



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Randall

Respondent: Asda Stores Limited

Heard at: Midlands (East) Region by Cloud Video Platform
On: 1 and 2 September 2021
Reserved to: 7 October 2021

Before: Employment Judge Blackwell (sitting with Members)
Members: Mr Pittman
Mr Purkis

Representation

Claimant: Mrs D Randall in person
Respondent: Mr A Macmillan for Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:--

1. The claim of unfair dismissal pursuant to Sections 94 and 98 of the Employment Rights Act 1996 (The 1996 Act) fails and is dismissed.
2. Mrs Randall is not disabled within the meaning of Section 6 of the Equality Act 2010 (The 2010 Act) in respect of the impairment of Type 2 Diabetes and it therefore follows that all of her claims of disability discrimination must fail and are dismissed.

RESERVED REASONS

1. Mrs Randall represented herself with assistance throughout from Mr Jones who is also a lay person. Mr Macmillan of Counsel represented Asda. We heard evidence from Mrs Randall herself and for Asda Ms Benson, whose decision it was to dismiss Mrs Randall and Mr Wiltshire who heard Mrs Randall's appeal against dismissal. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues

2. The issues were identified in Employment Judge Hutchinson's Case Management Summary sent to the parties on 18 May 2021;-

2.1. *Provided that the Tribunal is satisfied that the reason for the dismissal was her misconduct, it will have to decide whether the Respondent acted reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant. In particular: -*

2.2 *Did they have reasonable grounds for that belief?*

2.3 *At the time the belief was formed had they carried out a reasonable investigation?*

2.4 *Had they conducted a reasonable procedure?*

2.5 *Was dismissal within the range of reasonable responses?*

Disability discrimination

3. *The Respondent accepts that the Claimant suffered from a disability at the time of her dismissal. They accept that she suffered from Crohn's disease. They do not accept that at the time she also suffered from diabetes. The Tribunal will have to satisfy themselves that at the relevant time the Claimant did suffer from diabetes.*

4. *The only claim of disability discrimination is discrimination arising from disability.*

5. *In this case the Claimant says that the Respondent treated her unfavourably by dismissing her.*

6. *She says that the conduct involving her taking the baguette arose out of her disability, namely she needed to eat the baguette urgently.*

7. *She says that the Respondent treated her unfavourably because of this thing, namely by dismissing her.*

8. *The Respondents allege that if this did amount to unfavourable treatment because of a matter arising from her disability then the treatment was a proportionate means of achieving a legitimate aim. The Respondents wish to amend their response to set out the matters they rely on in support of that.*

Findings of Fact

9. Mrs Randall was employed as a chilled colleague by Asda from June 2004 to 9 July 2019 when she was summarily dismissed. That is, therefore, the effective date of termination.
10. Asda need no introduction employing some 140,000 colleagues in the United Kingdom.
11. On or about 4 June 2019 allegations were made that Mrs Randall had committed theft by consumption, i.e consuming produce that had not been paid for.
12. Ms Staples, an Administrative Manager suspended Mrs Randall and began an investigation. She should not have done so as she was not a C10 Manager and thus did not have the authority to act as she did.
13. As soon as that was discovered, a second investigation was begun by Mr Ibbetson who had the necessary authority. He met with Mrs Randall and a number of other witnesses and the notes of those interviews begin at page 156. He also reviewed CCTV footage.
14. Mr Ibbetson concluded that the matter should move forward to a disciplinary hearing Mrs Randall was invited to attend such by letter of the 5 July 2019, see page 203. The letter stated;-

“At the hearing you will be asked to respond to the allegation that on 04.06.19 you committed theft by consumption. Theft by consumption is deemed to be a gross misconduct offence and if proven may result in your summary dismissal”.
15. On 9 July 2019 the hearing was held by Ms Benson. As part of the hearing she drew to Mrs Randall’s attention that part of the disciplinary procedure which stated that theft by consumption was regarded as gross misconduct. The notes of the disciplinary hearing begin at page 204.
16. Mrs Randall had admitted, and she had done so throughout, that she had taken a baguette that was due to be wasted and consumed a part of it. She said she had done so because she had felt faint and hot. She described it;- “As in going through the change”. She said it had been done on the spur of the moment and Mrs Randall told Ms Benson that she had two conditions, namely Crohn’s and diabetes type 2.
17. The disciplinary hearing also noted that Mrs Randall had been observed eating the baguette at 7:03, 7:09, 7:55 and 8:44 and on each occasion she was wearing her jacket.

