



# EMPLOYMENT TRIBUNALS

**Claimant: Wendy Adams**

**Respondent: Lighthouse Vending Services Limited**

**Heard at: Birmingham (hybrid hearing and via CVP)**

**On: 9/10<sup>th</sup> February 2021**

**Before: Employment Judge Beck sitting alone**

## **Representation**

Claimant: In Person, assisted by Mr Bate, Claimant's brother

Respondent: Laurentt Davies, Managing Director, in person

**JUDGMENT** having been sent to the parties on 23/3/21 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 Wendy Adams, was employed by the respondent Lighthouse Vending Services Limited as a vending operator. The parties agree the claimant worked a 40-hour week, earning £328 a week gross pay and £213 per week net pay.

2. The parties dispute the dates of employment, the claimant in her ET1 form states she was employed between 9/5/10 and 29/8/19. The respondent in his ET3 form states the dates of employment were from 1/9/16 to 29/8/19.

3. The claimant brings 2 claims before the tribunal, she claims she was unfairly dismissed under section 98 Employment Rights Act 1996, and she claims that the respondent breached her contract as she was not paid her notice period under her contract.

4. The respondent contests both claims and states the claimant was dismissed for gross misconduct, bullying and harassment of a colleague Joanne Palmer,

and breach of the company policy not to smoke in the company vehicles. On the basis the actions amounted to gross misconduct, the respondent states he was entitled to terminate the claimant's contract without notice.

5. Both parties accepted for the purposes of the Unfair Dismissal claim, the Claimant had 2 years' service, had applied for her claim within the 3-month statutory time limit and had employee status. The parties accepted 2 years' service would apply irrespective of whether the claimant had been employed from 2010 or 2016.

6. Both parties accepted for the purposes of the Breach of Contract claim, the claimant was an employee, the claim was presented on termination of contract, and the claim was presented within 3 months of the effective date of termination of the contract, 29/8/19.

7. The ACAS Conciliation certificate was dated the 12/9/19.

8. The case should have been heard at a 2-day hearing on the 24<sup>th</sup> and 25<sup>th</sup> August 2020. The Respondent at this stage had not complied with directions to serve documents. EJ Finlay on the 21/9/20 relisted the matter for the 9<sup>th</sup> and 10<sup>th</sup> February 2021, and did not strike out the respondent's opportunity to put in his response, accepting he had been ill. Directions were made for the respondent to file a bundle by the 18/10/20, and any additional witness statements from both parties by the 11/11/20.

9. The parties agree and had possession of a bundle prepared by the respondent numbered 1 –49. The claimant had prepared her own bundle which the respondent and I had not seen, but was at the tribunal hearing centre. The claimant says she sent the bundle to the respondent recorded delivery, the respondent states he did not receive it. I went through the claimant's bundle document by document over CVP, to ascertain what additional documents were in the bundle, which were not in the respondent's bundle.

10. Arrangements were made for copies of 5 letters dated 3/10/19, 6/9/19 (dismissal letter), 30/8/19 x 2 and 13/1/20, a copy of a contract dated 26/2/12, NHS letter and ACAS letter to be made available to the respondent and I. The case was put back for this to be organized, and additional time was allowed for the respondent to view these documents.

11. It was clarified with the respondent, that there were no additional documents submitted in accordance with EJ Findlay's order of the 21/9/20.

12. The claimant gave evidence and was cross examined by the respondent. The respondent and his witness Neil Hadlington, General Manager gave evidence and were cross examined by the claimant. Joanne Palmer had provided a letter in the respondent's bundle, but the respondent advised she could not have time off work to attend to give evidence.

**Issues for the tribunal to decide**

13. The date the claimant was employed from. The claimant has provided a contract dated 26/2/12, and the respondent a contract dated 1/9/16.
14. Whether the claimant bullied and harassed her colleague Joanne Palmer for a 2-week period prior to the 17/7/19, whilst both were travelling round customers sites in the claimant's van.
15. Whether an incident took place on company premises on the 17/7/19 between the claimant and Joanne Palmer.
16. Whether the claimant smoked in the company vehicle.
17. What occurred during the meeting on the 29/8/19.
18. Whether the claimant was dismissed, the claimant to show on the balance of probabilities
19. What the reason or principal reason for dismissal was. The respondent says the reason was conduct. I have to decide if the respondent genuinely believed the claimant has committed misconduct. The respondent is to prove on balance of probabilities a potentially fair reason for dismissal existed.
20. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating it as sufficient reason to dismiss the claimant. I will look at whether there were reasonable grounds for the belief, at the time the belief was formed whether the respondent had carried out a reasonable investigation, whether the respondent had acted in a procedurally fair manner, and dismissal was within the range of responses.
21. In regard to the breach of contract claim, was the claimant summarily dismissed for gross misconduct, and therefore not entitled to notice pay? Or was she dismissed but not for gross misconduct and therefore entitled to notice pay to be paid?

