



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Patterson

**Respondent:** Lidl Great Britain Limited

## AT A HEARING

**Heard at:** Leeds by CVP video conferencing    **On:** 11<sup>th</sup> and 12<sup>th</sup> April 2024  
**Before:** Employment Judge Lancaster

### Representation

**Claimant:** Mr A Gloag, counsel

**Respondents:** Mr A Sugarman, counsel

Reserved decision in writing (rule 61 (1) of the Employment Tribunal Rules of Procedure 2013):

## JUDGMENT

1. The Claimant was unfairly dismissed.
2. Remedy is adjourned to a date to be fixed, upon the parties having agreed a time estimate, further directions if appropriate and a list of issues which are to be communicated to the Tribunal no later than 7<sup>th</sup> June 2014.

## REASONS

1. On 12<sup>th</sup> July 2023 the Claimant was dismissed from his current position - which he had held since June 2021 - as store manager at Heckmondwike with payment in lieu of notice. That payment was initially stated incorrectly to be only 4 weeks, but was increased at the appeal hearing to the contractual 12 weeks,
2. The Respondent has, however, always maintained that the Claimant was guilty of gross misconduct, such that he might have been summarily dismissed without notice. The disciplinary procedure does, though, also expressly allow for dismissal on notice for "serious misconduct".
3. On 13<sup>th</sup> November 2023 the Claimant brought proceedings for unfair dismissal, following a period for ACAS early conciliation from 19<sup>th</sup> September to 24<sup>th</sup> October. At the time of commencing that early conciliation the outcome of the

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internal appeal hearing on 23<sup>rd</sup> August 2023 had still not been provided. Although the result of that unsuccessful appeal was not in fact given until 13<sup>th</sup> October 2023 which is an inexcusably long time and was not until the primary 3 month time limit would have expired, the Claimant has not been prejudiced and his claim is in time.

4. Under section 98 (1) of the Employment Rights Act 1996 it is for the employer to show the reason for dismissal. The case is pleaded in the alternative as conduct or capability, both of which are potentially fair reasons under section 98 (2).

5. I am satisfied that, as they have always maintained, the Respondent did dismiss for a reason which is properly characterised as being related to conduct, that is as was expressed by the dismissing officer in evidence "gross negligence". The charges against the Claimant were:

Failure to identify a culture of till sharing within store 630 Heckmondwike in contravention of procedure 3.2.1 Till and Safe in your capacity as store manager.

Failure to identify a culture of Colleague Discount Card misuse within store 630 Heckmondwike in contravention of the Discount Card policy in your capacity as store manager.

6. The reason is not, however, simply that assertion by the Respondent, but the set of facts known to them at the time and which caused them to dismiss: cf Abernethy v Mott, Hay and Anderson [1974] ICR 323

7. The fairness of the decision to dismiss is then to be determined under section 98 (4) "having regard to the reason shown by the employer".

8. It is common ground between the parties that this is legally therefore a straightforward claim of conduct related dismissal to be determined in accordance with the established principles in British Home Stores Ltd v Burchell [1980] ICR 303, EAT, a three-fold test where it must be shown that the employer :

- o Genuinely believed the employee guilty of misconduct
- o had in mind reasonable grounds upon which to sustain that belief, and
- o at the stage at which that belief was formed on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances.

9. Whether or not the dismissal was fair will depend upon whether or not, applying those criteria, the decision fell within the range of reasonable responses open to an employer. I, of course, remind myself that I must not simply substitute my own view for that of a reasonable employer.

10. In this case the set of facts known to the Respondent is essentially that a number of employees in statements taken between 4<sup>th</sup> April and 20<sup>th</sup> June 2023 had spoken about their own involvement in and/or observation of other colleagues breaching the company policies that were in issue.

