EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr R Teague	AND	Mr N Moore and Others Together trading as Penmere Manor Hotel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 29 October 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Miss E Repper, Friend**
For the Respondent: **Mr B Henley, Consultant**

JUDGMENT

The judgment of the tribunal is that:
1.The claimant was issued with a written statement of the particulars of his employment; and
2. The claimant's unfair dismissal claim is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Roger Teague claims that he has been unfairly dismissed, and asserts that the respondent failed to issue him with a written statement of the particulars of his employment. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and that it did issue the claimant with an appropriate written statement.
2. I have heard from the claimant, and from Miss Jacqueline Teague on his behalf. I have heard from Mr Nicholas Moore, Mr Simon Penna, and Mrs Louise Scrivener on behalf of the respondent. I was also asked to consider a statement from Mr Phil Morgan on behalf of the respondent, but I can only attach limited weight to this because he was not here to be questioned on this evidence.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The respondent is a family partnership consisting of Mr Nicholas Moore, Mr Brian Moore and Mrs Jean Moore who own and run the Penmere Manor Hotel in Falmouth in Cornwall ("the Hotel"). The claimant Mr Roger Teague commenced employment as a Bar Person at the Hotel in April 2008 and his employment transferred to the respondent in June 2008. He was dismissed by reason of gross misconduct with effect from 7 August 2017. For the last three years of his employment he also stayed overnight at the Hotel on occasion as a night porter and to deal with any emergencies.
5. There is a dispute between the parties as to whether the claimant was issued with a written statement of the terms of his employment or any other employment contract. The claimant denies that this was the case. The respondent has adduced a written contract of employment which it says was sent to the claimant, and a written staff handbook which it says was also sent and was available both in the staff area and the back office at the Hotel.
6. I have seen a schedule which was also adduced by the respondent dating from 2009. It lists all of the Hotel's employees and records that each of them was sent a written contract of employment. It also records whether each employee has signed and returned a copy. That schedule indicates that a contract of employment was prepared for the claimant, along with all other staff, in April 2009, and that in early May 2009 Mr Brian Moore of the respondent sent two copies of the same which he had signed to the claimant. The schedule also indicates that the claimant did not return a signed copy. The copy of that contract which is in the trial bundle is in the name of the claimant, but is not signed by either party. The respondent says that it was printed from its computer records for the purposes of the trial bundle today.
7. On the balance of probabilities I find that the claimant was issued with a written contract of employment in May 2009. It also seems that he did not return a signed copy. Nonetheless I am satisfied from the contemporaneous documents that he was sent this contract. In addition, it incorporates by reference the staff handbook for the Hotel, which is also available to the staff at the Hotel in the staff room and back office.
8. Clause 15 of the contract of employment is headed "Gratuities". This provides that employees must not accept or agree to accept any gifts or services, and concludes by stating: "All gratuities must be entered through either the hotel EPOS system or front of house system and will be distributed to employees accordingly dependent upon the number of hours worked and your rate of pay."
9. Paragraph 32 of the staff handbook refers to tips. Paragraph 32.1 provides: "When a tip is left, in cash or by way of a cheque or credit card payment, the rule is that all tips are paid into reception. This applies even if the tip is said to be for a particular group of staff, or an individual." Paragraph 32.2 explains that the respondent has a tronc system and that all tips received are to be distributed to all members of staff through their wages and subject to the normal income tax deductions. The distribution is calculated pro rata depending on the number of hours worked by the staff.
10. The claimant was aware of this system and had benefited from it for many years. The pooled tips were distributed through the tronc on a quarterly basis. Such payments were referred to as gratuities on the relevant pay slip.
11. The respondent's staff handbook also incorporated its disciplinary procedure. This provided that dismissal would be the normal sanction for gross misconduct, examples of which included, but were not limited to, theft and dishonesty. The procedure was silent on whether the respondent might involve outside personnel in the disciplinary process.
12. In June 2017 two matters arose which led to the claimant's dismissal. The first resulted from a complaint by a Hotel guest who arrived late and could not access his room. The claimant was working as the night porter. The guest rang the relevant number but his call was not answered. He had to sleep in reception. Mr Nicholas Moore, from whom I have heard, investigated the matter the following morning and found that the telephone in the room where the claimant had been staying was off the hook. He felt that the claimant had done this deliberately to avoid being woken.

