



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Hayden

**Respondent:** Lidl Great Britain Limited

**Heard at:** Manchester (by CVP)

**On:** 5 March 2021  
13 April 2021  
(in Chambers)

**Before:** Employment Judge Ainscough  
(sitting alone)

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms J Connolly, Counsel

# JUDGMENT

The judgment of the Tribunal is:

The claim of unfair dismissal is unsuccessful and is dismissed.

# REASONS

## Introduction

1. The claimant worked as a manager for the respondent, a supermarket, from 7 January 2008 until his dismissal on 15 June 2020.
2. The claimant began early conciliation on 14 August 2020 and received a certificate on 14 September 2020. The claimant lodged the Employment Tribunal claim for unfair dismissal on 13 October 2020.

3. The response of 27 November 2020 defended the proceedings. It stated that the claimant was dismissed for gross misconduct and the dismissal was fair in all the circumstances.

**Issues**

4. The respondent drafted a List of Issues for use at the tribunal. During the hearing, I was able to discuss that List of Issues with the parties and agree the following:

- (1) What was the respondent's reason for dismissing the claimant?
- (2) Did the respondent act reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him in the circumstances and in accordance with equity and the substantial merits of the case pursuant to section 98(4) of the Employment Rights Act 1996?
- (3) Did the respondent have a genuine belief in the claimant's misconduct?
- (4) Did the respondent have reasonable grounds for that belief?
- (5) Did the respondent follow a fair procedure when it dismissed the claimant?
- (6) Did the sanction of dismissal fall within the range of reasonable responses?
- (7) If the claimant's dismissal was unfair should any compensatory award be reduced to reflect the risk that the claimant would have been fairly dismissed by the respondent in any event?
- (8) If the claimant's dismissal was unfair, should any basic and/or compensatory award be reduced to reflect the claimant's contributory conduct prior to his dismissal?

**Amendment Application**

5. Whilst preparing for the hearing, the claimant asked the respondent to disclose documents about his health. The respondent refused to disclose these documents on the grounds of relevance, and the claimant intimated that he wished to amend his claim to include one of disability discrimination.

6. The claimant's application was dealt with at the outset of the hearing. I was able to establish that the claimant was in fact stating that he wanted to bring a claim for bullying which had caused his ill health. The claimant was not saying that he was a disabled person and that as a result of his disability he had been subject to either unfavourable treatment, less favourable treatment or harassment. I explained the limits of a discrimination claim to the claimant and it was agreed that he was not a disabled person and had not been subject to such prohibited treatment contrary to

the Equality Act 2010. As a result, the claimant withdrew his application to amend his claim and we were able to proceed with the final hearing.

### Evidence

7. I heard evidence from Michael Poole, the Regional Head of Sales and the dismissing manager. I also heard evidence from Chris Marshall, a Regional Director and the appeal manager. I finally heard evidence from the claimant and was referred to a bundle of documents that had been agreed at 319 pages.

### Relevant Legal Principles

8. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

9. The primary provision is section 98 which, so far as relevant, provides as follows:

- “(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 sub-section (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 sub-section if it ... relates to the conduct of the employee ...
- (3) ...
- (4) Where the employer has fulfilled the requirements of sub-section (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”.

10. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

11. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a

number of decisions of the Court of Appeal. The “**Burchell** test” involves a consideration of three aspects of the employer’s conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is “yes”, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

12. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

13. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.

### **Relevant Findings of Fact**

#### Claimant’s employment

14. At the time of his dismissal, the claimant was the Store Manager of the respondent’s Ashton store. The claimant was responsible for the performance of the store and 18 employees. The claimant’s line manager was Dawn Gough. Dawn Gough reported to Michael Poole, the Regional Head of Sales. Kirsty Palmer, the Regional Director, was responsible for the performance of the region, and Michael Poole reported directly to her.

15. In October 2019 the claimant was absent from work with stress. On 1 November 2019, the claimant subsequently raised a grievance about Dawn Gough. The claimant returned to work from sick leave on 2 November 2019.

16. The respondent operated a “till and safe” procedure. Part of that procedure prohibits employees from serving themselves with the respondent’s products and any stock purchased via a colleague, must be paid for before being consumed. The policy requires the employee to place the stock packaging in the “welfare area” with the receipt so that it can be checked at any time.

17. The claimant’s role of Store Manager was supported by a job profile that included leadership responsibilities and a requirement to comply with company guidelines. The job description also listed a number of competencies which included that a Store Manager be reliable, trustworthy and dependable.

