# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Miss L Stevens** |
| **Respondent:** | **Sky Retail Stores Limited** |
| **Heard at:** | **Birmingham (hybrid and via CVP)** |
| **On:** | **10th and 11th January 2023** |
| **Before:** | **Employment Judge Beck** |
| **Representation** | |
| Claimant: | Mr Cooper (Trade Union Representative) |
| Respondent: | Miss Martin (Counsel) |

**JUDGMENT** having been sent to the parties on 11/1/23 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 on the 12/1/23, the following reasons are provided:

# REASONS

## Background

1. Miss Stevens was employed by Sky Retails Stores Limited from the 20/2/10 until the 17/8/21, as a sales agent. She worked on a retail stand at Merryhill Shopping Centre selling Sky products to customers.

2. The claimant was dismissed for gross misconduct on the 17/8/21, in relation to an incident on the 3/8/21 when the claimant wrote down a customer's full name and e mail address on an unauthorised document. The claimant accepted from the initial investigation stage that she wrote the details down on the document.

3. A claim for unfair dismissal was presented to the employment tribunal on the 18/11/21. It was clarified by subsequent order dated 27/7/22 that any claim for disability discrimination the claimant made was withdrawn.

4. An initial 2- day hearing on the 16th and 17th August 2022 did not proceed, and the matter was relisted for hearing today.

5. I have considered a 234- page bundle, plus an additional e mail from Mr Brown dated 27/8/21 which has been disclosed by the parties today. Also witness statements from Mr Shepherd, Mr Brown, Miss Salkeld and Miss Stevens.

6. The claimant and representative Mr Cooper have appeared in person at the tribunal hearing centre in Birmingham. The Claimant has been provided with the 234 -page bundle in paper format, which has been provided by the respondent for use at the hearing. The claimant also had copies of the 4 witness statements, and the clerk provided a photocopy of Mr Browns e mail dated 27/8/21.

7. Miss Martin, Counsel appeared for the respondent via CVP. I heard evidence from Mr Shepherd, Mr Brown, Miss Salkeld and Miss Stevens.

8. I checked with Mr Cooper before the hearing started if Miss Stevens required any adjustments to the hearing in light of her medical issues. Mr Cooper confirmed none were required.

9. I have considered a 10- page document from the respondent containing closing submissions. Mr Cooper accepted the law as set out by Miss Martin at paragraphs 3-10 of this document, and agreed it sets out the legal tests I have to consider in this case, see paragraph 14 below.

10. Mr Cooper raised in closing submissions, the case of **Boucher and Essential Finance Group an Employment Tribunal decision by EJ Ganner in May 2022.** Mr Cooper argued that the facts of the case were similar to the claimants. In that case the claimant transferred customer details to his own account by e mail, the judge found it to be unfair dismissal because of how the investigation was carried out. It was argued that it was similar on the facts, the claimant transferred customer details and in this case the claimant wrote the details down. Mr Cooper argued all 3 managers in this case did not carry out a fair investigation.

11. Miss Martin was granted a 15 -minute adjournment to consider the case and make representations on it, which she did. Her position was it was not binding as it was an Employment Tribunal decision. The tribunal in that case was applying **BHS v Burchell (1980) ICR 30**3, to the facts before it, and it was an intensely factual case with a flawed investigation. She highlighted the facts involved a failure of the respondent to disclose a transcript of a telephone call, which they said was irrelevant because they had a zero-tolerance approach to recording customers details. The judge found that a zero – tolerance policy was not contained in the written policies of the respondent, and the claimant had not been advised of it, and had been dismissed in accordance with a policy he was not aware of, and had been unfairly dismissed. Miss Martin submitted the Boucher case was not helpful to the case before this tribunal.

12. The chronology of events is as follows:

3/8/21 - Potential data breach found by Mr Shepherd at Merryhill stall 1

4/8/21 - Investigation meeting Mr Shepherd and Miss Stevens

4/8/21 - Miss Stevens suspended pending investigation

6/8/21 - Investigation summary provided by Mr Shepherd and invite to conduct hearing 12/8/21

17/8/21 - Conduct hearing takes place with Mr Brown; Mr Ballard Trade Union Representative was present to assist Miss Stevens

Miss Stevens was dismissed. A dismissal letter was issued dated 18/8/21

20/8/21 - Miss Stevens requests an appeal hearing and makes a request for manager outside the retail line to conduct the appeal

4/9/21 - Miss Stevens requested by letter to attend appeal meeting on 8/9/21 by external manager Miss Salkeld (Sales Manager, call centre)

15/9/21 - Appeal meeting takes place with Miss Salkeld, Mr Ballard Trade Union Representative was present to assist Miss Stevens

20/12/21 - Appeal outcome letter, appeal dismissed and dismissal decision upheld

**Issues / Law**

13. The parties agreed that the claimant was an employee, with 2 years -service, who had brought a claim in time, and who had been dismissed.

