



# EMPLOYMENT TRIBUNALS

BETWEEN  
AND

Claimant  
Mr K Mirza

Respondent  
WM Morrison  
Supermarkets  
Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham ON 1 – 3 May 2019

EMPLOYMENT JUDGE GASKELL

### Representation

For the Claimant: Mr J Singh (Solicitor)  
For Respondent: Miss E Wheeler (Counsel)

## JUDGMENT

The judgment of the tribunal is that:

- 1 The claimant was fairly dismissed by the respondent: his claim for unfair dismissal is not well-founded and is dismissed.
- 2 The claimant was lawfully dismissed in accordance with his employment contract: his claim for wrongful dismissal is dismissed.

## REASONS

### Introduction

1 The claimant in this case is Mr Kamran Mirza who was employed by the respondent, WM Morrison Supermarkets Plc, from 14 April 2008 until 27 March 2018 when he was dismissed. The claimant has carried out a number of roles during the period of his employment but, at the time of his dismissal, he was employed as a Service & Petrol Team Manager. The reason given by the respondent at the time of the claimant's dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 27 June 2018, the claimant claims that he was unfairly and wrongfully dismissed. In its response to the claim, the respondent admits that the claimant was dismissed but maintains that he was dismissed for a reason relating to his conduct; and that the dismissal was fair and that it was a lawful dismissal under the employment contract.

## The Evidence

3 I heard evidence from five witnesses. For the respondent, Mr Christopher Musson: Duty Manager, who was the dismissing officer in this case. The claimant gave evidence on his own account and called three others: -

Dr Zara Farooq: the claimant's wife; a practising GP.

Mr Asim Nazir: the claimant's brother-in-law who also works for the respondent.

Miss Naomi Mighty: a former colleague of the claimant.

4 In addition to the oral evidence, I was provided with an agreed trial bundle running to approximately 320 pages. I have considered those documents within the bundle to which I was referred by the parties during the hearing.

5 I found the evidence given by Mr Musson to be compelling; consistent; and credible. He readily admitted to an error in the dismissal letter and I am confident as to the accuracy of what he told me.

6 The claimant was an unsatisfactory witness: his evidence was inconsistent in various respects of which, the following are examples: -

- (a) In his claim form at Paragraph 5, the claimant states that he asked his colleague Shaista Jabeen (SJ) to swipe him out as he left the respondent's store at 6:30pm on 23 March 2018. He then speaks of telephone conversations with SJ at 6:55pm and again at 7:34pm when he enquired as to whether or not she had swiped him out as requested. In his witness statement at Paragraph 8, the claimant again speaks of asking SJ to swipe him out as he left the store at 6.30pm and again talks of the telephone conversation at 6:55pm - but now says he is unsure whether he spoke to SJ at 7:34pm. In his oral evidence, the claimant states that he is quite clear that there was no telephone call at 7:34pm; just a message and him refusing to take SJ's call at that time. The claimant also states in evidence that, until the following day, he was unaware that SJ had not swiped out at 6:30pm as originally requested: if this is the case, then his evidence of having made subsequent enquiries at 6:55pm and possibly at 7:34pm is nonsensical.
- (b) In his claim form at Paragraph 12, the claimant positively asserts that, in April 2018, SJ resigned from her employment with the respondent complaining that she had been forced to amend her witness statement. In his witness statement at Paragraph 20, the claimant acknowledges that this is not in fact the case. In oral evidence the claimant acknowledged that he could have requested SJ to attend as a witness; but he had decided against this.

7 Where there is a factual discrepancy between the evidence given by the claimant and that given by Mr Musson, I prefer the evidence of Mr Musson. However, it is clear to me that, so far as the essential facts of the case are concerned, there is very little by way of dispute.

8 The evidence of Dr Farooq, whilst given with the utmost sincerity and concern for her husband, is frankly of little relevance to the case. And calling her demonstrates a misunderstanding on the claimant's part as to the legal issues to be determined. The same can be said of the evidence of Mr Nazir and Miss Mighty.

