



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MARTIN sitting alone

**BETWEEN:** Mr Q Imran Claimant

AND

Asda Stores Ltd Respondent

**ON:** 21 September 2017

**APPEARANCES:**

**For the Claimant:** In person

**For the Respondent:** Mr T Gillian - Counsel

## **RESERVED JUDGMENT**

The judgment of the Tribunal is that the claims for unfair dismissal succeeds with the Claimant contributing to his dismissal by 80% and any compensatory award shall be reduced by this amount.

## **RESERVED REASONS**

1. By a Claim Form lodged at the Tribunal on 25 May 2017 the Claimant contends that he was unfairly dismissed. This matter was heard over one day with judgment being reserved. I heard oral evidence from Ms Alexandra Arsene (People Trading Manager) and Mr Kunil Bhica (Deputy Store Manager) on behalf of the Respondent and the Claimant in support of himself. I have carefully considered such documents as I have been taken to in the bundle and read and listened to the closing submissions of the parties. The findings of fact set out below are limited to those that are relevant and necessary to explain my decision although all evidence was heard and considered.

2. The Claimant was employed as a Training Coordinator by the Respondent between 1 June 2012 until his summary dismissal for being absent without leave on 28 December 2016. The Claimant commenced a two-year career break the rules of November 2014. Was due to return to work on 17 November 2016. The Respondent has a Career Break policy which provides that *"if a colleague does not return to work at the end of the requested period, find out the reasons straight away. If they are not returning as planned follow the absence procedure for unauthorised absence. Eventually, if no contact is made, you may need to assume they no longer wish to work for ASDA and therefore follow the AWOL process explaining the situation"*.
3. There is a section *"Key Points"* and as relevant this section says: –  
  
*"ASDA will guarantee colleagues a job on return to work. However, this will not necessarily be at the same level, in the same function, location or on similar terms and conditions, although every effort will be made to accommodate colleagues in similar role to which they held prior to the start of the career break.*  
  
*Colleagues who take advantage of this scheme are expected to make every effort to accept whatever position they are offered and to return to work on the next working day following the expiry of a career break. Colleagues should recognise that even if the role is not ideal for them they have the opportunity to apply for positions that are more suitable when vacancies arise.*  
  
*A colleague who rejects any of the offers made to facilitate the return to work, may have their employment terminated.*  
  
*Colleagues must not take up any paid employment with any other company during a career break without prior written consent of ASDA"*.
4. The policy further provides that the employee *"must make contact with their line manager a minimum of 8 weeks prior to the return date to discuss return to work plans"*. It was common ground that the Claimant did not contact his line manager the minimum eight weeks before his career break was due to end, and also did not return to work on the due date or make any contact with the Respondent.
5. The first contact was made by the Respondent writing to the Claimant on Saturday 19 November 2016 asking him to make contact and warned that failure to notify the Respondent was a breach of the Respondent's absence procedure, and could result in disciplinary action. This letter would have been received by the Claimant at the earliest on 21 November 2016, but most likely on 22 November 2016. The Respondent sent a letter dated 21 November, 2016 based on him not contacting the store for the Claimant to attend an investigation meeting which had been scheduled for 24 November 2016 to establish the reasons for his unauthorised absence following his career break, and the Claimant's failure to contact the school store in line with the policy and to consider whether the case should be referred to an absent without leave disciplinary meeting.
6. The Claimant attended the store on 23 November 2016 and he was offered the role of home shopping. The Claimant said he had difficulties

with working hours offered however, those are the only hours available at that time. Arrangements were made for him to visit the store to see the store manager who was on holiday. He did not attend the investigation meeting on 24 November 2016, and similarly did not attend the store at the time, which had been arranged to discuss vacancies with his manager.

7. The Respondent wrote to the Claimant on 28 November 2016 inviting the him to a re-arranged investigation meeting, which they scheduled for 1 December 2016. The Claimant did attend this meeting. At this meeting, the Claimant was told that the hours he had previously been offered had been filled as he had not turned up to his meeting with his manager. He was offered a further position within the Fresh section. However, the Claimant told the Respondent he could only work Monday to Thursdays at set times, this role required weekend working as did most roles within the Respondent's organisation.

