



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Coombs
Respondent: Marks and Spencer Plc

Heard at: East London Employment Tribunal
Before: Employment Judge Peter Wilkinson
On: 8 October 2021

Representation

Claimant: In person
Respondent: Anna Greenley, Counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded.
2. Remedy will be dealt with at a separate hearing.

REASONS

1. The Claimant was employed by the Respondent from 26 June 2011 until 5 May 2020, when her employment ended following her summary dismissal for gross misconduct. At the time of her dismissal the Claimant was working as a Customer Assistant at the Respondent's store in Southend on Sea. Following a period of ACAS Early Conciliation, the Claimant presented an ET1 on 14 September 2020. She has brought the following claim:

- 1.1. A claim of unfair dismissal under Part X of the Employment Rights Act 1996

2. The case was listed for one day via CVP, hearing from four witnesses. There was insufficient time at the conclusion of the hearing to give judgment and reasons which were formally reserved.

The Issues

3. The issues in the case were not in dispute and were as follows:

3.1. *Unfair dismissal*

3.1.1. It was admitted that:

3.1.1.1. The Claimant had sufficient continuity of service to present a claim of unfair dismissal without needing to show any automatically unfair reason for the dismissal; and

3.1.1.2. There was no dispute that the Claimant had been expressly dismissed by the Respondent; so

3.1.1.3. The first contentious issue was whether the Respondent could show that the dismissal was for a potentially fair reason. The Respondent says that the reason for the dismissal was conduct namely;

3.1.1.3.1. That the Claimant had intentionally and knowingly removed goods belonging to the Respondent from the store without paying for them.

3.1.1.4. The Tribunal needed to decide whether:

3.1.1.5. The Respondent held an honest belief in the Claimant's misconduct, which belief was;

3.1.1.6. formed following a reasonable investigation; and

3.1.1.7. whether the Respondent followed a reasonable procedure; and

3.1.1.8. taking these matters into account whether the dismissal was fair or unfair applying the test in sub section 98(4) of the Employment Rights Act 1996?

4. In considering whether the Respondent has demonstrated a potentially fair reason for dismissal, I am not concerned with whether or not the conduct took place as alleged, only with the question of reasonable belief in that conduct, formed following a reasonable investigation.

The hearing

5. In advance of the hearing the parties had, in accordance with the directions of

the tribunal, prepared an agreed bundle of documents running to some 132 pages. They had also prepared and exchanged witness statements from the following people:

- 5.1. the Claimant;
- 5.2. Emily Garrod, Team Manager and the investigating officer;
- 5.3. Jennifer Dobson, Team Manager and the dismissing officer; and
- 5.4. Graham Bennett, Chair of National BIG at the Respondent and appeal manager.

6. In advance of the hearing the Respondent's solicitor had sent the Tribunal video files of CCTV footage said to have supported the Respondent's conclusion that the Claimant had taken items without paying for them. In the event the video files were not relied on, and the still photographs were of such poor resolution as to be worthless.

7. At the conclusion of the evidence Counsel for the Respondent made written submissions. I shall not set out those submissions in full but address the most important points within my discussions and conclusions set out below.

The evidence

8. In this section I set out my initial findings of fact drawn from the evidence I have heard and read. I do not intend to address the whole of the evidence, but I have considered all the oral evidence, the content of the witness statements and those documents to which I was taken in the bundle.

9. On 5 May 2020, the Respondent identified a concern with two transactions said to have been carried out by the Claimant on 17 April 2020.

10. In respect of the first such transaction, it was said that the Claimant had passed food and clothing across a scanner on a Self Check Out Till (A SCOT till) but that she had only paid for the food, taking the clothing without paying for it. In respect of this allegation, later put to the Claimant as allegation number 1 in the investigation interview on 7 May 2020, the Respondent relied on their having made an examination of the Electronic Journal on the relevant SCOT till, which it was said showed "all food but not clothing and home". Asked what happened to those items, the Claimant's response was "I have no idea". When informed as a fact that she put the items across the SCOT till, but the Electronic Journal shows no payment, she responded "OK". Notably, she did not say that she had not taken the goods without paying for them, despite the fact that she was apparently being accused of theft and despite the fact that it is now agreed that she had in fact paid for the goods at the time and that the allegation appears to result from a failure to properly examine the electronic journal.

11. The investigating officer, Emily Garrod, also interviewed a section manager called John Povey in respect of allegation number 1. Having said that he had reviewed the CCTV and the electronic journal, he stated that the Claimant had "two items of clothing in her trolley alongside food items". His statement says "This was presented at SCOT till 804 and "no clothing items were paid for". "Again, I checked electronic journal to confirm that only food was purchased by Sally".

12. This allegation was apparently maintained in the letter sent to the Claimant by Emily Garrod on 11th May 2020, which included an allegation of leaving the store without paying for goods and dishonest behaviour.

13. In an undated document entitled "Investigation Report", it is acknowledged that the electronic journal in fact shows that the Claimant paid for all the items that were the subject of allegation number 1 in full at the time that she was at the till. This despite at least two previous statements that the electronic journal had been examined and showed that the clothing items had not been paid for and despite John Povey stating that he had examined the CCTV. In a further example of the inaccuracy of John Povey's observations of the cameras and the electronic journal, there were in fact three items of clothing in the trolley, not two.

14. From this point on, allegation number 1 was not pursued, it being accepted that the Claimant had in fact paid for the items in question and the initial examination of the CCTV evidence and the electronic journal had led to a conclusion which was palpably false. One might have expected this to result in extreme care in respect of allegation number 2.

15. In respect of the second transaction, it was said that the Claimant had carried out a "layaway transaction – non recalled". A hoodie, 3 trifles, chopped herrings, 1L of Orange Juice". It may be helpful to record my understanding of what is meant by a Layaway transaction – non-recalled.

16. When goods are scanned through a point of sale, they are automatically removed from the retailer's stock record, the goods no longer being available to sell. Ordinarily, they will then be paid for, and the sale is complete. When, for whatever reason, payment is not made at the time of the items being recorded as off-stock (where for instance the customer forgets to bring a means of payment), it is possible to lay the transaction away for later payment, when it can be recalled to the point of sale. The goods are still off stock, because they are not available to sell to another customer, but they have not yet been paid for. If the goods are not paid for then the failure to return them to stock results in a loss. A layaway that has not been paid for is referred to as a layaway - non-recalled.

17. In the investigation meeting on 7 May 2020, Emily Garrod put it to the Claimant that she had a layaway-non recalled from 17 April. The Claimant responded that she remembered the layaway. She gave an account, which appears not to be challenged, that she had tried to pay for the layaway and it came up as invalid. She said that she did mean to speak to someone. She was asked "So you left the store without paying?". She responded, "well yes, I must have done". She was asked why she didn't mention the layaway when she later purchased trainers. She said "I must have forgot". She was asked why she had not raised it since. She said she should have done. She was asked if it was acceptable "to do that and leave the store without paying" she said "No its not". Tellingly, when asked what she should have done she said "told someone". She did not say she should have made payment. She was asked "so when you left the store without paying for the goods in your layaway, you knew you hadn't paid for those goods". She answered yes.

18. I note that at no stage in this investigation meeting was it ever suggested to the Claimant that she removed the goods from the store. She admitted failing to pay for

the goods on her layaway. She admitted leaving the store without paying for the goods on her layaway and knowing that she had not paid for those goods when she left. She did not admit, nor was she asked to admit, that she had taken the goods out of the store without paying for them.

19. Again, this allegation features in the interview of John Povey by Emily Garrod. He said he had reviewed the CCTV and could not see a single transaction being paid for that matched with the layaway.

20. John Povey goes on to say that he has screenshotted the footage that was reviewed and had a clear image of the white hoodie that formed part of the layaway transaction. He says this image was taken as the Claimant was about to complete her final transaction before leaving. Noting John Povey's previous review of CCTV had apparently demonstrated to his satisfaction that "no clothing items were paid for" in respect of allegation number 1, this should have been treated with some caution. I have seen what I understand is the screenshotted still image. Even were it possible to make out a white hoody in that image, which it is not, the image does nothing to demonstrate that any of the layaway items were removed from the building.

21. The investigation report already adverted to above sets out the allegations, (including the items from allegation number 1). The allegations include "leaving the store with failure to pay for items (from the layaway) plus additional items from the 1st transaction. The findings exonerate the Claimant in respect of allegation number 1. The finding on allegation number 2 recites that in respect of the layaway transactions "in your interview you admitted that you did place these on layaway and put them in the fridge. After reviewing the electronic journal this layaway still hasn't been re-called for payment to be made and our clothing stock file shows no purchase".

22. The investigation report goes on to record that the Claimant had said in interview that she tried to pay for the layaway items but it didn't work. The report records that a review of the CCTV shows "what looks like a layaway attempt to be paid for but fails to work".

23. Unhappily, the report goes on to record that "*instead of retrieving items from your trolley to re-scan and pay for, you leave with the items and no payment was made. When asked if you left the store knowingly with unpaid items you replied "well yest I must of"*. As a matter of fact, this is simply wrong. The interviewers own note records the exchange as "So you left without paying" and "well yes I must have done". There is a world of difference between "*so you left without paying*", in the context of an unrecalled layaway, and "*you left the store knowingly with items for which you had not paid*". There appears to be absolutely no evidence at this stage that the Claimant left the store with items for which she had not paid, nor has anyone put that allegation to her in terms. She has certainly not admitted it. The investigation concludes on this basis that this is a case of theft.

24. As part of the allegation, it is recorded that the Claimant attempted to pay for the layaway but that her attempt was unsuccessful. What seems to be asserted is that she then left the store with the items still in her possession.

25. This was not at a SCOT till, but at the till of a colleague by the name of Tayla. If the transaction happened as contended for by the Respondent, the Claimant tried to

pay for the goods in the layaway, when they did not go through, she put them back in her bag and left with them. She can hardly have done so without Tayla being aware and yet there is no trace of any interview with Tayla and no mention of her having been spoken to in the investigation at all.

26. There was a disciplinary hearing before Jennifer Dobson on 18 May, at which there was an opportunity to resolve any ambiguity and to rectify the obvious flaws in the investigatory process. The note of that meeting runs to 16 pages of manuscript.

27. It was put to the Claimant that she had “failed to notify us of non-payment” and that she “left without paying for items”. She was asked to explain why she didn’t pay and she explained that she tried to pay and the layaway didn’t work. She said that she didn’t want to be late back from her break and the items were in the fridge. She was never challenged on this answer. It was put that the allegation of dishonest behaviour was that the transaction was on 17/04 and “you never alerted us”. The Claimant replied that she knew John (Povey) investigates layaways but she just forgot.

28. It was put to the Claimant that she had admitted to leaving without paying for goods and she was asked if she had anything to add. She said no but it was never her intention. She was asked about contacting someone. She said “I knew layaways are looked at and I wasn’t hiding it. I thought after all this time someone would have alerted me”. When asked if she accepts she didn’t pay, she responded “I knew I did it. I knew it had to be done. It’s a failure. I should have got hold of Faye and told her but didn’t feel it was professional”.

29. It seems to me that these responses are entirely consistent with knowledge on the part of the Claimant of an administrative failure. Why would she say “I knew it had to be done”? How can theft be said to be a failure? Why would she say she should have told the store manager, if she had stolen from the store? Again, crucially, in 16 pages of notes, there is no record at all of the Claimant being asked to accept that she had taken goods from the store without paying. What is put is that she left without paying, not that she left *with the goods* without paying. When she says the items were in the fridge, she is not challenged.

30. Jennifer Dobson was the dismissing manager. The notes in the bundle are hers. I asked her whether she had ever asked the Claimant if she had taken goods from the store without paying for them. She said the Claimant had admitted it, apparently relying on the notes showing that the Claimant had admitted leaving without paying for the items on the layaway. She said that the decision was based on information given to her and she made her decision solely based on that.

31. Ms Dobson seemed to be of the view that the Claimant had said in interview that when she got home she realized she had the garment (the white hoody). The notes in fact show that no such admission was ever made.

32. In re-examination, Ms Dobson said that the Claimant never said she left the items in the store. On page 6 of the manuscript notes of Ms Dobson’s disciplinary meeting, she is recorded as asking the Claimant why she did not ask for the items to be re-scanned when she was at the till paying for her purchase of trainers. The response was “I just didn’t want to be late back from my break. Also, Items were in the fridge.”

33. Ms Dobson was asked whether she had checked the fridge to see if the layaway goods were still there. She said that she had not. She gave evidence that if the items had been left in the fridge they would likely have been added back to stock. She said there was a diary in which this would have been recorded. She was asked if she had checked that diary. She said that she had not.

34. There is a dismissal letter in the bundle. It is noted that nowhere in that letter does it state that the Claimant took the goods from the store, nor that she has admitted doing so. Despite this, the paper appeal process appears to simply repeat conclusions which are unsupported by the documents which were before the appeal manager.

