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EMPLOYMENT TRIBUNALS

Claimant: Walter Dharmadasa

Respondent: Brook Hotels No 1 Ltd

Heard at East London Hearing Centre

On: 3 July 2021

Before: Employment Judge Cheunviratsakul

Representation

Claimant: In Person

Respondent: Ms C Ashiru (counsel)

JUDGMENT

1. The Claimant was fairly dismissed by the Respondent for gross misconduct. The Claimant's claim for unfair dismissal therefore fails.
2. The Respondent did not fail to pay the Claimant wages in breach of contract. The Claimant's claim for wages therefore fails.
3. The Claimant's claim in respect of his tools is not well-founded and fails.

REASONS

Introduction

1. The Claimant, Mr Dharmadasa was employed by the Respondent, Brook Hotels No 1 Ltd as a general assistant from 25 August 2013 to 5 September 2021.
2. The Claimant claims that his dismissal was unfair within the meaning of section

98 of the Employment Rights Act 1996. The Claimant also claims that the Respondent made unlawful deductions from his wages and has failed to return some of his tools.

3. The Respondent contests the claim. It says that the Claimant was fairly dismissed for misconduct which resulted in a breakdown in trust and confidence with the Claimant. As a result, the Respondent states it was entitled to terminate his employment without notice because of gross misconduct. The Respondent denies the Claimant's claim in relation to wages and states that he was paid in accordance with his contract.
4. The Claimant represented himself and gave sworn evidence. The Respondent was represented by Ms Ashiru, counsel. She called sworn evidence from Umesh Ummat, Company Director of the Respondent.
5. I considered the documents from a trial bundle of 213 pages and witness statements from the Claimant and Mr Ummat which the parties introduced in evidence. References to page numbers are to the agreed Bundle of Documents.

Observations on the evidence

6. The standard of proof is on the balance of probabilities. This means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal will be satisfied that the event did occur.
7. The Tribunal considered Mr Ummat to be a credible and reliable witness. He was measured and reasonable in his testimony which was consistent with the documentary evidence. He gave clear evidence as to what was agreed with the Claimant as regards wages and why and the process which led to the Claimant's dismissal.
8. In contrast the Tribunal did not consider the Claimant, Mr Dharmadasa, to be a credible or reliable witness. He was evasive when answering questions and gave answers which were inconsistent both with his earlier testimony and the documentary evidence. In oral evidence, he stated that he first became aware of the Respondent's claim that he would be paid an extra £2000 during lockdown (which amounted to £166.67 per month), from Mr Umesh Ummat's witness statement. There is documentary evidence at page 26 of the trial bundle in an email to Mr Dharmadasa, dated 6 November 2020. In that email it states 'you had offered to shift in the hotel and stay there. For this purpose, you asked for and we agreed on an additional payment of £2000 per annum over and above your salary. And thus, this amount of £537.62 for the period 25 March to 30 June was paid to you in June payroll.'
9. Further, in his oral evidence, Mr Dharmadasa stated that there was only a manual lock on the main door which he was required to operate in order to let guests in and out throughout the night. He later stated in cross examination that he had not left the hotel door open and that 'anyone can open the door'. He stated, 'anyone can go in and out - there is no key' and 'there was no way of keeping [the door] locked'. His evidence on this point was confused and inconsistent.
10. On page 149, at point 5.0 of the minutes of a disciplinary meeting held with Mr

Dharmadasa on 28th August 2020, Mr Dharmadasa stated that no one came to paint the bar when questioned about an unknown male painting the reception area. In oral evidence, Mr Dharmadasa stated that a guest had assisted him with painting. Mr Dharmadasa stated 'he said let me help you and then he went'. Again, on this point Mr Dharmadasa gave confused and inconsistent evidence.

Preliminary matters

11. At the beginning of the hearing, before any evidence was heard, I discussed the nature of Mr Dharmadasa's allegation regarding the return of his tools and the extent of the Tribunal's jurisdiction over this matter given the circumstances. The Respondent has asked Mr Dharmadasa for a list of the tools which is yet to be provided.
12. Mrs Ashiru indicated that it was the Respondent's case that Mr Dharmadasa's claim for unauthorised deduction from wages was out of time but conceded that, in any event, Mr Dharmadasa's claim for wages under breach of contract was in time. Mr Dharmadasa's claim for unpaid wages proceeded on this basis.

