



# EMPLOYMENT TRIBUNALS

**Claimant**  
D McCall

v

**Respondent**  
Holland and Barratt Retail Limited

**Heard at:** Watford by CVP  
**Before:** Employment Judge Anderson

**On:** 13,14,15 and 16 June 2023

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** C Searle (counsel)

## **RESERVED JUDGMENT**

1. The claimant's claim of unfair dismissal is dismissed.

## **REASONS**

### **Background**

1. The claimant was employed by the respondent, a health food retailer, from 29 April 2000 until her dismissal on 15 October 2021. At the time of dismissal she was a store manager. The claimant was dismissed after the respondent found that allegations of inaccurate time recording and overbooking of holidays were proven. The claimant brings a claim of unfair dismissal. Her case is that the process leading to her dismissal was unfair and that the decision to dismiss was unreasonable. The respondent's defence is that the claimant was dismissed for misconduct after it followed a fair disciplinary process, and that its decision to dismiss was within the range of reasonable responses.

### **The Hearing**

2. The claimant asked for a postponement of the hearing two working days before it commenced. That request was refused. The claimant said at the outset of the hearing that she did not think it was fair that she should have to go ahead.

3. The parties filed a joint bundle of 641 pages. The claimant asked for two WhatsApp messages to be added to the bundle. The respondent agreed to that, and I received copies of the messages. The claimant asked to make further additions to the bundle close to the end of the hearing. I refused further additions at that point. She emailed the tribunal after the hearing asking to submit further information and I also refused that request.
4. The claimant filed five witness statements: her own; Ahcene Adoum, Samantha Pittas; Livui Heradi and Guillermo Monaz. Mr Adoum and Ms Pittas were unable to attend the hearing and I did not have regard to those statements when making my decision. Mr Heradi and Mr Monaz attended the hearing to give oral evidence, as did the claimant. The respondent filed three witness statements. All three witnesses, being Ayaz Ali, Adam Moore and Darsh Chand, attended and gave evidence.
5. I adjourned at around 10.30am on 13 June 2023 until 12.00pm for reading and to give the claimant further time to prepare her cross examination, after I had explained to her the various steps of the hearing and her role in cross examination. I later decided to extend the adjournment until 2pm to allow the claimant further time to prepare. The claimant contacted the tribunal before 2pm and said she was too unwell to attend that afternoon. I therefore adjourned until 10am the next morning (14 June 2023). The claimant made an application to postpone the hearing early on the morning of 14 June 2023. I have set out below my consideration of that application, which I refused. The claimant was advised by tribunal administration that the hearing would commence at midday on the 14 June 2023 in her absence. I am pleased to say that the claimant decided to attend the hearing and played a full part over the next two days. Before cross examination began, I gave the claimant the option of using the text box function available on the CVP system to type questions if she felt she was unable to verbalise them. She said that she could not type due to an injured wrist. The claimant has a speech impediment, however I was able to understand her evidence and cross examination, as were the witnesses. Evidence was taken slowly, and the claimant was asked to repeat anything that I had not understood. Both parties made oral submissions in closing. I gave the claimant the option of sending written submissions, making oral submissions or doing both. She chose to make oral submissions.

#### **Application to postpone the hearing**

6. The claimant made an application to the tribunal at 6.50am on 14 June 2023. She said that she did not have representation and was unable to go through with representing herself. She said that she has the disability of a speech impediment and being on medication did not help. She said that the hearing felt embarrassing for her and daunting. No evidence to support the application was supplied and it was not copied to the respondent, though contained a request from the claimant to let the respondent know.

#### Background to the application

7. This hearing was listed for 1 and 2 March 2023. On 7 February 2023 the claimant's representative wrote to the tribunal and the respondent requesting

a postponement of the hearing to enable the parties to explore settlement. On 10 February 2023 the claimant's representative re-iterated the request stating that she had only been given conduct of the file the week before. The respondent did not object to the postponement. The postponement was refused by EJ Quill, noting that both parties should be in a position to proceed and the fact that there was consent between them was not reason to postpone.

8. On 20 February 2023 the claimant's representative again requested a postponement, this time on the grounds that the claimant intended to produce four witnesses (including the claimant), and therefore the two day listing was too short. The correspondence between the parties indicates that the fact that the claimant would have four witnesses was only brought to the respondent's attention between 16 and 20 February 2023. The hearing was postponed on this further application and listed for four days commencing 13 June 2023.
9. On 9 June 2023 the claimant made an application to postpone the hearing due to commence on 13 June 2023. In that application she said that she wanted to postpone as she did not have representation and was awaiting gall bladder surgery. The application was considered by EJ Quill and refused on 12 June 2023 due to the application being unsupported by evidence, lacking in clarity and not being copied to the respondent.
10. The respondent attended the hearing at 10am on 14 June 2023 as scheduled. The claimant did not attend. I heard submissions from the respondent.