14. The issues for me to determine are:

(a) The respondent has to show, on the balance of probabilities that a potentially fair reason for dismissal exists. **Section 98(2) Employment Rights Act (1996).**

The respondent asserts the potentially fair reason was conduct.

(b) If the respondent shows that a potentially fair reason for dismissal exists, I have to consider **Section 98(4) Employment Rights Act (1996**),

'Depends on whether in the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.'

This requires a focus on the reason accepted as a potentially fair reason at section 98(2) ERA 1996.

It also requires consideration of section 98 (4) (b);

'Shall be determined in accordance with the equity and substantial merits of the case'.

This means fair play, and in misconduct cases involves consideration of whether the respondent has dealt with others in a similar situation more leniently. In considering section 98(4) ERA 1996, the burden of proof is neutral.

(c) In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **BHS v Burchell 1980 ICR 303 and Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the

employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.

It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer **Iceland Frozen Foods Limited v Jones 1982 IRLR 439.**

(d) In respect of gross misconduct dismissals, **Brito – Babapulle v Ealing Hospital NHS Trust (2013) IRLR 854** requires the tribunal to consider (1) was it reasonable for the respondent to characterize the conduct as gross misconduct and (2) was it reasonable to dismiss without notice, taking into account length of service and previous behaviour of the employee. **Tayeh and Barchester Healthcare Ltd (2013) EWCA Civ 29** states it is for the employer to judge the severity of the offence it has concluded the employee is guilty of, it is not for the tribunal to substitute its own subjective view. In the case of **British Leyland UK v Swift (1981) IRLR 91**, if the employee has committed an act of gross misconduct, it would be unusual for the tribunal to conclude the mitigating circumstances were so powerful that dismissal fell outside the band of reasonable responses.

(e) In respect of inconsistent treatment, **Hadjioannou v Coral Casinos Ltd (1981) IRLR 352**, identified 3 situations in which a consistency argument may be relevant.

1. where employees have been led to believe certain conduct will not lead to dismissal.

2. where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal was not the real reason.

3. where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable to dismiss.

15. During the course of the hearing, Mr Cooper did not cross examine on, and confirmed to the tribunal that he was not pursuing, as part of his argument, that the minutes of the conduct hearing dated 17/8/21 with manager Mr Brown were inaccurate. He also confirmed he was not pursuing an argument over the length of the conduct hearing being too long, and arguments Mr Brown questioned the claimant excessively during the meeting were also not pursued.

16. Mr Cooper also confirmed in his final submissions that he did not put forward that the claimant's mental health was the reason for her conduct in this case. The respondents' witnesses were not cross examined on this point.

## Evidence and findings

17. The claimant conceded in the initial investigation and throughout the investigation, conduct hearing and appeal process that she wrote the customer's name and e mail address on an unauthorised form on the 3/8/21. She stated in evidence that she had given the document to the customer to take away, and was not aware how the document came to be on the stand subsequently.

18. The 3 witnesses for the respondent all confirmed in their statements, and during evidence they had accepted the claimant's version of events, that she had written the information on a form and given it to the customer.

19. It is apparent from page 122, the minutes of the conduct hearing (which I accept as accurate as this has not been challenged), that the investigation encompassed 2 potential breaches of the conduct policy (1) writing down a customer's full name and e mail address on an unauthorised document on 3/8/21 and (2) failing to destroy a document containing a customer's name and address on the 3/8/21.

20. Evidence in the bundle confirms the claimant had mental health difficulties during 2021. In clarification questions Mr Brown confirmed he was the claimant's manager from June – August 2021, covering a colleague managers maternity leave. Page 222 in the bundle confirms Mr Brown supported the claimant with reasonable adjustments in July 2021, regular breaks, reductions in late shifts, reduction in targets for 4 months, support through AVIVA.

