



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. P. Draper

**Respondent:** Mondelez UK Limited

**Heard at:** London South, Croydon

**On:** 23 October 2018 and in chambers on the 1 December 2018

**Before:** Employment Judge Sage

## Representation

**Claimant:** In person but assisted by his father

**Respondent:** Ms. Fraser Butlin of counsel

# RESERVED JUDGMENT

The Claimant's claim for unfair dismissal is not well founded and is dismissed

# REASONS

1. By a claim form presented on the 15 May 2018, the Claimant claimed unfair dismissal. The Claimant stated that his dismissal was unfair because it was based on evidence of visits to his customers made between 4-7 weeks after his visit at which time the situation would have changed significantly from when he reported on the standards at the retailer.
2. Although the Respondent accepted in their ET3 that there had been a delay in call backs, they submitted that the volume of inaccurate recordings across numerous stores was excessive. The Respondent stated that the reason for dismissal was conduct and they carried out a reasonable and fair investigation and that dismissal was fair and within the band of reasonable responses.

### **The Issues**

3. Has the Respondent shown a potentially fair reason to dismiss – the Respondent will state that it was conduct.
4. Did the Respondent dismiss for that reason?
5. At the time of dismissal had the Respondent carried out a fair investigation process, one that was within the band of reasonable responses?
6. Was dismissal within the band of reasonable responses open to the employer?
7. If the dismissal was unfair did the Claimant contribute to his dismissal?
8. If there were any procedural failings in the dismissal process, what is the percentage chance that had the procedural irregularity not occurred that the Claimant would still have been dismissed?

### **Findings of Fact**

9. The Claimant was employed by the Respondent from 21 July 2003 until the date of dismissal on the 25 January 2018. At the time of his dismissal he was employed as a Field Sales Development Executive (FSDE). The Respondent had a disciplinary policy seen at pages 31-39 of the bundle which provided for an investigation that was fair and balanced and where the allegation was potentially one of gross misconduct, suspension was appropriate while further investigations were carried out. The appeal could be by a complete rehearing or a review of the fairness of the original decision. The policy provided that an appeal could be adjourned to carry out further investigations (page 36).
10. The Respondent produces a large range of confectionery which is sold via their workforce of 170 FSDE. The FSDE's work largely autonomously working out in the field and are provided with a company car and tablet to carry out their role. They are required to visit all the stores allocated to them on a regular basis (every 4 weeks) and during the visit they are encouraged to take photographs to show that certain criteria has been met and they are expected to send a report of their visit back to the Company. Their tablets are synced twice a day. The FSDE can claim commission on stock sold via their outlets and commission only becomes payable when the transaction is complete, they are also entitled to claim a bonus at the end of the year.
11. Part of the role of the FSDE is to deliver what is described as a 'Perfect Store' in their region. They are encouraged to deliver as many stores that comply with the Perfect Store criteria. To comply with a Perfect Store the FSDE must provide details of an advantageous and prominent location of the racking where the Respondent's good were located (whether it be the front or the back of the store) and the displays had to be current, bearing all the correct marketing colours and designs. There were also scoring categories in relation to products sold by the Respondent including Perfect Bags (in relation to the sale of bagged sweets) Perfect Biscuits and Perfect Candy. The requirement to meet the criteria included taking a photograph of the store and to carry out an audit to show that the stores

are compliant at the date of each visit. One of the purposes of adopting these requirements was to ensure that the Respondent could compete with their competitors for a share of space in each outlet where their goods were sold.