### **The Facts**

9 The essential facts of the case are that, on 23 March 2018, the claimant was scheduled to work until 7:30pm; he left work at approximately 6:30pm; but he did not swipe himself out on the respondent's time recording system; he was swiped out by SJ when she left the store at 7:30pm.

10 This discrepancy came to the attention of the claimant's line manager Mr Steve Cooper the following day. He viewed relevant CCTV footage and established that the claimant appeared to have ceased working at around 6:15pm; he spent approximately 15 minutes engaged in personal shopping; before leaving the store at 6:30pm. Mr Cooper spoke to the claimant to establish the facts and initially the claimant told him that he had left the store at 6:50pm; when confronted with the CCTV evidence the claimant confirmed that it was 6:30pm.

11 The claimant's explanation given to Mr Cooper was that he had received a telephone call from home requiring him to leave early he had therefore asked SJ to stay late and cover the end of his shift. As he was leaving, the store he told her that he had forgotten to swipe out and asked if she would swipe out for him; he admitted that this was an error stating "*I fucked up*". Mr Cooper queried the statement that the claimant was in a hurry by pointing out that he had spent 15 minutes engaged in personal shopping before leaving. The claimant insisted that he had asked SJ to swipe him out at 6.30pm and not when she finished at 7:30pm.

12 Later the same day, the claimant disclosed to Mr Cooper that he had been taking antidepressants and so had his sister. He described some very difficult family circumstances included the attempted suicide of his brother-in-law and the call from his wife (a practising GP) advising him that his sister was suicidal and should not be left alone. Thus, he decided to end his shift early to get home; he explained that he had done some shopping before leaving the store because he would not be able to leave his sister to do the shopping later.

13 Mr Cooper spoke to SJ, she explained that the claimant had asked to stay on to complete what would have been his shift and that he asked her to swipe him out. Certainly, it appears from what she said to Mr Cooper that she understood she had been asked to swipe him out at 7.30pm when she left the store. SJ produced telephone records showing that, after the claimant left the store at 6.30pm they had spoken on the telephone at 6.55pm and there had been a further telephone contact of some description at 7:31pm - just minutes before SJ had swiped the claimant out.

14 Mr Cooper was clearly of the view that the claimant was guilty of gross misconduct for falsifying time records. He expressed this view to the claimant; and he submitted an Investigation Report recommending disciplinary action.

15 Mr Musson was appointed as disciplinary manager: he had had no previous contact with the claimant or Mr Cooper; and I accept his evidence that before conducting the disciplinary hearing he did not discuss the case with anyone. Mr Musson relied entirely on Mr Cooper's report; the notes of meetings; the other evidence obtained by Mr Cooper; and what the claimant told him at the hearing.

16 The disciplinary hearing took place on 27 March 2018. The claimant made no reference in the hearing to his suffering from anxiety and depression; he did explain that he was dealing with a family emergency namely his sister's suicidal condition; and that had required him to leave the store early. He explained that he had secured satisfactory cover by SJ been staying on; and he explained that he had forgotten to swipe out and had asked SJ to swipe him out. His intention had been for her to swipe him out correctly at 6:30pm.

17 Mr Musson did not entirely accept the claimant's account: -

- (a) He accepted that the claimant had left the store early to deal with a family emergency and he has no criticism of the claimant for that.
- (b) He did not accept that the claimant had left the store in such a panic that he did not have time to swipe out correctly. It had been established that the claimant had time to spend 15 minutes doing his personal shopping all of which had been scanned and paid for correctly. Mr Musson's view was that it would have taken no more than an additional two or three minutes for the claimant to have swiped himself out.
- (c) Based on the telephone records, and on SJ's account, it appeared that the claimant well knew that she was not swiping him out until what would have been the normal end of his shift at 7:30pm.

18 On the day of the disciplinary hearing, Mr Musson received an additional handwritten statement from SJ indicating that there had been a previous occasion on which the claimant asked her to swipe him out. This statement was

given to the claimant at the commencement of the hearing; he confirmed that he was agreeable to the hearing continuing immediately.

