



EMPLOYMENT TRIBUNALS

Claimant: Samuel Baxter

Respondent: Maidenhead Aquatics Limited

Heard at: Manchester (by video)

On: 9th January 2025

Before: Employment Judge Cline (sitting alone)

Representation

Claimant: Mr In person

Respondent: Mr Lanre Fakunle (senior litigation consultant)

JUDGMENT having been sent to the parties on 9th January 2025 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:

REASONS

Introduction and Preliminary Issues

1. By way of his ET1 claim form received by the Tribunal on 20th January 2024, the Claimant, Mr Samuel Baxter, brings a claim for unfair dismissal against the Respondent, Maidenhead Aquatics Limited, following the events set out below that occurred in and around October 2023. The Respondent owns and operates approximately 145 retail outlets nationwide, including aquatic stores, garden centres and cafés; the Claimant was initially employed as a sales assistant in August 2016, ultimately becoming a store manager at the Preston branch of Dobbies in April 2021. When that branch of Dobbies was closed in September 2023, the Claimant was

transferred to the other Preston store as a sales assistant (a lower tier of the staff hierarchy) but on the same salary as before.

2. At the one-day hearing of this matter, the Claimant represented himself and the Respondent was represented by Mr Fakunle, a senior litigation consultant. During the course of the hearing and when considering my decision, I had an agreed hearing bundle running to 143 pages and any references to specific pages of that hearing bundle here will be by way of square brackets, for example [78] or [34-54]. I also received witness statements from the following witnesses and heard oral evidence from each of them:
 - a. The Claimant, Mr Samuel Baxter (28th July 2024);
 - b. Mr Matthew Wallace (business partner for the Respondent) (undated);
and
 - c. Mr James Peacock (Respondent's national human resources manager) (undated).
3. I directed that only issues of liability (including any question of a *Polkey* deduction or a deduction for contributory fault) would be dealt with initially as the hearing was only listed for one day; if the claim succeeded, remedy would be dealt with separately thereafter. The relevant legal framework is summarised below.
4. At the start of the hearing, I noted the contents of the hearing bundle and specifically discussed with the Claimant the difference between a claim for unfair dismissal and a claim for breach of contract or wrongful dismissal (namely that unfair dismissal focusses on the procedure leading to dismissal and not on the specific facts underlying the dismissal), emphasising that he had only brought a claim for unfair dismissal. In this context, I made it clear that the matters to be determined would be limited to the list of issues set out in Employment Judge Lloyd's case management order of 15th July 2024, set out below. I also discussed with the Claimant the burden of proof, the role of cross-examination and the manner in which I would need to consider the evidence before reaching a decision; he said that he understood these points and I was content that he did.

The Issues to be Determined

5. As noted above, I had in mind throughout the hearing the following issues, as set out in Employment Judge Lloyd's order:

1.1 It is not disputed that the claimant was dismissed on 19 October 2023. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 there were reasonable grounds for that belief;

1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.2.3 the respondent otherwise acted in a procedurally fair manner;

1.2.4 dismissal was within the range of reasonable responses.

Findings of Fact: The Investigation and Disciplinary Process

6. The facts which I considered relevant to the determination of the Claimant's claim are set out below. Where they were not agreed and I was required to make findings, I did so on the balance of probabilities and have set out, to the extent required, how I came to those findings. For the avoidance of doubt, I did not find any of the witnesses to have been dishonest or intentionally misleading; I was conscious throughout of the inevitable frailties of human memory and that I was dealing with matters which took place well over a year previously which I had to examine in some detail in order to deal justly with the case. There were actually very few factual disputes in this case, and even fewer that were fundamental to my decision, such that much revolved around my application of the settled law to the facts before me.

7. As noted above, the Claimant worked as a store manager before being relocated and, it could be said, demoted on the same salary, to being a sales assistant at the Respondent's Preston store in September 2023.

