



EMPLOYMENT TRIBUNALS

Claimant: Mr S Tracey

Respondent: Asda Stores Limited

Heard at: London South Employment Tribunal (by CVP) **On:** 16 June 2022

Before: Employment Judge T Perry

Representation

Claimant: Mr M Arnold (consultant)

Respondent: Mr S Giffins (counsel)

JUDGMENT

1. The Claimant's claim for unlawful deduction from wages is dismissed on withdrawal.
2. The Claimant's claims for unfair dismissal and breach of contract fail and are dismissed.

REASONS

Claim and issues

3. The Claimant brings claims for unfair dismissal and wrongful dismissal. It was confirmed at the start of the hearing that the claim for unlawful deduction from wages could be dismissed on withdrawal.
4. The issues for the Tribunal to decide are:
 - 4.1. Has the Respondent shown what was the reason for dismissal and that the reason was a potentially fair one within the meaning of section 98 Employment Rights Act 1996 (ERA)? The Respondent relies on conduct as the potentially fair reason.
 - 4.2. Was the dismissal fair within the meaning of section 98(4) ERA?
 - 4.2.1. Specifically, was there a genuine belief in misconduct?
 - 4.2.2. Was that based on reasonable grounds having done as much investigation as was reasonable?
 - 4.3. Was dismissal within the band of reasonable responses having regard to whether the Respondent followed a fair process?
 - 4.4. Should compensation be reduced following Polkey v AE Dayton?
 - 4.5. Would it be just and equitable to reduce compensation to reflect blameworthy conduct on the part of the Claimant contributing to dismissal?

- 4.6. In respect of mitigation, has the Respondent proved that the Claimant failed to take reasonable steps to mitigate loss?
- 4.7. Has the Respondent shown that the Claimant did something so serious that the Respondent was entitled to dismiss without notice?

Evidence

5. I was provided with an agreed final hearing bundle running to 281 pages. I was provided with a password protected USB stick containing CCTV footage, which was available to all parties and which was watched during the hearing.
6. The Claimant and his partner, Hannah Boorman, gave evidence from witness statements. For the Respondent, Kim Powell (Operations Manager) and Darren Barker (General Store Manager) gave evidence from witness statements.
7. Due to lack of time, I did not hear oral submissions. I received written submissions from the Respondent. The Claimant was offered but declined the chance to make written submissions.

Findings of fact

8. The Claimant worked as a delivery driver at the Respondent's Broadstairs store between September 2017 and his dismissal on 17 December 2020.
9. The Claimant's employment relationship was governed by a contract of employment, which referred to several non contractual policy documents including a disciplinary policy. The disciplinary policy in the bundle was dated June 2020 and included a non exhaustive list of conduct potentially amounting to gross misconduct. The list includes "theft and retail crime". The Claimant confirmed he was aware that any theft would potentially lead to dismissal without notice.
10. The Claimant worked on 29 August 2020.
11. On 12 September 2020 the Respondent received a complaint purporting to be from a customer, Mr England. The complaint set out that on 29 August 2020 a home delivery van had been parked opposite Mr England's property after making a delivery and that rubbish had been left on the grass verge after the van's departure. The complaint included pictures of an empty tub of ice-cream, an empty pack of cheese & bacon bites, an empty package for a spiced chicken and wholewheat salad, and a receipt with the Claimant's name written on it. It was accepted both that the Claimant drove the route past Mr England's house on 29 August 2020 and that he stopped for a break outside Mr England's house on that day.
12. Alex Longley, E Commerce Trading Manager, was appointed to conduct an investigation into the allegations. The Claimant was shown the images and confirmed that it was his receipt but did not know how it had his name on it. The Claimant accepted the salad may have been his but denied eating the other items. The Claimant denied throwing any items out but said he did not know if items dropped out. The Claimant was told that the customer at his previous delivery stop had processed an online refund for cheese & bacon bites that were not delivered. The Claimant was told that the customer had given a physical description matching him. The Claimant stressed that it made no sense for him

to leave an item with his name on and asked that CCTV back at the store be checked to show him putting his rubbish in the bin by the double doors. The Claimant also asked for CCTV on the van to be checked. The Claimant was handed a letter suspending him on full pay.

