



EMPLOYMENT TRIBUNALS

Claimant: Mr Williams
Respondent: ASDA Stores Limited

Heard at: Bristol **On:** 18 and 19 July 2024

Before: Employment Judge Murdoch

Representation

Claimant: Ms Ramanand, legal rep
Respondent: Mr Sangha, counsel

REASONS

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

Introduction

1. The claimant, Mr Williams, was employed by the respondent, ASDA Stores Limited, as a Warehouse Worker / Colleague for almost 15 years from 17 March 2008 until his dismissal on 6 March 2023.
2. By a claim presented to the employment tribunals on 21 July 2023, the claimant complained that his dismissal was unfair. The claim was not presented within the applicable time-limit – it was one day late – but the ET previously determined that this was because it was not reasonably practicable to do so and that it was presented within a further reasonable period.
3. The respondent resisted the claim asserting that that it fairly dismissed the claimant for gross misconduct after a full disciplinary process, following a fair procedure, and that the decision to dismiss was a fair one in all the circumstances.

The hearing

4. I heard the claim on 18 and 19 July 2024. The claimant was represented by Ms Ramanand, his legal representative, and gave sworn oral evidence. The respondent was represented by Mr Sangha, counsel, who called

sworn evidence from Mr Werrett (Investigation Manager), Mr Foreman (Disciplinary Manager), Mr Gilmour (Stage 1 Appeal Manager) and Mr Vyse (Stage 2 Appeal Manager).

5. I considered a bundle of documents (351 pages) and five witness statements. These were authored by the claimant and the R's four witnesses.
6. At the conclusion of the evidence, both representatives made oral and written closing submissions, which I took into account.

Issues for the Tribunal to decide

7. I agreed with the parties at the outset that it was not disputed that the reason for dismissal was related to conduct, which is a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996. The R confirmed that it's position, in the alternative, was that the reason was 'some other substantial reason', as set out in its grounds of resistance and skeleton argument.
8. I agreed with the parties that the remaining issue for me to decide in this hearing was whether the respondent acted reasonably in all the circumstances in treating the conduct as a sufficient reason to dismiss the claimant. I noted that the Tribunal would decide the following questions:
 - (i) Was there a genuine belief that the claimant was guilty of misconduct?
 - (ii) Was that belief based on reasonable grounds?
 - (iii) Had the employer carried out a reasonable investigation into the matter?
 - (iv) Had the employer followed a reasonably fair procedure?
 - (v) Was the decision to dismiss the claimant within the band of reasonable responses?
9. I agreed with the parties that the questions of the application of the *Polkey* no difference rule, the ACAS Code and contributory fault, which although strictly issues of remedy, were appropriate to be considered at this stage. If the dismissal is unfair, the Tribunal would have needed to decide:
 - (i) Whether the claimant have been dismissed fairly in any event (this is often referred to as a *Polkey* reduction). The respondent argued that the claimant would have been dismissed in any event, and therefore any award should be reduced by 100% accordingly. The claimant contended that he would not have been dismissed if the disciplinary procedure was not flawed.
 - (ii) Whether the respondent failed to comply ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). The claimant

noted at the outset that he did not contend that the ACAS Code had been breached.

- (iii) Whether the claimant contributed by his inappropriate conduct to his dismissal. The respondent asserted that the compensation should be reduced by 100% to reflect the claimant's contributory conduct. The respondent argued that the 5 February 2023 incident was culpable and blameworthy. The claimant's position was that he did not contribute to his dismissal.

The law

Unfair dismissal

10. Section 94 of the Employment Rights Act 1996 gives employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to an employment tribunal under section 111. The claimant must show that he was dismissed by the respondent under section 95.
11. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
12. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

Misconduct dismissals

13. In misconduct dismissals, there is well-established guidance 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, 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).

Gross misconduct

14. Gross misconduct may result in summary dismissal (i.e. dismissal without notice), thus relieving the employer of the obligation to pay any notice pay. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract, and the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence.

Findings of fact

15. The claimant, Mr Williams, was employed by the respondent, ASDA Stores Limited, as a Warehouse Worker / Colleague for almost 15 years from 17 March 2008 until his dismissal on 6 March 2023. The C had a clean disciplinary record. The R is a large employer and has over 600 stores in the UK and employs around 145,000 people.

