



EMPLOYMENT TRIBUNALS

Claimant: Mr Callum Andronicou

Respondent: Lidl Great Britain Ltd

Heard at: Bristol (via VHS)

On: 16 and 17 October 2023

Before: Employment Judge Boyce
(sitting alone)

Representation

Claimant: Mr Andronicou by VHS

Respondent: Mr Proffitt, of counsel by VHS

JUDGMENT

1. The Claimant's claim for Unfair Dismissal is not well founded and is dismissed.

REASONS

1. The Claimant requested written reasons in this case.

Law and Issues

1. Lidl Great Britain Ltd ("Lidl") state that Mr Andronicou was dismissed for misconduct, which is a potentially fair reason for dismissal under s98(2) Employment Rights Act 1996 (the Act). The burden of proof is on Lidl to prove that fact and the standard of proof is the balance of probabilities.
2. If the reason was conduct, the issue is whether it was fair or not. The starting point for the issue of fairness is the words of s98(4) of the Act.

".... 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. There is no burden of proof in deciding the issue of fairness, it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.
4. In cases of misconduct, it is the employer who must show that the misconduct was the reason for dismissal. Applying the test in British Home Stores Ltd v Burchell 1980 ICR 303, EAT and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, the Tribunal must consider:
 - a) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
 - b) If so, was that belief based on reasonable grounds?
 - c) Had the Respondent carried out such investigation into the matter as was reasonable?
 - d) Did the Respondent follow a reasonably fair procedure?
 - e) If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction such as a warning?

Evidence

5. Mr Vials and Mr Shirras gave evidence on behalf of Lidl
6. Mr Andronicou gave evidence.
7. There was an agreed bundle of 255 pages, plus witness statements of 19 pages.

Findings of Fact

8. Mr Andronicou started working at Lidl on 14 March 2017 as a Customer Assistant. He was promoted to Shift Manager on 1 September 2021 and moved to the Ferndown Store on 1 June 2022. He was summarily dismissed on 20 September 2022 for gross misconduct.
9. The alleged gross misconduct concerned three allegations, comprising two instances of lone working on 4 July 2022 and 2 August 2022; one instance of refusal to obey a reasonable instruction; and three instances of asking colleagues who have clocked out at the end of their shift to remain in store, on 27 June 2022, 28 June 2022 and 12 July 2022.
10. There were two investigation meetings. The first was on 14 July 2022. Mr Andronicou states that he was told it was an audit meeting. Mr Vials is clear that he read the pre-prepared introductory speech for investigation meetings, which explains that it could lead to disciplinary proceedings. Mr Andronicou has signed each page of the meeting notes and it is clearly written at the start of the notes that the reason for the meeting is 'investigation'. The notes from the meeting are not very clear about what

was said in relation to lone working but I accept Mr Vials' evidence that he confirmed during the meeting that lone working was not permitted. This is evident from the beginning of the second investigatory meeting on 4 August 2022, which starts:

"BV - Last meeting we discussed how lone working wasn't permitted by Lidl, and you understood that, yes?"

CA – Yes it's not allowed"

