



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105864/2024

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Held in Glasgow on 14 October 2024

Employment Judge R King

10 Ms M English

Claimant
Represented by:
Mr R Gilmour - Lay
Representative

15 Paul Cowan/PMS Leisure Services Ltd

Respondent
Not present and
Not represented

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed and that the respondent is ordered to pay the claimant –

- a basic award for unfair dismissal in the sum of **£1,029.60**
- a compensatory award of **£10,362.32** made up of the following components
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(1) Past loss of earnings in the sum of **£5,162.35**

(2) Past loss of employer's pension contributions in the sum of **£74.98**

(3) Future loss of earnings of **£2,732.52**

(4) an award for loss of statutory rights of **£400**

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(5) An uplift of 25% on the total of components (1), (2), (3) and (4) of the compensatory award because of the respondent's unreasonable failure to follow the Acas Code of Practice, said uplift amounting to **£1,992.47.**

- The recoupment regulations apply:
 - The prescribed element is £5,162.35.
 - The prescribed period is 10 May 2024 to 14 October 2024
 - The total award is £11,391.92.
 - 5 ○ The balance is £6,229.57.

REASONS

1. The claimant alleges that the respondent unfairly dismissed her. The respondent had not lodged an ET3 response and was not in attendance nor represented at the hearing. The Tribunal was satisfied that the respondent had received formal intimation of the notice of hearing in order that it could seek to take part to the extent permitted by the Tribunal.
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2. The claimant gave evidence on her own behalf and referred to documents that had been provided to the Tribunal in advance of the hearing. The Tribunal found the claimant to be a credible and reliable witness.

15 Relevant law

Unfair Dismissal

3. Section 94 of the Employment Rights Act 1996 (ERA 1996) provides the claimant with the right not to be unfairly dismissed by the respondent.
4. It is for the respondent to prove the reason for dismissal and that it is a potentially fair reason in terms of section 98 (ERA 1996). At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal; merely that it was capable of doing so.
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5. If the reason for dismissal is potentially fair, the Tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 94 (ERA 1996). This depends on whether in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or
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unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry, the onus of proof is neutral.

6. If the reason for the claimant's dismissal relates to the conduct of the employee, the Tribunal must determine whether at the time of the dismissal, the respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation – ***British Home Stores v Burchell 1978 IRLR 379.***
7. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range.
8. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss – ***Iceland Frozen Foods Limited v Jones 1983 ICR 17 EAT.***
9. Any provision of a relevant Acas Code of Practice, which appears to the Tribunal may be relevant to any question arising in the proceedings, shall be considered in determining that question (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).
10. The Acas Code of Practice on disciplinary and grievance procedures provides that:
 - a. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of these decisions;
 - b. Employers and employees should act consistently;
 - c. Employers should carry out any necessary investigations to establish the facts in the case;

- d. Employers should inform employees of the basis of the problem and give them an opportunity to put their case and response before any decisions are made;
- e. Employers should allow employees to be accompanied to any formal disciplinary or grievance meeting; and
- f. An employer should allow an employee to appeal against any formal decision made.
11. The code also provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

10 **Findings in fact**

12. Having heard evidence, the Tribunal makes the following findings in fact.

Background

13. The respondent employed the claimant from February 2021 until her summary dismissal on 10 May 2024. She was employed as a bar manager at The Portmann Hotel, 42 Portland Road, Kilmarnock, East Ayrshire where she was responsible for overseeing the running of the bar and the hotel check in. She reported to Paul Cowan whom she understands was one of the business owners.
14. The claimant was contracted to work 20 hours per week each weekend and her rate of pay was £11.44 per hour. She was paid weekly, and her gross and net pay by the date of her dismissal were £228.80 and £224.45 respectively. Her employer also contributed £3.26 to her pension each week.
15. The claimant also often worked additional hours during the week over and above her contracted hours for which she was paid cash in hand. She was unaware whether or not the respondent deducted any tax or national insurance from her pay for those additional hours worked.

The claimant's telephone conversation with Mr. Cowan on 12 April

16. On Friday 12 April 2024 Mr Cowan telephoned the claimant and told her not to come in for her planned shift that day. When she asked, he refused to tell her why, but he said he would explain matters to her when they next saw each other on the following Monday 15 April. During this call, Mr Cowan also told the claimant that, from then on, she would only be working her contracted 20 hours each week and that he would issue her with a new rota.

The claimant's meeting with Mr. Cowan on 15 April 2024

17. The claimant met Mr Cowan on Monday 15 April 2024. During their meeting he repeated that her working hours would from now on be her contracted 20 hours per week. He also told the claimant that customers had made allegations to the respondent's landlord, Oxford Inns, about her conduct while working in the hotel. At that time, Mr Cowan did not provide any more information than that. The claimant was upset because as far as she was concerned she had done nothing wrong.
18. In the circumstances, the claimant telephoned Oxford Inns direct and spoke to a manager there whom she knew as "Andy". She explained to Andy all that Mr Cowan had said to her about the allegations. Andy's response was that Oxford Inns had received no customer complaints about her conduct and he suggested that the claimant speak again to Mr Cowan.
19. In turn, the claimant sent a text message to Mr Cowan, told him what Andy at Oxford Inns had said, and asked for details of the allegations. Mr Cowan did not respond to this text message.
20. On 17 April 2024, the claimant had a panic attack and went to see her GP who issued her with a fit note stating she was suffering from work related stress, which she e-mailed to Mr Cowan that same day.