12. The Tribunal were taken to the new KPI's for the period 3 July to the 31 December 2017. At page 55 it showed the criteria that had to be met to claim Perfect store; it included taking a picture of a perfect shop display with all the correct signage and products placed together. There was a target called 'Perfect Bags' and the parameters for meeting the perfect bags criteria. The 'Perfect Biscuits' criteria was set out on page 57 showing that to achieve the criteria, there had to be all four biscuit lines stocked with permanent shelf reserves or permanent kit in situ sited in a number one position in store. The 'Perfect Candy' KPI was seen on page 58 which required four criteria to be met. The Claimant attended a regional sales meeting on the 29 August 2017 (page 71) where the new KPI's were discussed.
13. In October 2017 the Respondent issued a new work standard policy for the FSDE role.
14. The Claimant had an opportunity to earn a Sales Incentive Plan 'SIP' and the details of how much could be earned was on page 104 of the bundle. The total SIP that could be earned in a year was £2300 but it was contingent on the Claimant meeting the objectives set in the KPI (including meeting the requirements for perfect store, bags, biscuits and candy).
15. The Claimant's manager was Mr Faulks who conducted regular coaching meetings with the Claimant. The Claimant had coaching meetings on the 23 August 2017 (page 66), the 21 September 2017, 4 October 2017 (at page 91) and on the 2 November 2017 (page 141). The Claimant said that during this time Mr Faulks raised no concerns about his conduct or performance.
16. The Tribunal heard that Mr Faulks had carried out six calls backs on the Claimant's customers and discovered that there were a number of discrepancies. Out of concern he then carried out a further 20 calls backs and found more discrepancies in the Claimant's records showing that he had inaccurately marked certain stores as reaching the requirements to meet the definition of perfect stores, perfect bags perfect biscuits and candy when in fact they had not met the criteria. He also took two statements from retailers showing that they had not been provided with the relevant kit that was required to be in place in order to claim the perfect store rating.
17. By a letter dated the 30 December 2017 the Claimant was invited to a disciplinary investigation to take place on the 4 January 2018 by his manager; he was told that the meeting was to discuss discrepancies in car sales and tablet recordings and discrepancies in Perfect Bags. Biscuits and Candy after he had conducted call backs on the 11-13 November, 13, 15 and 18 November 2017. The Claimant was also provided with a copy of the disciplinary procedure.

18. The investigation minutes were on pages 148-153, the meeting lasted for over 2 hours. The Claimant confirmed in the meeting that perfect bags had been a feature of the KPI's since the start of 2016 and perfect biscuits and candy since July 2016. The Claimant also confirmed in the meeting that he attended the Regional Meeting where the new KPI's were cascaded. It was put to the Claimant that there was a large number of errors on his records sent to the Respondent. It was put to him that this was falsification of Company records which was related to his SIP and he agreed (page 152). The Claimant also confirmed that he had no photographs to support his 'perfect displays' and he had failed to make notes to say when they had been achieved. Mr Faulks was concerned that the Claimant had failed to give answers to direct questions and he provided "no evidence of legitimately achieving KPIS, no pictures and no notes on any calls".
19. After the investigatory hearing the Claimant was informed that he would be referred to a disciplinary hearing for "potential falsification" of his records "which has a direct impact on your KPI's and SIP Bonus". The letter highlighted the number of discrepancies uncovered. The Claimant was not sent the records showing these errors. He was warned that a likely outcome was dismissal. Although a disciplinary hearing was held on the 23 January 2018 which resulted in dismissal, this was revoked due to a significant procedural error. The process was repeated again on the 21 February 2018. The letter calling the Claimant to the second disciplinary hearing was in the bundle at page 175A and attached the minutes of the investigation meeting and the full investigation carried out by Mr Faulks. The Claimant was again warned that dismissal was a potential outcome.
20. The minutes of the disciplinary hearing were at pages 176-197 and the hearing was conducted by Ms. Burrows, she confirmed to the Tribunal that prior to the disciplinary hearing she had no previous dealings with the Claimant. The hearing lasted for over 5 hours and the Claimant was given a full opportunity to respond to the allegations. Ms Burrows formed the view from the Claimant's evidence given in the hearing that he had acted dishonestly and deliberately in misrepresenting the status of his retailers in order to qualify for the SIP Bonus. She concluded that he worked in a position of trust and was unsupervised and had the random checks not been carried out, the Respondent would have been unaware of this. Ms Burrows concluded on the evidence that the Claimant had been unable to provide a credible explanation for the errors.
21. Although Ms. Burrows accepted that ideally call backs to stores should take place within one week of the visit, she told the Tribunal that calls backs can however take place within a window of one to eight weeks of the visit (paragraphs 40-41 of her statement). She concluded that the Claimant had deliberately recorded the errors in his records designed to increase his KPI's ahead of the calculation for his SIP Bonus (paragraph 43).
22. The Tribunal saw from the notes of the disciplinary hearing that the Claimant admitted that he did not have the criteria for Perfect Candy when he claimed for it because the product was not displayed on the Respondent's kit and it was 'not priced or stickered' (page 182), the Claimant's response in the hearing was that it had 'never been flagged as

an issue'. At page 185 of the minutes the Claimant accepted that he had recorded Perfect Bags but again had not met the criteria and again at page 189 of the minutes he accepted that he claimed Perfect Store when there was no 'shelf strips' and only one double facing. He replied that the customer had a 'no sticker policy' but it was pointed out to the Claimant that strips were not stickers, the Claimant's explanation then changed to "the customer doesn't want a uniform shelf edge across store" (page 189). The Claimant's evidence in the hearing was that he could claim Perfect Store when the criteria had not been met with the agreement of his manager but accepted that he had 'nothing in writing'. The Claimant in the meeting challenged the accuracy of the report produced by Mr. Faulks and asked for the dates when the call back visits were conducted.