21. The respondent had a 'How we work' policy, which detailed for example at page 69 'keeping customers safe', that 'we never write down or capture our customers details anywhere'. Page 73 stated 'please do not keep a written record of any customer details or save customer details on a personal device'.

22. At page 96 of the 'How we work' policy, a full page is given to the statement 'any cases / investigations found to be in breach of the processes and policies set up in this document may be deemed gross misconduct, which may result in further action being taken in line with sky's conduct policy'.

23. Sky's conduct policy at page 43 sets out the process that will be followed, when conduct issues arise. It lists the process as: investigation, informal / formal stage, outcome, appeals, role of companions, examples of offences, and gross misconduct. In respect of gross misconduct at page 46, it states 'gross misconduct is a very serious type of offence which is likely to lead to dismissal'. The policy provides examples; 'serious breach of the terms and conditions of your employments and / or sky rules and policies'. It also gives as an example 'negligent, reckless or wilful failure to comply with the provisions of sky's data protection policies'.

24. Training records for the claimant in the bundle at page 98 indicate 3 separate types of training were under taken on data protection in 2019, and 2021. The claimant accepted during cross examination that she was familiar with the policies, and understood the requirements not to write customer information down, and the requirement to shred any data. She accepted the respondent took data protection seriously and she confirmed she was familiar with the conduct policy.

25. The claimant e mailed Mr Shepherd on the 6/8/21 agreeing the contents of the investigation notes. The letter dated 6/8/21 inviting the claimant to a conduct hearing set out the allegations faced, included a copy of the conduct policy and all documents the respondent was considering at the hearing. A change of date from 12/8/21 to 17/8/21 was accommodated due to claimant's holidays.

26. Mr Shepherd confirmed in clarification questions that he was aware of 2 similar cases to the claimant's that he had dealt with. The first case involved a staff member who had written down a customer name and postcode, it was written on a leaflet found on a stand. The staff member was on a probationary period and it was not extended. Mr Shepherd confirmed Employee Relations advice, was it could go via a formal conduct hearing or non-renewal of probationary period. The second case involved a staff member who wrote a customer account number down. On the basis the customer could not be identified from this alone, it resulted in a first written warning.

27. The claimant attended the conduct meeting on the 17/8/21 with Mr Brown and a Trade Union official present. I note from the minute's checks were made regarding the claimant's health and welfare, and breaks were offered in the meeting. I note breaks were taken in the meeting, and a 2-hour gap ensued and the meeting was resumed.

28. The dismissal letter dated 18/8/21 set out the basis of the claimant's dismissal. Mr Brown confirmed in cross examination, he found the allegation of writing down a customer's name and e mail address based on the claimants' admissions proven. He clarified in cross examination, and made it clear in his letter dated 18/8/21 that although he found the second allegation proven, that the claimant had failed to destroy a document, he did not take this into account in his dismissal decision. He accepted the claimant's account that she handed the document to the customer, and then could not control what they did with it. The dismissal decision was based on the action of writing down the customer's name and e mail address. The letter informed the claimant of her right of appeal.

29. Mr Brown confirmed when cross examined, he had consulted Employee Relations and been advised similar cases had resulted in dismissal. He considered other options, bur felt dismissal was the appropriate sanction, he was aware the claimant had no disciplinary record. He did not feel it was relevant to contact the customer as he was not disputing the claimant's version of events, and didn't feel it necessary to check CCTV.

30. A request by the claimant on the 20/8/21 for an independent manager outside retail to hear an appeal was granted. The claimant was informed on the 4/9/21 that Miss Salkeld would chair the appeal. She was provided with all documents to be referred to in the meeting. It summarised her grounds of appeal which were reflected in her e mail dated 2/9/21: the outcome was too severe, the procedure was wrong and unfair and the claimant had new evidence to show an unfair outcome, she wasn't treated well in the conduct process. The meeting was rescheduled from 8/9/21 to the 15/9/21 at the claimant's request.

31. The claimant attended the appeal meeting on the 15/9/21 with a Trade Union Representative. She provided for the first time during the conduct process, screenshots of WhatsApp conversations between other staff members regarding

a data breach incident (bundle 164) from 2018. The claimant confirmed by e mail 21/9/21 that the minutes of the appeal hearing were accurate. (Page 162)

32. In cross examination, Miss Salkeld confirmed she did not think it was necessary to contact the customer as the claimant had admitted to writing the information down. She sought details of comparator cases and outcomes from Employee Relations. She was provided with information that similar cases had resulted in dismissal. She confirmed she did not have the names of the individuals (page 189) at the time of the appeal, Employee Relations provided the comparators. She conceded on reflection it may have been better to interview Mr Wickson at a different time, not on the train. However, she was concerned they had diary clashes and she wanted to try to conclude the appeal. She was unable to establish from him or Mrs Vickers any details regarding the 2018 alleged data breach due to the passage of time.

