



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Y Hough

**Respondent:** Lynn Pinder t/a The Bakeaway

**HELD AT:** Manchester

**ON:** 21 November 2019

**BEFORE:** Employment Judge Ainscough  
(sitting alone)

**REPRESENTATION:**

**Claimant:** Mr D Hough (Claimant's son)

**Respondent:** In person

**JUDGMENT** having been sent to the parties on 10 December 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

### Introduction

1. The claimant was dismissed from her role as a Bakery Assistant with the respondent, a community bakery, on 12 June 2019. The claimant commenced early conciliation on 3 July 2019 and received an ACAS early conciliation certificate on 10 July 2019. The claimant presented her claim to the Employment Tribunal for unfair dismissal and a claim for holiday pay on 29 July 2019. On 10 September 2019 the respondent submitted a response.

### Issues

2. The issues to be determined were as follows:

- (a) Can the respondent show that the reason for the dismissal relates to the conduct of the claimant in accordance with section 98(2)(b)?
- (b) If so, in the circumstances, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the

claimant in accordance with section 98(4)? Specifically, did the respondent following a reasonable investigation, have reasonable grounds for sustaining that belief? Was the dismissal within the range of reasonable responses available to the respondent?

- (c) Was the claimant entitled to the payment of accrued annual leave at the date of dismissal in accordance with regulation 14 of the Working Time Regulations 1998?

### **Evidence**

3. The claimant submitted a written statement of evidence together with a small bundle that contained a handwritten statement of a colleague Miss A Robinson, Miss Sharon Barnett and Miss Julie Hays. The claimant also provided a calculation of statutory redundancy pay, a payslip and a brief Schedule of Loss.

4. The respondent provided a witness statement, a hand written statement from Ms Lesley Ryan and a bundle of documents which included extracts from CCTV footage, rotas and extracts from texts messages.

5. The respondent, Lesley Ryan and the claimant all gave live evidence.

### **Relevant Legal Principles**

6. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

7. The primary provision is section 98 which, so far as relevant, provides as follows:

**“(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 the dismissal and**

**(b) that it is either a reason falling within sub-section (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 sub-section if it ... relates to the conduct of the employee ...**

**(3) ...**

**(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**

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

8. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

9. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal.

10. The “**Burchell** test” involves a consideration of three aspects of the employer’s conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is “yes”, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

11. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

12. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.

13. Regulation 14 of the Working Time Regulations 1998 provides:

(1) [Paragraphs (1) to (4) of this regulation apply where—]

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$(A \times B) - C$

where—

**A** is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

**B** is the proportion of the worker's leave year which expired before the termination date, and

**C** is the period of leave taken by the worker between the start of the leave year and the termination date.

14. Regulation 30 provides that a worker can make a complaint to an Employment Tribunal when the employer has failed to make a payment owed under regulation 14.

### **Relevant Findings of Fact**

15. The claimant was employed at the respondent's bakery from September 2000 until her dismissal on 12 June 2019. The claimant worked as a shop assistant in the shop of the bakery.

16. The claimant was employed by the respondent, Lynn Pinder, who owns the business having taken over from her parents, Maureen and Thurston, two years previously.

17. The claimant's role included serving customers, making products and handling money. In addition, the claimant would often open up the shop at the start of each day. The claimant worked 16 hours per week and was paid £8.21 per hour which equated to £131.36 per week.

18. The respondent also had a policy that any accrued annual leave could be converted into pay and put in a savings account to be taken at the end of the year rather than paid when the employee took holiday.

19. The respondent employed five other people at the bakery: Natalie, Tracy, Lesley, Marie, and Christine. The respondent also worked at the bakery. The shop is fitted with CCTV cameras.

20. It was the policy of the bakery that staff would not serve their own family members. In addition, staff were allowed to buy products for themselves at a staff discount. Whilst at work, staff were also allowed to buy lunch for themselves, and the most expensive product was allowed to be bought at half price. Any additional products were paid for at the staff discounted price. It was not a requirement that lunch be consumed on the premises, and staff often took products home.

21. When buying staff food, the staff would not put the money in the till but rather pay the respondent directly or somebody else if she was not there. If staff did not have the money, there was an IOU system on a clipboard and a note would be made of the money owed. It was a requirement to settle any tab at the end of the week.

22. On 10 June 2019 the claimant and the respondent were working together in the shop with Lesley Ryan. The respondent left the shop as the claimant's family (her daughter and two grandchildren) came into the shop. The claimant worked from 8.00am to 11.00am. As the claimant was leaving to attend a family funeral, she bought two sausage rolls for her grandchildren. The claimant paid Lesley Ryan £1 and told her that she was 20 pence short – the claimant had understood that the first sausage roll – full staff discount price 80 pence – would be 40 pence and the second would be full staff discount price in accordance with the staff lunch policy.

