EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001120/2024

Held in Glasgow on 21 and 22 January 2025

Employment Judge Campbell

Mr A Thomson	**Claimant** **In Person**
ASDA Stores Limited	**Respondent** **Represented by:** **Ms A Akers - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is:

1. The claimant was not unfairly dismissed;

2. The claimant was not subjected to an unlawful deduction from wages, whether in respect of pay or holidays accrued; and

3. The claim is therefore dismissed.

REASONS

Introduction

1. The claimant was dismissed by the respondent summarily on 6 May 2024 after a disciplinary hearing. The respondent maintains that he was fairly dismissed because of unacceptable conduct. The claimant does not accept that was the true reason for dismissal, and that in any event dismissal was too harsh a sanction.

2. Separately, the claimant does not accept that he was paid the correct amount of wages for March and/or April 2024, and that in any event he was denied payment for annual leave he had accrued.

3. At the hearing the respondent led evidence first, from Mr Nathan Hamilton who dismissed the claimant. The claimant gave evidence on his own behalf. The parties provided closing submissions and this judgment was prepared after deliberation.

4. The parties prepared a joint bundle of documents. Numbers in square brackets below correspond to pages in the bundle.

Relevant law

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

2. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

3. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

4. Under section 13 of ERA a worker is entitled not to have unauthorised deductions made from their pay. An unauthorised deduction will occur when they are paid less than they are entitled, or nothing at all, on a date when they

would normally be paid under their contract. Unless a deduction is required by law, it may only be made with the employee's specific and advance written consent.

5. Under the Working Time Regulations 1998, regulations 13 and 13A, a worker accrues annual leave during their employment and is entitled to take that leave with pay. They should not be unfairly prevented by their employer from exercising that right. Subject to exceptions, leave may only be taken in the leave year in which it is earned. The exceptions are, in brief, where the worker has not been able to take their leave because they took a period of either (i) statutory leave, such as maternity, paternity, parental or adoption leave or (ii) leave caused by illness. Under regulation 14 a worker should not be paid in lieu of annual leave accrued, unless that is in connection with the termination of their employment.

Findings of fact

The following findings were made as relevant to the issues to be decided, based on the evidence provided to the tribunal and on the balance of probability.

1. The claimant began employment with the respondent on 6 November 2020 and was dismissed on 6 May 2024 with immediate effect. He worked as a delivery driver based out of the respondent's Irvine store. His role fell within the 'Online Trading' department of the store, run by a number of Online Trading Managers (**'OTM'**).

2. The respondent has a set of standards which it expects its drivers to know about and uphold. They are set out in a document titled 'Your learning journey' on the staff intranet. There are then 'missions' to be completed. One is 'Think Customers – Exploring the level of service our customers expect and how to give an Easy, Fast and Friendly experience'. The claimant received and signed that document.

3. The respondent has a disciplinary policy covering all staff [70-91]. Separately there is a guidance document for managers conducting disciplinary processes [92-131]

4. The respondent has a policy in relation to taking holidays. An extract of that was produced [139]. Holiday bookings require manager approval. Under the heading 'Holiday Planning' it is explained that it is the responsibility of each employee to ensure their holiday entitlement is taken, and that any unused holidays at the end of a holiday year cannot be carried forward to the next year. Nor will payment in lieu of holidays be made in that situation. Only if an employee has been unable to take holidays because of sickness is it possible to carry holidays forward. The respondent's holiday year runs from 1 April each year to the following 31 March.

5. On 27 April 2024 a customer telephoned the Irvine store to complain about the driver who had delivered her shopping that day. A note was taken and an OTM Scott Speirs telephoned her the next day and took a note of what she said [151]. He also made a file note [150]. The customer said that the driver:

    a. Had started using foul language at her gate, 'shouted f--- off, etc',

    b. Was using bad language in front of the customer and her two grandsons,

    c. Had a bad attitude and didn't speak,

    d. Threw down totes (baskets which shopping is loaded into), and

    e. Been 'unpleasant to deal with'.

6. It was confirmed that the driver in question was the claimant. Mr Speirs interviewed him on 29 April 2024 and a note was taken by a colleague, which the claimant checked and signed [152-155]. The complaint note was read out to the claimant. In the course of the interview he said that:

    a. When trying to take two totes into the customer's garden he nearly broke his thumb, and swore once in response;

    b. He accepted it was not professional to swear in front of a customer, but he had just hurt his hand;

c. The customer was at her door but there was no sign of her grandchildren at this point;

d. He put down the baskets at her doorstep, and when empty went back to his van for another two baskets,

e. When doing so, he 'lobbed' the two empty baskets over the customer's hedge into the street outside (where there is a patch of grass),

f. He returned with the second set of two baskets which were unloaded, and he asked the customer to confirm receipt using a palm pad,

g. He did say something to the customer, such as 'there you go',

h. He then loaded the second set of baskets onto his van and went to his next delivery address.

