



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Kevin Mitchell

**Respondent:** Lidl Great Britain Limited

**Heard at:** Cardiff (by video)

**On:** 31 March 2022

**Before:** Employment Judge E Sutton

## Representation

**Claimant:** Mr Andrew Windross (counsel)

**Respondent:** Ms Joanne Williams (counsel)

# RESERVED JUDGMENT

1. The claimants claim of unfair dismissal is not well founded and is accordingly dismissed;
2. The claimants claim for wrongful dismissal is not well founded and is accordingly dismissed.

# REASONS

## Preliminary

1. These are my reasons following the final hearing which took place over the course of 1 day on 31 March 2022. It addresses liability issues arising from the claims brought by Mr Kevin Mitchell against Lidl Great Britain Limited. The claims relate to unfair dismissal pursuant to section 95(1)(a) and section 98 of the Employment Rights Act 1996 ('ERA') and wrongful dismissal; the latter being a common law action based on breach of contract. The hearing was conducted remotely by CVP.
2. In reaching my decision I have had regard to the agreed court bundle (263 pages), and a separate witness statement bundle (28 pages). I also had the benefit of hearing oral evidence from:

- (1) Mr Luke Burdge (assistant team manager on behalf of the respondent);
  - (2) Mr Andrew Thorndyke (team manager/dismissal officer on behalf of the respondent);
  - (3) Mr Darren Meaney (regional head of sales on behalf of the respondent), and
  - (4) Mr Kevin Mitchell (the claimant).
3. Additionally, at the conclusion of the oral evidence (late afternoon on 31 March 2022), it was agreed that succinct written submissions would be prepared by counsel due to the time of day. The claimants submissions are dated 24 April 2022 and the respondents are dated 5 May 2022. I am very grateful to counsel for their assistance in this matter. I have drafted this judgment as soon as practicable following receipt of their submissions. References in this judgment to page numbers refer to those contained in the agreed court bundle.

### The issues

4. At the outset of the hearing I identified and agreed the issues to be determined with the parties. It was agreed that the evidence would focus on liability only due to the number of witnesses and the time available. It was also apparent that there was no real dispute between the parties that the reason or principal reason for the claimants dismissal was 'conduct' which is a potentially fair reason for dismissal falling within section 98(1) ERA.
5. Consequently, the outstanding issues, by application of section 98(4) ERA and the principles arising from *British Home Stores v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17, were agreed as follows:
  - (1) Did the respondent genuinely believe that the claimant was guilty of misconduct?
  - (2) If so, was that belief based on reasonable grounds?
  - (3) Did the respondent carry out such investigation into the matter as was reasonable?
  - (4) Did the respondent otherwise act in a procedurally fair manner?
  - (5) If all those requirements are met, was it within the band of reasonable responses for the respondent to dismiss the claimant?
6. Additionally, in relation to the claim for wrongful dismissal, the issue is whether the claimant was guilty of gross misconduct.

## The legal framework

### Unfair dismissal

7. An employee has the right, under section 94 ERA, not to be unfairly dismissed, subject of course to certain qualifications and conditions set out in the ERA.

### *Reason for dismissal*

8. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within section 98(2) ERA or some other substantial reason. As already stated, a reason relating to the claimants conduct is a potentially fair reason falling within section 98(2).
9. Where an employer alleges that its reason for dismissing the claimant was related to the claimants conduct, the employer must prove that, at the time of dismissal, it genuinely believed that the claimant had committed the conduct in question; and that this was the reason for dismissing the claimant. The test is not whether the Employment Tribunal ('the Tribunal') believes the claimant committed the conduct in question, but whether the employer believed the claimant had done so.