The Investigation Process

8. The Respondent's effectively undisputed evidence was that, soon after the Claimant moved to the Preston store, concerns were raised about his conduct in the form of an email from Samuel Wilson, the store manager [77], which set out various matters including assertions that the Claimant had been changing the rota without his approval, had been persistently late and missed deadlines, had taken excessive breaks and had been the subject of complaints by customers about his manner and service. There was also [77] an undated summary of concerns reported by a colleague, Ryan, providing specific examples of these issues; an email from Dave Gilmore [84] regarding an incident on 21st August 2023 and an allegation that the Claimant was under the influence of alcohol at work; and there was a collection of three separate complaints by customers about the Claimant's interactions with them [85].
9. As a result of these allegations, Mr Peacock carried out an investigation interview with the Claimant by telephone on 5th October 2023, a transcript of which was provided [78-83] and which I considered carefully. During this interview, the Claimant admitted to changing the rota without permission from a manager; admitted having arrived late at work on one occasion because he was trying to find the correct route and not reporting this; denied failing to complete tasks or taking excessive breaks; agreed that he had a disagreement with Ryan in front of a customer but denied being rude on other occasions; and denied being under the influence of alcohol at work, noting as an explanation that he sometimes does not change his uniform after drinking the previous night such that he may smell of alcohol in work.
10. By way of a letter dated 10th October 2023 [86-87], the Claimant was suspended on full pay pending further investigation and, in a second letter of the same date [88-89], he was invited to attend a disciplinary meeting in respect of the following allegations:

- a. *Alleged taking part in activities which cause the company to lose faith in your integrity, further particulars being:*
 - i. *You are alleged to have altered the rota for Saturday 30th September 2023, without authorisation which has resulted in a member of staff not being paid correctly;*
 - ii. *You are alleged to have been under the influence of alcohol at the beginning of October.*
- b. *Alleged rude and objectional behaviour which lead to customer complaints being made about you on 18th September and 4th October.*
- c. *Alleged persistent lateness and a failure to report your lateness in line with the company absence reporting procedure in the employee handbook.*
- d. *Alleged failure to devote your time and attention to your duties, namely that you have taken extended and excessive breaks, without authorisation.*

The Disciplinary Process

11. The disciplinary meeting, attended by the Claimant, Matthew Wallace and James Peacock (the latter as note-taker) took place at 2pm on 12th October 2023, lasting 42 minutes, and I have considered the transcript provided [90-97]. The contents will not be repeated here in detail but, in summary, the Claimant admitted changing the rota without a manager's permission or knowledge; he said that he did not really have any justification and explained that a colleague named Jade had wanted to work additional hours so he "saw the opportunity to give her a day and just decided to take the day off [himself]". As a result, the Claimant accepted, Jade was not paid for working those additional hours because the alteration had not been dealt with properly. The Claimant then denied having ever been under the influence of alcohol at work, saying again that he may smell of alcohol from the night before, and said that he had not been rude to customers and believes that he is being victimised; he also admitted being late perhaps 5 times in the previous month without reporting it, saying this was because he had been trying to find a new route when driving to work but had no reason for not allowing more time for the traffic. Finally, the Claimant denied taking excessive breaks.

12. Further investigations were then carried out and, on 15th October 2023, Mr Wallace received an email from Jade McLaughlin which read (in full) as follows:

I'm emailing you as a witness to a conversation that I had with Sam Baxter. This conversation was in the shop about when he was closing down the store at dobbies where he was drinking a beer and he was startled as he saw either you or one of the partners walk in so he had to hide his beer. This is all I heard.

13. In light of that email, the disciplinary hearing was reconvened on 18th October 2023, the transcript of which [100-103] I have read. In effect, Jade McLaughlin's email was put to the Claimant and he again denied ever having been under the influence of alcohol at work; he also recounted an incident when, he said, Jade came into work hungover and smelling of alcohol herself after having texted him after midnight the previous night saying that she "may be hungover tomorrow". He also asserted that he was aware that Ryan had smoked a cannabis joint in the carpark after work and had come into work under the influence of cannabis on another occasion, saying that he felt victimised by being singled out for this kind of alleged behaviour.

