



EMPLOYMENT TRIBUNALS

Claimant: Mrs Manjula Raj

Respondent: Asda Stores Limited

Heard at: Leicester **On:** Thursday 5 October 2017

Before: Employment Judge Evans (sitting alone)

Representatives

Claimant: Mr Welch of Counsel

Respondent: Ms T Burton of Counsel

JUDGMENT

1. The Respondent unfairly dismissed the Claimant (because it failed to follow a fair procedure).
2. If the Respondent had followed a fair procedure there would have been a 100% chance that the Claimant would have been dismissed within 3 weeks of her dismissal date in any event.
3. The Claimant contributed to her dismissal by culpable and blameworthy conduct. The compensatory award is reduced by one hundred per cent. The basic award is also reduced by 100 per cent because it is just and equitable to do so because of the Claimant's conduct prior to her dismissal.

REASONS

Background and Preamble

1. The Claimant was employed by the Respondent from 18 February 2003 until she was dismissed without notice on 3 December 2016. Following her dismissal she presented a claim of unfair dismissal which came before me in the Leicester Employment Tribunal on 5 October 2017.
2. The Claimant was represented by Mr Welch and the Respondent was represented by Ms Burton.
3. Prior to the hearing the parties had agreed a bundle of 160 pages and a further bundle of 29 pages relevant to the issue of remedy. In addition there was CCTV footage before me. In addition, both parties provided

written closing submissions.

4. Turning to the witnesses, Mr Shah and Ms Birtwisle gave evidence on behalf of the Respondent. In addition I had before me an agreed witness statement for Ms Timms of the Respondent. Because her statement was agreed she did not give live evidence. The Claimant gave evidence on behalf of herself.
5. These reasons are given extempore at the end of the hearing. They deal with liability, the issue of **Polkey** and contributory fault.
6. Before turning to the issues, I should comment on one event which I needed to address at the beginning of the hearing. Prior to the hearing beginning, the Tribunal's clerk came to be with an anonymous letter which apparently concerned the Claimant's claim. The cover note to the anonymous letter made it clear that the letter underneath dealt with the claim but not in what respect. I did not read the letter. I drew the attention of the two Representatives to it. I expressed the view that, since these proceedings are adversarial and the letter had not been produced by either party, it would be inappropriate for me to read the letter but, given that cards should be on the table, I proposed that I should provide a copy of it to each Representative. I proposed that I would then put the original letter into an envelope and leave it on the file unread until after the conclusion of these proceedings.
7. Both Representatives agreed this was an appropriate way for me to proceed and therefore that is what we did.

The Issues

8. At the beginning of the hearing there was a discussion about the issues that I would need to decide in order to determine the claim before me. It was agreed that the following issues arose for determination:-
 - 8.1. Was the Claimant dismissed for a potentially fair reason within Section 98(2) of the Employment Rights Act 1996 ("the 1996 Act")? The Respondent relied on conduct. In considering this issue it would be relevant to consider whether the Respondent honestly believed the Claimant had committed gross misconduct.
 - 8.2. Was the Claimant's dismissal fair in accordance with Section 98(4) of the 1996 Act having regard to the following questions:-
 - 8.2.1. Did the Respondent have reasonable grounds for its belief in the Claimant's guilt?
 - 8.2.2. Did the Respondent carry out a reasonable investigation?
 - 8.2.3. Was the decision to dismiss the Claimant and the procedure followed to reach that decision within the range of reasonable responses open to the Respondent?
9. There were then two issues for me to decide if I concluded that the dismissal was unfair:-

- 9.1. First, if the dismissal was procedurally unfair, what reduction (if any) should be made to the compensatory award in accordance with **Polkey**?
- 9.2. Secondly, if the dismissal was unfair, did the Claimant cause or contribute to her dismissal?
10. Having agreed the issues as set out above at the beginning of the hearing, I then asked Mr Welch what particular points he intended to make on behalf of the Claimant: the same was not clear to me from the claim form which had been presented by his instructing solicitors.
11. Mr Welch explained to me that there were 3 points which he would pursue.
 - 11.1. First, whether the Respondent had reasonable grounds for its belief in the Claimant's guilt. Mr Welch would contend that it did not.
 - 11.2. Secondly, even if the Claimant was guilty of the misconduct of which she was accused, Mr Welch would argue that the sanction of dismissal was not within the band of reasonable responses because of her length of service and her good employment record. She had received various awards during her employment and no disciplinary penalties.
 - 11.3. Thirdly, Mr Welch would argue that the dismissal was procedurally unfair because the Claimant had not been permitted to appeal against the decision to dismiss her.
12. Mr Welch confirmed that no other points were to be taken. I checked this position again with him at the beginning of his closing submissions and again he said that was the case. In particular he indicated that no point was taken in relation to whether the investigation had been insufficient and therefore not reasonable.

