



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T D Lipsham

**Respondent:** Huhtamaki (UK) Ltd

**Heard at:** Southampton

**On:** 17 & 18 August 2020

**Before:** Employment Judge Rayner sitting alone

**Representation**

**Claimant:** In Person

**Respondent:** Miss Platt, Counsel

## JUDGMENT

1. The claimant was fairly dismissed for gross misconduct.
2. The claimants claim of unfair dismissal is dismissed.

# REASONS

1. The claimant was employed by the respondents from 30 September 2013 until he was dismissed for gross misconduct on 3 December 2018.
2. In a claim to the employment tribunal dated 28 February 2019 he alleged that he had been unfairly dismissed. He said his dismissal for being paid for hours that he had not worked was incorrect. He stated his manager was paying him for different hours worked, not the days the respondent looked at. He stated that the company had no policy, rules or guidelines in respect of the wages system, so that his over manager did not know what he was doing wrong. He also said the sort of payments he received were widespread throughout the business. He also alleged that the notes from the investigations were incorrect and that unreliable evidence was used and that questions were ignored.
3. In their ET3 the respondent deny that the dismissal was unfair. The ET3 sets out an explanation of the process that the respondents followed before deciding to dismiss the claimant.

## **The hearing**

4. I have heard evidence for the respondent from Mrs K Ockleford who carried out the initial investigation into Mr Knight and who wrote a summary investigation report; from Mr Biggs who heard the disciplinary and made the decision to dismiss the claimant and from Mr Keith Crossley who heard the claimant's appeal. Mr Crossley gave his evidence over the telephone with the consent of the parties.
5. For the claimant I heard evidence from the claimant himself. I also received an email statement purporting to be from Mr Gary Owen, although it was not signed.

6. The claimant told me that he had asked Mr Owen to attend but Mr Owen had said that he could not do so, and could not explain why. No witness order had been applied for.
7. I explained to the claimant that I would accept the statement but that because it was unsigned and because I have not heard live evidence from Mr Owen it would inevitably carry less weight than the live evidence that I had heard.
8. The parties produced a joint agreed bundle of documents of 255 pages including pleadings, which included notes of investigation meetings with the claimant, notes of the disciplinary hearing and notes of the appeal hearing, as well as the relevant letters of invitation to hearing the claimant's appeal and the letter from Mr Biggs dismissing the claimant .
9. The respondent had also produced a draft list of issues and a chronology of the key matters in the case. Although these have not been agreed in advance they were very helpful and the claimant did not take issue with either document
10. The parties agree that the claimant was dismissed for 5 reasons:
  - a. acting dishonestly by accepting payment from the respondent for hours not worked;
  - b. acting dishonestly by failing to disclose the potential misuse of the overtime system;
  - c. failing to act in the interests of the respondent by accepting overtime payments for hours not worked
  - d. failing to act in the interests of the respondent by failing to disclose the potential misuse of the overtime system by other staff;
  - e. fundamental breach of trust and confidence by accepting overtime payments for hours not worked.

**The issues in the case and the relevant legal principles**

11. In this case, the parties accept that the reason for the claimant's dismissal was an allegation and finding of gross misconduct. The claimant denies that he committed misconduct.

12. The issues for the tribunal in such a case are identified in ***British Home Stores Ltd v Burchell 1980 ICR 303*** which the respondent's Counsel Miss Platt has referred me to. The employment tribunal must ask and answer the following questions:
  - a. did the respondent believe that the employee claimant had done the things for which they were dismissed? In this case, that is the matters set out at paragraph 10 a-e above.
  - b. Secondly, did the respondent have in his mind reasonable grounds upon which to sustain that belief?
  - c. At the stage at which it formed its belief on those grounds and at any rate at the final stage when it formed the belief on those grounds had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
  - d. If so, is dismissal of this employee by this respondent within the range of reasonable responses, taking into account the size and administrative resources of the respondent?
13. Those are the matters that I must consider and I remind myself as I reminded the parties on several occasions and as I myself had been reminded by Counsel, that in the case of unfair dismissal, it is not for me to substitute my own view of whether or not the respondent reached the correct decision on the evidence. What I must do in this case, is consider whether or not the respondent who made the decision to dismiss or uphold the appeal, genuinely believed that the claimant had committed the misconduct; whether it had reached that genuine belief on reasonable grounds and whether it did so following as much investigation as was necessary in this case
14. In this case, serious allegations had been made in respect of fraudulent claims for overtime pay and therefore the respondent is expected to have carried out a thorough investigation prior to dismissal.
15. In this case the parties both accept that the reason for the claimant's dismissal was that there was an allegation of misconduct. The claimant denies that he committed misconduct.

