



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112384/2021

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Held in Glasgow on 29 and 30 March 2022

Employment Judge B Campbell

10 **Mr S Houston**

**Claimant
In Person**

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Tesco Stores Limited

**Respondent
Represented by:
Ms A Bennie -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the claimant was not unfairly dismissed. His claim is therefore dismissed.

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REASONS

Background

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1. This claim was made by a former employee of a national supermarket chain. On 11 September 2021 he was dismissed from his employment. The respondent argues that the reason was related to his conduct, and that he had repeatedly failed to follow instructions about his working methods. The claimant challenged that finding and believed dismissal was too excessive a sanction.

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2. Evidence was heard from the respondent by way of Mr Jim McAllister, who investigated the claimant's conduct, Mr Stephen Lee, who chaired a disciplinary hearing and dismissed the claimant, and Mr Harvey McGillivray,

who heard the claimant's appeal against his dismissal. The claimant also gave evidence himself.

3. A bundle of documents had been prepared for use at the hearing and where relevant those are referred to below. Numbers in square brackets correspond to page numbers in the bundle.
4. At the end of the hearing the parties gave oral submissions which were noted and considered along with the evidence in reaching the findings in this judgment.
5. Where necessary, time was taken to explain to the claimant the relevant conventions, rules and principles which apply to employment tribunal hearings and the type of claim he had raised.
6. All witnesses were found to be credible and reliable in general. The claimant was however evasive when dealing with questions about his attempts to mitigate his losses. He would not disclose details of other work he undertook. Ultimately that did not affect the outcome of his claim as it was not necessary to calculate compensation.

Issues

The tribunal has the following legal issues to decide:

7. Was the dismissal of the claimant for a potentially fair reason within the meaning of s.98(1) or (2) of the Employment Rights Act 1996 ('ERA')? The respondent argued that the claimant was dismissed by reason of his conduct, which is a potentially fair reason.
8. If so, did the respondent meet the requirements of section 98(4) ERA in relation to the claimant's dismissal, so that the dismissal was fair overall? This will take into account the respondent's size and administrative resources, equity and the substantive merits of the case.
9. If the answer to either of the questions above is 'no' and the dismissal was therefore unfair, what remedy should be awarded? The claimant sought compensation.

Relevant law

10. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that analysis.
11. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

Findings in fact

The tribunal made the following findings based on the evidence, as they are relevant to the issues above.

General

12. The claimant was an employee of the respondent between 5 December 2015 and 11 September 2021. On the latter date he was dismissed after a disciplinary process was followed. The claimant worked as a Customer Assistant at the respondent's Silverburn store. That is a large supermarket which is open 24 hours a day. The claimant worked night shifts on Fridays and Saturdays. Each shift began at 10pm and ended at 7am the following morning. His core duties were to replenish the store shelves with stock.

13. The respondent operates a 'Code of Business Conduct' (the 'Code') [30-61]. It also had in place a 'Disciplinary Policy' (the 'Policy') [62-71]. Both applied to the claimant among other employees.
14. The respondent has a practice which managers are expected to follow when dealing with more minor performance and conduct matters. They will speak to the member of staff concerned and fill in a 'Let's Talk' form recording the key points of the discussion. These records will have a status below that of a formal warning but are kept in the individual's personnel file.
15. The claimant had been the subject of a number of 'Let's Talk' discussions since commencing with the respondent, about performance, following correct processes and timekeeping.
16. The claimant received a 'final written warning for misconduct' on 22 October 2020 from a Lead Manager named Colleen Cowie [80-81]. It was to remain live for 52 weeks from the date of issue. The warning had been issued after a disciplinary hearing and was said to be for two reasons, which in summary were:
- a. repeatedly failing to comply with requests of a Manager, and
 - b. failure to follow company process in relation to problem solving, including by emailing the store Manager about matters he should have resolved another way.
17. The warning letter contained a section setting out by way of bullet points the way the claimant had to improve. One such way was that '*You must comply with all reasonable requests made during working hours*'. Examples given included remaining in his designated aisle and finishing his replenishment tasks, not moving aisle to talk to colleagues, working through back stock and delivery cages thoroughly and consistently and working high-level areas thoroughly and consistently.
18. The letter mentioned '*a pattern of failure to take responsibility and accountability and therefore a large amount of documented evidence to suggest that you fail to learn from any sanction or repercussions but continue*

to choose and repeat the same behaviour. Again as discussed, this is unacceptable and failure to acknowledge and change your behaviours will be treated as Gross Misconduct.'

19. Later in the letter it was said *'I would like to remind you that any further incidents of misconduct during the period that the warning is live are likely to lead to further disciplinary action and this could ultimately result in your dismissal from the Company.'*

20. The claimant was given the option to appeal against the warning but did not do so. It therefore remained in place.

10 ***Disciplinary investigation***

21. In July 2021 Mr Jim McAllister was asked by his store manager to investigate a complaint about the claimant. Mr McAllister was a Night Team Manager at Tesco Silverburn. He was not the claimant's direct line manager at the time. The allegation described to him was that the claimant had not followed reasonable instructions from his own manager, a Mr Frazer Fleming. Mr McAllister had not been involved in the matter himself.

22. Mr McAllister met with Mr Fleming on 10 July 2021 to note the details of the complaint. Mr Fleming reported first that the claimant had not been replenishing the store shelves in the right way. In particular, he was not giving priority to a process called 'capping', which involves bringing down excess stock from above the shelves and placing it in the appropriate place on the shelves. That is done to ensure that stock nearest its expiry date is sold before items which have a longer shelf life. Instead, the claimant was said to be stocking the shelves from cases of goods in cages on the floor of his aisle, known as 'back stock', which should normally only be done after the shelves are filled by capping. As well as risking that stock will go out of date before it is sold, that was said to be taking the claimant longer than it should, and he was not replenishing as much stock as he should have done. Mr Fleming said that he had marked some items of stock in the claimant's aisle which the claimant should have brought down onto the shelves, but on checking later he had not done so. As a separate concern, Mr Frazer said that in-store

cleaners had complained about the claimant upsetting them by throwing down cardboard packaging at or near them while they were working, and smirking at them.

23. Mr McAllister then scheduled a meeting with the claimant, which took place
5 at the store on 17 July 2021. Before the meeting Mr McAllister prepared an investigation checklist, which is a template document used by the respondent for such processes. He noted down the issues to cover. A note taker attended the meeting and a written note was produced [97-103]. The claimant signed the note at the end of the meeting. He did not wish anyone to attend with him
10 when offered.

24. Mr McAllister put the two allegations to the claimant. In relation to the first allegation, the claimant was asked to describe the process he followed to replenish his aisle. He confirmed that he stocked the shelves from the cages before capping. Mr McAllister checked that the claimant knew the order the
15 claimant was supposed to follow. He did. The claimant confirmed he would follow that process in reverse, and would just work the way he felt he would get the aisle done.

25. Mr McAllister asked the claimant about a noted 'Let's Talk' discussion with Mr Fleming on 10 July 2021. In answer to the point raised about the claimant not
20 replenishing enough stock in his shift, he said that he had 'run out of time'. He acknowledged that on that night Mr Fleming had told him to prioritise capping.

26. Mr McAllister next met with one of the store cleaners who had raised issues about the claimant. Her name was Agnes Ross. The meeting was on 27 July
25 2021 and was noted. Ms Ross signed a copy of the note. Ms Ross was an employee of a cleaning company rather than the respondent. It took longer to arrange the meeting than had she been the respondent's employee. Ms Ross confirmed she had raised a complaint with Mr Fleming. She said the amount of cardboard left in the claimant's aisle was excessive on the days he worked compared to other days of the week. She also referred to the claimant having
30 a '*considerable bad attitude*' by making her feel uncomfortable and throwing down cardboard at her feet. She described an occasion three weeks before

when he had thrown a box down on the floor in her path rather than letting her pass.