Mr. Cowan's text message to the claimant

21. On 22 April 2024, Mr Cowan sent the claimant a text message in the following terms:

"You are being investigated for defrauding the company by falsifying your hours this is an ongoing investigation..."

You are being investigated of being inebriated or under the influence of drugs whilst working this is an ongoing investigation...

5 *You are being investigated of selling drugs on the premises. This is an ongoing investigation...*

All investigations will be backed up with statements and CCTV."

22. In response the claimant immediately sent a text to Mr Cowan asking him to e-mail details of the allegations. At that time, nothing was forthcoming.

10 *The respondent's disciplinary letter to the claimant*

23. On 1 May 2024, Mr Cowan wrote to the claimant in the following terms:

"I am writing to tell you that The Portmann Hotel is considering dismissing OR taking disciplinary action such as suspension against you.

This action is being considered with regard to the following circumstances:

15 *Gross misconduct by defrauding the company by falsifying hours on Friday April 5th, 2024.*

Consuming controlled substances while on shift, while being the DPS (Designated Premises Supervisor).

20 *You are invited to attend a disciplinary hearing on Tuesday 7 May, 2024 at 11.30am which is to be held in the Function Room at the Portmann Hotel, 42 Portland Road, Kilmarnock, Scotland, KA1 2DL.*

I enclose the following evidence:

Your timecard with your hours written by yourself:

25 *Statement from a staff member in regards to consuming controlled substances while being the DPS (Designated Premises Supervisor)*

CCTV footage will be available at the disciplinary hearing."

24. The accompanying witness statement from the staff member was dated 1 May 2024, signed and was in the following terms:

“This is a summarised account of a verbal statement given to our employer following questions regarding staff conduct.

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- *Drinking on duty was common practice and Michelle actively encouraged all staff to join in.*
 - *While behind the bar, she would serve herself with drinks, while in the office or elsewhere, she would ask us to get her a drink.*
 - *Turning up late for shifts was accepted as common for her.*

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 - *Spending more time in the office or elsewhere was also very common.*
 - *On the night in question, she was quite late for her shift, then we didn’t see her for the majority of the night.*

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In conclusion, the management had noted some issues and reviewed the camera’s. Following on from what they have seen, questions have been asked. I am not being asked for my opinion here, but simply to confirm what is already known via footage and personal experience. There is no malice intended, I am simply presenting the situation as it is.”

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25. In the claimant’s view, the witness statement did not support the allegations in the respondent’s letter of 1 May 2024. The claimant was especially concerned that she was facing an allegation that she had taken drugs while on shift when the witness statement had referred only to her having allegedly drunk alcohol on duty with no mention of drugs. In her experience within the hospitality industry, any reference to controlled substances is a reference to drugs and not to alcohol.

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26. The claimant therefore e-mailed Mr Cowan on 1 May in the following terms –

“Could you provide evidence for the following to allow me SUITABLE time to be prepared for the meeting you have arranged:-

What time you believe I started and finished on 05/04/24

Evidence of me taking substances whilst at work

The CCTV footage

Failure to do so would prevent me from being suitably prepared for the meeting and therefore would put me at a disadvantage when I attend the meeting.

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On another note the witness statement states “on the night in question” but doesn’t state a date. Please have this amended!

Could you also supply me with the employee handbook as this should be supplied before the disciplinary process takes place”.

- 10 27. Mr Cowan did not respond to the claimant’s request for further information about the allegations. Having regard to the terms of her unanswered letter to Mr Cowan, the claimant did not expect the disciplinary hearing to go ahead until the material requested had been provided.

The claimant’s dismissal

- 15 28. On 10 May 2024, Mr Cowan wrote to the claimant in the following terms:

“On May 1st, you were informed that The Portmann Hotel was considering dismissing OR taking disciplinary action such as suspension against you.

You were invited to attend a disciplinary meeting on Tuesday May 7 2024 at 11.30am which was to be held at The Portmann Hotel, 42 Portland Road, Kilmarnock, Scotland, to which you did not attend or provide correspondence for your absence.

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The investigation was concluded on Thursday May 9th 2024 and you were indeed found guilty of Gross Misconduct.

I am therefore writing to you to confirm the decision that you will be dismissed from PMS Leisure Services LTD and that your last day of service for the company was Friday May 10 2024.

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The reason for your dismissal is:

Gross misconduct by defrauding the company by falsifying hours on Friday April 5th 2024 and Tuesday March 26th 2024.”

29. No right of appeal was offered to the claimant in the dismissal letter.
30. On 17 May 2024, the claimant emailed Mr Cowan explaining that she had not attended the hearing because she had not been supplied with the material she had requested in her e-mail to him dated 1 May 2024. Mr Cowan did not respond to that email.

The claimant's situation post dismissal

31. Since the claimant's dismissal, she has not worked at all and is in receipt of Universal Credit of £648.64 each month. Since her dismissal she has been applying for jobs within the hospitality industry within her local area but without success so far.

Discussion and decision

32. On the basis of the dismissal letter provided, the claimant was dismissed for a reason relating to her conduct, namely that she had falsified her timesheets on 26 March and 5 April 2024.
33. However, that reason was different from the allegations set out in the respondent's letter of 1 May inviting her to a disciplinary hearing, which were that she had taken drugs while on shift and falsified her time sheets on only one of those dates, namely 5 April 2024.
34. There was no doubt that the respondent had, without explanation, dismissed the claimant for a different set of reasons from those set out in the allegations that had been put to her.
35. The respondent had also failed to respond to the claimant's reasonable request for further information about the allegations against her and for details of the employee handbook, both of which she reasonably required in order to allow her to prepare for the disciplinary hearing. The respondent should have provided the material requested by the claimant on 1 May in advance of the planned disciplinary hearing and it was unreasonable for the respondent to

proceed with the hearing and the determination of the disciplinary case in her absence.

36. As a result, the respondent failed unreasonably to provide the claimant with essential details of the allegation relating to 5 April, namely her alleged start and finish dates and why they differed from her hours claimed. It also failed unreasonably to provide her with any evidence whatsoever in relation to the alleged falsification of her timesheet on 26 March 2024. In the circumstances she was never provided with a reasonable opportunity to answer the allegations against her that were the asserted reason for dismissal.
37. Having deprived the claimant of a fair opportunity to answer the allegations resulting in her dismissal it cannot be said that the respondent adopted a fair dismissal procedure. No employer acting reasonably would have acted as the respondent did. In those circumstances, nor can it be said that the respondent carried out a reasonable investigation. It therefore follows that it could not have had a genuine belief on reasonable grounds that the claimant had been guilty of the misconduct for which she was dismissed. Its decision to dismiss her was therefore also outside the range of reasonable responses available to it.
38. The Tribunal was concerned that the allegation against the claimant that she had taken drugs while on shift was never evidenced and then disappeared for no reason and that the witness statement that accompanied the respondent's letter of 1 May 2024 referred only to the drinking of alcohol, which did not support the allegation. It was evident to the Tribunal that the respondent was determined to dismiss the claimant whether or not it had a fair reason to do so.
39. In all the circumstances, the Tribunal finds that the claimant was unfairly dismissed.

Basic award

40. The claimant's basic award is £1,029.60 based on her gross weekly wage of £228.80 and 3 years completed service, the claimant having been aged 50 as at the date of her dismissal.

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Compensatory award

41. The Tribunal was satisfied that the claimant had taken reasonable steps to find suitable alternative employment but without success and that she would likely face another 12 weeks of unemployment following the date of the hearing. She should therefore receive compensation for that entire period.

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42. The Tribunal's award is limited to the claimant's contractual 20 hours per week in circumstances where prior to her dismissal, the respondent had informed her that in future she would work only her 20 contracted hours.

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43. Between the date of her dismissal and the date of the hearing the claimant lost 23 weeks net pay at the rate of £224.45 per week and 23 weeks of employer pension contributions at the rate of £3.26 per week. Her weekly loss is therefore £227.71 and her total loss to the date of the hearing is £5,237.33. Her future loss is 12 weeks at £227.71, which totals £2,732.52.

Loss of statutory rights

44. As a result of her dismissal, the claimant has lost a number of statutory employment protection rights which are dependent on a qualifying period of service – most notably the right not to be unfairly dismissed until she has worked for a new employer for two years. In the circumstances, she is entitled to a payment of £400 for loss of those statutory rights.

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Acas Code of Practice

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45. The Tribunal finds that in all the circumstances, the respondent unreasonably failed to follow the Acas Code of Practice on disciplinary and grievance procedure (Acas Code). There was no proper investigation to establish the

facts of the case. The claimant was not provided with sufficient details about her alleged misconduct in advance of the disciplinary hearing on 7 May 2024 in circumstances where she had reasonably requested them. The respondent simply ignored the claimant's correspondence. As a result, the claimant was not provided with details of the case against her or given an opportunity to put her case before the dismissal decision was made. Further, she was ultimately dismissed for different reasons from those set out in the allegations that had been put to her. Finally, the claimant was offered no right of appeal. In all the circumstances the respondent's failure to follow the ACAS Code was entirely unreasonable.

46. In all the circumstances, it is just and equitable to increase the amount of the compensatory award by 25% in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (as inserted by section 3 of the Employment Act 2008). The 25% applies only to the compensatory award and amounts to £1,992.47.

Recoupment Regulations

47. As the claimant is in receipt of Universal Credit as a result of her dismissal the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. The monetary award exceeds the prescribed element by £6,229.57 and this sum is payable immediately.

R King

Employment Judge

14 November 2024

Date of Judgment

Date sent to parties

15 November 2024

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