



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Moss

**Respondent:** Asda Stores Limited

**Heard at:** Liverpool

**On:** 3 October 2019

**Before:** Employment Judge Aspinall

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Keith of Counsel

# JUDGMENT

The judgment of the Tribunal is that the respondent fairly dismissed the claimant.

The complaint of unfair dismissal is therefore dismissed.

# REASONS

1. Mr Moss (the claimant) worked for Asda (the respondent) in its Widnes store from 22 July 2014 until his dismissal for gross misconduct on 2 February 2019.
2. He was employed to work 38 hours per week and his contract said that he had to work "at such times as may from time to time be rostered by Asda".

Sometimes, the respondent required him to start his shifts at 5am and sometimes 6am.

3. The claimant's job required him to clock on and off. Staff had clock cards that logged their arrival and departure. If someone clocked in after the anticipated start time of their shift the system would generate an exception report to show that the person was late. Exception reports then had to be signed off by another manager. The claimant knew that staff should not sign off their own exception reports as it would leave them vulnerable to a suggestion that they were falsifying records.

4. Throughout his time working for the respondent the claimant was often late. On 19 December 2018 the claimant was late. The claimant signed an exception report to claim that he had started work at 5.00am. He did not take care to check the time and ensure he recorded it accurately. The respondent's cctv footage showed him arriving at 5.47am. The claimant says he may have been there earlier and may have been helping to jump start vans in the yard. That is unlikely and in the absence of any corroborating evidence from the claimant I find that he arrived at 5.47am.

5. On 28 December 2018 the claimant was again late for work. On this occasion he signed the exception report as starting at 6.00am. He arrived at 6.27am.

6. On 6 January 2019 the claimant again attended work late. On this occasion he recorded 6.00am as his time of arrival on the exception report. The respondent says that the claimant arrived at 7.11am and again in the absence of any evidence from the claimant, he doesn't even say he was there at 6am, he says he doesn't know what time he was there, I find he arrived at 7.11am.

7. The respondent became aware of the exception reports and appointed Mr Shaun Codd to conduct an investigation into falsification of the exception reporting by the claimant.

8. During the course of that investigation on 18 January 2019 the claimant was interviewed. Those interview notes are at p274 of the bundle. The claimant was accompanied by a union representative Anna Harrison to the investigation meeting.

9. The investigating officer concluded that the matter should proceed to a disciplinary hearing. The respondent wrote to the claimant at p300 of the bundle inviting him to attend a disciplinary hearing. The letter said:

“you will be asked to respond to the allegation that you falsified company documents for your own personal gain.....(on 10 December 2018, later dropped) 19 December 2018, 28 December 2018 and 6 January 2019, you falsified the exception reports resulting in a benefit to yourself

10. The claimant was given copies of the investigatory interview notes and invited to view cctv footage and the exception report sheets. He was told of his right to be accompanied to the disciplinary hearing.

11. At the disciplinary hearing on 4 February 2019 the Customer Trading Manager, Mr David Duffy, heard from the claimant who was accompanied by a union colleague. The claimant said that more evidence was needed as to the allegation

against him on 10 December 2018. The claimant admitted that he was in the wrong on 19 and 28 December 2018, and on 6 January 2019.

12. Mr Duffy decided that the allegations against the claimant were proven. Mr Duffy considered whether or not a disciplinary sanction should be imposed. For him, the issue was one of trust. He decided to dismiss the claimant. The claimant was dismissed on 5 February 2019. The letter of dismissal is at p325 of the bundle.

13. The claimant was advised of his right to appeal and he exercised that right. His letter of appeal is at p327 of the bundle.

14. Alun Roberts, Deputy Store Manager from the St Helens Store, heard the claimant's appeal. Mr Roberts was not satisfied that the investigation in the claimant's case had been thorough enough. Mr Roberts told the Tribunal that he sent the matter back for a reinvestigation. In particular, he was concerned that he did not have enough information about the incident on 10 December 2018 and the times of the claimant's arrival at work.