27. A second cleaner named Angela Allan had complained to Mr Fleming about the claimant. Mr McAllister met with her on the same day as Ms Ross. A note was kept of the discussion. Ms Allan said that the claimant's aisle looked *'like a bomb went off'*. She said there was an occasion shortly before when the claimant had left a lot of cardboard on the floor and smirked at her. She believed that he didn't respect her or her role. She said it was difficult to get past the claimant because of the amount of cardboard he had put on the floor, and that a customer could trip over. She said no-one else left their aisles like that. When asked whether she had raised the matter with the claimant she said he was not approachable and would 'growl' at her.
28. On 31 July 2021 Mr McAllister updated the claimant to say that he was still conducting his investigation. The claimant had not been suspended, and was either on leave or off ill. He said that was fine and that Mr McAllister could contact him again when needed.
29. Mr McAllister conducted a telephone interview with another Customer Assistant named Sarah Hughes on 7 August 2021. A colleague took a note of the conversation. One of the cleaners had referred to her as a witness to what they had seen. Ms Hughes worked the next aisle along from the claimant at the relevant time. She recounted an occasion where she saw the claimant stand in the way of one of the cleaners and throw down cardboard in front of her. The note recorded her as saying *'The cleaner looked at me, stunned. I could[n't] believe how arrogant and lack of self awareness that other people in the store have to do their jobs as well.'* She also said that the claimant generally made a lot of mess, more than other staff, and she assumed that was an issue for the cleaners. She said that someone could slip on the discarded cardboard. She contrasted what the claimant did with other employees who tidied their discarded cardboard into bundles before waiting to put them in a cage. She said even when he had a cage he continued to throw his cardboard on the floor.

30. Mr McAllister wished to meet again with the claimant and arranged a meeting for 8 August 2021. The claimant again declined representation and a handwritten note of the meeting was taken, which he signed [130-136].
31. Mr McAllister put to the claimant the allegations made by the cleaners and Ms Hughes. The claimant denied smirking or growling at any of the cleaners. He said he was always smiling. He denied deliberately throwing cardboard in the way of the cleaners. He said he was just doing his job while they were doing theirs.
32. Mr McAllister also asked the claimant to look at CCTV footage clips showing his aisle at the time he was working on 10 and 17 July 2021. There were two clips for each day, both around the end of his shift. He agreed that they showed a large amount of cardboard and other packing material on the floor of his aisle, and that it was 'a mess'. Adjacent aisles could be partially seen. They had little or no waste on the floor. He denied deliberately throwing cardboard on the floor, but said that he had dropped it there and didn't pick it back up again. He agreed what could be seen as not acceptable.
33. There was not enough time to conclude the meeting on the day and it was adjourned. It was reconvened on 21 August 2021. In between Mr McAllister was on annual leave and so it could not take place earlier.
34. At the reconvened meeting on 21 August 2021 a note was again taken and signed by the claimant. The claimant again waived his right to have a representative present. The two key allegations of failure to follow replenishment procedures and inappropriate behaviour towards the cleaning staff were discussed in more detail. The CCTV footage viewed at the last meeting was viewed again and discussed further. The claimant's position on the issues was substantially the same as in the earlier two meetings he had attended.
35. There was also discussion of some earlier occasions when managers had to raise issues with the claimant's performance of his duties in an informal way. The matter of compliance with replenishing procedures had been raised with

the claimant a number of times before July 2021. [pp74-76] In 2020 there had been nine such discussions and in 2021, seven.

36. At the end of the meeting Mr McAllister confirmed that he believed the claimant was deviating from proper procedures and standards deliberately rather than through a lack of knowledge or skill. He decided to move the process to the next stage, which was for another manager to hold a disciplinary hearing. The meeting was brought to a close.

Disciplinary hearing

37. The claimant was invited to attend a disciplinary hearing with a Mr Stephen Lee, who was the manager of a different store from where the claimant worked. Mr Lee was asked by one of the respondent's People Partners whether he was able to take on the process and confirmed that he was. Mr Lee had chaired between 40 and 50 disciplinary hearings in his career and had undergone training, including in relation to dealing with complex disciplinary cases.

38. Mr Lee received a copy of the materials created in the process to date, including notes of the various interviews Mr McAllister had conducted and the CCTV footage clips. He saw that the claimant had a live final written warning in place. He also consulted the Code and the Policy. He prepared a disciplinary hearing checklist, which is another template used by the respondent in such situations. He wrote down the allegations he was dealing with and drafted some questions to put to the claimant. Following the disciplinary hearing he completed a section to record his conclusions and the rationale for them. He issued a disciplinary hearing invite by email to the claimant.

39. The disciplinary hearing proceeded on 11 September 2021. The claimant attended and declined the option of having a representative present. A note taker joined and a handwritten note of the discussion was made [204-218]. The claimant signed the note on each page at the conclusion of the meeting.

40. 40. The allegations were discussed. Mr Lee asked questions designed to help him understand whether the claimant understood the stock replenishing procedures he was asked to follow. The responses given demonstrated to Mr Lee that the claimant did. Despite this, the claimant's comments suggested to Mr Lee that the claimant could not see he had done anything wrong by departing from them. When asked what he would now do differently, he replied '*nothing*'.
41. There was also discussion of the allegation that the claimant had behaved unprofessionally towards cleaning staff. The claimant largely denied the complaints against him. Mr Lee considered that the accounts of the cleaners and Ms Hughes appeared to be plausible. He saw no reason not to believe them. He considered the CCTV records supported them in relation to the volume of mess the claimant left.
42. Mr Lee moved on to discuss the separate concern over the claimant working in a manner that created risk to others. Mr Lee checked that the claimant had completed online safety training, and was aware of the dangers of slip and trip hazards. He found the claimant's answers to his questions to be offhand.
43. Mr Lee adjourned the meeting for around thirty minutes and in that time reached a decision on the outcome of the hearing. He reconvened the meeting and confirmed to the claimant that he had decided to dismiss him on the grounds that, despite a final written warning for the same issue, he was continuing not to follow reasonable management instructions.
44. Following the meeting, and on the same day, Mr Lee prepared a letter confirming his decision and the reasons for it [219-220]. This was sent to the claimant. Mr Lee played no further part in the process.
45. In his outcome letter Mr Lee confirmed that his decision to dismiss the claimant was based on:
- a. The claimant choosing not to follow the instructions of Mr Fleming during his shift on 9 July 2021, amounting to a deliberate failure to follow a management instruction;

- b. Displaying poor behaviour towards cleaning staff by deliberately throwing cardboard into their path and creating a hostile and intimidating working environment for them; and
- c. Failure to work in a safe manner, breaching the respondent's health and safety policy.

46. Mr Lee also covered the following matters in the 'Rationale' section of his letter:

- a. That the claimant had had a generally poor performance records since his employment started;
- b. That he was the subject of a live final written warning;
- c. He did not show any remorse during the whole process; and
- d. The witness accounts and CCTV were corroborative and showed the claimant's disregard for other colleagues and health and safety standards.

47. The letter confirmed that the claimant had a right of appeal against the decision.

Appeal

48. The claimant used his right of appeal by emailing one of the respondent's People Partners on 12 September 2021. He gave reasons for appealing, which are summarised as follows:

- a. He was not refusing to follow a manager's instruction – there was just not enough time to do everything he had been asked;
- b. He decided to prioritise moving stock from cages so that other colleagues could also remove stock from those cages;
- c. Mr Fleming himself was known to the claimant not to always prioritise capping before stocking from the cages;

- d. He denied the finding of creating a hostile environment for the cleaning staff;
- e. The two cleaners' statements were not completely consistent and perhaps an apology was a more appropriate sanction;
- 5 f. He accepted that there was a volume of cardboard left on the floor, but this often happened and no-one was injured;
- g. He made a better effort to keep his aisle tidy after being made aware of the cleaners' concerns;
- h. The disciplinary process had caused him stress and anxiety.

10 49. The claimant was invited to attend an appeal hearing on 23 September 2021, at the Silverburn store. It was confirmed that Mr Harvey McGillivray would chair the hearing. He was the manager of that store. He knew of the claimant but did not know him personally and had not been involved during the investigation or disciplinary stages. He received a set of the documents
15 created through the process to date and reviewed the Policy.

50. The claimant declined to be accompanied at the appeal hearing. A People Partner attended and took a note of the hearing [232-242], and the claimant initialled each page.

51. Mr McGillivray asked the claimant to take him through each appeal point. He
20 asked questions to clarify matters. Mr McGillivray summarised the claimant's position to be:

- a. He should be given another chance to improve;
- b. In response to the allegation of not following instructions, he was doing what he thought was best;
- 25 c. He did not intend to create difficulties for the cleaning staff or a health and safety risk.

52. Mr McGillivray adjourned the meeting for 25 minutes, in which time he reached a decision. That was to uphold the original decision to dismiss the

claimant. He reconvened the hearing and confirmed his decision to the claimant. He believed that Mr Lee's decision was fair and reasonable, and that the claimant had received substantial training and support. The claimant had not provided any new information. The meeting ended.

5 53. Later that day Mr McGillivray finalised an outcome letter which was emailed to the claimant. It confirmed that there was no further right of appeal. He summarised his reasons for not upholding the appeal to be:

a. He believed Mr Lee's decision was a fair and reasonable one;

10 b. The claimant had a final written warning for similar conduct still in place, and had not improved;

c. He had the necessary support and training to correct his behaviour, but had failed to do so; and

d. No new information was provided during the appeal.

15 54. Under the respondent's Policy, there was no further right of appeal and the claimant's dismissal remained effective.

Losses and mitigation

20 55. The claimant made attempts to obtain work similar to that of a Customer Assistant with another employer. He registered with recruitment websites and made applications to similar retail employers, without success. He said he was constricted in the roles he could apply for because of other remunerative work and other commitments. He could only work on Friday and Saturday night shifts. He would not clarify further.

25 56. The respondent provided evidence to show that in retail, and among supermarket chains in particular, there were a substantial number of vacancies generally, although those did not focus on the hours to which the claimant had restricted himself (which in fairness they did not know was his position).

Discussion and conclusions

57. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. The respondent's representative dealt with the various principles and requirements established by that authority in her closing submissions, and the claimant was asked to confirm his position in relation to those as well.

58. ***Burchell*** requires three things to be established before a conduct dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

Burchell part 1

59. In relation to the first part of the Burchell test, it is accepted that there was a genuinely held belief in the claimants' misconduct. This was the position given under oath by Mr Lee and Mr McGillivray and was accepted, and supported by the documents which were prepared at the time and provided to the tribunal. A disciplinary process in traditional form, i.e. investigation, hearing, appeal, was followed. The Policy was referred to, which was designed to deal with conduct matters. When deciding to refer the matter forward for a hearing, Mr McAllister drew a distinction between the claimant's 'will' and his 'skill'. The claimant was dismissed for things he deliberately did or did not do. The claimant himself did not challenge the respondent's stated reason for dismissing him, or suggest there was a different reason.

Burchell part 2

60. According to ***Burchell*** it is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct.

61. The considerations above in relation to the first limb of ***Burchell*** are also relevant, including any admissions made by the claimant. Looking at the evidence, there was enough of sufficient reliability and clarity to reach the

conclusions on the key allegations that Mr Lee did. By his own admission, the claimant knew the replenishing process the respondent required its employees to follow and consciously departed from it through his own preference. He indicated that he would not do anything different in the future, given the chance. There were documented warnings of the same matter having to be raised with him in the past, including one live final written warning. There were corroborating accounts from the cleaners and another colleague about the claimant leaving excessive amounts of packing on the floor of his aisle, and making no reasonable attempts to keep his aisle tidy and safe from tripping or slipping hazards. There was CCTV footage which supported this, which was considered and discussed with the claimant.

Burchell part 3

62. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to pursue every avenue irrespective of time, cost and prospects, but no obviously relevant line of enquiry should be omitted.
63. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.
64. The respondent's investigation was sufficiently thorough in this context. Mr McAllister spoke to the manager who had raised the original concerns, to understand the details of the issue. He spoke to relevant eye-witnesses. He sought out and considered reliable supporting evidence in the form of CCTV footage. He met with the claimant three times to discuss the allegations. By the end of the investigation the allegations were clear, as was the evidence potentially supporting them and the claimant's response. There was no other obviously relevant matter to investigate and the claimant did not suggest anything else should have been done.

The band of reasonable responses

65. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.
66. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonable employer would only issue a final warning, or vice versa.
67. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonable range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.
68. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances.
69. The respondent may well have decided to give the claimant one last chance, as he had asked at the appeal stage. But they were not unreasonable by deciding that the claimant had effectively been given enough chances. This was particularly so given that the claimant was under a live final warning, and had said in the process that he would in all likelihood have departed from the respondent's process again in the future. As such the respondent was entitled to consider the claimant's request for another chance to be futile. It was also

entitled to consider the allegations of inappropriate behaviour towards colleagues and inattentiveness to risk of injury as part of the reason to dismiss. Those were relevant and serious enough to be treated in that way.

Conclusions

5 70. As a result of the above findings it is not necessary to address further matters such as contributory conduct, *Polkey*, mitigation or other aspects or remedy.

71. The claimant was fairly dismissed by reason of his conduct after a reasonable process. His claim is therefore dismissed.

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Employment Judge: B Campbell
Date of Judgment: 06 May 2022
Entered in register: 06 May 2022
and copied to parties

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