



# EMPLOYMENT TRIBUNALS

**Claimant:** Harvinder Jutla

**Respondent:** B & M Retail Ltd

**Heard at:** Manchester Via CVP

**On:** 18 June and 9 July 2021

**Before:** Employment Judge Serr

## **Representation**

Claimant: Mr Marsh, Counsel

Respondent: Ms Steel, Solicitor

# JUDGMENT

1. The Claimant was not dismissed and accordingly her Claim for Unfair Dismissal is not well founded and is dismissed.

# REASONS

## The Issues

1. By a claim form dated the 26 August 2020 the Claimant brings a claim for unfair dismissal. At the outset of the hearing the Tribunal endeavoured to define the issues. The parties had agreed in advance a written schedule of issues. On discussion with the representatives, it became clear that some of the issues identified were no longer being advanced. Accordingly, the issues before the Tribunal were as follows:
  - (i) Was the Claimant dismissed. The Respondent says that the Claimant resigned following a factfinding meeting where evidence was presented to the Claimant suggesting that she had been stealing monies from the cash till that she worked on. The Respondent says that the Claimant immediately admitted to this and freely and voluntarily offered her resignation so as to avoid the matter being taken any further forward. The Claimant denies this and says that she was forced into resigning by the Respondent and was accordingly unfairly dismissed.
  - (ii) If the Claimant was dismissed has she contributed to her own dismissal and/or would the Claimant have been dismissed fairly in any event had the process been allowed to continue.

- (iii) Remedy -the Tribunal indicated that save for the issue of contributory fault and polkey the issue of remedy will be reserved to a further hearing if necessary.
2. The Tribunal had before it a bundle of documents running to some 215 pages. It heard evidence from the Claimant and three witnesses for the Respondent- Scott Hulme an HR advisor, Deega Abdillah a customer services supervisor and Jack Coysh a store manager. The Tribunal made the following findings of fact based on the balance of probabilities.

### The Facts

3. The Respondent is a national discount retailer operating approximately 550 stores nationwide and employing approximately 25,000 employees. The Claimant was employed from 12 November 2015 as a customer service assistant at the Respondent's West Drayton store. The store subsequently closed after the events giving rise to these proceedings.
4. Due to a cognitive impairment the Claimant has some difficulty reading and writing. The Tribunal does not find that the Claimant is functionally illiterate, nor does the Tribunal accept that the Respondent had knowledge of any literacy problems. The Tribunal has seen a number of documents that the Claimant signed to acknowledge at the outset of her employment including her contract of employment, documents in respect of the staff discount card and the working time regulations and the staff search process. The Tribunal has also seen various training documents completed by the Claimant during her employment. While the Tribunal accepts that on occasion the Claimant may have had assistance in completing some documentation it does not find that the Claimant required co-workers to read all documentation to her and complete all documentation on her behalf. There is no evidence of any formal reasonable adjustment being requested or put in place for her. There was no issue of concern raised on her personnel file. A perusal of documentation such as the fire refresher training completed May 2019 shows that it has clearly been completed by the Claimant herself. Requiring co-workers to undertake all reading and writing for her would have been onerous and unlikely to have been voluntarily agreed to without a recorded instruction from management.
5. The Claimant asserted that she was asked to work in the office by Deega Abdillahi sometime in 2019 and was asked to leave and return to the shop floor after 2 weeks due to inadequate numeracy and literacy skills. This was not accepted by the Tribunal. There is no documentary record of this and it was denied by Ms Abdillahi who was not in fact a supervisor at that time but a floor colleague and would not have been in a position to request the Claimant move rolls.
6. The Claimant often worked on cash register one in the West Drayton store. The Tribunal was told and accepts that there was a continuing problem with cash register 1 in that the mechanism was broken and staff who worked on the till had ready access to the cash till using a key unlike the other working tills. Cash register 1 was subject to regular cash discrepancies which at time the Respondent attributed to this malfunction. Efforts to repair it were made seemingly without success.

