EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr O Ijausi		**Asda Stores Limited**

HELD AT: **Ashford** **ON:** **24 May 2019**

BEFORE: **Employment Judge K Bryant QC**

Appearances:

For the Claimant: **Mr J Olatunde (Adviser)**

For the Respondent: **Mr J Wallace (Counsel)**

RESERVED JUDGMENT

The Claimant's claims for unfair dismissal and breach of contract fail and are dismissed.

REASONS

Claims and issues

1. The claims to be determined in this case were agreed at the start of the hearing as 'ordinary' unfair dismissal under section 98 of the Employment Rights Act 1996 ('ERA') and breach of contract / wrongful dismissal. A claim for race discrimination had previously been dismissed on withdrawal.

2. For the purposes of the unfair dismissal claim the Respondent relies on conduct as the potentially fair reason for dismissal, the burden being on the

Respondent to prove that was in fact the reason or principal reason for the Claimant's dismissal. In particular, the Respondent relies on the Claimant's conduct at work on 22 May 2018.

3. The Respondent relies on the same conduct for the purpose of the wrongful dismissal claim. The Respondent says that the Claimant's conduct resulted in a fundamental breach of the Claimant's contract of employment such that he was not entitled to notice of termination of his employment.

Evidence and findings of fact

4. The tribunal was provided with an agreed bundle of documents. In addition, the Claimant provided a document titled 'Claimant's Response to Grounds of Resistance', a skeleton argument and a witness statement for the Claimant. The Respondent provided witness statements for its two witnesses.

5. The Respondent called evidence from Shane Quinlan, Warehouse Operations Manager, who took the decision to dismiss the Claimant summarily and from Jon Dennis, General Manager, who heard the Claimant's second stage appeal.

6. The Claimant gave evidence on his own behalf.

7. In light of all the evidence heard and read by the tribunal, it has made the following findings of fact:

    7.1 The Respondent operates a large supermarket business. As part of its business it operates distribution centres or warehouses, one of which is a distribution centre for chilled goods in Erith, Kent ('the Erith CDC').
    7.2 The shop floor of the Erith CDC is maintained at a more or less constant internal temperature between 2 and 4 degrees Celsius.
    7.3 The Claimant was employed by the Respondent as a warehouse operative at the Erith CDC from 30 November 2003 until his summary dismissal with effect from 29 May 2018.
    7.4 Part of the Claimant's regular duties involved the operation of machinery known as Material Handling Equipment ('MHE'), which is used to pick up and move heavy pallets of goods around the warehouse.
    7.5 The Respondent has implemented various policies at the Erith CDC. There is no suggestion that the Claimant was not aware of the relevant policies.
    7.6 One such policy concerns food and drink. There is, as the tribunal understands it, a canteen at the Erith CDC and also a 'warm room' where employees may go during breaks in their work, in both of which food and drink may be consumed, but employees are instructed that no food or drink may be taken or consumed in the warehouse itself. The tribunal has seen a written statement of this policy which the Claimant signed in December 2003; the policy states that neither food nor drink may be taken into or consumed in the warehouse and provides that

any breach will be subject to disciplinary investigation and could lead to dismissal.

7.7 Another of the Respondent's policies concerns drugs and alcohol. It provides that 'Colleagues must not consume alcoholic drinks on our premises' and that 'Colleagues are prohibited from consuming alcoholic drinks on the Company premises … A breach of this rule will be considered to be Gross Misconduct, which may lead to disciplinary action up to and including dismissal'.

7.8 The tribunal has also seen the Respondent's disciplinary procedure which gives, as one example of gross misconduct, 'consuming alcoholic drinks on company premises whilst carrying out duties'.

7.9 The Respondent says, and the tribunal accepts, that drinks being brought into the warehouse gives rise to a risk of spillage, which could cause employees to slip, or of drink containers being dropped, which could, for example, become lodged under the pedals of an MHE.

7.10 The Respondent accepted during the hearing that in ambient temperature warehouses the internal temperature can become very hot and there have been cases where the warehouse manager has allowed employees to take bottled water onto the shop floor but only on a temporary basis and only with the express permission of management. However, as the Erith CDC is a chilled warehouse this exception to the ban on food and drink on the shop floor is never lifted even temporarily. The tribunal also accepts the Respondent's unchallenged evidence that water fountains are available around the Erith CDC for the use of employees.