35. The Claimant gave evidence of her own involvement in auditing layaways and her knowledge of the checks made on them by John Povey. She told the tribunal that failing to complete a layaway or return the goods to stock was a serious matter and that it was looked on as producing a loss. Her evidence was that she had taken the goods on the layaway to a cold room, which she described as the fridge and left them there in the trolley. She was clear that she accepted that failure to complete the layaway was a serious matter and that she accepted that she should have paid for the goods on the layaway. She accepted that she had not done so. She was however resolute that she had not removed the items from the store.

Findings on investigation

36. Having heard from the Claimant and from the witnesses for the Respondent and having considered the documentary evidence covering the investigation and dismissal meetings, I have come to the clear conclusion that the investigation in this matter was seriously flawed in a number of respects:

- 36.1. There was no attempt to determine whether the goods in question were still in the store or had been added back to stock. I was told that there was a book in which items added back to stock were recorded but that it had not been examined. No-one had looked to see if the goods had remained in the fridge. Given that the Claimant had said in interview that the goods were in the fridge, this seems to have been a key question.
- 36.2. The allegation that the Claimant had left the store with the goods without paying for them was never put to her. It might be said that it was obvious she was being accused of theft and should have expressly denied it, but the same could be said of allegation 1, where she never said in terms that she had not stolen the items, whilst in fact it transpired that she had paid for them in full at the time of the transaction.
- 36.3. There was a collective and unquestioning reliance on the part of the Respondent on what they believed was an admission of theft on the part of the Claimant, whilst she had admitted nothing of the sort. Her admission that she had not completed the layover and that this was wrong of her does not amount to an admission of theft. The mis-attribution to the Claimant of an express admission that she left the store with goods for which she had not paid (detailed in paragraph 22 above) is illustrative of the lack of rigour in this investigation and the sloppy manner in which information was analysed and utilised.

- 36.4. There was an over-reliance on the conclusions of John Povey, in particular from his observation of the video footage. This is the same man who had confidently asserted that previous video footage showed the Claimant taking goods without paying for them. It did not. As noted above, given the palpably false conclusions reached by John Povey in respect of allegation 1, largely on the basis of his examination of the CCTV, any reliance on his further conclusions arising from the same manner of source material should have been tempered with a need for direct supporting evidence.
- 36.5. Further, at least two other members of the sales team, Claire and Tayla, were involved in the layaway transactions. There is no evidence that they were ever spoken to or that the electronic journal on Tayla's till was ever examined to clarify whether in fact the Claimant attempted to pay for the goods.
- 36.6. Finally, given that this was a dismissal for theft and was expressed as such, it seems quite remarkable that it is accepted that the Claimant tried to pay for the goods which the Respondent says she took from the store, but no consideration seems to have been given to whether her later failure to pay for the layaway was inadvertent rather than actively dishonest. There is an express finding of theft, which on the face of it would seem to be wholly inconsistent with an attempt to pay for the goods before leaving the store and I would have expected there to be some explanation of how the Respondent concluded that this was deliberate dishonesty. As noted above, an examination of the electronic journal record on Tayla's till may have assisted in shedding light on what happened at that till on 17 April 2020.

37. Given my findings in respect of the investigation carried out by the Respondent, I am unable to accept that the Respondent held a reasonable belief in the dishonest conduct of the Claimant on reasonable grounds after such investigation as was reasonable in the circumstances. There was nothing reasonable about the Respondent's investigation, which I have found to have been deeply flawed.

Unfair dismissal

38. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 *General.*

- (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.*
- (3) *.....*
- (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.*

39. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': *Thomson v Alloa Motor Co Ltd* [1983] IRLR 403, EAT. It is not necessary that the conduct is culpable *JP Morgan Securities plc v Ktorza* UKEAT/0311/16.

40. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129.

41. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

42. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

43. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee *A v B* [2003] IRLR 405. *A v B* also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not.

44. I have found that the Respondent did not carry out a reasonable investigation on which to found their belief in misconduct, particularly bearing in mind the size and administrative resources of the Respondent and the seriousness of the allegation.

45. In my view no reasonable employer could have relied on the product of such a flawed investigation to found a dismissal and dismissal was thus not within the range or band of reasonable responses open to the Respondent.

46. It follows that I find that the Claimant was unfairly dismissed.

47. I will list a remedy hearing for 1 day but would suggest that the parties attempt to resolve or narrow their differences in order to avoid or reduce the costs associated with that hearing.

**Employment Judge Wilkinson
Dated: 22 December 2021**