Issues for the Tribunal to decide

13. Having dealt with these preliminary matters, I agreed with the parties the issues for me to decide.

Unfair dismissal

13.1 What was the reason or principal reason for dismissal? The Respondent says the reason was gross misconduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

13.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular, whether:

- (a) there were reasonable grounds for that belief
- (b) at the time the belief was formed the Respondent had carried out a reasonable investigation
- (c) the Respondent otherwise acted in a procedurally fair manner
- (d) dismissal was within the range of reasonable responses.

13.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

13.4 Would it be just and equitable to reduce the amount of the Claimant's

basic award because of any blameworthy or culpable conduct before the dismissal

13.5 Did the Claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

13.6 Did the Respondent fail to pay the claimant's wages in breach of contract and if so how much was deducted?

13.7 Where an employee has duties or responsibilities that are carried out overnight:

(a) Is the employee properly described as being on call

(b) Or is the employee working through the night even though they might sleep between tasks.

Findings of fact

14. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

15. The Claimant, Mr Dharmadasa was employed by the Respondent, Brook Hotels No 1 Ltd as a general assistant from 25 August 2013 to 5 September 2021.

16. In August 2018, Umesh Ummat had a meeting with Mr Dharmadasa as regards a complaint from a female member of staff regarding Mr Dharmadasa's behaviour. The meeting resolved the matter which was taken no further. Mr Dharmadasa stated that there was no meeting but only a telephone call. Given the evasive and inconsistent nature of his oral evidence a, on balance I find that Mr Ummat is a more credible witness on this point and that a physical meeting did take place.

17. When the Covid 19 pandemic started, the Respondent company, as a hotel, were particularly affected. The Respondent took a number of measures in order to ensure that the business survived the pandemic. The hotel remained open under government guidelines to provide accommodation for essential workers. To this end, Angela Abell, the General Manager worked from 7am – 6pm Monday to Thursday. She was the person responsible during those times for providing a minimal service of breakfast and housekeeping to essential worker guests. The bar was closed and no other services were offered. In order to ensure that there was cover in the event of emergency, Mr Dharmadasa was asked to work his normal days as a night porter and stay in the hotel over the weekend instead of closing it. Mr Dharmadasa moved into the hotel on 31 March 2020. Mr Umesh Ummat and Mr Dharmadasa orally agreed that he would be paid an extra £2000 per annum (£166.67 per month) whilst undertaking the additional work. Mr Ummat gave credible evidence on this point. He stated that, due to a considerable downturn in work, it was implausible that he would have agreed to pay Mr Dharmadasa for the hours stated on his timesheets (a total of 124hours a week for 18 weeks) and for working every weekend from Friday 6pm to Monday 7am.

In contrast, Mr Dharmadasa as set out above, was evasive and inconsistent when giving evidence. On balance, the evidence of Mr Ummat is preferred as to the nature of the agreement and what was agreed.

