

JERSEY / JUDGMENT

Petru Serpu vs Jersey Waterfront Management Ltd

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IN THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL IN THE MATTER: BETWEEN PETRU SERPU CLAIMANT AND JERSEY WATER FRONT MANAGEMENT LTD RESPONDENT TRIBUNAL JUDGMENT Reference: [2019] TRE 186 Hearing Date: Thursday, 6 February 2020 Before: Advocate F B Robertson, Deputy Chair Appearance: For the Claimant: In Person assisted by Mr Alex Misselbacher (Translator) For the Respondent Matthew O'Brien, Senior HR Business Partner Valerie Sloman, Financial Controller THE DECISION The Claimant's claims for wrongful dismissal and unpaid wages fail.

REASONS

INTRODUCTION

1. By way of a Claim Form dated 12 September 2019 the Claimant brought the following complaints;
 - (a) Unpaid wages /deductions;
 - (b) Unpaid Notice pay i.e. wrongful dismissal on the grounds that the Respondent terminated the Claimant's employment without notice;
 - (c) Unfair dismissal;
 - (d) Race discrimination.
2. The claims for unfair dismissal and race discrimination were rejected by the Tribunal for the reasons set out in a letter to the parties dated 16 September 2019.
3. By way of a Response Form dated 25 September 2019 the Respondent defended the claim for notice pay on the basis that the Claimant was summarily dismissed for gross misconduct, and the claim for unpaid wages or deductions on the basis that no deductions had been made.
4. The Tribunal received witness statements and heard oral evidence under oath from the Claimant and Mr Hany Ismail on behalf of the Claimant. The Respondent filed witness statements from Ms Josie Ofori, Employee Relations Manager of the Respondent and Ms Valerie Sloman, Financial Controller of the Respondent. At the Hearing oral evidence on

oath was given by Ms Sloman, Matthew O'Brien, the Senior HR Business partner of the Respondent, and Miss Beverly McIlwee, Assistant Financial Controller of the Respondent. Ms Ofori was unable to attend the Hearing. Mr O'Brien gave oral evidence which covered and was consistent with the matters raised in Ms Ofori's witness statement, and gave additional evidence in relation to other matters.

BACKGROUND

5. The largely agreed background is now set out below.
6. The Claimant commenced employment with the Respondent on or about 4 November 2018 as a food and drinks shift leader at the Respondent's Radisson Blu Hotel in Jersey. The Claimant asserted he commenced employment on 28 October 2018. Nothing, however, turns on this as it was common ground the Claimant's employment was terminated on 6 September 2019, and it is thus clear that he did not have sufficient continuity of employment at the time of dismissal to bring a claim for unfair dismissal.
7. The Claimant claimed that he was significantly underpaid in that there were many hours he worked which were not accounted for in the Respondent's payroll system. To assist with payroll processing within the Hotel the Respondent used an electronic system (known as "EPS"). Employees were expected to "clock in" and "clock out" for each shift they worked. In addition there was back up manual recording of hours worked. The working hours recorded were then reviewed by the employee's direct line manager on a weekly basis who would then make any necessary adjustments (eg for the deduction of any breaks etc). Once the line manager had authorised the employee's working hours the hours recorded would be electronically submitted to the Respondent's finance team for review and then uploaded onto the payroll system for subsequent payments to employees on a monthly basis. The Claimant accepted that the EPS electronic clocking in system was in place but submitted that it was common practice for additional hours worked to be recorded manually, and these additional hours had not been paid.
8. The Respondent contended that the Claimant was summarily dismissed for gross misconduct as a result of him removing cash from the Respondent's tills without authorisation and concealing the monies taken. The Claimant accepted that he had removed monies from the tills but maintained that they were monies due to him by way of tips. He further asserted that it was common practice for employees to keep tips individually notwithstanding the procedure set out in the Respondent's Staff Handbook. Paragraph 6 of the Staff Handbook/List of Policies and Procedures signed by the Claimant on 14 November 2018 contained the following terms; "6. Gratuities and service charge If a customer requests that a gratuity be added to an account, it is not permitted to imply or infer that cash would be preferred. If cash is given to you by the customer as a gratuity or a service charge this must be handed to your line manager immediately. All gratuities (paid by cash or card) will be totalled in the usual way and distributed according to the hotel standard operating procedure." The Hotel will make the necessary statutory deductions before making payment

to you through the payroll.... All Team Members are reminded that it is your personal responsibility to ensure any cash tips are declared and handed to your line Manager to comply with the Criminal Finances Act which came into effect on 30th September 2017, failure to comply with this Policy will result in disciplinary action being taken.” (Emphasis added).

9. The background to the dismissal of the Claimant is now set out below.
10. An investigative meeting was held with the Claimant on 30 August 2019 following the Respondent’s review of CCTV footage which showed the Claimant removing monies from the till on 22 August 2019. Present at the meeting were Ms Grainne McAreavey (Chair), Beverly McIlwee (the notetaker), Peter Munns, the CCTV operator, and the Claimant. Contained in the Court File was a handwritten note of the meeting prepared by Ms McIlwee. The Note indicates that the Claimant accepted that he removed money from the till but maintained that the cash removed represented tips due to him, and that he had often removed tips due to him at the end of the evening. At the end of the meeting the Claimant was informed that he was suspended whilst further investigations were conducted.
11. A letter dated 30 August 2019 was sent by the Respondent to the Claimant confirming his suspension on full pay.
12. Subsequently, by a letter dated 2 September 2019 the Claimant was invited to attend an investigation meeting on 4 September 2019. The Claimant alleged he never received this letter.
13. An investigation meeting was held on 4 September 2019. Minutes of this meeting were in the Court File. The attendees were Ms McAreavey and Ms McIlwee. It was noted that the Claimant had failed to attend the meeting and that the decision made was to continue the case to a disciplinary hearing for gross misconduct.
14. A letter dated 4 September 2019 was sent by the Respondent to the Claimant inviting him to attend a disciplinary meeting on 6 September 2019 regarding his alleged gross misconduct. The particulars of the allegation were detailed in the said letter as follows: “Your theft of company property. On 1 August, 5 August, 8 August (on two occasions), 10 August (on two occasions) and 22 August 2019 you have been observed removing cash from the till without authorisation and concealing this about your person. During the investigation on 30 of August 2019 you also stated you had done this on 26 August and 28 August 2019.”
15. The said letter further indicated that the Claimant was entitled to be represented at the disciplinary meeting by a fellow employee or trade union representative.
16. The disciplinary meeting was held on 6 September 2019 which was attended by the Claimant. The other attendees were Peter Munns (Chair) and Beverly McIlwee (notetaker). The notes of the meeting indicate that the Claimant was content to proceed without a representative. The Claimant indicated that he had not received the previous letter of 2 September as he had changed address. He was advised that it was the employee's

responsibility to notify the Respondent of a change of address. He was then given the opportunity to read the notes of the meeting of 4 September 2019.

17. The conclusion reached at the meeting was that the Claimant was to be dismissed with immediate effect for gross misconduct in removing and keeping cash from the tills. The Claimant was advised that he had the right of appeal. The Claimant was also advised that the matter was being reported to the Police. The Claimant indicated he did not understand English well enough but read and signed the notes of the meeting.
18. A letter was sent by the Respondent to the Claimant on 6 September 2019 informing him that he had been summarily dismissed for gross misconduct and setting out details of the offence. The letter confirmed that the Claimant had a right of appeal and indicated the address to which any appeal should be sent within seven days.
19. The matter was subsequently referred to the Police but the case was ultimately dropped.
20. The above background was largely uncontested. There were however a number of material areas of dispute between the parties and the witnesses. The material elements of the evidence including the disputed matters is summarised below. WITNESS EVIDENCE The Claimant
 - (a) Unpaid wages
21. The Claimant accepted that there was an electronic signing in system (which operated by way of a hand scanner). There were also manual records kept. The Claimant's evidence was on occasion difficult to follow but in essence he alleged that it was common practice and procedure for employees who were working overtime to enter the extra hours manually on the paper worksheets but not to sign in electronically.
22. He indicated that he had been told by the Respondent's Food and Beverage manager, Mr Ismail that any additional hours over a 10 hour shift should be recorded manually and not recorded electronically. He was in particular told to sign out electronically at the end of a 10 hour shift then record any additional time manually. He said that the reason for this was that the Respondent did not want too many hours recorded electronically as "it would not appear good for the company" to have too many hours showing. The Claimant stated that he was also told this by his fellow workers.
23. The Claimant indicated that the extra hours he worked which he did not login electronically were often incurred in the mornings. For example he indicated that he would often start work at 7am to cover the breakfast shift but not login until much later. Similarly he indicated that he would often work late at night until 1am or 2am but log out electronically earlier in the evening. (The Tribunal, however noted that the EPS time records provided on the Court File near invariably showed the Claimant electronically logging out at 23:45, midnight or 1am in any event. The Claimant accepted this).