14. By way of a letter dated 19th October 2023 [104-105], Mr Wallace informed the Claimant that he was being dismissed with immediate effect on the basis that the Claimant's conduct had "*resulted in a fundamental breach of [his] contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship*"; colloquially known as a finding of gross misconduct. This decision had been made, Mr Wallace said, after carrying out the disciplinary process and finding that all the allegations against the Claimant (as set out at paragraph 10 above) had been substantiated such that, by reference to the company's standard disciplinary procedure, no lesser sanction than summary dismissal would be appropriate in the circumstances.

15. The Claimant was advised in the dismissal letter of his right to appeal but did not exercise that right. I note that, throughout the hearing, the Claimant's position was that he had been unfairly dismissed and that the whole process was, in reality, a way

of trying to get rid of him because he was being paid more than would normally have been the case for a sales assistant, having been demoted to that position on the same salary as when he was a manager.

Relevant Law and Analysis: Unfair Dismissal

The Legal Framework

16. I referred at paragraph 5 above to the issues that I must determine in deciding whether the claim for unfair dismissal succeeds. A short summary of the applicable legal principles which I have kept in mind when considering these issues is appropriate at this point.
17. Section 94 of the Employment Rights Act 1996 (“ERA”) confers on the Claimant the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The Claimant must show that he was dismissed by the Respondent under section 95; in this case, this is not in dispute.
18. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within Section 98. First, the Respondent 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, 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. In this case it did not appear to be in dispute that the Respondent dismissed the Claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The Respondent has therefore satisfied the requirements of section 98(2).
19. Section 98(4) then 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 Respondent, shall depend on whether in the circumstances (including the size and administrative resources of the Respondent’s undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant; and this shall be determined in accordance with equity and the substantial merits of the case.

20. In misconduct dismissals, there is well-established guidance for the Tribunal on fairness pursuant to Section 98(4) in the decisions in British Home Stores Ltd v Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the Respondent had a genuine belief in the Claimant'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 Claimant acted reasonably or unreasonably pursuant to 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. I reminded myself that it is immaterial how the Tribunal would have handled the events or what decision it would have made, and that 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).

Analysis of the Claimant's Claim

21. I have set out above a summary of the investigation and disciplinary process and I will not repeat it here. The process was not subject to any specific criticism by the Claimant during the course of the hearing but, having heard the evidence and considered the relevant documentation, it seemed to me that the manner in which the allegation about drinking alcohol was handled left much to be desired. The findings against the Claimant in this respect appear to have been made on the basis of the emails from Dave Gilmore [84] and Jade McLaughlin [98]; the Claimant denied the allegations throughout but there appears to have been no attempt to actually speak to either of these employees and / or scrutinise their accounts. In this respect, it is also relevant that Dave Gilmore's allegation related to an incident on 21st August 2023, which was not specifically an allegation that formed part of the investigation or disciplinary process and, notably, was not put to the Claimant during that process but was used as a basis for finding against him in respect of the allegation that he was under the influence of alcohol in October 2023. I asked Mr Wallace, when he was giving evidence, why he found the allegation to be proved in such circumstances and he told me that he had no reason to disbelieve Jade McLaughlin, especially when

there was a previous allegation in similar terms by Dave Gilmore. I found this approach to be extremely unimpressive in that Mr Wallace had, in effect, reversed the basic notion that an allegation needs to be proved: he had taken both employees' allegations against the Claimant at face value and had decided that, because he denied them, the Claimant must be lying. Furthermore, the allegation by Jade McLaughlin was not even that she had herself witnessed the Claimant being under the influence of alcohol, but that he had told her that he had been drinking at work on a previous occasion; this was a poor quality of evidence even if the conversation was found to have happened and Mr Wallace did not appear to appreciate the point that, even if the Claimant had said this to Jade McLaughlin, it may not actually have happened. Mr Wallace also appeared not to have taken into account at all the Claimant's consistent explanation that he (or his clothes) may have sometimes smelled of alcohol as he had not changed his uniform after going out and drinking the previous night.

