



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Raymond

**Respondent:** Asda Stores Ltd

**HEARD AT:** HUNTINGDON **ON:** 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> February 2017  
21<sup>st</sup> April 2017

**BEFORE:** Employment Judge Moore

**Members:** Mrs P Jagger  
Mrs L Gaywood

**For the Claimant:** Mr G Lee (Solicitor)  
Mr P Bal (Assisting Solicitor)

**For the Respondent:** Ms R Barrett (Counsel)

## RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant's dismissal arose from his disability.

## REASONS

1. The Claimant was employed by the Respondent as a Lorry Driver for 15 complete years. His employment ended with his summary dismissal on the 18<sup>th</sup> April 2016. He was at that time 60 years of age. His Claim form which was submitted on the 15<sup>th</sup> August 2016 contains a complaint of unfair dismissal and a complaint that the dismissal was an act of disability related discrimination. In respect of the former the Respondent admits dismissal and avers that the reason was a reason related to conduct. In respect of

the latter the Respondent accepts that the Claimant, who suffers diabetes mellitus (Type 2) is disabled within the meaning of Section 6 of the Equality Act 2010.

## THE FACTS

2. On the 29<sup>th</sup> March 2016 the Claimant had driven to the Respondents shop at Harlow and parked his lorry close to the loading bay in the adjacent yard. On leaving his lorry he felt an urgent need to urinate and relieved himself in what he describes as a discreet part of the yard. It appears that a security guard at Harlow had telephoned a Mr Norton (a transport manager at the Respondent's Bedford Depot) to say that Mr Raymond had done this. No statement was taken from this witness and no verbatim record of the telephone call was ever made.
3. In due course Mr Godliman was assigned to investigate the matter. He was provided with a copy of the CCTV footage taken on the day in question. He approached the Claimant on the 4<sup>th</sup> April 2016 without prior warning and commenced an investigation meeting. On learning that the Claimant wished to have a representative present he adjourned the meeting to the 8<sup>th</sup>. The minutes of that meeting are at pages 112–115 of the bundle. Mr Godliman has, as is entirely proper and conventional in cases of this nature been cross examination on the question of how he approached his task. His answers to those questions have led us to conclude that he did not conduct a fair and impartial investigation of the kind prescribed in *Sovereign Business Integration Ltd v Trybus EAT0107/07*. He did not consider himself to be under any duty to carry out any investigations from the Claimant's perspective. He admits that he did not consider it necessary to look into the reasons why the Claimant had urinated and he didn't consider it necessary to obtain any medical evidence despite the relevance of the Claimant's diabetes being urged upon him by the Claimant's representative Mr Hall. He did not visit the scene of the incident and carried out no investigation into the question of the distance between the yard and the nearest available toilet. We can conclude this point by quoting his answers to two questions put to him in cross examination; 'All I did was get the CD with the E-Mail and interview Raymond. I did no further investigation. He admitted urinating that is gross misconduct.' Although the notes purport that the e-mail was from the security guard it appears to have been the one from Mr Norton at Page 110.
4. The Claimant gave his account in terms that he has maintained throughout. He said he had urinated in the yard. He was desperate he had to he said he was really sorry and had just got caught short and desperate.
5. On the 13<sup>th</sup> April 2016 the Respondent wrote to the Claimant requiring him to attend a disciplinary hearing on the 13<sup>th</sup> April 2016, the date having been brought forward by 1 day to accommodate the Claimant's representative. The letter is at page 123 of the bundle. It frames the charge in these terms:-

*'At the hearing you will be asked to respond to the allegation that on the 29<sup>th</sup> March you were witnessed urinating in the Harlow shopping centre's yard outside the Asda loading area. This is a serious breach of trust and confidence resulting in a breakdown in working relationship. A deliberate and serious breach of H&S (Health and Safety Regulations) that could endanger self or others or bring the Company's name into disrepute. A serious or willful neglect to Company property. These are all deemed to be a gross misconduct offence and if proven may result in your summary dismissal.'*

The letter goes on to explain that the purpose of the hearing was to:-

- (1) Explain the allegation and present all the available evidence.
  - (2) Allow the Claimant to respond to the allegation and provide any mitigating circumstances.
  - (3) Allow the claimant to put forward any suggested questions for Mr Carter (the author of the letter who was to conduct the disciplinary hearing) to explore with the relevant witnesses.
  - (4) Decide what disciplinary action might be appropriate in accordance with the company disciplinary procedure.
6. The notes of the hearing are at pages 125–131. Those notes do not indicate compliance with the terms of the letter. On page 125 we can see that Mr Carter announced the purpose of the meeting as being 'To go through the main points of your investigation listen to your responses and make points if any. We are in no doubt as to what he meant by his reference to investigation since he explains that it was Mr Godliman's efforts on the 4<sup>th</sup> April 2016. It is also clear that there was no explanation of the multifaceted charge. The notes and his evidence show that Mr Carter simply read or quoted them as written in the letter. His evidence at paragraph 10 of his witness statement that he discussed the terms of the ASDA health and safety policy with the Claimant is not true. He made no mention of the policy's terms other than to ask the Claimant if he had breached it. To that question he received the reply that the Claimant did not know what the policy was on urinating. He did not produce a copy of any policy and has not referred to the terms of any such policy either then or before us. In terms of a review of the evidence Mr Carter confirmed in cross examination that the only evidence he had was the Claimant's and Mr Halls (The Claimant's representative who did not give evidence but did advance arguments on the Claimant's behalf). The notes indicate that in fact the substance of the hearing was Mr Carter questioning the Claimant. The Claimant's version was consistent with his earlier account that upon stepping out of his lorry he was overcome with a desperate urge to urinate. He admits that the question of the Claimant's diabetes was raised with him but that he neither had nor sought evidence to inform the question of whether the Claimant's diabetes was relevant. He accepted that if the diabetes had had an effect it would have been mitigation.

7. At pages 132 and 133 we have a typed note of Mr Carter's decision. In the second paragraph he recognises the Claimants point that it was only when he stepped out of his cab that he felt the sudden urge to urinate and yet one of the grounds he finds against the Claimant was that he had waited in his cab for 20 minutes before deciding not to go to the stores toilet. This we find to be inconsistent with the evidence before him. He was exercised by the belief that the Claimant's action was illegal. This appears not to have been the product of any research since he has not explained the basis of this belief. The notes of the hearing show that when the Claimant asked (through his representative) Mr Carter to explain the policies he was referring to his reply was 'It comes under Health and Safety'. He was asked again for specifics and replied 'It's the general policy included in the contract – it's an illegal act by law, you can be arrested for it unless you're pregnant'. We are satisfied that he had not acquainted himself with the specific terms of the regulations referred to in the charge or the policies or contractual provisions he latterly referred to and did not know what they were. That position has prevailed and he has not addressed them before us. He found that the Claimant had urinated on trays stored in the yard and relies on the security video to support this contention. That idea evidence has been played to us and we find it to support the Claimants contention in that that it does not establish this at all. It shows that the Claimant did seek a spot that was relatively (screened partially by his lorry a wall and what we were told were pallets) but it does not show him urinating on any specific object. He relied on the fact that colleagues had told him that the stores toilets were two minutes away, he had not obtained statements to that effect and whilst the subject of why the Claimant did not use the store toilets did feature in his questioning of the Claimant he did not explore the Claimant's contention that staff toilets could only be accessed through locked doors and that public toilets were further away. He has not given a rationale of how this point relates to the Claimants contention that his urge was sudden and urgent.
8. At page 134 we have the letter of dismissal which Mr Carter sent to the Claimant on the 19<sup>th</sup> April 2016. Again he correctly records the Claimants case; that the sudden urge overcame him when he left his cab, that he went to the back of the lorry to open the doors but was unable to control his bladder any longer, that he could not wait long enough to reach the facilities and that he thought this might be instrumental in his predicament. There was no evidence before Mr Carter capable of rebutting the Claimants contentions. There had been no investigation into the Claimant's medical position. Mr Carter found that it was not relevant on the ground that the Claimant had said he had not experienced such a sudden uncontrollable urge before. We have concluded that a reasonable employer would have made appropriate enquiries and would have recognised that in respect of any symptom of a medical condition there has to be a first time. He repeats his finding that the Claimant had waited in his cab for twenty minutes but neither at the time or before us has he been able to indicate what this was probative of given that the only evidence before him was of the Claimant suffering an urgent need to urinate later in time than this. He has not

addressed the details of the charge or correlated the evidence to them. He has simply recorded that the main points of the allegation are proven and that this is regarded as a gross misconduct offence. Neither then nor before us has sought to rationalise why summary dismissal was reasonable and we conclude that he regarded it as a fait accompli and did not turn his mind to the question. We do not find him to have held a genuine or reasonable belief that the Claimant was guilty of the alleged misconduct. We address this point further in our conclusions.

