



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss A O'Brien**

**v**

**Mansons Chemists Ltd T/A  
Rooneys Pharmacy**

**Heard at:** Watford  
**Before:** Employment Judge R Lewis

**On:** 13 August 2018

**Appearances:**

**For the Claimant:** Mr R Wigglesworth, Non-legal Representative

**For the Respondent:** Mr Z Malik, Trainee Solicitor

**JUDGMENT** having been sent to the parties on 31 August 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This was the hearing of a claim presented on 7 October 2017. Day A was 24 September and Day B was 6 October. The claim was of unfair dismissal only, and in accordance with the usual practice, the tribunal issued directions and listed this hearing when the claim was served by letter dated 17 October.
2. By its response, the respondent asserted that the claimant had been fairly dismissed for gross misconduct and that it had lost trust and confidence in the claimant.
3. There are a number of case management matters to mention:-
  - 3.1 Before the hearing the respondent informed the tribunal of its wish to present CCTV footage and possibly audio recording at the hearing.
  - 3.2 With consent of the parties, I saw the CCTV footage, which lasted about three minutes, on Mr Malik's laptop. It was shown twice before evidence started and once more after closing submissions at my request.
  - 3.3 The parties had brought an audio disc, which was the recording of the claimant's disciplinary hearing. Neither party had prepared a transcript. I declined to listen to the audio in the absence of a transcript. I confirmed that the parties were free to cross-examine

about what had been said at the disciplinary hearing.

- 3.4 There was an agreed bundle of some 92 pages and additional documents about mitigation. The parties agreed that I would deal with liability and contribution at first stage and remedy later in the day if necessary.
  - 3.5 On behalf of the respondent, the only witness was Mr Nimish Patel, director. The claimant was the only witness on her own behalf. Although the claimant had served a statement on behalf of her partner, Mr Hodges, he was not called.
  - 3.6 I preface my findings with general observations.
  - 3.7 The first is that in this case, as in many others in the tribunal, evidence touched on a range of matters which did not assist me. Where I declined to allow such evidence; or where I make no finding on the matter which was mentioned; or where I make a finding but not to the depth of the parties' evidence on the matter; those are not matters of oversight or omission but reflect the extent to which the point was truly of assistance.
  - 3.8 Secondly, in this case, as in many, there was strong feeling on both sides, both about the primary events and about the litigation process. While I understand the strength of feeling and of the language used at the hearing, it is my duty to disregard those factors entirely in my judgment.
  - 3.9 The tribunal has great experience of the important role played by lay members of the public in helping the presentation of cases. I make every allowance in favour of Mr Wigglesworth, who was plainly doing his best to help. That said, it is right to record that he pursued a number of points on the basis of an incomplete knowledge and understanding of the law and procedure. In fairness, I add that I do not think that any shortcomings in presentation had any bearing on the outcome of the claimant's case.
4. The tribunal makes the following findings:-
- 4.1 The respondent is a pharmacy business. It is a small business directed by Mr Nimish Patel and his brother, employing a total of 50 employees and about 8 at the claimant's workplace, which was its Tring branch.
  - 4.2 The claimant, who was born in 1971, joined the respondent as a sales assistant in March 2008.
  - 4.3 Her role included the range of shop assistant duties, including handling of takings. In addition, it involved a role in giving basic pharmacy advice to members of the public, and dealing with a procedure to help giving up smoking. She had some access to patient records, but could not dispense. The pharmacy operates in a regulated environment. The claimant had an unblemished

disciplinary record.

- 4.4 I was concerned with an incident on 11 July 2017. It was a hot day. Staff were allowed not to wear uniform and to wear their own clothes to work.
- 4.5 At around 9.15am the claimant's colleague, Coral Williams, used her bank card outside the pharmacy.
- 4.6 Later that morning, another colleague, Helen Waldron, saw a bank card on a shelf in the non-public area at the back of the pharmacy (77).
- 4.7 The claimant usually (but not invariably) took her morning break after Ms Waldron. CCTV footage showed that in the late morning of 11 July the claimant went into the non public area, and took an object off a shelf. The object looked like a bank card, and the claimant agreed in evidence that it was a bank card.
- 4.8 The footage did not show what the claimant did with the bank card after taking it off the shelf.
- 4.9 At the end of the same day Ms Williams reported that she could not find her bank card. A search of the area at the back of the pharmacy was undertaken but it could not be found.
- 4.10 The claimant had by then gone home. The following day, 12 July, she was off sick with a migraine. The card could still not be found. During the course of the day other members of staff viewed CCTV footage from the previous day. They saw that it showed the claimant lifting the card. They included Ms Hamilton and Mr Hajee, pharmacist manager.
- 4.11 Mr Hajee telephoned the claimant at home. She was not well because of her migraine. She told Mr Hajee that she had not seen the card.
- 4.12 The claimant was off sick again the following day, 13 July.
- 4.13 On the evening of 14 July there appeared to have been an incident when by chance the claimant and Mr Hodges met Ms Williams and her partner at a pub and had a disagreement about the card. Evidence about this encounter did not seem to me likely to assist and I have disregarded it.
- 4.14 On Monday 17 July Mr Nimish Patel returned to work from holiday and was updated on events. The claimant returned to work from sick leave the same day.
- 4.15 Mr Patel viewed the footage with Ms Williams. Mr Patel then had a meeting with the claimant. She agreed in evidence that she repeated her denial of having seen the card.

- 4.16 Mr Patel then showed the claimant the CCTV footage. That was the first she had seen it. The claimant acknowledged that it showed her moving the card, but said that she had forgotten such a trivial incident. She also referred to her period of illness.
- 4.17 Mr Patel then suspended the claimant. He confirmed the suspension in writing on 28 July (80-81). While legally correct, the letter was not easy to understand, and the claimant's criticisms of it seems to me well made.
- 4.18 The events in the case were not reported to the police. Mr Wigglesworth placed emphasis on this point. I do not agree that it was relevant.
- 4.19 The claimant was asked to come to a disciplinary investigation with Mr Patel and Ms Hamilton, which she did on 7 August. The bundle contained summary notes of the meeting (78-79). The claimant was assisted by Mr Hodges although, as Mr Malik rightly said, she had no statutory right to have a companion at an investigation meeting.
- 4.20 It was common ground that the claimant was upset, that Mr Patel got her a glass of water, and that the claimant found the experience troubling and intimidating.
- 4.21 By that point, the question of what had happened on 11 July had become relatively clear because of the quality of the CCTV footage. The major question had become that of how the claimant had responded to being asked about the missing bank card. She was repeatedly questioned by Mr Patel about inconsistent answers which she had given. The inconsistency could be simply stated: before seeing the CCTV footage, the claimant had denied having had anything to do with the bank card; after seeing the CCTV footage, she accepted that she was seen with the card, but said that she had forgotten about it.
- 4.22 After the disciplinary investigation meeting, the respondent appointed an outside consultant, Mr Chehal of HR Face to Face (a company which is part of the Peninsula organisation) to investigate and report. Mr Chehal was provided with papers and instructed to conduct an independent disciplinary meeting, after which he would make a recommendation to Mr Patel.
- 4.23 On 14 August (73) Mr Patel wrote to the claimant, instructing her to attend a formal disciplinary hearing on 22 August, and telling her that it would be independently chaired. He sent her a full set of papers, and summarised the allegation:

“It is alleged that you have taken part in activities which cause the company to lose faith in your integrity namely, taking another employee's credit card without authorisation. Further particulars being that on 11 July 2017, you allegedly took the credit card that belonged to Coral Williams that she had placed on a shelf in the pharmacy. The company alleges that this matter, if proven, represents a gross breach of trust.”

4.24 Allowing for the ambiguity around the word “take” (which could, in context, have meant ‘took permanently’ or ‘borrowed without permission’) I find that that fairly summarises the nature of the respondent’s case.

4.25 Mr Chehal conducted the disciplinary meeting on 22 August. The bundle contained a note which I accept was an outline summary, not a transcript (70-72). Ms Waldron and Ms Hamilton were also present. The focus is perhaps summarised in the following:

“Mr Chehal asked the claimant when she remembered picking up the card. The claimant says she remembered when she saw the CCTV.” (70)

4.26 Mr Chehal then wrote a report of 30 August, in which he summarised the events. While the drafting could have been more clearly stated, his conclusions at paragraphs 14 and 15 were the following:

“Based on the information/documentation before Mr Chehal and upon reviewing the supporting witness statements made by the various employees, the oral evidence from his interviews and the investigations by Mr Patel, Mr Chehal is satisfied that the allegation is upheld in that the claimant had not told the truth about the whereabouts of the credit card before the CCTV was shown to her. This only leads Mr Chehal to draw the conclusion that more probably than not, the claimant took the credit card and had not placed it on the fridge as alleged. Her actions are gross misconduct... Furthermore, the claimant’s untruthfulness, not showing remorse or being apologetic questioned the confidence trust and integrity her employer has in her.”

4.27 Mr Chehal recommended summary dismissal. By letter dated 31 August, Mr Patel wrote to the claimant to state that the report represented his decision and that she was dismissed with immediate effect. His letter included the following:

“You have the right to appeal against my decision and should you wish to do so you should write to the above address within five days of receiving this letter giving the full reasons why you believe the disciplinary action taken against you is too severe or inappropriate. This matter is now closed. Thank you for your co-operation throughout this process.”

4.28 I accept Mr Wigglesworth’s comment that the language of the first sentence could have been more clear and that the second sentence was at best unnecessary if there was indeed a right of appeal. The claimant did not appeal.

5. This was a case of unfair dismissal, brought under the provisions of Part 10 of the Employment Rights Act 1996 (‘ERA’). The first task of the tribunal is to find the reason for dismissal, in the sense of the operative consideration in the mind of the person making the decision to dismiss.

6. The tribunal must next consider it through the provisions of section 98(4) of the 1996 Act, which provides, “[T]he 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.”

7. I then had to have regard to the guidance given in authorities, notably British Home Stores v Burchell 1978 IRLR 379 (always bearing in mind that that case was decided under a burden of proof which differs from that now in force) and Sainsburys Supermarkets Ltd v Hitt 2003 IRLR 23. I must take care not to substitute my own view for that of the employer at any stage, and to bear in mind that at each stage where the employer exercises discretion, the question is whether its decision or conclusion has been within the range of reasonable responses: that range includes the range of reasonable inquiries open to the reasonable employer investigating the allegation. An employer is not duty bound to pursue every line of inquiry. In setting penalty, the question is not whether the tribunal considers the sanction of dismissal to be harsh or excessive, but whether it is within the range of reasonable responses.
8. The questions to be answered by the tribunal are whether in dismissing the employee, the respondent had a genuine belief, based on a reasonable inquiry and on reasonable evidence, that the claimant had committed the misconduct alleged; and if it did, was dismissal within the range of reasonable responses.
9. If the tribunal finds that the dismissal was unfair, but that the conduct of the claimant was such that it would be just and equitable to reduce the basic award to any extent, it must reduce the basic award to that extent. If it finds that the claimant's actions caused or contributed to his dismissal, it shall reduce the compensatory award by such proportion as it considers just and equitable. The reduction need not be the same in both instances, bearing in mind in particular that the basic award represents accrued service before the dismissal event.
10. I reach the following conclusions.
11. The reason for dismissal was a reason relating to the claimant's conduct. The conduct in question was that of how the claimant dealt with the bank card, in moving it without permission, making no effort to return it to its owner, and then in the answers she gave when asked about it.
12. I had to remind both parties that it is not the task of the tribunal to convict or acquit the claimant of a criminal charge. I make no finding as to whether she sought to keep the bank card as opposed, for example, to playing a prank.
13. The claimant's evidence to the tribunal was that the card on the table was back up, so that the front, showing the name of the owner, was not visible and she did not see the name of the owner. I do not accept that evidence. When the claimant saw the card for the first time, she knew that it was not hers. It was therefore an item of valuable lost property. The most obvious immediate reaction to finding lost property is to ask who it belongs to. Where the property is a bank card the most obvious way to do that is to look at the front of the card and see the name of the holder. I do not accept that the claimant did not do that.

14. It was common ground that having lifted up the card the claimant did not hand it to the colleague who had lost, it or to a manager, or to any other responsible person. There was no independent corroboration of the claimant's assertion that she put it on top of the fridge.
15. In my judgment, the respondent was reasonably entitled to conclude that the claimant had taken up the card and then not dealt with it in a manner appropriate to a colleague's valuable item of lost property.
16. I find that that was the genuine belief of Mr Patel, drawing on reasonable evidence after reasonable enquiry.
17. The plain fact was that once the CCTV had been viewed, there was little further enquiry that could take matters further. Clearly, the claimant had to be asked for an explanation. Unfortunately, when that explanation was asked for, the claimant opened up a second line of enquiry. She first denied having seen the card; once she saw the CCTV footage, she stated that she had no recollection of the incident. In evidence in this tribunal the claimant very fairly admitted that that could look suspicious.
18. Mr Wigglesworth argued that dismissal was too harsh a penalty. That is not the question for the tribunal in a case of unfair dismissal. The question for the tribunal is whether dismissal was within the range of reasonable responses. I accept that the claimant appeared to have behaved in a manner which was potentially dishonest. I accept that in a regulated environment, dealing with health records, medication, confidential information and money, she owed a duty of trust and confidence which the respondent was entitled to take into account in dismissing the claimant.
19. The dismissal was fair. I make no finding on contribution save to say that if I had had to do so, I would have set contribution at a high level. The claimant's conduct was blameworthy in both respects: first in failing to deal properly with the card; secondly in failing to answer questions about it candidly and consistently.

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Employment Judge R Lewis

Date: .....03/10/2018

Judgment sent to the parties on

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For the Tribunal office