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11. There was, however, at no stage during the investigation or the disciplinary process any attempt to analyse the different things that had been said in those statements, so as to give any detailed picture as to the extent or pattern of those breaches. Rather the Respondent relies upon an assertion that the statements identify a “culture” of non-compliance.
12. At an early stage of the investigation the Area Manager, Harry Lown, asked AK in an interview if there was a culture in the store of colleagues misusing discount cards and she said she “didn’t know about that”. Only one of the interviewees who made a statement before the completion of the investigation report on 7<sup>th</sup> June 2023 had used the word “culture”. JP had said that when on the till he *could* have processed another colleague’s discount card without them being present for the transaction “...because that was the *culture* in the store. It is very likely”. The investigator, John Noble, then concluded in his report: “ It is evident following investigation that there is a culture of poor procedural compliance in store 603 Heckmondwike specifically related to the sharing of discount cards. This is in breach of the Discount Card procedure. Given the scale of poor compliance, it is probable that the opportunity to correct process has been overlooked by the accused. K Patterson fails to act responsibility (sic) as the Store Manager to ensure correct implementation of the colleague discount card policy. This failure to follow up could have prevented further breaches of policy (emphasis added).” Two further interviewees whose statements were taken after the report was in fact prepared were then asked leading questions by the investigator about a culture in the store. One of those employees (FW) agreed that there had on unspecified dates in the past been a “culture” (sc in the context only of till sharing rather than discount card sharing) but not since 22<sup>nd</sup> December 2022 when they returned to work at Heckmondwike . The other employee (CS) who was asked a leading question about a culture said that they had only ever witnessed one instance of discount card sharing when they first started about two years before – which would be about June 2021 when the Claimant was also first appointed as Store Manager – and not since.
13. I am satisfied therefore that the concept of there being a “culture” of non-compliance is one that originated with the investigation process and in particular the investigation report. I agree with Mr Gloag’s submission that this is a somewhat nebulous concept.
14. It is important, therefore, to identify what was said in the statements and which constitutes the set of facts actually known to the Respondent, rather than the general characterisation of this as a “culture”.
15. In respect of the allegation of a culture of till sharing (that is a colleague stepping not another’s till without changing the log-in details, to cover for short break such as going to the toilet) there is only one recorded instance of that being observed by senior management. That was on 2<sup>nd</sup> April 2023 when a visiting manager, the regional director Kirsty Palmer, saw a shift leader (CM) take over on the till of a customer assistant (AK) for a few minutes.
16. There is no evidence of till sharing ever having been actually observed by any other senior manager. Not by an area manager on any of their regular inspections of the store, not by any other visiting manager, not by the Claimant’s predecessors as store manager, not by the store manager of any store whose staff when assigned

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temporarily to work at Heckmondwike brought with them an expectation that till sharing could take place.

17. It is (apart from a conjecture in the appeal outcome letter) accepted that the Claimant himself had never in fact observed any till sharing happening. There is no suggestion in any of the staff statements that he had in fact ever witnessed his, nor that it had ever been reported to him by any managers under him or other staff who may have seen it going on. It is accepted that it is not a requirement for the store manager to wear a head-set, from which he might have picked up conversations asking a colleague to till share. There is certainly no suggestion in the statements taken that he had ever personally condoned this practice.

18. What was said in the statements about till sharing was:

AK said she had only ever till shared once (ie when she was observed) and that the last time she had seen anyone else do it was “a while back”.

AN said that she had never till shared, but that she had been asked to do so, and had seen others do it for a very short time in exigent circumstances.

CH said that she had never till shared, never been asked to do so and had never seen anyone else do it.

RW said that he had shred his till when he needed the toilet but “not often”, that he had probably been asked to till share by a colleague and that he thought all customer assistants and shift managers had done it at some point or another.

JG said that till sharing (specifically jumping on somebody else’s till when they wanted to use the toilet) went on throughout the store.

JP said that he had shared his till once with another manager (he specifically used “till sharing” in the sense that if it was busy and a staff member asked a manager to close their till to go to the toilet but it was not feasible to do so) and that it had been common practice but was not any more.

SR said that she had till shared for toilet breaks “not often” and that she had seen other do so for the same reason in the past.

CM said that till sharing had been quite common in the store until two months before when it had become an issue and that she had done it “every other week at least” for three to four years.

SS said that she had till shred and seen other do it, but that it did not happen any more and that “it doesn’t often happen to me to be honest”.

VB said that she did not think she had ever till shared, that she had not been asked to do so by someone else that she knew it had been taking place in store.

AK in a further interview confirmed that she had only till shared once, that she had expressly refused requests by others to share their till, that it did not happen often she would say “about once a month “ and repeated that the last time was “a while ago”.

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PR said that colleagues had in the past shared tills if it was very busy but “only very occasionally” and “not in the recent year”.

FW said that when she had previously worked at the store, at an unspecified time, she had been aware of till sharing (in the sense of “someone wanted to go to the toilet or jumped on for a few minutes”, but that she had not seen it since December 22<sup>nd</sup> 2022 including when she had been specifically carrying out till observations.

CS said that he had heard conversations, but only since the start of the investigation, about what staff should do if they needed the toilet, but that he had never witnessed till sharing.

