EMPLOYMENT TRIBUNALS

Claimant: **Ms R Goddard**

Respondent: **Sunshine Hotel Limited t/a Palm Court Hotel**

Heard at: **London South** **On:** **31 October 2018**

Before: **Employment Judge Cheetham QC**

Representation

Claimant: in person
Respondent: Mr R Chaudhry (solicitor)

JUDGMENT

1. The claims for unfair and wrongful dismissal succeed.

2. The Respondent will pay the Claimant compensation in the sum of £14,318.35.

REASONS

1. This is a claim for unfair dismissal and wrongful dismissal brought by Mr Raymond Goddard.

2. The dismissal was by reason of conduct, so the issues for the tribunal were whether the Respondent had a genuine belief in the Claimant's guilt, based upon reasonable grounds and following a proper investigation. It was of particular relevance in this case whether the procedures followed were fair and also whether the Claimant contributed to the dismissal through his actions and, in the event of the dismissal being unfair, if there was a chance that the Claimant would have been dismissed in any event.

3. I heard evidence from the Claimant and – for the Respondent – from Jason McCabe (General Manager) and Milad Shehata (Director).

Findings of fact

4. From 2003, the Claimant was a night porter at the Respondent's hotel until he was summarily dismissed on 17 April 2018.

5. The hotel is in Eastbourne and it has 38 rooms and employs 11 staff. It caters in particular for elderly and blind guests, who tend to form coach parties staying during the week or at the weekend.

6. The facts are straightforward and largely undisputed; in fact, the Claimant chose not to ask any questions of the Respondent's witnesses. The Claimant was on duty on the night of 13 and 14 April. It is not in dispute that at 12:10 a.m., as shown on the CCTV, he entered an anteroom, which is off the main lounge area of the hotel. It is also not in dispute that the Claimant was in that room and on a bed when Mr Shehata entered at about 1:30 a.m..

7. What is not agreed is what happened in between those times. The Claimant says he left the anteroom by a side door after a couple of minutes, so at around 12:12 a.m., and went off to make his usual patrol of the hotel, which involved checking, cleaning and generally ensuring everything in the hotel was in order. This took him down to the basement and then up to the third floor and then back downstairs again.

8. He said that this, "took as long as it took", which could mean 45 minutes or more, although the Respondent was sceptical about it taking so long. Normally, when not patrolling, the Claimant would be based in the front lounge, which was next to the front door of the hotel. Had he been there on the night in question, then he would have been caught by CCTV. As it was, the Claimant says that when he had finished his patrol, he returned to the anteroom by the same side door. That is why, he says, he was never caught by the CCTV cameras which were covering the lounge and reception area.

9. The Claimant went back to the anteroom that night at about 1.30 a.m., because he was feeling very unwell, with what he described as a migraine. He says there was a bed in the anteroom on which he sat, propped up, with a blanket covering him and with the light off. He set his alarm for 1:45 a.m., which would be the end of his short break. He said that he was not asleep.

10. However Mr Shehata described the Claimant as snoring loudly and said that the Claimant was only woken up by Mr Shehata coming back into the room to take a picture of him. The photograph was too indistinct to have any evidential value, but, on balance, I prefer Mr Shehata's evidence. I do not think he would have had reason to enter that ante-room unless he had heard something and I believe he was being truthful in his evidence. That does not mean that I find the Claimant was lying; it is quite possible that he was unaware that he was snoring, just as it is quite possible that he did not realise that he had dropped off to sleep, particularly if he was feeling unwell.

11. The Claimant was then suspended and Mr McCabe carried out what he described as an investigation, but which was no more than sitting down with Mr Shehata to view the CCTV.

12. On 14 April, the Claimant was invited to an investigation meeting to take place on 16 April. The letter said that that, if there was any substance to the allegations of breaching company rules by sleeping whilst on duty, there would be a disciplinary hearing. In fact the meeting on 16 April was the disciplinary hearing; there was no investigation meeting.

13. The minutes of the meeting are cursory, but it is clear that the Claimant did not provide as full an explanation as he later did at his appeal or at this tribunal. For example he did not refer during the 16 April meeting to leaving the room and going on patrol, nor did he did say he had a migraine, but simply referred to having a headache.

14. Mr McCabe concluded that the Claimant had been asleep from 12.10 to 1:30 a.m. and he dismissed the Claimant for gross misconduct. The Claimant brought an appeal, which was heard by Mr Shehata, who said in evidence that, because it was a small company and he was the only active director, there was no one else available. In his evidence for the appeal, the Claimant did provide some further information, including a reference to going on his patrol and also to having a chronic migraine. However the appeal was dismissed and the outcome letter said that the Claimant's evidence had offered nothing new, although that would appear to be incorrect.