13. By a letter dated 12 October 2020 the Claimant was invited to a disciplinary hearing. The allegation was that the Claimant had consumed Cheese and Bacon bites taken from a customer's order and implied that this was theft by consumption, which was stated to be deemed a gross misconduct offence. The Claimant was provided the details of the customer complaint and the investigation documentation.
14. The disciplinary hearing took place on 16 October 2020. It was chaired by Ms Powell. The Claimant confirmed that he did not eat the salad during his break after loading the van but before going out on his route. The Claimant confirmed that he parked up for his break where the litter was reported. The Claimant speculated that he might have kicked some litter out by mistake when getting out of the passenger side door. The Claimant had no explanation for how the cheese and bacon bits package was in the same place. The Claimant suggested that another colleague might be involved in placing the receipt as the Claimant thought he might have left the salad behind and this could be checked by CCTV and that the colleague had brought the salad out to the Claimant in his car but without the receipt. The Claimant identified the colleague as Andrew Gilfillan. The Claimant claimed to have been "stitched up" and said that Mr Gilfillan had access to the Claimant's run sheets and had access to the loads the Claimant was going to take out and could have taken items out and planted them where the Claimant was going to take his break. The Claimant alleged Mr Gilfillan might have access to a system called Microlise to allow him to track the Claimant's van's whereabouts. The Claimant admitted he had no evidence of this but said that some might be found from CCTV footage. The Claimant mentioned that run sheets sometimes had to be reprinted. The Claimant raised concerns that an ex colleague had been told by Mr Gilfillan that the Claimant had been escorted off the premises. The Claimant suggested that Mr Gilfillan was annoyed about the Claimant's relationship with Ms Boorman and read out several messages. The Claimant suggested Mr Gilfillan might know the customer who had complained.
15. During an adjournment, Ms Powell checked the CCTV at the counter and established that the Claimant left his salad at the till and that a colleague identified it and wrote the Claimant's name on the receipt. Ms Powell stated that there was no evidence of Mr Gilfillan having set up the Claimant. It was confirmed that there would be further investigation done and that Ms Boorman should not be the Claimant's companion going forward. This was apparently on the basis that she was a potential witness.
16. Alex Longley held a further investigation hearing with the Claimant on 26 October 2020. The Claimant repeated that he did not receive a receipt from Mr Gilfillan for the salad. Mr Longley confirmed that the CCTV showed the receipt being sellotaped to the salad. Mr Longley confirmed that the CCTV showed Mr Gilfillan being given the salad but was unclear as to whether the receipt was with the salad. The Claimant was shown this CCTV footage. The Claimant repeated his allegations regarding Mr Gilfillan having access to Mircolise and/or run sheets and suggested that the Claimant's run sheet had been missing. Mr

Longley stated that this was not reported to him at the time. The Claimant asked if Mr Longley could establish if the person raising the complaint lived where they alleged and whether they knew Mr Gilfillan. The Claimant speculated that Mr Gilfillan might have taken the photos in question and passed them on to someone else.