7. On 21 of October 2019 the Claimant was subject to an informal discussion following a cash discrepancy of £15.98 on the till that she was working on. It is noted at that time that the Claimant said she wasn't sure if she carried out a return and carried it out wrong and she will call for help next time.
8. On 17 and 18 of December 2019 the Claimant was subject to another informal discussion in respect of double scanning while she was using her cash register and not presenting her ID card on a transaction and using the wrong ID codes on price overrides.
9. On Saturday 4 April 2020 an incident occurred at the West Drayton store with the Claimant's husband. The Claimant had been asked to work overtime by Ms Abdillahi who at this point had been promoted to the role of supervisor. The Claimant agreed to this. The Claimant's husband attended the store on the morning of 4<sup>th</sup> April seemingly irate that his wife was working on a weekend. The Claimant's husband was aggressive to staff including Ms Abdillahi who believed he may have been intoxicated. He was escorted off the premises. The Claimant left early and did not finish her shift.
10. On 5 April 2020 until 20 April 2020 the Claimant was required to self-isolate due to Covid 19 symptoms. The Claimant was also considered vulnerable due to an existing diabetic condition. The Tribunal does not find that the incident on 4 April 2020 involving the Claimant's husband or the fact that she had to self-isolate for two weeks from 5 April caused any animus towards the Claimant by Ms Abdillahi or indeed any employee of the Respondent. Ms Abdillahi did not blame the Claimant for the behaviour of her husband. The requirement to isolate over this period in the early days of the pandemic was entirely routine and commonplace and would not have engendered any hostility towards the Claimant by the Respondent.
11. On the 1 May 2020 the Claimant was subject to a discussion about a conduct matter in respect of the misuse of the staff discount card. On 6 May 2020 the Claimant was spoken to about the non-payment of a carrier bag. Both of these informal discussions were noted and the Claimant signed to confirm the notes.
12. On the morning of 7 May 2020 Ms Abdillahi was in the management office reviewing CCTV footage overlooking the Claimant's cash register 1 from the previous day. Ms Abdillahi was reviewing a no sale transaction which allows the register to be open without a valid sale- usually for the operator to access the cash draw to put in or take out change. The previous transaction was a card payment and there was no apparent need for the Claimant to access the register. The CCTV seemed to show the Claimant secrete something out of the cash draw and into her pocket in absence of any customers. The CCTV footage raised concerns with Ms Abdillahi.
13. The CCTV footage was shown to Mr Coysh store manager by Ms Abdillahi who shared her concerns about the suspicious nature of the transaction. Mr Coysh sought the advice of Mr Scott Hulme HR advisor who advised that the Claimant should be asked to attend an investigation meeting. Ms Abdillahi spoke to the Claimant and asked her to come to the office. She did not tell the Claimant the nature of the meeting as she felt it would not have been appropriate given the public area in which the Claimant was working.

The Claimant did not ask what the meeting was about. The Claimant was not offered the opportunity to be accompanied at the meeting.

14. What occurred next is a matter of controversy between the parties and central to the case before the Tribunal. The Claimant states that when she entered the office she was accused by Mr Coysh of stealing for over a year. Mr Coysh stated that he had CCTV to support this allegation but refused to show the CCTV to the Claimant. Mr Coysh asked the Claimant to hand over her company ID and locker keys. She was accused of faking the self isolation note authorising her self isolation due to COVID 19 in April 2020. She was also accused of deliberately undercharging a customer who was known to her the previous day. Mr Coysh then dictated a resignation letter contained at p.77 of the hearing bundle which he stated had to be in her own handwriting. The Claimant had never heard the word resignation and did not know what it meant. She was highly stressed and in shock. She wrote the letter as instructed under extreme duress and then was escorted off the premises and told by Mr Coysh not to return to any other of the Respondent's stores and to return the uniform. Notes of the meeting subsequently produced and given to the Claimant at pp75-76 were never shown to her at the time and her signature has been fabricated.
15. The Respondent's version is diametrically opposite to the Claimant's. The Respondent says that the Claimant was shown the CCTV footage at the start of the meeting. She was asked to comment and admitted she had stolen £20. She then admitted to stealing £20 per week and that overall, she had stolen about £1000. She offered to repay the money. Notes were made of the meeting by Ms Abdillahi which the Claimant signed after having them read back to her. The Claimant then offered to resign. Mr Hulme was contacted and advised that she should be permitted to resign with a handwritten signature. The Claimant was offered this and subsequently wrote out the resignation letter at p.77. A search was then undertaken of her locker and the Claimant handed over 10 x £2 coins being the money she had taken the previous day.
16. The Claimant asked the Respondent not to involve the police. She offered some money to Mr Coysh to repay what had been taken but this was refused. Mr Coysh subsequently spoke to the Respondent's profit protection department who accepted that given the difficulties in calculating the precise loss and enforcement there was no purpose in pursuing the matter further and the police were not involved.
17. The Tribunal accepts the Respondent's version of the meeting of 7 May. It does so for the following reasons:
  - 17.1 The Tribunal accepts the evidence of Mr Coysh, Ms Abdillahi and Mr Hulme. It found their evidence straight forward and largely consistent and it is noted in particular that the evidence of Mr Hulme corroborates the account of Mr Coysh and Ms Abdillahi in respect of the communications with Mr Hulme about HR advice on the day in question.
  - 17.2 The Tribunal finds the assertion that Ms Abdillahi's notes of the meeting to be fabricated an improbable one. The Claimant herself accepted in evidence that Ms Abdillahi had a pen and paper with her

when she entered the office on the morning of the 7 May and was writing something. It is difficult to understand what other reason Ms Abdillahi would have for having the pen and paper other than to take a note of the meeting as asserted. Indeed, in her letter to the Respondent dated 1 June 2020 setting out her account of 7 May she stated that Deega “was taking notes”. The notes confirm that the Claimant was shown the CCTV and admitted to taking the money from the Respondent.