### *Fairness*

10. If the respondent proves that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason, applying the test in section 98(4) ERA.
11. Section 98(4) ERA provides that:

*'... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case'*

12. The Employment Appeal Tribunal ('EAT') has provided guidelines regarding how this test should be applied to cases of alleged misconduct in *British Home Stores v Burchell* [1980] ICR 303. The EAT stated that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

13. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make representations on allegations made against them and put their case in response; and allowing a right of appeal from the disciplinary process.
14. In 2015, ACAS issued its current Code of Practice on Disciplinary and Grievance Procedures. The Tribunal must take into account all relevant provisions of the Code when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) of the Trade Union and Labour Relations (Consolidation) Act 1992).
15. Even where procedural safeguards are not strictly observed, a dismissal can be fair. This can be the case where specific procedural defects are not intrinsically unfair and the procedures overall are fair. The Tribunal must determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness (or lack of it) of the process, and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies.
16. In applying section 98(4) ERA, the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place. Similarly it is irrelevant that a lesser sanction may be reasonable.
17. Rather, section 98(4) ERA requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.
18. This 'range of reasonable responses' test applies equally to the procedure by which the decision to dismiss is reached (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23).
19. The EAT has emphasised the importance of length of service and past conduct as being factors to take into account when considering whether the sanction imposed fell within the band of reasonable sanctions (*Trusthouse Forte (Catering) Ltd v Adonis* [1984] IRLR 382).
20. I have also considered the authorities of *A v B* [2003] IRLR 405, *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721, *Linfood Cash and Carry Ltd v Thomson* [1989] IRLR 235 and *Rajendra Shreshtha v Genesis*

*Housing Association Limited* [2015] EWCA Civ 94, as referenced by the parties in their helpful written submissions.

### Wrongful dismissal

21. Wrongful dismissal is a common law contractual claim, normally pursued in respect of notice pay. The Tribunal has jurisdiction to consider complaints of wrongful dismissal by virtue of articles 3 and 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, arising or outstanding on the termination of employment.
22. If the claim is for notice pay it must first be proven that the employee had a contractual entitlement to notice on the termination of their employment. The second stage concerns the dismissal itself: if the employee is dismissed without notice, a breach of contract is in principle established. At the third stage it is for the employer to prove that it was entitled to dismiss the employee without notice. Such an entitlement is created if the employee had acted in fundamental breach of the contract of employment. This is typically (though not always) said to have occurred if the employee has committed an act of gross misconduct, or engaged in conduct which would objectively be viewed as being so serious so as to repudiate the contract (*Hutton v Ras Steam Shipping Co Ltd* [1907] 1 KB 834).

### **The facts**

23. The claimant was born on 22 June 1969, and at the date of the hearing, was 52 years old. On 24 April 2006, age 36, the claimant commenced his employment with the respondent as a warehouse operative (maintenance) within the Bridgend Regional Distribution Centre, working 40 hours a week [pg 59].
24. Almost 14 years later on 24 March 2021, 4 bottles of vodka were found in the claimants workplace locker. On 25 March 2021, the claimant was suspended [pg 65]. On 2 April 2021 there was an investigation meeting and on 8 April 2021, an investigation report was prepared by Mr Luke Burge (assistant team manager) [pg 68-69].
25. On 19 April 2021, following the investigation, a letter was sent to the claimant, stating that the matter would proceed to a disciplinary hearing [pg 66-67]. The claimant was also provided with the investigation report and evidence gathered as part of the investigation [pg 68-109].
26. On 26 April 2021, a disciplinary statement was submitted by the claimants legal representatives citing flaws in the investigation [pg 113-121]. On 27 April 2021, a disciplinary hearing was due to take place, but the meeting was adjourned at the conclusion, so that the disciplinary officer, Mr Andrew

Thorndyke (team manager) could investigate the points raised within the disciplinary statement [pg 123-145].

27. On 14 May 2021, the claimant received an invite to a reconvened disciplinary hearing along with further information gathered as part of subsequent investigations undertaken by the respondent [pg 146-175]. On 17 May 2021, the claimants legal representatives submitted a supplemental disciplinary statement in response to the further information gathered by the respondent [pg 178-185]. On 18 May 2021, the reconvened disciplinary hearing took place. On 25 May 2021, the claimant received a letter notifying him that he had been summarily dismissed for gross misconduct [pg 193-197]. On 27 May 2021, the claimant appealed the decision [pg 199] and on 12 July 2021, he attended an appeal meeting, conducted by Mr Darren Meaney (regional head of sales) [pg 206].
28. On 26 July 2021, the claimant was advised by letter that his appeal was unsuccessful and that the decision to dismiss remained [pg 212-214]. On 5 October 2021, the claimant submitted his ET1 for unfair and wrongful dismissal [pg 9-26]. On 18 January 2022, the respondent submitted their ET3 denying liability [pg 28-40].

