



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr J Brown

AND

**Respondent**  
Tenpin Limited

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Plymouth

**ON**

11 December 2020

**EMPLOYMENT JUDGE** N J Roper

## Representation

**For the Claimant:** In person, assisted by his father Mr C Brown  
**For the Respondent:** Mr N Bidnell-Edwards of Counsel

## JUDGMENT

**The judgment of the tribunal is that the claimant's claim for unfair dismissal is dismissed.**

## REASONS

1. In this case the claimant Mr Jack Brown claims that he has been unfairly dismissed. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair.
2. I have heard from the claimant. I have heard from Ms Toni Rogers and Mr Thomas Berry on behalf of the respondent. I was also asked to consider statements from Mr Rob Osborne on behalf of the claimant, and from Ms Jane Ewing on behalf of the respondent, but I can only attach limited weight to these because they were 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 national family entertainment provider which has 44 sites in the UK and employs approximately 1,100 employees. The claimant Mr Jack Brown was employed as a Customer Service Assistant (CSA) at the tenpin bowling centre in Plymouth from 28

March 2015 until his summary dismissal for gross misconduct on 10 May 2019. The claimant suffers from epilepsy and the respondent was aware of this, although the condition had not caused any difficulty to the claimant in completing his various duties during his employment.

5. The claimant had been issued with a written statement of the terms and conditions of his employment, which included a written disciplinary procedure. The non-exhaustive list of examples of gross misconduct which might result in dismissal included "Misappropriation of Company money or property"; "Falsifying Company Documents and records (including expense claims)"; "Suspicion of and Theft or Fraud"; and "Failure to carry out correct procedures resulting in cash or stock shortages (including wilful or reckless overcharging or undercharging of customers)". This disciplinary procedure also confirmed that employees had the right to be accompanied at any disciplinary hearing, but this was restricted to the statutory minimum of allowing representation by a fellow colleague or trade union official.
6. The claimant was also issued with a Job Description which required him to "take accountability for adherence to all company policies and procedures ... to use all stocks and supplies in an appropriate manner to minimise wastage ... to ensure that all steps are taken to minimise or prevent loss or damage to company property ... to ensure the security of all cash and stock for which you are personally liable." The respondent also had other procedures in place for serving customers. This included a requirement that drinks and food should be paid for by the customer before being provided. The respondent also had a procedure for drink wastage known as the wastage log. If drinks are served in error or subsequently refused by a customer, then staff are required to throw the drink away and put it down as wastage by entering the details on a wastage log.
7. The circumstances which gave rise to the claimant's dismissal arose on the evening of Saturday, 4 May 2019. The claimant had been scheduled and assigned to work within the kitchen from 5.00 pm until 0:45 am on Sunday, 5 May 2019. At about 7:23 pm the claimant served drinks to two of his friends or acquaintances for which he did not take payment. Another CSA who was working at the time, namely Jessica Berry, brought this to the attention of the duty manager Ms Toni Rogers, from whom I have heard. Miss Berry is the daughter of Mr Thomas Berry a General Manager of the respondent, from whom I have also heard.
8. The information which Miss Berry gave to Ms Rogers was that the claimant had come from the kitchen to the bar, where he had not been working, and poured a rum and pepsi, and a vodka, which he then took over to two of his friends who were sitting at a nearby table. When he returned to the bar she confronted him and told him that he was not allowed to give away drinks for free. She said that the claimant then told her to "piss off" and wrote down the two drinks under wastage and returned to the kitchen. She did not prepare a written statement to this effect at that time, but did prepare a signed written statement giving that same information for the purposes of the subsequent appeal hearing.
9. Ms Rogers immediately went to review the CCTV footage of the relevant area, which she concluded showed that Ms Berry was challenging the claimant and an apparently heated discussion had ensued. She then went to check the wastage sheet and saw that one of the drinks had been entered by the claimant on that sheet, namely a Morgans Spiced rum and pepsi on the basis that it was a mistake. There was no mention of the vodka. She also checked the Detailed Transaction Report for the bar at that time, which showed that the two drinks had not been entered as sales. She thought there was a reasonable basis for her to conclude that these drinks have been served by the claimant without taking any payment for them.
10. Ms Rogers then called the claimant to the office and put this allegation to him. His response was not satisfactory. Ms Rogers suspended the claimant on full pay pending a potential disciplinary hearing. She passed the relevant information to the General Manager Mr Berry to deal with.
11. Mr Berry wrote to the claimant on 7 May 2019 inviting him to attend a disciplinary hearing on 10 May 2019. That letter explained that the allegations to be answered were the alleged theft of company stock on 4 May 2019 and in particular that the claimant had not taken