18. In mitigation, Mrs Randall also said that she had recently increased her diabetes medication from two to three tablets a day. She also said that prior to 4 June, she had never felt faint before though she had had hot flushes.

19. Ms Benson reached the decision to dismiss and such was confirmed in a letter of the same date beginning at page 220. She found;-

- “You admit to eating the bread
 - Although you think the bread had no value, it is actually stock in the eyes of the company, it does have a value & is company property until purchased
 - A spur of the moment act would be done as a reaction to something without thought – but as you then repeated these actions, I would not consider them all to be spur of the moment
 - You said you removed your jacket when you felt faint and hot, but you are wearing your jacket when you eat on every clip from CCTV
 - You have been taking the higher dose of medication for 6 weeks & 1 week prior to this incident so would have had chance to establish the effects and deal with them
 - You chose to move the bread from one location to another, making it pre-meditated
 - You did not seek permission from a section leader or manager to purchase something or take a break in order to feel better
 - You do not follow any dietary advice so your shift pattern should not interfere with when you have to eat
 - 15 years of service would be considered, but length of service alone was not enough to grant a sanction on the penalty for gross misconduct”

20. Mrs Randall initially appealed by letter of 15 July 2019 which was then reformatted as required by Asda’s Disciplinary and Appeals Process and resubmitted on 26 July 2019 beginning at page 226.

21. Mrs Randall was invited to an Appeal Hearing which began on 19 August 2019, held by Mr Wiltshire. The notes of the Appeal Hearing begin at page 229. Mr Wiltshire went methodically through each ground of appeal and invited Mrs Randall to comment at each stage. Mr Wiltshire took the decision to adjourn the Appeal, principally on the ground of Appeal point 4, namely that she had not been provided with copies of the Staples Investigation. Mr Wiltshire invited Mrs Benson to reconvene the disciplinary hearing once those notes had been disclosed to Mrs Randall and considered by her and a further hearing before Ms Benson was held on 28 August. The notes of that hearing begin at page 250. Ms Benson, after consideration, wrote to Mrs Randall on 2 September 2019 at page 270. She concluded that she would discount other allegations made to Mr Staples of theft by consumption and concluded that her review of the Staples Investigation did not affect her original decision which was confirmed.

22. Mr Wiltshire, in the light of that, reconvened the Appeal Hearing on 13 September 2019. He determined to uphold the dismissal and wrote to Mrs Randall accordingly on 13 September beginning at page 284.

CONCLUSIONS

Unfair Dismissal

1. It is for Asda to prove a potentially fair reason for dismissal within the meaning of Section 98 1 and 2 of the 1996 Act.

2. If such is proven, then the decision as to whether the dismissal was fair or unfair is to be taken in accordance with subsection 4 of Section 98;-

1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

3. It is not in dispute that Mrs Randall was summarily dismissed by reason of conduct as described in our Findings of Fact. Nor is it in dispute that Ms Benson and Mr Wiltshire had a genuine belief that such misconduct had been committed.

4. Did they have reasonable grounds for that belief? Again, the factual evidence is not in dispute having regard to Mrs Randall's admissions and the evidence of the CCTV.

5. As to the question of a reasonable investigation. Mrs Randall in her Grounds of Appeal makes two complaints. The first is an indirect one, namely that she was not permitted to see the witness statements from the Staples Investigation. This was put right by the intervention of Mr Wiltshire and by the reconsideration of that material by Ms Benson. Indeed, in our view, Ms Benson would have been entitled to take into account the other allegations of theft by consumption and had we needed to do so, we would have found as a fact that the allegations in relation to the consumption of grapes were true, having regard to the unconvincing evidence Mrs Randall gave on the point during cross examination.