Respondent's objections

11. Mr Searle, for the respondent, said that the claimant had not copied the application to the respondent. He noted the email from the tribunal yesterday setting out requirements for a postponement application and highlighting his suggestion that the order of evidence could be changed to assist the claimant. He said that if the application was granted the claimant had by default obtained what she sought on 9 June 2023 and which had already been refused. He noted that the reading time yesterday had been extended to assist the claimant. Mr Searle said that he was aware of the claimant's disability and had noted that she had some difficulties in communication yesterday, however, the respondent was also entitled to have this case heard. He noted the previous postponement which he said was due to the claimant stating that she would have four witnesses, and that costs had been incurred by the respondent due to that postponement. He said that the tribunal was entitled to take into consideration in reaching its decision that the merits of the defence were overwhelming in what is a straightforward unfair dismissal case. He said that the respondent's view was that the hearing should continue. If the tribunal decided to postpone, I should reserve the hearing to myself in view of the time already invested, and it should be expedited.

Decision and reasons

12. I refused the application. In reaching this decision I took in to account the overriding objective (Rule 2 schedule 1 of the Employment Tribunal Rules

2013) which is to deal with cases 'fairly and justly', and which includes avoiding delay, so far as compatible with proper consideration of the issues as well as saving expense.

13. The claimant's reason for requesting a postponement is that she is unrepresented. I note that her representative notified the tribunal that it was coming off the record on Tuesday 30 May 2023. No evidence was provided by the claimant as to why this happened. I was not given information about whether she decided that she did not wish to instruct the representative any longer or the decision was taken by the representative. If the latter, it is very unlikely in my view that 30 May 2023 would be the day that this matter was first raised with the claimant. No request was made for a postponement until nine days later, no evidence has been provided about any attempts by the claimant to obtain alternative representation. When EJ Quill refused the application on 12 June 2023, he set out that one of the reasons for that was a lack of evidence and clarity. When the tribunal emailed the claimant yesterday it advised as follows: *Should there be any further request for a postponement, this must set out reasons in detail and be fully supported by documentary evidence.* Nothing was provided other than the request summarised above.
14. I noted that this was the second representative engaged by the claimant in these proceedings to come off the record. In the absence of information from the claimant it was not clear to me whether a postponement would ensure that the claimant could obtain alternative representation.
15. The fact that the claimant would find attending a hearing as a litigant in person embarrassing and daunting is noted but it is not a reason to postpone a hearing. The tribunal is used to litigants in person appearing before it and takes very seriously its duty to assist litigants in person in accordance with Rule 2 to ensure that, so far as is practicable, the parties are on an equal footing.
16. I considered the claimant's point that she has a speech impediment. The claimant attended the hearing briefly yesterday. It was not my view due to that appearance that it would not be possible to continue with the hearing because of the claimant's speech impediment and she did not raise that at the time. Even if represented, the claimant would be cross examined by the respondent's counsel. The time allocated for the hearing was generous and would allow time for cross examination to progress more slowly than usual. I also noted that this is not a medical condition that has just arisen, but it has not been raised during the lifetime of these proceedings that the claimant would have any difficulties in giving evidence. I realise that giving evidence and cross examination are different but in the absence of evidence to the contrary, and taking the view that assistance could be afforded to the claimant where necessary by the tribunal, including the opportunity to type questions in the text box facility as the hearing took place by CVP, I concluded that this was not a reason to postpone the hearing.

17. Finally, I considered the balance of prejudice. The claim is prepared in that the bundle is complete and the witness statements have been exchanged. The six witnesses are able to attend the hearing this week. The respondent has already incurred the costs of one postponed hearing and would incur further costs if there was a second postponement. Re-listing of a four day hearing is not likely to be this calendar year, causing difficulties to all witnesses in terms of distance from the events relevant to the claim. The claimant knows her case and there is no guarantee that a postponement would result in the claimant attending the relisted hearing with representation.
18. Taking all of these matters into account I refused the application.

### **The Issues**

19. The following list of issues was agreed between the parties:

#### Ordinary Unfair Dismissal - ERA 1996, s 98(1), (2))

1. What was the reason or principal reason for the Claimant's dismissal?
2. Was it a potentially fair reason? (ERA 1996, s 98(1), (2))
3. The Respondent relies on the potentially fair reason of serious misconduct following several previous instances of misconduct.
4. Did the Respondent act reasonably in the circumstances, in treating the alleged misconduct as a sufficient reason for the Claimant's dismissal? (ERA 1996, s 98(4)). In particular, did the Respondent form:
  - a. genuine belief that the Claimant was guilty of the misconduct alleged on reasonable grounds
  - b. after such investigation as was reasonable? (BHS v Burchell [1978] IRLR 379)
  - c. Was dismissal a sanction within the range of reasonable responses open to the Respondent? (ERA 1996, s 98(4))
5. Did the Respondent follow a fair procedure? (ERA 1996, s 98(4))

#### Remedy

6. If remedy is appropriate should any compensation awarded be reduced on the ground that:
  - a. The Claimant has failed to properly mitigate any purported loss? And/or
  - b. It would be just and equitable in all the circumstances? *Polkey v AE Dayton Services Ltd [1987] ICR 142* And/or
  - c. The Claimant failed to follow the ACAS Code of Practice? And/or
  - d. The Claimant contributed to her dismissal through his own conduct? And/or
  - e. If the Claimant was unfairly dismissed because the Respondent failed to follow a fair process, if such a process had been followed would the dismissal have been fair, with compensation being reduced accordingly?