The employer's policies

16. **Disciplinary Procedure Document:** This policy sets the standards of conduct expected of all colleagues and sets out a disciplinary framework which management will adopt to maintain satisfactory standard of conduct and to encourage improvement. It is not a contractual policy and may be amended by ASDA at any time.
17. Under the section entitled 'examples of Disciplinary Offences - Misconduct / Serious Misconduct and Gross Misconduct', the policy document states that this is not an exhaustive list and is intended to act as a guide only in order to achieve consistency. It states that the individual circumstances of each allegation should be considered and the appropriate action taken. The list of examples of gross misconduct includes: "serious harassment, discrimination or bullying of other colleagues, either generally or on the grounds relating to their sex, marital status, race, colour, nationality, ethnic origin, disability, religion, beliefs, age or sexual orientation." The disciplinary policy also sets out a scenario of harassment as "unwanted conduct that has the purpose or effect of violating a person's dignity or creating an offensive, intimidating or hostile environment" and marks the potential level of misconduct as 'gross misconduct'.
18. The disciplinary policy further confirms that ASDA may suspend colleagues on their average pay (and benefits where appropriate) if there continuing presence at work may hinder an investigation or the allegation against them may, if proven, amount to a gross misconduct offence. ASDA will only suspend a colleague for however long it takes to investigate the allegations, with these arrangements being confirmed in writing.
19. **Diversity and inclusion policy:** This document states under 'key points' that ASDA doesn't tolerate any form of discrimination, harassment,

victimisation or bullying. It defines harassment as follows: "Harassment involves unwanted conduct that has the purpose or effect of violating a person's dignity or creating an offensive, intimidating or hostile environment. Unwanted conduct can be either physical, verbal, non-verbal or written, for example, unwelcome sexual advances such as touching, standing too close or displaying offensive materials."

Historic issues prior to 5 February incident

20. The C raised numerous historic issues with his employer, such as not being paid correctly every month for a period of years, despite raising the problem every month. Failure by an employer to pay their employees correctly and promptly causes all manner of problems for employees. It is entirely understandable that this vexed the C.
21. The C also asserts previous occasions of unfair treatment. One such instance was an interaction with Mr Davey in September 2021 where the C was given bad news in relation to a wages issue on the shop floor, which was deemed to be an inappropriate setting for such a conversation, and was later also deemed to be incorrect information. Another such instance concerned multiple allegations of bullying treatment by Mr Broad towards the C. In both of these cases, the C received an apology.
22. The claim in this case, however, does not concern any of these issues, it concerns unfair dismissal and unfair dismissal only. I accept the R's submission that there is a lack of clarity about how the previous historic matters that the C is referencing can be said to have played any role in the facts or beliefs that the R held at the time it dismissed. They are matters of different subjects. The managers that the C complained of are different to those doing the key decision making in the C's disciplinary case.
23. The C was not dismissed for any conduct prior to the incident occurring on the 5 February and I therefore do not propose to consider them in any more detail.

5 February 2023 incident

24. The R's position is that on 5 February 2023, the C touched Ms Winfield. She told him not to touch her. The C then touched Ms Winfield again. Ms Winfield told the C not to touch her again.
25. The C's position during the hearing was that he could not recall the incident as it happened 18 months ago. His position was that it did not happen, and if it did, it did not constitute harassment. The C's position is that by Ms Winfield's own words, she herself did not feel harassed. She herself used words such as 'uncomfortable' and 'startled'. The C's position is that this does not meet the high threshold of harassment and that the R has substituted its own view for Ms Winfield's view.
26. I prefer the R's position. My reasons are as follows. I note that the C says he doesn't remember now but in the investigation meeting he said he had touched Ms Winfield to thank her for bringing the 'load card' back. This

inconsistency undermines his credibility. Whilst I note the C's point that Ms Winfield did not herself use words falling within the R's definition of harassment, it is entirely reasonable and proper for the employer to assess the situation from a bird's eye point of view, after investigating, interviewing witnesses, and assessing all the evidence, and come to their own view on whether they reasonably believed the behaviour had taken place, and to then decide whether that behaviour fell within their policy's definition of harassment. I note that the definition of harassment is that the conduct was unwanted, which it clearly was in my view. I further note that it does not matter if the C did not intend to harass Ms Winfield, if the effect of his behaviour was to create the proscribed environment. I accept the R's position that it was clear from other witness evidence that Ms Winfield was in fact distressed. The R has listed some of the references in his skeleton argument and includes the following:

- Ms Osman describing Ms Winfield as being "uncomfortable";
- James Buckby saying "she seemed upset";
- Mr Kovacs saying that he wanted to say (but did not actually say) "stop being disrespectful to women" and also how Ms Winfield was red when she exited the pod and was very distressed;
- Mr Werrett asking Ms Winfield whether she had consented to any contact from the C and she stated that she did not;
- Ms Winfield's account to Mr Gilmour was that she was "more startled" when she felt the C touch her, and she goes on to state "...I asked him not to touch me, and he thought I was joking I became very uncomfortable".

Investigation

27. On 5 February 2023, in accordance with ASDA's disciplinary policy, ASDA commenced an investigation into an allegation that, earlier that same day, the Claimant touched a female colleague on the arm and hair, without that colleague's permission. The investigation included holding an investigation meeting with the Claimant and interviewing relevant witnesses. Once the relevant witnesses had been interviewed, on 5 February 2023, the Claimant was informed by the investigation chair Mr Werrett that he was suspended on full pay with immediate effect pending completion of the investigation. Ms Winfield was also suspended accordingly.
28. On 7 February 2023, an investigation meeting was held with the Claimant. In this investigatory meeting, the R asked the C to provide his own account and documented it at length, and sought the C's response to the accounts of the four witnesses, namely Ms Osman, Ms Winfield, Mr Kovacs and Mr Buckby. As already noted, at this meeting, the Claimant stated that he could not recall touching the colleague's hair, but that he had touched the colleague to thank her for bringing the 'load card' back.
29. I accept the C's position that there are some inconsistencies between the witness statements of Ms Osman, Mr Kovacs and Mr Buckby, such as Ms Osman saying that she herself intervened to reinforce what Ms Winfield had said about not touching her, whereas no one else said that a third party intervened. However, despite the minor inconsistencies, two witnesses who were present during the events in question both confirmed

that they saw the Claimant touch the female colleague and that she had asked him to stop touching her. A third witness was present at the time and, whilst he was unable to see what had taken place, he also said he heard the female colleague ask the Claimant to stop touching her.

30. The C contends that the investigation stage of the process was procedurally unfair, as Mr Werrett had previously been involved in the C's numerous wages issues. The C believes that Mr Werrett had ill feelings towards the C before the investigation even began and that he was being pushed out of the company. The C contends that this is a conflict of interest and compromised the neutrality of the first leg of the process.
31. I accept the R's position and Mr Werrett's written and oral evidence that the wages issue was entirely separate from the harassment investigation and that there is no conflict of interest here. Mr Werrett may have been involved in helping the C sort out his problems with pay with the relevant people in HR and finance, but it does not follow that he would have been unable to conduct an impartial and objective investigation. Mr Werrett made his decision in the investigation based on his knowledge and application of ASDA's policies, four witness statements of relevant colleagues, and after interviewing the C. Mr Werrett did not, in any event, decide on the C's guilt, so to speak. Mr Werrett's decision was limited to deciding that the matter would be forwarded to a disciplinary hearing on the grounds of gross misconduct for harassment.

Disciplinary hearing

32. Mr Foreman, Warehouse Operations Manager, was appointed to deal with the disciplinary matter. By letter of 23 February 2023, the Claimant was invited to a disciplinary hearing on 1 March 2023. All the relevant documentation was provided to the C in advance of the Disciplinary Hearing with the invite letter.
33. After considering all of the information collated, and the Claimant's representations, Mr Foreman concluded that the Claimant's conduct amounted to gross misconduct. In particular, he found that:
- In the disciplinary hearing, the Claimant stated that he may have touched the female colleague's shoulder/arm, but he was unsure, and it was unintentional if he did. However, in the investigation meeting with Mr Werrett, the Claimant had stated that he did touch the female colleague on the shoulder to thank her for bringing the load card back. The Claimant's version of events were inconsistent. Based on this, and the statements from the witnesses, Mr Foreman found that, on the balance of probabilities, the Claimant did touch the female colleague on the shoulder/arm.
 - The female colleague did ask the Claimant not to touch her and that the Claimant had heard this but did not respect this request.
 - The Claimant did touch the female colleague's hair, after she had asked the Claimant not to touch her.

34. Having come to that conclusion, Mr Foreman considered whether a disciplinary sanction should be imposed and, if so, what that sanction should be. He decided that a sanction should be applied and, having considered the range of sanctions which could apply, came to the conclusion that the most appropriate was summary dismissal. In making this decision, I accept that Mr Foreman considered the Claimant's long length of service, previous clear disciplinary record, the evidence obtained during the investigation, and all the representations made by the Claimant.

First Appeal

35. The Claimant was reminded of his right of appeal, which he exercised on 6 March 2023. Mr Gilmour, General Manager, heard the appeal on 20 March 2023. Following the appeal hearing, Mr Gilmour held meetings with four individuals named within the Claimant's appeal, to ensure that Claimant's appeal points were properly investigated.

36. On 3 April 2023, the appeal hearing reconvened, and, on 5 April 2023, Mr Gilmour confirmed his findings to the Claimant in writing. The Claimant's grounds of appeal were dismissed, and his dismissal was upheld.

Second Appeal

37. The Claimant was reminded of his second right of appeal in line with ASDA's Disciplinary Policy, which he exercised on 11 March 2023. Mr Vyse, General Manager, heard the second appeal on 26 April 2023. By letter of 2 May 2023, Mr Vyse confirmed his findings. The Claimant's grounds of appeal were dismissed, and his dismissal was upheld.

Conclusions

38. I now need to decide whether the respondent acted reasonably in all the circumstances in treating the misconduct as a sufficient reason to dismiss the claimant.

Genuineness of belief and reasonable grounds

39. Having heard from the respondent's witnesses orally, as well as reviewing their written signed witness statements and documents set out in the bundle, I find that all the respondent's relevant management held a genuine belief that the C was guilty of gross misconduct. They all gave clear, reliable and unequivocal evidence in their written and oral evidence about why they believed the C was guilty of gross misconduct. The reason was that they believed the incident on 5 February 2023 constituted harassment, which is an example of gross misconduct in their own internal policy documents.

40. The claimant's behaviour which they believed constituted harassment was touching a female colleague twice, after she had asked him not to touch her, and that Ms Winfield's dignity was violated by this behaviour, and/or that it created an intimidating or hostile environment. This, in my view, provides an objectively reasonable foundation for a genuine belief.

41. The investigation outcome letter, dismissal letter and the appeal hearing outcome letters are all consistent with the R having a genuine belief on reasonable grounds that the C was guilty of gross misconduct.

Investigation and procedures

42. As set out in full in the findings of fact, in relation to the act of misconduct that led to dismissal, the respondent carried out a detailed investigation, conducted an investigatory meeting, provided evidence and sufficient information to the C, and ensured that the investigation and disciplinary hearing was carried out by a different person. I have already found that there was no conflict of interest in Mr Werrett conducting the investigation. The respondent notified the claimant of the time and venue of the disciplinary meeting, advised him of the right to be accompanied, and held the disciplinary meeting without delay. The respondent decided on appropriate action and informed the claimant in writing of their decision to dismiss him. They provided details on reasons, date of termination, and right of appeal.
43. This was then followed by two appeals before two separate senior people within the R's organisation – both of which had nothing to do with the investigation or the previous disciplinary hearing. The claimant was invited to set out his grounds for appeal and the appeal meetings were heard without delay. The claimant chose not to be accompanied. Both appeals officers conducted a thorough review of the disciplinary hearing. The claimant was informed of the results promptly and in writing.
44. The C does not contend that any parts of the ACAS Code were breached. But in any event, it is worth recording that it is difficult to imagine how the respondent could have conducted a more detailed, reasonable and appropriate investigation and disciplinary proceedings in the circumstances.

Band of reasonable responses

45. The C during the hearing stated that he did not commit harassment and that, in any event, the event did not constitute harassment. So even if he did touch Ms Winfield twice, he does not consider that behaviour to be problematic. I accept the R's position that it believed that no suitable alternative action was available to ASDA as the C was not apologetic or remorseful of his actions, and that there was therefore a risk of similar behaviour being repeated, and ASDA has a duty to protect its colleagues.
46. As set out earlier, 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 I myself would have handled the events or what decision I would have made, and I must not substitute my view for that of the reasonable employer. I note that the size and administrative resources of the respondent is very large, and I would therefore expect a full and proper process to be followed. I find that the extent, nature, outcome and reasons provided during the investigation, disciplinary hearing and two appeals fell well within the range of reasonable responses that a reasonable employer might have adopted.

47. Therefore, I have no hesitation in finding that the decision to dismiss the claimant falls within a band of reasonable responses of an employer faced with a set of circumstances with which they were faced.

Overall conclusion

48. In summary, therefore, the respondent acted reasonably in all the circumstances in treating the conduct as a sufficient reason to dismiss the claimant. The claimant's complaint of unfair dismissal under Part X Employment Rights Act 1996 is not well-founded and is dismissed.

Employment Judge Murdoch

2 September 2024

REASONS SENT TO THE PARTIES ON
19 September 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE