



EMPLOYMENT TRIBUNALS

Claimant: Miss A Duku
Respondent: Asda Stores Limited
Heard at: East London Hearing Centre
On: 31 October 2023 & 1-2 November 2023
Before: Employment Judge J Feeny

Representation

For the Claimant: In person
For the Respondent: Mr A Rozycki, counsel

JUDGMENT having been sent to the parties on 7 November 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

- 1 This has been a hearing to determine the complaints of unfair dismissal, wrongful dismissal and holiday pay. The claimant had previously brought a number of different complaints; some under the Equality Act 2010 and also detriment on trade union grounds, but these complaints were dismissed upon withdrawal by Judge Massarella at the preliminary hearing on 22 May 2023.
- 2 The claim for holiday pay was withdrawn at this hearing when it transpired that the claimant had not in fact been underpaid for holiday.
- 3 The claim for unfair dismissal was in two parts: firstly, a complaint of automatic unfair dismissal because of trade union membership and/or trade union activities pursuant to section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") and a complaint of ordinary unfair dismissal applying section 98 of the Employment Rights Act 1996 ("ERA").

- 4 At this hearing the claimant has represented herself. The respondent has been represented by Mr Rozycki of counsel. I have heard evidence from Lorraine Campbell, Paola Estrada, David Palmer and Imran Khan for the respondent. The claimant gave evidence on her own account.
- 5 The documentary evidence has been contained in a bundle of 379 pages, along with a few loose documents provided by the respondent on the second day of the hearing.
- 6 During this hearing I have also watched CCTV footage. Where appropriate, Ms Campbell explained in evidence (i.e. under oath) what each video showed. There was no material challenge by the claimant to Ms Campbell on this during Ms Campbell's evidence and I therefore take the respondent's interpretation of the CCTV footage to be largely agreed by the claimant.

Findings of Fact

- 7 From the totality of the evidence, I make the following findings of fact.
- 8 The respondent is a well-known supermarket retailer. The claimant worked as a service host at the self-scan area at the respondent's Beckton store. Her employment had commenced in 2001. Her role required her to assist customers using the self-scan machines. She would also on occasions purchase her own shopping using the self-scan machines, generally towards the end of her shift.
- 9 I deal now with the facts that are said to support the claim for automatic unfair dismissal.
- 10 For some time the claimant has been a member of the GMB trade union. In January 2020 she became a representative of GMB. For the first two years of being a representative the claimant had no real issues with her managers. However, she believes the position changed in around April 2022 and she relies on three instances of her carrying out trade union activities to support this claim. The respondent accepts that the statutory test for trade union activities was satisfied in respect of each.
- 11 The first incident was in early May 2022, involving a colleague called Tracy. Tracy complained that a male colleague had shouted at her. Tracy, with the claimant as her trade union representative, went to discuss this with Ms Campbell. There was a discussion about whether Tracy should submit a grievance or was better served agreeing to mediation.
- 12 After the meeting, in a private conversation with the claimant, Tracy said that she did not want mediation as she believed that Ms Campbell and another manager, Kelly, had been picking on her. The claimant did not tell Ms Campbell or Kelly about this conversation. Ms Campbell arranged a fact-finding meeting in May 2022; Kelly was also present. The claimant attended with Tracy. Tracy became angry in the meeting and stormed out. She did not ever return to work for the respondent.