The Law

13. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within Section 98(1)(b) or Section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer.
14. A reason for dismissal is a set of facts known to or beliefs held by the employer which caused it to dismiss the employee. If the Respondent persuades the Tribunal that the reason for dismissal is a potentially fair one, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4). In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say I must not substitute my own judgment for that of the Respondent. Rather I must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted.
15. When the reason for the dismissal is misconduct the Tribunal should have

regard to the 3 part test set out in **British Home Stores Limited v. Burchell** [1980] ICR 303. First the employer must show that it believed that the Claimant was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and the burden of proof is on the employer.

16. Secondly the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt. Thirdly the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and, as stated above, the burden of proof in relation to them is neutral.
17. Turning to the **Polkey** issue, section 123(1) of the 1996 Act provides:-

“Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”
18. I have therefore to consider whether any compensation awarded should be reduced to reflect the chance that the Claimant could have been dismissed fairly at a later date or if a fair procedure had been used.
19. Turning to contributory conduct, section 123(6) of the 1996 Act requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the Claimant caused or contributed to their dismissal. In addition Section 122(2) requires me to reduce the basic award if I consider that it would be just and equitable to do so in light of the conduct of the Claimant prior to dismissal.

Findings of Fact

20. I do not refer in these findings of fact to all the evidence that was before me but I have taken it all into account in making the following findings necessary to support my conclusions.
21. On 23 November 2016 the Claimant returned an electric toothbrush which she had bought on 15 October 2016. She said that she had lost the receipt. She told the inexperienced employee working in the Customer Service desk that she could not remember the cost of the toothbrush. She did not produce her colleague discount card. Her colleague gave her a £35 refund for the toothbrush by way of a gift card.
22. Immediately after obtaining that refund the Claimant bought a loaf of bread from the same colleague in the Customer Service desk. She handed the colleague who had just carried out the refund transaction her colleague discount card and obtained a 10% discount on the loaf of bread. That this happened is extremely clear from the CCTV which I viewed during the course of the hearing.

23. On 30 November 2016 the Claimant attended an investigative meeting with Vicky Timms. It was put to her that on 23 November 2016 she obtained a refund of £35 for an item for which she had only paid £13.50 and, also, that although she had used the discount card when she had purchased the item, she had not produced that card when obtaining the refund. Initially the Claimant said that the toothbrush she had returned was a different one to the one that she had purchased. When it was pointed out to her that this could not be the case because the barcodes were the same, she said that she had made a mistake. She was also asked why the reduction label had been removed from the item that she returned. She said that she didn't know that there had been a label there but perhaps her husband had removed it. When she was asked about her discount card and why it had not been presented when she had obtained the refund, she said "I forgot my card. I am sorry". She said this twice during the course of the interview. Ms Timms decided that the allegations against the Claimant should proceed to a disciplinary hearing.

24. Mr Shah invited the Claimant to a disciplinary hearing by a letter dated 30 November 2016. The letter said:

"At the hearing you will be asked to respond to the allegation that on 23rd November, you returned an electric toothbrush which you had purchased at a marked down price. When you returned this item to [sic] received a gift card of a value higher than you had paid. This was a deliberate attempt to defraud the company and is considered to be theft. On the same date you misused your discount card by not presenting it when you returned the toothbrush. This is also a deliberate attempt to defraud the company. These are considered to be gross misconduct offences which if proven may result in your summary dismissal."

25. Mr Shah conducted the disciplinary hearing on 3 December 2016. During that hearing the Claimant said:-

25.1. That the price when she had sought the refund had come up on the till as £75.00. She thought that that was incorrect and she had in fact paid £30 to £35. That was why the £35 refund had been made.

25.2. She could not remember what the reduced price of the item had been when she had bought it. Nevertheless the reason she had bought the toothbrush was that it had been reduced.

25.3. It might be that one of her children (not husband, as she had suggested during the investigative interview) had taken the reduction sticker off the toothbrush box after she had taken it home and before she had brought it back for the refund.