**Findings of FACT**

16. I make the following findings of fact. The claimant was initially employed by the respondent as a warehouse operative and in addition to basic salary he received overtime. His contract of employment issued at the time when he was initially employed stated that any hours worked which exceeded standard working shift had to be authorised by the head of department so that overtime would be paid. In addition, the contract referred to emergency overtime arrangement and a disturbance allowance.
17. The claimant suggested in his cross examination of the respondent that there was no policy related to pay. Whilst it is correct that there was no separate policy regarding the payment and approval of overtime, the basic requirements are set out in the contract of employment, and the practice, which all employees and all managers must have known of, was that overtime must be worked before it could be claimed for, that it had to be approved, and that it was expected that the overtime claimed would be for a day on which it had been worked, not some other day.
18. I find that the claimant knew throughout the internal investigation and disciplinary process that he had to demonstrate both that he had done the work for which he had been paid and the day on which he had done the work.
19. The claimant did work overtime and I accept that over the years that he had worked very hard for the company, that he had been flexible in meeting the various demands of his job. I accept that he was passionate about his work and I accept that his job changed over the years and that he had numerous different skills which the company utilised. I find that this was understood by the company and that the claimant had every opportunity to explain why that was of relevance both to Mr Biggs, Mr Crossley and Mr Owen during the course of the investigation, the disciplinary hearing and the appeal meeting.
20. In December 2017, Mr Ashley Smith started to work as the Logistics Manager and the claimant reported to him.
21. In January 2018, the claimant and another employee took on line responsibility for production control.

22. In February 2018, Mr Knight who was senior to the claimant had requested a salary increase for the claimant and another member of staff which had been rejected. Mr Knight disagreed with that decision.
23. In October 2018, Mr Smith became concerned that Mr Knight appeared to be clocking on for the claimant and approving overtime for the claimant and another member of staff in respect of hours on various dates when there was no evidence that he could see that the claimant had in fact been at work and therefore done the work that was being claimed for.
24. I heard no evidence from Mr Smith or Mr Knight but the respondent tells me and I accept that Mr Smith reported a conversation he had had with Mr Knight to Human Resources. In that conversation it is alleged that Mr Knight had said that Mr Smith should not worry about the overtime over clocking because he, Mr Knight was “putting this on Chronos to make up for what they are not getting”. Chronos is the system used by the respondent for recording hours worked and dealing with pay.
25. On 26 October 2018, following the conversation, one of the HR business partners reported that a member of staff who she didn’t name had made her aware that Mr Knight had been potentially authorising overtime for the claimant and another individual for hours not worked by them. At that point the claimant was not reporting directly to Mr Knight and it was unusual that he was approving the claimant’s overtime. The claimant suggested subsequently that this was because Mr Smith was not familiar with the way that they worked.
26. The respondent took the concerns raised seriously and decided that the three individuals involved would be suspended whilst an investigation took place. The claimant was therefore suspended on 29 October 2018 pending an investigation into potential gross misconduct.
27. Mr Knight and the other colleague were also suspended.
28. The claimant accepted in cross examination that in the circumstances it was not unreasonable for him to be suspended or for the matter to be investigated. He also specifically accepted that throughout the process he was not treated

any differently to other members of staff who were subjected to the same allegations.

