



EMPLOYMENT TRIBUNALS

Claimant: Miss L Mitchell

Respondent: Michael Abakhan Limited

Heard at: Liverpool **On:** 14 and 15 February 2019

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mr Mensah, Counsel

Respondent: Mr Ali, Counsel

JUDGMENT having been sent to the parties on 16 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claims

- 1.1. In this claim the claimant claimed unfair dismissal only. The only claim which the claimant had clearly identified in her ET1 was one of unfair dismissal. Whilst there had previously been reference to potential other claims, including a holiday pay claim and another unspecified claim, at the outset of the hearing it was confirmed that no other claims were, in fact, pursued.

2. The Law

- 2.1. It is not denied by the respondent that the claimant was dismissed. Accordingly the first question is what the reason for the dismissal was. Section 98 (1) Employment Rights Act 1996 ("ERA") states:

"In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

2.2. Accordingly, it is for the respondent to present evidence to establish to the Tribunal the reason for the dismissal, and if established that the reason falls within the scope of s98(1)(b).

2.3. If the respondent can establish a potentially fair reason for dismissal, the question then becomes whether the dismissal for that reason was fair? Section 98(4) states (as applicable to conduct dismissals):

“...where the employer has fulfilled the requirements of subsection (1), the 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 treated in accordance with equity and the substantial merits of the case.”

2.4. There is a substantial body of case law that assists Tribunals in the application of this section.

2.5. Firstly, in **Iceland Frozen Foods v Jones [1982] IRLR 439** the EAT summarised the correct approach to adopt in applying the s98(4) test, giving the following key guidance:

2.5.1. The starting point should be the wording of s98(4) itself;

2.5.2. In applying the section the Tribunal must consider the reasonableness of the employer’s conduct, not simply whether the Tribunal consider the dismissal to be fair;

2.5.3. In judging the reasonableness of the employer’s conduct, the Tribunal must not substitute its own view of what is the right course to adopt for that employer;

2.5.4. In many cases (though not all) there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another;

- 2.5.5. The function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.
- 2.6. There is further specific guidance on the application of s98(4) in conduct dismissals. Notably the case of **British Home Stores v Burchell [1978] IRLR 379** set out a four stage test for application in a case where a claimant denies misconduct prior to dismissal (as is the case here):
- 2.6.1. The employer must have a genuine belief in guilt;
- 2.6.2. The employer must have carried out a proper investigation;
- 2.6.3. The employer must have reasonable grounds upon which to base that belief; and
- 2.6.4. Dismissal for the misconduct alleged must lie within a band of sanctions open to a reasonable employer.
- 2.7. When determining the reason for dismissal, the respondent bears the burden of proof. When determining the fairness of the dismissal for that reason, a neutral burden of proof applies. When considering the reasonableness of the respondent's actions, the test to apply is often referred to as the "range of reasonable responses". Under the test the question is whether a *reasonable* employer *could* have done what the respondent did if they found themselves facing the same circumstances. This test will apply to each and every decision made by the respondent, (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**) including procedural decisions, not just the substantive question of the sanction. The same test will apply to the overall decisions reached by the respondent.

3. The Issues

3.1. Reason for dismissal.

The respondent submits the reason for the claimant's dismissal was that she committed a number of connected acts of gross misconduct. Subsection (2) (b), of s98(1) of the ERA states:

*"A reason falls within this subsection if it –
.....
(b) relates to the conduct of the employee,
....."*

The claimant did not, in her evidence or via her representative in his submissions made on her behalf, put forward any coherent argument that there was any other reason for dismissing her.

