



EMPLOYMENT TRIBUNALS

Claimant: Mr S Dolcey

Respondent: Sainsbury's Supermarkets Ltd

Heard at: London South Employment Tribunal **On:** 6 November 2019

Before: Employment Judge Ferguson (sitting alone)

Representation

Claimant: Mr J Neckles (union representative)

Respondent: Mrs Scarborough (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant was unfairly dismissed.
2. The amount of the basic and compensatory awards should be reduced by 50%.
3. No adjustment should be made to the compensatory award pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992.
4. The Claimant's complaint of wrongful dismissal succeeds.
5. Notice of a remedy hearing will be sent in due course.

REASONS

INTRODUCTION

1. By a claim form presented on 11 April 2018, following a period of early conciliation from 10 to 11 April 2018, the Claimant brought complaints of unfair

dismissal and wrongful dismissal. The Respondent defended the claim. The issues to be determined are:

- 1.1 Has the Respondent shown that the reason for the Claimant's dismissal related to his conduct?
- 1.2 Did the Respondent believe that the Claimant committed the misconduct in question?
- 1.3 Were there reasonable grounds for that belief?
- 1.4 Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?
- 1.5 Was the decision to dismiss within a range of reasonable responses?
- 1.6 Did the Respondent follow a fair procedure in all the circumstances?
- 1.7 If there was any procedural unfairness, what is the chance the Claimant would have been dismissed following a fair procedure?
- 1.8 If the dismissal is found to be unfair, should there be a reduction under section 122(2) and/or section 123(6) of the Employment Rights Act 1996 because of the Claimant's conduct?
- 1.9 Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?

Wrongful dismissal

- 1.10 Was the Claimant guilty of gross misconduct such that the Respondent was entitled to dismiss him without notice?

2. On behalf of the Respondent I heard evidence from Luckasz Romanowski and Brett Wildey. I also heard evidence from the Claimant.

FACTS

3. The Claimant was employed by the Respondent as an Online Delivery Driver from 27 May 2014 until his summary dismissal with effect on 14 February 2018.

4. After six months' service the Claimant was provided with a "Colleague Discount Card" which entitled him and a nominated second user to a 10% discount in store and online. The conditions of use, which the Claimant read and signed on 22 December 2014, provide (so far as relevant):

"Eligible users:

1. Only you as a Sainsbury's colleague and your nominated second user can use your colleague discount card. A second user is only

eligible if they live permanently at the same address as you and they are a member of your immediate family or your spouse/partner.

...

3. You must immediately notify us of any changes to the personal circumstances of either user that could affect eligibility to use your card.
4. You are responsible for your card and how it is used. If you or your nominated second user breaches the rules you could face disciplinary action, which could lead to summary dismissal or the benefit could be withdrawn.”

5. The Claimant nominated his wife, Alison Dolcey, as his nominated second user. She signed a declaration on 23 December 2014 stating that she had read the rules.

6. The Respondent’s disciplinary policy lists among the examples of gross misconduct, “Fraud, including deliberate or careless misuse of a colleague discount card or Nectar card or falsifying company records or paperwork”.

7. The Respondent has a team of investigators known as “Eagle Eye Investigators” who look out for suspicious behaviour and monitor suspected theft or other fraud. Mr Wildey explained in his evidence that one of ways in which employees’ activity is monitored is by comparing records relating to use of the discount card with records of Nectar cards used in the same transactions. If multiple Nectar cards, registered to multiple different names, are used against the same discount card this is flagged up as potentially suspicious activity.

8. In early to mid-January 2018 an Eagle Eye investigator produced a report on the use of the Claimant’s discount card. It noted that the discount card had been used alongside eight different Nectar cards, two of which were registered to the same address as the Claimant. The other six were registered to different addresses or no address. The report noted the following actions:

- “- Review CCTV to see who is present at the time of the transactions.
- Interview colleague to ascertain why 8 Nectar card have been used in conjunction with their staff discount card.
- Refer to all policies at the end of this investigation pack.
- Complete investigation outcome and return to Eagle Eye Investigator within 21 day SLA”

9. Appended to the report were lists, separated by each Nectar card, of each transaction with the discount card in the period from July 2017 to January 2018. The total value of the discounts, according to the report, was £276.38. There were around 75 transactions with the Nectar card registered to the Claimant’s wife and around 50 transactions with other Nectar cards. These ranged from one transaction for some cards to 21 for a card registered to the Claimant’s daughter at the same address. The records show which store the transaction took place in and the amount spent. They do not show the method of payment or any details of credit or debit cards used.