- payment for two drinks served to his friends. The letter made it clear that it was an allegation of gross misconduct which might result in the claimant's dismissal. The claimant was reminded of his right to be accompanied by a work colleague or a trade union representative. Mr Berry included copies of the relevant documents and informed the claimant that the CCTV footage would also be shown at the meeting.
12. The claimant attended that meeting on 10 May 2019 and was accompanied by a work colleague namely Mr Michael Turner. The meeting was chaired by Mr Berry, and Ms Rogers was present to take notes. The claimant asked if his father could accompany him but Mr Berry confirmed that the respondent's procedures only permitted a work colleague or trade union representative, as explained in the invitation letter. The claimant did not ask for a postponement, and did not mention his subsequent assertion to the effect that his epilepsy might induce a seizure due to stress and/or might cause short-term memory loss.
  13. During the hearing the claimant accepted that he had served the two drinks as alleged and had not taken payment for them. He explained that he was very busy in the kitchen and that he had forgotten to take back the card machine to charge for the drinks. When asked why he was serving drinks at all when he had been working in the kitchen, he explained that he delivered food previously and had been asked for the drinks and decided to get them himself because the bar staff were too busy. When asked why he had entered the drinks on the wastage log, he suggested that he had become confused because the kitchen was so busy. He asserted that he had made an honest mistake and that he should have asked someone else to serve the drinks.
  14. Mr Berry ensured that the claimant and his representative Mr Turner were able to make such further comments as they wished, and then adjourned to consider the matter. Shortly thereafter he reconvened the hearing. Mr Berry explained that he found the claimant's explanation too doubtful. The claimant had suggested that the bar staff were too busy to serve the drinks, but it was clear from the CCTV that Miss Berry and another member of staff were not that busy. The claimant suggested he was intending to process the payment through the till but instead he went straight to the wastage sheet and wrote off the drinks as wastage. Mr Berry concluded that the claimant's version "did not add up" and that there was every opportunity to ask another member of staff to serve the drinks. Mr Berry concluded on the information before him that the most likely explanation was that the claimant had had no intention of processing the sale transaction but instead had served the drinks to his friends for free and tried to write them off as wastage. He confirmed that for this reason he had decided to dismiss the claimant for gross misconduct.
  15. Mr Berry confirmed his decision in writing by letter dated 13 May 2019. This confirmed his decision that the claimant had been summarily dismissed on the grounds of gross misconduct with immediate effect. The reasons for dismissal were given as: "Theft of company stock whereby on Saturday, 4 May 2019 you did not take payment for drinks served to your friends". The claimant was reminded of his right of appeal against the decision which was said to require written grounds of appeal within seven days.
  16. The claimant appealed against the decision to dismiss him by letter dated 16 May 2019. There were four grounds of appeal. The first was that the disciplinary meeting was carried out without his chosen representative, namely his father, who had been a trade union member. Secondly the CCTV evidence only showed what the claimant had already confirmed, and did not disprove that he was telling the truth or alternatively prove that he was a thief. The third ground was that his medical condition was not taken into consideration. The fourth was that he had worked for the respondent for a number of years and had been a good worker with a clean record. He stressed that he should not have been dismissed for what was a genuine mistake.
  17. Ms Jane Ewing, a Regional Manager of the respondent, was appointed to deal with the appeal. She was senior to Mr Berry and independent of the dismissal decision. Mr Berry collated the various minutes and documents and passed them to Ms Ewing. Mr Berry also asked his daughter Jessica to prepare a short written statement confirming the information which she had given to Ms Rogers which had prompted the investigation in the first place. In addition, the claimant's father had complained to Mr Berry about the dismissal, and alleged that his daughter Jessica had herself been serving drinks for free on the night