15. Mr John Ling, Deputy Store Manager from the Warrington store, was then appointed to deal with a re-hearing of the disciplinary matter. It was reinvestigated. The claimant attended a reinvestigation interview in April 2019 accompanied by his union representative. A rehearing of the disciplinary hearing was held on 10 May 2019.

16. Mr Ling found that on 19 December 2018 the claimant had claimed to have arrived at work at 5.00am when in fact he had arrived at 5.47am. On 28 December 2018 the claimant had claimed to arrive at 6.00am when in fact he had arrived at 6.27am. On 6 January 2019 the claimant had claimed to have arrived at 6.00am but had arrived at 7.11am. Mr Ling decided to uphold the decision of summary dismissal with effect from 5 February 2019.

17. The claimant was advised of a further right to appeal but he chose not to appeal. He did not appeal this time because he mistakenly believed that he could not both appeal and bring a tribunal claim at the same time.

18. The claimant contends that his dismissal was unfair for the purposes of section 94 and section 98 of the Employment Rights Act 1996.

19. The claimant seeks compensation.

20. The claimant represented himself at the hearing. He was accompanied by his father who was able to take notes for him and confer with him in the presentation of his case. The respondent was represented by Mr Keith of counsel.

21. The Tribunal heard oral evidence from the claimant, Mr Dillon Moss.

22. For the respondent, the Tribunal heard oral evidence from Mr John Ling, Deputy Store Manager, Warrington for the respondent who conducted the rehearing of the case and upheld the initial decision to dismiss, Mr Alun Roberts, also a Deputy Store Manager, St Helens for the respondent who had heard the appeal and decided to order a reinvestigation. The tribunal did not view the cctv footage and did not hear

from the original dismissal decision making officer Mr Duffy, though I had notes of the disciplinary hearing and the letter of dismissal in the bundle.

23. The bundle, which was paginated though had no index, ran to over 600 pages. The first 300 pages or thereabouts were a page for page reproduction of the claimant's personnel file. It was not necessary for the Tribunal to look at most of those pages. All witnesses provided witness statements which referred to pages in the bundle. The Tribunal looked at those pages of the bundle to which it was referred by the witness statements or to which it was taken in evidence by the parties.

24. The respondent had a disciplinary policy and procedure. It provided at page 54 of the bundle:

"Punctuality

Customers expect us to be able to give them the service they want, therefore all colleagues must avoid lateness. Wages will be deducted for lateness at the beginning of a shift or if you are late from a break without a reasonable explanation."

25. It also provided at page 59 of the bundle:

Misconduct

"For cases of misconduct a People Manager should be present to take notes and support the investigating manager. However, where this is not possible an appropriate alternative notetaker can help.

"Where dismissal is a possible outcome, a People Manager must always be present as the notetaker."

26. It also provided at page 60 of the bundle:

Disciplinary hearing

"Copies of the investigation notes and any evidence which we relied on to form a decision must be enclosed with the invite letter to give the colleague sufficient opportunity to prepare for the hearing."

and:

"Disciplinary hearing

Managers conducting a disciplinary hearing must be...impartial and have had no prior involvement in the investigation or the case."

27. The disciplinary procedure also gave examples of the forms of gross misconduct. At page 67 of the bundle it provided the following examples of gross misconduct:

- "Falsification of company records..."

- Fraud or attempted fraud against the company...
- Breaching swiping in and out rules, working hours including breaks where the intend was to defraud the company.”

28. It had been made clear to the claimant in the documents above that falsifying company records would be gross misconduct. When he entered times earlier than those at which he can be sure he arrived at work on exception report sheets on 19 December 2018 and 28 December 2018 and 6 January 2019 the claimant falsified company records.

29. The allegation relating to 10 December 2018 was not proceeded with in the reinvestigation. Accordingly, it is not necessary for me to make findings of fact on this allegation.