3.2. Fairness of dismissal.

3.3. The claimant's representative confirmed at the outset that the claimant did not seek to rely on any argument that there were procedural defects in the disciplinary process leading up to the dismissal. The claimant accepted the respondent had gone through the appropriate process in full. The claimant's claim was pursued on three potential grounds:

3.3.1. **Failure to fully investigate the personal issues that were causing the claimant stress, and the impact these had been having on her work:**

It is the claimant's case that the respondent did not carry out a proper investigation into her ongoing problems with stress and that this could cause the type of mistakes which led to her dismissal. The claimant argues that she flagged with the respondent the issue of her stress and the mistakes which it had caused and that, as she was dismissed for undercharging customers which was found to be dishonest rather than an innocent error, evidence of mistakes in the recent past which had been triggered by stress would be relevant.

In relation to the duty to investigate, the EAT gave guidance in **Gratton v Hutton (2003 unreported)** that the question to be asked is not whether further investigation might reasonably have been carried out but whether the investigation which had been carried out could be regarded by a reasonable employer as adequate.

3.3.2. **Lack of reasonable grounds to base the belief of guilt on:**

It is the claimant's case that there was not sufficient evidence that the undercharging was dishonest. Whilst this is a question of fact based on the evidence heard, it would be an error of law to substitute a different conclusion with the benefit of hindsight or to apply the standards of the Tribunal. The question is not if another person would have found the claimant to be dishonest, but if, on the basis of the evidence available, could a reasonable employer have reached that decision.

3.3.3. **Dismissal as a sanction lay outside the band of reasonable responses available to the respondent:**

This is a question of fact based on the evidence. The claimant referred the Tribunal to the case of **Turner v East Midlands Trains [2012]**. This was in support of a submission that, as the finding against the claimant, given the nature of her work in the retail sector, was career threatening, more care needs to be taken by an employer in any investigation. In addition, for the same reason more care needs to be taken before reaching a finding of guilt and deciding to dismiss.

4. Evidence

4.1. The claimant presented witness evidence on her own behalf. For the respondent, witness evidence was presented by the investigating officer, Miss Roberts, and from the dismissing officer, Mrs Jones. In addition the parties

had prepared an agreed bundle of documentary evidence for the use of the Tribunal.

- 4.2. Only evidence in relation to liability was heard. The parties were agreed that the listed hearing duration would facilitate a subsequent remedy hearing if necessary.
- 4.3. On the basis of the evidence presented the following key, uncontested, facts were found:
 - 4.3.1. The claimant was employed by the respondent as a Sales Assistant from on or around 11 March 2008 (the date is not critical) until she was dismissed with effect from 22 July 2017.
 - 4.3.2. The delay in getting to a Tribunal hearing (from mid-2017 to early 2019) was caused by a number of postponement requests for various reasons. Neither party is in any way blamed or blameworthy for these delays. It is noted, however, that they did present a difficulty for the hearing, in that recollections of the critical matters were naturally degraded.
 - 4.3.3. The claimant was dismissed following a disciplinary procedure that arose out of an incident which had occurred on 27 June 2017. This was a day when the claimant had attended her work as normal and it was not until partway through her working day that the incident arose.
 - 4.3.4. The entire incident had been caught on an extensive network of CCTV cameras which the respondent has covering the claimant's place of work. From this footage, which the claimant was shown during the disciplinary process, a timeline of events had been produced by the respondent. This was produced as part of the disciplinary investigation. Nothing of any substance within that timeline was disputed, in that the events shown on CCTV had occurred as per the timeline. For this reason there was no need for the CCTV to be viewed as part of the hearing.
 - 4.3.5. The incident in question began when a customer entered the store at 11.23am on 27 June 2017. This customer was a former colleague and manager of the claimant. The claimant's evidence was that she was still on friendly terms with the customer in question.
 - 4.3.6. When the customer arrived in store, there was some interaction between the claimant and the customer, which did not appear to be significant. Sometime later, the claimant is seen on the CCTV putting a number of purchases which the customer in question was making through a till. The claimant had measured some of the fabric for the customer as part of that process.
 - 4.3.7. In doing so it is undisputed by the claimant that she undercharged this customer friend for a number of items. Specifically, she did not charge her friend at all for a reel of thread; she did not charge properly for some bird patterned fabric; she charged the correct quantity for another batch of fabric but at the incorrect price (having used the wrong fabric code); and then for

a further item of purchase she charged for a shorter length than that which had been measured. The evidence was that there were three different colours of fabric where the length had been combined; however, the individual measured lengths when added together were significantly more than the total length charged for.