18. During his period of stay at the hotel, Mr Dharmadasa was required to work for very few additional hours. There was no kitchen or bar service and other than usual maintenance jobs when Mr Dharmadasa was on site, he was to lock the main door at 10pm, open it at 7am and sleep in the room provided. There was nothing agreed as regards painting and decorating. During the period of his stay and contrary to his assertions there was barely any work which Mr Dharmadasa needed to do during the hours of 10pm and 7am. Mr Dharmadasa was not required to be awake and was permitted to sleep during these hours.
19. At pages 115-122 there is email evidence from Mr Dave Pearson and Mr Andrew Croxon. Mr Pearson on page 117 refers to 'the elusive rarity called night staff' and on pages 120-12 states that 'some very special housing guests...ran havoc from 11pm to 5.30am with no word from Walter the night duty person who I woke up at 5.40am'. Mr Croxon states at page 122 in relation to the 'night porter', that 'he would regularly be asleep in the bar area on a sofa' or 'regularly leave the hotel unattended'.
20. As set out above, Mr Dharmadasa's evidence was inconsistent on this point, in particular the extent to which the main door either required or did not require manually locking and whether Mr Dharmadasa undertook any painting. Mr Pearson and Mr Croxon indicate in their emails that Mr Dharmadasa was asleep and did not attend a disturbance. Mr Croxon states that an 'unknown male' was painting the reception area whose appearance was 'very shabby'. Mr Dharmadasa stated in evidence that Mr Pearson and Mr Croxon's evidence was made up to assist the Respondent's case. Given the date of Mr Pearson's emails, 5 March 2020 and that the contents of the emails were put to Mr Dharmadasa in his disciplinary meeting on 28 August 2020, I find Mr Dharmadasa's allegation implausible. I find that Mr Ummat's evidence on the extent to which Mr Dharmadasa was required to work at night is to be preferred and therefore that, during the period in which Mr Dharmadasa was living on the premises any additional work he did was reflected accurately in the total of 132 additional hours attributed to him as set out on page 155.
21. Mr Dharmadasa was therefore entitled to be paid 732 hours during the period in question comprising 600 salaried hours and 132 extra hours. For the period from 1/4/20- 30/6/20 Mr Dharmadasa received £5072.03 gross as is evidenced by wages slips on pages 210-212 comprising payment for his salaried hours and an amount of £537.62 which reflects back payments of £166.67 per month as set out in the agreement detailed in paragraph 17 above. As he stated in oral evidence, Mr Dharmadasa also received £300 in addition to the amount shown on those wages slips during the period he was staying at the hotel.
22. Mr Dharmadasa was arrested on 30 June 2020 for allegedly raping a female member of the public on the Respondent's premises. In an email dated 2 July 2020, on page 123, Colin Parker DC informed the Respondent that, in a prepared statement, Mr Dharmadasa had admitted having a sexual encounter on site but denied assault and was on police bail with conditions. One of those conditions was that Mr Dharmadasa could not enter the hotel or have any contact with

employees save for Sam Ummat, the Business Development Manager. In oral evidence, Mr Dharmadasa denied making a prepared statement as set out above. I find the police email to be credible evidence that a statement was made in such terms.

23. On 2 July 2020 the Respondent sent a letter (page 124) to Mr Dharmadasa suspending him in accordance with the company's disciplinary rules and procedures in order to conduct an investigation into the allegation. That letter states that the suspension is 'in order to allow us to conduct the investigation impartially and fairly and is in no way a form of disciplinary action against you'.
24. Mr Dharmadasa replied to that letter by email (page 132) apologising for any problems caused. In a letter dated 5 July 2020 to investigate the matter, the Respondent via Ashok Ummat asked Mr Dharmadasa to provide his version of events through email. On 7 July 2020 via email (page 144) Mr Dharmadasa asked that his solicitor attend any meeting due to police involvement and his police bail conditions. On 8 July 2020, Ashok Ummat replied by reference to the staff handbook on disciplinary procedure (page 143) and asked for Mr Dharmadasa to provide his version of events. On 9 July 2020, Mr Dharmadasa replied (page 143). He stated his solicitor had instructed him that he was unable to give a statement/explanation at the moment due to the ongoing investigation by the police. The nature of the investigation and police bail meant any further investigation, at this stage, was prevented.
25. On 13 August 2020, the police confirmed via email that Mr Dharmadasa had been released without charge (page 145). That email states that there was no further action as the [alleged] victim is a very vulnerable person. The police stated that Mr Dharmadasa remained a named suspect and that the matter had not been formally closed. The police further stated that as part of their initial stages of investigation they had discovered that the front door to the hotel was wide open which allowed the [alleged] victim to walk in off the street.
26. On 28 August 2020 Mr Dharmadasa attended a disciplinary meeting with Umesh Ummat for Mr Dharmadasa to set out his case in relation to the alleged sexual assault which took place at the hotel. In the invitation to the meeting he was informed of his right to be accompanied by a colleague or a union representative. In that meeting Mr Dharmadasa stated that no female had come to the hotel and that there had been no encounter with a female. He further stated that the door was not left open after 10pm. Mr Dharmadasa further denied that any meeting had taken place in August 2018 as set out in paragraph 15 above or that anyone had painted the reception area as per Mr Croxon's letter (page 122).
27. In a letter dated 4 September 2020 (page 151-152) Umesh Ummat wrote to Mr Dharmadasa informing him that his employment had been terminated for gross misconduct. The Respondent concluded that the allegation of sexual assault was more likely to be true than not and based that conclusion on (i) the inconsistencies between Mr Dharmadasa's account to the police and his account in the disciplinary meeting (ii) that he remained a named suspect in a case which may be recommenced in future. The letter also refers to the fact that the hotel door was left open during his duty as a night porter and to the allegations made against Mr Dharmadasa in August 2018 as background evidence. Mr Dharmadasa was informed of his right to appeal which he did not pursue. Mr Dharmadasa states