13. The second matter involved the retention of a £5 tip by the claimant. Mr Hunking the head chef had reported to Mr Moore that the claimant had passed on a tip of £20 in an envelope from a coach party, but had told him that he refused to pay in a further tip of £5 through the respondent's system. The claimant has never denied that he retained this £5 tip, and says that it was a personal gift to him from a grateful customer.
14. Mr Moore suspended the claimant on full pay, and carried out an investigation. This included interviewing staff and obtaining statements from the receptionist (namely Lisa), and from Mr Phil Morgan, another employee. Mr Hunking declined to provide a statement apparently for fear of repercussions. Mr Moore sent an email to the claimant on 29 June 2017 requiring him to attend a disciplinary hearing to face allegations relating to these two matters. The email also referred to other performance issues and complaints. The claimant was informed of his right to bring a representative. That email did not expressly state that the disciplinary hearing might result in the claimant's dismissal. The claimant responded with a request for a copy of his job description, contract of employment and employee handbook, which the respondent then sent to him.
15. Unfortunately, Mr Moore's sister died and it was another four weeks before the disciplinary hearing was arranged. In addition, Mr Moore decided that because he had carried out the initial investigation and suspension, and wished to give evidence about what he had found, it was not appropriate for him to chair the disciplinary hearing. The respondent is a small family partnership, and also because of the recent bereavement he decided to engage someone independent of the respondent's business to chair the disciplinary hearing to make the decision. He asked Mr Penna, from whom I have heard, who agreed to do so. Mr Moore knew Mr Penna personally, and asked him because he had many years' experience of HR matters, including employment in that role by the local authority. Although they were friendly, I accept Mr Penna's evidence that he conducted the disciplinary hearing and considered the appropriate sanction independently of any influence or suggestions from Mr Moore.
16. The disciplinary hearing took place on 3 August 2017. Mr Moore presented his own statement, and that of Lisa the receptionist and Mr Morgan, together with the contract of employment and staff handbook. Mr Moore was questioned by Mr Penna. The claimant also attended with Miss Jacqueline Teague, from whom I have heard. Mr Penna questioned the claimant, who was able to state his case in reply to the allegations. I have seen the minutes of the disciplinary hearing, which the claimant subsequently signed to confirm were true and accurate. The minutes record that he accepted he was familiar with the staff handbook, although the claimant now says that this was only after the same was sent to him following his suspension.
17. Mr Penna concluded that during the hearing the claimant had "bent the truth and deliberately withheld information". He concluded that the claimant was aware of the provisions of the staff handbook and the respondent's system for dealing with gratuities, but had still taken the £5 tip "without any conscience". He noted that the £5 was a relatively trivial sum, but it still amounted to theft and led to a breakdown of trust in the relationship. Secondly, Mr Penna was very concerned about the claimant's attitude with regard to leaving the telephone unmanned which he considered to be a serious health and safety breach. He noted that the claimant had conceded that on night porter duty he was responsible for the safety of the Hotel, and had to be available in the event of an emergency, but had not been available when needed.
18. Mr Penna rejected all of the other performance-related allegations as being unproven, but decided to dismiss the claimant summarily for the two instances of gross misconduct. He considered other potential sanctions, but felt that the dishonesty shown by the claimant together with his serious negligence when sleeping as the night porter had destroyed the trust and confidence between employer and employee, and that dismissal was the appropriate sanction.
19. I accept the evidence of both Mr Penna, and Mr Moore, that it was Mr Penna who took the decision to dismiss the claimant, independently of Mr Moore. Mr Moore then wrote to the claimant on 7 August 2017 on behalf of the respondent confirming the claimant's summary dismissal, and his right of appeal.

20. The claimant appealed against his dismissal. Mr Moore felt that there was no independent senior manager within the respondent who could deal with the matter fairly, and therefore decided to appoint a further independent person to hear the appeal. He spoke with his accountant, who recommended Mrs Scrivener, from whom I have heard, and who has considerable HR experience, including employment with Marks and Spencer in that capacity. Mr Moore had never met her before. Prior to the appeal process the claimant expressed concern that the appeals not been dealt with by a manager of the respondent, but Mr Moore felt that the only fair resolution was to have someone from outside the small family business.
21. In any event it was Mrs Scrivener who chaired the appeal hearing which took place on 22 August 2017. The claimant attended and was represented by a friend namely Charlotte Wells. Mrs Scrivener dealt with the matter by way of a re-hearing on appeal. She obtained a further statement from Lisa, to clarify certain concerns, but as a result of this she determined to overturn the finding of gross misconduct in connection with the allegation that the claimant had neglected his duties as the night porter. She felt that there was a conflict of evidence between Mr Moore's version and the claimant's version, and no corroborating evidence, and she felt that this allegation was therefore unproven. The claimant's appeal was successful to this extent only, namely that this finding was overturned.
22. Nonetheless Mrs Scrivener decided that the claimant had been guilty of gross misconduct in failing to account for the £5 tip. She decided that the claimant had been the beneficiary of the respondent's tronc tips system for many years, and that he was conversant with the requirements of the staff handbook, both through his knowledge of the tronc payroll system and the provisions of the handbook which was widely available, and had deliberately and dishonestly failed to account for the tip when required to do so. For this reason she decided to reject the claimant's appeal and to uphold Mr Penna's decision to dismiss the claimant.
23. Having established the above facts, I now apply the law.
24. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
25. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends 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, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
26. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
27. I have considered the cases of British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14) IDS Brief 1027 and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
28. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

29. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
30. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.
31. At an earlier case management preliminary hearing, the claimant confirmed that he relied upon three grounds of alleged unfairness. The first was unreasonable delay; the second the involvement of the independent decision-makers; and the third was the harshness of the sanction.
32. The claimant confirmed at this hearing that he no longer asserts that the dismissal was unfair by reason of the delay between his suspension and the disciplinary hearing. It was unfortunate that this took a period of four weeks, but was explained by the respondent's family bereavement. Although it was unpleasant for the claimant having the disciplinary charges hanging over him, nonetheless he was not prejudiced by this delay which was not unreasonable in the circumstances, nor an inordinate delay in any event.
33. In my judgment on the circumstances of this case, it was not unfair or unreasonable of the respondent to involve Mr Penna and/or Mrs Scrivener in this process. The respondent is a small family business, largely run by Mr Nicholas Moore, and he was closely involved in the investigation and had provided a written statement. Apart from two other members of the family partnership, there was no one senior to Mr Moore who could have made an independent decision. The claimant is right to point out that there is no provision in the relevant procedure which apparently allows the respondent to appoint an outside agency. Nonetheless, I accept the evidence of Mr Penna and Mrs Scrivener that they took their decisions entirely independently of any influence from Mr Moore, and considered the circumstances of this case entirely on its merits as they saw them. Given Mr Moore's concern about the requirements to have a affair an independent process, in my judgment it was commendable of the respondent to do so, rather than being an unreasonable or unfair decision.
34. I find that in this case the was a reasonable investigation undertaken by the respondent on the circumstances of this case. This involved interviewing and taking statements from other members of staff, and Mr Moore preparing his own statement and the relevant documents. Although the claimant was not informed when required to attend the disciplinary hearing that it might result in his dismissal, nonetheless he was fully aware of the allegations against him and that the respondent perceive them to be gross misconduct. He also had the opportunity to state his case to meet these allegations during the disciplinary process.
35. In my judgment Mr Penna was entitled to prefer Mr Moore's evidence to that of the claimant and reach the conclusion that the claimant had deliberately failed to answer the telephone when in a position of responsibility. Mrs Scrivener was equally entitled to disagree, and she overturned this finding. Mr Penna's decision not to uphold the other matters raised before the disciplinary hearing, and Mrs Scrivener's decision to overturn one of the findings of gross misconduct, are both indicative of a healthy independent process which by no means merely rubberstamped the allegations raised by Mr Moore.
36. The allegation which both initially and ultimately led to the claimant's dismissal was his retention of the £5 tip, which the claimant never denied withholding. Given the availability of the staff handbook, and that the claimant had benefited from the shared tips system through the tronc and was clearly well aware of how the system worked, it was in my

judgment reasonable for the respondent to believe that the claimant had deliberately and dishonestly withheld the tip.

37. The respondent genuinely believed that the claimant had acted dishonestly; that belief was based on reasonable grounds; and it followed such investigation as was fair and reasonable in all the circumstances of the case.
38. The claimant complains that the sanction of dismissal was too harsh. It is true that the amount of the tip was nominal, but it was the act of dishonesty which led to the claimant's dismissal, not the amount of the tip. There is a band of reasonable responses to this conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
39. It is not for the tribunal to substitute its view for that of the respondent. In my judgment this was an act of dishonesty, in circumstances where the claimant often worked alone in a position of trust, and dismissal is therefore within the band of responses reasonably open to the respondent when faced with these facts.
40. Accordingly I find that bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant's unfair dismissal case.
41. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 22; a concise identification of the relevant law is at paragraphs 24 to 30; how that law has been applied to those findings in order to decide the issues is at paragraphs 31 to 40.

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Employment Judge N J Roper

Dated: 30 October 2018

JUDGMENT SENT TO PARTIES ON