19 Mr Musson was clearly aware of what the claimant had told Mr Cooper about his mental state; but, during the disciplinary hearing, the claimant did not suggest that this accounted for his conduct. The evidence available from other sources, such as SJ and the CCTV, suggested that the claimant was not panicking and appeared to be acting quite rationally.

20 The conclusion reached by Mr Musson therefore was that the claimant had left the store early; and had consciously asked SJ to swipe him out at 7:30pm presenting a misleading impression to the respondent that he had completed his shift. Mr Muston concluded that this behaviour showed a lack of integrity and was in fact dishonest: he regarded this as serious misconduct and that notwithstanding the family emergency; what the claimant had said about his mental health; and the claimant's 10 years' previous unblemished record; that the appropriate sanction was summary dismissal. This conclusion was communicated to the claimant in a letter dated 7 April 2018; the claimant was told of his right to appeal.

21 On 17 April 2018, the claimant submitted a letter of appeal setting out a number of grounds for appeal. Two appeal hearing dates were set: in response to the first, the claimant telephoned to say that he could not attend; and this was re-arranged. The claimant did not attend the second hearing and had been told that if he failed to do so it would be assumed that he did not wish to pursue the appeal and no further action would be taken. In the event the claimant did not attend the second hearing and the appeal was treated as having been abandoned.

22 It now appears that the letters giving the appeal dates was sent to an old address - albeit an address at which the claimant's parents are still resident and it would be reasonable to assume that those letters would have reached the claimant's attention. What does appear to have been overlooked however, is an email from the claimant dated 5 June 2018 explaining that he did not wish to attend an appeal meeting but wished his appeal to be considered on its merits on paper. Because this email was overlooked, no such consideration of the merits took place.

23 The claimant was advised by the respondent of the outcome of the appeal in a letter dated 28 June 2018.

24 The claimant has given evidence supported by Mr Nazir and Ms Mighty of previous difficulties between himself and Mr Cooper. In February 2017, he raised a grievance against Mr Cooper: the facts of the grievance appear at that time to have been resolved; and the claimant confirmed that he had no objection to Mr

Cooper continuing at his line manager. During the 2018 disciplinary process, at no stage did the claimant express any concern as to Mr Cooper's impartiality or fitness to investigate.

25 The claimant is also called evidence through Mr Nazir that there is reason to suspect that Mr Cooper wished to step down from his management role and that the claimant's Team Leader role would have been an ideal alternative for him. The suggestion is therefore made by the claimant that Mr Cooper somehow skewed his investigation to ensure the claimant's dismissal in order to make way for him. In the event, Mr Cooper did not take the claimant's role but secured an alternative role elsewhere.

26 The claimant also maintains that he has evidence that in advance of his dismissal he had been removed from rotas suggesting that his dismissal was pre-determined. Although he claims there was evidence available to him to support this proposition he has not called any such evidence.

27 In his evidence, the claimant stated that there had been other occasions during the time of his employment with the respondent where he had forgotten to swipe himself out. He knew that the correct procedure in those cases was simply to inform the duty manager of the position at the earliest opportunity - likely to be the commencement of his next shift. The claimant could give no reasonable explanation as to why this procedure had not been followed on 23 March 2018.

## **The Law**

### *Unfair Dismissal*

#### 28 **Employment Rights Act 1996 (ERA)**

##### **Section 94: The right not to be unfairly dismissed**

(1) An employee has the right not to be unfairly dismissed by his employer.

##### **Section 98: General Fairness**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

- (2) A reason falls within this subsection if it—
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant, or
  - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (4) .....where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
- (a) depends 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
  - (b) shall be determined in accordance with equity and the substantial merits of the case.