10. On 20 January 2018 the Claimant was called to a meeting with a Customer Service Manager, Debbie Morris. Ms Morris told the Claimant that it had been

discovered that 7 different people had been using his discount card with 7 different Nectar cards. She warned that this was classified as fraud and can lead to dismissal. The notes of the meeting record that the Claimant responded that he had “no idea”, and said he gave the card to his wife. He said he hardly used the card and did not know if she had given the card to someone else. In his oral evidence the Claimant denied saying this and claimed he might have said it would be very unusual. The Claimant’s oral evidence as to what was said at the various meetings was extremely unclear and I consider it very unlikely that the notes of this or later meetings were concocted or inaccurate to the extent suggested by the Claimant.

11. On the same day the Claimant was suspended pending investigation into alleged gross misconduct and was invited to an investigation meeting with Ms Morris on 23 January 2018. The alleged misconduct was as follows:

“Your fraudulent use of your colleague discount card. On multiple occasions between 2nd October 2017 and 18th January 2018 you have allowed multiple third parties who are not your nominated second user to use your colleague discount card.”

12. The Claimant attended the investigation meeting on 23 January alone. Again, the Respondent has produced a full contemporaneous note of the meeting. At the disciplinary hearing the Claimant disputed these notes and in his oral evidence he said that several of the entries attributed to him were simply wrong. For the same reasons as above, I find that unlikely and I accept that the Respondent’s notes are broadly accurate.

13. The notes record that the Claimant told Ms Morris that Alison Dolcey was his “ex-wife”. He said he gave her the conditions of use of the discount card, but “she has admitted she didn’t read it”. Ms Morris put to him that someone called Maureen Brown had used the discount card five times. The Claimant responded “She’s my sister in law, I’m so embarrassed, there is nothing I can say, I’m guilty as charged”. Ms Morris went through the other names in the report. The Claimant said one was his daughter, and “wife has given it to her”. Two others he said were his wife’s other sisters and one was “probably her work colleague”. The Claimant repeated that his wife said she had not read the rules and said “she would come in”. The Claimant said he had used the card once on the first day but not again since then. When asked if he understood the allegations the Claimant said, “Absolutely, it’s theft isn’t it, fraud, she should know better. I’m carrying the can for it and it’s not nice, maybe I shouldn’t have given the card. She uses it most days to get her lunch”. As to other people using it, he said “A lot of the time she’s with them with the card”. The Claimant asked if he could give the card back, saying “I don’t use it and she is out of order”. At the end of the meeting the Claimant was asked if there was anything he wanted to add. He said “No, I can’t defend it and I must say I am sorry.”

14. Ms Morris decided to refer the matter to a disciplinary hearing. The Claimant was invited to a disciplinary hearing which ultimately took place, to allow for the Claimant’s union representative John Neckles to attend, on 7 February. In advance of the meeting the Claimant was given a copy of the investigation meeting notes and the Eagle Eye report.

15. The hearing on 7 February was conducted by Lukasz Romanowski, a Store Manager. The Claimant attended, accompanied by Mr Neckles. Mr Neckles said at the start of the meeting that some aspects of the investigation notes were not accepted and asked for Ms Morris to attend so that she could be cross-examined. Mr Romanowski refused that request, but said that his decision would be “solely on his findings”. When first asked why the discount card had been used by 8 different users the Claimant said “I don’t know” and repeated that he had handed the card over to his wife straight away when he got it. He accepted that he was responsible for making sure his wife used the card correctly. He also told Mr Romanowski that he was not living with his wife “as wife and husband”. The notes record Romanowski asking “So you are not living in the same house so do you have one household where you shop for yourself and she shops for herself?” and the Claimant answered “Yes”. The Claimant said he had asked his wife for an explanation and “she said that she was present when those transactions happened so she didn’t hand over the card from my understanding but she may have given the points away”. Mr Romanowski then postponed the meeting to the following week. He noted the following findings:

- “- SD has given his colleague discount card to his wife to use as she was a second nominated user. SD did not know his wife used the card.
- SD admits that he is responsible for the colleague discount card.
- SD admits that he should have explained to his wife about T&C of colleague discount card and that it’s his fault it has been misused.
- SD admits that he has separate household to his wife household, and they shop separately.”

16. The Claimant claims that he and his wife were still living in the same house at this time and he simply explained in the meeting that they were separated. There is some ambiguity in the notes and I accept that the Claimant did not say or intend to give the impression that he and his ex-wife were living at different addresses.

17. The hearing was reconvened on 14 February. The Claimant again attended with Mr Neckles. The Claimant reiterated that his wife had said she was present at all times when the discount card was used. Mr Neckles asked the Claimant, “To your knowledge, the use of the discount card to purchase items, was it for use of the household” and the Claimant answered “Yes”. Mr Romanowski questioned why other people would have paid for shopping for the household and there followed a discussion about what the Eagle Eye report showed. Mr Romanowski accepted that it did not show how the transactions were paid for or by whom. In his evidence to the Tribunal Mr Romanowski said he “did not see the relevance” of this. Mr Neckles repeated that the investigation notes were disputed and Mr Romanowski said “Yes and that’s why I will make my own judgement based on the conversation in the room today”.

18. At the end of the meeting Mr Romanowski told the Claimant he was dismissed without notice. He recorded the following in a document entitled “Decision Making Summary”:

- “- Stephen is not aware how colleague discount card reward works, i.e. said of the first instance that his wife has passed on the points to her friend like a Nectar points which is not a case.

- Then he informs that his wife has been present of every transaction (over 20 times) and shopping has been done for her household at all the times.

...

- Stephen accepts and understand his responsibility in this matter.

...

- John (SD rep) questions evidence of misuse, which is clear and transparent to me.

- SD could and should keep a control over his colleague discount card, especially that he leaves [presumably "lives"] with his wife at the same address."

19. The decision was confirmed by letter dated 14 February 2018. The charge set out at the start of the investigation process was upheld.

20. In cross-examination Mr Romanowski accepted that, to his knowledge, no-one had checked the CCTV from the different stores of the transactions taking place. He also said he had not checked the method of payment for the transactions because it was not included in the pack and he considered the evidence given to him was sufficient. He accepted that the transactions had taken place without the Claimant's knowledge.

21. The Claimant appealed the decision, arguing that there was insufficient evidence of the charge and/or the decision to dismiss was disproportionate taking into account the fact that the Claimant was estranged from his wife and was unaware of the alleged misuse of the card.

22. An appeal hearing took place on 26 February 2018, conducted by Brett Wildey, Store Manager. Mr Wildey upheld the decision to dismiss for the following reasons:

"I am satisfied a fair process has been followed with a fair decision made considering the colleagues lack of control of his benefit 'discount card' over a long period of time with a substantial amount of money saved through the abuse of the discount card."

23. In his evidence to the Tribunal Mr Wildey said he took into account that "£300 of theft had taken place through fraudulent use of the discount card". He accepted that the Respondent would have the information to show who had paid for the transactions in question. He considered, however, that the evidence of the different Nectar cards being used was sufficient. He accepted it was possible that the Claimant's wife had given the Nectar points away, but he considered it unlikely based on his previous experience. He said he would "expect to have seen something similar if that was the case".

24. The transaction records attached to the Eagle Eye report were put to the Claimant in cross-examination and it was pointed out that on three occasions there were two transactions using two different Nectar cards in the Wandsworth store. It was put to the Claimant that it was "incredibly unlikely" that his wife had shopped twice on all three of those days. The Claimant disputed that and said it was likely. It was also pointed out that the Claimant's wife's Nectar card had never been used in Tooting or Purley Way, but his daughter's Nectar card had been used in both

stores. The Claimant did not accept that this suggests his daughter was using the card without his wife being present.

THE LAW

25. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or "some other substantial reason". A reason relating to the conduct of an employee is a fair reason within section 98(2). According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

26. In misconduct cases the Tribunal should apply a three stage test, set out in *British Home Stores Ltd v Burchell* [1980] ICR 303, to the question of reasonableness. An employer will have acted reasonably in this context if:-

- 26.1 It had a genuine belief in the employee's guilt;
- 26.2 based on reasonable grounds
- 26.3 and following a reasonable investigation.

The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

27. Sections 122-123 of the ERA provide, so far as relevant:

122 Basic award: reductions.

(1) ...

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

...

123 Compensatory award.

...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount

of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

...

CONCLUSIONS

Unfair dismissal

28. The Claimant did not put forward any alternative reason for his dismissal, and I accept that he was dismissed for the reason given by Mr Romanowski and that that was a reason related to his conduct.

29. I also accept that Mr Romanowski genuinely believed that the Claimant was guilty of the misconduct in question. I find that he approached the matter in good faith and genuinely believed that the discount card had been misused; that that was the Claimant's responsibility; and that dismissal was the appropriate sanction.

30. There are concerns, however, as to the adequacy of the investigation. It is of course permissible for the Respondent to rely on Nectar card records to flag up suspicious behaviour as regards the use of discount cards. I accept that multiple Nectar cards being used with one discount card gives rise to a reasonable suspicion that the discount card has been misused. In this case, however, the Claimant had no direct knowledge about the use of the card (which Mr Romanowski accepted) and was reliant on the explanation given to him by his wife. Although he appeared to admit at the investigatory meeting that there had been some misuse, saying that his wife had not read the conditions of use, even at that early stage he claimed that in respect of "a lot" of the transactions, his wife was present. He maintained that position during both disciplinary hearings, and asserted that his wife had told him she had been present for all of the transactions using the discount card. The suggestion that she had given the Nectar points away was speculation on the part of the Claimant, but he did clearly assert that the transactions were his wife's, for the household.

31. It appears from Mr Romanowski's notes that he may have misunderstood the point that was being made about the Nectar cards. The Claimant had not said that "his wife has passed on the points to her friend like a Nectar points"; he had asserted that his wife was the only person who used the discount card and speculated that the reason for multiple Nectar cards being used was that she had allowed people who accompanied her to take the Nectar points on their cards.

32. Even if it seemed improbable that this explained all of the disputed transactions, the Nectar card use was not proof of the identity of the person using and benefiting from the discount card, so it might have explained at least some of them. It was relevant to the extent and seriousness of the alleged misconduct. It is notable that the Respondent treated this as a case in which almost £300 was wrongly saved by the use of the card, but in fact 60% of the transactions were with the Claimant's wife's Nectar card and accepted to be legitimate. Neither party had worked out the total savings in the 50 disputed transactions, but if the transactions amounts were averaged out, it would be just over £100. If the Claimant's wife had paid for some of those transactions and allowed someone else to take the points on their Nectar card, the level of misuse would be even lower. I also note that two of the Nectar cards were only used once each and the card that was used on the

most occasions, after the Claimant's wife's, was the Claimant's daughter's, who lives at the same address. If those were purchases for the household, that is relevant to the seriousness of the misuse.

33. Mr Wildey accepted that the Respondent holds the information as to the method of payment and, if credit or debit card, the identity of the card-holder, in respect of every transaction. That was information that the Eagle Eye investigator could easily have provided.

34. In circumstances where the Claimant was unaware of the disputed transactions and his wife had given an explanation that could have meant at least some of them were legitimate use of the card, so that the level of misuse might have been very low, and the evidence of credit or debit card use was readily available, I consider it was unreasonable for the Respondent not to seek further evidence showing who paid for the disputed transactions. I also take into account that the Eagle Eye report listed under Actions: "Review CCTV to see who is present at the time of the transactions". This was never done and no explanation has been given for not doing so.

35. In reaching this conclusion I am mindful not to substitute my own view of how the investigation should have been conducted. I have taken into account the Respondent's view, which would be based on experience to some extent, that the Nectar card information was sufficient evidence of misuse, but in the particular circumstances of the case I consider that no reasonable employer would have failed to seek the further evidence that was available showing who paid for the disputed transactions. The evidential gap was implicitly recognised in the Eagle Eye report by recommending a check of the CCTV.