18. The respondent also operated a “high five leadership principles” policy. Those principles included:

- (a) Taking responsibility and being a role model; and

(b) Creating trust and acting fairly.

19. The respondent's disciplinary policy sets out a non-exhaustive list of behaviours that could amount to gross misconduct which includes:

- (a) Fraud or theft or attempted fraud or theft or otherwise acting dishonestly; and
- (b) A material failure to comply with the company policies and procedures from time to time in force.

20. In advance of any disciplinary hearing, an employee should be given notice and a reasonable amount of time to prepare. In addition, the employee should be provided with any evidence that will be considered at that hearing.

### The Incident

21. On 6 May 2020, whilst working a shift, the claimant took a sandwich and chocolate off the shop floor to eat whilst he was working. The claimant did not pay for the products prior to consumption. The claimant also drank a drink that he had purchased earlier that day.

22. On the same date, the Regional Director, Kirsty Palmer, visited the store. Kirsty Palmer saw the empty sandwich packet and half eaten chocolate at the entrance to the warehouse. Kirsty Palmer asked the claimant if he knew who the items belonged to and he said he did not but would find out. It was agreed that the claimant would look into the matter and report back to his line manager, Dawn Gough.

23. The claimant then spoke with a customer assistant, Daniel Molloy. The claimant asked Daniel to pay for the products and obtain receipts. Daniel Molloy refused to do this. The claimant asked Daniel Molloy again and he again refused and walked out of the claimant's office. Later in the shift, the claimant called Daniel Molloy into the office and asked him again to pay for the products and obtain a receipt otherwise the claimant would lose his job. On this third occasion Daniel Molloy agreed to pay for the products and obtain receipts.

24. At approximately 7.49pm Daniel Molloy paid for the chocolate, sandwich and drink (that had already been purchased by the claimant).

### Investigation

25. On learning of the incident, Dawn Gough undertook an investigation. As part of that investigation the claimant was spoken to on 8 May 2020 and informed Dawn Gough that the products belonged to Daniel Molloy and he had authorised Daniel to consume the products prior to payment because Daniel felt weak.

26. On 9 May 2020 Daniel Molloy spoke with Dawn Gough and confirmed that he had consumed the products because he was feeling weak and this had been authorised by the claimant.

27. From 9 May 2020 until 17 May 2020 the claimant was self isolating as a result of the coronavirus pandemic. From 17 May 2020 until 15 June 2020 the claimant was on annual leave.

28. On 25 May 2020 Dawn Gough held a second investigation meeting with Daniel Molloy. At that meeting Dawn Gough informed Daniel Molloy that she was in the process of obtaining the CCTV from 6 May 2020. Daniel Molloy was asked whether he took the products for consumption in the warehouse. On this occasion Daniel Molloy said he did not and that the products had been taken by the claimant. Daniel Molloy informed Dawn Gough that the claimant was upset that the claimant had lied to Kirsty Palmer and asked Daniel Molloy to pay for the products and say that they were his.

29. Later that day Dawn Gough conducted a second investigation meeting with the claimant during which the claimant admitted that he had lied to Kirsty Palmer about the ownership of the products and that he had asked Daniel Molloy to pay for the products as he did not want to lose his job. The claimant apologised for his behaviour.

30. During the investigation the claimant was not living at his home address and had arranged for Royal Mail to redirect any mail sent to his home address to his parent's home address.

#### Discipline hearing and dismissal

31. On 3 June 2020 the claimant was invited to a disciplinary hearing. The invitation letter set out the following allegations:

- (a) there had been a breach and/or material failure to comply with company policies and procedures; and
- (b) there had been fraud or theft or attempted fraud or theft or otherwise acting dishonestly on 6 May 2020.

32. The invitation was sent to the claimant's home address. The invitation included a copy of the disciplinary policy, a copy of the receipt and the meeting notes from the investigation meetings.

33. The claimant received the invitation on 12 June 2020. On 12 June 2020 the claimant's discount card was cancelled.

34. On 15 June 2020 the claimant attended a disciplinary hearing that was chaired by Michael Poole, the Regional Head of Sales. During the hearing the claimant admitted that he had taken the products without paying and had asked Daniel Molloy to pay for them. The claimant admitted that he asked Daniel Molloy three times before Daniel agreed to pay for the products. The claimant admitted that he had not put Daniel Molloy in a good position. The claimant agreed that it was not acceptable to put Daniel Molloy in that position. When the claimant was asked whether Dawn Gough could trust him again, he acknowledged that she could not.

