



EMPLOYMENT TRIBUNALS

Claimant: Mr P Pitchell

Respondent: JATA construction Ltd

Heard at: Bristol (by CVP)

On: 11th & 12th November 2024

Before: Employment Judge Clarkson

REPRESENTATION:

Claimant: In person

Respondent: Mr Ushiago (HR)

JUDGMENT having been sent to the parties on 25 November 2024 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Unfair Dismissal

1. This is a claim brought by the Claimant, Mr Pitchell, against his former employer Jata construction. He represented himself at the remote hearing. A director of the company attended the hearing, Mr Taylor, and the Respondent was represented by Mr Ushiago, from Peninsular services, a HR company. Mr Taylor and the Claimant gave evidence via video.
2. The Claimant provided a written statement, a document entitled loss of income and a further document entitled 'money received and work commitments'.
3. The Respondent provided written submissions of 9 pages for the hearing and a bundle of 164 pages.
4. The claim was heard on 11& 12 November 2024 and an oral decision was given. The Respondent requested written reasons on 04/12/2024.

5. During the oral hearing of the claim evidence was given by the Claimant, who represented himself, Mr Rob Taylor a director of the Respondent company and Mrs Moore, the account manager of the Respondent company. The Respondent was represented by Mr Ushiago from Peninsula Services a HR company.

The Claims and Issues

6. An ACAS certificate was issued on 08/11/2023. The ET1 was received by the tribunal on 21/11/2023 and the response received on 16/01/2024.
7. The undisputed facts were that the Claimant withdrew £100 cash from a company card on 31/08/23 and used this money to buy pottery for himself. The Respondent alleged stealing and misuse of company property that amounted to gross misconduct warranting dismissal. The Claimant says that in the circumstances that dismissal was unfair.

The Claimant claims unfair dismissal under section 98 Employment Rights Act 1996. The issues the tribunal has to determine are:-

8. (1) did the respondent hold a genuine belief that the claimant committed gross misconduct,
9. (2) was there some other substantial reason that made dismissal fair and
10. (3) was that belief based on reasonable grounds and following as reasonable an investigation.

Was dismissal within the range of reasonable responses?

11. If the Claimant is found to have been unfairly dismissed, the issues in relation to Polkey are:-

- a. Was a fair procedure followed by the Respondent?
- b. If not, would the Claimant have been dismissed in any event, or is there a chance that he would have been dismissed in any event?

12. If the Claimant is found to have been unfairly dismissed, the issues in relation to contributory fault are:-

- a. Was any conduct of the Claimant before the dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, by how much (per s122 (2) Employment Rights Act 1996)?
- b. Was the dismissal, to any extent, caused or contributed to by any action of the complainant and, if so, by what proportion is it just and equitable to reduce the amount of the compensatory award (per s123(6) Employment Rights Act 1996)

13. The Claimant also claims £1500 and £279 in deductions from his wages in 2019.

14. The Facts

15. I make the following findings of fact in this case.

16. The Claimant was employed by the Respondent from at least September 2019 to 09/09/23. He was employed as a labourer and driver. Prior to 2019 the Claimant worked for the Respondent on a sub-contracted basis. He asserted that he was unaware of his status and believed himself to be employed. He failed to evidence his belief, did not provide pay slips, a contract or tax records and on balance I determine that prior to September 2019 he was not employed by the Respondent. [

17. The Claimant had been given an Amex credit card by the Respondent and then subsequently a Tap and Cap card.

18. On the evening of Thursday 31/08/23 he took £100 cash from the Tap and Cap card and used it to purchase some pottery.

19. On Friday 01/09/23 the following day he telephoned the office of the Respondent and informed Ms Moore that he had taken the money and wished to repay it and asked what was the best way to do this.

20. On Monday 04/09/23 the claimant left the £100 cash at the Respondent's office.

21. On 06/09/23 he had a meeting and explained his actions, with Rob Taylor in attendance. On 08/09/24 another meeting was held with Rob Taylor again in attendance, and the claimant was dismissed for gross misconduct and was given a letter confirming this. The Claimant then appealed this decision and a further meeting took place on 19 October 2023, which Rob Taylor attended.

22. A letter was written, dated 18/10/23, confirming the dismissal and that the appeal decision was final. It stated that the Claimant had misappropriated the company credit card which they decided was a fundamental breach of the contractual terms and that under the employee handbook on gross misconduct warrants summary dismissal. The Claimant raised a grievance regarding Rob Taylor being both the investigator and appeal decision maker but then withdrew this as he was no longer an employee.

23. The other relevant facts to consider in these circumstances are that the Claimant was not paid by the Respondent for work done while he was an employee and that the debt of this work amount rose to approximately £9000 during 2020/21. The claimant kept a record of these debts and discussed it with the Respondent's director, Mr Taylor. Gradually payments were made clearing the debt after

approximately 10 months. The Respondent company would buy the claimant tools that were then set off against the debt that they owed him.