### **Findings of Fact**

20. The claimant was employed by the respondent, a health food retailer, from 29 April 2000 until 15 October 2021. At the time of her dismissal she was the store manager at the respondent's Palmers Green branch.
21. On 3 September 2020 the claimant was suspended pending the investigation of a number of allegations of misconduct. Following an investigation, a disciplinary process was instigated by the respondent, and this resulted in the claimant being issued with a final written warning (FWW) on 19 October 2020. Four allegations were investigated: two allegations of falsifying timecards, a breach of health and safety processes and a breach of the new employee onboarding process. The breach of the new employee onboarding process was found proven. The allegations of falsifying timecards were not, but the claimant was instructed by the disciplinary hearing manager to undergo additional training on the respondent's time recording system, known as Heart.
22. The claimant appealed the warning. An appeal hearing took place on 26 November 2020. The claimant was notified in a letter dated 1 December 2020 that her appeal was not upheld.
23. The respondent's disciplinary policy states that a FWW will remain active on an employee's employment record for 12 months from the date of issue.
24. The claimant accepted that she was provided with training on the Heart system when it was introduced by the respondent in March 2020. She accepted that she had access to online training on the operation of Heart through the respondent's intranet. Following the FWW the claimant received training on the Heart system from Lisa Vickers. Documentary evidence was provided to show that the claimant had received training on rotas, holiday booking and timecard submissions. The claimant said this was a review and not training, and that it was a day where many subjects were covered. I find that the claimant was provided with training and had access to further training, on how to use the Heart system both before she became subject to a FWW and after that.
25. On 5 April 2021 Lorna Murray (an administrator in the respondent's Manpower department) raised with Mr Ali (the claimant's line manager) that the claimant was overbooking her holidays. Specifically, she was booking off full weeks but only recording one of the days in that week as holiday. Mr Ali forwarded the email to the claimant on 12 April 2021 asking her to review her holiday booking. The email was in the bundle, but the claimant denied receiving it. Ms Murray called the claimant to discuss the problem on 13 April. In an interview with Mr Ali on 29 June 2021 Ms Murray said that in that conversation on 13 April 2021 the claimant agreed she would ask to amend the holidays or delete them and that Ms Vickers had told the claimant she could call her back if she got stuck. She states that the claimant did not contact her again. On 24 April 2021 Mr Ali visited the Palmer's Green store to carry out a general compliance check. While there he states that he raised the holiday booking issue with the claimant and showed her how to record holiday correctly. Mr Ali states that he noticed when reviewing the claimant's

holidays that timecards were also incorrectly completed. Timecards are records on the Heart system which show the hours an employee was scheduled to work on any given day and their actual hours. Time cards also show whether an employee has logged in and out of the system correctly when entering or leaving their place of work.

26. It is Mr Ali's evidence that when he visited the claimant at the Palmer's Green store on 24 April 2021, he told her that she had overbooked leave and that if she took two weeks of leave booked to commence shortly after his visit then the second week of leave would put her in a position where she had taken more than she was entitled to in that holiday year. He states that he told her if she took the second week it must be recorded as unpaid leave. The claimant took no action in respect of amending the system and took the two weeks holiday. The claimant sent a WhatsApp message to Mr Ali on 29 April 2021 which included a photograph of a hospital appointment letter for an appointment on 27 April 2021. She emailed Mr Ali on 29 April 2021 to say that she needed to take her planned holiday in order to recuperate. It is the claimant's evidence that she had told Mr Ali she would take the second week as unpaid leave and that she had expected him to amend the system so that she did not get paid. The email of 29 April 2021 refers to holiday. It does not refer to unpaid leave. The claimant provided no evidence to show that she requested Mr Ali or anyone else to amend the system to remove that second week of holiday. The email of 29 April 2021 states the claimant intends to take holiday. One of the claimant's arguments was that she was unable to remove holidays and it was up to others to do so. In oral evidence Mr Ali confirmed that claimant would need to contact him or Lorna Murray in the Manpower department to tell them to cancel her holidays but at no point did she do so. I find that the claimant knew that she had to ask someone to amend her holidays and she did not ask Mr Ali or anyone else to amend the Heart system to show that she was taking unpaid leave in that week rather than holiday. Furthermore, I find that she was aware that in taking that week she would exceed her annual holiday entitlement.
27. The matter of overbooked holidays remained unresolved, and Lorna Murray sent a follow up email to Mr Ali on 21 May 2021. She noted that the claimant had requested a further two weeks holiday since Ms Murray first raised the issue and had booked off 6 weeks holiday using only 9 effective days. Mr Ali decided to commence an investigation into the claimant's personal record keeping. He visited the Palmer's Green store for that purpose on 16 June 2021 accompanied by Eileen Cronin, another regional manager. The claimant was not given prior notice of this visit. That same day, before Mr Ali and Ms Cronin attended the store, a theft took place at the store. This was one of a number of thefts that took place at the store from 2017. The claimant was physically injured in at least one of the thefts but not during the theft on 16 June 2021. I accept the claimant's evidence that she was upset and anxious on that day due to the theft.
28. At the investigation meeting on 16 June 2021 the claimant denied that she had agreed to cancel the second week of her holiday (the first week in May 2021). She also said she had done some work during that week, that she had