25.4. She used her discount card "every time" she made a purchase.

25.5. She had not used her discount card when she had obtained a refund because "I didn't have my purse on me that day".

25.6. She had made no other purchases on the day when she had obtained the refund.

26. It is notable that in the notes of the disciplinary hearing the Claimant was not recorded as expressing any doubt as to whether or not she had her purse with her or whether or not she had made any purchases on that day.
27. When she had been told in the disciplinary hearing that CCTV showed that she had used her discount card immediately after obtaining the refund in order to buy bread she had said that she did not remember that and did not wish to watch the CCTV.
28. When asked again why she had not produced the discount card for the refund of the toothbrush when she had used it to buy the bread she said "I am so sorry I can't remember".
29. During the disciplinary hearing the Claimant presented Mr Shah with a letter which was at page 121 of the bundle. In that letter she apologised for what she had done. She said that she had made a mistake. She referred to her length of service. She also referred to the fact that she never attended work late.
30. Mr Shah adjourned the disciplinary hearing. He considered the evidence that he had heard and reached the decision that the Claimant had deliberately obtained a higher refund than she was entitled to and so had committed an act of fraud. He reached this conclusion for two reasons. First she did have the discount card with her and had used it to buy bread just after she had obtained the refund. That much was clear from the CCTV. Secondly he did not accept that she would have forgotten how much she had paid for the toothbrush. The reduction had been very substantial indeed from £75 to (after the application of the 10% discount) £13.50. He also did not accept that she would have forgotten that she used the discount card when she had purchased the toothbrush because she had said to him that she always used it.
31. Mr Shah then proceeded to decide to dismiss the Claimant summarily for gross misconduct.
32. I accept as true his evidence that in reaching his decision to dismiss summarily he took account of a number of factors including those set out above but also the lengthy service of the Claimant and her clean disciplinary record/good performance at work. I find that Mr Shah also took into account what the Claimant had said during the hearing, the CCTV evidence and the notes of the investigation and other materials in the pack prepared by Ms Timms.

The Respondent's Policies and Procedures

33. I find the Claimant was aware of and had signed for policies and procedures which included the following. First of all, there was the colleague discount card policy. The following extracts of the colleague discount card policy which the Claimant accepted she was aware of, are perhaps of particular relevance. First at page 37 of the bundle the following extract:

"Abuse of the discount card rules (irrespective of the monetary value involved) may result in dismissal, if it is reasonably believed that there

was a deliberate intention to defraud the company.”

34. Then at page 39 under the heading obtaining a refund:

“Where discount has been received, colleagues are responsible for informing customer services of the discount, and will need to produce their discount card for the discount to be removed from the refund amount.”

35. Subsequently under the same heading:

“Any failure to inform customer services of a discount being applied when obtaining a refund may result in dismissal if it is reasonably believed that there was a deliberate intention to defraud the company.”

36. Then at page 40 under the heading breach of discount card rules:

“Any breach of the discount card rules must be investigated and where appropriate action taken in accordance with the Disciplinary Policy.”

37. Then under the heading gross misconduct the following wording:

“Breach of rules with deliberate intent to defraud the company.”

38. Secondly I find that the Claimant was aware of the following provisions of the disciplinary policy. At page 54 of the bundle under the heading of gross misconduct there are the following provisions as to what may constitute gross misconduct in the eyes of the Respondent:-

39. First:

“An act of misconduct so serious we no longer have enough trust or confidence for a working relationship to be maintained. In these circumstances, it will be necessary to clarify the specific details of the misconduct which led to this conclusion.”

40. Second:

“Breach of colleague discount card rules or conditions by the colleague, whether colleague obtains goods or financial gain outside of the terms of the card.”

41. Third:

“Fraud or attempted fraud against the company.”

The Appeal

42. I move on now to make findings of fact in relation to the appeal. On 9 December 2016 the Claimant appealed against her dismissal.

43. On 12 December 2016 Ms Birtwisle wrote to the Claimant asking for

specific grounds of appeal. The Claimant responded to this letter on 15 December 2016. Her response was at page 113 of the bundle. Under the heading "Fact and Severity", various points are made including the following:

"I have always been a hardworking colleague and always helped out on various occasions, I do not believe I have any customer complaints or any staff complaints and I have always been punctual in my 13 years at Asda."

44. On 21 December 2016 Ms Birtwisle replied to this letter by a letter which was at page 114 of the bundle. In this letter Ms Birtwisle commented:

"As previously advised, colleagues have the right to submit an appeal and this should be based on one or more of the following grounds:...

...Severity - A suggestion that the severity of the sanction is not comparable to the original allegation or is inconsistent with previous decisions. As stated in the invite letter your offences are deemed to be gross misconduct offences, in line with Asda's disciplinary policy. The outcome of this is usually dismissal unless suitable mitigation is offered. Asda's disciplinary policy is applied in the same way with all colleagues regardless of length of service.

If you would like to pursue your appeal I request that you re-submit your appeal outlining the specific grounds for your appeal."