KW said that prior to the start of the investigation she had seen till sharing, but that was a generalisation for which she could give no specific examples, and that the biggest issue was now with people coming as cover from other stores who did not believe that this was procedural issue.

19. In respect of the allegation of discount card sharing there are three issues which were under consideration.
20. Firstly there was an issue as to whether the proper process for recording staff sales had been followed. It is only when a discount card is actually scanned that a 10 per cent staff reduction will be applied. When a staff member used their discount card when making a purchase it should, though, not only have been scanned but also a unique “red” number should have been manually entered by the customer assistant on the till. If the procedure is carried out correctly the transaction will show in the ejournal as a “staff sale” and be attributed to a purchase by a particular employee identifiable by their unique number. If the card is only scanned but the number is not entered, it will appear in the ejournal under “manual discounts” together with all other discounted transactions (eg end of line reductions or products approaching their sell-by-date), but will not be electronically searchable. It will only be apparent on a visual inspection of the entire sub-folder in those instances where a “colleague discount” is recorded but without also showing a card number. It will not then ever be attributable to an individual staff member.
21. Secondly there was an issue as whether staff were allowing other colleagues to use their discount card, if that other person did not for some reason have a card or did not have it on them at the time.
22. Thirdly there was an issue as to permitted use by family and friends. Specified categories of person sharing a household with a staff member could also benefit from their discount, provided the employee was actually present with them in the store when the transaction was carried out at the till. Similarly there was a single issue involving employees allowing a security guard, who not being an employee of Lidl was not in fact himself entitled to staff discounts, to use or to photograph their cards.
23. Failure to enter the unique red number is potentially an indication that the card is in fact being improperly used by reason of it having been shared, but is not necessarily so. It may simply be a procedural error, so identification of such a transaction is not in itself any indication of what had actually happened on that occasion. The total number

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of times discount cards had been used in a period would only be ascertainable by adding the number of recorded staff sales to the number of times a scan-only "colleague discount" showed in the manual discounts folder . If this was an unusually high figure it may have indicated excessive usage consistent with improper sharing taking place over and above colleagues' individual purchases.

24. At the end of 2022 or the beginning of 2023 the Area Manager, Harry Lown, had identified from the manual discounts folder in the ejournal that there were recorded instances of the number not being entered properly, and had communicated this to the Claimant. This did not however trigger any alarm at the time that it may be an indicator of improper usage, rather than a mere procedural failure. That is that the most likely cause was at this time perceived to be simply that when a card was properly produced at the till and scanned the assistant forgot also to enter the number. By agreement with Mr Lown the matter was, therefore, addressed, by posting a reminder of the policy on the notice board.
25. On 16<sup>th</sup> March 2023 Mr Lown then identified a specific instance of the number not having been properly entered, which he did then investigate further and this is what triggered the investigation into discount card misuse. Mr Lown had identified in the manual discounts folder a double "void line" entry in a receipt. That is where an item has been rung though the till but is then deleted so that it is not in fact paid for. Two bags of snacks "Graze Crunch Marmite" were voided in this way. The items that were, however, paid for were shown to have been subject to a colleague discount but without any identification number.
26. It is not suggested that the Claimant should himself have identified this potentially suspicious transaction before Mr Lown in fact did so. There was never any statement from Mr Lown but he did request CCTV footage of this till transaction. It is a safe assumption that it was this which identified that the discount card had been improperly used on this occasion by the security guard (AG). Without that additional investigation the nature of this transaction would not have been evident simply from the ejournal entry. The Claimant explained that he had been unaware until then that such a collateral investigation might be commissioned on authorisation by the Area Manager in such circumstances.
27. Apart from the till receipt from 16<sup>th</sup> March 2023 and another in respect of the same customer assistant (VB) from the next day (17<sup>th</sup> March 2023) where there was also a failure to record the card number the Respondent has produced no evidence of any other examples of potential card misuse from the ejournal entries.
28. There is no evidence of how many staff sales were recorded in any given period, nor of how many additional colleague discount transactions appear in the manual discount folder for that same timeframe. There is therefore no evidence of the actual volume of discount card use, nor any analysis of what would therefore have been the expected level of usage and whether or not the actual figures disclosed any apparent discrepancy. It is entirely possible, absent any such analysis, that the total number of occasions when a staff discount card was used - whether properly recorded or not - was within the range of what might have been anticipated.
29. When the Claimant therefore stated in the course of the disciplinary meeting that he had been aware of a disparity in the recorded number of staff sales (typically 70 to 80

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per week and never much more than 100) and the anticipated usage based on a rough calculation based on 3 transactions per employee per day, there was no further investigation as to what the true figure would have been when the figures from the manual discounts were added in and whether this would in fact have revealed any obvious discrepancy. Because the Claimant at this time mistakenly believed that all scanned staff discounts were shown as staff sales, irrespective of whether or not the card number had also been entered, the potentially low total would not, logically, however have indicated any possible misuse: it would, had the Claimant's misapprehension been correct, simply have indicated in practice an unexpectedly low usage of the discount cards overall.