intended to sort it out with Mr Ali, he could have told her she would not get paid, she should have been given compassionate leave, and also that her holidays were approved, the last point being that a manager should not have approved the holidays if they would lead to over booking.

29. The investigation meeting was adjourned to allow Mr Ali time to investigate some of the claimant's responses to his questions. The meeting was reconvened on 6 July 2021. In that meeting, on the matter of holiday pay, the claimant said '*I haven't been myself. I will not have been myself. Should have asked you to change it, just take the money back. I have had robbery after robbery it's not an excuse but can you take that into consideration.*' The claimant was also questioned about time recording at that meeting. She was presented with CCTV evidence of entry and exit to the premises which did not match with the time claimed and had resulted in an overpayment of hours. The claimant's response was that she did not take breaks, she had done some work from home and that she thought there was a policy on Sundays that you could claim for a full 7.75 days even though the store was open fewer hours.
30. Following those two meetings Mr Ali concluded that a disciplinary hearing was warranted. Also following that meeting an occupational health referral was made in respect of the claimant. The claimant consented to this on 21 July 2021.
31. The claimant commenced a period of sick leave on 16 August 2021. The occupational health meeting took place on 17 September 2021 and a report was issued on 21 September 2021. This confirmed that in the opinion of the occupational physician the claimant was fully fit to attend a meeting. The reason she was off sick at the time the assessment took place was due to a fractured wrist. On 29 September 2021 the claimant told Mr Ali in a telephone welfare meeting that her health in general was fine, and it was just the pain in her hand that was causing an issue. She said she hoped to return to work after 4 October 2021 and would not be able to lift heavy items.
32. On 1 October 2021 the claimant was invited to a disciplinary hearing on 5 October 2021. Copies of the investigation materials were attached. The allegations were:  
  
*Failing to book holidays in Heart in accordance with process, resulting in you taking and being paid for more holiday than your entitlement.*  
  
*Failing to accurately record your hours of work, resulting in you being paid for more hours than you had worked.*
33. On 4 October the claimant's partner emailed Jack Bates, an HR Manager, and said the claimant had been sick over the weekend and could not attend the meeting on 5 October 2021. On 6 October 2021 the claimant spoke to Jack Bates by telephone. His account of that conversation, provided for the purposes of the appeal investigation, was that the claimant said she was unwell but would not disclose the nature of her illness. He said to the claimant that the OH report indicated she was fit to attend a meeting and she would



need to provide medical evidence if she could not attend the re-arranged meeting. He emailed the claimant the same day with an invitation to the re-scheduled meeting, noting that if she felt unable to attend she needed to provide evidence, and that there were alternatives to attending in person. In the appointment letter it is stated:

*If you fail to attend without good reason or prior notification, the hearing may be dealt with in your absence and a decision made based on the evidence I have. As this hearing may result in your dismissal, I urge you to attend.*

34. On 12 October 2021 at 08:35 the claimant sent a blank email to Vicki Stewart (lead employee relations advisor) with a photograph attached of an appointment letter for a medical appointment on 8 October 2021. No contact was made with the meeting organiser, Jack Bates, or the hearing manager, Adam Moore. The claimant did not attend the meeting and Mr Moore decided to go ahead in the claimant's absence. He recorded his reasons in the disciplinary hearing script as follows:

*"I have decided to hold today's meeting in Dorothy's absence as this is the second time that she has failed to attend this disciplinary. The first occasion her husband contacted Jack Bates and notified him that Dorothy was unwell and could not attend. On this occasion neither myself nor Jack have received contact from Dorothy to advise that she wouldn't be attending.*

*In addition, I have reviewed the occupational health report that is included as evidence with the disciplinary invite, and it says that Dorothy is fit to attend any meeting. I therefore did not consider it appropriate to postpone and re-arrange the meeting again."*