**Applicable Law****Unfair Dismissal - Dismissal**

**Section 95(1) Employment Rights Act (1996)** provides that for the purposes of this part, an employee is dismissed by his employer if (and subject to subsection (2) only if)-

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice
- (b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract;
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

## Unfair Dismissal – Reasons and Fairness of Dismissal

**Section 98 (1) and (2) Employment Rights Act (1996)** 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, and
  - (b) that it is 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
  - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant, or
  - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

**Section 98(4) Employment Rights Act (1996)** provides: Where the 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 the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with the equity and substantial merits of the case

In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *BHS v Burchell* 1980 ICR 303 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets*

Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

### **Breach of contract**

**Article 3 [Employment Tribunals] Extension of Jurisdiction (England and Wales) Order (1994)** provides that proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
- (b) the claim is not one to which article 5 applies; and
- (c) the claim arises or is outstanding on the termination of the employee's employment.

### **Evidence Heard**

#### **The date the claimant was employed from**

22. 2 contracts have been provided. The claimant provided a contract dated 1/11/11 between the claimant and Lighthouse Vending Logistics Ltd, signed and dated 26/2/12 by the claimant. The second contract, provided by the respondent, dated 1/9/16 between the claimant and Lighthouse Vending Services Limited, the current respondent in these proceedings. The claimant asserts that she has worked for the same company, as Mr. Davies owned the previous company, The respondent stated in evidence that he sold Lighthouse Vending Logistics Ltd and it was liquidated, which the claimant did not challenge in evidence. The 2016 contract contains a clause which states at 3.2 that no service with a previous employer will be deemed as continuous.

23. I have noted at page 8 of the bundle the contract of employment dated 1/9/16. It contains company disciplinary rules and procedures. Included are terms setting out the procedure for gross misconduct dismissals and minor breaches of rules.

24. Paragraph 14 of the contract page 12 states 'the Disciplinary Rules and Procedures do not form part of your contractual terms and conditions'. At the end of the contract, page 14, the 'Disciplinary Rules and Procedures' are set out.

25. Paragraph 3 sets out 'you will be liable to summary dismissal without notice (or money in lieu) if guilty of gross misconduct or gross neglect. The following list (which is not exhaustive) illustrates examples of gross misconduct.

- (g) any action which is in serious breach of safely procedures (including breach of the company's no smoking policy)

(n) racial or sexual discrimination or harassment’.

## **2 weeks alleged bullying and harassing of Joanne Palmer**

26. There is a letter dated 4/10/19 from Joanne Palmer, page 5 in the respondent's bundle. It is not in statement form or with a declaration that the contents are true. The letter refers to a 2-week period prior to the 17/7/19, when Joanne Palmer states she was intimidated and bullied whilst a passenger in the van with the claimant on her visits to customers. She states she was told by the claimant every day for the 2 weeks she was with her in the van, she would not be able to do the claimants run. No specific words the claimant was alleged to have used were stated in the letter, or specific dates given for the 2-week period.

27. The claimant accepts Joanne Palmer was present in the company van with her, she denies harassment and bullying took place in her statements, and confirms no other persons were present during the time referred to, which she states was 1 week not 2. The respondent and Mr Hadlington both state Joanne Palmer told them she had been bullied and they conducted an investigation. Both confirmed no contemporaneous note of the interview with her was taken, which was conducted as part of the investigation. The respondent confirmed in evidence the bullying and harassment allegation relating to Joanne Palmer, related to the 2-week period only, whilst Joanne Palmer was with the claimant in her van.

## **17/7/19 Incident**

28. The respondent in evidence stated the claimant's behaviour was aggressive and bullying that day, he heard an incident from his office. Joanne Palmer was responding to the claimant, although the respondent didn't hear words used by them, he states the claimant was stood over Joanne Palmer.

29. The respondent recorded in his diary for that date 'Mrs Adams warned investigation re: bullying and aggressive behaviour review by end of August. warned behaviour not acceptable and could lead to dismissal'. The diary entry is in the bundle at page 20. The respondent states he commenced an investigation and interviewed Joanne Palmer and other members of staff.

30. Mr Hadlington states he heard raised voices, the claimant was acting aggressively to Joanne Palmer, both were pointing their finger at each other, in his view the claimant seemed to be more aggressive. Mr Hadlington conceded in cross examination that he has not mentioned in his statement both women were pointing their finger at the other. Mr Hadlington confirms his diary entry exhibited in the bundle at page 19, stating 'Wendy Adams verbal warning' on the 17/7/19. The respondent would have given the warning for behaviour he stated.

31. The claimant's evidence was that both parties were shouting at each other and Joanne Palmer approached her. The claimant states she was not the aggressor in the incident, she accepts raising her voice and points to Mr. Hadlington's evidence that he heard raised voices. She was warned in the office after the incident, although she was not clear if this was a formal verbal warning, or a warning she was being investigated, the claimant can't remember what was said, Joanne Palmer was not warned.

32. The evidence concerning whether the respondent gave a warning regarding an investigation or a verbal warning is unclear. The respondent's evidence was that the claimant was advised there would be an investigation, and was warned about her behaviour. This is reflected in his diary entry. Mr Hadlington in his diary entry stated a verbal warning was given, but in evidence said he could not remember whether there was a warning, but if there was it would have been the respondent giving the warning. The claimant stated that she was warned by the respondent on that day there would be an investigation.

#### **Did the claimant smoke in the company van**

33. The respondent stated the evidence of the claimant smoking in the van related to information from the Transport Manager he obtained, in the course of the investigation regarding the claimant. The Transport Manager advised him the claimant smoked in the van, and her previous van required 3 days cleaning due to nicotine stains. A statement from the Transport Manager has not been provided, and he has not been called to give evidence. Mr Hadlington's evidence referred to the same information being provided by the Transport Manager. No contemporaneous note of the interview with the Transport Manager is available. Photos have been referred to at page 6 and 7 in the bundle, of a company van, these were not put to the claimant, the respondent accepted taking the photos.

34. The claimant in her statement accepted smoking in the van when it was stationary and she could open the door. She stated other staff did this too, this was not challenged. When cross examined by the respondent, she confirmed smoking when the vehicle was stationary with the door open.

#### **The Meeting on the 29/8/19**

35. The respondent describes the meeting in his evidence as an open meeting. In evidence he stated he was explaining the findings of his investigation to the claimant, which was that she had smoked in the company van and that she had bullied and harassed Joanne Palmer. As a consequence of his investigation, he was considering a compromise agreement or immediate dismissal, on the basis of gross misconduct. It was clarified the respondent's findings of bullying and harassment were based on the 2-week period when the claimant and Joanne Palmer were travelling round in the van together only.

At page 14 of the bundle, the respondent confirmed this was in breach of company disciplinary rules and procedures at 3(g) serious breach of safety procedures and (n) racial or sexual discrimination or harassment, both of these grounds were the basis of the dismissal. It was confirmed the claimant has no existing disciplinary matters on her record. The respondent's diary entry for 29/8/19 shows 'Mrs. Adams refused to discuss became aggressive and left the meeting, asked General Manager for keys to van and left, dismissed gross misconduct bullying and smoking in the van', page 21 of the bundle.

36. Mr. Hadlington confirmed his recollection of the meeting on the 29/8/19 was that it was the claimant, respondent and himself present, he did not take any notes and the claimant stormed out. His diary notes for the day, at page 18 of the bundle stated 'Wendy let go today', which he clarified meant she was dismissed. Mr Hadlington confirmed the respondent said in the meeting to the claimant she should resign or he would dismiss her.

37. The claimant stated that she was called to a meeting on that day without knowing what it was about, or without being offered the opportunity for anyone else to be present. The respondent threatened her that he would make her life hell if she did not resign and that he would give her a good reference. The claimant asked to leave the meeting and called her husband. Mr Hadlington asked her to leave the premises and take her belongings.

### **Findings of Fact and conclusions**

38. I find that the claimant's contract of employment dated 1/9/16 is correct for the purposes of employment legislation and employment rights. Therefore, the claimant is treated as having been employed by the respondent since the 20/10/16, the date she signed her contract.

39. In relation to the contract of employment, on the basis that no evidence has been presents of a group company owning both named companies in the contract, and no evidence has been presented of continuous employment between the 2 companies, I accept the 2016 contract is effective.

40. I find there is insufficient evidence to establish on the balance of probabilities that the claimant bullied and harassed Joanne Palmer for a 2-week period prior to 17/7/19. On the evidence presented, I have to conclude this did not happen.

41. Limited weight can be attached to the letter dated 4/10/19 from Joanne Palmer, concerning the allegations of bullying and harassment. It is not in statement form, with a declaration of truth. The witness did not give evidence to allow her account to be challenged and the letter is lacking in detail. The letter is dated 4/10/19, 3 months approximately after the alleged bullying and harassment took place. There is no direct evidence of what occurred during that 2-week period other than the claimant's evidence, in which she denies bullying and harassment took place. Therefore, I conclude this incident did not happen.



42. I find an altercation took place between the claimant and Joanne Palmer on the 17/7/19.

43. Considering the 17/7/19 incident, the claimant's evidence is corroborated by Mr Hadlington that raised voices were heard, and I accept the claimants and Mr Hadlington's evidence which is similar, in that both parties were pointing their finger at the other, and involved in an argument / altercation.

44. I find that a warning was given to claimant after the 17/7/19 incident, regarding an investigation into bullying and harassment of Joanne Palmer.

45. All parties accept that a warning was given to the claimant on the 17/7/19. I accept that the note in the respondent's diary made at the time corroborates the fact the claimant was warned of an investigation regarding bullying and aggressive behaviour, this was not a formal verbal warning at this stage.

46. I find on the balance of probabilities that the claimant did smoke in the company van with the door open on the basis of her witness statement dated 5/10/2020, and admissions in evidence.

47. The claimant has made admissions to smoking in the van, whilst it was stationary and with the door open. The claimant admitted this in her written statement and when cross examined by the respondent in evidence before the tribunal. I accept this evidence. There is no other direct evidence of the claimant smoking in the company van.

48. I find that the claimant had left the meeting on the 29/8/19, after the respondent had told her of the outcome of his investigations, and that he intended to dismiss her for gross misconduct or reach a compromise agreement with her.

49. The respondent, Mr Hadlington and the claimant all confirm the claimant did leave the meeting on the 29/8/19. I accept that the claimant did leave the company premises, after having been dismissed by the respondent, Mr Hadlington having told her to leave. This accords with the diary entries for the respondent and Mr Hadlington.

50. I find as a fact that the claimant was dismissed on the 29/8/19 by the respondent.

51. The claimant was given an ultimatum on the 29/8/19, resign or be sacked for gross misconduct, this amounts to a dismissal by the respondent, he terminated the contract of employment. The claimant has shown on the balance of probabilities that she was dismissed, based on the respondent's evidence at that meeting the offer was of a compromise agreement or dismissal for gross misconduct, Mr. Hadlington confirmed in evidence the respondent has said to the claimant resign or he would dismiss her.

**Has the respondent shown a potentially fair reason for dismissal?**

52. The burden of proof on the employer at this stage is not a heavy one. It requires a 'set of facts known to the employer or beliefs held by him which cause him to dismiss the employee'. The respondent believed that he had grounds to dismiss the claimant on conduct grounds relating to smoking in company vehicles and bullying and harassing of Joanne Palmer. Section 98(8)(2)(b) Employment Rights Act 1996 states it can be a reason if it 'relates to the conduct of the employee'.

53. At this stage the respondent had conducted an investigation into bullying and harassment of Joanne Palmer which involved an interview of her, and states he became aware during the investigation and by interviewing the Transport Manager of allegations of the claimant smoking in the company van.

54. Therefore, the respondent has discharged his evidential burden to show that there was a potentially fair reason for dismissal, on the grounds of the claimant's conduct.

**Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss?**

55. The respondent accepted in evidence being in charge of an investigation between 17/7/19 and 28/9/19 into the bullying and harassment allegations, and stated Joanne Palmer was interviewed, and others, although they were not named. No notes of the interviews were taken, and none are available to the tribunal. The respondent confirmed in evidence the claimant was not interviewed as part of this process. Mr Hadlington in evidence referred to Joanne Palmer being upset when 'we' interviewed her, implying he had been involved in the interview process, he stated he was content she was upset and had been bullied. In the respondent's statement he refers to 'we' spoke to Mrs. Adams 'we would investigate the claims', implying both himself and Mr Hadlington were investigating. In relation to the meeting on the 29/8/19, all parties have confirmed the claimant, respondent and Mr Hadlington were present. The respondent and Mr Hadlington confirmed in evidence no notes were taken in this meeting, apart from the diary entries they made.

56. All parties confirm that the claimant did not have any warnings or disciplinary matters on her record at that time. In evidence the respondent accepted the only letter sent to the claimant regarding her dismissal was dated 6/9/19, although later when the chronology of the claimant's letters was being considered, the respondent accepted that he may have sent 2 letters, both dated the 6/9/19. (The second letter is not in evidence before the tribunal) The claimant states she only received 1 letter dated 6/9/19 (This letter considered by the tribunal), setting out the grounds for her dismissal as smoking in the company van, and bullying and harassment of Joanne Palmer.

The respondent described the meeting on the 29/8/19 as an open meeting, although he stated he was going to share the contents of his investigation, namely that the claimant had committed gross misconduct, by smoking in the company van and bullying Joanne Palmer. The respondent was not sure if a response was sent to the claimant's letter of the 3/10/19 requesting an appeal. The respondent confirmed he was not aware of a separate no smoking policy at the company, although it was referred to in the contract of employment.

57. In considering the question of whether a reasonable investigation had been carried out, I have to consider the size and administrative resources of the employer. I am aware from the ET3 form, that the company is small, with 24 employees.

58. I find that the respondent had not carried out a reasonable investigation which was procedurally fair. I have taken into account the size of the company, but find a reasonable employer acting in these circumstances would have; notified the employee in writing of the allegations, taken a written statement from Joanne Palmer and other regarding the allegations, provided copies of those statements to the claimant, and invited her to a meeting at which she could respond to the allegations. When the claimant attended the meeting on the 29/8/19, none of these steps had been taken. The claimant was not interviewed regarding her version of events, or given an opportunity to consider what evidence she may wish to present. I accept the claimant was not offered the opportunity for another person to attend the 29/8/19 meeting with her. It is apparent from the letters provided by the claimant dated 30/8/19 and 3/10/19, they contained requests for an appeal hearing, the respondent admitted in evidence that letter had not been answered. Although the disciplinary rules set out an appeal should be requested within 7 days, and the claimant admitted sending correspondence to the wrong company address.

59. Therefore, on the grounds that the respondent had failed to carry out a reasonable investigation, and had not acted in a procedurally fair manner, I find that the claimant was unfairly dismissed, and her claim on this ground succeeds.

### **Breach of contract claim**

60. In relation to the breach of contract claim, I have to consider different tests than those applicable to the Unfair Dismissal claim, where the focus is on the reasonableness of the management's decisions, it being immaterial what decision I would have made for myself about the claimant's conduct. I have to decide for myself whether the claimant was guilty of conduct serious enough to justify the respondent terminating her contract without notice.

61. The evidence relating to the allegation of bullying and harassment is contained in a letter from Joanne Palmer dated 4/10/19, which postdates the dismissal decision on the 29/8/19.

I have not seen any statements of the interview that took place with Joanne Palmer about these matters, because the respondent says he did not make notes about it. Joanne Palmer was not called to give evidence; therefore, I was unable to hear the details concerning her allegations. Apart from the altercation on the 17/7/19, no other witness has given evidence concerning the 2 weeks the claimant and Joanne Palmer were said to be working on the company van together, and the respondent confirmed in evidence that this was the basis of the bullying and harassment claim.

62. The claimant has denied this behaviour in her evidence. Therefore, I am unable to make a finding on the evidence presented that bullying and harassment happened, for the reasons given above.

63. In relation to the claimant smoking in the company vans, I have had no statement from the Transport Manager who is said to have witnessed the claimant smoking in company vans, and ordered a deep clean of the claimants' van. There is no statement from him as part of the investigation. However, the claimant, both in her evidence and her statement dated 25/10/19, did admit that she smoked in the company van with the door open, which I accept.

64. Smoking is referred to in the Company disciplinary rules and procedures, at page 14 of the bundle, which is annexed to the claimant's contract signed by her on the 20/10/16. It provides:

'You will be liable to summary dismissal without notice (or money in lieu) if guilty of gross misconduct or gross neglect. The following list (which is not exhaustive) illustrates examples of gross misconduct:

(g) any action which is in serious breach of safety procedures (including breach of the company's no smoking policy)

65. A copy of the companies no smoking policy has not been provided in evidence. The respondent when giving evidence stated he didn't believe the company had a separate no smoking policy. I have not been provided with any evidence of any information provided to employees concerning smoking in the work place. The claimant in evidence stated other employees smoked in company vans and this evidence was not challenged.

66. Against a background of it being accepted the claimant did not have any warnings on her disciplinary record, and the lack of evidence of a smoking policy in the workplace, I find taking the admittance by the claimant of smoking in the van with the door open, I am unable to find this constituted gross misconduct for the purposes of summary dismissal. Therefore, I find the respondent was not entitled to dismiss the claimant without notice, and the claimant is entitled to her notice pay.

**I confirm these written reasons have been electronically signed**

Signed by: Employment Judge Beck  
Signed on: 10 May 2021