### Findings of fact

(i) *CCTV evidence*

29. I am invited by the claimant to find that Mr Burdge knew that the CCTV cameras were pointing in the wrong direction at the relevant time, and that this of significant relevance to the investigation.
30. I do not make this finding. I cannot see how this issue points towards an unreasonable investigation process *as a whole* as CCTV evidence did not feature in Mr Thorndyke's decision making when undertaking the disciplinary process post investigation. Even if Mr Bevan had provided a statement setting out that which he told Mr Burdge (ie, that the CCTV cameras were pointing in the wrong direction at the relevant time), I struggle to see what the additional benefit to the investigative process (in taking that step) would have been.
31. I accept the evidence of Mr Burdge (as he stated in cross examination) that he approached Mr Bevan and was informed by him, before the end of the investigative report, that as the cameras were pointing in the wrong direction, they could not be accurately used and were of no use to the investigation. The CCTV footage provided no evidential value (good or bad) to the investigative process. Whilst it may have been *preferable* to reference this, it was not unreasonable to omit this from the investigation report if nothing was to turn on it.

32. It was referenced in the dismissal letter, but as stated by Mr Thorndyke in cross examination, *'the main point was that the footage did not add or detract to the issues being considered'*.
33. I am also invited to find that Mr Thorndyke's response at the 1<sup>st</sup> disciplinary meeting on 27 April 2021 [pg 143], that he would consider the CCTV footage *'if I think necessary. If relevant'*, are *'the words of someone who has made up their mind in respect of the claimants guilt, and are therefore not very interested in conducting further investigations'* (written submissions of the claimant, pg 7 §p).
34. I do not make that finding as it fails to contextualise matters. In particular, the fact that this meeting was *adjourned* in order for further investigations to be carried out by Mr Thorndyke as a consequence of matters raised by the claimant at the meeting [pg 144]. Had Mr Thorndyke made up his mind (as alleged), there would have been no need for further time and energy to be spent looking at issues raised by the claimant on 27 April 2021. On 14 May 2021, the claimant received an invite to a reconvened disciplinary hearing along with further information gathered as part of subsequent investigations undertaken in that 2 ½ week period by the respondent [particularised at pg 176].
35. In my judgment, there is a danger of retrospective analysis and micromanaging of this particular issue. Whilst I have been assisted greatly by the submissions of counsel for the claimant, I do not find, on the balance of probabilities, that there was an unreasonable investigation in respect of the CCTV issue. For the avoidance of doubt, the claimant has not provided any evidence that the CCTV cameras had been tampered in any way.

(ii) *Failure to interview Mr Neil Bevan*

36. I am invited to find that there has not been a reasonable investigation due (in part) to the fact that Mr Bevan (regional head of logistics) was not interviewed by the respondent. The evidence of Mr Bevan, within an undated statement, is that when he checked the lockers at around 13.50 on 24 March 2021, they were all locked [pg 147].
37. I do not make that finding. Although it may have been *preferable* for Mr Bevan to have been interviewed following the claimants reconvened disciplinary meeting on 18 May 2021, it was not *necessary* as the question he would be asked was seemingly a 'yes/ no' matter about whether or not he recalled the claimants locker being locked or unlocked (as opposed to a more complex nuanced point of discussion). Mr Bevan's statement specifically says that he formed the view that the 3 cabinets were locked having *'witnessed'* them (ie, a visual check).

38. Consequently, in my judgment, the likelihood would be that Mr Bevan, at interview, would simply reiterate his written statement – that having walked into the maintenance area, he saw that the 3 cabinets were locked.

(iii) *Anonymous witnesses*

39. The nub of Mr Windross' submissions regarding Mr Painter relate to the claimant being '*significantly hamstrung in his ability to defend himself from an allegation of criminal behaviour*' [pg 13 §j]. Mr Painter's written evidence is that he saw the claimants locker open between around 10.30am-11am [pg 84 and 158].

