



# THE EMPLOYMENT TRIBUNALS

## Claimant

Ms Carol Rogers

## Respondent

Dhesi Ltd t/a Family Shopper

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE  
EMPLOYMENT JUDGE GARNON (sitting alone)

ON 12 March 2020

### *Appearances*

For Claimant: no attendance

For Respondent: Mr Mark Summers, Manager

## JUDGMENT

**The name of the respondent is amended to that shown above.  
The claim of unfair dismissal is not well founded and is dismissed.**

## REASONS

### 1. Introduction and Issues

1.1. The claimant, born 18 March 1972, was employed from May or July 2017 as a shop assistant until her dismissal without notice effective on 14 October 2019. She claims unfair dismissal only. The respondent denies her claim saying she was guilty of theft from it.

1.2. The liability issues are:

1.2.1. What were the facts known to, or beliefs held by the respondent which constituted the reason, or if more than one the principal reason, for the dismissal?

1.2.2. Were they, as the respondent alleges, related to the claimant's conduct?

1.2.3. Having regard to that reason, did the respondent (a) have reasonable grounds after a reasonable investigation for its genuine beliefs (b) follow a fair procedure (c) act reasonably in treating that reason as sufficient to warrant dismissal?

1.3. Rule 47 of the Employment Tribunals Rules of Procedure 2013 says if a party fails to attend or to be represented at the Hearing, the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it shall consider any information which is available to it after any enquiries that may be practicable about the reasons for that party's absence.

1.4. When the case was called on for hearing at 10:00 am, the claimant had not attended. The Tribunal clerk telephoned her mobile number in my presence and it went to voicemail.

The Tribunal Judges relocated premises last week but the administrative staff remain at the former premises in North Shields until next week. I telephoned there to see if any contact had been made or the claimant had reported her presence in the building. She had not attended, or contacted, North Shields. At 10:30 am I heard the case in her absence which took 15 minutes. The clerk returned to the waiting area at 10.45 to check if the claimant had arrived but she had not. I then gave judgment.

## **2. The Relevant Law**

2.1. Section 98 of the Employment Rights Act 1996 ("the Act") provides:

*"(1) 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 dismissal*

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

### **The Reason**

2.2. In Abernethy-v- Mott Hay & Anderson, Cairns L.J. said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether the conduct is inside or outwith the course of employment, it impacts in some way on the employer/employee relationship.

### **Fairness**

2.3. Section 98(4) of the Act says:

*"Where an 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 all 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*

*(b) shall be determined in accordance with equity and the substantial merits of the case."*

### **Reasonable belief and investigation**

2.4. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did take place. The employer simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation as was reasonable British Home Stores v Burchell as qualified in Boys & Girls Welfare Society v McDonald.

### **Fair procedure**

2.5. In Polkey v AE Dayton Lord Bridge of Harwich said :

*"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons recognised as valid by (Section 98(2)). These, put shortly, are:*

*(b) that he had been guilty of misconduct*

*But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the*

authorities as “procedural”, which are necessary in the circumstances of the case to justify that course of action. Thus; ...in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; ...If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this question is simply irrelevant.

2.6. The so called rules of natural justice are explained in the case of Khanum v Mid Glamorgan Area Health Authority. There are only 3 basic requirements which have to be complied with during proceedings of a domestic disciplinary enquiry: firstly, the person should know the nature of the accusation against him; secondly, he should be given an opportunity to state his case; and thirdly, the decision maker(s) should act in good faith.

2.7. Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt), held the Tribunal must not substitute its view on matters of substance or procedure for that of the employer unless the view of the employer falls outside the band of reasonable responses.

### **3. Findings of Fact**

3.1. I heard for the respondent its manager Mr Mark Summers and its owner Mr Gursewak Singh. When the claimant was on late shift, due to end at 9pm, on Thursday 10 October 2019, Mr Singh was present only feet away on the next till. At about 8.45, the claimant served herself, which she and others had been told not to do, with 8 cans of Stella lager, and told Mr Singh she had paid. She turned her till off and left with the cans. On checking later, no purchase of Stella had been rung through. The claimant says she made the purchase using her debit card and was unaware payment had not gone through but there was no card receipt in the till. The card machine shows her card was used to attempt payment of £1 (the Stella costs about £11) at the same time, but that was declined due to no funds in the account.

3.2. The respondent says she was dismissed because she stole and “ *didn't prove her innocence though we gave her the chance to do so .She was adamant she did not steal , but never proved this to be the case*”. The claimant told other staff she had tried to get money from a cash machine earlier that day but could not because there was none in her account.

3.3. When she next attended work on Sunday 13 October she was spoken to in private in a room at the rear of the shop. She said she had paid but the respondent thinks she knew her card had been declined. She was given time to produce evidence. On Monday she brought in a print out from her bank which showed the same card had been declined at another shop earlier on 10 October due to insufficient funds. Nothing showed she had paid or could reasonably believe she had. On that basis, the respondent formed the view she had knowingly taken the Stella without paying, for which dismissal was an appropriate sanction . It told her so but added if she produced any other evidence it would be prepared to reconsider. She never did. It is a small business with about 15 employees.

#### **4 Conclusions**

4.1. The beliefs held by the employer which constituted the reason for dismissal were that the claimant had taken 8 cans of Stella without paying and done so knowingly. That related to her conduct.

4.2. The respondent had reasonable grounds after a reasonable investigation for its genuine beliefs. It followed a fair, though informal, procedure at every stage. The claimant was given every opportunity to put forward explanations and did not. Its view of what sanction was appropriate was well within the band of reasonable responses.

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**T M GARNON      EMPLOYMENT JUDGE**

**JUDGMENT SIGNED BY THE EMPLOYMENT JUDGE ON 12 March 2020**