36. The Claimant's dismissal was therefore unfair because the Respondent did not conduct as much investigation as was reasonable in the circumstances. Had it done so, it may well have concluded that only a very small number of the transactions involved misuse of the card. Although that may still have justified a finding that the Claimant had breached the conditions of use, which expressly state that he is responsible for the card and how it is used, it was never alleged that the Claimant himself had acted dishonestly, so the finding might have been that he failed to control the use of the card resulting in a small number of transactions in which the card had been misused. On any view that would not have justified dismissal.

37. Further, regardless of the extent of the investigation, I consider it was unreasonable for the Respondent to conclude that the Claimant's conduct amounted to "Your *fraudulent* use of your colleague discount card" (emphasis added). Mr Romanowski accepted that the Claimant had no knowledge of these transactions. Although the conditions of use state that the Claimant is responsible for the card and how it is used, and that "If you or your nominated second user breaches the rules you could face disciplinary action, which could lead to summary dismissal", it is implicit that there is a spectrum of misuse. This must have been at the lower end of the spectrum. The example of gross misconduct in the disciplinary procedure is "Fraud, *including* deliberate or careless use of a colleague discount card" (emphasis added). There was no evidence that the Claimant himself had committed fraud or that he had benefited in any way from the disputed transactions. It was reasonable to conclude that the Claimant had breached the conditions of use, but there was no dishonesty or fraud on the Claimant's part.

38. I also conclude, therefore, that dismissal was outside the range of reasonable sanctions for the Claimant's conduct. This was not a situation where the Respondent had found dishonest behaviour that would have made continued employment impracticable. Any dishonesty was on the part of the Claimant's ex-wife. The breach of the conditions of use was not so serious that it affected the relationship of trust and confidence. Any concerns could have been met by withdrawing the card, as the Respondent was entitled to do under the conditions of use, and giving the Claimant a warning.

39. I do not accept the Claimant's other criticisms of the disciplinary process. Mr Neckles argued that the investigation and disciplinary officers should not have asked "leading questions". There is nothing in the notes of any of the meetings to suggest that there was any unfairness to the Claimant in this regard. He had a full opportunity to present his case. It was also argued that there was a breach of the ACAS code, and/or unfairness by not giving the Claimant a copy of the Eagle Eye report until after the investigation interview. I do not accept that; the matters in the report were put to him in the investigation interview and he was then given a copy and had ample opportunity to consider it before and at the disciplinary hearing. He was able to challenge the extent of the evidence and investigation. Finally, it was argued that there was a breach of paragraph 6 of the ACAS Code because Mr Romanowski, having agreed to disregard the investigation interview, acted as both investigating and disciplinary officer. There is nothing in this complaint. The Respondent appointed different people to carry out the investigation and disciplinary hearing. It was at the Claimant's request that Mr Romanowski disregarded the notes of the investigation interview. He did not conduct any separate investigation beyond asking the type of questions that would be expected at a disciplinary hearing. There was no unfairness in this regard and the Respondent's approach was reasonable.

40. As to contributory fault, I find that the Claimant's conduct was blameworthy in that he failed to ensure that his discount card was being used in accordance with the conditions of use. It is unlikely, given the number of transactions, the different Nectar cards used and the different stores attended, that all 50 disputed transactions were paid for by the Claimant's wife. I find that there was a low level of misuse on her part by allowing other people to benefit from the discount. The Claimant did not know about this, but the fact that the Claimant and his wife had separated made it all the more important that he should satisfy himself she understood the rules and would not abuse the benefit. I consider that it would be just and equitable to reduce the amount of both the basic and compensatory awards by 50%.

Wrongful dismissal

41. The evidence before me is essentially the same as the evidence that was before the Respondent at the time of dismissal. There is insufficient evidence to conclude that the Claimant was guilty of fraudulent conduct. I accept that his conduct amounted to a breach of the conditions of use of the card, in that he was responsible for the low level misuse by his wife that I have found above, but on the basis of the evidence before me I am not satisfied that it was sufficiently serious to constitute gross misconduct. The wrongful dismissal complaint therefore succeeds.

Employment Judge **Ferguson**

Date: 19 November 2019