30. The charge against the Claimant is not dependant upon any calculation of financial loss. If it is simply a failure to enter the card number there is no actual loss at all. If it is an unauthorised sharing of a card with someone who would have been entitled to the discount had the proper procedure been followed the Respondent is in no worse position. Having said that each incorrect transaction results in a 10 per cent discount that should not have been deducted, even if the amount involved is likely to be relatively low; the two identified transactions from 16<sup>th</sup> and 17<sup>th</sup> March account for a total sum of 42 pence.
31. It is accepted that the Claimant himself had never in fact observed any card sharing happening. There is no suggestion in any of the staff statements that he had in fact ever witnessed this, nor that it had ever been reported to him by any managers under him or other staff who may have seen it going on. Although the Claimant did say that "it might sound insane" saying that up until the investigation started in March 2023 he did not believe there was an issue, that is a figure of speech, and it is not suggested that he did in fact know.
32. There is one instance where the Claimant appears to have potentially misunderstood the rules on card use by family and friends. On 27<sup>th</sup> March 2023 AK's family – whom she did live with - were prevented from using her card by a manager, JP, when she was not present with them in the shop. AK then messaged the Claimant on his day off and he replied: "As far as I'm aware it's your immediate family? Either your partner or in your case your parents? May be worth looking up the policy when your next in work? Should be on that terminal in the canteen." If, as he plausibly claims, the Claimant had not in fact read the message properly and appreciated that AK was not present his initial response would have been correct. In any event he did not expressly sanction the inappropriate use of the card, but referred AK to the policy. At the first investigation meeting with Tim Brown on 10<sup>th</sup> May 2023 the Claimant volunteered the fact that he remembered that he had had this text exchange with AK. The minutes of that meeting were omitted from the investigation report and disciplinary pack.
33. What was said in the statements about discount card misuse was:

VB initially claimed not to remember the 16<sup>th</sup> March transaction involving AG, but remembered that on the 17<sup>th</sup> March it was a voided line on Sushi for CMA (a manager who had since left), who was of course entitled to use her own discount card.

AK said that on 2<sup>nd</sup> April 2023 she had used a manager's card for his father's shopping because he told her to (that person (BP) does not appear himself to have been interviewed), and that her card had been used for her sister's shopping. She said that

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she had done her best to put the numbers through properly. It is to be noted that AK is dyslexic.

AG confirmed that staff including managers had allowed him to use their discount cards, and he had taken a photograph of one so that he could scan it through from his phone.

AN said that he had shared his card or used someone else's, but only if he was on shift with them and not often, and that one colleague (SR) lent their card to colleagues if they had not got theirs, but he did not know how often. He also said he had never processed a colleague's card without them being present.

CH said that she did not think she had ever shared her card, and had not witnessed any card sharing.

RW said that she had shared her card with colleagues and this happens "all the time", but she could only recall VB doing it. She said she had never given her card to family or friends, had never processed another person's card without them being present at the till and had never witnessed colleagues giving their cards to family or friends to use.

JG said that he had probably shared his card with a colleague "in the past a long time ago", and had never witnessed colleagues sharing their cards nor had he or anybody else given his card to friends or family nor had he ever processed another's card without their being present.

JP said that he had once shared his card with a new starter who did not have one, and that during the 6 months he had worked it had been common practice "in the past". It was he who said that when on the till he *could* have processed another colleague's discount card without them being present for the transaction "...because that was the *culture* in the store. It is very likely". Also, however it was he who refused permission for AK's family to use her card.

SR said that she had shared her card once "a long time ago", and that she thought everybody had done it. She had never given her card to family or friends nor processed another's card without their being present. She said she had seen AK give her card to her parents to use without her being present.

CM said that it had been common until 2 months before for colleagues to use each other's cards if they had "left it in their bag at home". She could not specifically recall seeing colleagues share their cards, nor could she specifically recall giving her card to family or friends, though she probably had done, and could not say whether others had done so. She could not think that she had ever processed someone's card without them being present.

