



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Nebojsa Marinkovic  
**Respondent:** Sainsbury's Supermarkets Limited  
**Heard at:** East London Hearing Centre  
**On:** 27 April 2021  
**Before:** Employment Judge Ross

## Representation

**Claimant:** Mr Marinkovic (Claimant's Son)  
**Respondent:** Mr Liberadzki (Counsel)  
**Interpreter:** Ms N Davis

## RESERVED JUDGMENT

1. The complaint of unfair dismissal is not upheld.
2. The Claim is dismissed.

## REASONS

1. The Claimant was employed by the Respondent between 20 July 2018 and 16 September 2020 as a Delivery Driver at the Twelve Trees Crescent Store. After a period of early conciliation, between 13 October 2020 and 10 November 2020, the Claimant presented a claim alleging that he had been unfairly dismissed. By its ET3 response, the Respondent contended that the Claimant had been fairly dismissed for gross misconduct, namely for theft from another employee.

## The Hearing

2. At the hearing before me, the Tribunal Service had arranged for an interpreter to attend to assist the Claimant. Ms Davis attended and provided interpretation throughout the hearing, save during the submissions made on behalf of the Claimant by his son Dean Marinkovic who had discussed the submissions with the Claimant prior to the hearing restarting after the lunch adjournment. The Tribunal ensured that the Interpreter had adequate breaks, and that any question or answer was repeated for the Interpreter as necessary. The Claimant made no complaint at this hearing that he did not understand any question or any other point and when he did seek clarification of the Interpreter, this was provided either by the Interpreter repeating or by the Interpreter asking the Tribunal what exactly had been said.

3. Having initially said that he did not want to be represented by Dean Marinkovic, the Claimant asked for permission for his son to represent him at the point of cross-examination of the first witness, Mr Drew. I allowed Mr Marinkovic junior to represent his father having decided that this would further the overriding objective. Thereafter, Mr Dean Marinkovic asked questions, with my assistance in breaking down longer questions, by dividing the questions into shorter or more concise questions.

4. Any other Court or Tribunal considering this set of Reasons must understand the following. Mr Marinkovic junior put few questions to either witness for the Respondent despite the assistance of the Employment Judge. The assistance of the Employment Judge could not be such as to act as a lawyer for the Claimant particularly in circumstances where:

- 4.1 The ET1 claim form contained only very short particulars - consisting of 3 – 4 lines in box 8.2;
- 4.2 The witness statement of the Claimant was very short consisting of 2 quite short paragraphs; and
- 4.3 Both the ET1 and the witness statement stated that the Claimant thought that the can of Coke, which he admitted taking, had been left for disposal by someone leaving it behind; but the evidence before me pointed strongly to the fact that this reason was not given at the disciplinary hearing or the investigation hearing.

## The Issues

5. The following list of issues was outlined by Employment Judge Ross at the outset of the hearing; and it was agreed by the Respondent and not opposed by the Claimant:

- 5.1. What was the reason for dismissal? When I asked if the reason for dismissal was admitted to be the reason alleged by the Respondent (a reason relating to conduct, specifically gross misconduct), the Claimant stated that the reason stated by the Respondent was a lie; but he did not allege any other reason for his dismissal either at that stage nor during his evidence.
- 5.2. Was it for a potentially fair reason?

- 5.3. Was the decision to dismiss procedurally fair?
- 5.4. If procedurally fair did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer? In conduct cases, in considering the fairness of a dismissal, the classic questions for a Tribunal to consider are:
  - 5.4.1. Did the employer have a genuine belief that the employee was guilty of misconduct?
  - 5.4.2. Was that belief based on reasonable grounds?
  - 5.4.3. Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See **BHS v Burchell** [1980] ICR 303)
- 5.5. If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event had a fair procedure been adopted?
- 5.6. Did the Claimant contribute to the dismissal? If so, what percentage deduction to the basic and/or compensatory awards is just and equitable?

### **The Evidence**

6. I read witness statements for and heard oral evidence from the following witnesses:

- 6.1. Ben Drew, 4S Customer and Trading Manager;
- 6.2. Mr Manjurul Haque, 5S Operations Manager;
- 6.3. The Claimant

The witness statements of Mr Drew and Mr Haque were detailed and cross-referred to documentary evidence in the hearing bundle, including the notes of the investigation meeting, the disciplinary hearing and the appeal hearing, and the dismissal letter and appeal outcome letter.

7. The Respondent's witnesses were not challenged on key issues, so I put various points to them to assist the Claimant to put his case.

8. I found both of the Respondents' witnesses to be credible and reliable witnesses with their evidence corroborated by the documents and to some extent by the evidence of each other.