9. The Claimant appealed and the appeal was heard by Mr Mackay on the 7<sup>th</sup> June 2016. The Claimant submitted a letter from his General Practitioner with his grounds of appeal (P139). That letter confirms in unambiguous terms that the Claimant suffered from uncontrolled Diabetes Mellitus and that this condition increases hunger, thirst and the passing of urine. Patients could experience sudden urges to urinate and suffer stress incontinence. We note that this accords with the Claimant's consistent account of his experience on the day in question. Mr Mackay was aware that a Ms Knight a 'people co-ordinator had e-mailed an occupational health consultant Kwasi Opoku. The Respondents have been unable to say whether this person has any medical qualifications but insofar as their input is concerned they are entirely consistent with Claimant's GP's account. We do not accept Mr Mackay's assertion at paragraph 17 that it did not support the Claimant's contention. The e-mail in question is at page 153, it expressly confirms that frequency of urination is one of the key symptoms of the Claimant's condition, that if the condition was poorly managed nerve damage and a propensity to urinary tract infections could add to this problem. There can be no doubt that Mr or Ms Opoku is saying that he or she cannot associate a sudden urge to urinate with the side effects of Metformin (medication taken by the Claimant) (our emphasis). It does not contradict the assertion that such an urge could arise from the Claimant's condition. The brief also contains a reference to the fact (perhaps a matter of common sense and common knowledge) that a sudden and urgent need to urinate is part of the human condition and may be experienced by anyone for any number of reasons not necessarily medical.
10. Mr Mackay found that the Claimant could have avoided the situation by going to the toilet earlier. This finding was contrary to the only evidence on the point which was that the Claimant suffered an urgent need only when he stepped out of his lorry. He has stated that there were obvious contradictions between the account that he gave to Mr Carter and himself. As we have observed the Claimant was subjected to questioning by Mr Carter it was not a situation where he was advancing his account in the manner of someone giving their considered account. In any event it was one of his grounds of appeal that Mr Carter had misunderstood his evidence on the particular point in question. It related to the fact that the Claimant is noted as saying that he had never suffered an urgent need to urinate prior to the event in question. The point he raises is that he does suffer from an increased need to urinate both at work and in his private life but that he had never before been forced into the position of having to urinate in a delivery yard before. Mr Mackay did not conduct any investigation into the matter

and appears to have proceeded on the assumption that Mr Carter was not mistaken. He conducted no further enquiries into the facts of the matter. His conclusion that the Claimant had breached health and Safety Regulations by urinating on trays was, like Mr Carters earlier finding not established by evidence. He has not, in the course of his evidence been able to specify the terms of any regulations that featured in his conclusions. We do not find the appeal to have remedied what we find to have been an inadequate investigation into the facts of the matter.

11. There was a final tier of appeal and this was heard by Mr Edwards (himself a diabetic) on the 14<sup>th</sup> July 2016. Like his predecessors before him he focused on the question of whether the Claimant's medical condition was as he put it 'an excuse' for the Claimant's actions. He visited the Claimant with the burden of proving that the reason he found himself in the predicament that he did on the day in question was because his blood pressure was high. He dismissed the appeal on the ground that the Claimant had not discharged this burden. He has not been able to rationalise with reference to established facts his finding that summary dismissal 'was a fair outcome'. He conducted no further investigation into the facts and the notes of the hearing show that he devoted a major part of the time to 'advising' the Claimant about managing his condition rather than the task in hand.

## CONCLUSIONS

12. Turning first to the complaint of unfair dismissal. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal which has to be one of the potentially fair reasons identified in the section. The reason relied upon by the Respondent is conduct and that is a specified reason. In cases where conduct is relied upon we are not concerned with the question of whether the Claimant was guilty or not guilty of the conduct in question We concerned with different questions namely whether the Respondent had a genuine and reasonable belief that the employee was guilty. Of the charge in question, the word genuine has its ordinary meaning but a belief will only be reasonable if the employer shows that they had had in mind reasonable grounds upon which to sustain that belief having, at the time that belief was formed, carried out as much investigation into the matter as was reasonable in the circumstances. If the Respondent discharges their evidential burden then it is for us to determine on a neutral burden of proof whether, in all the circumstances of the case (including the respondent's size and access to administrative resources) they acted reasonably in treating that reason as a sufficient reason for dismissal. Again it is not for us to substitute our view but rather to measure against a range of responses open to a reasonable employer.
13. We try cases on the evidence put before us by the parties, both were represented and the respondent is a large organization with no apparent deficit in administrative resources. Their case on the point of whether there was a reasonable investigation is probative of the fact that there was not. As we have stated Mr Godliman's express and repeated evidence was that he