that he did not appeal as he was 'mentally down' at the time. There was no evidence of mental illness before me today.

28. Other than a short sentence in his witness statement, Mr Dharmadasa provided no evidence demonstrating either in general or specific terms the tools which he alleged the Respondent had failed to return to him. The Respondent asked for a list which Mr Dharmadasa has failed to provide.

Relevant law – unfair dismissal

29. In this case the fact the claimant was dismissed is not in dispute
30. Section 98 of the Employment Act 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Conduct is a potentially fair reason within this section. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
31. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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.
32. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **British Home Store v Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. In short, the employer must show that misconduct was the reason for the dismissal and must establish a genuine belief based on reasonable grounds after a reasonable investigation that the employee was guilty of misconduct.
33. The Court of Appeal in **British Leyland (UK) Ltd v Swift [1981] IRLR 91** set out the approach: "If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair. It must be remembered that in these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably [would] take a different view.
34. It is immaterial how the Tribunal would have handled the events or what decision it would have made. The Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation. The Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).
35. As to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the

question of remedy and compensation reduced to reflect that fact.

36. Section 122(2) of the Employment Rights Act 1996 provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) of the Employment Rights Act further provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.
37. Mr Dharmadasa's claim for wages proceeded as a claim for breach of contract. The law is trite. If there was an oral agreement between the parties and a term as to payment has been breached, Mr Dharmadasa is entitled to damages to put him in the position he would have been had the contract been performed.
38. The National Minimum Wage Regulations 2015/621 regulations 14 to 16 apply in this matter as the Claimant was staying on site at the Respondent's premises. Regulation 14 allows for an accommodation offset which can be taken into account when calculating the minimum wage. Regulation 16 provides that, at the relevant time, namely April 2020, the amount for provision of living accommodation was £8.20 per day.
39. In **Royal Mencap Society (respondent) v Tomlinson-Blake (appellant); Shannon (appellant) v Rampersad and another (t/a Clifton House Residential Home) (respondents) [2021] UKSC 8** the Supreme Court considered the cases of two sleep in workers. In each case the issue was how the hours of their sleep-in shift should have been calculated for the purposes of the national minimum wage (NMW). The Supreme Court held that the special rule for sleep-in workers (reg 32(2) of the NMW Regulations/reg 15(1) or later, reg 15(1A) of the NMW Regulations 1999 is quite clear. A worker is not doing time work for the purposes of the NMW if they are asleep. Further they are not doing time work unless they are awake for the purposes of working. It is necessary to look at the arrangements between the employer and the worker to see what the worker is required to do when not asleep but within the hours of the sleep-in shift. If the worker is given the hours in question as time to sleep and the only requirement on the worker is to respond to emergency calls, the worker's time in those hours is not included in the NMW calculation for time work unless the worker actually answers an emergency call. In the event that worker does answer such calls, the time he spends doing so is included.

Submissions

40. The Respondent submitted that the Claimant was not a credible witness. That the Claimant raised matters for the first time today which were not raised at the disciplinary hearing and that the Claimant was inconsistent with the account he gave to police. The Respondent submitted that the Claimant's account that everyone was lying including the police but except himself was implausible and could clearly not be the case. The Respondent invited me to find the Claimant's evidence was unreliable and not credible and where there was a dispute of fact to prefer the evidence of Mr Ummat who, the Respondent submitted, was a frank, open and honest witness.