9. As I have explained, the Claimant's witness statement was very limited in scope containing two paragraphs. The first and only substantive paragraph stated: "*I was in the cafeteria when I saw a coca cola left unattended, there was no name tag on the can of coke to indicate it belonged to somebody, I assumed that the can was left for*

*disposal as normal people leave their unwanted food and drinks when they are in a rush and leave it to be disposed by somebody else”.*

10. It is important to record that the Claimant admitted that at the investigation meeting, the disciplinary hearing, and the appeal hearing, he understood all questions and could answer all the questions put to him. It was corroborated by his own evidence in which he accepted that he had worked for the Respondent for two years and had communicated every day with colleagues and customers during that time.

### **Findings of Fact**

11. The Claimant, like all the Respondent’s employees was subject to the Respondent’s disciplinary and appeals policy which is at page 117 and following pages in the bundle. At page 118 the policy states as follows:

#### “Gross Misconduct

*There are certain conduct issues that are considered so serious, they may result in dismissal without notice, even for a first offence. These instances are termed “gross misconduct”. Some examples of gross misconduct are:*

- *Theft or attempted theft from the company, colleagues or customers”*

12. As I have stated, the Claimant was employed as a Delivery Driver. This was a position of trust. A Delivery Driver in his role delivered online orders which would include a high value of stock, which was delivered to customers. This role was carried out unsupervised, so the Respondent had to be able to trust the Claimant.

13. The Respondent received a complaint from an employee, X, which was that she had bought two drinks and food in the canteen and had gone to the toilet and on her return found that one drink had gone.

14. By a letter dated 4 September 2020, the Claimant was invited to an investigatory meeting. The letter set out the allegation which is at page 62. The Claimant was advised of his right to be accompanied.

15. On 7 September 2020, the investigation meeting took place. The Investigating Manager was Mr Matimbias. During that investigation meeting, Mr Matimbias showed the Claimant the CCTV footage from the canteen at the relevant time on 31 August 2020. During the investigation interview, the following evidence was given:

- 21.1 The Claimant admitted taking a can of coke from a sofa in the canteen;
- 21.2 The Claimant admitted that it was not his can of Coke;
- 21.3 The Claimant stated (in answer to the question whether anyone had told him to take it): *“no, I was alone there, and I thought someone forgot the coke, it is just 75p”;*
- 21.4 The Claimant admitted that there were two cans of Coke on the sofa but that he only took one.

- 21.5 The Claimant admitted that he would have lied about where he obtained the can from if he had been asked by Security (see page 67).
- 21.6 The Claimant admitted that he was guilty, and it was his fault (see page 69) where he states, *"I am sorry, it was my fault, I am sorry"*.
16. Mr Matimbias decided that the case should proceed to a disciplinary hearing.
17. On 13 September 2020, the Respondent sent the Claimant a charge letter, inviting him to a disciplinary hearing. The letter set out the allegation and it warned the Claimant that a possible outcome was dismissal.
18. The disciplinary hearing took place on 16 September 2020. The Hearing Officer was Ben Drew. Before the disciplinary hearing commenced, he had reviewed the evidence from the investigation including the CCTV. He had decided that it was thorough, and that no reinvestigation was needed.
19. At the commencement of the disciplinary hearing, the Claimant was not accompanied by a work colleague or a representative. Mr Drew adjourned to ensure that a work colleague could be arranged for the Claimant. The hearing proceeded after a work colleague had been arranged.
20. The notes of the disciplinary hearing are at pages 75 – 82 of the bundle. I find that these are an accurate record of the meeting even if not every word was recorded. In particular, during the disciplinary hearing the following evidence was given:
- 26.1 The Claimant admitted taking the can of Coke at various points during the hearing as set out in paragraph 16 of the witness statement of Mr Drew.
- 26.2 The Claimant specifically admitted that he was at fault and that he was "guilty".
- 26.3 The CCTV footage was shown at the meeting. Mr Drew considered that this evidence showed that the Claimant went over to the sofa, sat down next to the cans and after looking around took a can and quickly left. In cross-examination, Mr Drew explained that the CCTV showed that the Claimant had sat down for only about a minute or less. He was not challenged on that evidence nor on what the CCTV evidence showed to him.
- 26.4 At the disciplinary hearing, the Claimant failed to give any good or legitimate reason why he took the can of Coke. His response to questions was either that he did not know why he took it or that he was not thinking at the time.
21. Mr Drew adjourned the disciplinary hearing and reviewed the evidence including reviewing the CCTV and the investigation notes.
22. Mr Drew decided that the Claimant was guilty of the allegation of theft for the reasons explained at paragraph 20 of his witness statement. He believed that this was an opportunistic theft by the Claimant. I found that this was an honest belief based on reasonable grounds. The reasonable grounds consisted of the evidence collected

during the investigation and at the disciplinary hearing. I should add that it was never put to Mr Drew during his evidence that he was lying nor that his memory was unreliable.