Submissions

15. I heard oral submissions from Mr Chaudhry, who also provided helpful written submissions. The Claimant did not make any closing submissions.

Conclusion

16. Based upon these findings of fact I drew the following conclusions.

17. Plainly there was a serious procedural failing, because there was no investigation hearing. The Claimant was therefore never given the opportunity of providing a full explanation before any disciplinary hearing. That is a basic employment right, just as it is a basic right that an employee knows the case that they are facing and can prepare for a disciplinary hearing. That did not happen here. Mr McCabe said that the Respondent was relying upon its legal advisers, but whether or not that is the case, it does not alter the position.

18. Further, at the disciplinary hearing, the Claimant was entitled to bring a companion or trade union representative, which is another important employment right. It also seems to me that there was a failure at the appeal stage, because the Claimant was providing information not previously given at the disciplinary hearing, but it does not seem that this was fully considered. Given that this was such a small company, I think that in the circumstances it was reasonable for Mr Shehata to hear the appeal, but that

made it even more important that he considered all of the evidence presented.

19. In my judgement, the dismissal was procedurally unfair and it was difficult for Mr Chaudhry to argue against that.

20. However that is not the end of the story. Mr Chaudhry says first that there is a question of contributory fault. Whatever else might be said, he submits, the evidence suggests that the Claimant was asleep. I would put that slightly differently, in that I accept Mr Shehata's evidence that he reasonably thought the Claimant was fast asleep, not least because he heard loud snoring.

21. The Claimant did not provide an immediate explanation to Mr Shehata, which is a little surprising, nor did he tell him that he felt very ill. Also, the Claimant had not thought to telephone Mr Shehata earlier to explain that he was feeling very ill, even though he knew that he was staying close by.

22. In summary, the Claimant was in bed with a blanket over him in a room with a light off at a time when Mr Shehata reasonably expected him to be at work and, on hearing him snoring, reasonably thought he was asleep. In those circumstances I find that the Claimant contributed to his dismissal to the extent of 25%.

23. Secondly Mr Chaudhry says that, even if the dismissal was procedurally unfair, it would not have made any difference; in other words he is raising a Polkey argument.

24. I cannot agree that it would have made no difference if a fair procedure had been followed. A proper investigation might have made some difference. For example, Mr McCabe could have walked the patrol of the hotel with the Claimant, which would have allowed him to see how long it took and whether, as the Claimant maintained, he would not have been seen by the CCTV. There might have been some investigation into his migraine.

25. Nevertheless I accept that there is a real chance that the Respondent could still reasonably have concluded that the Claimant was asleep on duty without any reasonable excuse. The evidence certainly leaned in that direction. It was very important that a member of staff was available at all hours, so the employer was entitled to treat this very seriously.

26. Therefore, after considering all of the evidence I think there is a 50% chance that, had a fair process been followed, the Claimant would still have been dismissed.

27. Therefore I conclude that the Claimant was unfairly dismissed. but that there should be a reduction of 25% for contributory fault and a reduction of 50% for the chance that he would have been fairly dismissed had a fair procedure been followed.

28. There was also a failure to follow the ACAS Code. I do not believe there was any deliberate attempt to do so; rather, I would conclude that the

Respondent was unaware of what it was meant to be doing. I order a 5% uplift for that breach.

Remedies

29. The Claimant has been out of work for 28 weeks from the effective date of dismissal to the hearing today. He had a net weekly income of £394.59, which gives a total of £11,048.52.

30. As to his future loss, I accept the Claimant's evidence that he has been looking for jobs in hotels, which is where his experience lies, but that he has not been offered anything to date. He told me that the position might well improve in the spring. He has been to the job centre and he has done some online research, but he is not especially good with computers.

31. Doing the best I can, it seems to me likely that he will find alternative work within six months. I therefore award him 26 weeks' future loss in the sum of £10,259.34. I would assess loss of statutory rights in the sum of £400. Although there is a claim for wrongful dismissal, I am not making a separate award in respect of the notice pay.

32. The Claimant's basic award is 19.5 times £394.59, which equals £7,694.51.

33. The total compensatory award amounts to £21,707.86. Applying the 50% Polkey reduction gives a sum of £10,853.93. That sum is increased by 5% (£542.70), giving a sum of £11,396.63 and then reduced by 25%, which gives a total compensatory award of £8,547.47.

34. In my judgment, the 25% contributory fault deduction should also apply to the basic award, which reduces that sum to £5,770.88.

35. The total award is therefore £14,318.35. There are no recoupments for benefits.

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Employment Judge Cheetham QC
Date 13 November 2018