



EMPLOYMENT TRIBUNALS

Claimant: Mrs A L Hands

Respondent: Asda Stores Limited

HELD AT: Liverpool

ON: 13 November 2017
20 November and 21
December 2017
(in chambers)

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Gow, counsel

Respondent: Mr Frew, counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Issues for the Tribunal to decide

1. Mrs Hands' complaint is of unfair dismissal, having been summarily dismissed by reason of gross misconduct from her job at the respondent's Walton store on 4 January 2017. The issues for the Tribunal to decide were set out in a List of Issues agreed between the parties as follows:

- (a) Has the respondent established that the reason for the dismissal was misconduct as per section 98 of the Employment Rights Act 1996?
- (b) If so, did the respondent act reasonably or unreasonably in the circumstances (including the size and administrative resources of the respondent) in treating the misconduct as a sufficient reason for dismissing the claimant?

- (c) As the potentially fair reason put forward by the respondent is misconduct the Tribunal is to have regard to the guidance set down in the case of *British Home Stores v Burchell [1978] IRLR 379* which is:
- (i) Did the respondent have an honest belief that the claimant had committed an act of misconduct?
 - (ii) Did the respondent have reasonable grounds for holding that belief?
 - (iii) At the time that that belief was formed on those grounds, had the respondent carried out as much of an investigation as was reasonable in the circumstances?

2. The respondent and the claimant agreed that the Tribunal should have the opportunity to view for itself CCTV footage of an incident that occurred on 1 November 2016, but due to technical problems the Tribunal was unable to do so during the hearing itself. Mr Perkins and Mr Millington described in detail in the investigation notes and in their witness statements what they saw from the CCTV footage. Mrs Hands was also asked to describe her recollection of the CCTV footage while giving evidence. However, during the course of deliberations, it became clear that the CCTV footage of the incident of 1 November 2016 was a key piece of evidence in Mr Millington's decision to dismiss, and therefore the CCTV evidence was subsequently supplied by the respondent and viewed by me in chambers.

Findings of Fact

3. Mrs Hands gave evidence to the Tribunal in the form of a witness statement and answers to questions under cross examination, as did three witnesses for the respondent: Mr Perkins, who carried out the investigation; Mr Millington who was the disciplinary officer and took the decision to dismiss; and Mr Nicholas who heard the claimant's appeal against dismissal.

4. Mrs Hands began work for the respondent on 1 November 2002 in its Walton store in Liverpool. She was dismissed on 4 January 2017. She had more than 14 years' service at the time of her dismissal and it was accepted by the respondent that, prior to the circumstances that led to her dismissal, she had a clean employment record. She had moved to work on the night shift at the Walton store, and her role entailed having access to checkout keys, being in a trusted position, dealing with duties such as supervising the self-service checkouts during the night shift.

5. Stephen Perkins was the Security Investigation Manager for the respondent for Liverpool and North Wales. His role was to detect so-called "malicious activity", whether by the respondent's customers or the respondent's staff. During 2016, he became aware that the Walton store had high levels of "malicious activity" and commenced an investigation in an attempt to discover its source of this activity and to reduce the losses that it caused to the respondent's business.

6. Mr Perkins was in the Walton store reviewing its CCTV footage and was initially investigating a colleague of the claimant, "AMW", whom it was believed was

stealing clothing from the “George” department of the store. An investigation was commenced into AMW’s actions, but she resigned before the investigation could be concluded and any action taken against her.

7. During the investigation into AMW’s behaviour, Mr Perkins developed a suspicion that Mrs Hands may have also been involved in theft with AMW, although of food items rather than clothing. Following a further investigation of CCTV footage and checkout and sales records, Mr Perkins and the respondent identified five separate allegations against Mrs Hands, as follows:

- (1) On 1 November 2016 at 5.27pm she was observed on the store’s CCTV footage selecting two large Thorntons cakes from the “marked down” area of the bakery department. These cakes were priced at £3.14 each, a reduced price due to the imminent expiry of the “best before” date on those items. The respondent alleged that CCTV showed that she passed the two cakes to AMW at the cigarette kiosk where AMW worked, where AMW stored the items in a cupboard until 10.16pm the same day. CCTV then showed AMW processing these cakes through a “hybrid” checkout, assisted by Mrs Hands, but the receipt for those transactions showed that the cakes were not processed through the till at £3.14 each, but were “skip scanned” using the bar code from a marked-down loaf of bread which was priced at 5 pence, meaning that AMW paid 5 pence for each cake as opposed to the price of £3.14, allegedly assisted by Mrs Hands;
- (2) On 15 November 2016 Mrs Hands was seen on CCTV processing a refund to herself through the kiosk for a sandwich wrap in breach of the respondent’s shopping procedures;
- (3) On 16 November 2016 Mrs Hands was observed on CCTV selecting a cake from the “marked down” section at 10.00pm and was then observed purchasing the product at 1.15am for 50 pence. The item was priced at £1 when removed from sale;
- (4) On 24 November 2016 Mrs Hands selected a number of items from the “marked down” section and stored them in the cupboard in the self checkout area and at 2.49am the following morning, during the her night shift, she was observed scanning the items between herself and a colleague, overriding five different items for the value of 10 pence each; and
- (5) On 14 December 2016 Mrs Hands was seen taking loose change from a pot in the self-scan cupboard to make a purchase of some “marked down” bread for 10 pence.

8. The respondent’s case is that these actions are in breach of its policies and procedures, including the “Shopping At Work Policy” to which the Tribunal was referred during the course of the hearing.

9. Mrs Hands was interviewed on two separate occasions by Mr Perkins in relation to these allegations. During the investigatory meetings with Mr Perkins, Mrs

Hands was shown the CCTV footage of her that was used to compile the allegations against her and given an opportunity to comment on it.

10. Mr Perkins formed the view, taking all of the evidence into account, that there was potential “malicious activity” that required an explanation. He told the Tribunal that he was not persuaded that Mrs Hands’ actions had been blameless. He formed the view that the claimant’s actions had potentially defrauded the respondent, in that products had been deliberately withheld for sale and then purchased at a later time for a lower price. He recommended that the findings of his investigation should be put forward to disciplinary hearing.

11. Consequently Mrs Hands was invited to a disciplinary hearing on 21 December 2016, but this meeting was adjourned to allow the disciplinary officer, Mr Millington, to investigate further by asking Mr Perkins to interview Kenny Hughes, the night manager at the Walton store and therefore Mrs Hands’ line manager.

12. During Mr Perkins’ interview with Mr Hughes, it became apparent that Mr Hughes had allowed a culture of “bending the rules” to have developed by members of staff at the Walton store who worked on the night shift. In his interview with Mr Perkins, Mr Hughes accepted that breaches of the shopping policy were tolerated by him at the store, including:

- (i) that colleagues were allowed to buy items after midnight in breach of the respondent’s shopping policies, as they would have been past their “best before” date;
- (ii) that products that should have been kept at a chilled temperature were taken out of the chiller and left out to sell on till points at a reduced price in breach of the respondent’s food safety policies;
- (iii) that products were sold without a “marked down” ticket through the tills with store colleagues pricing the products themselves;
- (iv) that sometimes his colleagues priced what he described as “*super mark downs*” saying that they would have those “marked down” products for their dinner; and
- (v) that items were not always scanned through the tills properly if they were “marked down” at a very low price, but all scanned through as the same product.

13. When asked about Mrs Hands’ potential culpability, Mr Hughes answered “*I know Linda very well to be honest...In my experience with her she has been as honest as anything*”.

14. Mrs Hands’ disciplinary hearing was held on 4 January 2017 and was chaired by Mr Millington. Mrs Hands was not suspended from work in the interim period but instead was allowed to work during that time, a period of four weeks prior to her eventual dismissal, however some duties were removed from her, for example she was not allowed to hold or use keys during that time to carry out checkout supervisory duties.

15. When giving evidence at the hearing, Mr Millington drew a distinction between the policy and practice that Mr Hughes had allowed to build up and what Mrs Hands did. He confirmed that he had read the notes of Mr Hughes' interview and accepted that Mr Hughes had tolerated breaches of policy, but said that he did not accept that what Mrs Hands did was what was allowed by Mr Hughes, in that it went further than even that allowed by Mr Hughes.

16. A significant factor in Mr Millington's opinion was the incident of 1 November 2016. He described this as "*a premeditated decision to hide the Thorntons cakes at 5.30pm before the claimant's shift started at 10.00pm in conjunction with AMW to buy those cakes later at a much reduced price.*"

17. He told the Tribunal that this incident was, "*totally different to the others*" because it was "*premeditated*" due to Mrs Hands having come in at 5.30pm to do other shopping in store, at which time she and AMW acted together to hide the cakes until five hours later. Mr Millington told the Tribunal that if Mrs Hands had paid for the items properly at the full price at £3.14 each, even at a later point in her shift, he would not have dismissed her, notwithstanding that this action was a breach of the "Shopping At Work" policy.

18. He also said that Mrs Hands was right next to AMW while AMW "skip scanned" the cakes as a 5 pence loaf of bread, and that as Mrs Hands intervened in her supervisory role when the transaction was halted on the till screen, she would have seen the screen and known that AMW had not paid the correct price for the cakes, but allowed the transaction to continue.

19. Mrs Hands' evidence to the Tribunal was that she had fully intended to pay £3.14 each for the two Thorntons cakes that evening. However, her plan to do this was disrupted when AMW arrived at a "hybrid" till and offered to pay for the cakes for both of them. Mrs Hands had accepted AMW's gesture. She said that this was often what they did as night shift colleagues, to buy one another sugary foods to share to get through the unsociable hours, so this was not out of the ordinary. Mrs Hands told the Tribunal that her intention all along was that her Thorntons cake would have been eaten by all the night shift staff, so she was not getting the benefit of it for herself in any event. Her intention had been that AMW would have the other Thorntons cake for herself.

20. Mr Millington had asked Mrs Hands why she did not buy the Thorntons cakes for £3.14 each when she had been in the store several hours earlier. The same question was asked of her during the Tribunal hearing. Mrs Hands response both times was that this was something that she simply did not do. I find that Mr Millington found this response to be an unsatisfactory explanation.

21. Mrs Hands told the Tribunal that while AMW was processing the items through the hybrid till, she was not aware that AMW had "skip scanned" the cakes for 5 pence each. She said that AMW did this, not her. I accept that AMW "skip scanned" the cakes, not Mrs Hands. The hybrid till then required supervisor intervention for the transaction to continue. It is the respondent's case that the CCTV footage shows Mrs Hands authorise the transaction and then remain by AMW, assisting her in putting the cakes into carrier bags.

22. Mrs Hands' evidence to the Tribunal was that she did not look at what was on the till screen when she intervened on that occasion. She said that she had needed to intervene because the scales on the "hybrid" till had not registered the cake because AMW had put it in the wrong place. Therefore her intervention was to correct that and allow the transaction to continue. She said she had not been aware of how much AMW had paid for the cakes. She said that she trusted AMW as a long-standing colleague, and one who the respondent also clearly trusted, because AMW had been given the responsibility of being in charge of the cigarette kiosk. She said that she was busy chatting while packing the cakes into bags and did not pay attention to the transaction on the screen.

23. Mr Millington decided that the outcome of the disciplinary hearing should be that Mrs Hands be dismissed for gross misconduct. Mr Millington was asked whether he was influenced by the fact that AMW was involved, and had other allegations of theft against her. I accept from Mr Millington's answers that he did not know of the allegations against AMW and had not been involved in that element of the respondent's investigation.

24. In his disciplinary decision, Mr Millington accepted mitigating evidence to reduce some of the other charges against Mrs Hands. He accepted that on 15 November 2016, when she refunded the sandwich wrap to herself, that she had not been trained how to do refunds and therefore did not follow the correct procedure. He also accepted her evidence in mitigation in relation to the allegation of 24 November 2016 of scanning the five different products as Pukka pies for the value of 10 pence each, due to the evidence of Mr Hughes that this was a practice that had become tolerated in store.

25. He also accepted that on 14 December 2016 when the claimant used changed from the "slummy jar" that this was a practice that had developed at the Walton store and that lots of members of staff picked up loose change off the floor, put it in a jar and used it either for customers who were short of money or for staff to use and repay at a later date. He recommended that that practice cease immediately but accepted the claimant's evidence in mitigation.

26. However, his evidence was that the key incident was on 1 November 2016 due to the premeditation and the intention to receive those cakes for less than the "marked down" price and that the outcome of the disciplinary was that Mrs Hands be dismissed for gross misconduct.

27. The claimant was then offered an opportunity to appeal and she did so by a letter dated 5 January 2017 and her grounds of appeal were that she wished to appeal about the "*severity of my disciplinary hearing outcome*". She was then invited to an appeal hearing on 20 January 2017 with Mr Nicholas.

28. Mrs Hands also told the Tribunal that the appeal process had not been fair, in that she had been asked for "additional evidence" but was not able to provide any, and that without this further evidence there was no real discussion at her appeal hearing. Her grounds of appeal were that the penalty was too severe. She did not expressly say why, but it is clear that what she intended was that the respondent would look at her length of service and employment record and reduce the penalty so as to avoid her dismissal. Mr Nichols was clearly not of the opinion that her

employment record was enough to avoid dismissal and asked Mrs Hands for something else for him to take into account. When this was not forthcoming, the appeal was dismissed.

29. Mrs Hands told the appeal hearing that the penalty given to her was too harsh and that it was not her actions that had led to the cakes being mis-scanned, but AMW's. She said that she had not collaborated with her and did not know what AMW was doing. Mr Nicholas asked her if she had any new evidence or any new reason why the penalty was too harsh, to which the claimant said she did not. Mr Nicholas therefore considered that the decision on the evidence that had been before Mr Millington was sound and that the appeal was therefore upheld.

30. Mrs Hands told the Tribunal that the decision to dismiss her was unfair because she was being punished for something that AMW did, in that she was sacked because AMW did not pay for them. She told the Tribunal that she had no intention to not pay full price for the cakes herself. She also believed that the respondent had not taken enough account of her long record or loyal service and her clean employment record. She said that there was no way that she would have put her job on the line for five or six pounds worth of cakes. She said that she would have accepted a final written warning even though she was not guilty.

The Law

31. For a dismissal of an employee to be fair, a respondent must establish that the reason for the dismissal was one of the five potentially fair reasons as per section 98 of the Employment Rights Act 1996. In this case, the respondent asserts that misconduct was the potentially fair reason.

32. Further, the respondent must act reasonably in the circumstances of the case (including the size and administrative resources of the respondent) in treating the misconduct as a sufficient reason for dismissing the claimant. This issue must be decided according with the principles of equity and the substantial merits of the case.

33. As the potentially fair reason put forward by the respondent is misconduct the Tribunal is to have regard to the guidance set down in the case of ***British Home Stores v Burchell [1978] IRLR 379*** which is:

- a. Did the respondent have an honest belief that the claimant had committed an act of misconduct?
- b. Did the respondent have reasonable grounds for holding that belief?
- c. At the time that that belief was formed on those grounds, had the respondent carried out as much of an investigation as was reasonable in the circumstances?

34. Although the ACAS Code of Practice on Disciplinary and Grievance Procedures is not legally binding, the Tribunal must have regard to it when assessing both the substantive and procedural fairness of an employer's decision to dismiss. However, it is a well-established feature of the law of unfair dismissal that the investigation and procedure need only be within a range of reasonable actions. For

example, the investigation need only be a reasonable one and need not be a forensic examination of all possible evidence.

35. Furthermore, the Tribunal is expressly cautioned against substituting its view for that of the respondent in reaching the decision to dismiss. The Tribunal must not decide the case on the basis of what it considers to be the correct action in the circumstances, but instead must decide whether the respondent's actions were the actions of a reasonable employer in the circumstances.

Application of the law to the facts found

36. It is for the respondent to show that they had a potentially fair reason for Mrs Hands' dismissal, which is misconduct. They have demonstrated this. It is then for the respondent to show that the decision-maker had a genuine belief in Mrs Hands' culpability. I find that Mr Millington has demonstrated such a genuine belief.

37. The question for the Tribunal to consider next is whether such a genuine belief was reasonably held. Was that belief held on reasonable grounds as a result of an investigation that was a reasonable one in the circumstances?

38. It is clear that Mr Millington accepted evidence in mitigation of several of the charges against Mrs Hands, largely on the basis of procedures having not been followed correctly elsewhere in the Walton store on the nightshift. For example, he accepted that staff used the "slummy jar" of coins found on the store floor to pay for their own shopping on occasion, and put the money back afterwards. It is clear that he took into account the somewhat ad hoc culture that Mr Hughes had allowed to develop on the night shift at the Walton store. It is also clear that Mr Millington was aware of Mrs Hands' long service and clean employment record.