22. For these reasons, I found that the determination that the Claimant had been using alcohol at work or, alternatively, was under the influence of alcohol at work was made in such a fundamentally unreasonable way that it was not within the band of reasonable responses for the Respondent to make such a finding.
23. Turning to the allegations about the Claimant's rudeness to customers, arriving late at work and taking excessive breaks, having considered the documentation reflecting those allegations and the Claimant's flat denial, I found that the Respondent was entitled to make those findings in that they resulted from a genuine belief after a fair process (including considering accounts from various customers) such that it was within the reasonable band of responses open to them. Given that Mr Wallace was clear in his evidence to me (and I can see why this was so given the nature of the allegations) that none of these would have led to dismissal on their own without either the alcohol or the rota change allegations being found, I will not deal further with those issues as I do not see them as affecting the overall fairness of the ultimate decision to dismiss.
24. I was therefore left with the single allegation that the Claimant changed the rota without permission or authority as the crux of his case for unfair dismissal. In my

view, it was clearly reasonable for the Respondent to make this finding because the Claimant admitted the allegation from the outset without any ambiguity; he effectively said during the disciplinary meeting, and repeated to me in evidence, that he accepts that it was in breach of the Respondent's specific procedures and that, when he was a manager, he would not have accepted it as appropriate if one of his staff had done the same thing. Whether this was an approach that the Claimant had carried over from when he was a manager and had the authority to do this I do not know and it was not necessary for me to determine that. In any event, this conduct inevitably led to an inaccurate payroll process which meant that the Claimant was effectively given a free holiday without authorisation and a colleague worked unpaid, unauthorised overtime. Notably, the Claimant did not even attempt to provide a justification for what he did. He was no longer a manager and no longer had the authority to do what he did. He even went as far during his evidence as blaming his manager's "incompetence" for not knowing that the rota had been changed even though he was on holiday when the Claimant made the decision himself and did not inform anyone else. I therefore found that it was within the band of reasonable responses to make a finding of gross misconduct on the basis of the rota change.

25. What did trouble me (as I made clear during the hearing) was what appears to have been the automatic step from the finding of gross misconduct to dismissal. The Respondent's own disciplinary procedure [43-46] says twice at [45] that a finding of gross misconduct will lead to dismissal. I am very surprised by this but I accept that, strictly speaking, it does not seem to breach the ACAS code of conduct on disciplinary procedures, to which I must have regard in such circumstances. I questioned Mr Wallace about his decision to dismiss and whether he considered other options and, unfortunately, I found his explanation to be very difficult to follow; in fairness to him, I suspect that was because he was unclear in his own mind what his thought process was at the time. However, the dismissal letter [104-105] did say that other sanctions were considered and there was an undertone to Mr Wallace's evidence to indicate that he did consider whether or not to dismiss but ultimately considered the offence serious enough to warrant summary dismissal.

26. Against that background, I was just about persuaded that, in totality, there was reasonable consideration given to other sanctions prior to dismissal at the time such

that the process was fair and that it was within the band of reasonable responses to dismiss; in my view, no employer can reasonably be expected to tolerate a situation where an employee changes a rota, causing incorrect payroll processing, without their knowledge or authorisation. If I am wrong about that, I am, again, just about persuaded that, given the serious nature of the Claimant's conduct, it was in any event reasonable to consider that there was no other realistic option but to dismiss.

27. For the avoidance of doubt, If I am wrong in my approach and the dismissal was, as a matter of law, unfair, I make it clear that I would have found that the Claimant contributed to his dismissal entirely by way of his own conduct in changing the rota without authorisation such that any award for unfair dismissal would have been reduced by 100% on that basis alone for contributory fault.

Conclusion and Disposal of the Claim

28. For the reasons set out above, I found that, as a matter of process, the Claimant's dismissal without notice was fair.
29. As a consequence, the Claimant's claim for unfair dismissal failed and judgment was given accordingly. There was no claim for breach of contract or wrongful dismissal.

Employment Judge Cline

Date: 14th February 2025

REASONS SENT TO THE PARTIES ON

28 February 2025

FOR THE TRIBUNAL OFFICE