29. An investigation meeting took place.
30. Mrs Ockleford from whom I have heard evidence met with the IT manager. Various data was provided to her by the IT manager, sourced from the respondent's computer systems. I accept the evidence that Mrs Ockleford has given to the Tribunal about the systems that were in place and the processes that were available for overtime as set out in her statement at paragraph 4 – 6. I find as fact that what she says is true and correct.
31. The respondent operates several mechanisms by which an employee's presence at work can be proved. There is a clocking in and clocking out system. The respondent accepted that on occasions when a person left at the end of a shift they might not clock out because the gates might have been left open for example.
32. I find as fact that Mrs Ockleford and her colleague properly considered the various information that was available to them and carried out sufficient investigation. I find as fact that the matters set out in paragraph 7 of Mrs Ockleford's witness statement are correct.
33. As part of her investigation Mrs Ockleford met Collette Goddard on 29 October and was provided with the information about overtime manual punches. At this point, they were looking for overtime manual punches entered by Mr Knight resulting in overtime for Mr Lipsham and another staff member.
34. Having looked at all the information, they identified a number of dates for Mr Lipsham where there were queries, and set them out in a breakdown of dates at a document identified as appendix two, which was then provided to Mr Lipsham and the other employee.
35. At this point I find that the respondents expected, with reason, that the evidence before them of the claimant clocking in would show them the days and the dates on which the work had been done, even if it didn't show the duration of the work.

36. The respondent also operated an entry system. Whilst it was possible to enter the building by driving through a barrier without being registered, the door entry system would always register an individual entering the premises.
37. The respondent also operated a system which tracked who was logged on and logged off at various computers. The claimant's work involved using various computers although I accept he did not do this every day. The respondent had also accepted he did not use the computers every day. The respondent also had computers available for general use which would not record specific individual use.
38. Nonetheless the respondent expected that the various systems that I was told about combined with CCTV, for example, would give a broad and reasonable overview on the days on which a person was attending at work.
39. In any event, the respondents also expected their employees to make sure that they reported the correct hours of work on the correct days that they worked, and the correct dates and times of overtime worked.
40. I find that this was a reasonable expectation of the respondents.
41. Whilst I accept the claimant's evidence that his payslips did not show the dates of his work, they did show the number of hours of work that he had been paid.
42. The respondent's system for recording hours for the purposes of payroll, referred to above, was Chronos. This was the system on which hours would be logged, and on which overtime worked and authorised. There was a mechanism for a manual punch for entering the date and number of hours worked. It is self-evident and not disputed by the claimant that the respondent was entitled to expect that managers would enter the correct hours and the correct dates on which employees had in fact worked.
43. On that basis it was entirely reasonable for the respondent at this point having information in front of them from their own documentation and also information from one of their managers of some concerns being raised about



the claimant for him to be suspended and therefore to be an investigation. That is what happened.

44. Following the claimant's suspension, the respondent carried out further investigation. They looked at the claimant's records, considered the summary of overtime and they looked at net 2 data, barrier data and produced a summary.
45. The claimant was invited to an investigation meeting with Mr Owen which he attended on 2 November 2018. He was accompanied by a work colleague.
46. In the course of that meeting, the claimant was asked why there were manual adjustments to the overtime systems and why there were some days when he was marked as having done overtime which did not show up on any of the systems.
47. He stated there were days when *I have marked overtime not being on the system, for example, by painting and repairs in the warehouse.*
48. He was asked why there was no net 2 activity and he explained that there were days when he hadn't touched a computer. The claimant also gave examples of occasions when he came in to deal with specific incidents, and his time was not logged. One of these incidents involved an accident with a forklift truck. He had been called in after hours and said that the number of hours he had worked had not been logged.
49. The claimant also raised concerns about the systems themselves and their accuracy. He has suggested before me that a lack of training on the system may have contributed to some of the difficulties he faced.
50. He raised the fact that he had not received training when he met with Mr Owen in the investigation meeting. Whether a lack of training was responsible for errors in general terms is not a matter that I have to determine. What I do have to determine is whether or not the claimant was able to raise it and whether or not it was part and parcel of any considerations that took place during the investigation.