35. At the end of the hearing Michael Poole dismissed the claimant for gross misconduct.

36. The claimant signed three of the four pages of the meeting notes to agree their accuracy but did not sign the fourth page because he left the meeting after he had been told that he had been dismissed.

37. During the meeting the claimant asked why he had not been provided with the statement of Kirsty Palmer. Michael Poole informed the claimant that he had not needed to consider the content of that statement. The claimant was told he would be provided with a copy of that statement prior to any appeal.

38. On 18 June 2020 Michael Poole sent a letter to the claimant, confirming the dismissal and provided a copy of Kirsty Palmer's statement and the notes of the disciplinary hearing.

#### Appeal

39. On 23 June 2020 the claimant appealed against his dismissal. The claimant's grounds of appeal were that he was suffering from poor mental health as a result of the actions of Dawn Gough. The claimant gave details of the difficulties he had experienced with Dawn Gough.

40. The claimant complained that he did not receive the invitation to the disciplinary hearing until 12 June 2020 and was concerned that his discount card had been cancelled on 12 June 2020. The claimant alleged that Dawn Gough had pursued the investigation because she knew he had lied, and it was a revenge because he had terminated her daughter's employment.

41. On 7 July 2020 the claimant was invited to an appeal hearing with Chris Marshall, a Regional Director.

42. The claimant attended the appeal hearing on 14 July 2020 with Chris Marshall and the regional head of HR Danny Morris as the notetaker.

43. During the appeal hearing the claimant disclosed that he had recently been divorced and this had affected his mental health. The claimant also detailed the difficulties he had with Dawn Gough. The claimant contended that he had confessed to Dawn Gough before being confronted about the CCTV, and that the 25 May 2020 was the first opportunity he had had to do so. The claimant admitted that he would not be in a position to performance manage Daniel Molloy.

44. The claimant alleged that the decision to dismiss was predetermined. The claimant cited the cancellation of his discount card and the late notification of the hearing. During the meeting Danny Morris, also asked questions. It was put to the claimant that he had not raised any of these points with Michael Poole during the disciplinary hearing. The claimant stated that that was because he did not expect to lose his job.

45. Following the appeal hearing, Chris Marshall referred the claimant for an Occupational Health assessment.

46. On 31 July 2020 the Occupational Physician reported that the claimant suffered with a depressive illness. The Occupational Physician was of the view that on 31 July 2020 the claimant was an adult with capacity who could understand decisions and the potential consequences of the decisions made.

47. The Occupational Physician advised that if an adult was suffering from depression it did not always mean that they would not have capacity to make decisions. However, the Occupational Physician was also of the view that if somebody was suffering from severe depression, this could have a detrimental impact on their decision making capacity.

48. It was the conclusion of the Occupational Physician that because the assessment took place approximately six weeks after the incident, he was unable to determine retrospectively the claimant's state of mind on 6 May 2020.

49. On 10 August 2020 the claimant received the outcome of his appeal. Chris Marshall dismissed the claimant's appeal because he was of the view that the claimant demonstrated sufficient decision making capability on 6 May 2020 similar to that which he had demonstrated during the appeal hearing and during the assessment with the Occupational Physician.

50. The claimant was informed that because he made a conscious decision to cover up his lies and coerce Daniel Molloy into those lies, the dismissal for gross misconduct was appropriate. Chris Marshall was concerned that the claimant only admitted what he had done after being confronted by Dawn Gough.

51. Chris Marshall did not accept that the previous issues with Dawn Gough played any part in the claimant's conduct. Chris Marshall was concerned that the claimant did not raise the issues about Dawn Gough with Michael Poole during the disciplinary hearing. Chris Marshall did not accept the cancellation of the claimant's discount card meant that the decision was predetermined.

## **Submissions**

### Claimant's Submissions

52. The claimant submits that the dismissal was unfair because the respondent did not follow its own policies and procedures. The claimant contends that relevant information was not supplied at the disciplinary hearing and the appeal hearing notes were not true or accurate.

53. The claimant states that being bullied by Dawn Gough impacted on his health and he was not capable of making proper decisions. The claimant submits that he suffered a traumatic two years with Dawn Gough as his manager.

54. The claimant is aware of others who have lied and had no disciplinary action taken against them, and had he been able to obtain the documents from the



respondent he could have proven this. It is the claimant's case that senior managers falsified documents.

55. The claimant believes if he had been through mediation with Dawn Gough following his grievance he would not be in this position today. The claimant asked the Tribunal to note that he has been through unimaginable pain and suffering.