30. The claimant said that his manager, Matt Turner, had given him a general instruction that he was free to arrive at any time between 5.00am and 6.00am for his 5 am shifts. This was put to Mr Turner as part of the disciplinary reinvestigation. Mr Turner absolutely refuted this suggestion. The claimant also said that he had been instructed by Mr Turner to “round up” the time of his arrival. Again, this was put to Mr Turner as part of the disciplinary reinvestigation. Mr Turner admitted that he may have said that the claimant could “round up” the time when recording it on the exception reporting sheet. However, the Tribunal finds it implausible to suggest that by this Mr Turner authorised the claimant to claim that he had arrived at 5.00am when in fact he had arrived some 47 minutes later, or to claim 6 am and arrive at 6.27, or to claim 6 am and arrive at 7.11am. That would be go beyond any sensible interpretation of “rounding up”. The claimant was not entitled by anything Mr Turner had said to falsify his arrival times.

31. The Tribunal heard from the claimant that during December 2018 and January 2019, the period during which he falsified the time records, he was suffering personal stress. The claimant's uncle was diagnosed with a terminal illness and died. The claimant's son was hospitalised in late January 2019 with salmonella. The claimant's girlfriend was unwell. The claimant had a child with his ex partner. His daughter often stayed with the claimant overnight at his parents' home. On those occasions he said that it would affect his ability to get to work on time as he had to wait for his parents to be up to take care of his young daughter. The claimant had two car crashes in early December 2018. On one occasion he was loaned a courtesy car.

32. The claimant sought to argue at tribunal that the signing off of his own exception reports with incorrect times of arrival wasn't falsification. He said it wasn't his fault that he didn't have a clock card in December 2018 and that he had asked his line manager Matt Turner for a clock card on numerous occasions. He said it wouldn't have happened if he had had a clock card and that he genuinely did not know the times when he was arriving at work. I asked him did he have a mobile phone and where was it ? He had it with him in his pocket on the witness stand, he always has it with him. It was not credible to suggest that, during a period when his family members were ill, his child in hospital and his uncle dying, he didn't check his phone, that he didn't know the time when he got to work. He had made these same arguments on appeal and at rehearing.

33. The claimant argued that the respondent did not follow a fair procedure in arriving at his dismissal. In particular, he argued that the absence of a People Manager at a meeting on 19 March 2019 was unfair. He says the respondent's own policy, at page 59 of the bundle, requires that a People Manager must always be present. The meeting on 19 March was not an investigatory interview nor a disciplinary hearing. This meeting did not result on the imposition of any sanction on the claimant. Whilst the claimant might technically be correct that a People Manager ought to have been present, it made no difference whatsoever in this case.

34. The claimant also suggests that Mr John Ling who conducted the second disciplinary hearing was biased against him. The basis of this argument is that it was Mr John Ling who, on 7 January 2019, had telephoned the claimant to ask why he had appeared on an exception report for his late arrival on 6 January 2019. I heard from Mr Ling that this did not make him impartial in the disciplinary investigation. Mr Ling conducted a rehearing of the disciplinary hearing with the claimant present at which the claimant was able to put his case. The claimant was represented at that hearing. I find no evidence of bias in the way in which Mr Ling conducted the disciplinary hearing or in his decision to uphold the dismissal.

35. The claimant also argued that the second disciplinary investigation was tainted because the people involved in the second investigation and disciplinary hearing had read the papers from the first disciplinary investigation. Mr Ling gave evidence, and I found him to be a reliable historian, when he said that he did not read the paperwork from the first investigation.

36. The claimant also argued that the second disciplinary investigation had been prejudged because he had been taken off the rota in early January 2019. He had two weeks' annual leave before returning to work on 2 February 2019 to face his disciplinary hearing. The claimant did not put this point to the respondent's witnesses. However, the Tribunal had heard from the claimant that throughout December 2018 and January 2019 he had been advising his line manager of the personal stress he was suffering. The Tribunal makes no finding and draws no adverse inference from the timing of the claimant's annual leave. It was not relevant to the decision to dismiss made by Mr Duffy and Mr Ling.