51. I find, that insofar as the claimant considered that training was an issue he was able to raise it and did in fact raise it with those dealing with this process, and it was both considered and taken into account by those dealing with the process.
52. During the investigation meeting the claimant was warned by Mr Owen that any misconduct found to do with the clocking in and out over overtime, where there were discrepancies, could be considered to be gross misconduct. He was also told that it would be a serious allegation, meaning that there would need to be an investigation and a potential further disciplinary hearing. I find that at this point the claimant understood the seriousness of the issues and that he also understood that this was potential gross misconduct, which could, if proven lead to dismissal.
53. During the course of that meeting Mr Owen asked the claimant “have you received overtime payment where you have not physically been at work?” The claimant replied, no. He said “I have never been paid anything I’ve not worked” and said all the overtime claims have been worked but it was painting, ongoing cleaning or whole weeks of cleaning at Portsmouth for example.
54. He said that Mr Knight knew the hours that he was working at Portsmouth because there would be a phone call.
55. Following that investigation meeting, some further enquiries were made. Mr Owen contacted Karen Martin of the respondents to check the further information he had been given, with the various dates of the events that Mr Lipsham had referred to during his investigation meeting. These were dates which included the 3 May 2016; the incident with the forklift truck collision and a handling unit being hit by a truck on 14 June 2018.
56. Following the further enquiries, the respondent came to the conclusion that the claimant had not provided a satisfactory explanation for all the dates in question and a decision was made to take the matter to a disciplinary hearing.
57. I find that on the basis of the evidence at that point and on the basis of the interviews that had taken place with the claimant and Mr Knight and in the

absence of any clear explanation it was entirely reasonable for the respondent to proceed to a disciplinary hearing. It was reasonable for them to have been concerned of the possibility of gross misconduct having taken place.

58. The claimant attended a disciplinary hearing with Mr David Biggs, sales and marketing director on 22 November 2018, having received a letter inviting him to such on 16 November 2018. The letter to the claimant set out the allegations of potential gross misconduct. The disciplinary allegations referred to the evidence and included the document referred to as appendix 2. This is the document prepared by the IT manager and was a summary of the overtime hours that had been claimed by the claimant and another employee approved by Mr Knight for which the respondent said there was little or no evidence of activity to justify the overtime record.
59. I find that the letter sets out clearly and fairly and in sufficient detail the allegations against the claimant. I find that he understood what the allegations were, that he had the evidence the respondents were relying upon and that he understood the seriousness of the allegations and the potential consequences should he be found to have committed them. He knew that he was being accused of gross misconduct and he knew that there was a potential for summary dismissal.
60. At the disciplinary hearing conducted by Mr Biggs the claimant was accompanied again by Mr Cooper. I have seen the notes that are set out in the bundle. I find that they are a fair reflection of what was said at that meeting. The claimant had produced a statement for the hearing and Mr Biggs went through it with him in detail. Mr Biggs also referred to appendix 2 as the key document relevant to the allegations. The claimant responded that *this piece of paper needs to be thrown in the bin*.
61. Mr Biggs said he would have a chance to address it subsequently but started the meeting by going through the various concerns that the claimant had raised. I find that Mr Biggs gave the claimant every opportunity to explain and discuss the various concerns he had and that he discussed them with the claimant in detail. I find that he asked appropriate and relevant questions,

that he listened to the claimant's concerns that the claimant raised about the systems used, that the claimant was able to raise his concerns about the CCTV and that he also raised his concerns about the electronic records.

62. The claimant referred to two occasions when he did have some evidence of having been in the workplace and I find that Mr Biggs considered that information and took it into account when making his decisions. The claimant also raised concerns about training and the Chronus system.
63. Towards the end of the meeting the claimant was asked why there were a high number of dates showing no BPCS activity, even though he was on shift on those dates. The claimant's response was that the reports were not reliable. He then said some of the payments made were payments in lieu and that there were three dates when he believed he had been at work. He went on to say that he had only been paid for hours worked that the hours paid may not have been correct. His manager did them on the system and had no guidance.
64. The claimant had only been able to provide a partial explanation in respect of some of the dates that the respondent had concerns about. Mr Biggs told me and I accept that the claimant had said the 5.2 hours of overtime entered on 12 June was in respect of events on the 14 June in respect of the forklift truck incident and that due to the working time restrictions the hours could not be entered on the correct date. The claimant did not explain to Mr Biggs what he had been doing during the 5.2 hours and I accept Mr Biggs' evidence in cross examination that there was no issue with the Working Time Regulations that would have restricted the entering of overtime on the correct days.
65. Following the hearing I find that Mr Biggs considered carefully all the evidence that he had before him. He told me and I accept that he had formed the view that the claimant had consistently refused to provide him with sufficient evidence that might have provided an acceptable explanation for the circumstances the respondent was concerned about. Despite this, he considered all the evidence he had with an open mind and in order to ensure that he had not missed anything which might have been a defence to the disciplinary allegations.