45. There was some further back and forth correspondence between the Claimant and Ms Birtwisle before a letter sent by Ms Birtwisle on 12 January 2017. Ms Birtwisle said that no appeal would be heard because the Claimant's grounds of appeal had been submitted too late. That was because a letter dated 5 January 2017 had not been received until 9 January 2017, outside the 7 day deadline previously set by Ms Birtwisle.

46. Having heard the evidence of Ms Birtwisle I find that by the letter of 21 December 2016 the Respondent was saying that it was not open to the Claimant in the particular circumstances of her case to appeal because the severity of the disciplinary sanction imposed was too great in light of her length of service. This is notwithstanding what was said in the final letter sent by Ms Birtwisle: I make this finding because of her oral evidence to the Tribunal.

47. Turning to the relevant Asda procedure in relation to the appeal, which was at page 60 of the bundle, under the heading appeal hearings the following is stated:

"Colleagues have the right to submit an appeal based on one or more of the following grounds:...

...Severity – an assertion that the severity of the sanction is disproportionate to the original allegation or inconsistent with previous decisions"

48. It then goes on to say:

“A formal appeal hearing must be arranged without any unreasonable delay.”

49. I find that the Asda disciplinary policy does not impose any restriction in the circumstances in which the employee may argue that the severity of the decision is disproportionate to the misconduct of which an employee has been found guilty. I find that it is clearly open to an employee to argue that the sanction is disproportionate because of their length of service and employment record, and indeed it would be odd if it were not.

Conclusions

50. I return now to the issues which were agreed at the beginning of the hearing.

Was the Claimant dismissed for a potentially fair reason within Section 98(2)?

51. I conclude that the Claimant was dismissed for a potentially fair reason. That reason was Mr Shah’s belief that she had committed an act of fraud. That act of fraud obviously related to her conduct. Indeed Mr Welch in his closing submissions did not seek to argue that there was no potentially fair reason for the Claimant’s dismissal.

Did the Respondent have reasonable grounds for that belief?

52. I conclude that Mr Shah did have reasonable grounds for his belief in the Claimant’s guilt. This is for the following reasons. First, it is extremely clear from the CCTV evidence that the Claimant made no attempt whatsoever to look for her discount card before obtaining the refund on the toothbrush. It is also extremely clear that, immediately after obtaining the refund when she took out her purse to pay for the loaf of bread, she had no problem whatsoever in finding the discount card and using it. Consequently it is clearly not true that she had forgotten her purse on the day in question or that she had made no other purchase, although she had said both these things without displaying any uncertainty in the course of the disciplinary hearing.

53. However in light of these matters, which quite clearly required some explanation by the Claimant, she put forward no explanation at the disciplinary hearing. She simply said “I’m so sorry. I can’t remember”. It was quite clearly necessary for her to explain why the colleague discount card had, according to the CCTV evidence, been used to her benefit in one transaction but then not used in the other (which use would have been to her detriment) notwithstanding the contents of the various policies set out above, which the Claimant accepts that she was aware of.

54. In light of these matters it was quite clearly reasonable for Mr Shah to conclude the Claimant had acted dishonestly and fraudulently: she had failed to offer a reasonable or consistent explanation for what was clearly visible on the CCTV footage. That is to say that she had used the colleague discount card to obtain a discount immediately after failing to produce it to reduce the refund she received, as the Respondent’s policies required if she had used it when the toothbrush had been purchased, as in turn seemed highly likely given she had said that she always used it when making purchases.

55. Secondly, given the assessment of the Claimant's honesty that Mr Shah had reached in relation to her use of the colleague discount card, and the effect of her lack of explanation on her credibility, it was quite clearly reasonable for him to then conclude that she had been dishonest when she said that she could not remember the original price of the toothbrush, taking into account also the size of the reduction.
56. Turning briefly to the points which Mr Welch made in relation to this issue in his closing notes which were at paragraph 2.2, I find or conclude that Mr Welch's first two points that the Claimant had been entirely consistent in the investigation and disciplinary meetings and that there were no grounds for believing that her explanations were not innocent explanations, were quite clearly misplaced in light of the conclusions and findings of fact I have made as set out above. So far as his points set out between paragraphs 2.3.1 and 2.3.6, are concerned these are at best points which show that as a matter of logic Mr Shah *might* have reached a different conclusion to the one that he in fact did reach. Indeed Mr Welch admitted in discussion with the Tribunal that these points really amounted to representations as to the appropriate weight to have been given by Mr Shah to particular bits of evidence. I find that these points do not come even close to making the conclusion that Mr Shah reached unreasonable.
57. Finally, although I have dealt at some length above with the question of the conclusion that Mr Shah reached, the Claimant really demolished her own case in this respect during cross examination when she accepted that Mr Shah had been entitled to come to the conclusion that he had come to on the evidence before him (albeit she then qualified that admission by saying that she had not in fact committed the act of misconduct in question).