7.11 The Respondent also says, and again the tribunal accepts its evidence on this, that consumption of alcohol in the warehouse would give rise to a further significant risk, in particular where employees are operating MHEs around the warehouse. It therefore imposes an absolute ban on alcoholic drinks being consumed in the warehouse.

7.12 As noted above, there has been no suggestion that the Claimant was not aware at all material times of the Respondent's policies as outlined above. Indeed, he accepted in evidence that a breach of the drugs and alcohol policy would be a serious matter and, in his own words, that it would be a 'big problem'.

7.13 The Claimant attended work at the Erith CDC on 22 May 2018. He brought with him a 50cl can of drink. The tribunal was shown the can. On the front it has what appears to be a coat of arms and beneath that is written 'Perlenbacher Radler cloudy' and then beneath that is a picture of some lemons. Written on the side of the can in a number of languages, the first of which is English, are the ingredients. The writing makes clear from the start that the can contains 50% beer. At the end of the ingredients, in slightly larger type, the writing also indicates that the alcohol content of the can is 2.5% by volume.

7.14 There is no dispute that the Claimant brought the can into the warehouse or that he opened the can on the shop floor. This was during his shift and at a time when he would thereafter have been operating an MHE.

7.15 There is also no dispute that the Claimant was then approached by a manager, Paul Tilbury, who started an investigation on the same day which led to the disciplinary process which in turn led to the Claimant's summary dismissal.

7.16 There is, however, dispute as to various other aspects of the events of 22 May 2018, although the tribunal notes that the Claimant's version of events has varied somewhat both during the internal proceedings and during the course of this tribunal claim.

7.17 Shortly after Mr Tilbury saw the Claimant with the can, he interviewed him. The Claimant was accompanied by a union representative. Notes were taken of the interview and the Claimant has signed each page to indicate their accuracy. Mr Tilbury informed the Claimant that he was investigating the circumstances of the Claimant consuming an alcoholic drink on company premises whilst carrying out his duties. Mr Tilbury told the Claimant that he had been seen taking a sip from a can of alcoholic drink. The Claimant said that he was about to take a sip of the drink, that it was an energy drink, that it had been given to him by a friend and that he was not aware it was alcoholic. Mr Tilbury told the Claimant that looking at the level of liquid in the can it seemed that the Claimant had drunk some of it. He adjourned the interview so that a drug and alcohol test could be undertaken.

7.18 A drug and alcohol test was then undertaken the result of which was negative. Mr Tilbury nevertheless decided to suspend the Claimant for consuming an alcoholic drink on the premises whilst carrying out his duties.

7.19 Mr Tilbury met again with the Claimant on the morning of 25 May 2018 and again he was accompanied by a union representative. Notes were taken and he has signed each page to indicate their accuracy. During the course of this interview the Claimant reiterated that he had been given the can by a friend. He said that the friend had told him it was a non-alcoholic drink. When asked whether he had checked the can he said that the can had a picture of a lemon on it so he thought it was a healthy drink and did not read the can. The Claimant accepted that he had been about to take a sip when approached by Mr Tilbury but he denied drinking any of the drink. He also said that the alcohol content was 'very very low' and that as far as he was concerned alcoholic drinks fall into three categories, beer, wine and spirits, and since this was not within any of those categories it was a non-alcoholic drink.

7.20 Mr Tilbury wrote to the Claimant the same day, 25 May 2018, to inform him that the matter was being referred to a disciplinary hearing on 29 May 2018 which would be chaired by Mr Quinlan. The allegation was said to be that he consumed alcohol at work on 22 May 2018. He was informed that this was deemed to be gross misconduct and if proven may lead to his dismissal.

7.21 The disciplinary hearing took place on 29 May 2018 and the Claimant was again accompanied by a union representative. The Claimant reiterated that he had been about to take a sip of the drink when Mr Tilbury approached him, that he had been given the drink by a friend

and that he had told Mr Tilbury that it was an energy drink. He also said that he had seen others taking drinks onto the shop floor and assumed that it was acceptable.