66. Mr Biggs came to the conclusion that there was insufficient evidence to support the claimant's claim that he had done genuine work either on each of the days he was paid the overtime or on any other day, especially when Mr Biggs considered the amount of overtime that was being paid overall. He concluded that the claimant had received overtime payments for work that was not carried out. He concluded that a number of examples of overpayment showed a pattern of activity which he did not consider to be a one off.
67. However, Mr Biggs found there was only limited evidence of there being a formal scheme between Mr knight and the claimant, and he therefore on the basis of the evidence he had heard decided that he would uphold only five of the six allegations. He then decided that it was appropriate to dismiss the claimant without notice for gross misconduct.
68. The claimant does not challenge the decision to dismiss him on a summary basis once gross misconduct had been found, as being unfair. His challenge is that he should not have been found to have committed the gross misconduct at all.
69. Following the determination, the respondent sent the claimant a letter informing him of the decision that he had committed gross misconduct and of the decision to dismiss him summarily and his right to appeal.
70. The claimant subsequently filed an appeal, was invited to an appeal hearing which took place on 19 December before Mr Crossley.
71. Mr Crossley considered the process that had been followed and heard a number of the concerns that the claimant raised at that point. He heard the claimant's concerns about the nature of the investigation and the evidence that had been provided and the process. The claimant again referred to various incidents including the incident with the forklift truck crashing into and collapsing the racking.
72. The notes of the hearing, which I have been referred to show that there was a full and thorough consideration of all the matters the claimant raised.

73. His initial appeal was on the basis that important evidence had been ignored and that the respondent's evidence was unreliable. Mr Crossley gave the claimant full opportunity to deal with these matters and discussed them in full detail.
74. He also asked for further details in advance of the hearing. Mr Crossley noted all the points the claimant had made and considered them in his outcome letter.
75. The claimant said for the first time, at the appeal hearing, that he had never worked on the dates in question as set out in appendix 2 and so there would be no evidence of him having accessed the site on those occasions.
76. The claimant was accepting that he had not been on site on the dates the respondent had concerns about.
77. It is therefore correct that at the point of appeal at least, since the claimant had accepted that he had not been on site on the dates that he had been paid for overtime, that any potential flaws in the technical evidence produced by the respondent was not and is not relevant to the fairness or otherwise of the dismissal.
78. The question then was, whether or not the claimant had any explanation for the claims being made on those dates.
79. Mr Crossley stated and I accept that at the appeal the claimant did not raise any new evidence and that on that basis and on the basis of his review of the evidence he found no reason to overturn the decision. Mr Crossley concluded that nothing presented or said by the claimant raised any doubt of the original conclusions of findings of fact by Mr Biggs. He therefore upheld the claimant's dismissal.
80. Before me the claimant was very critical of the respondent's evidence but even if I was to find, which I don't, that the evidence or the way that it was recorded, had any errors in it, I find that the respondent looked at all the possible evidence of entries and exit points and that in any event by the time of his dismissal the claimant had conceded that he had not been at work on

the dates which the respondent was concerned about and that therefore, the reliability of that technical evidence is irrelevant.

## **Conclusions**

81. From the evidence I have heard from Mr Biggs, which I find was clear and consistent, I conclude that he had tried to find evidence to support what the claimant was saying. I find as fact that he had wanted to find a way to accept the claimant's assertion that the claimant had done nothing wrong.
82. I conclude that the claimant was quite wrong to suggest that there had been any sort of instruction to Mr Biggs or that he had prejudged anything. Mr Biggs approached the disciplinary hearing with an open mind and he was actively looking for a way to accept the claimant's evidence.
83. The claimant himself did not provide any sufficient evidence in respect of the majority of the dates that the respondent was concerned with. The respondent had told the claimant precisely which dates they were concerned with; they provided the evidence they were relying upon; they investigated before suspension; after suspension; during the suspension meeting; following the meeting and had asked for further details of the claimant at the disciplinary hearing. Not only had Mr Biggs asked questions of the claimant but interviews had also been held with Mr Knight and another employee and I accept that Mr Biggs considered that he had essentially met a brick wall from the claimant and from other employees when looking for any sort of reasonable explanation.
84. The claimant has a responsibility in respect of his own hours of work and it was entirely reasonable for this employer to expect him to be able to provide some evidence that he had done the work that he has been paid for on the dates in question or on another date. The respondent was entirely reasonable conclude that the claimant had failed to do this and that the reason was that he had committed misconduct.
85. It was entirely reasonable for the respondent to rely upon the various sources of data which they had from the various systems and it was entirely reasonable for them to provide it to the claimant.