23. On the respondent's return to the shop, after the claimant had left, she asked Lesley Ryan if the claimant had bought anything. Lesley Ryan told the respondent that the claimant had given her £1 for a sausage roll. The respondent had asked Lesley Ryan if she had given the claimant 20 pence change, to which she was told "no, she gave me £1 and said 'that's all you're getting'".

24. On Tuesday 11 June, the claimant came into work and forgot to pay the additional 20 pence.

25. The claimant does not work on a Wednesday and was not in work on Wednesday 12 June 2019. On that date, the respondent checked the CCTV. The respondent saw the claimant's daughter come into the shop with her two children and a friend at 11.29am. The claimant was seen putting two sausage rolls into a paper bag and giving them to her family. The claimant was then seen handing £1 to Lesley and leaving. The respondent again asked Lesley what the claimant had taken and paid for, and Lesley said she did not know how many sausage rolls the claimant had taken as she did not serve her. Lesley reiterated that she had only been given a pound and that the claimant had said, "that is all you're getting".

26. On the same day, the respondent rang the claimant on her mobile phone. The respondent informed the claimant that she was concerned that the CCTV showed that:

- (a) she had served her own family; and
- (b) she had underpaid for two sausage rolls.

The respondent informed the claimant that in her eyes this was theft. The claimant immediately hung up.

27. The respondent then texted the claimant asking her to bring her keys back "tomorrow" and that she would be given her wages for that week plus any savings and that she would need to see the respondent. The claimant responded denying she was a thief and told the respondent to take whatever money was owed out of her wages. The claimant also asked the respondent to provide her with a dismissal letter.

28. The claimant did not attend at the bakery the next day and therefore on Friday 14 June 2019 the respondent sent the claimant another text asking her to go into the shop, bring in her keys and collect her money. The claimant sent her son in with the keys and to collect her money.

29. On Saturday 15 June 2019, the claimant sent a letter to the respondent by recorded delivery asking for a dismissal letter. The respondent sent a response on 16 June 2019 setting out that the claimant had been dismissed for gross misconduct because she had served her own family and deliberately paid the wrong amount for products. The claimant was invited into the shop to explain the reasons for her actions. The respondent sent that letter by recorded delivery on 17 June 2019, but it was never delivered to the claimant's address and she did not go to the Post Office to collect it because she had lost the delivery slip.

30. The respondent does not have a written disciplinary policy and admitted that the claimant was not offered the opportunity to appeal her dismissal. The respondent also admitted that had such a policy been followed, the claimant would have been dismissed in any event.

31. The claimant had hoped she would be employed in alternative employment by the date of this hearing. However, that job has been postponed and the claimant has made no other efforts to find employment.

## **Submissions**

### Claimant's Submissions

32. The claimant was represented by her son, a lay representative, and no submissions were made after live evidence.

### Respondent's Submissions

33. The respondent submits that she is a reputable employer with long-serving staff. The respondent denies that the claimant was unfairly dismissed and that she had a reasonable belief of gross misconduct. The respondent contends that there was a reasonable investigation but the claimant refused to engage.

34. The request for the dismissal letter was the claimant's acknowledgement that she had been sacked for gross misconduct.

35. It is the respondent's case that the claimant has changed her claim from that contained within the claim form after seeing the CCTV footage and noting that she was unable to deny her actions. The Tribunal was asked to take this into account when considering the claimant's credibility.

36. The respondent contends that the claimant is untruthful and untrustworthy. The respondent has been put to expense in dealing with this matter and believes the claimant has used the position to get out of the job and seek another job. The respondent submits that the claimant's compensation, if awarded, should be reduced by 100%.

## Discussion and Conclusions

37. The respondent has proven that the claimant was dismissed because of conduct. I accept the evidence of the claimant that the respondent did dismiss her during the phone call on 12<sup>th</sup> June 2019.

38. However, the dismissal was unfair. The respondent did not follow any procedure prior to sending the dismissal letter on 16 June 2019.

39. The respondent had made her mind up from watching the CCTV, the claimant's reaction to the phone call and request for a dismissal letter.

40. The claimant was not offered any appeal and was merely left with the finding of dismissal.

41. The respondent does not have a written disciplinary policy in accordance with the ACAS Code of Practice. Staff cannot know what to expect if suspended for misconduct, gross or otherwise. The respondent admitted in evidence that she would only ever deal with a disciplinary matter verbally.

42. Due to the lack of investigation it cannot be said that the respondent had reasonable grounds to sustain the belief of misconduct and dismissal was not therefore within the range of reasonable responses.

## Remedy

43. The respondent has submitted that if it did fail to follow a fair procedure, the claimant would have dismissed the claimant in any event and no compensation should be awarded. This is in accordance with the finding of the House of Lords in the case of **Polkey v A E Dauton (or Dayton) Services Ltd [1987] IRLR 503**.

44. The respondent had no procedure. Had it had one, and followed it, it is impossible to say whether the claimant would have been dismissed or not. The failure by the respondent to have or to follow any kind of procedure means I cannot sensibly say what might have been, and will therefore not make a deduction on any award on this basis.

45. I do accept the claimant contributed to her dismissal by giving her grandchildren the products. The claimant completed the transaction with a colleague. However, the claimant did fail to pay the correct amount and note it on a board and rectify the following day.

46. It is said the claimant was distracted due to the death in the family but her failure to rectify the following day cannot be explained. It was not noted on the 10<sup>th</sup> or the 11<sup>th</sup> and it is understandable that the respondent became suspicious without explanation.

47. I therefore find that any award made to the claimant should be reduced by 50% for her contributory conduct, this is after any ACAS uplift and the addition of four weeks' pay for the failure to provide a contract of employment. The reduction will apply to both the basic and the compensatory awards.

48. I do not accept the respondent's submission that any award should be reduced by a further 25% for the claimant's failure to appeal – this was not offered to the claimant.

49. I do however think that any compensatory award should be uplifted by 25% for the respondent's failure to have any type of disciplinary policy or follow the same. This uplift will apply before the award of four weeks' pay for the lack of contract of employment under section 38A of the Employment Tribunals Act 1996 is applied.

50. I also find that the claimant has not fully mitigated her loss. The claimant was reliant on a job that has not materialised. The claimant has not looked for any alternative employment.

51. The amount awarded to the claimant for the Basic Award in accordance with section 118(1)(a) and section 119 of the Employment Rights Act 1996 is based on her employment from 3 December 2012 – 12 June 2019 (6 years) and her weekly wage of £131.36. The claimant was 52 years of age at the date of dismissal and the claimant is therefore entitled to 1.5 weeks' pay for each year of employment. The Basic Award is £1182.24.

52. In accordance with section 122(2) of the Employment Rights Act 1996 this amount is reduced by 50% to take account of the claimant's conduct which contributed to her dismissal. **Therefore, the Basic Award is £591.12.**

53. The amount awarded to the claimant for the Compensatory award in accordance with section 118(1)(b) and section 123 of the Employment Rights Act 1996 is based on her weekly wage of £131.36. The claimant will receive £1839.04 for wage loss incurred between 12 June 2019 – 19 September 2019 (14 weeks) based on her full weekly wage. As a result of the claimant failing to fully mitigate her loss she will receive £919.52 for the period 19 September 2019 – 26 December 2019 (14 weeks) based on 50% of her full weekly wage. The total amount of the Compensatory award is £2758.56.

54. In accordance with section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, the claimant will also receive a 25% uplift on the compensatory award only, in accordance with section 124A of the Employment Rights Act 1996, as a result of the respondent's failure to follow the ACAS Code of Practice in regard to a disciplinary procedure. This uplift equates to £689.74.

55. The amount awarded to the claimant for the respondent's failure to provide her with written particulars of employment is £525.44 based on four weeks wages in accordance with section 38 of the Employment Act 2002.

56. The total amount of the compensatory award is £3973.74. In accordance with section 123(6) of the Employment Rights Act 1996 this amount is reduced by 50% to take account of the claimant's conduct which contributed to her dismissal. **Therefore, the Compensatory Award is £1986.87.**

57. The claimant is awarded **£250** for loss of statutory rights. This award takes account of the claimant's conduct which contributed to her dismissal.



58. The claimant is awarded **£234.36** for non-payment of accrued but untaken holiday in accordance with regulation 14 of the Working Time Regulations 1998.

59. The claimant's claim for compensation for the respondent's failure to provide written reasons for dismissal contrary to section 92 of the Employment Rights Act 1996 is without merit and is dismissed. The respondent did provide written reasons for the dismissal in the letter of 16 June 2019. The claimant did not collect this letter from the Post Office and it was returned to the respondent.

60. The claimant's claim for costs under rule 77 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 is also dismissed because I am not of the view that the respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of these proceedings.

61. I am satisfied the claimant has not received the relevant benefits for the purposes of recoupment under the Employment Protection (Recoupment of Benefits) Regulations 1996.

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Employment Judge Ainscough

Date: 17 June 2020

REASONS SENT TO THE PARTIES ON

8 September 2020

FOR THE TRIBUNAL OFFICE

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