



EMPLOYMENT TRIBUNALS

Claimant: Ms T McNulty

Respondent: Asda Stores Ltd

HELD AT: Manchester

ON: 8 May 2018

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr S Garsden, family friend

Respondents: Mr R Childe, Solicitor

REASONS

1. These are the reasons for the judgment sent to the parties on 8 May 2018 after a hearing on that same date at which the complaint of unfair dismissal was dismissed. The claimant has requested that reasons for the judgment given in writing.
2. The respondent admitted that it dismissed the claimant from a position as a checkout/service assistant on 21 July 2017. It maintained that the reason for dismissal was theft of cash from a purse that was in the lost property cupboard in the respondent's Bolton store. The claimant denied that she had taken anything from the purse and that the evidence did not establish that she had done so.
3. I heard evidence from Mr John Baird, Ms Denise Ramsden and Ms Judith Ryder who were, respectively, the investigating, dismissing and appeal officers. The claimant was not called to give evidence. However, I read her witness statement and those of the other witnesses. I was provided with documents and I saw the video footage from the CCTV camera on which the respondent relied.
4. I made the following findings of fact.

Findings of fact

5. The claimant had been employed by the respondent since 2005.
6. On 29 June 2017 a customer left a black leather purse at the checkout of Subashi Patel at about 7 p.m. Ms Patel took it to the customer services desk

where she said that Dee Walmsley counted the money in the purse and that it amounted to at least £100 in cash. Ms Patel confirmed that in an interview on 1 July 2017 (59).

7. Ms Walmsley made a written statement on the same day that there was £125 in cash in the purse when she counted it and some other items. She placed the person's contents in a box at the customer services desk in case the customer return for it. The purse was locked away in a cupboard when her shift ended at 10 p.m. When she next went on duty she checked to see if the purse had been collected. When she saw that it had not been collected she took it to security (Julie Mott) and it was then discovered that there was money missing. The matter was reported to Mr Baird.
8. Mr Baird said that he was informed that £40 was missing by Ms Mott. Ms Mott examined the CCTV footage and noted that the claimant was the only person to have touched the purse and she so informed Mr Baird.
9. Mr Baird arranged for an investigation meeting to take place on 2 July 2017 (63-69). The claimant attended and was accompanied by Sue Liles her representative.
10. The claimant said that she been asked by Jackie Minion to clear the lost property covered as the store was not busy. She said that somebody had asked about a purse so she looked in it to see if there was a card in the purse. She said there was a gym card in the purse which she had put back. She zipped it up and put it back in the cupboard and did not take anything from it. When asked how many times she had taken the purse out of the cupboard, she said she had taken the purse out and put it back. She said that she had not counted the money.
11. The claimant and Ms Liles were shown the CCTV footage.
12. The meeting was reconvened. In response to questions from Mr Baird the claimant said that she had paid for some items in the store with a £20 note at the end of her shift. Mr Baird pointed out that staff are not allowed to have money on them whilst on duty in the store. The claimant said she only had it she needed to pay for something. She said the £20 note had been in her right hand pocket which was the same pocket into which Mr Baird believed the CCTV footage showed she had placed money from the purse. Mr Baird suspended claimant on full pay and said that he would contact her again. He wrote to her on 3 July 2017 (76) recalling her to an investigation meeting on 5 July 2017.
13. At that meeting the claimant was accompanied by Steven Garsden. Mr Baird recounted the allegation. Mr Garsden said that he had watched the CCTV footage. He made points about the position of the notes in the purse and the quality of the CCTV footage. After an adjournment it was agreed that a copy of the CCTV footage would be provided so that the claimant could seek to have it enhanced. After further questions about what the claimant had with her on the day in question Mr Baird showed Mr Garsden the footage in the security office. After that he asked the claimant why she went into the purse. She said that it was in order to see whether there was any identity document in it. Mr Baird asked the claimant how many times she taken the post out of the cupboard and she said twice.

14. The meeting was adjourned on Mr Garsden's request that he wished to see the CCTV of Ms Walmsley and Ms Patel checking the money.
15. Mr Baird wrote to the claimant on 10 July 2017 recalling to a further investigation meeting on 13 July 2017.
16. The claimant attended with Mr Garsden again. At that time the enhanced CCTV footage was not available but it was agreed that the meeting would proceed. There was a discussion about whether the claimant had permission to take certain items of stock which he said had been a lost property. Mr Baird explained that he had interviewed Tracy Smith who was adamant that she had not given authority for stock to be taken.
17. Mr Garsden was taken to the security office to view the CCTV footage of the two colleagues checking the contents of the purse.
18. During an adjournment Mr Baird interviewed Jackie Minion who confirmed that she had given permission to the claimant to take stock left in lost property.
19. Mr Baird reconvened the investigation meeting with Mr Garsden and the claimant. The matter of stock was not taken further formally. Mr Baird concluded there were reasons for the claimant to answer the allegation concerning the missing money at a disciplinary hearing. He set that out in a summary document (94-95).
20. Ms Ramsden was asked to chair the disciplinary hearing. She was provided with the documents that had been created thus far and the CCTV footage.
21. On 18 July 2017 the claimant was invited by letter to the disciplinary hearing. The letter set out the allegation, warned the claimant that theft, if proven, might result in dismissal for gross misconduct and reminded her of her right to representation.
22. The disciplinary hearing took place on 21 July 2017. Mr Garsden again represented the claimant. Mr Garsden suggested that having reviewed the CCTV images it did not appear that Ms Walmsley had counted the money so it was impossible to determine whether any money was missing. He therefore asked for the charge to be dismissed immediately. Ms Ramsden said that she would conduct a thorough investigation and would continue with the hearing.
23. Ms Ramsden asked the claimant to explain what had happened. The claimant explained and said in answer to Ms Ramsden that she had only taken the purse out twice. Ms Ramsden put to the claimant that she had taken the purse out of the cupboard five times between 12:24 and 12:38 p.m. on the day in question. Mr Garsden objected that they had not had the opportunity to see all the footage to which Ms Ramsden was referring. Ms Ramsden therefore offered Mr Garsden and the claimant a further opportunity to view the footage. Mr Garsden continued to object.
24. Ms Ramsden adjourned the meeting. In the meantime she spoke to Emma Horsley from security regarding the suggestion that the claimant and Mr Garsden had not seen the footage. Ms Horsley explained that she had started to show them the footage from 12:24 p.m. When the meeting reconvened Ms Ramsden

explain that to Mr Garsden who continued to protest that there had been a breach of company rules and employment law.

25. After a further adjournment Ms Ramsden and Mr Garsden agreed that the incident took place at 12:25 PM and that therefore Ms Ramsden would consider the CCTV from 12:24 to 12:25 PM.
26. The meeting then continued on that basis with which the claimant agreed. Ms Ramsden then discussed the witness statements of Ms Patel and Ms Walmsley. Ms Ramsden asked the claimant why she had not informed security about the purse and had not logged it in the lost property book. The claimant said she did not know why she had not done that but thought it was probably because she was in a rush as her shift finished at 1 PM.
27. At the end of the meeting the claimant said that she had always previously told a manager or security about any issues and did not know why she had failed to do so on that day. Mr Garsden reiterated the point that the CCTV did not show Ms Walmsley counting the money and argued that the claimant could not be seen with cash in her hand on the CCTV. Ms Ramsden adjourned to deliberate.
28. Ms Ramsden came to the conclusion that the claimant had taken the money. She relied upon:
 - 28.1. the statements of Ms Walmsley and Ms Patel;
 - 28.2. the fact that the claimant was the only person to handle the purse whilst it was in lost property;
 - 28.3. the fact that the claimant had failed to inform security or a manager and that although she said she was in a rush there was plenty of time to report it before her shift ended;
 - 28.4. that the CCTV footage appeared to show the claimant removing money with her right hand at 12:25 PM and put it in her right hand pocket which was the same pocket from which he took £20 out to pay for shopping shortly afterwards; and
 - 28.5. that the claimant clearly knew Adsa procedures and processes.
29. Notwithstanding the claimant's length of service there was no mitigation for what Ms Ramsden considered to be an act of theft. She informed the claimant of her conclusions when the meeting reconvened and informed her of her right of appeal.
30. Ms Ramsden confirmed her decision in a letter of 22 July 2017 (122-123).
31. The claimant appealed on two grounds which he set out in a letter (124). She said that the CCTV showed that D Walmsley did not count the money in the purse. She said that additional CCTV showed her hand going into the purse and coming out with "an undetermined item". She maintained she put her hand back into the purse and when it emerged again that there was nothing in it and she had not put a handbag in the purse after that.
32. Mr Garsden submitted further grounds of appeal (126-127).

33. Ms Ryder conducted the appeal on 11 August 2017. Mr Garsden appeared for the claimant. Notes were taken (128-131). Ms Ryder summarised her findings in a document called an Appeal Summary (132-133). She reconvened the hearing on 6 September 2017 and told the claimant she was dismissing the appeal. She wrote to the claimant a letter dated, incorrectly, 1 September 2017 in which she expanded upon her reasons for dismissing the appeal. I was satisfied the letter was written after the reconvened hearing since it refers to it in the past tense. I was satisfied that the letter was simply incorrectly dated.
34. In the letter Ms Ryder identified that there were grounds of appeal based on procedure, fact and severity and that the two points advanced by the claimant would come under the heading of fact.
35. Ms Ryder said that having reviewed the CCTV footage of Dee Walmsley counting the money she was satisfied that is what Ms Walmsley did. She said that CTV footage she reviewed “clearly shows Tracey’s hand going into the purse removing note scrunching them up in her hand and as she turned slightly toward the till she puts her hand into her right hand pocket where I believe she puts them.” Ms Ryder also dealt with ancillary points but in my judgment the two findings I have just recited are crucial.

Relevant law

36. For unfair dismissal the relevant statutory provision is s. 98 of the Employment Rights Act 1996. It is for the respondent to prove the reason or principal reason for the dismissal. If it is shown that it is a reason relating to conduct, the tribunal must be satisfied that the respondent had a genuine belief in the conduct alleged, that it had reasonable grounds for that belief, that it was formed after as much investigation into the circumstances as was reasonable and that the decision to dismiss for that conduct was one which a reasonable employer could reasonably make. (See: British Home Stores Ltd v Burchell [1978] IRLR 379 EAT, Iceland Frozen Foods v Jones [1982] IRLR 439) The test for a fair investigation is also the “reasonable range” test. (See: Sainsbury’s Supermarkets Ltd v Hitt [2003] ICR 111 CA)
37. I reminded myself further of the appropriate test by reference to the first paragraph of the judgment of the CA in *Turner v East Midlands Trains* [2013] IRLR 107 where Elias LJ said:

“It is now a firmly established principle of unfair dismissal law that when an employment tribunal has to determine whether an employer has acted fairly within the meaning of section 98 of the Employment Rights Act 1996, it applies what is colloquially known as the “band of reasonable responses” test. In other words, it has to ask whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own view for that of the reasonable employer. That principle has been enunciated in the line of cases beginning with *British Home Stores v Burchell* [1978] IRLR 379 and affirmed in cases such as *Post Office v Foley* [2000] IRLR 827, *Sainsbury’s Supermarkets v Hitt* [2003] ICR 111, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 and, most recently, *Orr v Milton Keynes Council* [2011] ICR 704.”

38. I note especially the warning given by Mummery LJ in the *London Ambulance Service* case quoted by Moore-Bick LJ in paragraph 50 of *Orr v Milton Keynes*, the last mentioned of those cases:

“... it is not the function of the employment tribunal to place itself in the position of the employer. Mummery L.J., with whom Lawrence Collins and Hughes L.J.J. agreed, said this:

"43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

Submissions

39. On behalf of the respondent I received submissions in writing which, having set out the relevant legal framework, submitted in essence that having regard to the findings made by Ms Ramsden and Ms Ryder the tribunal should conclude that the dismissal was fair.

40. On behalf of the claimant Mr Garsden essentially rehearsed the arguments that he had made at the earlier stage.

Conclusions

41. Against that background I reached the following conclusions.

42. Before rehearsing them I should record that I was shown the CCTV footage in question. However I reached my conclusions based upon the legal framework and without forming any concluded judgment on what the CCTV footage showed. The extent to which I considered it relevant I set out below.

43. On the evidence I was satisfied that both Ms Ramsden and Ms Ryder genuinely believed that the claimant had taken money from the purse.

44. It was open to one or both of them to decide whether they believed the evidence in the statement of Ms Patel and Ms Walmsley. Clearly they did believe that evidence. Ms Ryder in particular made a point of checking it against the CCTV footage. Her conclusion that Ms Walmsley did count the money when the purse was handed to her by Ms Patel was one which a reasonable employer could have come to. There was no real issue that the purse contained less money after the claimant and the claimant alone had handled it once that point was accepted. The effect of that point being established was that, looked at from the perspective of any reasonable employer, there was a strong circumstantial case that the claimant had taken the money. As any practitioner of criminal law will know a strong, simple circumstantial case may very often be unanswerable.

45. On that basis I was satisfied that Ms Ramsden and Ms Ryder had reasonable grounds for their belief.

46. Notwithstanding Mr Garsden's attempts to argue that the procedure was flawed, I was satisfied that it was a procedure which not only complied with the minimum requirements of the ACAS Code of Practice but whatever criticisms could be made of it, taken as a whole, it was a reasonable investigation which any reasonable employer could have carried out.
47. The only remaining question then was whether the decision to dismiss was one which a reasonable employer could reasonably have reached. This is sometimes described as the "range of reasonable responses" test. In my judgment, on the facts found by the respondent this is not just a case of whether the decision to dismiss lay within the range of responses of a reasonable employer but it is hard to see how any reasonable employer could have failed to dismiss in the circumstances. The theft of money in these circumstances constitutes a fatal breach of the trust that should exist between employer and employee.
48. I wish to conclude by tendering a sincere and unqualified apology to the parties for the serious delay in sending out these reasons to them. This has been due to the pressure of other judicial work.

Employment Judge Tom Ryan

Date 26 October 2018

REASONS SENT TO THE PARTIES ON

30 October 2018

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