29 **Cases on Unfair dismissal**

**British Homes Stores v Burchell [1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

**Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)**

**Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

**Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

**Taylor -v- OCS Group Limited [2006] IRLR 613**

**London Central Bus Company Limited -v- Manning UKEAT 0103/13 (EAT)**

**Afzal -v- East London Pizza Limited [2018] ICR 1652 (EAT)**

In determining whether an employer has followed a fair procedure the tribunal should consider the procedure as a whole if one element of procedural unfairness is identified the question is whether there was impact on the fairness or otherwise of the dismissal process overall. Where the defect is at the appeal stage, this could only render a dismissal unfair if it denied the employee the opportunity of showing that the employer's reason for dismissal could not reasonably be treated as sufficient.

**30 The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

*Wrongful Dismissal*

31 The wrongful dismissal claim is a simple claim under the law of contract. The claimant's case here appears to be that because Hillcrest did not follow the disciplinary procedure his dismissal is invalid (although he does not appear to be arguing that his employment is continuing). It is certainly his case that he is entitled to a period of notice and that because the disciplinary procedure was not followed the respondent cannot lawfully dismiss him summarily.

32 The legal position is that even if the claimant can establish that he was entitled to a period of notice he will not be permitted to enforce the contract in his favour if he himself is found to have been in fundamental breach of it.

33 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or otherwise of the respondent's decision; but must make its own findings as to whether the claimant had acted in repudiatory breach of contract.



34 **Cases on Wrongful Dismissal**

***Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch.D. 339**  
***Cavenagh v William Evans Ltd.* [2013] 1 W.L.R. 238**

An employer may terminate an employee's contract of employment without notice in circumstances where the employee's conduct amounts to a sufficiently serious breach of a term of the contract of employment such that the conduct amounts to a repudiation of the contract. Further, the employer may justify summary dismissal by reference to such conduct even if the conduct was not known to the employer at the time of termination but was discovered only subsequently.

***Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420 (CA)**  
***British Heart Foundation v Roy* UKEAT/0049/15 (EAT)**

In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is himself in breach of contract and that breach is repudiatory.

**Discussion & Conclusions**

*Reason for Dismissal*

35 I am satisfied that Mr Musson decided to dismiss the claimant for a reason relating to his conduct and for no other reason. I find the claimant's suggestion that Mr Musson was manipulated by Mr Cooper either because of Mr Cooper's desire to settle scores or because of Mr Cooper's desire to take over the claimant's role to be utterly fanciful and devoid of merit. Conduct is a potentially fair reason for the purposes of S98(1) & (2) ERA. I accept that Mr Musson considered the matter independently without any improper influence; and that there was no question of pre-determination on his part.

36 The particular misconduct identified by Mr Musson was: -

*That the claimant instructed a colleague SJ to swipe him out of his shift at 7:34pm after he had left the building early without permission and without informing the duty manager at 6:25pm.*

37 It should be stressed that the misconduct was the instruction to SJ to swipe him out it was not leaving before the end of his shift or arranging for SJ to cover. Mr Singh's attempts therefore to bringing evidence about "shift swapping" and to cross-examine on this, were completely unnecessary and irrelevant.

*Fairness*

38 I have considered the three limbs of the Burchell test: -

- (a) I am satisfied that Mr Musson genuinely believed that the claimant was guilty of the misconduct found above.
- (b) In my judgement, Mr Musson had ample evidence for this conclusion. There was the fact shown on CCTV that the claimant did leave at 6:25pm; there was the fact, evident from the swipe-out system, that he was swiped out at 7:34pm; there was SJ's account that the claimant had asked her to swipe him out; this was confirmed by the claimant. The only dispute between the claimant and SJ was whether he had asked to swipe him out at 6:30pm or at 7:30pm. Mr Musson concluded the latter because on the evidence before him: the claimant was not in such a rush that he could not have swiped out himself at 6:30pm; and because the telephone evidence suggested contact between the claimant and SJ after the claimant had left leading up to the time she swiped him out. Furthermore, the claimant knew the correct procedure to follow on occasions where he had forgotten to swipe out and had no explanation for not following that procedure on this occasion.
- (c) In my judgement the investigation carried out by Mr Cooper was entirely adequate. There was no need for him to fully investigate the claimant's medical condition as the claimant had not put this forward as a potential explanation for his conduct and frankly there is no basis to conclude that the fact that somebody suffers from depression and anxiety would cause them to ask a colleague to swipe out. It might of course account for an employee forgetting to swipe himself out: but that is not the issue in this case.