24. Prior to September 2019 the Respondent deducted £1500 from the Claimant's wages due to an incident with a tipper and £270 for damage to a vehicle taillight.
25. At the date of dismissal the Respondent owed the Claimant £60 in regard to a payment he had made for a work on a company van whilst working in London.
26. The Respondent or as one of the directors of Mr Taylors other companies, Mr Taylor owed the Claimant £100 for a job cutting grass at the date of dismissal.
27. The Claimant and the Respondent appear to have been friends in the past. The Claimant had worked at the home of one of the other directors, Mr Spencer, as well as the home of the director Mr Taylor. He had also worked transporting the family of the director Mr Taylor. Between his telephone call on 01/09/23 and his dismissal on 08/09/23 he continued to work for the company and also worked at Mr Taylor's home.
28. The director Mr Taylor was present at the first and second meetings and sent that Claimant the letter confirming his dismissal.

The Law

29. For ordinary unfair dismissal under section 98 Employment Rights Act 1996, the law is well-settled.
30. First, the Respondent has the burden of proving that there was a potentially fair reason for dismissal.

31. In order to decide whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of the dismissal.

32. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within s98 (4) Employment Rights Act, in the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**:

- a. Did the Respondent genuinely believe in the misconduct of the Claimant?
- b. Was that belief based on reasonable grounds?
- c. Was a reasonable investigation carried out in the circumstances?
- d. Was summary dismissal within the band of reasonable responses open to a reasonable employer in all the circumstances?

33. The Tribunal, when considering whether there was a reasonable investigation carried out, must consider whether procedure was fair, reasonable and complied with the ACAS Code of Practice for Disciplinary and Grievance Procedures or the relevant procedure operated by the Respondent. If it finds the Burchell test has been answered in the Claimant's favour or there is an issue with the procedure, the Tribunal is required to consider the percentage chance that the defect made no difference and the Claimant would have been dismissed anyway in accordance with the principles in **Polkey v AE Dayton Services Ltd [1978] UKHL 8**.

34. In considering whether or not the Claimant has been unfairly dismissed, it is the genuine belief of the Respondent that is important, if the claimant is found to have been unfairly dismissed, in assessing contributory action, the test is not the same. The leading case is **Nelson v BBC (No. 2) [1980] ICR 110 (CA)** which states that there are 3 factors that must be present to give a reduction to the compensatory award for contributory action:

- i. The Claimant's conduct must be culpable or blameworthy (but need not be the sole or even the main cause of the dismissal)
- ii. It must have actually caused or contributed to the dismissal;
- iii. The reduction must be just and equitable.

Conclusions

35. I find that the reason for the Claimant's dismissal was conduct, a potentially fair reason. The Respondent asserts that the Claimant's conduct amounted to theft and that in the alternative it was some other reason which was an irredeemable breach of trust due to dishonesty.

The next issue for me to determine is whether the decision maker believed that the claimant committed theft. The term misappropriation was used in the dismissal letter, this had the implications of dishonesty or theft. I do not accept that this was an honestly held belief of the Respondent. The Respondent did not report the matter as theft as they knew the money had been repaid and when they were notified of the Claimant taking the money were told he wanted to repay it. They did believe that the Claimant has not used the card for an authorised use and believed that this was synonymous with theft.

I move on to consider whether that belief was based on reasonable grounds after a reasonable investigation.

I find that it was not for the following reasons.

36. The claimant contacted the Respondent to repay the money he had taken the following working day.

37. The Respondent dealt with the Claimant's actions as if there had been theft despite him having repaid the money promptly. The Respondent's representative has directed me to the Theft Act and asserts that borrowing can amount to theft. I note that the provision is only if the borrowing is in circumstances and for a period that makes it equivalent to outright disposal. No reasonable employer could have come to that conclusion. The Respondent knew, prior to dismissal, that that Claimant had contacted the office the next day to asking to repay the money. It was not therefore reasonable of them to conclude that the claimant had the intention to permanently deprive the Respondent of the money. Therefore, on the facts known to the respondent at the material times, it was not reasonable to conclude that the claimant had committed theft.
38. The dismissal letter does not take into account the circumstances of the personal nature of the relationship between the claimant and the respondent company, in particular with the director Mr Taylor. Whilst the Respondent asserts that the relationship is not relevant I find that it is relevant in regard to reflecting the unusual business practices of the Respondent company. Further, Mr Taylor confirmed that he would have lent the £100 had he been asked for it. When the claimant had been owed money by the company previously, this had been allowed to mount up to a very large amount, it had been paid back in off setting money and by the purchase of objects, as well as some payments in cash.
39. The Tribunal is not permitted to substitute its views as to whether it personally thinks that the Claimant's actions constituted gross misconduct or what it personally would have done in the circumstances if had been the employer. In these highly unusual circumstances, I do not find that summary dismissal was within the band of a reasonable responses open to reasonable employer when they had repaid the Claimant in this manner in the past and that he had in any even returned the cash promptly.
40. The Respondent has asserted in the alternative that some other substantial reason made the dismissal fair. In their submission they asserted that the Claimant had been dishonest. No reasonable employer could have concluded that the claimant was dishonest on the facts known to the decision maker.
41. The other substantive reason asserted by the Respondent is the terms in the handbook that set out conduct that irrevocably destroys trust and confidence necessary to continue the employment relationship. Given the fact that the Claimant has been repaid in the past by off setting and by the purchase of goods and that that he continued to be employed and was trusted to work at the Director's home after his notification of his actions no reasonable employer could have concluded that trust and confidence was destroyed.
42. In any event, there was no reasonable or adequate investigation. The Respondent failed to take account of, or make findings in regard to the personal and money lending relationship of the parties. They also failed to follow a fair procedure as the same director was investigating and making the decision and