37. The claimant argues that in deciding to dismiss him the respondent acted outside the range of reasonable responses. He drew to the Tribunal's attention the fact that a colleague, LS, had also signed his own exception report. Page 598 of the bundle shows LS signing an exception report in respect of his own late departure from work on Tuesday 11 December 2018. However, there is a notable difference between this exception report and those signed by the claimant; LS had swiped in with his clock card at the start of his shift at 12.55pm. LS had swiped out at the end of his shift at 22.39pm. The system recorded that LS would be paid for a shift running from 13:00 to 22:39. In effect, this exception report provides accurate information as to the arrival and departure time of LS. It then generates payment for LS for the additional 39 minutes he worked on that occasion. His shift was due to start at 13:00 hours and conclude at 22:00 hours. It is in effect a claim for overtime pay where there is system based proof of the actual time worked. The exception reports in relation to the claimant on 19 December 2018, 28 December 2018 and 6

January 2019 do not have system generated accurate clocking in and clocking out data.

38. The relevant legal principles that the Tribunal must apply are not in dispute.

#### Unfair Dismissal

39. The respondent bears the burden of proving on a balance of probabilities that the claimant was dismissed for misconduct. (See section 98(1) ERA 1996). If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. If the respondent does persuade the Tribunal that it held that genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. To complete its enquiry the Tribunal must go on to consider the general reasonableness of that dismissal under section 98(4) Employment Rights Act 1996.

40. Section 98(4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources), the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral. The respondent's size is said to have some bearing in this case. It has significant resources, an HR Department and a range of Store Managers and Deputy Store Managers upon whom it can call to conduct disciplinary matters.

41. In considering the question of reasonableness, the Tribunal has to have regard to the decisions in **British Home Stores Limited v Burchell [1980] ICR 303 EAT**, **Iceland Frozen Foods Limited v Jones [1993] ICR 17 EAT**, **Beedell v West Ferry Printers Limited [2000] IRLR 650 EAT** and **[2001] ICR 962 Court of Appeal**, the joined appeals of **Foley v Post Office** and **Midland Bank PLC v Madden [2000] IRLR 82 Court of Appeal**, and **Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23 Court of Appeal**.

42. In short, when considering section 98(4) ERA, the Tribunal should focus its enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of its investigation. However, the Tribunal should not put itself in the position of the respondent and test the reasonableness of its actions by reference to what the Tribunal would have done in the same or similar circumstances. In particular, it is not for the Tribunal to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence that was before it at the Tribunal hearing but not before the respondent at that time), and substitute the Tribunal's own conclusion as if it is conducting the process afresh. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees, and it is instead the Tribunal's function to determine whether in the circumstances this respondent's decision to dismiss this claimant fell within that band. The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

*What was the principal reason for the claimant's dismissal?*

43. The claimant was dismissed because the respondent believed that the claimant had falsified time records, in particular that on 19 December 2018, 28 December 2018 and 6 January 2019 the claimant had claimed that he had arrived to start work earlier than he had in fact arrived.

*Was this a potentially fair reason?*

44. The Tribunal finds, having regard to the respondent's disciplinary policy and procedure, that falsifying time records is an act of gross misconduct and a potentially fair reason for dismissal.

*In particular, has the respondent proved that it had a genuine belief in the claimant's misconduct and that this was the reason for his dismissal?*

45. The respondent took me to p481 of the bundle and showed me the exception report for the claimant, claiming that he started work on 19 December 2018 at 5am. It looked at cctv footage that showed the claimant arriving at 5.47am. It genuinely believed he had falsified the record on this occasion.

46. The respondent took me to page p484 of the bundle. It showed the exception report for 28 December 2018. I also saw the notes of the investigatory interview and notes of the disciplinary hearing that were before the dismissing officer Mr Duffy and the rehearing officer Mr Ling. The claimant said that he came into work with Rebecca Hirst on that day and he that as she usually starts at 6.00am he assumed that must have been the time he started.