17. Mr Longley then conducted further investigations. On 20 November 2020 he spoke to Mr Gilfillan. Mr Gilfillan was initially reluctant to talk to Mr Longley because of concerns of his statement being shown to colleagues and there being repercussions but was reassured this would not happen. Mr Gilfillan did not recall a receipt being attached to the salad. Mr Gilfillan denied having access to Microlise. Mr Gilfillan confirmed that run sheets sometimes went missing.
18. Also on 20 November 2020 Mr Longley met with Claire Stickens, who confirmed she did not recall any drivers asking for run sheets to be reprinted in August. Mr Longley also met with Paul Norris who confirmed he recalled one driver asking for a run sheet to be reprinted in August.
19. On 23 November 2020 Mr Longley interviewed Ms Boorman who denied that there had been a receipt attached to the salad.
20. On 30 November 2020 Mr Longley interviewed Barry John who was unclear about whether he had ever reprinted a run sheet for the Claimant generally but said he had not printed a run sheet on 29 August 2020.
21. On 3 December 2020 Mr Longley met with the Claimant again to give him the outcome, that the case would be going back to a disciplinary manager. Mr Longley apologised for the delay in conducting his further investigations.
22. By letter dated 15 December 2020 the Claimant was invited to a further disciplinary hearing. The allegation had expanded at this point to include leaving litter behind on the pavement as well as having taken the Cheese & Bacon bites.
23. Ms Powell conducted this meeting on 17 December 2020. The Claimant stated that he considered reprinting run sheets once a month was not very rare. When asked for further evidence implicating Mr Gilfillan the Claimant stated that section leaders have seen Mr Gilfillan using Microlise in the past. Ms Powell stated that there was no evidence proving that Mr Gilfillan was at the scene or involved. The Claimant restated his version of events and challenged what he saw as inconsistencies or vagueness in the CCTV footage and Mr Gilfillan's evidence. Ms Powell confirmed that the customer who made the complaint was on the electoral roll and was not fictitious. The Claimant stressed his clean disciplinary record and that he had no interest in causing this kind of trouble for himself. The hearing was adjourned for 40 minutes after which Ms Powell informed the Claimant of the outcome of the hearing.
24. Ms Powell found that the Claimant had taken the cheese and bacon bites from a customer's order and left the packet and other litter at the scene. Ms Powell stated that the allegation that Mr Gilfillan had set the incident up was unsupported by evidence. The Claimant was dismissed for gross misconduct for theft by consumption. The Claimant was informed of his right of appeal.

25. The decision to dismiss was confirmed in a letter dated 22 December 2020.
26. The Claimant wrote to appeal his dismissal by an undated letter submitted before Christmas 2020. The Claimant alleged that a blind eye had been turned to Mr Gilfillan's vendetta against the Claimant. The Claimant disputed that the photographs could be used to support the allegations as they had no time or location on them. The Claimant expressed his dissatisfaction at the length of time the investigation took.
27. Mr Barker was appointed to hear the Claimant's appeal and met with the Claimant on 20 January 2021. It was stressed again the Ms Boorman was not an appropriate companion given her involvement in the investigation. The Claimant expanded on his grounds of appeal. He detailed the names of two drivers who he felt should be spoken to regarding Mr Gilfillan discussing his dismissal at an unusually early stage. The Claimant complained that CCTV from the van had not been looked into and felt this would "rule him out" as it would not show the Claimant consuming what was alleged or littering or that it might show Mr Gilfillan following the Claimant. There was a discussion that there was no camera in the cab but that there were cameras showing forwards, backwards and the side of the van. The Claimant expressed that he felt information about run sheets being reprinted had been "brushed over". The Claimant again stressed his clean disciplinary record and good character. Following a fifty-minute adjournment Mr Barker dismissed the appeal holding that the statements would not have had any bearing on the decision made, that the CCTV did not cover the cab, and that there was no other material justifying overturning the decision to dismiss.
28. The decision was confirmed in a letter dated 26 January 2021.

The Law

29. Section 98 ERA states
- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it—*
- (b) *relates to the conduct of the employee,*
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- (4) *In any other case where the employer has fulfilled the requirements of subsection (1), 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.*
30. The burden is on the Respondent to show the sole or principal reason for

dismissal and that it is a potentially fair reason within section 98(1) or (2) ERA.

31. The classic statement of the reason for dismissal is per Cairns LJ in **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'."
32. The leading case on conduct dismissals remains **British Homes Stores v Burchell** 1978 IRLR 379 EAT, which requires that there be a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation.
33. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**). The burden of proof in relation to this aspect is neutral.
34. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness **Taylor v OCS Group Ltd** [2006] IRLR 613. The Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt** 2003 IRLR 23 CA is authority that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss. Again, the burden of proof in relation to this aspect is neutral.
35. The requirement for reasonable investigation also applies to investigating defences raised by the Claimant per Richards LJ in the Court of Appeal in **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399:
"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into the issue."
36. As to contributory fault, the relevant principles are laid down by the Court of Appeal in **Nelson v BBC (No.2)** 1979 IRLR 346 CA. There must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. That conduct must have caused or contributed to, to some extent, the dismissal. It must be just and equitable to reduce the assessment of the Claimant's loss to a specified extent.
37. In considering whether the 'Polkey' principles, laid down by the House of Lords

in *Polkey v A E Dayton Services Limited* 1987 IRLR 503 HL, apply, regard should be had to **Software 2000 Ltd v Andrews** 2007 IRLR 568 EAT.