7.22 Having heard from the Claimant, Mr Quinlan adjourned the hearing to consider the evidence presented to him. He himself believed, based on the evidence available to him, that the Claimant had already drunk some of the can when approached by Mr Tilbury but on any view, as the Claimant had admitted, he would have drunk the can had Mr Tilbury not stopped him. Mr Quinlan found that there had been a breach of the food and drink policy and, more seriously, a breach of the drug and alcohol policy. He considered the mitigation put forward by the Claimant, namely that he had seen others taking drinks onto the shop floor and that he was unaware the drink was alcoholic. He noted that the Claimant had been spoken to before about bringing drinks onto the shop floor and also that the alcohol content was clearly displayed on the side of the can and it was the Claimant's responsibility to ensure that he knew what he was drinking.

7.23 Mr Quinlan considered the range of possible sanctions and concluded that summary dismissal was appropriate. He reconvened the meeting to announce his decision. His decision and a summary of his reasons were confirmed in a letter dated 29 May 2018.

7.24 The Respondent has a two stage appeal process. The Claimant appealed against his dismissal by letter dated 31 May 2018. He raised four grounds: first that others took food and drink onto the shop floor, second that he did not consume alcohol on company premises, third that 'the drink in question is not alcoholic' and, finally, that dismissal was disproportionate.

7.25 The first stage appeal was heard by Gavin Town, General Manager, on 15 June 2018. The Claimant was again accompanied by a union representative and he signed each page of the notes of the hearing to indicate their accuracy. Mr Town asked the Claimant for examples of others bringing food and drink onto the shop floor and the Claimant replied that he was referring to others holding cans of drink or cups of coffee or eating a chocolate bar. When asked when this was he said he could not remember. The Claimant was asked about his second ground of appeal and he said that the person who gave him the drink told him it was good for him and that he, the Claimant, does not drink for health reasons. He also said, for the first time, that after opening the can he was not sure what was in it and so wanted to seek clarification from someone else as to what it was but no one was around. He said that he had left the drink on 'the legger'. This, the tribunal notes, is inconsistent with the version of events given to Mr Tilbury, ie that he had been about to take a sip of the drink when stopped by Mr Tilbury.

7.26 Having discussed the other grounds of appeal, Mr Town adjourned the hearing to consider the evidence. He concluded that there may be some occasions on which employees take drinks onto the shop floor although he would not want this to become the norm. However, he

noted that there had been no examples given of anyone else taking an alcoholic drink onto the shop floor. He concluded that although the drug and alcohol test was negative, perhaps because the Claimant had not consumed enough of the drink or because it had passed out of his system by the time of the test, he had clearly intended to drink an alcoholic drink on the shop floor and he must take responsibility for that. He dismissed the Claimant's contention that the drink was not alcoholic; the can clearly said that it contained 2.5% alcohol. He also concluded that dismissal was not disproportionate in the circumstances, noting that the Claimant had intended to drink the can and that he was driving an MHE as part of his work that day.

7.27 Mr Town dismissed the first stage appeal and his decision and reasons were confirmed in a letter dated 15 June 2018.

7.28 The Claimant appealed again by letter dated 20 June 2018. His grounds were that he said that other accusations had been added to the allegation that he had consumed alcohol whilst at work and that he had not consumed alcohol on the Respondent's premises. He said that although he intended to consume the drink he was hesitant because he was not sure what it was. He said that he should be educated on what alcohols are rather than dismissed.

7.29 The second stage appeal was heard by Mr Dennis on 3 July 2018. The Claimant was again accompanied by a union representative and he signed each page of the notes of the hearing to indicate their accuracy. He said that Mr Quinlan had referred to previous conduct issues during the disciplinary hearing which were not then mentioned in the dismissal letter. He reiterated that he did not drink alcohol on company premises and that although he had intended to do so he had not in fact done so.