47. It is not credible for the claimant to suggest that he did not know when he completed the exception report sheet on 28 December 2018 that he claimed to have started work at a time earlier than the time at which he had actually arrived. The claimant said if he had been wanting to get paid for work he hadn't done he could have claimed to have arrived at 5am that day as that was the time he was due on shift. He must have known when he completed the exception report that he had not arrived at store at 6.00am. Mr Duffy, the dismissing officer had a genuine belief that the claimant had falsified the exception reporting sheet on 28 December 2018.

48. Mr Duffy had good grounds for a genuine belief in the claimant having falsified the exception report for 6 January 2019 too. It is at page 485 of the bundle. It shows the claimant claiming to have started work at 6am, the respondent cctv showed him arriving at 7.11am. In the rehearing on 10 May 2019 Mr Ling at page 403 of the bundle to page 406 of the bundle questions the claimant about the 6 January 2019 arrival time. The claimant cannot account for what time he arrived at work, only that he left Liverpool in a taxi at 5am after a night out and went home and then to work and thinks it would have been around 6am. The respondent, by Mr Duffy or in the alternative Mr Ling at the 10 May hearing had a genuine belief that the claimant falsified the exception report as to his arrival time on 6 January 2019.

49. The reason for dismissal was gross misconduct for the falsification of the company records. Mr Duffy sets it out in his dismissal letter at page 325 of the bundle and Mr Ling, who following a reinvestigation had reheard the matter, confirms it a page 417a where the claimant is told he is dismissed for gross misconduct for falsifying company records.



*Did the respondent carry out such investigation as was reasonable in all the circumstances of the case ?*

50. The Tribunal finds that the respondent conducted a thorough investigation. Mr Shaun Codd was appointed to investigate. The claimant was invited to investigatory interview. He was invited to view the cctv footage and exception reports. He knew the allegations he was to face and the evidence the respondent relied on in support of them prior to his disciplinary hearing. He was represented throughout by a union representative.

51. Mr Roberts, who heard the appeal, felt that the investigation was lacking. In particular he wanted evidence from the claimant's line manager as to whether or not he had been given authority to come in and out without a clock card, "round up" the time and sign his own exception reports. A reinvestigation was ordered. I find that this was unnecessary but showed the impartiality of the respondent's processes in that it was open to Mr Roberts to reach this conclusion. At his behest the line manager Matt Turner was interviewed and his statement shared with the claimant. A new manager was brought in to reconsider the decision to dismiss.

*Was the dismissal fair or unfair in accordance with section 98(4) ERA? Was the sanction of dismissal within the band of reasonable responses open to a reasonable employer ?*

52. The decision to dismiss was fair. Throughout the investigatory and disciplinary processes the claimant was supported by a union colleague. The Tribunal was satisfied that the claimant was made aware of the allegations which he would face. The claimant was invited to investigatory interview. He was made aware of the potential implications of the investigatory process. The claimant was invited to a disciplinary interview and made aware that as he faced an allegation of gross misconduct this could result in his dismissal. The claimant was accompanied to the disciplinary hearing and able to put his case. The ACAS Code of Practice was complied with.

53. The respondent reasonably believed that the falsification of the records had taken place and that in the light of that finding it could no longer trust the claimant. It was open to the respondent to reach that conclusion. The claimant argued that LS had been treated differently for the same misconduct. LS's situation at paragraph 37 above was wholly different from the claimant's. The decision to dismiss, although in the light of the claimant's personal circumstances at that time could be considered harsh, fell within the band of reasonable responses open to a reasonable employer.

**Conclusion**

54. For the reasons given above, the conclusion of the Tribunal is that the claimant was fairly dismissed.

Employment Judge Aspinall

Date: 18 October 2019

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

24 October 2019

FOR THE TRIBUNAL OFFICE

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