#### Respondent's Submissions

56. The respondent submits that the burden of proof is on the respondent to establish a fair reason for dismissal. The burden of proof on whether the respondent acted reasonably or unreasonably is neutral. The Tribunal was reminded that it must not substitute its view for that of the respondent but rather to decide whether dismissal was within the range of reasonable responses.

57. The respondent submits that the respondent had a genuine belief of the misconduct because the claimant had admitted all that he had done. The respondent contends that Michael Poole is a credible witness and that dismissal was within the range of reasonable responses. It is the respondent's case that the claimant devised a tissue of lies for Daniel Molloy and he accepted that he pressured a junior employee into collusion with him. It is the respondent's case that a Store Manager has to be trusted without supervision, and that in fact, the claimant had undermined the trust both ways, with junior colleagues and the senior managers.

58. The respondent contends that Chris Marshall reached a reasonable decision to uphold the dismissal after he had obtained medical evidence about the claimant's mental health. The respondent contends that the claimant did not raise his mental health issues at work, did not raise them in his disciplinary hearing and there was no medical evidence to suggest that he was suffering from impaired decision making on 6 May 2020.

59. The respondent contends that the procedure was fair and if there was the odd glitch it would not render it unfair. The non provision of the Kirsty Palmer statement was not such a glitch because it added nothing to the process, and further it had not been proven that the invitation to the disciplinary hearing was late. The claimant did not contend he needed more time or that he was unprepared.

60. Finally, the respondent submitted that given the claimant's admissions during the disciplinary hearing, the appeal hearing and at this hearing, if there was a finding of unfair process, any financial award should be reduced to zero because of the claimant's culpability.

#### **Discussion and Conclusions**

##### Reason for claimant's dismissal

61. The claimant was dismissed on 15 June 2020 for gross misconduct. Section 98(2) of the Employment Rights Act 1996 provides that conduct is a fair reason for dismissal.

62. The claimant was dismissed for fraud or theft or attempted fraud or theft, or otherwise acting dishonestly, and a material failure to comply with the company policies and procedures from time to time in force. Both amount to gross misconduct within the respondent's disciplinary procedure.

63. Conduct was the reason for the claimant's dismissal, and in accordance with section 98(2) of the Employment Rights Act 1996 this is a fair reason.

Was the dismissal fair in all the circumstances?

Did the respondent conduct a reasonable investigation?

64. The incident took place on 6 May 2020 and by 9 May 2020 both the claimant and Daniel Molloy had been interviewed.

65. However, the claimant believes that following these interviews, Dawn Gough should have dropped her investigation because she had an explanation for why the products were in the warehouse. It is the claimant's contention that Dawn Gough only continued with the investigation because she knew what the claimant ate and did not believe what she had been told in the investigatory meetings.

66. It was not unreasonable for Dawn Gough to carry on with the investigation on this basis. As Dawn Gough had doubts about what she had been told, she made arrangements to view the CCTV footage.

67. On 25 May 2020 and prior to viewing that CCTV footage, Dawn Gough gave both the claimant and Daniel Molloy another opportunity to tell her what had happened on 6 May 2020. Dawn Gough discovered that both the claimant and Daniel Molloy had lied at the initial investigation meeting; the claimant also admitted that he had coerced Daniel Molloy, a junior employee, to lie for him. It was therefore not unreasonable for Dawn Gough to recommend that the claimant face a disciplinary hearing.

Did the respondent follow a fair procedure?

68. The invitation to the disciplinary hearing was sent on 3 June 2020 but not received by the claimant until 12 June 2020. The claimant was between addresses during this time and had asked the Royal Mail to redirect any post that went to his home address.

69. The respondent's policy provides for notice in advance of any disciplinary hearing and a "reasonable amount of time" to prepare. The disciplinary hearing was on 15 June 2020 and therefore the claimant had approximately three days to prepare for that hearing. The claimant was provided with a copy of the disciplinary policy, the receipts and the meeting notes from the investigation meetings. The claimant complained that he was unable to prepare for the disciplinary hearing because he had custody of his children on those three days.

70. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 does not define the duration of time that should be given to an employee to prepare

for a disciplinary hearing. Instead, it requires that notice is given with sufficient information in order to enable the employee to prepare to answer the case at the disciplinary hearing.

71. The respondent sent the invitation letter on 3 June 2020 to the claimant's home address. The redirection of mail from that address to the claimant's alternative address meant that he did not receive it until 12 June 2020. Initially, the respondent had intended to give the claimant 12 days' notice. In reality, the claimant had three days' notice which should have been sufficient time to prepare for the disciplinary hearing on 15 June 2020.