8. Another meeting was set up for 21 December 2016, which the Claimant did not attend. The letter dated 23 December 2016 inviting the Claimant to this meeting said:

*"Further to my letter dated 17 December 2016, I wrote to you inviting you for a meeting on Wednesday, 21 December 2016 at 13:00. You did not attend the meeting, and you failed to contact us to explain the reasons for not attending the meeting.*

*You should be aware that not contacting us as a serious breach of Asda's attendance policy. As such, the result of this investigation could be disciplinary action.*

*I have therefore rearranged the meeting, details of which are as follows:*

*Date: 27 December 2016*

*Time: 14:00*

*Venue: training, Asda, Hounslow*

*The meeting will be conducted by Kunal Bhica, Deputy Store Manager and I will be present to take notes.*

*I must advise you that if you do not attend this hearing or fail to contact us, then we may conduct the hearing with the information available to us at the time of the decision regarding your future employment with the company and appropriate disciplinary sanction may then be made in your absence. The outcome of the meeting may be your summary dismissal".*

9. The Respondent's evidence was that the meeting on the 27 December was a disciplinary hearing. The Tribunal notes the wording of this letter and particularly that there was no right to be accompanied to the meeting mentioned. The Tribunal find this letter to be ambiguous as it refers to rearranging an investigatory meeting, but also refers to disciplinary action being taken.

10. The Claimant says that he did attend the Respondent's premises for the

meeting but was not called in. The Respondent's evidence is that he did not attend. There was no evidence to support the Claimant's assertion. The visitor book did not have his name recorded and the Tribunal accepted the Respondent's evidence that the visitor's book was genuine and had not been tampered with. The Claimant did not bring any other evidence to corroborate his evidence. The Tribunal finds that on the balance of probabilities the Claimant did not attend given the entries in the visitor book and the Claimant's history of not attending meetings.

11. The meeting proceeded in his absence with a colleague representative being appointed on the Claimant's behalf. The Respondent believed the Claimant to be guilty of gross misconduct and summarily dismissed him. This was confirmed in writing by letter dated 28 December 2016 which gave a right of appeal.
12. The Claimant appealed the outcome of the decision to dismiss him. There was some argument as to whether it had been submitted in time. The Respondent however accepted his appeal, but unfortunately misplaced or inadvertently shredded his appeal letter and therefore asked on 27 January 2017 for a further copy of the letter to be submitted. The Claimant did not provide a further copy so the Respondent wrote to the Claimant on 16 February and 9 March 2017, asking him to send a copy of his letter of appeal. He did not do this and for this reason his appeal was not progressed.
13. Whilst on his career break the Claimant was working as a taxi or minicab driver. He said he had been doing this before his career break started and that he was self-employed.
14. It is for the Respondent to show that there was a potentially fair reason for dismissal. In this case the Respondent asserts that it was for a conduct reason namely the Claimant being absent without leave. Once that reason is established I have to consider section 98(4) of the Employment Rights Act 1996 to consider whether in all the circumstances of the case the Respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the employee whilst considering the equity and the substantial merits of the case.
15. I remind myself that it is not for me to substitute my own view for that of the Respondent but only to consider whether or not the processes and the decision to dismiss fell within a band of reasonable responses. In conduct cases I am to be guided by the case of ***British Home Stores v Burchell [1980] ICR 303***, and that I need to consider whether the Respondent held a genuine belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation.
16. I also need to consider if I find that the dismissal was procedurally unfair whether a proper procedure would have made any difference to the decision to dismiss.

17. I conclude that the Respondent has demonstrated that the Claimant was dismissed for a conduct reason. The procedures carried out within the final disciplinary process were however flawed. The letter dated 23 December 2016 in particular was ambiguous and confusing. On the one hand it purported to rearrange an investigatory meeting, and on the other referred to dismissal being a possible sanction. Given that there was no right to be accompanied mentioned in this letter I find that that meeting was to be an investigation meeting only to decide whether to proceed to a disciplinary hearing. For this reason, I find the dismissal to be unfair. However, I find that the Claimant has contributed significantly to his own dismissal first by not attending for work or contacting the Respondent at the end of his career break and secondly by failing to attend the meetings set up to investigate his absence. I find that he contributed by 80% and any compensatory award should be reduced by this amount.
18. I further find that had the Respondent conducted a fair disciplinary process that inevitable result would have been the termination of the Claimant's employment. I come to this conclusion as I was not convinced that the Claimant would have contacted the Respondent at all had it not contacted him about returning to work at the end of the career break. Further, the Claimant had refused two job offers saying the hours were not suitable for him, failed to attend a meeting with the Store Manager to discuss vacancies and failed to attend any of the formal investigation meetings that had been arranged. It is notable that the Claimant even at this hearing could not give a satisfactory explanation for him not abiding by the career break policy. I find that the Respondent should have convened a formal disciplinary hearing giving the Claimant the right to be accompanied and had they done this, the Claimant would have been fairly dismissed. I find that it would have taken three weeks for the meeting to have been arranged and a decision made. Therefore, the Claimant's compensatory award is limited to three weeks' pay, reduced by 80% as set out above.
19. A remedy hearing will be listed and the parties will be notified of the date in due course. Given the findings above, the parties are encouraged to resolve the issue of remedy without a hearing.

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Employment Judge Martin  
Date: 11 October 2017