- 4.3.8. There was a minor dispute between the parties as to the gross value of the undercharging. The respondent valued it at around £19. The claimant's estimate was £15 or £16. The submissions of the parties suggested that this small difference arose because it was impossible, with hindsight, to be certain of the precise amounts of fabric that had been given. Whilst it is clear on the CCTV footage that more fabric was given than charged for, it is not possible to accurately re-measure it from CCTV alone.
- 4.3.9. What is recorded on the CCTV summary is that two minutes after the transaction had been '*tilled up*', and before the customer had left the store, another member of staff went to the till and printed out a duplicate of the relevant receipt. This member of staff had been near the claimant when she served the customer in question. The member of staff stated to the disciplinary investigation that she believed she had observed that the claimant had failed to properly charge for the reel of cotton, the only item at that point which was in doubt. The till receipt appeared to confirm that the reel of cotton had not been charged for. The parties were agreed that the reel of cotton in question was worth less than £1.
- 4.3.10. No concern was raised with the claimant at the time. Instead, the respondent's manager was asked to look at the CCTV. At this stage it is the respondent's case that it was still believed that there was no concern beyond a belief that the claimant had, in error, failed to charge for a reel of cotton thread. A decision was then taken to view the CCTV footage, to try to confirm whether the claimant had, indeed, made an error in not charging for the reel of cotton. The claimant did not dispute this sequence of events.
- 4.3.11. It was agreed by the parties that the CCTV footage showed that the claimant was not behaving in any way abnormally that day.
- 4.3.12. Nothing was said to the claimant on the day of the incident. This was despite the fact that an inspection of the CCTV later that day raised additional concerns about the under-charging of the customer in question. Whilst it was agreed that the CCTV footage had been viewed before the claimant left work that day, it was not agreed how late in the day it had occurred. Regardless, it was agreed that before the claimant left work that day, it had become apparent to her manager that there was grounds to suspect that the claimant had failed to charge correctly for a number of items.
- 4.3.13. The claimant went home as normal that day. The following day, pursuant to an agreement that she had made with the customer, whilst the customer was in store, the claimant went to the customer's house to acquire some of the fabric which had not been properly charged for. The claimant gave

evidence to the Tribunal that she paid her friend the sum of £3 for this fabric. The claimant's explanation was that her friend had wanted the fabric, but not all of it. Accordingly, the claimant had arranged to visit the customer's home to see if the surplus fabric would be enough for a project she was planning. All of this, the claimant frankly and honestly admitted to the respondent during the disciplinary process.

- 4.3.14. On her return to work on 4 July 2017, the claimant initially went about her duties as normal. She was, a couple of hours later, called into a meeting. In this meeting she was shown the CCTV footage and the duplicate receipt. The claimant was asked to explain events. The claimant accepted that she had done all the things which the CCTV appeared to show, and explained that she had collected some of the fabric from the customer for her own use. The claimant is recorded as commenting at the end of the meeting *"it's a mess though and if I was in your shoes I'd be sacking me. I really don't know what I've done but it wasn't done on purpose. I wouldn't"*.
- 4.3.15. There followed a disciplinary investigation. A number of witnesses were spoken to. Very detailed timeline summaries were produced by viewing the CCTV footage. All the witness evidence collected was disclosed to the claimant. The claimant was then told she would have to attend a disciplinary hearing, which would consider a number of allegations, including dishonesty, failure to meet the correct standards of work, negligence and timewasting.
- 4.3.16. At the outset of the disciplinary hearing itself the issues to be considered were described as *"gross misconduct, that you are alleged to have acted dishonestly with failure to meet required standards of work expected of a sales assistant"*.
- 4.3.17. The minutes of the disciplinary hearing record that the other concerns raised with the claimant, including spending too long with the customer in question and ignoring other customers were discussed. It is clear from the disciplinary hearing, notes that the greatest and central focus of the disciplinary officer was the question of whether the undercharging was dishonest and deliberate, or innocent and a simple error.
- 4.3.18. The disciplinary officer was clearly aware that the claimant had personal problems at home. She is recorded as saying *"I understand the problems you have at home. I'm a mum and I know what you're going through, but I really need to just get through these questions and understand what happened on this particular day with [.....]"*.
- 4.3.19. At the disciplinary hearing the claimant was asked in detail about each of the alleged items of undercharging. The claimant did not dispute any of the individual items that were undercharged. The claimant was asked on each occasion why she had undercharged. The only explanation provided by the claimant was that she had been making a lot of mistakes at work because of what she was going through; she had asked for help and support and that she was not undercharging intentionally.