41. As to unfair dismissal, the Respondent submitted that it is a small business with limited resources. The Respondent submitted there were two elements: the incident of the alleged rape and a loss of trust and confidence because of the Claimant's responses during the disciplinary hearing. The Respondent submitted that the 2018 complaint and the 2020 guest complaints were not the reason for the dismissal but that they simply informed the process as regards the Claimant's credibility. The people involved in those complaints as well as the police had no reason to lie and the Claimant's answers in the disciplinary hearing caused Mr Ummat to no longer trust him. Consequently, the Respondent had a genuine belief that the Claimant had committed the alleged misconduct (the alleged rape). That belief was reasonable in the circumstances given the information from the police and as the Claimant had changed his story at the disciplinary hearing.
42. The Respondent submitted that the belief was based on a reasonable investigation in the circumstances given the nature and sensitivity of the situation and the Respondent's limited resources. The Claimant was offered an opportunity to provide his version in writing, but he declined to do so. Notwithstanding that, the Respondent had waited for the Claimant to be able to participate and get his responses before taking any further action.
43. The Respondent submitted that it was entitled to rely on police information as being truthful, particularly in relation to the Claimant's original admissions to police as regards the nature of the encounter. The Respondent pointed to the Claimant's change of story and to the inconsistencies in his evidence as set out above which informed its decision that the Claimant could not be trusted and that it was more likely that the Claimant had acted in gross misconduct on hotel premises.
44. In relation to the breach of contract wages claim, the Respondent submitted that the Claimant's version that he worked 124 hours a week for 18 weeks, translates to 17.7 hours every day for 18 weeks which was not believable in the circumstances the hotel faced at the time. The fact that the hotel was working at significantly reduced functionality and that the general manager was present from Monday to Thursday, the Respondent says, seriously undermines the claim.
45. The Respondent pointed to the clear evidence given by Mr Ummat as regards agreeing to pay the Claimant £166.67 per month for his on-call status during the lockdown period and the fact that the hotel could not afford to and did not agree to pay the Claimant more given the impact of Covid.
46. The Respondent accepted that the Claimant was entitled to be paid the national minimum wage for the hours he actually worked but stated that the calculation was subject to the National Minimum Wage Regulations 2015 'accommodation offset' of £8.20 a day or £57.40 per week.
47. In relation to the amount of hours worked by the Claimant during the period he stayed at the hotel, Mrs Ashiru referred to pages 153-155 which are the Respondent's calculations of the Claimant's working (or salaried hours) and non-working (time when the Claimant was expected to be available for emergencies) hours. They are 600 and 132 hours respectively.

48. The Respondent submitted that, in accordance with **Mencap** (above) workers are entitled to national minimum wage only for the hours that they are working, namely when they are awake and attending to a disturbance. That Mr Ummat's evidence made clear that the Claimant's role was to help with weekend cover in case of emergencies and that the Claimant was supposed to rest and sleep in the room provided for him unless there was an emergency to attend.
49. The Respondent pointed to the fact that, the Claimant's duties would have been different during the lockdown period due to the significantly reduced capacity in the hotel and that he may well have been at the hotel for long periods of time because of the 'stay at home' directive but that he was not expected to be available for work the entire time. In support of this, much was made of the Claimant's inconsistent evidence on the extent to which he was or was not required to operate the door for guests. The Respondent also pointed to the email from Mr Croxon on page 122 which suggested that the Claimant was regularly sleeping or leaving the hotel unattended. In short, the Respondent submitted that the Claimant was only required to attend a disturbance or an emergency of which there were none in the period in question. Therefore, in accordance with Mencap the Claimant spent no time responding to calls which counted for the purposes of the minimum wage.
50. In relation to calculating the amount the Claimant received for the additional 132 hours on top of his salaried hours, the Respondent submitted that, taking into account the accommodation offset, the Claimant had been paid for 932.87 hours which is far in excess of the 732 hours recorded on page 155. The Respondent therefore submitted it was clear that the Claimant had been paid the NMW for the additional 132 hours he worked during the relevant period.
51. The Claimant made several short submissions. He stated that the 'entire thing is a management set-up' and referred to the amount of Tripadvisor complaints. He referred to poor management and swearing in the reviews and stated that the entire thing was fabricated and was lies. In relation to wages, the Claimant stated he worked 'day and night' and 'was not sleeping any day'. He claimed the total amount he was owed was 1512 hours. A total of 84 additional hours per week for 18 weeks on top of the 40 hours a week he had been paid for. The Claimant made a further request for his tools to be returned.
52. The Respondent submitted it was far-fetched to suggest the entire thing was a fabrication and given the nature of previous staff and customer complaints, the suggestion that the matter has been set up was unbelievable.