86. Once the respondent realised that the claimant was accepting that he hadn't worked on the dates when the overtime or other pay had been claimed then I accept that data effectively became redundant. Nonetheless what the claimant needed to demonstrate to the respondent was that he had done the work he had been paid for. Instead the claimant relied in his disciplinary hearing and appeal hearing as he has before me on his assertions that the data was unreliable, that he didn't know what hours he had worked and that he was sure he had done nothing wrong.
87. He considered, wrongly, that the respondent should be looking for information to prove that he had done the work, not that he himself had any obligations to do so. He failed to recognise that the respondent had already done as much as they could to ascertain the evidence that the claimant had in fact been paid for work which he had done and that they had been unable to find it. That was the reason for the suspension, the investigation, the disciplinary hearing and ultimately the claimant's dismissal.
88. I conclude that the respondent carried out a full investigation once they had been alerted to the possibility of misuse of the overtime system. The investigation carried out was in keeping with the size and administrative resources of this respondent and the individuals involved were scrupulous in considering the documentation fairly from the various sources.
89. I conclude that Mr Biggs in particular was aware of the short comings of the system but that it was reasonable for him to reach the conclusions he reached and set out in paragraph 22 of the disciplinary letter, that it was very unlikely that the company systems would fail to record an employee's presence at work on multiple occasions.
90. I conclude that the investigation meeting with the claimant was conducted fairly and openly. He had every opportunity to raise concerns, give his side of the story and provide explanations.
91. I conclude that the decision to conduct a disciplinary hearing in respect of allegations of gross misconduct was reasonable given the respondent's reasonable belief at the time that they did not have a full explanation of the



payments. I conclude that the letter sent to the claimant inviting him to the disciplinary meeting and the accompanying pack of information sets out in full and appropriate detail, the allegations against him and the information which the respondent was relying upon.

92. On the basis of the matters set out in the letter sent to the claimant on 3 December 2018, as well as the evidence at the hearing itself, the subsequent questions raised by Mr Biggs and his oral evidence before me which I accept in its entirety, I conclude that the hearing itself was conducted by Mr Biggs with conspicuous fairness. Mr Biggs approached the disciplinary with an open mind and the hearing was appropriate and fair in all the circumstances. I find Mr Biggs carried out appropriate and sufficient further investigation prior to making his decision, following discussions with the claimant. I conclude that Mr Biggs genuinely believed that the claimant had committed the misconduct. The letter sets out fully and fairly the reasons why Mr Biggs had reached its conclusions and they demonstrate a genuine belief reached on reasonable grounds.
93. The claimant's admission during the course of his cross examination that he had no issue with the procedure but was concerned primarily with the evidence was an honest reflection on the fact that the procedure was fully fair.
94. I note that Mr Biggs did not find that the claimant had fundamentally breached the trust and confidence with the company by being involved in the scheme to reward staff for hours not worked and I find that this is indicative of his open mind and his fair and reasonable approach to the evidence he had to assess.
95. I conclude the decision to dismiss the claimant was a decision within the range of reasonable responses open to this employer in the circumstances, five of six allegations of conduct in respect of dishonesty and breach of trust had been found and the conclusion was made by Mr Biggs that the claimant had deliberately and dishonestly accepted company overtime payments, knowing that the hours have not been worked and should not have been paid.
96. In those circumstances, I dismiss the claimant's claim and find that this was a fair dismissal.

---

Employment Judge Rayner

---

Date 10 September 2020