- 4.3.20. It was put to the claimant in evidence that the incorrect codes which she had used were for fabric that is very commonly sold. For this reason it was put to her that she, like other experienced sales assistants, would be expected to simply know the correct code. It was further put to the claimant that the measurement error which she had made was significant and very obvious. When this was put to the claimant in the disciplinary process she suggested that perhaps she had simply mis-measured the fabric. She also made reference in the disciplinary process to having difficulty with the till which she stated was not recording what she was trying to type into it. Whilst giving evidence in this hearing the claimant suggested that she may have added up the different sections of fabric incorrectly.
- 4.3.21. The evidence from the respondent's witnesses was that if the claimant could not explain the use of the incorrect fabric code by saying that the till had not registered the key presses she was trying to make, this was because the relevant codes were so different that a failure to register all key presses could only generate an error. Further, the claimant's explanation that she was trying to enter in "2.7" metres and the till missed the "7" so the length was recorded as "2." Metres did not explain the fact that there was in excess of 3m of fabric. The respondent also stated that, in any event, it was known that on occasions the till did not properly register key presses, so staff were expected, and did, take extra care to make sure that mistakes did not occur.
- 4.3.22. At the end of the disciplinary process the claimant was dismissed for gross misconduct.

5. Findings

5.1. Reason for dismissal

- 5.1.1. The respondent has presented clear evidence, which has not been contested, that the claimant undercharged a customer. The evidence shows that the claimant was then subject to disciplinary proceedings, at the conclusion of which she was dismissed for gross misconduct.
- 5.1.2. The claimant has presented no evidence to suggest that she was dismissed for any other reason.
- 5.1.3. On the balance of the evidence presented, the respondent has discharged the burden of proof and shown that the reason for the claimant's dismissal was her conduct.

5.2. Fairness of dismissal for misconduct

- 5.2.1. It is accepted by the claimant that she did undercharge a customer. This was accepted at all points during the disciplinary process. The claimant was dismissed because the respondent concluded that the undercharging was dishonest, and not innocent mistakes.

5.2.2. The claimant argued that this dismissal was unfair on three grounds. The findings in relation to each ground are set out below.

5.2.3. **Failure to fully investigate the personal issues that were causing the claimant stress, and the impact these had been having on her work.**

5.2.3.1. The dismissing officer's evidence was clear, in that she did not believe that the claimant's previous stress absences or ongoing stress were factors which led to the conclusion that the claimant's errors were honest. It was clear that the dismissing officer did not accept that stress could cause dishonesty, which is a reasonable position for her to have taken. She stated in evidence that she had taken into account the following factors in reaching that conclusion:

- The fact that there were a lot of errors, which were all of a different nature. Some of the errors were simply not charging for items, others were just using wrong codes for items or entering incorrect and lower measurements for items.
- The fact that these errors had been made in favour of a friend of the claimant, not an unconnected customer. Moreover, the claimant had, by her own admitted prior arrangement, the next day acquired some of the items which had not been correctly paid for.

