, she states that she returned to Wigmore Hall to return the keys to Will,

the Manager in person. She found the Will was not yet in and after waiting for a while, went up to the Music Director's office on the 3rd floor, tried to explain the situation to her, and asked permission to take a photo of the keys on her desk. This person then phoned Will and explained to him and they both went down to Will's office and put the keys there and took another photograph. These key photographs were timed at 8.14 and 8.23 am.

15 However, Mr Jackson denies having orally dismissed the Claimant at that meeting. He states that the meeting was amicable and that they agreed about the unpaid wages and then he asked the Claimant to return the keys because she had been seen in unauthorised parts of the building and had taken photographs of the cleaning flaws of other cleaners and potential failures of supervision, since she seemed to have built up a resentment against Mario; that she then became aggressive and refused to hand the keys over. He followed her outside and asked again for the keys and she said 'tomorrow' as she was walking away at 7.32.

16 At 7.34 Mr Jackson sent a text to the Claimant saying that he would be reporting the theft of the keys to the police since he had legitimately requested them back from her. At 8.07 he sent an email summarily dismissing the Claimant 'following discussions with you this morning and your refusal to hand over the keys' and saying that the matter would be reported to the police if they were not returned to himself or to Wigmore hall management by midday the next day. The email also says 'that holiday pay and disputed extra hours would be paid to her on 28 March as agreed this morning.'

17 After careful consideration of all the evidence before it, the Tribunal concluded, on a balance of probabilities, that it preferred the Claimant's account of events on that morning because there were certain inconsistencies in the Respondent's case:

(i) In paragraph 6 of his statement Mr Jackson said that he had told the Claimant at the meeting that he would investigate whether her holiday pay had taken into account the amount of overtime she had worked. However, Mr Jackson said in Tribunal that all of the pay discrepancies were amicably agreed between himself and the Claimant at the start of their meeting.

(i) Mr Jackson said in paragraph 7 of his statement that the Claimant could access her work areas in the building even without the keys, using an access code and that therefore the removal of her keys was not necessarily consistent with her being dismissed and that he had asked for the keys in order to stop the Claimant entering unauthorised areas of the building. However he admitted in cross-examination that she could not enter the building at all without the keys.

(ii) The Grounds of Response, paragraph 13, says that "no keys have been returned", but Mr Jackson has known since 9.01 on 17 March from Wigmore management that the Claimant had returned the keys to them.

(iii) Mr Jackson admitted in cross-examination that he had never actually raised the issue of 'unauthorised areas' in the building with the Claimant and could not define what these were, save to say that it was understood that the Claimant should confine herself to those areas which she cleaned. It was noted that Mr Jackson had asked the Claimant why she was in the downstairs (public) toilet on one occasion, as she did not clean that area, but he had never raised any other 'unauthorised areas' at any time.

(iv) Mr Jackson also raised the potential fear that the Claimant may misuse photographs of cleaning flaws in other parts of the building, for the first time during this hearing. However, this was never raised with the Claimant.

18 The Claimant was paid all of the disputed wages amounts in the end of March payroll.

The Law

19 As to the law, the Tribunal directed itself as follows:

(i) It is for the employer to show the reason or the principal reason for dismissal and that it was one of the potentially fair reasons for dismissal as set out in **Section 98(2) of the Employment Rights Act 1996**, materially in this case, a reason which ... (b) relates to the conduct of the employee.

(ii) In order to establish conduct as a fair reason for dismissal, the employer is required to show that it entertained a genuine belief, based on reasonable grounds, after a reasonable investigation that the employee had mis-conducted herself (**British Home Stores v Burchell** [1980] ICR 303).

(iii) If the employer shows a potentially fair reason for dismissal, the Tribunal must then consider whether the employer acted reasonably or unreasonably in all the circumstances (including the size and resources of the organisation) in treating the reason shown as sufficient reason for dismissing the employee, and this question shall be determined in accordance with equity and the substantial merits of the case (**Section 98(4) of the Employment Rights Act 1996**).

(iv) The question for the Tribunal is whether the employer acted within the range of reasonable responses of a reasonable employer in dismissing the employee and it is not for the Tribunal to substitute its own view for that of the reasonable employer (**Iceland Frozen Foods v Jones** [1982] IRLR 439).

(v) **Section 104(1)(b) of the Employment Rights Act 1996** provides that an employee shall be regarded as unfairly dismissed if the reason or the principal reason for the dismissal is that the employee asserted a statutory right.

(vi) Compensation will be reduced to the extent that the Tribunal finds that an employee's own actions have caused or contributed to her own dismissal (**section 122(2) and section 123(6) Employment Rights Act 1996**)

Conclusions:

20 The Tribunal formed the view that the conversation which took place on the morning of 17 March 2022 was against a background of mistrust on both sides, in the relationship. The Claimant was most immediately doubtful that Mr Jackson would pay her for the hours which she had worked and about which he had not replied to her earlier requests.

21 On Mr Jackson's side, the Tribunal concluded that he mistrusted the Claimant on the basis of the issues for which she had received a Written Warning in 2020 and suspected that she may not have actually worked all of the large number of overtime hours for which she had claimed between October and December 2021; in other words that he may have been paying for hours not actually worked and where the timesheets had at times been completed by the Claimant's partner. However, the Warning had expired in August 2022 and any other doubts which he may have had subsequently had not been raised with the Claimant and she had therefore not been in a position to respond.

22 Nevertheless, the Tribunal concluded that Mr Jackson's previous doubts and mistrust had informed his behaviour in relation to the Claimant at that meeting on 17 March 2022, when the issue of unpaid wages was being discussed. He may well have been angered at the mention of the Trades Union assisting in pursuing her claim for unpaid wages; wages which Mr Jackson had described as 'budget-busting' and which he privately doubted were properly owing. It is not credible, given the lack of evidence about 'unauthorised areas' of the building, that this formed the major reason in his mind for demanding the return of the keys at that particular moment, a request entirely consistent with telling the Claimant that she was fired. Nothing else occurred which could account for his oral dismissal on that morning and the Tribunal concluded that, on a balance of probabilities, the demand for unpaid wages was the principal reason for firing the Claimant at that time.

23 Demanding unpaid wages is the assertion of the statutory right not to suffer unlawful deduction of wages under **section 13 Employment Rights Act 1996**. The Claimant's complaint of unfair dismissal under **section 104(1)(b) of the Act** is therefore well-founded and succeeds.

24 Turning to the complaint under **section 94 of the Act**: even if the Claimant had been dismissed by the Respondent's email sent at 8.07 on 17 March 2022, instead of orally at around 7.15, the Tribunal would have concluded that the Claimant had been unfairly dismissed, within the provisions of **section 98 of the Employment Rights Act 1996** for the following reasons:

(i) Theft - the appropriation of property belonging to another, with the intention permanently to deprive – is a very serious criminal offence. It is not credible that Mr Jackson entertained a genuine belief that the Claimant intended to steal the Wigmore Hall keys. Firstly, by his own account, she shouted ‘tomorrow’ at him as she left the premises. Had he been so very seriously afraid, he would have informed the police at once, as he threatened to do. He did not inform the police at any time.

(ii) Even if Mr Jackson did believe that the Claimant may deal with the keys in a manner inimical to his proper custody of them, for example by losing them or having them copied, this belief was not held on reasonable grounds. It was very much in the context of historical mistrust of the Claimant’s previous attendance discrepancies, failure to use a log in (which was however often out of order), Cesar’s role in filling out the time sheets, the many overtime hours claimed and matters dealt with in the previous 2 year old, expired, Written Warning. There was no history of abuse of keys or other property by the Claimant and he had himself promoted her to supervisor after the Written Warning had been issued. Mr Jackson’s grasp of proper disciplinary procedure was not thorough. For example, he raised the previous Written Warning in the context of the Claimant’s dismissal, when by the Respondent’s own procedures it had expired more than 6 months previously.

(iii) Further, there was no investigation whatever into the theft allegation. It is trite law that the more serious the conduct alleged the more careful and thorough must be an investigation before acting to dismiss an employee. Had Mr Jackson taken the time to go back into the hall, or to telephone the manager to check whether or not the keys had been returned, he would have soon found that they had been. Then it would have remained for him to conduct a proper disciplinary meeting with the Claimant in order to seek an explanation of why she had refused to hand them back to him in person, but preferred to hand them to Wigmore management.

(iv) This employee had very serious difficulties in understanding English, which Mr Jackson well knew, as she frequently resorted to Google Translate during any but the most mundane conversation with him. A reasonable employer will always ensure that an employee is given every opportunity to understand, prepare for disciplinary process and have proper opportunity to present their side of the case, whenever misconduct is alleged, especially very serious criminal misconduct.

(v) In the above respects the Respondent, in dismissing the Claimant, did not act within the range of reasonable responses of a reasonable employer and the Claimant was accordingly unfairly dismissed within the meaning of **Section 98(4) employment Rights Act 1996.**

25 Contributory conduct: The Respondent contends that the Claimant was 75% responsible for her dismissal because she left the building with the keys, having been asked to hand them over to Mr Jackson. The Claimant contends that there was no culpable contributory conduct and no harm done

to the Respondent since the Claimant returned the keys to the Wigmore management shortly afterwards.

26 The Tribunal having concluded that the Claimant was orally dismissed before she was asked for the keys, her retention of them cannot have contributed to her own dismissal. Had she not been orally dismissed first, the Tribunal would have been minded to find 5% contributory conduct by walking away from the building with the keys and retaining them for less than half an hour, on the basis that she went back after some 15 minutes to wait for the manager. The Tribunal would not have been minded to find a higher percentage of contributory conduct because the Claimant was unable, due to language constraints, to explain her various concerns about handing the keys to Mr Jackson in person and her intention to hand them to Wigmore Hall management directly.

27 A provisional remedy hearing date has been agreed to take place on 27 April 2023 and the parties' representatives have undertaken to agree a List of Remedy Issues, including alleged failure to mitigate, and to otherwise collaborate in preparatory steps for that hearing.

Signed: Employment Judge A Stewart

Employment Judge

Date 21 March 2023

Judgment sent to the parties on

22/03/2023

FOR THE TRIBUNAL OFFICE