11. Whether or not Mr Andronicou understood the reason for the policy is irrelevant. He had been told that lone working was not allowed and he continued to lone work on 2 August 2022, which postdated the first investigation meeting. Mr Andronicou accepts lone working on both occasions. Mr Andronicou was in a position of trust and responsibility in his role as a Shift Manager. He had completed the Trading Law training on 1 September 2021 and the refresher training on 28 February 2022 and should have been familiar with the Health and Safety policies and should have provided an example for his team by following those policies.
12. As part of the investigation, Mr Vials spoke to members of staff about lone working and working time clocks and three incidents were identified where staff said they had been asked to clock out and remain in store whilst Mr Andronicou completed various tasks. Mr Andronicou accepts asking staff to clock out and wait because in his view, they were no longer working and were just waiting for him to finish so that the alarm could be set. Mr Vials and Mr Shirras were both clear that there are posters displayed in all the stores stating that employees are to be paid for every minute they are working and it is a policy that is very important to them. Mr Andronicou worked for Lidl for 5.5 years and I do not accept that he was not aware of this policy.
13. Mr Andronicou raises a question of the fairness of this investigation because he was not provided with the alarm logs and the timesheet evidence does not show what time the alarm was set. I find that Lidl provided enough information to Mr Andronicou for him to respond adequately to the allegations against him, given that he had accepted asking colleagues to remain in store whilst he completed various tasks and he was given access to statements collected from those colleagues, which detailed their accounts.
14. A disciplinary meeting was held on 17 August 2022 with Mr Simpson, and Mr Andronicou was sent a letter explaining the reasons for the meeting and confirming that he could be accompanied by a Trade Union representative or a work colleague. Mr Andronicou asked to bring a family member to the meeting but this was refused as it was not in line with the Lidl disciplinary policy. The statutory right to be accompanied under s10 Employment Relations Act 1999, only extends to trade union representatives, officials employed by trade unions or fellow workers and I do not consider it to be unreasonable to refuse the request for a family member to accompany Mr Andronicou to a meeting which was likely to discuss confidential information about company procedures. There were no extenuating circumstances that

required a reasonable adjustment in this regard. Mr Andronicou was capable of presenting his case.

15. Following his dismissal on 20 September 2022, Mr Andronicou appealed against the decision and an appeal hearing was held on 28 November 2022 with Mr Shirras. Mr Andronicou's appeal grounds contained 15 points of appeal and 8 factors to be taken into account as mitigation. Mr Shirras addressed each of these in turn in his 12 page outcome letter dated 19 January 2023.

Conclusions

16. Turning to the agreed list of issues, parties are agreed that the reason for Mr Andronicou's dismissal was misconduct. It therefore falls to consider whether the investigation was reasonable and whether it followed a fair procedure.
17. Lidl held two investigation meetings, one disciplinary meeting and one appeal hearing. Mr Andronicou was provided with written particulars of the allegations against him and copies of evidence collected during the investigation, including:
 - Disciplinary policy
 - Investigation report
 - Working time planning and recording policy
 - General store risk assessment
 - Investigation minutes from meeting 14 July 2022
 - Investigation minutes from meeting 4 August 2022
 - Witness statements from JC, GY and RD
 - Timesheets from 27 June 22, 4 July 22, 11 July 22 and 1 August 22
18. Mr Andronicou was given the right to be accompanied by a co-worker or trade union representative, he was told that the allegations were potentially gross misconduct and that the meeting may result in disciplinary action being taken which could include dismissal, and he was given information about his right of appeal once the decision had been communicated.
19. Lidl made an effort to rearrange meetings where requested and I do not consider there to be an unreasonable delay in dealing with the disciplinary process, given the number of allegations and the number of points raised by Mr Andronicou in his appeal letter.
20. The existence of gross misconduct is not determinative of whether a dismissal is fair or unfair Brito-Babapulle v Ealing Hospital NHS Trust 2013 IRLR 854, EAT, mitigating factors still need to be considered and the test for fairness, as outlined above, is contained in s98(4) of the Act. Mr Shirras explained in his evidence, in a measured and consistent way, why the allegations constituted gross misconduct and why he discounted any other sanction. In his letter confirming the outcome of the appeal, he addressed all of the mitigation points raised by Mr Andronicou and explained why they did not change his decision. I accept that lone working, which is a health and safety issue, and not recording time properly, which is a breach of policy

which puts Lidl in a position where they are potentially liable for unpaid wages claims, could constitute gross misconduct.

21. I have considered the test in s98(4) of the Act and I have looked at the size of Lidl and the resources available to it. They are a large company who have options available to them for redeployment or demotion, but I am satisfied that Lidl acted reasonably in treating the incidents of lone working and asking staff to remain in store after they had clocked out, as a sufficient reason for dismissing Mr Andronicou, and I am satisfied applying the criteria from Burchell and Hitt above, that it was within the band of reasonable responses to summarily dismiss Mr Andronicou rather than impose some other disciplinary sanction.

Employment Judge Boyce
Date 17 October 2023

Judgment sent to the Parties on 15 November 2023

For the Tribunal Office