*Procedural fairness*

39 The claimant has highlighted a number of matters which he says constitute procedural unfairness in this case: -

- (a) The claimant complains that, because of their history, Mr Cooper should not have conducted the investigation. In my judgement, this complaint is devoid of merit. The past grievance had been resolved; and the claimant had agreed to Mr Cooper continuing as his line manager; the current investigation was part of Mr Cooper's line management duties. Further, at no stage during the investigation or the disciplinary did the claimant object to Mr Cooper's involvement. In my judgement Mr Cooper's report is entirely consistent with the facts as admitted by the claimant. In my judgement, it is very clear that Mr Musson was not improperly influenced by Mr Cooper's conclusion that the claimant had committed gross misconduct.

- (b) The claimant is concerned that Mr Musson was asked to conduct the disciplinary hearing at only 12 hours' notice. This gave him insufficient time to prepare. This too is a complaint which is wholly devoid of merit: this was not a heavy document case; I accept Mr Musson's assertion that two hours reading time was sufficient; and there is no evidence to be gleaned from the disciplinary hearing or Mr Musson's dismissal letter that he had somehow underprepared.
- (c) The claimant received SJ's handwritten statement on the morning of the disciplinary hearing. No unfairness arises from this: it was a very short statement; and the claimant was asked if he had any objection to the hearing continuing.

40 Save for the failure to deal with the appeal, I am satisfied that the respondent adopted a conspicuously fair procedure which complied fully with the ACAS Code.

41 So far as the appeal is concerned, it is of course a matter of concern that no appeal took place on the merits. But I have now had the advantage of considering the claimant's case at its height. I have considered what new matters he might have been able to bring to the attention of the appeal officer and how these might have impacted on the decision. The reality is that nothing to the issues in the case has emerged. There is further evidence as to the claimant's depression; and as to the severity of his sister's suicidal intentions that night; this would all explain the claimant's decision to leave early; and his failure to swipe out; but not his decision to ask a colleague to swipe him out. Still less (as was Mr Musson's reasonable finding), the decision to ask his colleague to swipe him out at 7:30pm when he had left the store at 6:30pm. Accordingly, I am satisfied that no unfairness or injustice arises from the manner in which the appeal was conducted.

### *Sanction*

42 I remind myself that it is not for me to substitute my decision as to the severity of the sanction for that of Mr Musson. I am satisfied that Mr Musson took account of the family situation and of what he knew of the claimant's medical condition and of the claimant's previous good record. He concluded however that this behaviour constituted a lack of integrity on the claimant's part and was made more serious because there were alternatives available to him and he involved a junior colleague in what Mr Musson found to be deception.

43 My judgement is that, in view of the claimant's previous good record, this decision could be regarded as a harsh decision and no doubt some employers may have dealt with it differently. But that is not the test which I am required to apply: I have to consider whether the sanction of dismissal fell outside the range of reasonable responses; I am satisfied that the sanction was within that range.

44 Accordingly I find that the claimant was fairly dismissed by the respondent his claim for unfair dismissal is not well-founded and is dismissed.

*Wrongful Dismissal*

45 I am satisfied that, by his conduct in asking a junior colleague to swipe him out when the claimant could easily have swiped himself out or alternatively omitted to swipe out and reported the matter to the duty manager at the next opportunity, the claimant acted in serious breach of his employment contract. Accordingly, he is not entitled to rely on the benefit of the contract by receiving notice of his dismissal or a payment in lieu thereof.

46 The wrongful dismissal claim is dismissed

Employment Judge Gaskell  
17 June 2019