7.30 Having adjourned the hearing to consider the points made, Mr Dennis then reconvened the hearing and announced his decision and reasons. He said that although there was no clear evidence that the Claimant had consumed any of the drink, he had admitted opening it and intending to drink it. That, he found, was a breach of the drug and alcohol policy and was the reason for Mr Quinlan's decision. He said that it was the Claimant's responsibility to ensure that he did not bring alcohol onto the premises with the intent to drink it and that he should have checked the content of the can if he was unsure. He had checked the Claimant's contention that cans of shandy had been sold in the canteen some years previously and even if it had been sold in the past it was not sold at the time and would not be in the future. He also noted that the Claimant had signed to acknowledge receipt of the relevant policies and that it was his responsibility to make sure he understood them.

7.31 Mr Dennis therefore dismissed the Claimant's second stage appeal and confirmed his decision and reasons in a letter dated 4 July 2018.

7.32 The tribunal has already noted above the inconsistency in the Claimant's version of events during the internal process in that he initially said that he had been about to take a sip from the can but later

said that he was not because he unsure of its contents. During his oral evidence during this hearing he accepted at times that he had been about to take a sip but at others said that he had not and then he reverted to the 'about to take a sip' version. Further examples of evidential inconsistencies have arisen. As noted above, the Claimant said during the internal process that the friend who gave him the drink told him it was an energy drink and/or that it was non-alcoholic. In his oral evidence to the tribunal this changed to being told that the drink was isotonic and a muscle relaxant; this form of words was used by the Claimant a number of times in his oral evidence. The Claimant has also said on occasions that he does not drink for health reasons and on others that it is because he is Catholic and on yet others that it is because his parents are Catholic.

7.33 As well as aspects of his evidence that are contradictory or at least inconsistent, others are, the tribunal finds, implausible. For example, on one version of his case the Claimant says that he read on the can of drink that it was shandy. Notwithstanding that the word 'shandy' does not appear on the can, if he read any part of the wording on the can, and in particular if, as he says, he was concerned as to its content, the tribunal does not accept that he did not also read that the can contained 2.5% alcohol.

7.34 The tribunal also cannot accept the Claimant's protestations, made as part of his appeal, that the drink was non-alcoholic because the alcohol content was 'very very low' and/or because it was not beer, wine or spirit. The can clearly indicates that it is 50% beer, so even on the Claimant's interpretation of what constitutes an alcoholic drink this drink would be one. The Claimant's response to this point when put to him in oral evidence was that he thought the reference to 'beer' could be to root beer or ginger beer which are non-alcoholic. The tribunal cannot accept the Claimant's evidence on that point.

7.35 Taking all of the evidence into account, and recognising that on the wrongful dismissal claim it is for the Respondent to prove, on the balance of probabilities, that the Claimant's conduct amounted to a repudiatory breach of his contract of employment, the tribunal has concluded that the Claimant took the can of drink onto the shop floor, opened it and did take a sip before being stopped by Mr Tilbury; it was reported to Mr Tilbury that the Claimant was seen taking a sip, both Mr Tilbury and Mr Quinlan noticed that the level of the drink in the can was lower than it would have been if the can were full and it would be natural, the tribunal finds, only to open a can of drink when one is ready to drink it. Further, the tribunal finds that by the time the Claimant opened the can he had read the words on the side of the can and cannot have failed to realise that it contained 50% beer (as opposed to a non-alcoholic drink such as root beer) and 2.5% alcohol by volume. In other words, he knew when he opened the can that it was an alcoholic drink. He also intended to drink the rest of the can and, had he not been stopped by Mr Tilbury, would have done so even though he was operating an MHE as part of his duties that day.

Law and submissions

8. The tribunal has reminded itself of the provisions of section 98 of the ERA and of relevant guidance from the EAT and higher courts. As noted above, it is for the Respondent to prove that the reason or principal reason for dismissal was a potentially fair reason within the meaning of section 98. If the Respondent discharges that burden then the tribunal must consider whether dismissal was fair or unfair in all the circumstances of the case, the burden being neutral at that stage. In conduct cases, such as this, the tribunal is likely to be assisted by the EAT's guidance in *British Home Stores Ltd v Burchell* ([1978] IRLR 379) which suggests that the tribunal consider (a) whether the Respondent had a genuine belief that the Claimant was guilty of the alleged misconduct, (b) whether that belief was held on reasonable grounds and (c) whether there had been a reasonable investigation. The tribunal would add that it should also consider whether, in a wider sense, the procedure adopted by the Respondent was fair and also whether dismissal was a fair sanction. At each stage of consideration of the unfair dismissal case, once the Respondent has discharged the initial burden of proving a potentially fair reason for dismissal, the question is whether the Respondent's approach was within the band of reasonable responses of a reasonable employer.

9. For the unfair dismissal claim, whether or not the Claimant did in fact commit an act of gross misconduct is irrelevant to the question of liability. However, for the wrongful dismissal claim that is the key question: has the Respondent established to the tribunal's satisfaction that the Claimant, by his conduct, repudiated his contract of employment?

10. In closing submissions, it was said on behalf of the Claimant that the Respondent may well have had another reason for dismissal, such as that he had brought previous tribunal proceedings. This was not something that had been raised before and had not been put to either of the Claimant's witnesses. It was also said that the Claimant had not consumed alcohol and that there had been no willful or deliberate breach of the Claimant's policies. There had been merely an 'incidental occurrence' due to an 'oversight'. It was said that the Respondent had tampered with evidence in that it had included in the tribunal bundle photographs of the drink can which were enlarged which cast doubt on the Respondent's case.

11. The Respondent said in closing submissions that its case was strengthened by the fact that three independent decision-makers had each come to the same conclusion. Their genuine belief in the Claimant's guilt could not be challenged. As for reasonable grounds, it was said that there was evidence that the Claimant had in fact taken a sip of the drink and that his story changes as had been seen in his oral evidence at the hearing. In any event, it was said that there was no substantive difference between taking a sip and intending to take a sip; he intended to act, and would have acted, in breach of the drug and alcohol policy but for the manager's intervention. Whether the

Claimant knew the drink was alcoholic or should have known, he had the relevant intention. When asked by the tribunal whether there was a level of alcohol in a drink below which a breach of policy would not occur, the Respondent said that it took a zero tolerance approach, that it would be difficult to set a cut-off level, that on any view any cut-off would not be as high as 2.5% alcohol by volume and that the drug and alcohol policy specifically provides that it covers low alcohol products. With reference to a reasonable investigation, it was said that little more could have been done since the Claimant was found with the can in his hand and admitted that he intended to drink it. With regard to the wrongful dismissal claim, the Respondent said that the Claimant's credibility was low in light of his changes of evidence and that the tribunal should find that he knew that the drink was alcoholic and also that he knew that bringing alcohol onto the premises was a serious matter.

12. Although the Claimant's representative did not refer specifically to his skeleton argument or his Response to Grounds of Resistance document, the tribunal has taken their contents, and the cases to which they refer, into account when reaching its conclusions in this case. The tribunal will not repeat their contents here but does note that, in so far as those documents suggest that dismissal was for asserting a statutory right and refer to section 104 of the ERA, (a) no case under section 104 has been pursued in the Claimant's evidence or in cross-examination of the Respondent's witnesses and (b) in particular, no relevant statutory right has been identified either in evidence or submissions.

Discussion and conclusions

13. Dealing first with the unfair dismissal claim under section 98 of the ERA, it is clear to the tribunal that the reason in Mr Quinlan's mind at the time he decided to dismiss the Claimant was a reason relating to the Claimant's conduct. Similarly, the reason in the mind of the relevant decision-maker at each of the two appeal stages was a reason relating to the Claimant's conduct. The Respondent has therefore discharged the initial burden of proving that the reason or principal reason for dismissal was a potentially fair reason.

14. It is also clear to the tribunal that the Respondent's decision-makers had a genuine belief that the Claimant had breached the relevant policies by his conduct on 22 May 2018 and that they had reasonable grounds for holding that belief. Mr Quinlan, the dismissing officer, concluded that the Claimant had brought an alcoholic drink onto the shop floor, had opened it and, he believed, had taken a sip from the can before he was stopped by his manager. That, the tribunal accepts, would have been a clear breach of the food and drink policy and, more importantly, of the drug and alcohol policy. Mr Quinlan had ample evidence on which to base those conclusions and the tribunal cannot say that his conclusions were outside the band of reasonable responses. The Claimant had admitted bringing the drink onto the shop floor and opening it. He did not accept that he knew it was alcoholic but given that

he did accept that he had read at least some of the wording on the side of the can and there was a clear indication of the can's alcohol content Mr Quinlan had reasonable grounds to believe that the Claimant knew it was an alcoholic drink. There was also evidence to support his conclusion that the Claimant had taken a sip; Mr Tilbury's notes of the investigation meeting record that someone had reported seeing the Claimant take a sip and, further, both Mr Tilbury and Mr Quinlan saw that the can was not full when removed from the Claimant.

15. However, for Mr Quinlan and those hearing the two stages of the appeal process, whether the Claimant had in fact started to drink the contents of the can or merely intended to, and would have done had he not been stopped by Mr Tilbury, did not alter their conclusion that he had breached the relevant policies. The Claimant has sought at various times to distinguish drinking an alcoholic drink on the shop floor, which he accepts would be a breach and a serious matter, and being in possession of an open can of an alcoholic drink with the intention of drinking it on the shop floor but being prevented from doing so by a manager's intervention, which he does not accept is a breach. The tribunal has concluded that this is a distinction without a difference. It cannot be right that an employee who starts to drink from a can commits a breach of the drug and alcohol policy whereas one who fully intends to do so and is caught with an open can in his hand but is prevented from drinking it by his manager does not. Both, in the tribunal's judgment, would commit a breach of the relevant policy.

16. Similarly, the fact that the Claimant returned a negative drug and alcohol test did not absolve him of any breach of the policy. The tribunal accepts the Respondent's evidence that the negative result does not give any real indication as to whether the Claimant had taken a sip of the drink, given the time that passed before the test was undertaken, but in any event a breach would have occurred whether or not any drink in fact passed the Claimant's lips.

17. Looking at the reasonableness of the Respondent's investigation and the procedure adopted in a wider sense, the tribunal finds that the investigation and procedure were clearly within the band of reasonable responses and no real challenge to the procedure was made by the Claimant in evidence or submissions.

18. Finally, the tribunal has considered whether dismissal was a fair sanction in all the circumstances. It is right to note that the Claimant was a relatively long-serving employee and, although no stranger to the Respondent's disciplinary process, as far as the tribunal is aware his disciplinary record was clean at the time of the incident in question. It is also right to note the concession by the Respondent's witnesses that if the Claimant had been caught drinking a non-alcoholic drink on the shop floor then there would have been a disciplinary sanction but it would have been short of dismissal. However, the Respondent has a clear policy on drugs and alcohol the rationale for which is probably

obvious: in a busy warehouse environment where pallets of goods are being moved around and heavy machinery is in operation any consumption of alcohol on the premises would give rise to an unacceptable risk to the safety of its employees. Similarly, the Respondent made clear to employees that any breach of that policy would be treated as gross misconduct and the Claimant himself accepted in evidence that a breach of the policy would be a 'big problem'. In all the circumstances, the tribunal finds that dismissal in this case was within the band of reasonable responses.

19. The tribunal has therefore concluded that, in all the circumstances, the Claimant was not unfairly dismissed.

20. The tribunal has gone on to consider the wrongful dismissal claim, which involves a different legal test and the outcome of which may therefore not be the same as for the unfair dismissal claim. However, in light of the findings of fact as set out above the tribunal has concluded that the Claimant was guilty of an act of gross misconduct on 22 May 2018 which was sufficient to entitle the Respondent to dismiss him without notice. In particular, the tribunal has already found as fact that the Claimant did start to drink from the can at a time when he was on the shop floor and knew that the can contained 2.5% alcohol. He also intended to drink the rest of the can and would have done so and then gone on to operate an MHE had Mr Tilbury not stopped him. That, in the tribunal's judgment, clearly amounts to gross misconduct entitling the Respondent to dismiss him summarily.

21. In the circumstances, the Claimant's claims fail and are dismissed.

Employment Judge K Bryant QC
28 May 2019