- before the incident in question, namely 3 May 2019. Mr Berry investigated this, and found that Jessica was not working on that evening. A further allegation was then made that Jessica had served drinks without charging for them on a different date. Again, Mr Berry investigated this, and again found the Jessica was not working on that evening. Mr Berry also gave evidence to this Tribunal that until the disciplinary proceedings involving the claimant had resulted in his dismissal, he was unaware of any allegations that his daughter Jessica had served drinks without seeking payment, and denied that the respondent was aware that she had done so and decided not to take disciplinary proceedings against her.
18. Ms Ewing decided to deal with the appeal as a full rehearing so that she could consider again the entirety of the evidence and any further points which the claimant wished to raise. The appeal hearing took place on 4 June 2019. The claimant had also provided a letter from his doctor stating that he suffered from epilepsy and that if he became distressed this might cause a seizure and for that reason Ms Ewing agreed that the respondent would depart from its written procedure and allow the claimant to be accompanied by his father. However, there was nothing in that letter from the doctor to suggest that the claimant's epilepsy had caused any forgetfulness, or that his conduct was in any way related to or arising from his condition.
  19. The claimant was able to state his case against the allegations again, and to explain his grounds of appeal. By this stage Jessica Berry had been asked to confirm her original recollection in a signed written statement, and this was present before Ms Ewing. The claimant and his father objected to that statement being included because it was not before the first disciplinary hearing. Ms Ewing therefore agreed to discount that statement in reaching her decision.
  20. During the appeal hearing the claimant admitted that he had made no attempt to take payment for the drinks which he had served to his friends on the night of 4 May 2019. The claimant also confirmed that he understood the correct process to undertake when an incorrect drink is served to a customer, and that he knew the correct procedure to record drink wastage. The claimant accepted that this was not the process which he had undertaken on that evening, but said that he had become confused. He suggested that not taking payment for the drinks was because he had been distracted by the food order but Ms Ewing concluded that there was no evidence of any food order being processed around the time the claimant had served these drinks. In any event the claimant also confirmed that he was not required to serve on the bar as part of his kitchen duties, and that he should have asked another colleague to serve his friends. Ms Ewing reviewed the CCTV footage and formed the view that there were other members of staff available who could serve the drinks (despite the claimant's differing versions of events as to whether other bar staff were busy), and that the claimant had had a number of opportunities to process the sale transaction and take the relevant payment, but had not done so.
  21. Ms Ewing concluded that the claimant had made no attempt to take any payment or complete a sales transaction for the drinks which he had served and that there was no evidence that a food order had been placed. She concluded that the correct decision had been made to dismiss the claimant, and for those reasons she upheld the decision to dismiss him.
  22. Ms Ewing wrote to the claimant on 12 June 2019 to confirm her decision. Her letter stated: "This decision has been taken because by your own admission you identified and admitted that no attempt was made to take payment for drinks served to your friends on the night of 4 May 2019. You also acknowledged and clarified the correct process to undertake when an incorrect drink is served to a customer, which was not the process you undertook on 4 May 2019, you also could not provide a reason as to why you had not followed this process. Your mitigation for not taking payment for the drinks was due to being distracted by a food order, my investigation has found no evidence of the food order being processed around the time of you serving the drinks and after viewing CCTV footage of the night I believe you had a number of opportunities to process the transaction and take payment which you did not. As you made no attempt to take a payment or complete a transaction for the drinks served and there is no evidence to show that a food order had been placed, I believe the

- correct decision to dismiss you from Tenpin Plymouth was made and for this reason the decision has been upheld.”
23. The claimant has subsequently alleged that Miss Berry had been found having served drinks without payment and that no action has been taken against her. Ms Rogers evidence is that she was unaware of any such complaint. Mr Berry had also investigated the two dates upon which this was said to have happened, and Jessica was not working on either of these dates. In any event, this allegation was not raised by the claimant during either the disciplinary hearing or the appeal hearing. No evidence has been adduced before this tribunal on behalf of the claimant to the effect that Jessica Berry had served drinks to friends without asking for payment, and/or that the respondent knew about it but had decided to take no action against her.
  24. Having established the above facts, I now apply the law.
  25. 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”).
  26. 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”.
  27. 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”).
  28. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; 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; The tribunal directs itself in the light of these cases as follows.
  29. 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.
  30. 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.
  31. 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.

32. As confirmed in a case management order dated 2 April 2020, the claimant alleges that his dismissal was unfair for the following three reasons. First, he alleges that his conduct was a result of a genuine oversight on a busy night. That point was put to the respondent during the disciplinary process and considered by them. The claimant says in his originating application that: "They have dismissed me on what it looks like rather than what actually happened." I deal with this point in the reasonableness of the respondent's belief below.
33. Secondly, the claimant alleges that the procedure was defective in that the respondent did not allow his father to represent him at the first disciplinary hearing. I reject the allegation that this renders the dismissal unfair. In the first place the respondent's procedure reflects the minimum statutory scheme which allows an employee to be represented by a fellow employee or trade union representative. That statutory right was afforded to the claimant, who was accompanied by a fellow employee namely Mr Turner at the first disciplinary hearing. They did not ask for a postponement of the hearing. They did not adduce any medical evidence to the effect that it was necessary for the claimant's father to attend at that stage. When they did so subsequently, Ms Ewing allowed the claimant's father to attend and represent him. That was during a full rehearing of the matter at the appeal stage. I do not accept that there was any procedural breach at the disciplinary hearing, but even if there were, this would have been remedied by the respondent allowing the claimant's father to attend and represent him at a full rehearing on appeal.
34. The third allegation of unfairness is that there was inconsistency of treatment in that Jessica Berry is said to have committed the same offence but was not disciplined. I reject this allegation. There is simply no evidence to suggest that Jessica Berry had committed the same alleged gross misconduct, and the respondent's managers were unaware of any such allegations. When they were made after the claimant's dismissal, they were investigated and found to have been untrue. In any event they were not allegations raised by or on behalf of the claimant during either the disciplinary or the appeal hearings. There is no evidence upon which to conclude that there was inconsistency of treatment between the claimant and Jessica Berry on the same facts, and I reject that allegation of unfairness.
35. I find in this case that there was a full fair and reasonable investigation into the allegations of gross misconduct said to have been committed by the claimant. The claimant was aware of the allegations against him, and aware that they might result in his dismissal for gross misconduct. He was provided with the relevant documentary evidence during the process, and was able to state his case in full against the allegations. He was entitled to be accompanied by fellow employee, and when he provided medical evidence to suggest that his father should be allowed to accompany him during the rehearing at the appeal stage, this was permitted by the respondent. It is not alleged that any evidence from Miss Berry was central to the allegations against the claimant, and should have been disallowed because her father was the dismissing officer. Miss Berry's only involvement was to trigger the investigation in the first place by raising her suspicions to Ms Rogers. It was the investigation undertaken by Ms Rogers and then by Mr Berry which led to the claimant's dismissal, not because of any evidence from Miss Berry. When she signed a short statement to confirm her initial reasons for raising the investigation just before the appeal stage, the claimant's father objected, and Ms Ewing discounted that statement. In my judgment the respondent conducted an investigation which was full, fair, and reasonable in all the circumstances of this case.
36. It is clear and I so find that the dismissing officer Mr Berry and the appeal officer Ms Ewing genuinely believed that the claimant had committed gross misconduct. Their evidence has not been challenged in this respect, and they say as much in their letters confirming the dismissal and the rejection of the appeal respectively.
37. I also find that on the evidence before them that it was reasonable for them to hold the belief that the claimant had committed gross misconduct. The claimant accepted that he had served the drinks and had not charged for them. He accepted that he was aware of the correct procedures for recording wastage, but had not followed that procedure correctly on the evening in question. He admitted under cross-examination today that he had given evasive answers with regard to the surrounding circumstances, and changed his story when presented with the CCTV footage. The circumstances included that the claimant had

- been assigned to work in the kitchen, and there was no reason for him to serve drinks, particularly when other members of the bar staff were available to do so. He suggested that he was too busy with the food order to remember to charge for the drinks, and yet the respondent's records show that there was no food order being processed at the relevant time. He says he forgot to collect the card machine and charge for the drinks because he was too busy, and yet he had time to enter one of the two drinks in question on the wastage sheet. He admitted that the customers were friends of his, and had ended up receiving drinks for which nobody paid. In my judgment it was entirely reasonable of the respondent to conclude on the evidence before them that the claimant had committed the gross misconduct of which he was alleged and for which he was dismissed.
38. 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.
  39. In my judgment the theft of drinks from bar staff who are in a position of trust is a very serious matter. The respondent's procedures clearly specify the same as being gross misconduct which is likely to result in dismissal. In my judgment dismissal is within the band of reasonable responses open to the respondent when faced with these facts, even if it is at the extreme end of that range. It is not for this Tribunal to substitute its view for that of the respondent.
  40. In conclusion I find that there was a full and fair investigation, the respondent genuinely believed that the claimant had committed gross misconduct, that belief was based on reasonable grounds, and dismissal for gross misconduct was within the range of reasonable responses open to this respondent when faced with these facts. I therefore find that even 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 23; a concise identification of the relevant law is at paragraphs 25 to 31; how that law has been applied to those findings in order to decide the issues is at paragraphs 32 to 40.

Employment Judge N J Roper

Dated: 11 December 2020

Judgment sent to Parties: 8 January 2021

FOR THE TRIBUNAL OFFICE