Conclusions

53. I have considered the above submissions and, where necessary, refer to them when reaching my conclusions.

What was the reason or principal reason for dismissal?

54. I find that the principal reason for dismissal was gross misconduct following the events which took place between the period of the Claimant's arrest on 30 June 2020 and the Claimant's disciplinary hearing on 28 August 2020. The Claimant was arrested for allegedly committing a serious sexual assault on the

Respondent's premises. The Police confirmed with the Respondent that the Claimant had stated that an encounter had taken place but that it was consensual. Once bail conditions were lifted and the criminal investigation halted, the Claimant gave inconsistent versions of events to the Respondent in his disciplinary hearing which led to the Respondent to conclude, that on balance, the Claimant had committed gross misconduct.

Were there reasonable grounds for that belief?

55. The Claimant was arrested for allegedly committing a serious sexual assault on the Respondent's premises. The Police confirmed with the Respondent that the Claimant had, in a prepared statement, stated that an encounter had taken place but that it was consensual. Once bail conditions were lifted and no further action was taken in the criminal investigation the Respondent had an opportunity to hold a disciplinary hearing with the Claimant. The police had confirmed that the Claimant remained a named suspect and that the matter had not been formally closed (as per paragraph 25 above). During the disciplinary hearing the Claimant gave a series of answers to questions which were inconsistent with what the Respondent knew or had been told by the Police (as per above in paragraph 26). These included a denial of any encounter taking place and a denial of a previous meeting in 2018 between the Claimant and Respondent as regards a staff complaint in which the attendees of the disciplinary meeting had also been present. Given the inconsistencies in the Claimant's account in the disciplinary hearing and the nature of his change of story, I find that there were reasonable grounds for the Respondent to believe that the Claimant had committed gross misconduct.

At the time the belief was formed had the Respondent carried out a reasonable investigation and otherwise acted in a procedurally fair manner?

56. Following the Claimant's arrest on 30 June 2020, the Respondent wrote to the Claimant on two occasions asking him to provide his version of events in writing. The nature of the Claimant's bail conditions at the time meant any meeting in person was prohibited. Due to the ongoing criminal investigation at the time the Claimant replied to these requests and stated that he had been advised not to provide any explanation at that point. The Respondent took no action in relation to the Claimant's employment at this stage. When no further action was taken in relation to the criminal investigation, the Respondent invited the Claimant to a disciplinary hearing to hear his version of events. The Claimant was given an opportunity to be accompanied by a colleague or union representative. In the meeting, the Claimant was asked for his version of events as set out above and the information which the Respondent had received from the police was put to the Claimant. When the outcome of the meeting was sent to the Claimant on 4 September 2020 (page 151-152) the Claimant was informed of his right to appeal. The Claimant did not take advantage of this right. There was no evidence before the Tribunal today demonstrating that the Claimant was not in a position to appeal or seek help to appeal at the relevant time. In the circumstances, and as the Respondent submitted in closing submissions, it is difficult to see what further investigation could have taken place, given the sensitive nature of the circumstances. I therefore conclude that the Respondent carried out a reasonable investigation and otherwise acted in a procedurally fair manner and

in accordance with ACAS codes in the way it conducted the investigation and disciplinary process after the Claimant's arrest.

Was dismissal within a range of reasonable responses

57. As set out in paragraph 27 above, the Respondent concluded that the allegation of sexual assault was more likely to be true than not and based that conclusion on inconsistencies in the Claimant's version of events given in the disciplinary hearing. For these purposes, the allegation does not need to be proved beyond reasonable doubt. All that is required is that the Respondent had reasonable grounds to sustain its position that the Claimant had committed gross misconduct. As set out above in paragraphs 33-34 above it is not for the Tribunal to substitute its view for that of the reasonable employer. Where there is a band of reasonableness, one employer might reasonably take one view, another could reasonably take a different view. I have to consider whether the Respondent's actions were within a band of reasonable responses. In my conclusion, given the nature of the investigation and the answers the Claimant gave in the disciplinary hearing, the dismissal was clearly within a range of reasonable responses.
58. I therefore conclude that the Claimant was fairly dismissed by the Respondent. In the circumstances it is not necessary for me to consider the remaining issues under this head of claim in relation to any potential reductions to the award.

Did the Respondent fail to pay the Claimant's wages in breach of contract and, if so, how much was deducted?

59. The Claimant contends that he worked for 124 hours a week for a period of 18 weeks. He claims that he was only paid for 40 hours a week and contends that the Respondent agreed that he would be paid for the remaining hours namely 84 hours a week. The Respondent states that there was an oral agreement with the Claimant that he would be paid an extra £166.67 per month and that they could not afford anymore given the circumstances of Covid at the time. At paragraphs 8 and 17 above, I set out the nature of the parties' evidence on this point. In particular, I make reference to the inconsistent nature of the Claimant's evidence as to when he first became aware of the Respondent's version. I further make reference to the inherent implausibility that an employer, faced with the circumstances the Respondent faced at the start of the pandemic, would agree to such considerable extra cost as claimed by the Claimant. Further, the nature of the Claimant's evidence was evasive, unreliable and lacking in credibility as set out above in paragraphs 8-10. I therefore conclude that there was an oral agreement that the Claimant would be paid £166.67 per month for the additional work he undertook whilst living on site and that additional work amounted to 132 hours as set out on page 155. The Claimant was entitled to be paid the national minimum wage for the 132 hours. A total of £1151.04 at the Claimant's hourly rate of £8.72 per hour. As set out above, the Respondent is entitled to offset £8.20 a day amounting to £57.40 per week for the accommodation provided. For the relevant period, a total of 14 weeks, this amounts to £803.60. The Claimant received £537.62 as per page 212 and, as per his own evidence, an additional payment of £300 from the Respondent in March or April time when he questioned the amount he was being paid for the period of his stay. In addition to the pay for his salaried hours, the Claimant received a total of £1641.22 for the additional 132 hours he carried out. Dividing this sum by the Claimant's hourly rate amounts

to 188.2 hours. I conclude that the Claimant was therefore paid the national minimum wage for the additional 132 hours.

Where an employee has duties/responsibilities that are carried out overnight, is the employee on call or working throughout the night even though they might be sleeping between tasks?

60. In accordance with my findings at paragraphs 18 to 20 above, I conclude that, during the relevant period, Mr Dharmadasa's role at the hotel whilst he was staying on site, was to help with weekend cover in case of emergencies. Unless there was such an emergency, Mr Dharmadasa was supposed to rest and sleep in his room. Applying Mencap, Mr Dharmadasa was only entitled to national minimum wage for the hours that he was working, namely when he was awake and attending to a disturbance or an emergency. In light of my findings above, I conclude that Mr Dharmadasa has failed to establish, on balance, that he attended any such disturbances over and above the 132 additional hours he has received payment for.

The Tools

61. Mr Dharmadasa failed to provide any evidence identifying the basis on which he was making a claim in this jurisdiction for return of his tools. He further failed to provide evidence of ownership or any evidence itemising the tools which the Respondent allegedly retains control over. In the circumstances, I conclude that any claim Mr Dharmadasa may have been entitled to bring in this jurisdiction has not, on balance, been proved.

Employment Judge Cheunviratsakul

29 September 2021