23. At the hearing before me, during the cross-examination of Mr Drew, it was alleged that there was no reason to discipline the Claimant because the item taken did not belong to Sainsbury's and it was never taken off the premises. This was a point never raised during the investigation meeting or the disciplinary hearing. Mr Drew explained that the canteen was run by a third-party caterer and the can was not sold by the Respondent nor owned by the Respondent or caterer at the time that it was taken. I found that Mr Drew had an honest belief based on reasonable grounds in the form of the evidence from colleague X and his knowledge of the canteen arrangements that X owned the two cans having paid for them in the canteen, including the can of Coke taken by the Claimant.

24. At the end of the disciplinary hearing, having considered the evidence, Mr Drew decided to dismiss the Claimant for the reasons that he gave in paragraphs 20 – 21 of his witness statement. Mr Drew was not challenged on this evidence during cross-examination. Mr Drew decided that the Respondent had lost trust in the Claimant; the theft of any item of whatever value was not acceptable to the Respondent.

25. By a letter dated 24 September 2020, Mr Drew set out the outcome of the disciplinary hearing with his reasons for dismissal, which further supported the Respondent's case that he held an honest belief based on reasonable grounds that the Claimant was guilty of the allegation.

26. At the disciplinary hearing, the Claimant did not say that the can of Coke he took had been abandoned by a member of staff and left for disposal. Consequently, this is not addressed at the disciplinary hearing nor in the dismissal letter. However, insofar as it was a possibility that Mr Drew should have considered, I find that he had an honest belief based on reasonable grounds that this was not the reason that the Claimant took the can, because this explanation was not consistent with the Claimant's suspicious behaviour shown on CCTV and that a full and unopened can would not be left for disposal on a canteen sofa.

27. As I have explained, at no time did the Claimant fail to understand questions put to him or the allegations against him at the disciplinary hearing. Mr Drew was not challenged that the Claimant had every opportunity to put his case at the disciplinary hearing, and that Mr Drew ran through all the points with him. I found that the notes of the interview demonstrated that the Claimant had sufficient understanding of the questions asked and the allegation made.

28. By grounds of appeal dated 28 September 2020, the Claimant appealed. The grounds of appeal are set out at pages 90 – 91 of the bundle.

29. The appeal hearing took place on 13 October 2020. It was heard by a more senior manager than Mr Drew, namely Mr Haque. Mr Haque had had no previous contact with the Claimant. At the appeal hearing, the Claimant was represented by one of his sons who read out a statement at the commencement of the appeal. This statement is in the bundle at page 107. Mr Haque had this statement copied. This statement states that at the time the Coke was taken, the Claimant honestly believed that it had been left for disposal and that he had taken it to drink in the smoking area

not knowing that it belonged to somebody else. It stated that he would have immediately reimbursed the owner if that person had approached them. The statement went on to say that it was not his intention to steal the Coke and that he had never stolen anything from the Respondent.

30. The appeal was not upheld for the reasons explained by Mr Haque in his witness statement and his oral evidence.

31. Under the Respondent's procedure, the appeal is basically a review of all the evidence with consideration of grounds of appeal: See page 122. However, in this case there was little difference between the disciplinary hearing and the appeal hearing which was more like a rehearing with the opportunity to the Claimant to raise further points in the grounds of appeal. This is evidenced by the appeal hearing notes at pages 97 – 106. Mr Haque did not uphold the appeal. His reasons were set out in the appeal decision letter dated 14 October 2020 (see page 108 – 112). The appeal decision addressed each ground of appeal and gave reasons why it was rejected. This explained that the issue was not about a can of Coke or the value of that item but about the trust that the Respondent could have in the Claimant.

32. In cross-examination, it was put to Mr Haque that the statement read out by the Claimant's son at the appeal hearing demonstrated that the Claimant was remorseful. However, in his oral evidence, Mr Haque explained why it did not appear to him that the Claimant was remorseful because he had seen and heard the Claimant at the appeal hearing and witnessed his body language. For example, he had heard his replies at page 102 at which point of the hearing the Claimant had shouted and referred to dismissal being for a can of Coke.

### **The Law**

33. In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within section 98 Employment Rights Act 1996 ("ERA").

34. A potentially fair reason is one which relates to conduct: section 98(2)(b) ERA.

35. Gross misconduct is conduct which is so serious that it goes to the root of the contract. By its very nature, it is conduct which would justify dismissal, even for a first offence.

36. I directed myself to section 98(4) ERA, which provides as follows:

*"(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."*

37. The burden of proof on the issue of fairness is neutral.

38. In conduct cases, in considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

- (a) Did the employer have an honest belief that the employee was guilty of misconduct?
- (b) Was that belief based on reasonable grounds?
- (c) Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See BHS v Burchell [1980] ICR 303)

42. I directed myself to the principles which it must apply when applying section 98(4) ERA:

- 42.1 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.
- 42.2 On the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.
- 42.3 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See Foley v Post Office and HSBC Bank plc v Madden [2000] IRLR 3.)

39. The Tribunal reminded itself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see Sainsbury plc v Hitt [2003] ICR 111. I directed myself to the following passage in Hitt, with emphasis added by me, which I found to be relevant to this case:

*"The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. **The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.** The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was*



*improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out.*"

40. Reading Hitt and Foley together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer.

41. Section 98(4) ERA focuses on the need for an employer to act reasonably in all the circumstances. In A v B [2003] IRLR 405, the EAT (Elias J presiding) held at paragraph 60 that the relevant circumstances include the gravity of the charge and their potential effect upon the employee:

"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

#### *Appeals*

42. In Taylor v OCS Group Ltd [2006] IRLR 613, it was stated that ultimately a tribunal must look at the overall fairness of the procedure, and not just consider whether the appeal had taken the form of a rehearing rather than a review.

#### **Conclusions**

43. After the lunch adjournment, submissions were heard from each party. I took into account each and every submission that was made even if I do not set them out in these conclusions.

44. Applying the law set out above to the findings of fact made, I reach the following conclusions on the issues set out above.

#### *Issues 1 and 2*

45. The reason for dismissal was a reason related to the conduct of the Claimant, specifically the theft of a can of Coke belonging to another colleague. The dismissal was for a potentially fair reason, namely a reason relating to the misconduct of the Claimant. Mr Drew was not challenged on his evidence that he had an honest belief that the Claimant was guilty of theft of the can of coke on 31 August 2020.

46. I concluded that Mr Drew had reasonable grounds for that belief for at least the following reasons:

- 51.1 A complaint had been made by colleague X that one of her cans of drink was gone;
- 51.2 The evidence of the CCTV and what it showed as explained in his witness statement and oral evidence;
- 51.3 The Claimant's admission that he had taken the can of Coke and that it was not his can;
- 51.4 The Claimant provided no real explanation to Mr Drew as to why he had taken the can. For example, he did not explain to Mr Drew that he believed that the can had been abandoned and had been left for disposal.

*Issue 3*

47. There was no evidence nor allegation that the Respondent had not followed its own procedure. I concluded that the Respondent had followed its disciplinary procedure and that the procedure was manifestly fair and reasonable in the circumstances of the case. There had been an investigation that was reasonable in circumstances in which an allegation of dishonesty had been made, including reviewing CCTV evidence and giving the Claimant an opportunity to put his case in response to the evidence gathered. In particular, Mr Drew went beyond what was necessary to ensure that the Claimant had a representative for his disciplinary hearing.

*Issue 4*

48. I found that the decision to dismiss was within the band of reasonable responses open to Mr Drew in the circumstances of this case for the following reasons:

- 53.1 The Respondent's procedure set out that theft from a colleague was an example of gross misconduct.
- 53.2 The Respondent's disciplinary policy also set out that offences of gross misconduct were likely to lead to dismissal even for a first offence.
- 53.3 The Claimant gave no legitimate reason at the disciplinary hearing why he had taken the can of Coke.
- 53.4 The CCTV was reasonably found by Mr Drew to show that the Claimant's conduct was dishonest and that he had stolen the can.
- 53.5 The Claimant was in a position of trust as a Delivery Driver. The Respondent needed to be able to trust the Claimant because he was dealing with valuable stock. The theft amounted to such a serious breach of trust that the Respondent had lost trust and confidence in the Claimant.
- 53.6 The Claimant had a full and fair appeal. The same or similar factors led Mr Haque to the same conclusion that Mr Drew had reached which was that the sanction of dismissal should be upheld. On the evidence before him, I find that this finding was well within the band of reasonable responses open to an Appeal Manager on the facts in this

case.

- 53.7 The value of the item taken was not relevant because any theft was unacceptable to the Respondent.

*Remaining Issues*

49. Having reached the above conclusions, there is no need for me to consider the remaining issues.

**Summary**

50. The complaint of unfair dismissal is not upheld. The Claim is dismissed. The provisional date for a remedy hearing shall be vacated.

**Employment Judge Ross**  
**Date: 2 June 2021**