Whether there was a reasonable investigation

58. The next issue for me to consider was whether there was a reasonable investigation. I conclude that there was and indeed that was not disputed by the Claimant at the hearing.

The decision to dismiss and procedure followed

59. Turning now to the decision to dismiss the Claimant and the procedure followed to reach that decision and whether they were within the band of reasonable responses, I come to the following conclusions. Turning first to whether the decision to dismiss was outside the band of reasonable responses because it was too severe, I conclude that it was not. The policies that I have set out above make crystal clear that the Respondent was entitled to treat what the Claimant did as being an act of gross misconduct. The Claimant did not argue that she was unaware of any of those policies. Further I find that when Mr Shah reached the decision he reached he did take into account the Claimant's length of service and conduct. In all these circumstances it was quite clearly within the band of reasonable responses, particularly perhaps in a retail environment, for Mr Shah to conclude that the act of dishonesty/fraud which he honestly and reasonably believed the Claimant to have committed was one which warranted dismissal.
60. I turn now to the procedural issue of the Claimant not being afforded a right of appeal. I conclude that the Claimant made her grounds of appeal

tolerably clear in the letter that she sent on 15 December 2016. They are not drafted in the way that a lawyer would have drafted them but she was making quite plain that she wishes to appeal upon amongst other grounds the basis that the sanction is too severe for the misconduct complained of in light of her length of service and employment record. It may well be that Ms Birtwisle took the view that such an argument was unlikely to succeed. Nevertheless Asda's disciplinary policies provided for the Claimant to have a right of appeal and to raise that argument if she so wished, whatever its merit. Consequently I find that the failure to offer or perhaps afford the Claimant a right of appeal means that the procedure followed by the Respondent was not a procedure that any reasonable employer would have followed and, consequently, the dismissal is unfair on that basis.

Polkey and contributory conduct

61. Turning to **Polkey** issues I find that if a fair procedure had been carried out an appeal hearing would have taken place within 3 weeks of the Claimant's dismissal on 3 December. Given the points raised by the Claimant in her various appeal documents, I conclude that there would have been a 100% chance that at that appeal the Claimant would have been dismissed. In none of the letters that she sent did the Claimant raise any point which would have had any realistic chance of undermining the conclusion that Mr Shah had come to that, first of all, she was guilty of what she was charged with and that, secondly, in all the circumstances, and taking into account her service and her record with the Respondent, dismissal was the appropriate penalty.

62. Turning finally to the issue of contribution, I found the Claimant to be an unimpressive witness. The evidence in her statement often contradicted evidence that she had given earlier in the proceedings, that is to say during the internal proceedings. Equally, some of it was clearly inconsistent with documentary or other evidence that was available to me. A good example of this is paragraph 11 of her witness statements, this states as follows in relation to the day when she returned the toothbrush:

“On the same day, after I had returned the item, I also later purchased a loaf of bread. For this transaction I did use my store discount card as I had found it in my bag at the time of this transaction.”

63. This evidence is quite clearly, to put it kindly, inaccurate. This is for two reasons. First of all the CCTV footage really does not support the suggestion that the Claimant “found” her card in the bag that she was carrying. The CCTV footage shows by the way in which the Claimant removes the card from her wallet that there was no real suggestion that she had misplaced it at all. She takes it straight out. There is no rummaging in the bag for it. Secondly the purchase of the loaf of bread could not by any stretch of the imagination be described as being “later”, it immediately followed the refund transaction. The two transactions were a matter of seconds apart.

64. In light of the view I formed of the Claimant when giving her evidence to the Tribunal, that is to say that the evidence was inconsistent and unsatisfactory, and the fact that the Claimant failed to reply to a number of questions in any meaningful way, and given the evidence that was before Mr Shah when he took the decision to dismiss, on the balance of probabilities I

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conclude that the Claimant did deliberately obtain a refund which she knew to be greater than that to which she was entitled and that she also deliberately failed to produce at that point her colleague discount card. In these circumstances I find that she contributed to her dismissal to the extent that her compensatory award should be reduced by 100% and her basic award also by 100%.

Employment Judge Evans

Date: 2 November 2017

JUDGMENT SENT TO THE PARTIES ON

18 November 2017

FOR THE TRIBUNAL OFFICE