40. Although he also gave additional information to Mr Burdge (unrecorded) that he had *seen* the claimant place the vodka in his locker, in my judgment, that does not make the *whole* investigation unfair in circumstances where that information was *unknown* to Mr Thorndyke (the decision maker) when determining whether the claimant should be dismissed. This information was not (therefore) relied upon Mr Thorndyke within the dismissal letter and it cannot be said that the respondent dismissed the claimant based on (i) the evidence of Mr Painter or (ii) the evidence of an *anonymous* witness (Mr Painter having since waived his anonymity).

41. In relation to Mr Matthew Bradshaw, I find that Mr Thorndyke did *not* take account of his evidence when reaching his decision to dismiss the claimant. This is not only clear from the letter of dismissal [pg 195], but Mr Thorndyke was emphatic when cross examined (at some length) about this point, and repeatedly stated that he did not take '*any of Mr Bradshaw's evidence into account*'. I have no reason to doubt the veracity of Mr Thorndyke's evidence on this issue. It is unnecessary (therefore) to make any findings in relation to how Mr Thorndyke dealt with the evidence of Mr Bradshaw.

## Conclusions

(1) Did the respondent genuinely believe that the claimant was guilty of misconduct?

42. I am satisfied that the respondent genuinely believed that the claimant was guilty of misconduct, namely a '*wilful concealment of bottles of vodka with the intent to steal*'. This was clear from the evidence of Mr Thorndyke, and the dismissal letter [pg 193-197]. Additionally, in his oral evidence, the claimant fully accepted that it was entirely reasonable for Mr Burdge to be concerned about the discrepancies in what he stated during the investigation process.



(2) If so, was that belief based on reasonable grounds?

43. I am satisfied that the respondents' belief was based on reasonable grounds. It was clear from Mr Thorndyke's written and oral evidence that he had taken reasonable steps to form this belief prior to dismissing the claimant.

44. Moreover, in cross examination, the claimant *accepted* that the decision reached by Mr Thorndyke was probably a reasonable one, having been taken by Ms Williams, quite carefully, through each point in the decision letter. The only issue he did not agree with related to whether he left his locker open when on break (returning at 14.00) and whether he remained in the cage area between 14.00-14.30.

45. In relation to the first issue, Mr Thorndyke relied on the written statement of Mr Neil Bevan (regional head of logistics) that when he checked the lockers at around 13.50, they were all locked. In relation to the second issue, the first time the claimant disputed leaving the cage area between 14.00-14.30 was during the hearing. It is unclear why this is now an issue, and without specificity, I do not consider it necessary to say anything further about this.

46. Mr Thorndyke also interviewed Mr Robert Hankin and Mr Cameron Jones once the claimant identified that they may have had a motive to plant vodka in his locker. Mr Thorndyke considered, and ultimately concluded, that they, and also Mr John Smith and Mr Sean Painter, had no reason to plant the vodka.

(3) Did the respondent carry out such investigation into the matter as was reasonable?

47. By application of section 98(4) ERA, I have to look at *all* of the circumstances, and having done so, I have concluded that the respondent did carry out a reasonable investigation. I am aware that allegations of criminal behaviour require careful investigation (per *A v B*, as approved in *Roldan*, *supra*), albeit with the caveat that such investigations are usually conducted (as they were in this case) by laymen and not lawyers.

48. In relation to the initial investigation process, Mr Burdge was clear in his oral evidence that he did the best he could with his limited experience. He said that in hindsight he would have obtained a statement from Mr Bevan and referenced the fact that there was no applicable CCTV footage within his investigation approach. I agree that both of these things would have been *preferable*, but (as set out above), I do not think it was unreasonable not to do so.

49. Equally, whilst his handling of Mr Painter's evidence was not ideal (ie, not setting out in writing what Mr Painter stated he saw, in full), this ultimately had no bearing on how the claimant was dismissed as Mr Thorndyke had no knowledge of the discussions between Mr Burdge and Mr Painter when making his decision. Whilst there are a number of learning curves for Mr Burdge arising from this case, his actions did not, when considering the input of Mr Thorndyke, render the investigation as a whole to be unreasonable.

50. I have paid careful regard to the lengthy submissions of the claimant, but, in short, this is not a pursuit of perfection. I am satisfied that there was a careful and conscientious investigation of the facts that was reasonable in the circumstances, and that Mr Thorndyke, in particular, considered matters in an even-handed manner. I also note that the claimant accepted in cross examination that, on the evidence that Mr Thorndyke had, he '*probably*' acted in a reasonable manner.

(4) Did the respondent otherwise acted in a procedurally fair manner?

51. The claimant has not submitted how it is alleged that the ACAS Code of Practice has been breached, save as to state that an employer should, amongst other things, investigate the issues. I have found that the respondent did undertake a reasonable investigation.

52. As regards the respondents disciplinary policy, it specifically states that an employee *could* be suspended if suspected of conduct that was sufficiently serious to be grounds for summary dismissal, for example, if they are suspected of theft [pg 46 §5.2]. When cross examined, it was put to the claimant that it was '*entirely reasonable*' for him to have been suspended on 25 March 2021 having regard to the facts known to the respondent at the time, to which he answered 'yes', and did not disagree.

53. The claimant also accepted that it was reasonable that he was sent a letter the same day as he was suspended [pg 65], and agreed that the letter gave him appropriate information to understand why the respondent had taken the step it had. I am satisfied that the respondent acted in a procedurally fair manner and that it also followed its own internal disciplinary procedure.

(5) If all those requirements are met, was it within the band of reasonable responses for the respondent to dismiss the claimant?

54. The decision to dismiss the claimant did fall within the band of reasonable responses that a reasonable employer in the particular circumstances of the respondent might have adopted. I am satisfied that the respondent took account of the claimants 15 years of unblemished service, but due to the

seriousness of the conduct, concluded that the claimant was guilty of misconduct and that dismissal was the appropriate sanction.

55. As Mr Meaney stated in cross examination, '*theft is theft regardless of length of service*'. I am satisfied that the respondent acted reasonably both in characterising the offence of theft as gross misconduct, and in deciding that dismissal was the appropriate punishment.

### **Wrongful dismissal**

56. The claimant accepted in cross examination that *if* he placed the vodka in his locker deliberately, with the intention to steal, that his conduct constituted gross misconduct. The internal disciplinary procedure states that in cases of gross misconduct, such as theft, this would likely warrant a dismissal without notice [pg 50 §6.1]. As to outcomes, if an employee commits an act of gross misconduct, they will normally be summarily dismissed without notice or payment in lieu of notice [pg 54 §7.3(5)].

57. I do not place any weight on the hearsay evidence of Mr Burdge that Mr Painter told him that he had seen the claimant place the vodka in his locker at around 10.30 on 24 March 2021. The respondent chose not to call Mr Painter as a witness at the hearing and his credibility regarding that aspect of the case cannot be tested.

58. I have, however, paid close regard to the claimants evidence. The claimant accepted in cross examination that there were significant discrepancies in his evidence, primarily regarding *when* he said he was in the maintenance cage on 24 March 2021, and *why* it may have been unlocked (to allow others to help themselves to squash). The claimant was unable to explain these differences, and I am ultimately left with a situation where 4 bottles of vodka were found in his locker without any satisfactory justification.

59. I therefore find, on the balance of probabilities, that the claimant wilfully concealed the vodka in this locker with an intention to steal for the reasons set out by Mr Thorndyke in his dismissal letter dated 25 May 2021 [pg 193-197]. It is noteworthy that the claimant readily admitted to looking in the items in the recall to see what had come back, and as part of his duties had no reason to be in those areas, and no reason to be looking through the stock returns.

60. The respondent was entitled to dismiss the claimant without notice due to the claimant committing an act of gross misconduct, so serious, as to repudiate the contract, namely wilfully concealing 4 bottles of vodka with the intention to steal.

**Disposal**

61. By reason of the above, I have therefore concluded that:

- (1) The claimants claim of unfair dismissal is not well founded and is accordingly dismissed;
- (2) The claimants claim for wrongful dismissal is not well founded and is accordingly dismissed.

Employment Judge E Sutton

Date: 19 June 2022

REASONS SENT TO THE PARTIES ON 21 June 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche