



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102212/2020 (V)

5 **Held via Cloud Video Platform (CVP) on 17 & 18 September 2020**

Employment Judge M Sangster

10 **Mr A Kelly**

**Claimant
Represented by:
Mr Bryce -
Solicitor**

15 **B&M Retail Limited**

**Respondent
Represented by:
Mr Frain-Bell -
Advocate**

20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed

REASONS

Introduction

25 1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to were compiled into a joint bundle of 170 pages. An
30 additional document was presented by the claimant during the course of the hearing.

2. The claimant presented a complaint of unfair dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was conduct, which is a potentially fair reason. The respondent maintained that

they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal.

3. The respondent led evidence from three witnesses: Sean Shanley (**SS**), Store Manager for the respondent, John Thompson (**JT**), Area Manager for the respondent and Kevin Hamilton (**KH**), also an area manager for the respondent.
4. The claimant gave evidence on his own behalf.
5. Parties provided an agreed list of facts to the Tribunal, within the joint bundle.

Issues to be determined

6. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?
7. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?
8. If the claimant's dismissal was unfair, what compensation should be awarded?

Findings in Fact

9. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
10. The claimant's employment with the respondent commenced on 12 April 2014. When the claimant commenced employment with the respondent, he was a Deputy Store Manager. He was latterly, from 31 March 2019, employed as a Store Manager for one of the respondent's Dumfries stores.
11. As the Store Manager, the claimant was responsible for the day to day operation and management of the store, including management of staff, staffing levels, rotas and the respondent's Time and Attendance (**T&A**) entries for the store.
12. The claimant reported to JT. JT set projected sales forecasts for each store in his area, including that managed by the claimant. Target staff costs for each store were produced by payroll, based on a calculation which took into account the projected sales forecast.

13. The T&A system was used to record the start and finish times of all members of staff in the store, including the Store Manager. Start/finish times were recorded by each member of staff swiping their personal identification on one of the tills in the store. The information recorded in the T&A system could be overridden/amended by the Store Manager and the Deputy Store Manager. On Sunday of each week, the information recorded for the store that week was 'committed', meaning that it was sent to the central payroll team so that payment could be arranged for each member of staff.
14. The respondent has a Colleague Handbook. This is referred to in all contracts of employment and is stated to contain further terms and conditions of employment, including a Disciplinary Procedure.
15. The claimant participated in an induction process on the commencement of his employment. As part of this, he was shown the respondent's Colleague Handbook, informed where it was held and informed he required to make himself aware of its contents.
16. In April 2019, following the claimant's appointment to the role of Store Manager, an updated edition of the Colleague Handbook was issued. At least 5 copies were provided to be held in each store. The respondent required that every member of staff sign a declaration stating that they have access to and have read and understood the Colleague Handbook. As Store Manager, the claimant was responsible for ensuring that all members of staff in his store signed this declaration. He delegated that task to his Deputy Store Manager, Leeanne Agnew (**LA**). The claimant signed the declaration stating that he had access to and had read and understood the Colleague Handbook on 1 July 2019.
17. The Disciplinary Procedure contained in the Colleague Handbook provides 37 examples of what may constitute gross misconduct and may lead to summary dismissal. Included in that list are the following:
- 'Fraud or attempted fraud, deliberate falsification of any records, such as T&A, time sheets, driver's record logs, expenses claims, and so on, in respect of yourself or any fellow Colleague'*

'A serious, wilful breach and/or disregard of any of the Company's Rules and Safety Procedures'

18. In November 2019, a number of allegations were made in relation to the claimant's conduct. It was determined that a formal investigation should be conducted in relation to these. SS was appointed to conduct this. The claimant was suspended pending the outcome of the investigation.

19. In the course of his investigation, SS took the following steps:

a. He interviewed Kira Mclver (KM), Customer Service Assistant, on 18 November 2019. She alleged that the claimant had spoken to her in an inappropriate manner.

b. He interviewed Alex Rutherford (AR), Customer Service Assistant, on 18 November 2019. He alleged that the claimant had spoken to him in an inappropriate manner and pressured him to go on a night out. He also alleged that, on 8 November 2019, he had been required by the claimant to work 4 hours over his contracted 12 hours for the week and was paid £40 cash by the claimant personally to do so. He stated that the claimant told him not to tell anyone about the arrangement (the **T&A allegation**).

c. He interviewed the claimant on 25 November 2019. At the outset of the meeting, he provided the claimant with the notes of the meetings with AR or KM and gave him the opportunity to read these. He then asked him to respond to the allegations made in turn. In relation to the T&A allegation he stated as follows:

'The final allegation made was in relation to payment of wages and manipulation of timesheets. On 8th Nov Alex R alleges that you called him to the office to discuss an email from John Thompson about cutting back on overtime. You stated to Alex R you needed him on the Saturday and to do his normal 6 hour shift, even though he only had a further 2 to do to make up his contract. You told him the extra 4 hours would need to be unpaid and you then took out a wallet and told him you would pay him for these 4 hours out of your own pocket. Alex R states you offered him £40 for remaining hours owed for that pay week in total for hours

that were not processed through T&A. Alex R has a contract of 12 hours. On the weekend question he worked a total of 20 hours. 12 were processed through T&A leaving eight hours outstanding which was allegedly paid for in cash by yourself. Is the above allegation correct?

5 The claimant responded 'Yes'. He stated he did so due to pressure to cut staffing costs and that he had told his deputy manager, LA, about the arrangement as he was not there on the Sunday of that week, so she would require to commit the payroll.

10 d. He interviewed LA on 28 November 2019. She denied that the claimant had informed her about the arrangement he had with AR. She stated she would have informed senior management if she had been made aware of this.

20. Notes, reflecting what was discussed at each meeting, were taken during each discussion and, at the conclusion of each meeting, the individuals were asked
15 to review the notes and sign them to confirm they were accurate.

21. The conclusion of SS's investigation was that there was no disciplinary case to answer in relation to any of the allegations made, other than the allegations related to AR's hours recorded on the T&A system and the payment made to him by the claimant.

20 22. By letter dated 29 November 2019, the claimant was invited to a disciplinary hearing on 4 December 2019. He was informed that the purpose of the disciplinary hearing was to discuss the following allegations:

a. That on 8 November 2019, he paid AR £40 in cash for working 8 hours;
b. That on week 32 AR worked 20 hours, but only 12 hours were logged
25 and processed on T&A;

c. That he paid AR £40 of his own monies; and

d. That by doing this he committed T&A fraud.

23. He was informed that, if substantiated, the allegations may amount to gross misconduct and could lead to the termination of his employment, without notice.

24. Appended to the letter were the notes of the investigation meeting held with claimant and the notes of the meeting held with LA. The disciplinary policy was also enclosed.
25. The notes of the meetings with AR or KM, which had been provided to the claimant to read during the course of his investigation meeting, were not enclosed with the disciplinary invite letter.
26. The disciplinary hearing ultimately took place on 6 December 2019, having been postponed at the claimant's request. It was chaired by JT, who was accompanied by a colleague. The claimant was not accompanied.
27. Around 15-20 minutes prior to the commencement of the disciplinary hearing, the claimant requested the notes of the investigation meetings with AR and KM. These were provided to him. He read them prior to the disciplinary hearing commencing. At the commencement of the disciplinary hearing JT asked the claimant if he had had time to read over all the statements. He indicated that he had.
28. At the disciplinary hearing, the claimant admitted that:
- a. On 8 November 2019, he paid AR £40 in cash for working 8 hours;
 - b. That the cash paid to AR was the claimant's own money; and
 - c. That during the week in which 8 November 2019 fell, AR worked 20 hours, but only 12 hours were logged and processed on the respondent's T&A system.
29. The claimant accepted that paying someone out of his own pocket was wrong, but denied that he had committed T&A fraud. JT put it to the claimant that, if his store was to receive a visit from HMRC and they investigated the actual hours worked and individual colleague's earnings, there would be a discrepancy in Alex's case. The claimant agreed, but indicated that all store managers would be in the same position, as they engaged in the practice of prepaying (whereby colleagues were recorded as having worked in one week, whereas in fact the hours were actually worked in the following week). When asked if he could provide any evidence of other store managers engaging in this process, the

claimant indicated that he could not. It was highlighted to him that the allegations against him were different to prepayment, in any event, as he had paid the individual of his own pocket.

5 30. JT adjourned the hearing to deliberate. He reconvened the meeting 30 minutes later and informed the claimant that he had found each of the allegations to be admitted or substantiated. He stated that the claimant's actions amounted to gross misconduct, he would be dismissed as a result and a letter would be sent to him confirming this. He informed the claimant of his right to appeal. At the conclusion of the meeting, the claimant reviewed the handwritten notes of the meeting and signed them, confirming they were accurate.

10 31. A letter was sent to the claimant on 13 December 2019, confirming that JT found that the allegations made against him were substantiated. The letter stated *'as a colleague of the business it is your responsibility to ensure all Company Policies and Procedures are met and adhered to accordingly...The actions demonstrated by you on 8th November 2019 are classed as fraudulent activity. You have admitted to these actions. This is fraudulent activity on T&A as you failed to correctly register the right amount of hours worked by a colleague and by paying said colleague with your own money... You were able to demonstrate a clear understanding that the actions you carried out were wrongful...You committed T&A fraud by not submitting a true and accurate account of the hours worked by Alex Rutherford. If your store was visited by HMRC and they investigated individual colleague's earnings and the tax pay outs this case would flag a discrepancy. This could pose a risk to all parties involved.'* The letter confirmed that the claimant's actions constituted a breach of the provisions of the Colleague Handbook stated at paragraph 17 of this judgment. It went on to say that the claimant's actions had *'led to a loss of trust and confidence in you and your ability to carry out your role to the standard required by the company, and that you have been summarily dismissed, without notice, from your employment.'* The letter also informed the claimant of his right to appeal.

15
20
25
30

32. On 23 December 2019, the claimant confirmed, by email, that he wished to appeal against the decision to terminate his employment. His email set out the following grounds of appeal:
- 5 a. SS's investigation failed to follow the ACAS code of practice on disciplinary and grievance procedures;
 - b. That the claimant's purported signature on the Employee Handbook was false; and
 - c. That the claimant had not been provided with a signed contract of employment and job description in relation to his role as Store Manager.
- 10 33. The appeal hearing took place on 23 January 2020. It was chaired by KH. KH was accompanied by another member of staff who took handwritten notes during the meeting and he was accompanied by one of the respondent's HR officers. The claimant was not accompanied.
34. At the conclusion of the meeting, the claimant reviewed the handwritten notes
15 and signed them, confirming they were accurate.
35. KH did not uphold the claimant's appeal and confirmed his findings in a letter dated 29 January 2020.

Submissions

Respondent's submissions

- 20 36. Mr Frain-Bell, for the respondent, provided a written submission which was supplemented by an oral submission. He referred to s98 ERA and the Burchell tests, which he stated were satisfied. The claimant admitted his conduct in deliberately falsifying records and paying AR in cash. This amounted to gross misconduct. It was within the range of reasonable responses for the respondent
25 to dismiss the claimant in the circumstances and a fair procedure was followed.
37. He referred to the cases of ***Stewart v Western SMT Co Ltd*** [1978] IRLR 553 and ***H Dalton v Burton's Gold Medal Biscuits Ltd*** [1974] IRLR 45 in relation to clocking offenses and the cases of ***Elliot Brothers (London) Ltd v Colvered***

[1979] IRLR 92 and *Arthur v Ghana International Bank Plc* [2019] 1 WLUK 575 in relation to reasonableness.

38. In the event that the dismissal was found to be unfair, there should be a significant reduction to compensation, on the basis Polkey and/or the claimant's contribution to his dismissal.

Claimant's submissions

39. Mr Bryce, for the claimant, stated that the claimant had been treated inconsistently. He invited the Tribunal to find that other managers were engaged in the practice of prepayment and that, as a result, this undermined the fairness of the claimant's dismissal, as there was a clear disparity in the treatment.

40. He stated that JT's involvement in chairing the disciplinary hearing was inappropriate, given that he set the projected sales forecasts for the claimant's store and it was as a result of pressure to meet targets, particularly staff cost targets which were linked to sales forecasts, that the claimant took the actions he did. He stated that JT demonstrated a closed mind during the disciplinary hearing and that he had prejudged matters. This was demonstrated by the questions posed during the disciplinary hearing and the fact that he failed to investigate the prepayment matter further.

41. If the dismissal was found to be unfair, no reduction should be made for Polkey and/or contributory conduct.

Relevant Law

42. S94 ERA provides that an employee has the right not to be unfairly dismissed.

43. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

44. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

5 “(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

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

45. Where an employee has been dismissed for misconduct, **British Home Stores v Burchell** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

15 i. whether the respondent genuinely believed the individual to be guilty of misconduct;

 ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

 iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

20 46. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have ‘substituted its own view’ for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any
25 given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439).

47. Equity means that similar cases should be dealt with in a similar manner. Valid arguments in relation to inconsistency of treatment however only arise in limited circumstances, such as where employers have previously treated similar matters less seriously, leading employees to believe that such behaviour is condoned or to an inference that the asserted reason for dismissal is not the real reason, or where employees, in truly parallel circumstances arising from the same incident, are treated differently (*Hadjoannou v Coral Casinos Limited* [1981] IRLR 32, approved by the Court of Appeal in *Paul v East District Health Authority* [1995] IRLR 305).

10 Discussion & Decision

48. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

49. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as *Iceland Frozen Foods Limited* that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

50. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did JT have a genuine belief?

51. The Tribunal concluded that JT did have a genuine belief that the claimant had committed the gross misconduct detailed in the dismissal letter.

Did JT have reasonable grounds for his belief?

52. The Tribunal noted that the claimant admitted that:

- a. in week 32 he had incorrectly recorded on the respondent's T&A system that AR had worked for 12 hours, when he had in fact worked for 20; and
- b. on 8 November 2019 he paid AR £40 in cash, of his own money, for working 8 hours.

JT accordingly had reasonable grounds for his belief that the first three allegations were substantiated.

53. Whilst the claimant denied that his actions amounted to T&A fraud, the Tribunal find that, in light of the admissions made by the claimant, that JT had reasonable grounds to believe that the claimant's accepted actions amounted to T&A fraud.

54. Having reached these findings, the finding that the claimant's conduct amounted to gross misconduct was open to JT in the circumstances and fell within the band of reasonable responses. The Tribunal did not accept that there was an unjustified disparity in the treatment of the claimant in comparison with other managers who, the claimant asserted, engaged in the practice of prepayment. Firstly, there was no evidence that such a practice was adopted by other managers. Secondly, even if it did, any such practice was different to the allegations against the claimant. With prepayment, the overall number of

hours recorded as being worked by each individual was correct and the correct declarations regarding payments made to employees were being made to HMRC. Paying cash in hand for hours worked and changing the respondent's records to suggest someone had not in fact worked when they had meant that incorrect information was necessarily provided. The Tribunal did not accept therefore that the circumstances of any manager who may engage in prepayment were truly parallel with those of the claimant. The argument in relation to consistency was accordingly not relevant.

55. Having reached the conclusion that the claimant had committed gross misconduct by his actions, JT concluded that the claimant should be summarily dismissed. JT felt that the claimant's admitted conduct constituted a breach of the respondent's disciplinary rules and that the claimant's actions undermined the trust and confidence the respondent required to have in him to carry out his role to the standard required by the company. It cannot be said that no reasonable employer, faced with these circumstances, would have dismissed the claimant. JT's conclusion accordingly fell within the band of reasonable responses open to the respondent in the circumstances.

Was there a reasonable investigation?

56. The respondent conducted a balanced investigation. SS interviewed all the individuals who were potentially implicated. Having done so, SS concluded that there was a disciplinary case to answer by the claimant in relation to the T&A allegation, but discounted the other matters as a result of insufficient evidence. There were no further steps which should, reasonably, have been undertaken during the investigation.

Procedure

57. There were a number of challenges to the procedure followed by the respondent. The principal challenges are addressed below.

- a. **Failure to provide the claimant with all of the documents in relation to the investigation.** The claimant was invited to a disciplinary hearing and provided with a copy of some of the documents compiled by SS during the course of the investigation, namely the notes of the meeting

held with him and the notes of the meeting held with LA. He was not, initially, provided with the notes of the meetings with AR or KM. He was however aware that these individuals were interviewed by SS and that there were notes of these meetings, as he had been asked to read them during the investigation meeting held with him. He requested these notes immediately prior to the disciplinary hearing and they were provided to him. He was given time to read them. At the outset of the disciplinary hearing he was asked if he had had time to read over all of the statements and he confirmed that he had. Any unfairness in copies of these two statements not being provided to the claimant with the disciplinary invite letter was accordingly remedied prior to the disciplinary decision being taken.

b. **JT chairing the disciplinary hearing.** JT was the claimant's line manager. He set sales forecasts for the claimant as part of his duties. Target staff costs for each store were linked to the sales forecasts. Whilst the claimant's stated motive was to reduce staffing costs, to bring them in line with the targets, the Tribunal did not accept that JT was not sufficiently impartial to chair the disciplinary hearing as a result.

c. **JT prejudged the outcome of the disciplinary hearing.** The Tribunal did not accept this to be the case, having reviewed the agreed minutes of the meeting and considered evidence presented. JT's questioning was appropriate in light of the admissions made by the claimant and the stated allegations. Given that the claimant did not provide names of any individuals who he claimed engaged in the practice of prepayment, or provide any evidence of this, it was open to JT to take the view that no further investigation into the matter was required. This was particularly so given that, even if such a practice was taking place, prepayment was quite different to, and not as serious as, the claimant's alleged conduct.

58. The respondent investigated the allegations against the claimant. They informed him of the allegations and the potential consequences and provided copies of the evidence compiled. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the

opportunity to appeal. He was informed of his right to be accompanied at all stages, but declined the right to do so. The respondent followed their internal procedures.

59. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Conclusions re s98(4)

60. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.
61. For these reasons, the claim of unfair dismissal is dismissed.

Employment Judge: M Sangster
Date of Judgment: 20 September 2020
Entered in register: 24 September 2020
and copied to parties