had not carried out an investigation at all and Mr Carter's evidence that he relied upon Mr Godliman's investigation. The Respondents do not purport to have carried out any other investigation. Mr Godliman questioned the Claimant who admitted that he had urinated in the yard on the day in question, showed him the CCTV footage and concluded that he was guilty of the act in question. On his own admission he did no more.

14. Wherever there are factual issues in dispute they must be investigated *Scottish Daily Record & Sunday Mail (1986) Ltv v Laird (1996) IRLR665, Ct Sess.* It is however the case that where an employee admits the act and if facts not in dispute there is probably no need for a full investigation *Boys and Girls Welfare Society v MacDonald (1997) ICR 693 EAT.* The Claimant admitted that he urinated in the yard and he was embarrassed and apologetic throughout. That admission obviated the need for investigation on that point. The Claimant went further and explained that he was in extremis at the time and had to taken urgent action to relieve himself. Whilst being careful not to substitute our own view we have concluded that a reasonable employer in these circumstances would recognise the need to ascertain whether the Claimant had committed the act in question by choice or because he had no viable alternative.
15. Impartiality is quintessential to a reasonable investigation (*Sovereign Business Integration plc v Trybus EAT 0107/07* provides that the investigator should look for evidence which weakens as well as strengthens case against the employee). The common and reasonable practice of having an investigatory meeting is to identify for the investigator both points in need of further investigation. The duties of reasonableness and impartiality require the investigator to follow up lines of enquiry suggested by the employee. Later, the possibility of a link between the Claimant's diabetes and his assertion of a sudden and urgent need to urinate was raised by the Claimant's representative it was a point of obvious relevance and one which it was incumbent upon the respondent to investigate. Mr Godliman had not explored the issue and Mr Carter chose not to.
16. In *AvB (2003) IRLR 405* the Employment Appeal Tribunal (EAT) held that the gravity of the charges and the potential effect on the employee are relevant to the question of what is a reasonable investigation and in *Salford Royal Foundation Trust v Roldan (2010) IRLR 721* The Court of appeal enunciated the principal that if the dismissal was likely to 'blight' a Claimant's career the tribunal would be required to scrutinise the Respondents conduct of the matter all the more carefully. Mr Carter had clearly identified the matter as potentially being gross misconduct which could in turn result in the summary dismissal of a long serving employee. We have concluded that is a case where we should see evidence of a careful unbiased investigation and process. We have found the fact (see paragraph 7 of our findings) that Mr Carter embarked on the task of determining charges containing allegations of breaches of policies without knowing what those policies said. This we find to be evidence that he approached his task with significantly less than a reasonable degree of care.