- 13 Although the claimant believed that part of the reason for Tracy's outburst was that she did not trust Ms Campbell or Kelly to fairly investigate the allegations, the claimant did not relay this in terms to Ms Campbell.
- 14 The second incident was said to have occurred on 24 June 2022. The claimant says that she was not allowed to go to the pharmacy to speak to a colleague who needed reasonable adjustments put into place.
- 15 The claimant's statement refers to this incident occurring instead on 30 June 2022. The claimant's evidence is that she knew the shop was busy. She asked her supervisor Sukvinder Singh if she could attend to the member. He said she needed permission from Paul, the manager. The claimant spoke to Paul and he authorised her to take the time off for trade union activities. Mr Singh therefore permitted the claimant to go. Afterwards the claimant and Mr Singh shared a joke about how she was not skiving.
- 16 The third incident occurred on 6 July 2022, when the claimant was given a final note for lateness following taking a call from a trade union member. On this day the claimant clocked in on time but before turning her phone off and starting work she received a call from an unknown number. She took the call and it was a trade union member asking for her help. She told the member that she could not speak now and would call on her break. She went to the shop floor but was by now two minutes late. Mr Singh said that a file note would be placed on her personnel file for lateness. The claimant said that she was only two minutes late and that she was carrying out trade union activities. Mr Singh said that he did not care and that she had prevented other people from clocking off their shifts. The claimant went to Ms Campbell to further argue her case. Ms Campbell was not sympathetic to the claimant's position and said words to the effect that the trade union member was not dying, implying to the claimant that the call was not sufficiently serious to justify taking it.
- 17 I move now to my findings of fact in respect of the disciplinary process.
- 18 In June 2022, Mr Singh reported to Ms Campbell that colleagues had told him that the claimant had been seen taking coins from the drawer in the self-scan area to pay for her shopping. The money in this drawer was collected from loose change that had been left behind by customers in the self-scan area. Ms Campbell asked Billy, the security guard, to watch the CCTV from the last month to see if he could find examples of the claimant doing this. It is common ground that Billy did not do this. Instead he told the claimant words to the effect that she was being watched. Ms Campbell had to get someone else to review the CCTV footage, a colleague called Trisha. Trisha's review of the CCTV showed two occasions when the claimant had taken coins from the drawer to pay for her shopping, on 23 May 2022 and 10 June 2022. Trisha also noticed four occasions when the claimant took Bags for Life without paying for them: 3 June 2022, 7 June 2022, 16 June 2022 and 27 June 2022.
- 19 Pausing there, as already noted in this judgment, the CCTV footage was played during this hearing. I am satisfied that it shows those incidents occurring. What is notable about the taking of the coins on 10 June is that the claimant appears to dawdle at the self-serve machine until her supervisor and colleague had

walked off screen before going to the drawer to take the coins. Similarly, with the video showing the taking of the Bags for Life, on at least a couple of occasions the video shows the claimant dropping the bag into her basket of shopping but then resuming working; the claimant did not just take a bag whilst scanning her shopping as one might expect.

- 20 Having viewed the footage, Ms Campbell considered that there was sufficient evidence to commence the disciplinary investigation. She decided against suspending the claimant as she considered the risk could be mitigated by moving the claimant to duties that did not involve cash handling.
- 21 The first investigation meeting took place on 7 July 2022. The claimant said that she wanted a trade union representative, so the meeting was adjourned.
- 22 The meeting resumed on 14 July with Martin Hall, a GMB official, representing the claimant. As part of her defence the claimant said that Ms Campbell allowed her to swap her coins with those in the drawer when her coins were not being accepted by the self-serve machines. As a result, Mr Hall submitted that Ms Campbell was a potential witness in the investigation and it was not therefore appropriate for her to continue overseeing the investigation. The meeting was adjourned again and Ms Estrada took over the investigation. Prior to this, Mr Singh had been interviewed by Ms Campbell on 11 July 2022. He described the reports he had received from colleagues about the claimant.
- 23 On 18 July 2022, Ms Estrada met with the claimant. On the same day she also met with Ms Campbell to discuss the coin-swapping issue. Ms Campbell confirmed that she had given permission to the claimant to do this, but she had not given permission for the claimant to take change from the drawer without replacing it with her own coins.
- 24 Ms Estrada decided that the investigation should go forward to a disciplinary hearing. Mr Palmer was appointed to chair the disciplinary hearing. This took place on 25 August 2022. The claimant was again represented by Mr Hall.
- 25 At the end of the meeting Mr Palmer adjourned to consider his decision. The claimant left the room, but Mr Hall stayed behind momentarily to suggest to Mr Palmer that a first written warning would be sufficient sanction. Mr Palmer explained to Mr Hall that it would be his own decision. The meeting reconvened after a one hour adjournment and Mr Palmer read a summary of the decision. The summary is at page 298 in the bundle. There was at one stage of the case a suggestion by the claimant that Mr Palmer had been unable to read the document and that the HR colleague supporting him in the meeting had read it out instead. However, the claimant no longer appeared to maintain that allegation in evidence and I am in any event satisfied that, as the agreed note suggests, it was Mr Palmer that read the decision summary.
- 26 Mr Palmer decided that the claimant was guilty of theft in that she had taken coins from the drawer without permission and taken Bags for Life without replacing them. He considered that this was gross misconduct and that summary dismissal was appropriate. This was confirmed to the claimant in a letter dated 26 August 2022.