appeal decision. Given their employment of an HR company this could have been easily remedied and was therefore unreasonable.

43. Whilst the reasons for the Respondent's actions were potentially fair, as misconduct, the dismissal of the Claimant in these particular circumstances was outside the range of reasonable responses, and as there was no loss of trust the claimant's dismissal was not fair.
44. The Claimant also claims £1500 and £279, as deductions from his wages that he felt he was owed. These were made when he believed that he was employed and the Respondent asserts that he was a subcontractor. Were the Claimant a subcontractor there is no jurisdiction of this Tribunal under S13 of the Employment rights act, Were he a worker and therefore could have had a claim for unlawful deduction from wages he claims is well out of time as he could have made the claim within 3 months or a reasonable period that would have been before the passing of 4 years. His claim is out of time.
45. The other monies owed to the claimant the £160 he accepts that he was paid once he had been dismissed.

Remedy:

46. I have considered whether it is just and equitable to reduce the amount of the award to the Claimant under sections 122 and 123 of the ERA and have decided that although there were mitigating circumstances the Claimant was aware of the standard work practices and the companies move towards formalising arrangements between workers and their employer and had he not spent the money on his company credit card the situation would not have arisen. I therefore find it just and equitable to apply a 1/3 reduction.

Basic award.

122 Employment Rights Act 1996

(2)Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

47. The basic award was capped at £643 per week applying the statutory cap for calculation of 1.5 weeks per year under s119 of the Employment Rights Act 1996. The figures were agreed with parties.

Compensatory award

123 Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

.....

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

The Claimant has consistently said that he intended to return the money he borrowed from the card and Mrs Moore gave evidence to confirm that the next day he did speak to her about how the money could be returned. I find him to be consistent and credible in his evidence. I also find that he knew that the cards were company credit cards, that he had not asked permission to take cash, that he did know that he was an employee of the company and that the situation with the Respondent company owing him money has passed and that he did not have explicit permission to take cash from the company card for his own personal use. In removing the cash he contributed to the Respondents actions, from which his losses arose, and I therefore considered it just and equitable to reduce the basic award by 1/3 and the compensatory award by 1/3.

48. The figures were agreed with parties as to the amount of net pay. The Respondent did not allege the Appellant had failed to mitigate his losses and accepted the evidence he had provide of the earnings he had received.
49. The hearing on 11 and 12th of November 2023 addressed the Claimant's actions and the losses for the year following his dismissal. He provided some evidence in this respect and the judgment was calculated on a compensatory basis and oral judgment was given on the basis of the loss being capped a year.
50. Subsequent to giving oral judgment I considered the the issue of future loss had not adequately been addressed at the hearing and should subject reconsideration. This was then heard in March 2025 and the original decision was not varied or revoked.

Polkey

51. As I have not found that the Claimant would have been fairly dismissed in any event there is no reduction applied.

ACAS

52. Failure to have an independent investigator and decision maker, para 6 of ACAS.

Discipline: Keys to handling disciplinary issues in the workplace

Establish the facts of each case

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

27. The Appeal should be dealt with impartially and , wherever possible, by a manager who has not previously been involved with the case.

53. The Respondent instructed an HR organisation, they have secretaries and are a large company. There were three directors at the time. It would have been reasonable to have had different people involved with the investigation and hearing.

54. The Respondent failed deal with the Claimant's Appeal impartially. The decision on his appeal was taken by the director Robert Taylor who was the person involved in the previous money lending directly with the Claimant. Who owed the claimant money at the time of Claimant's actions and was the director of who conducted the initial investigation as well as meeting with the Claimant to decide on his dismissal. Given that there were other directors and a HR department the same person being involved in the factual situation, the investigation and the appeal outcome was not impartial. I therefore awarded a 10% increase in the compensatory award for unreasonable failure to follow the ACAS code. I have awarded this at the rate of 10% as given the limited investigation and the conclusions of the Respondent to its investigation any independent appeal would be more likely than not to come to the same conclusion.

Case No: 1405910/2023

Approved by
Employment Judge Clarkson
Date: 25 April 2025

Reasons sent to the parties on
9 June 2025

Jade Lobb
For the Tribunal office