24. The Claimant in his Claim Form claimed that the total amount of unpaid hours was 80 hours. In his witness statement dated 19 December 2019, however he claimed that the unpaid hours were 80 hours per month for each of May, June, July and August 2019. When pressed the Claimant sought to explain that the witness statement was inaccurate due to his lack of familiarity with the English language. It is however to be noted that the witness statement is clear in its language as indicated below; "At the end of May when I received my payslip I noticed there are missing hours
- (80) which I wasn't paid for... Nothing happened until the end of June and the same issue happened again also approximately 80 hours on top of 80 from May... At the end of July same problem again and the same amount of hours missing."
25. The Claimant in his evidence at the Hearing stated that the missing and unpaid hours were 80 in total for the months of May, June, July and August. When pressed he indicated that the underpaid hours were exactly 20 hours each month.
- (b) Wrongful dismissal
26. The Claimant accepted that he had taken cash out of the tills but that he had only taken monies that were owed to him by way of tips. His evidence was that it was common practice for all staff to take their own cash tips as these were not pooled. His practice was where a customer did not provide a separate cash tip but paid for his meal etc with cash was that the Claimant would put the entire amount of cash into the till and make a mental note as to the amount allocated for a tip. He would then remove cash from the till once his total tips have reached a significant amount (say £20). He would take cash from the till three or four times a day on this basis. When asked by the Tribunal how he knew exactly how much was "owing" to him throughout the day he said he did not write anything down but simply remembered the running tally of tips due to him.
27. As regards section 6 of the Staff Handbook/Lists of Policies and Procedures which provided that cash tips had to be handed to the line manager immediately, the Claimant's evidence was that he had never signed that document. He was only taken briefly through it by his line manager, Mr Ismail who added the Claimant's electronic signature. The Claimant stated that he was unaware of the policy to give tips to his line manager and that he had never been told to do that by anyone.
28. As regards the meeting on 30 August 2019, the Claimant denied that he was shown the CCTV footage then. His evidence was that he only saw the footage for the first time at the meeting on 6 September 2019. He indicated that he did not receive the letter of 2 September inviting him to a meeting on 4 September as that letter was sent to his former address. Subsequently he was informed that letters were waiting for him at his former address. He thus attended the premises and collected the letters of 2 and 4 September, the latter of which invited him to the disciplinary meeting to be held on 6 September 2019 which he duly attended. Mr Ismail

(a) Unpaid Wages

29. Mr Ismail was the Food and Beverage Manager at the material times.
30. He indicated that the hours worked by staff were recorded by the electronic hand scanning system and there were in addition manual signing in and signing out sheets.
31. His evidence was that often the hand scanner was not working or an employee would forget to use it. The policy was to reconcile the manual sheets and electronic scanning records to ensure they were consistent or that any discrepancies were accounted for. For example, the Finance Department of the Respondent would deduct from the electronic records half an hour from every six hours to take account of work-breaks in order to calculate the pay due. There would however be occasions when there were disputes as to the amount deducted by the Finance Department. Problems often arose when the hand scanner was not working properly and it was therefore necessary to revert to the manual signing in sheets.
32. Mr Ismail's further and clear evidence was that he was not aware of any practice of employees deliberately not signing in via the electronic system and completing manual timesheets in relation to any additional hours worked. He further insisted he had never told the Claimant to avoid using the electronic hand scanner but to log in his additional hours manually instead.