7. The claimant was asked had customers complained about him before. He said there had been around six such complaints, although he did not say or agree that they were all well-founded. His position was that sometimes customers would be unreasonable and even threatening, and so they were in the wrong rather than him.

8. After a 20-minute adjournment in the meeting Mr Speirs confirmed to the claimant that he was being suspended pending a further disciplinary process, which another manager would take forward.

9. Mr Speirs summarised his findings in an 'Investigation Recap Form' which he passed to another OTM, Nathan Hamilton who reviewed the documents. He invited the claimant by letter to attend a disciplinary hearing on 6 May 2024 [161].

10. The claimant attended the disciplinary hearing. He opted not to bring a colleague or trade union representative. Mr Hamilton chaired the hearing and notes were taken by a colleague. Those were signed by Mr Hamilton and the claimant at the end of the hearing [162-165]. The note is taken to be a suitably accurate summary of the discussion.

11. When asked if he had any comments to add to what he had said in the investigation the claimant said he felt that drivers should be given protective gloves, which would have minimised the risk of him hurting his hand. He also said that if he never apologised to the customer for his language 'that's on me'.

12. The claimant also raised that he had expressed concern to another manager, Diane, about losing accrued leave. The issue was that he had had a large number of accrued hours to take before the end of the leave year running from April 2023 to March 2024, and had not been able to use them. The claimant's point was that he believed he was being disciplined for writing a letter to Diane outlining his concerns about losing holidays, although that was not understood by Mr Hamilton at the time. Mr Hamilton was unaware of the matter and unsure what relevance if any it had to the subject of the meeting.

13. The claimant also mentioned that, following a change in internal electronic systems, he had been unable to access his personal information such as hours, holidays accrued and payslips, and so was unsure how his accrued leave was being treated and what types and amounts of pay he was receiving. Mr Hamilton had been aware of this issue, which affected the claimant and some other employees as part of the transition of one system to another. He had tried to help the claimant access his new account, but the final steps could only be done by the claimant personally.

14. Mr Hamilton adjourned the meeting for 47 minutes and in that time reached the view that the claimant was guilty of gross misconduct, and that the appropriate response was to summarily dismiss him. The meeting was reconvened and the claimant was informed of the decision. His employment therefore ended at that point.

15. Mr Hamilton sent a letter to the claimant on 9 May 2024 [168-169] confirming his decision. In it he explained:

    a. Every colleague is expected to follow the respondent's guidance, processes and standards,

b. Those are found on the employee intranet,

c. The claimant's conduct was found to be offensive, against the respondent's core values and brought the respondent's name into disrepute,

d. His conduct, which he had admitted, had been viewed as gross misconduct and the response was summary dismissal,

e. The claimant would be paid up to 6 May 2024, and

f. Any appeal against the decision could be made within 7 days.

16. The claimant had not waited for Mr Hamilton's letter before appealing, doing so by letter on 6 May 2024, i.e. the day of his dismissal [167]. He said that:

a. There were mitigating circumstances for his conduct, namely that he incurred a soft tissue injury to his hand when trying to open the customer's gate, which is what prompted him to utter a 'mild curse',

b. This would not be unnatural in the circumstance,

c. He did apologise to the customer (something he could not remember doing during the disciplinary process), and

d. He had not been provided with adequate equipment, namely gloves;

e. He had a clean disciplinary record.

17. A General Store Manager from another store was identified to hear the claimant's appeal and she wrote to him on 14 May 2024 to arrange an appeal hearing on 20 May 2024 [170]. However, there turned out to be a clash of diaries and she could not attend on that date, and so offered to reschedule the meeting to 28 May 2024 [171]. The claimant only found out about this on 20 May 2024 when he had set out to attend the Irvine store where the meeting was to take place.

18. The claimant had a job interview on 28 May 2024 and contacted the Irvine store to say that he could not attend, and that he was fed up being messed around with arrangements for the meeting.

19. A third attempt was made to arrange an appeal hearing proposing the date of 18 June 2024 [172]. The claimant no longer wished to have a meeting and the process was treated as concluded.

20. The claimant sought alternative work by registering with his local Job Centre and applying for driving and other roles. He applied for around 20 per week. He was given interviews for some roles but not appointed. At one interview he was told that over two hundred people had applied for the same position. He applied for, and was given, a role with a loft insulation installation company. He worked for a week before being told that the role was self-employed. He did not want to work on that basis and so gave it up. He was paid around £200 gross for the week, although spent over half of that in fuel, travelling to different jobs.

21. The claimant received Universal Credit from around the beginning of July 2024, and still receives it.

22. The claimant had indicated in his claim form that he was primarily seeking reinstatement, following which re-engagement. He had no issue going back to work at the Irvine store, and with the same colleagues, despite the issues and processed which had occurred.