- 17.3 The case as put by the Claimant would require the Tribunal to accept that both Ms Abdillahi and Mr Coysh have conspired to orchestrate the Claimant’s termination in a most underhand and oppressive manner and then fabricated a story including documents to conceal this. On questioning by the Tribunal the Claimant could not give an answer as to why Ms Abdillahi would be so motivated to do the Claimant down as being suggested. The Tribunal has already rejected the assertion that Mr Coysh and Ms Abdillahi held an animus against the Claimant caused by resentment of the Claimant isolating from COVID-19 or because of the altercation with the Claimant’s husband on 4 April 2020. The Tribunal does not find that there existed any animosity to the Claimant from Mr Coysh or Ms Abdillahi prior to 7 May.
- 17.4 While the store did eventually close after the Claimant’s dismissal the Tribunal rejects the suggestion made by Mr Marsh in closing submissions that this could have been a motivation to orchestrate the Claimant’s resignation. There is no evidence that Ms Abdillahi or Mr Coysh knew of a likely closure on 7 May. Indeed, the evidence of Mr Coysh was that the store was incredibly busy at this time due to the fact it was open during the national lockdown caused by the pandemic. Mr Coysh and Ms Abdillahi would obtain no personal benefit from saving their employer a redundancy payment of less than £2 000.
- 17.5 The Claimant’s account in respect of the resignation letter is inconsistent and improbable. The Claimant in her witness statement told the Tribunal that Mr Coysh dictated the letter to her and he spelled each and every word for her but she made several mistakes and was asked to correct those mistakes by Mr Coysh and that she even got her own name and address wrong. The resignation letter in the bundle does not bear this out however. The spelling and syntax in the letter are poor reflecting the literacy difficulties that the Claimant undoubtedly has. It does not appear to have been spelled for her or corrected.
- 17.6 The Claimant stated in her evidence that Mr Coysh said to her when she was in the office that when she denied deliberately undercharging a customer on the previous day he didn’t believe her and he had been in the company longer than her. In fact Mr Coysh only joined the Respondent from March 2018 and so this was untrue and it is improbable that he said it.
- 17.7 Finally, the Claimant relied on the fact that the Respondent could not produce the CCTV for the Tribunal or an original version of Ms

Abdellahi's notes. The Respondent wipes CCTV after 28 days and its case was that the CCTV was wiped automatically. While there is a dispute as to what point the Respondent was put on notice that there was likely to be an issue about what actually occurred on 7 May (and therefore should have preserved the recording), given the unusual circumstances of a member of staff admitting to theft over a long period of time the Tribunal finds that the Respondent ought to have preserved it in any event. That said it was not entirely clear what inference the Tribunal was being asked to draw from its destruction and this was not clarified by the Claimant. So far as it is being said that the CCTV was destroyed because it showed no evidence whatsoever incriminating the Claimant this is highly improbable. It would mean that Ms Abdillahi and Mr Coysh fabricated their account of viewing the CCTV and fabricated the reason why the Claimant was called in to the office in the first place. The Tribunal does not accept this.

- 17.8 The Respondent could not produce the original notes of the interview although it had a copy. Again, it is unclear exactly what inference the Tribunal was being invited to draw from this failure. The Claimant indicated that she was at a disadvantage because without the original notes she could not have her signature forensically analysed to prove it was not her handwriting. The suggestion, so far as it made, that the original notes were destroyed to prevent this is rejected. There was no permission for an expert handwriting report and destroying the original notes for this reason is farfetched and improbable.
18. After the 7 May the Claimant's husband contacted the Respondent by phone but spoke to the switchboard and did not speak to Mr Hulme or the HR team. The Tribunal finds that the first time the Respondent became fully aware of the Claimant's version of the events of the 7 May was in a letter dated 1 June 2020 and beginning "dear concern". A response was invited within 14 days. Following this Mr Hulme became aware of the potential dispute around the Claimant's termination on or around 4 June. This was 28 days from the incident. On this date Mr Coysh and Ms Abdillahi were asked to produce some witness statements setting out what had occurred. The statements dated 4 June are lacking in detail but the Tribunal does not find that they are inconsistent with the Respondent's version of the events of 7 May.
19. Mr Hulme wrote to the Claimant on 5 June denying she had been dismissed and enclosing the resignation letter. The Claimant was subsequently sent the statements produced on 4 June 2020. Further correspondence emanated from the Claimant's husband to the Respondent ultimately resulting in the claim to the Tribunal.

### The Law

20. S.95 of the Employment Right Act 1996 (ERA) sets out the circumstances in which an employee is dismissed by their employer. It states:
- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if) —

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
  - (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
  - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
- (a) the employer gives notice to the employee to terminate his contract of employment, and
  - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
- and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.
21. A dismissal within the meaning of s.95 is a pre-requisite to a claim for unfair dismissal under s.98 ERA. A consensual termination is not a dismissal within the meaning of s.95. For this reason, a Tribunal must be astute to find clear evidence of a termination by mutual agreement.
22. A resignation preceded by a threat of dismissal will be construed as a dismissal. The leading authority is *Sandhu v Jan de Rijk Transport Ltd* [2007] IRLR 519. Endorsing dicta in *Jones v Mid Glamorgan* which stated

*Courts and tribunals have been willing, from the earliest days of the unfair dismissal jurisdiction, to look, when presented with an apparent resignation, at the substance of the termination for the purpose of inquiring whether the degree of pressure placed on the employee by the employer to retire amounted in reality to a dismissal. It is a principle of the utmost flexibility which is willing in all instances of apparent voluntary retirement to recognise a dismissal when it sees it, but is by no means prepared to assume that every resignation influenced by pressure or inducement on the part of the employer falls to be so treated. At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum: "Retire on my terms or be fired" – where it would not be surprising to find the industrial Tribunal drawing the inference that what had occurred was a dismissal. At the other extreme is the instance of the long-serving employee who is attracted to early retirement by benevolent terms of severance offered by grateful employers as a reward for loyalty – where one would expect the industrial Tribunal to draw the contrary inference of termination by mutual agreement. Between those two extremes there are bound to lie much more debatable cases to which, according to their particular circumstances, the industrial tribunals are required to apply their expertise in determining whether the borderline has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat*

23. In *Staffordshire CC v Donovan* (1981) IRLR 108 the EAT held that where the parties are seeking to negotiate in the course of disciplinary proceedings and an agreed form of resignation is worked out, it would be most unfortunate if

the fact that that agreement was reached in the course of disciplinary proceedings entitled the employee thereafter to say that there was a dismissal.

### Conclusions

24. At the outset of the hearing the Tribunal indicated to both representatives that it seemed that the Claim in essence turned on what in fact occurred at the meeting of 7 May and whose version of that meeting the Tribunal accepted. In their closing submissions to the Tribunal this was largely accepted by the Representatives. On the Claimant's case the Claimant was brought into a meeting without warning, accused of stealing without being provided with any evidence and then told to write a resignation letter, the contents of which she did not fully understand. She was then escorted off the premises and told not return. On the Claimant's version of events the Tribunal would have little hesitation in accepting that the circumstances are precisely those that fall within the concept of a forced resignation properly characterised as a dismissal under s.95 (1) (a) ERA.
25. On the Respondent's version of the meeting the Claimant freely admitted to taking cash from the Respondent over a prolonged period of time after having been presented with evidence to support this. It was the Claimant that offered her resignation and the Claimant who wrote out her own resignation letter. While it may well be the case that the Claimant's resignation was predicated on the desire to avoid what she may well have believed was an inevitable dismissal for gross misconduct had the matter been proceeded with, it was the Claimant's own admission that would have resulted in this dismissal. It cannot be the case that in these circumstances, where an employee resigns to avoid the consequences of their own actions it should be properly characterised as a dismissal. The employee may well feel pressured to resign but it is pressure of their own making and in these circumstances they would potentially have the benefit of avoiding the stigma of a misconduct dismissal.
26. For these reasons, having accepted the Respondent's version of the meeting the Tribunal is satisfied that the Claimant was not dismissed within the meaning of s.95 ERA but that this was a consensual termination.
27. The Tribunal would observe that while the Claimant's claim for unfair dismissal fails and stands to be dismissed there are aspects of the Respondent's practice that could be criticised. The Tribunal accepts that Ms Abdillahi would not want to necessarily broadcast the reasons for calling the Claimant into the meeting on 7 May in front of co-workers and customers. It is arguable whether the Claimant had a statutory right to be accompanied to what was in essence a fact-finding meeting at this stage. Nevertheless, providing the opportunity for the Claimant to have a colleague to at least witness what was on any view likely to have been an important and highly charged meeting would have been beneficial to both parties and potentially avoided arguments about what had occurred later. Likewise, retaining the CCTV in the present case would have been a reasonable and proportionate measure and may well have avoided the present proceedings.
28. While the above would have been good industrial practice for the Respondent to adopt, they do not change the position in respect of the Tribunal's



conclusions in respect of dismissal. The Claimant's claim for unfair dismissal is therefore dismissed.

Employment Judge Serr  
11 July 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON  
13 September 2021

FOR THE TRIBUNAL OFFICE