(b) Wrongful Dismissal

33. Mr Ismail's evidence was that it was common practice for the staff to keep cash tips to themselves rather than pooling them with others. Tips left by way of credit card payments or by way of service charge for rooms were pooled. Mr Ismail accepted it was not formal Company policy to allow the staff to keep cash tips but the widespread practice was that the staff kept their own cash tips. As Food and Beverage Manager he had stopped the practice during the Christmas period of 2018 as pooling was fairer, but after January 2019 he allowed it to happen again a result of complaints from the waiting staff. He believed that some staff may have taken money from the tills on account of tips. Mr Matthew O'Brien

(a) Unpaid Wages

34. Mr O'Brien is the Senior HR Business partner of the Respondent based in the UK. He gave general background evidence and was also able to give some evidence in relation to the matters in dispute.
35. It had been difficult for the Respondent to deal with the Claimant's claims in this regard as the Claimant had not specified which days he was allegedly underpaid.

36. Mr O'Brien stated he was unaware of any practice in Jersey of employees not checking in via the electronic EPS system. If there was ever a flaw in the EPS system then it would be correct to revert to the manual records. He did not however accept there were regular problems with the EPS system. He indicated that he had reviewed the EPS records for May, June, July and August 2019, and could not see any evidence of problems with the system.
- (b) Wrongful dismissal
37. The Respondent's policy was clear as regarding tips as set out in the Policies and Procedures document in the staff handbook. The Respondent had signed the document electronically on 14 November 2018. It was not uncommon for employees to commence employment and sign the relevant employment documentation shortly thereafter.
38. The policy was simply that all cash tips received by an employee had to be handed immediately to the employee's line manager. This was for two reasons; (a) to ensure that tips were pooled and shared amongst relevant employees and (b) to ensure that remuneration by way of tips was taxed in accordance with the local tax laws.
39. Mr O'Brien Indicated that responsibility for compliance with the policy was that of the relevant line managers. He did not know if there was widespread or any departure from the policy in Jersey allowing staff to keep their individual cash tips. He indicated he was certainly not aware of any practice of employees placing tips in the till and collecting them later by taking money from the till. He stated that even if this was the practice by certain employees this would still amount to grounds for summary dismissal in his view. Valerie Sloman
- (a) Unpaid Wages
40. Ms Sloman is the Financial Controller of the Respondent in Jersey.
41. Ms Sloman indicated that there was no problem with the EPS system in Jersey. The system recorded hours accurately. Occasionally however there may have been an issue with delays in the relevant information being uploaded to the line manager for review. One of the reviews undertaken by the line manager was to ensure there was deduction of 30 minutes for every six hours recorded in relation to unpaid breaks. If the staff member chose not to take a break they were required to request approval from their line manager. Ms Sloman indicated that sometimes staff forgot to log in electronically, and in those circumstances regard would be had to the manual timesheets. She gave firm evidence that at no time were staff ever informed that they should log in extra time on the manual timesheets and log out electronically in order to do this.

42. She took the Tribunal through the EPS records from November 2018 to August 2019. They indicated that on a few occasions the Claimant had not signed in electronically but these were fairly rare occurrences. The records also showed that on most occasions the Claimant was logging out near midnight or beyond and it was thus difficult to see how he could have worked significant extra hours in the evenings.
- (b) Wrongful Dismissal
43. Ms Sloman indicated that she became aware of the practice of staff keeping their own cash tips when Mr Ismail brought it to her attention in October/November 2018. She indicated that she was "not happy" with this practice but recognised that there could be retention problems with staff if they were not allowed to keep their own cash tips. The policy regarding cash tips was never formally changed. The issue was however discussed by various managers and it was accepted that cash tips could be kept individually. She indicated that employees would have been aware that they could keep their own cash tips directly received from a customer. She was however firm in her evidence that there was no authority for staff to "save tips" in the till and to subsequently collect the tips from the till by removing money from it. She was not aware of anyone doing this until the Claimant's conduct came to light. Each employee who had access to the tills would have had to sign a float certificate. It was the responsibility of each cashier to ensure that the float was correct. The Claimant would have had to have signed certificates certifying that the monies in the till were accurate.
44. The Respondent first began examining CCTV footage in May 2019 as it had noticed a deficit in the cash position compared to the stock sold. The Respondent instructed an external stock reviewer to analyse the situation. The investigation showed that there was a significant amount of "no sales" entered in the bar tills under the Claimants ID code. The No Sale button enabled the till to be opened without registering a sale although it would be rare for it to be used. The Respondent subsequently analysed a few chosen days to seek to understand why the Claimant was so frequently using the No Sale button.
45. A review of the CCTV Footage showed the Claimant on several occasions pressing the No Sale button or voiding the sale and removing money from the till (on one occasion it appeared to be two £20 notes). There were also occasions where the Claimant took money from the customer but then cancelled the transaction by voiding the sale, and then keeping the money. (It is to be noted that the minutes of the meeting of 4 September 2019 detailed examples of the Claimant pressing the No Sale button or voiding the sale and removing cash from the till on 1, 5, 8, 10 and 22 August 2019).
46. Ms Sloman indicated that the CCTV footage showed a couple of other employees pressing the No Sale button on a few occasions to open the till but no money was taken by them.
- Grainne McAreavey