33. The appeal was dismissed and dismissal decision upheld. The claimant was informed of this by letter dated 20/12/21, which gave details of the investigation Miss Salkeld had carried out into the alleged 2018 incident. The letter went through the three grounds of appeal raised by the claimant and gave Miss Salkeld's response in respect of each point.

34. The claimant conceded in cross examination, that whilst in her statement she stated she was dismissed for a spurious reason; she accepted the data protection breach was the reason for her dismissal.

**Has respondent shown on balance of probabilities a potentially fair reason for dismissal exists**

35. The burden of proof on the employer at this stage is not a heavy one. It requires a ‘set of facts known to the employer or beliefs held by him which cause him to dismiss the employee'. Mr Shepherd had found a form with the claimants' writing on, potentially in breach of data protection policies. He conducted an investigation meeting, and the claimant admitted writing on the form. Therefore, I find on the balance of probabilities that the respondent has shown a potentially fair reason for dismissal exists, namely conduct.

**Did the respondent act reasonably / unreasonably in treating that as sufficient reason to dismiss the claimant / Was that in the band of reasonable responses**

36. I have considered the 3-stage test in BHS v Burchell;

**Did the respondent genuinely believe the claimant was guilty of misconduct? –** yes, I find the respondent did believe the claimant was guilty of misconduct. The claimant had admitted recording a customer's name and e mail address on the form, and the respondent accepted her account of this.

37. **Was the respondent's belief based on reasonable grounds?** - yes, the respondent had the physical form the claimant had completed with the customers details, (page 97) and the claimant had admitted writing the customers details down during in the investigation.

38. **Did the respondent conduct a reasonable investigation?**

I have taken into account the size and administrative resources of the respondent. Sky is a large company with a high level of resources, it is reasonable to expect them to have detailed conduct policies and procedures, which they did, how to guides and conduct policies, as referred to in paragraphs 21,22 and 23.

39. The respondent held an initial investigation meeting the day after the incident, and sought the claimant's agreement to the notes of the meeting which she provided. A conduct hearing was to proceed on the 12/8/21, but was moved to the 19/8/21 to accommodate the claimant's holiday. The claimant was provided with the conduct policy and documents to be relied on in advance of the meeting, and had a representative with her in the meeting. She was advised in advance the allegations she faced. She was provided with the offer of adjustments / support for mental health difficulties during the conduct meeting. She was given an opportunity to respond to the allegations. Mr. Brown sought Employee Relations advice on similar cases and outcomes in making his decision.

40. Mr. Cooper has made submissions, and cross examined all 3 of the respondent's witnesses on the points (1) the customer was not contacted for information about what happened, and (2) no check was made of CCTV covering the stall. All 3 witnesses gave evidence that they did not contact the customer as the claimant had admitted to writing down the customer details, and they did not challenge her account the customer had taken the form away. In relation to CCTV, Mr. Shepherd confirmed Sky's procedures would not allow CCTV to be used for disciplinary matters, unless it was a criminal offence, as staff members were not aware it could be used in this way.

41. I find it was reasonable for the respondent to decide there would have been no benefit to speaking to the customer as part of the investigation, as the facts were not disputed that he had taken the leaflet away. I do not find it added any unfairness to the investigation that the customer wasn't spoken to. The explanation provided by Mr. Shepherds regarding CCTV seems entirely plausible. I find not obtaining the CCTV did not cause any unfairness to the investigation. The actions taken by the respondent, of not speaking to the customer and not retrieving the CCTV, are within the boundaries of reasonableness on the facts of this case.

42. I find that Miss Salkend conducted a thorough appeal in respect of the claimant, issuing a 5 ½ page letter on the 2012/21 concluding her findings, which addressed all the points raised by the claimant. I note that the appeal was the first time the claimant raised a comparator case, and it related to an incident in 2018. The claimant was unable to provide specific details regarding the incident in 2018. Despite the gap of 3 years since the alleged incident referred to, Miss Salkend did the best she could to contact previous managers to try to ascertain the position. Whilst it wasn't ideal the interview with Mr. Wickson took place on the train, ultimately, he was unable to remember any details due to the passage of time, and I do not find the format of the interview flawed the appeal process undertaken.