39. However, it became clear from Mr Millington's evidence at the hearing that the incident of 1 November was the pivotal incident in his decision to dismiss Mrs Hands for gross misconduct. Although Mrs Hands provided some explanation and evidence in mitigation to Mr Millington and to Mr Perkins in relation to her actions, they were not accepted by Mr Millington. It therefore became apparent during the course of the hearing that Mr Millington had formed his view of Mrs Hands' guilt on the basis of the CCTV footage. Mr Millington viewed the CCTV footage of Mrs Hands and AMW on 1st November 2016 and on the basis of this and the evidence of the till transactions of that day, decided that Mrs Hands and AMW acted together with intention from the outset to hide the two cakes and to buy them later for a minimal price

40. Having viewed the CCTV footage, I find that Mr Millington's belief is within the range of reasonable responses. The footage from 5.30pm shows Mrs Hands select the cakes from the shop floor while doing her own shopping, but instead of paying for them with her other shopping, she handed them to AMW who took the cakes from Mrs Hands and stored them at the cigarette kiosk. The footage of the hybrid till at 22.12 on 1 November shows that, contrary to Mrs Hands evidence, she stood and helped AMW from the start of the transaction. She was facing her and standing nearby when AMW "skip scanned" the cakes for the value of a 5 pence loaf of bread. She was facing the hybrid till screen for a considerable period of time and intervened in the transaction twice. She helped AMW put the cakes into bags at the start of the transaction and returned to take one of the cakes at the end of the transaction. It

was therefore within the range of reasonable conclusions that a reasonable employer could have drawn, that Mrs Hands and AMW were acting together to avoid paying the correct price for the cakes.

41. Mrs Hands' explanations in mitigation were that she did not look at the screen and did not check what AMW was doing, and that she did not realise that she had "skip scanned" the cakes for 5 pence. However, these explanations do not fit with the series of actions played out in the CCTV footage that was viewed by the respondent and subsequently viewed by me.

42. A different dismissing officer than Mr Millington may have placed greater weight on Mrs Hands' explanations, or may have issued a first and final written warning instead. However, this does not make Mr Millington's actions unreasonable. Mr Millington's view was clear to the Tribunal in that he believed that Mrs Hands actions had destroyed the relationship of trust and confidence between employer and employee, such that dismissal was the correct option to take.

43. In relation to Mrs Hands' appeal, and the fairness of the process, I find that Mr Nichols could have communicated his requirements better to Mrs Hands, as to what he meant when he asked her to provide him with more evidence to take into account. He could also have explained his reasoning better, because Mrs Hands, I find, did not fully understand what was expected of her and did not understand why her appeal had been dismissed. However, I nevertheless find that although the communication was not as clear as it could have been, that Mr Nichols did go through a proper process of considering the matter and the appeal falls within the range of reasonable responses test. Mr Nichols was of the same opinion as Mr Millington, which was that the incident of 1 November 2016 was an act of gross misconduct warranting dismissal.

44. One of the arguments put forward by Mrs Hands' representative was that Mr Millington had put great emphasis on the fact that Mrs Hands and AMW were acting together, but that Mr Millington had no evidence that they were acting "in concert". I find that the issue of whether they were acting together is not the significant issue that the claimant's representative asserts it is. Taking Mrs Hands' case at its highest, even if it is accepted that she acted on her own to take the cakes off display and always intended to pay £3.14 each for both cakes, it is reasonable for the respondent to conclude from the CCTV footage that she saw AMW pay 5 pence each for them, but nevertheless allowed the transaction to continue and was therefore party to the theft.

45. As was explained to the parties during the hearing, the legal test for unfair dismissal is not whether a claimant is innocent or guilty according to the standards of criminal law, but whether the employer acted within the range of reasonable responses as a result of a reasonable investigation to dismiss the claimant. It is a matter of well-established legal principle that in cases of unfair dismissal, it is not for the Tribunal to substitute its view for that of the employer and conclude that a different course of action should have been taken. It is instead to ask the question "would no reasonable employer have done what this employer did?"

46. I find that it was reasonable for Mr Millington on the facts before him to act as he did, and it cannot be said that no reasonable employer would have done what this employer did. Therefore, the claimant's claim fails and is dismissed.

Employment Judge Barker

Date ___ 18 January 2018 _____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 January 2018

FOR THE TRIBUNAL OFFICE