23. In cross examination it was put to the Claimant that he could not claim a perfect category if the stickers had not been updated and he replied, "to keep things moving, you would be allowed to claim on the understanding that it would be fixed when available". It was then put to him that this was incorrect he added that "If Mr Faulks had a problem he could have told me". The Claimant accepted that the evidence at page 238 of the bundle showed that he was not entitled to claim points for Perfect Candy. The Claimant also accepted in cross examination that in relation to store 9 (page 240) he was unable on the evidence to claim a Perfect category and accepted that he had inaccurately recorded this on his tablet. He also accepted that for the same store he had inaccurately recorded a score for stickers.
24. The Claimant was also taken to the data for store 10 at page 241 of the bundle, where he had not got the share of space requirement (SOS), bag reservers or stickers and accepted that he was not allowed to claim a Perfect category. The Claimant also accepted that in relation to the data on store 11 (page 242), there were no bag reservers and no kit, but he claimed Perfect Candy when he was not entitled to. It was also put to the Claimant that he was not entitled to claim Perfect Candy for store 21 because there were no stickers and he replied that it was "custom and practice to move the category forward as much as we could"; however this answer did not seem to be consistent with the criteria that had been imposed by the Respondent.
25. The Claimant confirmed that he was not entitled to claim for Perfect candy for store 21. The Claimant also accepted that he was not entitled to claim for store 23 (page 253) as they did not have bag reservers. The Claimant was taken to the data held on store 26 (page 257) where a number of criteria had not been met in respect of SOS and Perfect Bags, it was put to him in cross examination that in the disciplinary hearing (page 185) he told them that it was agreed with management that he could claim for these categories but it was not true and the Claimant responded that Mr Faulks "raised no objections" and told the Tribunal that Mr Faulks did not say he couldn't claim. The Tribunal find as a fact from this response that there was no evidence that his manager had given approval for these items to be claimed when the criteria had not been met. In cross examination the Claimant referred a number of times to what he described as "custom and practice" to work around matters if items were out of stock such as bag claimers which he described as a "fixable notion". There was no credible evidence to suggest that there was a custom and practice in

place to allow FSDE's to falsify records to show criteria had been met when they had not. The Claimant accepted in answers given in cross examination that by claiming items he was not entitled to, this affected his bonus

26. Ms. Burrows delivered the decision at the end of the hearing which was to summarily dismiss the Claimant for gross misconduct due to what was described as a fundamental breakdown of trust. The dismissal letter was dated the 27 February 2018 and was in the bundle at pages 198-200. Ms. Burrows provided the dates of the callbacks in an annex to the letter. She concluded that it was clear that there were multiple examples of errors which could not just be put down to the delay in the call back visit.
27. The Claimant appealed the decision and the appeal hearing was arranged for the 23 April 2018 (see page 202-3); the minutes were on page 204-216; the appeal was heard by Mr Hamilton. The Claimant told the hearing that he had been treated unfairly and if they wanted to get rid of him they should have offered him a redundancy package (page 208). The hearing then went through the evidence and the Claimant's other points of appeal. The Claimant's evidence to the appeal was that he had three other line managers who had never raised concerns with his work and when he said that he had a perfect display, no one disputed this. He stated that as no one had told him he was wrong, he carried on as he was. He accepted however that the criteria had changed and were 'constantly evolving' and although he accepted that the newest criteria applied, he felt it was incumbent on his manager to point this out. He appeared to accept no responsibility for his actions, instead he blamed Mr. Faulks for not correcting him, however this appeared to contradict his evidence given to the disciplinary hearing that he had agreement from his line manager or that his actions were consistent with custom and practice.
28. At the end of the meeting the Claimant confirmed that he had gone through his six points of appeal. The decision was delivered after a recess. The Claimant's appeal was unsuccessful. He concluded that the process had been followed fairly and no further information had been forthcoming to challenge the decision to dismiss. The original decision to dismiss therefore stood.