72. The respondent's own policy requires the disciplinary hearing manager to supply in advance any evidence that will be considered at the hearing. The claimant complains that he was not provided with the witness statement of Kirsty Palmer. Michael Poole was clear in his evidence that he did not provide this statement because he did not need to consider the statement in light of the admissions made by the claimant on 25 May 2020.

73. Kirsty Palmer's statement detailed that she had found the products and had asked the claimant if he knew who owned the items. Kirsty Palmer recalled that the claimant did not know but said he would take care of it and find out. The claimant confirmed in evidence that when he did see the statement, he did not dispute the content. As a result, had the claimant seen Kirsty Palmer's statement prior to the disciplinary hearing he would not have contested it and this would not have altered Michael Poole's decision to dismiss the claimant.

74. On 23 June 2020 the claimant submitted his appeal in accordance with the respondent's policy. The claimant appealed on the grounds of poor mental health and the difficulties he had had with his line manager, Dawn Gough. The claimant also complained about the delay in receiving the invitation to the disciplinary hearing. Finally, the claimant complained that the outcome of the disciplinary hearing was predetermined because his discount card had been cancelled on 12 June 2020.

75. Following the claimant reiterating these grounds at the appeal hearing, Chris Marshall adjourned the outcome of that hearing in order that medical evidence could be obtained to ascertain whether the claimant's mental health had had any impact on his action on 6 May 2020.

76. This decision was taken in accordance with the respondent's policy and despite the fact that the claimant had not raised this issue during his disciplinary hearing. It is clear that the respondent was keen to ensure that the claimant was given every opportunity to explain his behaviour. Chris Marshall only confirmed that the dismissal decision was final on receipt of the medical report and his interpretation of that report.

77. The occupational physician was unable to comment on the claimant's state of mind on 6 May 2020 and could only provide an opinion of the claimant's state of mind on the date of assessment. In light of this opinion, it was open to Chris Marshall to conclude, in the absence of any other evidence, that the claimant was capable of making decisions on 6 May 2020.

78. The claimant claims that the appeal hearing was unfair because Danny Morris intervened and asked him questions. There is nothing in the respondent's policy that precludes the note taker from asking questions. The transcript of the appeal hearing does not reveal that the claimant objected to those questions and was able to answer them.

*Respondent's belief*

79. At the meeting on 25 May 2020, and during the disciplinary hearing on 15 June 2020, the claimant admitted taking the products, lying to Kirsty Palmer, coercing Daniel Molloy and subsequently lying to Dawn Gough at the investigation meeting.

80. The claimant did not raise issues of mental health or his difficulties with Dawn Gough as mitigation for his actions. In light of these admissions, Michael Poole had a genuine belief that the claimant was guilty of the gross misconduct outlined in the respondent's disciplinary policy.

81. The claimant made the same admissions during the appeal hearing with Chris Marshall on 14 July 2020. but on that occasion provided details of mitigation for his actions.

82. Following the receipt of the medical report, Chris Marshall interpreted the advice that had been given to conclude that the claimant was of sound mind and decision making ability on 6 May 2020 and therefore was guilty of gross misconduct.

83. It was not unreasonable for either Michael Poole or Chris Marshall to hold that belief in light of the claimant's admissions and the medical evidence that had been obtained.

*Was the claimant's dismissal within the range of reasonable responses?*

84. The claimant admitted to taking products without paying for them, lying to the Regional Director, coercing a junior employee on three separate occasions until the junior employee complied with what had been asked, and lying during an investigation meeting.

85. As a Store Manager the respondent gave the claimant leadership responsibilities and had an expectation that he would ensure compliance with the company guidelines. The till and safe procedure is clear: any stock must be paid for and the receipts available for inspection before consumed. The claimant did not comply with that company policy.

86. The respondent also expects a Store Manager to be reliable, trustworthy and dependable. The claimant admitted to lying and coercing a junior employee into lying. The respondent's leadership principles policy expects leaders to take responsibility, be a role model, create trust and act fairly. The claimant's actions on 6 May 2020 were all contrary to these principles. The claimant admitted during the disciplinary hearing that he could not be trusted by his line manager and it was wrong to put a junior employee in that position.

87. In light of the claimant's admissions, the breach of the respondent's expectations of a Store Manager and the leadership qualities the respondent required of a Store Manager, the respondent's dismissal of the claimant was within the range of reasonable responses.

88. For these reasons, I conclude that the claimant's dismissal was fair and the claim for unfair dismissal is unsuccessful and is dismissed.

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Employment Judge Ainscough  
Date 17 June 2021

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
18 June 2021

FOR THE TRIBUNAL OFFICE

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