5.2.3.2. On balance, the dismissing officer's evidence was that she concluded, from the number of errors in the single transaction and the beneficiary of those errors, that on balance the undercharging was probably deliberate.

5.2.3.3. The claimant's position was that given her known stress issues that this was not a conclusion which the dismissing officer could reasonably reach.

5.2.3.4. The claimant's representative submitted that the CCTV footage did not show the claimant behaving in a duplicitous, furtive or shifty way at or around the time of the undercharging transaction. The claimant invited a conclusion that this should have been taken into account as an indication that her actions were not dishonest. The respondent agreed that the claimant did not look to be behaving in any way abnormally on the day of the relevant events, and submitted that this shows that she did not look stressed or otherwise struggling to cope with normal duties. There was no evidence that the claimant's demeanour on the relevant CCTV footage was a factor taken into account by the dismissing officer. It is not clear that it should have been; the submissions of the parties showing that it could be viewed either as an indicator of honesty or as a lack of general stress, which in this case are opposing positions. In the circumstances, the fact that this was not taken into account in the dismissal decision is not something which could render the decision unfair.

5.2.3.5. Had the claimant been dismissed for making honest errors, the claimant's assertion that her stress was given insufficient consideration in the decision would have carried weight. However, her dismissal was based on

a conclusion that she had been dishonest. No submission was made by the claimant or on her behalf that stress can cause dishonesty. Given this, the dismissing officer's decision that the claimant was guilty of dishonest acts, regardless of her personal stress, was a reasonable one to have reached at the time.

5.2.4. Lack of reasonable grounds to base the belief of guilt on.

- 5.2.4.1. The claimant submitted that the respondent did not have reasonable grounds to conclude that she was guilty of dishonest acts, rather than honest errors. The only credible reason that the claimant appears to have given, during the disciplinary process, for the undercharging was that she was suffering from stress arising from her domestic problems and making mistakes.
- 5.2.4.2. The respondent relied on the same arguments as discussed above, namely that there were many errors in a single transaction, and that these were all in favour of a friend of the claimant, in concluding that stress could not explain dishonesty.
- 5.2.4.3. It is entirely possible that the claimant has merely been unlucky that a panoply of unintentional errors occurred when she happened to be serving a friend. The acquisition of the fabric from the friend could be entirely innocent. This, however, does not change the position that on a balance of the evidence before the respondent's dismissing officer the respondent was entitled to reach the conclusion that probably the claimant had undercharged deliberately, given the number of errors, the fact that the potential beneficiary from those errors was a friend of the claimant and the fact that the claimant then acquired some of the fabric, which had not been properly charged for, the following day by prior arrangement. The claimant herself when she viewed the CCTV initially appeared to concur that the evidence against her looked very damning.

5.2.5. Dismissal as a sanction lay outside the band of reasonable responses available to the respondent:

- 5.2.5.1. Irrespective of the value of the transaction that was identified, the claimant is in a trusted position selling products by measurement, weight and product code, in circumstances where the respondent is entirely reliant upon her integrity and honesty.
- 5.2.5.2. Given a finding of dishonesty, a reasonable retail employer clearly could dismiss an employee, especially when they are giving unauthorised discounts to their friends at the till. Whilst the claimant had long service with the respondent, and apparently no similar event had occurred in the past, her actions were found to be a serious breach of trust.
- 5.2.5.3. It was accepted that the claimant had been suffering from stress. However, the claimant's actions were found to be dishonest. Whilst stress could explain mistakes it cannot explain dishonesty.

5.2.5.4. The impact of a dismissal for dishonesty on the claimant's career will be potentially significant. However, the conclusion reached was one that could reasonably be reached, and dishonesty in the retail sector is critical given the position of trust retail employees are in. The decision to dismiss was one which the respondent was entitled to make in the circumstances, irrespective of the fact that this may be a career threatening decision for the claimant.

Employment Judge Buzzard

Date 29 May 2019

REASONS SENT TO THE PARTIES ON

20 June 2019

FOR THE TRIBUNAL OFFICE

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