## **The Law**

### **98 Employment Rights Act 1996**

- (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--

(b) relates to the conduct of the employee,

(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.

### **Submissions**

29. These were oral and in writing and will be referred to as appropriate but were taken into account.

### **Cases Referred to by the Respondent**

Hill v Governing Body of Great Tey Primary School [2013] IRLR 274

Lambe v 186K Ltd [2004] EWCA Civ 1045

### **Decision**

30. The Tribunal noted that the criteria in place for assessing the effectiveness of their FSDE's marked not only the sales for each outlet but the uniformity of the current marketing stickers, labels shelf reservers and facings. Brand identity was essential to the Respondent as was the SOS available in each outlet. The FSDE's were graded on their effectiveness in delivering into this expectation. The Tribunal saw the Perfect Store criteria and the Claimant confirmed that he attended the training when this was rolled out. It was essential to meet this criteria in order to qualify for the SIP bonus at the end of the year.
31. The Claimant accepted in cross examination referred to above at paragraphs 21-3 that he falsely claimed that he had achieved the Perfect status for a number of products and stores when he had not met the criteria. He also accepted that this was the case when he attended the disciplinary hearing.
32. The initial investigation conducted by Mr Faulks reflected a large number of inaccuracies in the Claimant's record keeping. Although some of the call backs had taken place a number of weeks after the Claimant's visit, this did not explain how the discrepancies occurred. The Claimant in cross examination accepted that he had made claims for Perfect status where he was not entitled to, the timing of the call back appeared to be irrelevant considering his many admissions. This was a reasonable investigation and one that was within the band of reasonable responses.

The Respondent was entitled to refer the matter to a disciplinary investigation having discovered these discrepancies.

33. The Claimant was called to an investigatory meeting and this was his chance to make any points he felt to be relevant.
34. After the investigatory interview the Respondent took the decision to refer the matter for a disciplinary hearing. It was accepted that the first hearing was unfair and the decision to dismiss was overturned and the Tribunal are satisfied that the new disciplinary manager was independent. The disciplinary hearing was very long and detailed and only an outline of the hearing was referred to above. The Claimant had an adequate opportunity to respond to the accusations and to put forward an explanation in response to all the inconsistencies between the investigation report and the Claimant's report to the Respondent. Although the Claimant asked for the dates of each call back, this information was not provided until after the outcome of the disciplinary hearing. The Tribunal had to consider whether this impacted on the fairness of the process. The Tribunal considered that when looking at the overall fairness of the process, this involved looking at both the hearing and the appeal; it was evident that the Claimant was able to make submissions on the delay of the call backs to the appeals manager. It is concluded that the disciplinary process followed was fair and within the band of reasonable responses.
35. Turning to the reason for dismissal, it is accepted that the Respondent has shown a potentially fair reason for dismissal which was conduct and the evidence showed that this was the genuine reason for dismissal. The Respondent was entitled to conclude that the falsification of the records supplied by the Claimant was serious and amounted to an act of misconduct. The Tribunal also considered that FSDE's worked autonomously and the Respondent needed to trust them. The approach to recording adopted by the Claimant was inaccurate and his explanation that it was 'custom and practice' for managers to allow criteria to be shown as met (when it was not) was not supported by any evidence. There was no evidence that his manager had approved any derogation from the strict criteria that applied and the Claimant's evidence in relation to this point was not consistent. It was also noted that in the appeal the Claimant blamed Mr Faulks for not pointing out that what he was doing was wrong. This appeared to contradict that his practice was discussed and authorized. In cross examination the Claimant accepted that he had claimed that he had met a number of Perfect criteria when he should not have done. This was not honest and would result in him receiving a bonus that he was not entitled to.
36. The Respondent was entitled to treat this as a matter as an act of gross misconduct that warranted summary dismissal. Even though the Claimant had long service, his conduct fell below that expected of an autonomous employee, he was not entirely honest about his performance and incorrectly claimed that he was authorized to claim 'Perfect' status when the circumstances did not warrant it. In doing so he falsely claimed that he was entitled to receive the SIP Bonus.



37. It is not open to this Tribunal to substitute its decision for that of the employer or to consider the decision again. The role of the Tribunal is only to consider if there has been a fair process and procedure followed and to consider whether dismissal is within the band of reasonable responses open to this employer. Having concluded that the process followed was fair, the Tribunal also concludes that the decision to dismissal, although harsh was within the band of reasonable responses. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

Employment Judge **Sage**

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Date 13 December 2018