17. It is well established that before the disciplinary hearing commences the employee must know the full allegations against him. Disciplinary charges should be precisely framed and evidence used during hearing should be confined to those charges. (*Strouthos v London Underground Ltd (2004) IRLR 636 CA*) Charges must be squarely put *London Ambulance v Small (2009) UKCA Civ 22*. The Claimant was not charged with simply urinating in the delivery yard. The charge against him was that by doing so he had breached certain regulations, policies and his contract of employment. We have found as a fact (paragraph 7 of our findings) that Mr Carter embarked on the task of determining these allegations of breaches of policies without knowing what those policies said and whilst unable, when asked by the Claimant, to do so. This we find to be evidence that he approached his task with significantly less than a reasonable degree of care. He chose instead to substitute his own view that the Claimant could be arrested for an illegal act as he was not pregnant. If he was charged with the mere act of urinating in the yard the charge should have made this clear, if he was suspected of a criminal act this should have been squarely put and if it stood as drafted the referred to regulations should have been made known to the claimant and of course Mr Carter and examined carefully and considered at the hearing. We have found the hearing to be unreasonable and manifestly unfair. Given the lack of reasonable investigation we find Mr Carter not to have held a reasonable belief in the Claimant's guilt and given his failure to address the subject matter of the charge and the fact that he was influenced by his own opinion that the claimant had committed a criminal offence we are not persuaded that he had a genuine belief that the claimant was guilty of the charge.
17. The Claimant's case was not difficult to understand. His contention that he was overcome by a desperate and uncontrollable urge to urinate upon leaving his cab is not a complex assertion. Mr Carter noted that this was the point in issue and yet he did not address it in the terms of his decision; finding that the claimant should have gone sooner or gone in search of a toilet in the store/shopping precinct. We have found the hearing to be unreasonable and manifestly unfair. Given the lack of reasonable investigation we find Mr Carter not to have held a reasonable belief in the Claimant's guilt and given his failure to address the subject matter of the charge and the fact that he was influenced by his own opinion that the claimant had committed a criminal offence we are not persuaded that he had a genuine belief that the claimant was guilty of the charge.
18. The two appeals did not remedy the failure to investigate the factual matrix of the case and did not rectify the failure to ascertain the terms of the regulations referred to in the charge or address the question of breach. It is clear that the appeals addressed the question of whether the Claimant could prove that his medical condition caused his sudden and urgent need to urinate. As we have indicated we have concluded that a reasonable employer would address the question of whether he genuinely found himself in that position. Medical evidence was available to them from the Claimant's General Practitioner which established that his condition was capable of



resulting in this position and their own evidence from their occupational health adviser both supported this and went further by pointing out that it could be attributable to a great many reasons not just medical ones. Neither of the appeals was a full re-hearing, as we have stated neither addressed the inadequacies of the investigation. We therefore find the dismissal to be unfair. With regard to the Claimants account of the matter we do not find dismissal to fall within the band of reasonable responses. Given that at the request of the parties we have put over all matters pertaining to remedy we have not at this juncture addressed the questions of whether his conduct (as described by himself) was culpable and contributed to his dismissal.

19. We then turn to the question of whether the dismissal was unfavourable treatment arising in consequence of the Claimant's disability. Section 15 of the Equality Act 2010 provides that;-

A discriminates against a disabled person B, if A treats B unfavourably because of something arising in consequence of B's disability. And A cannot show the treatment is a proportionate means of achieving a legitimate aim.

As we have indicated the Claimant had declared his condition to the respondent in official documentation relating to night working and thus the Respondent knew or could be reasonably be expected to have known that the Claimant had the disability. That exemption from liability does not therefore apply in the present case. The question of whether dismissal satisfies the requirement of unfavourable treatment has not exercised the parties in submissions and we are satisfied that it does.

20. The question of objective justification has not featured in the case and thus the principal point is whether the claimant's act of urination which resulted in his dismissal was in consequence of his dismissal. In *Basildon v Thurrock NHS foundation Trust v Weerasingh* the EAT advanced a two stage test; we should ask what the something is and then ask if it is because of that that A treated B less favourably. In *Hall v Chief Constable of West Yorkshire* the EAT address the point in different (but we find not inconsistent) terms that something arises if it is a significant influence on the unfavourable treatment. We accept Ms Barretts point (based on Weerasingh) that we should not adopt the approach of just seeking a link and should bring the facts.
21. Unlike the Claim of unfair dismissal which focuses essentially on the reasonableness of a decision made by the employer at a historical point of time, it is for us to consider whether the complaint of disability discrimination is proved. We are there not only entitled but obliged to take our own view of the medical evidence. We have before us the two documents that were available to the respondent at the time of the internal appeals also the medical report at pages 266–268 of the bundle. We note that all three confirm that urinary problems of the type experienced by the claimant on the day in question are known effects of his condition. The latter report confirms

that it is highly likely that any patient (with the Claimant's condition) would have urge incontinence (ie a sudden and immediate need to empty their bladder. The Claimants evidence both to us and to his employer throughout) has been that this was his experience. On a balance of probabilities we conclude his disability placed him in the predicament that he found himself on the day in question. He gave a full account of his uncontrollable urge to his employers and on the strength of that account he was dismissed. Accordingly we find his dismissal to be unfavourable treatment which arose in consequence of his disability.

22. At the request of the parties we have put over the question of remedy and have not addressed any aspect thereof in this decision since we have not heard argument from the parties on the point.

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Employment Judge Moore, Huntingdon.

Date: 26<sup>th</sup> May 2017

Sent to the parties on: .....

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For the Tribunal Office