6. The second criticism of the investigation was the lack of availability of CCTV footage prior to the CCTV footage viewed by Mr Ibbetson and Ms Benson. We accept that that evidence was not available but we also note that Mr Wiltshire, in dealing with the point said "*Regarding the CCTV footage, I will take you at your word that you did at some point take off your jacket*". Thus, Mr Wiltshire is accepting Mrs Randall's entire account of what she says the CCTV evidence would have shown.

7. In our view therefore, the investigation did all that it needed to do. It fell within the band of a reasonable investigation.

8. Had Asda conducted a reasonable procedure?

9. Our view is that the procedure was thorough and fair and in particular the conduct of the Appeal by Mr Wiltshire was meticulous and even-handed.

10. Was the dismissal within the range of reasonable responses?

Just and equitable test - Iceland Frozen Foods

1. The starting point should always be wording of the Section 98 (4)
2. In applying the statute, the tribunal must consider the reasonableness of the employer's conduct and not whether the members of the tribunal, in their own judgment, consider the dismissal to be fair
3. In so judging the reasonableness of the employer's conduct, a tribunal must not substitute its own view of what was the correct course to adopt for that of the employer

4. In many cases, but not all, there is a band of reasonable responses to the employee's conduct within which one employer can reasonably take one view, but a different employer might reasonably take another, differing, view
5. The tribunal's function is to determine whether, in the circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses that a reasonable employer might have adopted

11. In reaching our decision, we must of course begin and end with subsection 4 of Section 98 of the 1996 Act.

12. We have reflected on that part of the disciplinary policy at page 108 as follows:-

"If mitigation is related to medication or any underlying medical condition has Occupational Health/the colleague's GP been consulted".

13. Ms Benson candidly acknowledged that she was not aware of that part of the policy, however, she had asked Mrs Randall during the Disciplinary Hearing for full particulars of her condition and her medication and indeed the information she was given was largely that, which is before us. In that regard, Mrs Randall gave conflicting evidence in that she repeatedly said that whilst she had had hot flushes prior to 4 June, she had not before felt faint whereas at another point, she indicated that the increase in medication which had begun some three weeks before 4 June had caused her to feel faint. We note that despite the medication issue being raised both in the Dismissal Hearing by way of Appeal and again in the Appeal Hearing, Mrs Randall provided no further information and indeed we can see from the medical evidence disclosed in connection with the disability issue, that there is nothing that would have assisted Mrs Randall. In short, Ms Benson was well informed as to Mrs Randall's state of health.

14. The dismissal has to be viewed in the context that Mrs Randall was employed in a retail business. It is clear that Mrs Randall knew from the outset that theft by consumption was a serious matter warranting dismissal, as is also clear from the witness statements obtained during both investigations. We also note that theft by consumption is recorded as gross misconduct in Asda's Disciplinary Policy. That of course does not by itself render theft by consumption gross misconduct but in our view, in the retail context and having regard to the Tribunals own industrial experience, theft by consumption would normally be regarded as gross misconduct across the retail sector.

15. We recognise that Mrs Randall regards the dismissal as harsh and disproportionate, having regard to the offence committed and her length of service but we note in particular, Ms Benson's evidence to the Tribunal when she was asked whether the decision would have been the same had there been only the one incident and she replied that it would have made a difference to her decision.

16. In summary, it is clear that Asda were following their own disciplinary procedures and policy, both of which were well known to Mrs Randall. The decision to dismiss may be at the harsh end of the band, nonetheless, in our view it falls within the band of reasonable responses for the reasons set out in the dismissal letter set out at paragraph 19 of the Findings of Fact and this admitted conduct was a sufficient reason for dismissing Mrs Randall in the circumstances of this case. Therefore, Mrs Randall's claim of unfair dismissal fails and is dismissed.