43. Mr Cooper cross examined Miss Salkend regarding the fact that she did not have the specific cases mentioned on page 189 of the bundle, before her when determining the appeal. I have accepted her evidence and that of Mr Brown that they contacted Employee Relations, and were given generic advice on similar cases, without names being given, and the outcomes they were advised of resulted in terminations for gross misconduct.

44. The claimant has not put forward any evidence of a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures, and I do not find any failures to comply with it.

45. Overall, I conclude a reasonable investigation was undertaken. The respondent had clear and specific written rules and procedures, and followed its internal procedures. Separate managers undertook the investigation, conduct hearing and appeal. An external manager heard the appeal at the claimant's request. The claimant was accompanied in all meetings, notified of the allegations in advance, and provided with copies of the policies and evidence in advance. She was able to put forward any evidence she wished, and the managers involved in the process took Employee Relations advice.

**Was the sanction within the band of reasonable responses**

46. In accordance with **Brito – Babapulle v Ealing Hospital NHS Trust**, the first question I have to consider is whether it was reasonable for the respondent to characterise the conduct as gross misconduct.

47. I find that the respondent's policies as detailed above paragraphs 21,22 and 23, were very clear that data protection breaches could result in action being taken, which could include dismissal for gross misconduct. It is significant in my view, that the respondent's conduct policy referring to gross misconduct specifically includes data protection breaches as an example.

48. There is evidence in the bundle in respect of Mrs Vickers interview at page 185, that actions such as those taken by the claimant would be viewed as gross misconduct. The nature of the text messages sent by Mr Guest at page 164, also supports the view that data breaches are taken very seriously, as he is seeking immediate guidance on what to do in a difficult situation. Mr Shepherds evidence regarding 2 similar cases he had personally dealt with are relevant. The first case may have resulted in conduct proceedings and dismissal, if the staff members probationary period had not been extended. I have taken into account Mr Brown and Miss Salkend sought Employee Relations advice, and were advised similar cases resulted in dismissal. The evidence provided at page 189 of the bundle, with regard to LR and a dismissal for gross misconduct 2 week prior to the claimant, is highly relevant as the facts of the case are almost identical.

49. In the circumstances I find it was reasonable for the respondent to characterise the conduct as gross misconduct. The respondent had clear detailed policies which gave examples of what could constitute gross misconduct, the claimants' actions falling within those definitions.

50. The second question I have to answer is whether it was reasonable to dismiss the employee taking into account their length of service and record. The claimant had 11 years' service and no disciplinary matters on her record. Normally length of service is relevant, but **AEI Cables Ltd v McKay,** states in cases of gross misconduct, it will not be a factor which carries any significant weight. Having found that it was reasonable for the respondent to treat the actions as gross misconduct, I take the case into account, and do not attach significant weight to the claimant's length of service. I also take into account that the claimant did not put forward any mitigating circumstances for her actions at the time.

51. The details of the 2018 incident the claimant referred to can't be considered as an inconsistent treatment argument, there is insufficient detail as to who was involved, what happened and what the outcome was. I do not find these circumstances fall within any of the 3 situations identified in **Hadjioannou v Coral Casinos Ltd.** It has not been argued the first 2 situations identified in the case apply. In respect of the 3rd identified situation, where it can be said to be a truly parallel case, the details of the 2018 circumstances are not known, so it is not a truly parallel case to consider.

52. I have taken into account the **British Leyland v Swift case**, that it would be unusual if there is an act of gross misconduct, for the tribunal to find dismissal to be outside the band of reasonable responses.

53. I do not find the Employment Tribunal case of **Boucher and Essential Finance Group** to be of assistance. The finding of unfair dismissal in that case relates to a zero -tolerance policy which the respondent claimed applied, which was not in writing and had not been communicated to the claimant. The policies in this case had been clearly communicated to the claimant, and she accepted knowledge of them, and having received training on them.

54. For all the above reasons I find that the dismissal in these circumstances was within the band of reasonable responses, and I dismiss the complaint of unfair dismissal.

I confirm this judgment has been electronically signed.

**Employment Judge Beck**
**17 January 2023**