



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Bryan

**Respondent:** Booker Limited

**Heard at:** Newcastle-upon-Tyne Hearing Centre      **On:** 9 April 2021

**Before:** Employment Judge Johnson

## REPRESENTATION:

**Claimant:** Mr C Pinkney (Trade Union Representative)

**Respondent:** Ms R Urmston (Solicitor)

# WRITTEN REASONS

1. These are the Written Reasons requested by the respondent in respect of the Judgment promulgated on 22 April 2021, which recorded that the claimant's complaint of unfair dismissal was not well-founded and was dismissed.
2. The claimant was represented by his trade union representative, Mr Pinkney, who called the claimant to give evidence. The respondent was represented by Ms Urmston, Solicitor, who called Ms Clare O'Toole (Delivery Manager) and Mr Ian Cairns (Area Manager) to give evidence. There was an agreed bundle of documents marked R1, containing 178 pages of documents.
3. By a claim form presented on 22 November 2020, the claimant brought a complaint of unfair dismissal. The respondent defended the claim. In essence, it arose out of an incident which occurred on or about 14 July 2020, when the claimant removed a burger from one of the display counters where he worked and did not pay for it. The claimant's position was that it was a generally accepted practice that employees could remove items of stock for their own consumption, and if at the time the store itself was closed and the till was not in operation, then payment could be made on the next available opportunity when the till was open. The respondent did not accept that this was normal custom and practice and insisted that employees were only allowed to remove stock for their own consumption if they had obtained prior authority/permission from their supervisor. The respondent suspected that the claimant had dishonestly removed the burger without intending to pay for it. He was suspended pending an investigation, following which there was a disciplinary hearing

at which he was dismissed. The claimant appealed against that decision, but his appeal was also dismissed.

### **The Issues**

4. The issues which were identified which as those which the Employment Tribunal would have to decide were as follows:

- (1) What was the respondent's reason for dismissing the claimant?
- (2) Was that reason one of the potentially fair reasons in section 98 of the Employment Rights Act 1996?
- (3) If misconduct, did the respondent hold a genuine belief on reasonable grounds following a reasonable investigation that the claimant had committed that act of misconduct?
- (4) Did the respondent follow a fair procedure in investigating the allegation, conducting the disciplinary hearing and conducting the appeal?
- (5) Was the respondent's decision to dismiss the claimant one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?
- (6) What, if any, remedy should be awarded to the claimant?

### **Findings of Fact**

5. The respondent is a wholesale cash and carry food and drink business, with a number of stores known as "branches" throughout the United Kingdom. The claimant was employed at the North Tees branch, where he worked as a Branch Assistant. The claimant's employment with the respondent started on 4 August 2012. His usual shift pattern was from 1.00pm to 10.00pm (known as the "twilight shift"). The claimant's duties included working on tills, undertaking delivery, picker duty, stocking and restocking shelves. During his 8 years of employment the claimant had a clean disciplinary record.

6. On 14 July 2020, the claimant was working the twilight shift from 1.00pm until 10.00pm, with a break at 5.00pm. One of the claimant's colleagues noticed that a burger was missing from the chilled section of the branch and that the claimant had later been seen consuming a burger. The matter was reported to Ms Jodie Fowler, the replenishment supervisor, who asked the claimant what he had eaten for his lunch that day. The claimant confirmed that he had eaten a burger. Ms Fowler asked the claimant if he had paid for the burger and the claimant stated that he had paid for it. Ms Fowler asked the claimant to produce the invoice for the burger and the claimant stated that he had thrown it in the bin. When questioned again, the claimant said he did not know whether or not he had paid for it, and under further questioning he confirmed that he had not paid for it. The claimant then said to Ms Fowler that he had intended to pay for the burger, but because the till was closed at the time, he intended to pay for it the following morning. The claimant told Ms Fowler that other employees took food without paying for it and were allowed to pay when the tills reopened. Ms Fowler suspected that the claimant had taken the

burger without intending to pay for it, and also suspected that this was not the first time the claimant had done so. Ms Fowler spoke to her own supervisor, who agreed that the claimant should be suspended pending an investigation into allegations of misconduct.

7. The claimant accepted that he had removed the burger from the chilled counter, that he had consumed it and that he had not paid for it. The claimant's explanation was that he had intended to pay for the burger, but could not do so at the time because the till was closed, and that he had intended to pay for the burger the following day when the till was open. The claimant further maintained that this was common practice and that other colleagues had done so in the past.

8. Those of the claimant's colleagues who worked on the twilight shift were interviewed and all confirmed that they were aware that any stock taken for personal consumption had to be paid for at the time through the till and a receipt obtained. If anything was to be taken whilst the tills were closed, then prior permission had to be obtained from a supervisor. None of those colleagues confirmed that it was common practice for stock to be removed for personal consumption without being paid for and without prior authority from a supervisor.

9. By a letter dated 28 July 2020, the claimant was invited to a disciplinary hearing on 3 August 2020 to answer an allegation that he had misappropriated without authority and consumed company food on company property. The claimant was informed that if the allegations were substantiated, then it could result in the termination of his employment. The claimant was provided with copies of all the investigation notes and statements and previous invoices issued to him.

10. The claimant did not attend the hearing arranged for 3 August 2020, on the grounds that he was too ill to attend. The claimant produced a sick note. The hearing was postponed to 17 August 2020. The claimant again declined to attend. He was invited to provide written submissions, which he agreed to do, and those submissions are in the bundle at pages 125-126. The disciplinary hearing proceeded on 20 August 2020 in the claimant's absence.

11. The claimant's written submissions included the following:-

- He was unable to attend the hearing due to work related stress and anxiety.
- He had over 8 years of perfect service with no previous disciplinary record.
- He accepted full responsibility for what had happened and tendered his apology. He maintained that it was "common practice for people to take items and not pay until the next day, when the tills are closed".
- Because he had been suspended, he could not therefore pay for the items the following day.
- His job was really important to him, as it enabled him to pay his bills and provide for his daughter.

- The claimant asked the company to take into account his previous efforts on behalf of the company.

12. The disciplinary hearing was conducted by Clare O'Toole. Ms O'Toole took into account the facts as set out above, namely that the claimant had admitted taking and consuming the burger without paying for it. Ms O'Toole rejected the claimant's explanation that it was common practice for this to happen and that other employees had done so. Ms O'Toole found that this was not the case. Ms O'Toole took into account the claimant's behaviour when first questioned about the incident by Ms Fowler, particularly saying that he had paid for it and had an invoice, before admitting that he had not paid for it at all. Ms O'Toole concluded that the claimant had never intended to pay for the burger, that this amounted to dishonesty and in all the circumstances amounted to gross misconduct. Ms O'Toole concluded that the claimant should be dismissed for gross misconduct as the respondent has "a zero tolerance approach in relation to theft by employees".

13. The dismissal letter appears at page 121 in the bundle and confirmed that the claimant was summarily dismissed for the unauthorised consumption of company food on company property. The claimant was advised of his right to appeal.

14. By a letter dated 25 August, (page 135) the claimant appealed against that dismissal on the following grounds:-

- I have 8 years' perfect service with no previous conduct history.
- I believe it is common practice that happens all the time and I wasn't given the chance to pay for it the next day when the tills were reopened.
- I feel to sack me without any previous warnings of disciplinary was too harsh.
- There was insufficient consideration of my explanation of the circumstances leading up to the dismissal.

15. The appeal hearing took place on 11 September 2020 and was conducted by Mr Ian Cairns, Area Manager. In preparation for the hearing, Mr Cairns examined the following documents:-

- (1) The claimant's invoices for staff purchases made over a period of time.
- (2) The interview notes of the claimant and other employees.
- (3) Notes of the disciplinary hearing and the outcome letter.
- (4) The claimant's letter of appeal.

16. The hearing took place on 11 September 2020. The claimant was accompanied by Mr Pinkney, his trade union representative. Mr Cairns' evidence to the Tribunal on the grounds of appeal was as follows:

- (1) The claimant's length of service and previous good character was not an adequate mitigating factor.

- (2) It was not common practice for staff to take stock from the branch without paying for it if the tills were closed.
- (3) That the claimant's explanation of the circumstances surrounding the incident were inadequate.
- (4) The decision to dismiss the claimant was not "too harsh" in the circumstances, as the respondent has a zero tolerance approach to theft.

17. Mr Cairns dismissed the claimant's appeal.

### **The Law**

18. The complaint of unfair dismissal engages sections 94 and 98 of the Employment Rights Act 1996.

19. Section 94 states:

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

20. Section 98 states:

- (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 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.

- (3) In subsection (2)(a) –
  - (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
  - (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
  
- (4) 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 employer's 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 equity and the substantial merits of the case.

21. The test of fairness in a dismissal for misconduct is now well established, and has been since the decision of the Employment Appeal Tribunal in **British Home Stores v Burchell [1980] ICR 303**. What the Tribunal has to decide is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief – that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, that the employer at the stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

22. Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular, if they do not give him a fair opportunity of explaining before dismissing him, and they do not have regard to equity or the substantial merits of the case, if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had gathered further information or evidence. If the employer forms the belief hastily and acts hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain, then their belief is not based on reasonable grounds and they are not acting reasonably.

23. The definition of “dishonesty” was confirmed by the Supreme Court in **Ivey v Genting Casinos [2017] UKSC 67**. The Supreme Court held that a fact-finding tribunal must ascertain subjectively the actual state of the individual’s knowledge or belief as to the facts, and then determine whether his conduct was honest or dishonest by the objective standards of ordinary decent people. The Tribunal found in the present case that the claimant must have understood that his actions were dishonest. The Tribunal found that, applying the objective standard of the ordinary decent person, the claimant’s actions in removing the burger and consuming it without paying for it, were in fact dishonest.

24. Nevertheless, it is not sufficient for a respondent employer to simply state that it has a “zero tolerance” approach to dishonest. The employer’s categorisation of conduct as dishonest must be reasonable in all the circumstances, and its decision to dismiss for that reason must still satisfy the “reasonable responses” test, which is explained above.

### **Conclusion**

25. In the present case, the Tribunal found that it was reasonable for the respondent to categorise the claimant’s conduct as dishonest. That dishonesty included the removal and consumption of the burger and the claimant’s attempts to cover up his conduct when questioned by his supervisor. Bearing in mind the nature of the respondent’s business, the Tribunal found that the respondent’s decision to dismiss the claimant for that misconduct was a decision which fell within the range of reasonable responses open to a reasonable employer in all the circumstances of the case.

26. For those reasons the complaint of unfair dismissal is not well-founded and is dismissed.

Authorised by Employment Judge Johnson

Date: 20 May 2021

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