Conclusions

Unfair dismissal

38. It is effectively conceded that the genuine reason for dismissal was belief in the alleged misconduct. No alternative reason was advanced by the Claimant.

39. The question then becomes whether there were reasonable grounds for believing the Claimant guilty of the misconduct. Again, this was not seriously challenged by the Claimant. This is unsurprising as, even on the Claimant's case, there had been a set up to create a situation that suggested the Claimant had been guilty of misconduct. The photographs showed the receipt with the Claimant's name written on together with the litter. The Claimant had bought a salad of that description on that day. The Claimant had delivered to that location on 29 August 2020 and indeed had stopped there for his break. Bacon and cheese bits had been reported missing from a previous drop off on the Claimant's delivery route. There clearly were reasonable grounds to support a genuine belief.

40. The third question under Burchell is whether the Respondent did as much investigation as was reasonable in reaching this belief. This necessarily includes asking whether the investigation into the Claimant's alternative theory that Mr Gilfillan had set him up was also reasonable. This was where much of the Claimant's representative's energies were rightly focussed in cross examination.

41. The Claimant criticised the investigation into whether Mr Gilfillan had access to the Claimant's run sheet or to his location from Microlise. Managers were asked about reprinting run sheets (including specifically about whether the Claimant's was re-run on 29 August 2020. The evidence of Ms Stickens, Mr John and Mr Norris suggested that Mr Gilfillan had not accessed the run sheet on the day. The Claimant had not been consistent or clear that his run sheet had been missing or reprinted on 29 August 2020. Equally, there was little evidence that Mr Gilfillan was still accessing Microlise at the time in question although this could not be ruled out by the investigation. It is my conclusion that the investigation done in this regard was objectively reasonable.

42. The Claimant criticised the investigation for failing to establish whether Mr Gilfillan and the alleged customer knew each other. The electoral register was checked to establish the customer was who he said he was. I do not consider that a failure to ask either Mr Gilfillan or the customer if they knew each other rendered the investigation unreasonable. It was reasonable to conclude they would not have admitted if they were colluding. In circumstances where there was no evidence to suggest they were colluding, it was not unreasonable of the Respondent not to pursue this point further. I reached the same conclusion regarding the failure to request from the customer electronic copies of the photos. It was not unreasonable to fail to do this.

43.

44. In a similar manner, I do not find that the failure to ask Mr Gilfillan directly whether he had set the Claimant up rendered the investigation unreasonable. It was reasonable to conclude that Mr Gilfillan would not admit this in any event.
45. The Claimant alleged the investigation was deficient because the Respondent did not interview several drivers, whom the Claimant alleged had told him that Mr Gilfillan had told them that the Claimant had been escorted off the premises and dismissed for theft. I find that it was within the band of reasonable responses not to interview these individuals. All the Claimant was suggesting they could say was whether Mr Gilfillan had been discussing the Claimant. There was no suggestion that these witnesses had material information about whether the Claimant was guilty of the allegation against him or about whether Mr Gilfillan had set the Claimant up.
46. The Claimant complains of failure by the Respondent to check CCTV footage from the van and from the store on his return allegedly putting his rubbish into the bin. There was footage of the Claimant returning to the store. In relation to the footage from the van, it was accepted that there was no footage of the cab where the Claimant ate his lunch. The Claimant believed the footage from the side or behind might have shown either Mr Gilfillan following the Claimant or the Claimant knocking litter out of the van by mistake. In light of the size and resources of the Respondent, and given other CCTV had been checked, I am concerned by the failure to check this CCTV. However, in circumstances where the CCTV could not have shown (even on the Claimant's case) whether the Claimant took and ate the cheese and bacon bits and in circumstances where there was no evidence supporting the Claimant's theory regarding Mr Gilfillan, I do not find that this took the investigation outside the band of reasonableness. I reject the suggestion that the Respondent did not take the Claimant's concerns regarding Mr Gilfillan seriously. They were taken seriously but were unsupported by evidence.
47. Accordingly, it is my conclusion that the investigation done by the Respondent was objectively reasonable in the circumstances.
48. As to whether dismissal was within the band of reasonable responses having regard to whether the Respondent followed a fair process, overall the process followed was fair and in accordance with the ACAS Code. The suspension was lengthy but this reflected the fact that the Respondent went back and investigated matters raised at the initial disciplinary that had not been raised before. This was not unreasonable and overall the suspension was not sufficiently long to render the dismissal unfair. The appeal hearing was brief but, given the limited nature of the Claimant's grounds of appeal, within the band of reasonable responses. The matters raised on appeal were considered and the Claimant given a decision on them which was logical and I do not find was predetermined. The decision to ask Ms Boorman not to be the Claimant's companion because she was a potential witness was probably ill advised but, in line with **Taylor**, when considered as part of the overall picture did not bring the process followed outside the band of reasonable responses.
49. I accept Ms Powell's evidence that she considered sanctions short of dismissal and the Claimant's length of service and good disciplinary record.