47. Miss McAreavey, the Commercial Development Manager of the Respondent had no involvement prior to 30 August 2019, when she was asked to chair a meeting with the Claimant. She confirmed that the CCTV footage was shown to the Claimant at that meeting. She confirmed that the notes of the meeting on 30 August and 4 September were accurate and that the Respondent's letters to the Claimant of 2 and 4 September were sent by email and post. Beverley McIlwee
48. Miss McIlwee, an Assistant Financial Controller with the Respondent took the notes of the meetings on 30 August, 4 and 6 September
2019. She confirmed that the notes were an accurate record of the meetings and in particular that the Claimant was shown the CCTV footage on 30 August. FINDINGS OF FACT
49. Having heard from the relevant witnesses I make on the balance of probabilities, the following findings of fact on the salient issues in dispute; (i) There was no authorisation from the Respondent for employees to record additional hours' work on manual timesheets but not to record them by way of the electronic hand scanning EPS system. The Claimant's evidence in this regard was directly contradicted by his own witness, Mr Ismail; (ii) There were no additional hours worked by the Claimant which were either not recorded by the EPS system or not paid by the Respondent. The Claimant's evidence was inconsistent on this issue and the evidence of the Respondent's witnesses is to be preferred; (iii) It appears to be accepted by the parties that certain employees (eg waiting and bar staff) were allowed to keep their own cash tips contrary to the Respondent's formal policy in this regard; (iv) Notwithstanding the fact that employees were, in practice, allowed to keep their own cash tips there was no authorised practice allowing employees to save their tips in the till and to remove cash from the till from time to time in order to "collect" their tips. The evidence of Ms Sloman in this regard was persuasive and compelling. The Claimant took and kept monies from the till without authorisation. There was no evidence of any employee other than the Claimant taking money from the till; (v) The Respondent followed a careful and well considered process which included a satisfactory level of investigation, and the notes of the meeting are an accurate record of them. THE LAW
50. Whilst there could not be any valid claim for unfair dismissal in this case, as the Claimant did not have sufficient continuity of employment at the time of dismissal to present such a claim, it remains of assistance to briefly consider the law in relation to dismissals for conduct generally.
51. An employer is required to show a reason for dismissal. In this case the Claimant was dismissed because the Respondent believed his actions amounted to gross misconduct.
52. Gross misconduct is conduct so serious that it justifies instant dismissal without notice. Exactly what amounts to gross misconduct will depend on the facts of each case but it must constitute an act or a series of acts, which fundamentally undermined the employment contract.

53. Where misconduct is the reason for dismissal whether or not it was gross misconduct it is helpful to take note of the test established in *British Home Stores Limited v Burchell* [1980] 1 CR 303, notwithstanding that it is primarily a test to determine fairness in unfair dismissal cases. The test requires the employer to show that (i) he believed the employee was guilty of misconduct; (ii) he had in his mind reasonable grounds upon which to sustain that belief, and (iii) at the stage at which he formed the belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

CONCLUSION

54. The Respondent had a genuine belief that the Claimant was guilty of gross misconduct and had reasonable grounds for that belief. There was a satisfactory and thorough level of investigation.
55. Taking and keeping monies from the till without authorisation clearly amounts to gross misconduct and this was a case which justified summary dismissal.
56. There is no evidence to suggest that the Respondent failed to pay the correct wages to the Claimant.
57. By reason of the above, the Tribunal has found that the Claimant was not wrongfully dismissed and that he received payment in full for the hours worked. He is thus not legally entitled to the sums claimed. Advocate F B Robertson, Deputy Chairman Date: 15 May 2020

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