Disability

17. Section 6.1 of the Equality Act 2010 states;-
- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

18. Asda accept that Mrs Randall is disabled within the meaning of Section 6 in respect of the physical impairment of Crohn's Colitis. They do not however, accept that Mrs Randall is disabled in respect of the physical impairment of type 2 diabetes.

The Medical Evidence

19. A limited amount of medical evidence has been disclosed and chronologically it begins with Mrs Randall's GP's Patient Summary at page 298. Mrs Randall was diagnosed with diabetes mellitus (type 2 diabetes) on 19 April 2013. She was given a diabetes management plan in December 2013 and had a six month review on 5 December 2013. At page 297 is what appears to be a Consultant's letter, though we see only part of it dated 16 February 2017. The letter principally concerns the symptoms and effects of Crohn's disease but also says "past medical history includes diet controlled diabetes".

20. On 21 May 2018 Mrs Randall was prescribed Metformin tablets to be taken twice daily and it was that medication that she was advised to increase shortly before the incident which lead to her dismissal.

Mrs Randall's evidence

21. At page 289 is a witness statement dated 23 March 2021 provided in accordance with an order made by the Tribunal on 14 October 2020. It relates almost exclusively to Crohn's Colitis, though there are references to type 2 diabetes. At the beginning of the hearing we noted that in effect, Mrs Randall had provided no evidence as to the impact type 2 diabetes had on her day to day activities. We adjourned to enable Mrs Randall to consider that and to discuss the matter with Mr

Jones. In fact, she provided little by way of evidence in chief and most of the evidence which emerged came from cross examination.

22. We remind ourselves that the barrier to proving disability is not a high one and further, we must concentrate on those day to day activities that Mrs Randall cannot carry out rather than the ones that she can.

23. Mrs Randall's evidence can be summarised as follows, namely that she carried out a full range of day to day activities prior to 4 June 2019. She had not had a fainting episode prior to then, nor had she carried food with her should she feel faint until after 4 June 2019. The only restriction on her day to day activities she referred to was that if she was going out for the day, she would always either carry food with her or be sure that she would be able to access food to purchase either from a café or shop. We note in relation to her work that it had been her custom to rise at about 4:30 am, travel to work, begin work at 6:00 am and such work would be carrying out day to day activities such as lifting and carrying produce and surprisingly would not eat at all until her first break at around 10:00 am.

24. On that evidence, there is clearly little or no effect on Mrs Randall's ability to carry out normal day to day activities and as she said in cross examination, she lived a normal life.

25. The matter does not end there because since 2018, Mrs Randall has been prescribed Metformin, therefore, in accordance with paragraph 5 of the first part of Schedule 1 of the 2010 Act;-

1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

26. Unfortunately, once again, there is no medical evidence to assist and all we have is Mrs Randall's evidence that she carried on a normal life both before and after she was prescribed Metformin that is between May 2018 and June 2019. Thus, we are unable to say whether, but for the prescription of Metformin, the type 2 diabetes would have a substantial effect on her ability to carry out day to day activities.

27. Mrs Randall also made the point in her Appeal and in her evidence before us that *"I had been taken a higher dose of my medication from 13 May 2019 just 3 weeks before the incident occurred. I then increased my medication again on 4 July which was after the incident had occurred"*. It seems to us that the transition between 2

tablets a day to 4 tablets a day was clearly short lived and could not be described as being long term.

28. Mrs Randall also asserted there was a connection between Crohn's Disease and Type 2 Diabetes. She accepted in cross examination that Crohn's Disease could exacerbate diabetes if it prevented her from eating. That, however, was not the case around 4 June. She accepted that Crohn's Disease did not cause her to feel faint, therefore, she must rely upon the condition of diabetes. There was no evidence of any other connection between the 2 diseases other than that the diabetic medication could exacerbate the Crohn's condition, but again, that is not the circumstance that arose on 4 June.

29. We therefore conclude that in respect of the physical impairment of Type 2 Diabetes at the relevant time, i.e June/July 2019 Mrs Randall was not disabled within the meaning of Section 6 and it therefore follows that her claims of disability discrimination must fail.

Employment Judge Blackwell

Date: 25 October 2021

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