23. The respondent's position, explained by Mr Hamilton, was that around 37 drivers are employed by the Irvine store. There are no vacancies at present, although some of the drivers were recently recruited and are on short temporary contracts. He accepted that it would be possible not to extend or renew one of those contracts in order to free up a driver role, but the question of the claimant's breach of trust and company values was insurmountable and made it impracticable to allow him to work for the respondent again in any role.

Holidays

24. The claimant became concerned around February 2024 that he would not be able to use up all of his accrued leave before 31 March. He was aware that he was at risk of losing it if not taken. The situation was made more difficult because he could not access the new system to check how much leave he had accrued, or to request it as time off. He approached a manager about this, but a manual holiday calendar which was being used as back up could not be found.

25. Becoming more concerned as time moved on, around March 2024 he wrote a letter to the store manager saying, in effect, that if he could not be credited for his accrued leave (assumed to be either by payment in lieu or the ability to carry the time forward into the next holiday year) he would go off on grounds of absence.

26. The claimant did indeed begin a period of absence, which covered the last two weeks of March 2024. He gave the reason as Covid-19, although provided no vouching such as a GP fit note as would have been required under the respondent's policy. The policy says that the first three days of illness-related absence would be unpaid, and then sick pay matching basic pay would be paid thereafter. Employees could self-certify for up to seven days, and then any further absence required medical certification.

27. On reviewing the claimant's absence, the store manager decided to treat the last two weeks of March 2024 as paid leave rather than illness absence. She did so because she believed that the claimant was not in fact ill, but implementing the threat he had made in his letter. She believed that doing so was giving him what in effect he wanted – the ability to use up his accrued holidays. He was therefore paid in full for the whole two-week period, whereas he would have been denied pay for the first three days of absence, and from the end of the first week, under the absence policy.

28. It was not completely clear how much leave the claimant was entitled to in the holiday year 2023-24, or how much leave he had taken by the end of that year, or when. To the best of his own recollection, he took a week in each of

November and December 2023, and a further week in February 2024. The first of those weeks is evidenced in his payslip of 2 December 2023 but there is no equivalent entry in a later payslip for the second or third week. His payslip dated 24 February 2024 stated that he had 128.12 hours remaining at that date. If he took the holidays he was fully paid while doing so.

29. The claimant's payslip for 23 March 2024 showed an entry for holiday pay equating to 66.5 hours. This was more than the claimant's normal pay for two weeks would have been.

30. The claimant's payslip dated 20 April 2024 showed an entry for 51.5 hours of holidays being paid. Again, as a result, his overall pay for that period was higher than normal.

DISCUSSION AND DECISION

Unfair dismissal claim

Was there a fair statutory reason for the claimant's dismissal?

31. The onus fell on the respondent to establish that the claimant's dismissal was for a fair statutory reason. The respondent argued that the claimant was dismissed for his conduct. Section 98(2)(b) confirms that conduct is a fair reason for dismissing an employee. The claimant did not accept that he was dismissed because of his conduct. He believed the actual, or more likely, reason was that he had written a letter to the store manager demanding to receive his holidays, and that management do not like employees who in effect know and assert their rights. He was therefore suggesting that he had been singled out as an example of a difficult employee.

32. The respondent has discharged the onus of proving that the reason for dismissal was potentially fair. The evidence clearly showed that the claimant was dismissed because of his own deliberate actions on 27 April 2024. He was viewed by Mr Hamilton as having deliberately acted outside of the respondent's rules and values in relation to customer interaction. The evidence consisted of documents generated at the investigatory and disciplinary hearing stages, and the oral evidence of Mr Hamilton.

33. The claimant's suspicion, whilst accepted to be genuinely held by him, was contradicted by the evidence. Mr Hamilton was not aware of his letter to the store manager and so could not have been influenced by it in the disciplinary process. Further, the store manager did not appear in any way upset by the claimant's letter, and ultimately gave him what he had demanded without any evident fuss.

34. Conduct was therefore found to be the reason for the claimant's dismissal.

Did the respondent act reasonably in implementing the dismissal?

35. The onus is neutral in relation to this issue, and that the longstanding precedent of ***British Home Stores v Burchell [1978] IRLR 379*** is still the starting point. According to that authority three things must be established for a conduct related dismissal to be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

Burchell part 1

36. The respondent maintained that it genuinely believed the claimant was guilty of misconduct. The claimant did not positively dispute that this was the case. He simply believed that at the same time the real reason for dismissing him was that he wrote what he believed to be a problematic letter to the store manager. However, he did not argue that the respondent only pretended to believe that he had committed an act of misconduct. He had admitted himself that he had done so at the initial investigatory stage, and again in the disciplinary hearing. The focus of his submissions was on making mitigatory points.

37. In any event, all of the evidence presented to the tribunal suggested that there was a belief in the mind of Mr Hamilton that the claimant was guilty of offensive behaviour which upset a customer and damaged the respondent's reputation.

38. Accordingly the first requirement under Burchell is met.

Burchell part 2

39. The respondent argued that it had a reasonable basis to form the belief in the claimant's misconduct. The claimant had admitted to using a profanity in sight of the customer, and when questioned recognised that he ought not to have done so, and why. There was therefore no dispute over what had happened and, to a degree, that it was not acceptable conduct. Whilst that may not be an act of misconduct for every employer or employee, the respondent had put in place a number of standards and values which it promoted and ultimately insisted upon.

40. The tribunal was satisfied on the basis of the evidence provided that the respondent had met the requirements of the second limb of the Burchell test. There were reasonable grounds for holding a belief that the claimant committed an act or acts of misconduct.

Burchell part 3

41. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to explore every possible avenue, but no obviously relevant line of enquiry should be omitted.

42. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

43. The respondent submitted that a sufficiently adequate investigation had been undertaken. The claimant did not dispute that this was the case. He was directly asked whether he took issue with either the investigation or disciplinary stages of the process, and he confirmed that he did not.

44. The nature of the investigation was by its nature limited as it centred around the events of a few minutes, which only the claimant and the customer would be able to recall. The claimant agreed with the customer's account on the key

point relating to the language he had used. No further investigation into it was therefore necessary.

45. The tribunal considered whether Mr Hamilton should have made follow-up enquiries with the customer to verify that her grandchildren were present when the claimant swore in her presence, but reached the view that the further intrusion this would have caused was not justified by any likely benefit from verifying her position, which had initially been clear. The claimant accepted in evidence that although he had not seen them initially, by the time he returned to the customer's doorstep with the second set of baskets he saw two children in the doorway.

46. Considering all of the evidence presented, the tribunal was therefore satisfied that the respondent's investigation was adequate and reasonable.

The band of reasonable responses

47. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

48. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

49. It is also important that it is the assessment of the employer which must be evaluated. As Ms Akers raised in her submissions, whether an employment tribunal would have decided on a different outcome such as applying a lesser penalty is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4)

ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer's own choices against the above standard.

50. On the evidence heard, it is found that dismissal of the claimant was within the band of reasonable responses. Whilst it may have been open to Mr Hamilton to decide to give the claimant a final warning and arrange that he did not deliver to the same customer, say, it was reasonably also open to him to reach the view, as he did, that the claimant had damaged the respondent's reputation in the eyes of a customer, making it untenable for him to carry on in the role.

51. The respondent therefore satisfied all of the requirements for a fair dismissal under section 98 of ERA.

Holiday pay claim

52. The tribunal reached the view that the claimant's complaint in relation to compensation for accrued holidays was unfounded.

53. As a starting point, the respondent had introduced a rule, applicable to the claimant and many other employees, that holidays had to be taken in the holiday year in which they were accrued, or be lost. Only in exceptional circumstances, such as when an employee was absent through long term illness, could the rules be relaxed. They were legally entitled to do so. Similarly, they were free to operate a rule that employees seeking two weeks or more of consecutive holidays had to apply at least 12 weeks beforehand.

54. In a sense this was the beginning and the end of the issue in this case, but the tribunal considered more closely what had happened in terms of the claimant taking and being paid for holidays in the holiday year from 1 April 2023 to 31 March 2024.

55. The tribunal notes also that the claimant was not helped in this situation, particularly in the final months of that holiday year, by having no access to an online system where the relevant details were to be found.

56. Nevertheless, from the evidence provided, including the claimant's own evidence, he took a week's leave in November 2023, a week in early December 2023, a further day on 26 December 2023, a week in early February 2024, and had the last two weeks of March 2024 treated as fully paid annual leave, and was paid more than his normal wages for those latter days. This appeared to more than cover his annual entitlement.

57. The claimant could not explain in detail what he believed he was due by way of accrued leave, or pay in lieu. He accepted that he may not have been due anything, but was not sure. He said he thought there was 'a chance' that he was owed something. However, the onus was on him to show that he was, and it was not possible for him to do so. The evidence suggested he had not been denied pay which he was due, by way of an unlawful deduction or otherwise.

Conclusions

58. The respondent satisfied the tribunal that the claimant was dismissed for the fair reason of his conduct, and overall the tribunal was satisfied that it acted reasonably in doing so. The claimant's dismissal was not unfair.

59. The respondent was under no obligation to pay the claimant for any holidays accrued but unused at the end of the holiday year falling on 31 March 2024. On the evidence, and in any event, he was able to take his full entitlement for that year and was paid all that he was due.

60. All of the complaints raised are therefore dismissed.

Employment Judge B Campbell

Date sent to parties **19 February 2025**