35. The claimant's evidence is that she had told Mr Bates that she would not be able to attend during their telephone conversation on 6 October 2021. I accept that the claimant said that during the conversation, but also accept that Mr Bates made it clear in that conversation and in writing afterwards that non-attendance must be supported by documentary evidence.
36. Mr Moore made a decision on the documentary evidence and decided to dismiss the claimant. He noted in the disciplinary hearing script that *"...Dorothy has committed two acts that are considered to be gross misconduct offences in their own right whilst also being on active Final Written Warning."*
37. At 2.20pm on 12 October the claimant emailed Jack Bates a letter from her GP setting out that the claimant had been referred to mental health services and had had a recent referral connected with an ongoing serious physical health problem. It notes that the claimant has told the GP that she cannot attend the meeting and ends 'I trust that you would re-schedule her review sympathetically given her recent health deterioration.
38. I find that the claimant did not provide any medical evidence to the respondent before the scheduled disciplinary hearing at 9am on 12 October 2021 that

she was unable to attend for health reasons, and she did not confirm before that meeting that she would not be attending. I accept the claimant's evidence that she tried to get a doctor's letter before the hearing, as evidenced in the WhatsApp screen shots she provided dated 11 and 12 October 2021 but find that she did not contact the respondent before the hearing to tell it that there was a delay on the part of the GP.

39. It is the claimant's position that the respondent was in a hurry to conclude the disciplinary process before 19 October 2021 when the FWW expired. I find that there is no evidence to support this allegation. The alleged misconduct took place in April to June 2021. Mr Searle pointed out that the warning was current when the events took place, and it did not then matter whether the year was up before the disciplinary hearing took place, which I accept is a correct interpretation of the currency of a FWW.
40. Mr Moore set out his decision in a letter dated 15 October 2021 as follows:

*During the Disciplinary Hearing, I considered the above allegations in detail:*

1. *Failing to book holidays in Heart in accordance with process, resulting in you taking and being paid for more holiday than your entitlement.*

*The evidence showed that you had booked 69 days holiday but had kept this under your annual entitlement by failing to accurately select the 'effective days' (the days you would have been due to work). For example, as referenced in Lorna Murray's statement, an occasion where a week had been booked off but you had selected only one effective day. Lorna discussed the correct process with you during a call on 13th April 2021, with the conversation concluding that you would go and correct these holiday bookings, but you didn't.*

*The Occupational Health report dated 21st September 2021, clearly states that in the OH Doctor's opinion, you should have no problems with following instructions or retaining information. This is a direct contraction of the mitigation you provided at the investigation meeting.*

*You were not present at the disciplinary hearing to contradict this evidence and I could not see that there was any reasonable explanation for your conduct.*

2. *Failing to accurately record your hours of work, resulting in you being paid for more hours than you had worked.*

*The evidence showed that on 3 occasions you had amended your timecard to show that you had worked longer than was actually the case. During the investigation meeting, you noted that this had been commonplace and that you had in fact been asked to amend timecards previously.*

*You initially stated that you would perhaps come in earlier and do work before clocking in later, but the CCTV screenshots obtained clearly show*

*you arriving and leaving the store at times that do not correspond with the hours you have claimed to work in your timecards.*

*Whilst I considered some of the health issues you raised during the investigation, that were alleged to have been caused by incidents in the store (robbery/assault), I could not see that there was any reasonable explanation for your conduct.*

*Having considered all the evidence available to me, I have come to the conclusion that your conduct is unacceptable. It is therefore my decision that you should be dismissed with payment in lieu of notice.*

41. In his witness statement Mr Moore said *'I did consider that Dorothy should be dismissed due to gross misconduct, however when I took into consideration her absence at the hearing, the first final and written warning on file and Dorothy's length of service I made the decision to dismiss for misconduct for pay in lieu of notice.'*
42. Under the Heading of *'Outcome of Disciplinary'* Hearing in the respondent's Disciplinary policy it is stated:  
  
*'The Hearing manager can apply any sanction at any stage, depending on the seriousness of the misconduct.'*
43. The claimant appealed Mr Moore's decision in a letter dated 18 October 2021. Darsh Chand, Director of Stores, was appointed as the appeal manager and a hearing was arranged for 12 November 2021. The claimant was unable to attend due to ill health and the hearing was rearranged to 22 November 2021. Before the hearing the claimant sent Mr Chand a number of documents including a number of time cards, holiday records and communications with Mr Ali. In addition, the claimant's trade union representative submitted a supportive statement.
44. At the outset of the meeting Mr Chand sought to understand the events that had led to the claimant not attending the disciplinary hearing. After the hearing Mr Chand carried out further investigations including sending questions to Mr Ali and Mr Bates arising from the claimant's evidence in the hearing. He also received and considered a further statement from the claimant, sent by email on 24 December 2021. During the appeal hearing the claimant was invited to send to Mr Chand messages and emails she said she had sent to Mr Ali about holiday and messages she had from other managers about it being common practice to adjust (known as straightening or tidying up) time cards. The claimant did not send these messages or emails to Mr Chand after the hearing. In oral evidence the claimant said Mr Chand had not carried out further investigation after the hearing. I find that there is clear evidence that he did carry out further investigation both in terms of the emails to and from Mr Ali and Mr Bates and the wording of the outcome letter.
45. Mr Chand said in oral evidence that he did not always re-investigate when hearing an appeal but that he had heard many appeals and he felt where the claimant had not attended the disciplinary hearing it was important to follow

due process. In the respondent's Disciplinary Policy, it is stated, under the heading of *'Your Right of Appeal'* that *'The Manager will adjourn the hearing to consider the reasons for the appeal, and to conduct any further investigation where necessary.'*

46. On 3 January 2022 Mr Chand issued a decision upholding the claimant's dismissal. The letter runs to nine pages and addresses all of the points raised by the claimant in her letter of appeal dated 18 October 2021, and all of the points she raised in the appeal hearing. On the subject of overbooking holidays Mr Chand noted that the claimant had been trained on how to book holidays, she had been told repeatedly that she was overbooking, she did not take action to correct this, and that the claimant was responsible for booking her own holidays. On the subject of the claimant's timecards not matching the hours she was physically in store as verified by CCTV on three occasions in the week of 28 May 2021, Mr Chand noted that the claimant had previously been investigated over allegedly falsifying timecards and had been provided with further training, she had provided no evidence that there was a common practice of straightening up timecards and there was clear evidence that the claimant had clocked in for more hours than worked on the relevant days.

#### **Submissions**

47. Both parties made oral submissions in closing. I have set out below a short summary of those submissions.
48. For the respondent, Mr Searle said that this is an ordinary unfair dismissal case. The respondent had the burden of showing the reason for dismissal, which was conduct in this case, and that clearly was the reason for dismissal. He said that the claimant was given three notifications that she must attend the disciplinary meeting and had failed to do so. An employer is entitled to continue with a disciplinary process when an employee is off sick, and absence from a meeting is not the same as being unable to attend a meeting. He noted that the claimant was off sick at that time with a fractured wrist. Mr Searle said that in relation to the FWW this had not been referred to in Mr Moore's dismissal, but it was clear that Mr Ali had taken a lenient view when making a decision on whether the claimant had fraudulently amended timecards in that first disciplinary process. The FWW had been considered by Mr Chand at the appeal stage and, taking into account that the tribunal had heard from three managers, as well as having sight of the appeal decision from Mr Barrett on the FWW warning, the respondent clearly viewed the issue of amending timecards as a serious matter. He said that the evidence of the respondent's witnesses was credible and the disciplinary and appeal outcome letters were detailed and well considered. He said that if the tribunal accepted that there were procedural defects at the disciplinary stage in that the hearing went ahead in the claimant's absence, then this was corrected at the appeal stage where Mr Chand approached the appeal with fresh eyes and followed due process in investigating the allegations against the claimant. Mr Searle said the claimant's witnesses, Mr Heredi and Mr Monoz, did not add anything to the evidence as their periods of employment ended some time before the dates of the misconduct of which the claimant was accused.

49. The claimant said that in relation to the FWW she was very shook up when Lauren Cutmore made allegations against her about conduct. She said she was off work from September 2019 to July 2020 due to illness and the pandemic. The claimant said that she felt that the allegation which was upheld within that disciplinary process, breach of the onboarding process of a new employee, was unfair. She also said that she did not agree that the allegation about locking doors, which also formed part of that investigation, but which was not upheld, was warranted.
50. In relation to the allegations which led to the claimant's eventual dismissal, the claimant said that she could not remove holidays from the system and the respondent, including Mr Ali, had admitted this. She said that she had said that some holiday in July 2021 should be taken off her holiday record and it had been. She said that, on the matter of the two week holiday commencing at the end of April 2021, she spent some of her holiday completing a review for the respondent, she had a hospital appointment and that staffing in the store was covered. She said that she had always cared. The claimant then talked about events that preceded the disciplinary process that resulted in a FWW, including that one of the staff Adam had been late and her then Area Manager was aware of this, she had always received compliments about her store, she was discriminated against following her illness due to her speech impediment and Lauren Cutmore's involvement in that first disciplinary process was a conflict of interest.
51. The claimant referred to the OH report of 25 September 2021. She said that the doctor only said that he thought she was able to attend meetings. The respondent knew she was sick. An occupational health report is for the long term sick, the respondent knew about her long term serious illness, and that the respondent had acknowledged in February 2021 that she needed some care. She referred to problems with a member of staff in her store during March and April 2021.
52. The claimant said that she had wanted to come to the disciplinary hearing. She said that she had put herself forward and had helped the respondent many times. Sometimes she was at the store at 6am in the morning. The claimant said she had been mocked by Mr Chand when she said that she had worked from home. The claimant said that the investigation was not done properly and asked that the tribunal look at the timecards in the bundle. She said that during the appeal hearing the respondent should have let her explain why she did what she did, and it could have looked at her budget. She said that she had come in to work on holidays and had worked long hours. If the respondent had looked at the timecards it would see all of the time that she had done on her own.
53. The claimant said that she emailed Mr Ali in May 2021 to say she was unwell and understaffed. She said that the respondent was concentrating on a few under recorded hours but not reflecting how much she had put in, which showed her passion and integrity, and that the respondent was clutching at straws. The claimant said that she had not had help from a solicitor which was very unfair to her. Regarding the FWW she had asked for the timecards from February which showed how many hours she had worked and how short