- 27 It is of note that the claimant's defence during the investigation and the disciplinary hearing, largely based on submissions made by Mr Hall on her behalf, was that she was entitled to take the change from the drawer because it was, on occasions, given to customers by staff when those customers were short of money to pay for their shopping. This was described by Mr Hall as both a breach of the lost and found policy but also common practice. It was not, however, said at this stage of the process that colleagues of the claimant also helped themselves to change from the drawer when they should not.
- 28 As for the Bags for Life, it was said by Mr Hall that the claimant had broken bags at home and had meant to bring them back in but had not got round to doing so. This was because there was a custom and practice of giving a customer a new Bag for Life if they had brought in a damaged bag. Further, it was a general feature of the claimant's defence that her actions had not cost Asda any money. However, it was confirmed during the disciplinary hearing that Asda was charged for Bags for Life and therefore there was a cost to them being taken without being paid for.
- 29 The claimant appealed the decision to dismiss her with a letter dated 29 August 2022. It raised three grounds of appeals: (1) severity of outcome, (2) procedural errors, and (3) common practice. It was later clarified at the appeal hearing that the reference to common practice was now said to be a common practice of colleagues also topping themselves up with change from the drawer if they were themselves short of cash when paying for their own shopping.
- 30 The appeal letter was discussed between the claimant and Mr Hall before it was submitted. It did not mention what is now the claimant's principal allegation in this case, namely that her dismissal was essentially a set up because Ms Campbell and Mr Singh did not like her carrying out trade union activities. Contrary to the evidence given by the claimant on this point at the hearing, I am satisfied that she did not in fact mention this allegation to Mr Hall at the time. I find it is overwhelmingly likely that if she had done so, he would have pursued this point on her behalf at the appeal.
- 31 There was also some delay convening the appeal hearing. Although the respondent seeks to apportion blame on GMB, the trade union, for a large part of the delay, it seems to me that the principal delay was in fact due to the respondent not appointing an appeal chair to deal with the matter until early October.
- 32 Mr Khan was belatedly appointed to chair the appeal and an appeal hearing took place with the claimant and Mr Hall on 21 October 2022. During the appeal hearing it was said, for the first time, that it was common practice for the claimant's colleagues to use change from the drawer if short of cash when paying themselves. In terms of the allegation relating to the Bags for Life, the claimant's defence had evolved to the claimant bringing damaged bags back into the store but without claiming a replacement. Mr Hall urged Mr Khan to watch the CCTV footage to confirm that the claimant had done this.

33 After the hearing Mr Khan interviewed Ms Campbell. He asked her whether it was common practice for colleagues to take change from the drawer to pay for their shopping; she denied it. At the end of the meeting Ms Campbell sought to bring in a new issue which was an allegation that the claimant had taken money on different occasions in the past. As this was a new issue being raised for the first time Mr Khan, in my judgment, quite properly ignored it. Mr Khan did not watch the CCTV to see the claimant returning bags because that footage would have been deleted after 30 days. In any event, the claimant had not given him any specific dates on which she said this occurred. Mr Khan also did not interview the claimant's colleagues, as she had refused to provide names. Mr Khan decided not to uphold the appeal and wrote to the claimant to confirm this on 22 November 2022.

The Law

34 The right not to be unfairly dismissed is contained in section 94 ERA. The test the Tribunal must apply for a claim of "ordinary" unfair dismissal is in section 98 ERA. It is for the Respondent to prove that it had a fair reason for the dismissal; conduct is a potentially fair reason (s 98(2)(a) ERA).

35 As this is a conduct dismissal the well-established principles of **British Home Stores Limited v Burchell** [1978] IRLR 379 apply. They are:

- a. Did the Respondent genuinely believe that the Claimant was guilty of misconduct?
- b. Did it have reasonable grounds for this belief?
- c. At the time that it formed the belief had it carried out as much investigation as was reasonable in the circumstances?
- d. Was dismissal within the range of reasonable responses?
- e. Was the procedure carried out fair?

36 The Tribunal must not substitute its view for that of the employer: the test is whether the Respondent's conduct in dismissing the Claimant was within the range of reasonable responses open to it (**Iceland Frozen Foods v Jones** [1982] IRLR 439, **London Ambulance Services NHS Trust v Small** [2009] IRLR 563).

37 However, the range of reasonable responses test is not infinitely wide and the Tribunal's consideration of the claim should not be reduced to procedural box-ticking (**Newbound v Thames Water Utilities Limited** [2015] IRLR 734). I must assess the substance of the decision.

38 I take into account the provisions of the ACAS Code of Practice for disciplinary and grievance procedures albeit compliance or non-compliance with the Code is not necessarily determinative of the claim.

39 The claim for automatic unfair dismissal is brought pursuant to section 152 of TULRCA, the relevant parts of which state:

- (1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee –
- (a) was, or proposed to become, a member of an independent trade union,
 - (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, [...]

40 As the respondent has accepted that the statutory test for trade union activities is met in relation to each incident relied upon by the claimant, I will not set out the law on that issue. As the respondent submitted, the key question is whether the activities were the reason for the claimant's dismissal.

41 Where there is an automatic unfair dismissal complaint alongside an ordinary unfair dismissal complaint the guidance of the EAT in **Kuzel v Roche Products Ltd** [2008] IRLR 530 is apposite:

- “57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.”

42 See also the observations of the Court of Appeal in **Serco Ltd v Dahou** [2017] IRLR 81, para. 29:

“It is plain that both the purpose of an employer’s act or omission (ss.146 and 148) and the reason for dismissal of an employee (s.152) consist in the factors operating on the mind of the relevant decision-maker: see, for example, *The Co-operative Group Ltd v Baddeley* [2014] EWCA Civ. 658, per Underhill LJ at paragraphs 41 and 42. Both under s.146 (see *Yewdall*) and s.152 (see *Kuzel*), it is for the employee to raise a prima facie case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show ‘only that there is an issue warranting investigation and capable of establishing the prohibited reason’: Simler J (paragraph 52) referring to *Maund v Penwith District Council* [1984] IRLR 24.”

43 However, in certain (limited) circumstances it is appropriate to impute the reason for dismissal to someone who was not the actual decision-maker but who nonetheless influenced or orchestrated the decision to dismiss by manipulating the process: see **Royal Mail v Jhuti** [2019] UKSC 55 and, in the context of trade union activities, **Cadent Gas Ltd v Singh** [2020] IRLR 86, EAT).

44 As for the wrongful dismissal claim, the test to be applied is whether the claimant has shown that she had not committed a repudiatory breach of contract so as to disentitle her to her right to notice under the contract. Unlike the test for unfair dismissal, the test is wholly objective and I must form my own view of the claimant’s conduct to determine whether it was repudiatory in nature.

Conclusions

45 The first question is what is the reason for dismissal? The burden is on the respondent to prove that it had a fair reason for the claimant’s dismissal. I accept that the respondent has proved that conduct was the reason for dismissal. Conduct is a fair reason.

46 In accepting this, I reject the claimant’s case that her trade union membership or activities were the reason for dismissal. The claimant’s case is in substance in relation to trade union activities; she did not suggest at any point in her evidence that the mere fact that she was a member of GMB was relevant to what happened. Importantly, the claimant accepts (and I find) that Mr Palmer was not aware of the trade union activities relied upon in this claim. She believed that Ms Campbell and Mr Singh concocted the disciplinary to dismiss her due to resentment about her trade union activities. Her case could therefore only really be brought as a **Jhuti** type claim; in essence she is inviting me to find that the reason why Mr Palmer dismissed her was invented by Ms Campbell and Mr Singh.

47 The problem for the claimant is that the reason why she was dismissed is clear for all to see from the CCTV footage. I myself have seen that footage. It shows her taking cash from the drawer without replacing it and taking Bags for Life without paying. On any account, those issues were not invented by Ms Campbell or Mr Singh.

- 48 In any event, I do not accept that Ms Campbell or Mr Singh had any particular animosity to the claimant carrying out trade union activities. There is no suggestion that either manager had any problem with the claimant's conduct during the first and second incidents relied on. In relation to the third incident (6 July 2022), whilst I accept that the attitude of the claimant's managers was somewhat heavy-handed and unsympathetic, I also accept that it was due to irritation caused by the claimant's lateness, not the activities of a trade union representative per say. The claim for automatic unfair dismissal therefore fails.
- 49 As for the ordinary unfair dismissal claim, I have applied the **Burchell** test.
- 50 Firstly, I accept that Mr Palmer had reasonable grounds for believing that the claimant was guilty of misconduct. There are four factors in particular that are relevant. Firstly, what the claimant did was a clear breach of the respondent's policy. The claimant should have known when shopping as a customer that she could not take change from the drawer without permission. Secondly, there was no suggestion made to Mr Palmer that other colleagues were taking change in the way the claimant had. Thirdly, there was no evidence that the claimant ever returned damaged Bags for Life, including during the disciplinary process. Fourthly - and importantly - the CCTV footage appears to show on at least one occasion the claimant taking change when she believed she would not be seen doing it.
- 51 Overall, in my judgment, Mr Palmer was entitled to decide that the claimant knew what she was doing was wrong and, despite the small amounts involved, it still met the definition of theft.
- 52 As for the investigation, I consider this was reasonable. I include the appeal process in this as this was when the claimant raised for the first time the point now relied upon, namely that other colleagues were also using leftover change to pay for their transactions. Mr Khan asked Ms Campbell about this and she denied it. Mr Khan did not carry out a survey of all the colleagues on the shop floor, but I accept this was not required in the circumstances. As for the investigation more generally, once the CCTV footage was available there was, in my judgment, little else needed other than to get the claimant's account on what it showed.
- 53 Moving on to the fairness of sanction, on a basic level if there is theft from an employer then, no matter the amounts involved, that is a significant breach of trust and confidence. I am therefore satisfied that dismissal was a sanction open to Mr Palmer and which was within the range of reasonable responses.
- 54 Finally, on the process followed, as I understand it, the only point taken by the claimant is in relation to the delay in convening the appeal. I accept that it was a long delay. I also accept that the responsibility for that delay lay primarily at the respondent's door. Stressful as this was for the claimant at the time it does not, in my judgment, go so far as to render the overall dismissal unfair. The claim for unfair dismissal therefore fails.

- 55 Finally, for the wrongful dismissal claim, I must decide whether the claimant was in reality guilty of gross misconduct such as to entitle the respondent to summarily terminate her contract. I accept that the claimant honestly did not believe that she was guilty of theft. She is supported in this belief to a degree by the looseness with which lost change was treated at the Beckton store. It appeared to me that Mr Khan (as a manager at a different store) had been surprised by the practice in Beckton of simply topping up customers who asked for help with the loose change from the drawer. This no doubt encouraged the claimant to believe that she could do similar when shopping herself.
- 56 However, the test I must apply here is an objective one. The claimant has not proved to my satisfaction that using loose change from the drawer without permission was common practice amongst her colleagues. I also have noted from the CCTV footage that on at least one occasion the claimant waited for her supervisor and colleagues to leave the area before going to the drawer for the money. This suggests to me that the claimant knew what she was doing was, on some level, wrong. In my judgment, her conduct, viewed objectively, was such as to breach the implied term of trust and confidence between her and her employer and on that basis her wrongful dismissal claim is also dismissed.

**Employment Judge J Feeny
Date: 19 January 2024**