50. The Claimant suggested the amounts in question were too small to justify dismissal but, when considering matters relating to dishonesty, the amounts are less important than the principle that an employer must be able to trust its staff not to steal.
51. Having regard to the Respondent's disciplinary policies and the nature of the alleged misconduct, the decision to dismiss was well within the band of reasonable responses.
52. Accordingly, the Claimant's claim for unfair dismissal fails and is dismissed.

Wrongful dismissal

53. It is for the Respondent to prove on the balance of probabilities that it was not in breach of contract in dismissing the Claimant without notice.
54. The disciplinary policy in the bundle was dated June 2020 and included a non exhaustive list of conduct potentially amounting to gross misconduct. The list includes "theft and retail crime". The Claimant confirmed he was aware that any theft would potentially lead to dismissal without notice.
55. There are several facts that are relevant to the claim of wrongful dismissal and that, in themselves, suggest that the Claimant committed the misconduct alleged:
- 55.1. The photographs showed the receipt with the Claimant's name written on together with the litter;
 - 55.2. The Claimant had bought a salad of that description on that day;
 - 55.3. The Claimant had delivered to the location in question on 29 August 2020 and indeed had stopped there for his break; and
 - 55.4. Bacon and cheese bits had been reported missing from a previous drop off on the Claimant's delivery route.
56. The CCTV viewed in the Tribunal is also relevant to the claim of wrongful dismissal. The section regarding the purchase by the Claimant of the salad shows the salad being left at the till, the receipt being taped to the salad in the same position relative to a distinctive green circle as it was later shown in the photographs sent by the customer and the Claimant's name being written on it. The later footage showing the Claimant's return to the store does not show the Claimant putting his rubbish into a bin as he initially alleged.
57. The Claimant's theory regarding Mr Gilfillan setting him up, possibly in concert with Mr England, does not satisfactorily explain the cheese and bacon bites being left with the salad and receipt. Mr Gilfillan, having obtained the receipt with the Claimant's name on it, had very little time indeed to have taken these from the Claimant's van. There is no evidence suggesting that Mr Gillifan did this. I find it improbable that Mr Gilfillan rather than the Claimant took the cheese and bacon bites and placed them outside the customer's house.
58. Overall, in light of:
- 58.1. the facts at paragraph 55 suggesting the Claimant was the person who took, consumed and left the items in question outside the customer's

house; and

58.2. the fact that the alternative theory suggested by the Claimant, that it was Mr Gilfillan who “set the Claimant up”, whilst not impossible, was unsupported by any evidence;

I am satisfied on the balance of probabilities that the Respondent has shown that the Claimant did commit the misconduct alleged. I find that on the balance of probabilities it was the Claimant who took and ate the cheese and bacon bites and discarded them outside the customer’s house together with the same salad handed to him earlier that evening by Mr Gilfillan.

59. I am satisfied that this amounted to “retail theft” and therefore gross misconduct in accordance with the Respondent’s policies and the Claimant’s dismissal without notice was therefore not wrongful. This claim fails too and is dismissed.

Employment Judge T Perry
Date: 4 August 2022

Sent to the parties on
Date: 11 August 2022