staffed she had been. She had to do a promotion with one person. On the Sunday she believed in her heart that it was okay by contract for her to record 7.75 hours when the shop was open from 11am to 5.30pm. She had not put in petty cash for extra hours.

**Law, Decision and Reasons**

54. The question I need to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.
55. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. I am satisfied on the evidence that the claimant was dismissed for conduct.
56. There was some suggestion from the claimant both in her cross examination and her witness statement that the respondent set out to dismiss her following the disciplinary process that resulted in the claimant receiving a FWW on 19 October 2020. She does not say why this would be the case. She does not put forward any other reason for dismissal and simply states that she believes that her card was marked after the first disciplinary process. I find that on the evidence that there was only one reason for the claimant's dismissal, which is conduct.
57. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and 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.
58. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379* 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*, *Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*, and *London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

59. In relation to the first part of the Burchell test I am satisfied that the respondent had a genuine belief in the claimant's misconduct where CCTV records and timecards did not match up, and the claimant had overbooked leave on the respondent's time management system.
60. I must then consider whether the respondent's genuine belief in the claimant's misconduct was based on reasonable grounds and after carrying out a reasonable investigation.
61. Mr Ali, regional manager and the claimant's line manager, carried out the initial investigation into the claimant's alleged misconduct. He interviewed the claimant at length on 16 June 2021 and 6 July 2021. In between those meetings he carried out investigations into comments made by the claimant in the first meeting. He gathered evidence from CCTV cameras as well as from colleagues involved in the claimant's training, and in dealing with holiday bookings. The notes made at the meetings were available for the claimant to view. At the end of that process he decided that a disciplinary hearing was warranted. An appeal manager was appointed, and he was provided with the documentation gathered by Mr Ali. The claimant was invited to a disciplinary hearing. The date of the hearing was re-arranged at her request. The hearing eventually went ahead on 12 October 2021 in the claimant's absence when she failed to attend or supply evidence as to why she could not attend. Although the claimant was on sick leave this was due to a fractured wrist and Mr Moore relied on a recent OH report (21 September 2021) in which the OH doctor had concluded that the claimant was fully fit to attend any meeting.
62. The claimant had a right of appeal which she exercised. She was accompanied at the appeal hearing by her trade union representative. The hearing date was re-arranged at the claimant's request. The claimant submitted further documentary material before the hearing. The appeal manager carried out further investigations in response to some of the points raised by the claimant at the hearing and accepted a further statement from the claimant. He set out his decision to uphold the dismissal in great detail, referring to the claimant's evidence and the other evidence before him to show how he had arrived at his conclusions.
63. The claimant raised a number of reasons in her grounds of claim as to why she believed that the investigation was not reasonable. She noted that she was not able to prepare for the investigation meetings on 16 June 2021 and 6 July 2021 as she was not given prior notice. I do not find that this would render the investigation unreasonable. It is not unusual for investigation meetings to take place without notice and there is nothing in the respondent's disciplinary policy to indicate that notice is required. The claimant further claims that as there had been a robbery at the store prior to the meeting she was in no state to proceed. This is not reflected in the minutes of the meeting and nor was it put to Mr Ali in cross examination. There was a second meeting on 6 July 2021 in which the claimant had the opportunity to put any points to Mr Ali that she had not put in the meeting of 16 June, and she had that opportunity again at the appeal hearing. In her grounds of claim the claimant states that there was a long delay between the appeal hearing and the appeal

outcome being delivered. The appeal hearing took place on 22 November 2021 and the decision was issued on 3 January 2022. Mr Chand acknowledged that he took five weeks, (which included a week for the Christmas break) to issue the decision. He said this was because he carried out a thorough investigation, taking into account all of the information provided by the claimant. I do not find that time between the appeal hearing and the delivery of the outcome is excessive when the volume of evidence to be reviewed is taken into account. I note that there are no time limits for the delivery of outcomes set out in the respondent's disciplinary policy.

64. The claimant states that it was unfair that the FWW was taken into account in the appeal decision as the FWW was for an unrelated matter. Mr Moore must have been aware of the FWW but did not refer to it in his decision. He found that the allegations against the claimant were made out and amounted to gross misconduct, though he decided to dismiss for misconduct on notice when taking into account the claimant's mitigation. Mr Chand referred to the FWW in his outcome letter and the importance he attaches to it is that the claimant had already been investigated over timecard violations and had been provided with additional training as a result. Mr Chand upheld the decision of Mr Moore to dismiss on notice for misconduct.
65. I do not find that it was unreasonable to take into account the fact that the disciplinary process that resulted in a FWW included an investigation into timecard fraud and led to the claimant receiving extra training on that issue.
66. The claimant set out in her grounds of claim and said in evidence that it was not reasonable for the respondent to have proceeded in her absence on 12 October 2021. I find that as the claimant had been told clearly on three occasions that she needed to provide medical evidence of an inability to attend and did not do so before the meeting commenced, it was not unreasonable for the respondent to proceed in her absence. The claimant said that the disciplinary hearing should not have been held at all when she was on sick leave. I was taken to no documents which set out that a disciplinary process must be suspended when an employee is on sick leave and accept the respondent's evidence that the claimant was off work with a physical issue (a fractured wrist) which did not stop her from attending a meeting, furthermore she had been deemed fit to attend a meeting by an OH doctor a few weeks beforehand. It had no evidence that the situation had changed. Finally, even if I had found that it was unreasonable of the respondent to continue in the claimant's absence on 12 October 2021, that defect was remedied by the appeal hearing. The claimant had an opportunity to put her case to Mr Chand, who considered all of her written and oral evidence, and carried out his own further investigations after the hearing.
67. My conclusion is that the respondent carried out a reasonable investigation.
68. I must then consider whether the decision to dismiss was within the range of reasonable responses. As set out above it is immaterial how the tribunal would have handled events, the test is simply whether a reasonable employer could have reached the decision to dismiss on the particular facts.



69. Most of the evidence and submissions made by the claimant in her pleadings and in her oral evidence focus on this issue. Specifically, that the conclusion reached by the respondent was wrong, unfair or unnecessarily harsh.
70. The claimant spoke at length about the events that were the focus of the first disciplinary hearing in 2020 and when I said to her that those matters were not relevant to the decision I needed to reach she said that respondent had brought it up. The documents relating to that process are contained in the hearing bundle. In reaching my decision on this claim the only relevance I attach to that process is that the claimant was investigated at that time for a similar infraction to the one she was dismissed for as regards timecards, she was told that her actions were unacceptable, and she was provided with further training. The other three of the four allegations comprising that process are not relevant to this claim and I have not considered them when deciding whether the decision of the respondent to dismiss was reasonable. I have also taken into account that the decision to dismiss was made on the seriousness of the allegations found to be proven in the disciplinary process which began on 16 June 2021. This is not a case where, because the claimant was subject to a live written warning for a previous misconduct finding against her, she was then dismissed because of the cumulative effect of another minor misconduct matter being found proven while that warning was live. Mr Moore stated that he considered the claimant's acts to have been gross misconduct but dismissed on notice taking her mitigation into account.
71. The claimant stated that she had staffing problems in her store, there had been a number of thefts, she was in ill health, she was unable to remove holidays from the system and that she amended timecards but overall, she worked in excess of her contractual hours. I have made no findings on these matters except in that it is accepted, as was confirmed by Mr Ali, that the claimant needed to ask someone to remove holidays. None of these points focused on the reasons why the respondent states that it dismissed the claimant.
72. I heard and read evidence that the claimant had been given training on using the Heart system, she had previously been told that her timecards must accurately reflect the hours she spent in the store, she had been told that her holidays were overbooked, she had not asked for holidays to be removed, she had booked further holidays and she had been overpaid. I took into account the evidence of the claimant's witnesses, which was about time card recordings and hours worked, but noted that neither of them had been employed at the time the allegations against the claimant had arose and also that the claimant had specifically been made aware through the first disciplinary process in 2020 that manipulating of time cards was an action prohibited by the respondent and considered to be a serious conduct matter. The claimant did not deny that she had received training or that she had amended her time cards so that they did not reflect the times she had been in the store on the relevant dates. Her evidence was about why she had amended timecards and that other colleagues, specifically managers, should have either not authorised her holidays or taken action to amend them. She also said that she had taken holiday when she could have been on sick leave.

Mr Chand has addressed all of these issues, which were aired in the appeal hearing, in his appeal decision letter of 3 January 2022. He concluded that this evidence did not address the allegations, and that the allegations were made out, taking into consideration the evidence gathered by Mr Ali and in Mr Chand's own further investigations. I accept the claimant's evidence that she was a long standing member of staff with a passion for her job, but I find that the decision to dismiss, where the respondent had evidence of the overbooking of holidays resulting in an overpayment, and evidence that the claimant had not been in the store during the hours she recorded on her timecard, was within the range of reasonable responses and one open to the respondent to make.

73. I therefore find that the dismissal of the claimant by the respondent on 12 October 2021 was fair, and the claimant's claim is dismissed.

---

Employment Judge Anderson

Date: 30 June 2023

Sent to the parties on: 18 July 2023

GDJ  
For the Tribunal Office