SS said she had shared her discount card but "not very often", and had probably seen others do it. She would not say that anyone had purposefully broken the rules about giving cards to family and friends and that she had never processed someone else's card without them being present.



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VB in a second interview said that she believed card sharing was permitted because the manager BP had told her it was, and that it had gone on in the past, and that AG used employees' discount cards. She said that prior to the investigation she regularly gave her card to family and friends to use when she was on shift and had seen others do this. She said that he had not however ever processed anybody's card without them being present.

AK in a further interview said that it was while ago that that everyone had shared their cards "when they had forgotten it or something" but that since retraining everyone had been doing it the right way. She said that she had been told by a former manager that it was alright to let family use her card if she was nearby and to process a colleague's card without their being present, that FW had told he it was ok to use it for her family and she referred to the text exchange with the Claimant. She said SR and JG sometimes shared their cards.

PR said that "unfortunately" she had shared her discount card with colleagues although she understood this was prohibited under the policy. She said that she had not however ever witnessed anyone else doing so in over seven years, had not given her card to family or friends nor, that she could recall had anyone else, and she had never processed someone's card without them being present.

CS said that there had been one instance in two years where he had advised a colleague against sharing their card with a neighbour.

KW said that she had only ever witnessed card sharing when other staff did not have theirs, but that it had stopped since the investigation. [The Respondent did also quote at the disciplinary hearing KW's conjecture that "I think it comes from a lack of communication from the management down to the Cas and potentially a lack of concern around cash procedures...."]

34. The reasons for dismissal are stated in the termination letter from Ben Stephany to have been:

"It is my reasonable belief that till sharing has been happening on a regular basis in store and that although colleagues are aware this should not be

"As a Store Manager you are responsible for installing and maintaining a culture of compliance, particularly around cash controls. In addition once this issue was highlighted to yourself, it is my reasonable belief that you failed to take the appropriate course of action to correct any behaviour as there is no recorded documentation which refers to any retraining. Although you stated that conversations had taken place in lieu of any formal training this would not satisfy my expectations of the appropriate course of action given the scale of the issues identified.

"In summary it is my reasonable belief and on balance that you failed to carry out your expected duties as a Store Manager in relation to identifying a culture of till sharing. I consider that this amounts to gross misconduct of your duties as a Store Manager.

"It is my reasonable belief that discount card sharing and further misuse has been happening on a regular basis in store and that although colleagues are aware this

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shouldn't be done there is a culture of acceptance within the store which means that this can continue to take place without any fear of retribution.

"As a Store Manager you are responsible for installing and maintaining a culture of compliance, particularly around cash controls. Although you have documented evidence of retraining on this subject having taken place once the issue had been highlighted, there is some doubt over the detail and integrity of the training cast by some of the witness statements and also by your text message response to AK (customer assistant) on the subject of the specifics of the policy

"In summary it is my reasonable belief and on balance that you failed to carry out your expected duties as a Store Manager in relation to identifying a culture of Colleague Discount Card misuse. I consider that this amounts to gross misconduct of your duties as a Store Manager."

35. The alleged failure subsequently to take appropriate steps to address training issues is not any part of the actual charge that the Claimant failed to identify culture. It can only be relevant, as Mr Sugarman concedes, as a potential lack of mitigation when assessin the reasonableness of the sanction.
36. In actual fact it is quite clear from the statements taken that since the start of the investigation in March/April the practices of till sharing and card misuse, had effectively stopped. These issues are consistently described as having been in the past. The training given by the Claimant and by Mr Lown was evidently a significant factor in arresting the continuation of these practices. It is hard to understand what further training on till sharing could have been given, other than reinforcing the message that it was prohibited. This reinforcement was given , and if the Claimant did not keep any formal record of conversations or meetings where this was done then neither did Mr Lown. The "some doubt" expressed as to the integrity of the training on discount card misuse is limited to some staff not having been present when training was delivered or having signed to acknowledge that they had undertaken it without having properly engaged. In any event all the training in this regard was also carried out under the supervision of Mr Lown.
37. Having regard to the actual reason shown for dismissal, that is the totality of what was said by employees who were interviewed, comprising therefore what was known to the Respondent at the time and what was unknown to them, I conclude that objectively this decision fell outside the band of reasonable responses.
38. The conclusion expressed in the present tense ("there *is* a culture of acceptance within the store which means that this *can* continue to take place without any fear of retribution") is not one which could reasonably be reached upon a fair reading of all the statements. Employees gave various accounts of irregularities having taken place on occasions at various times and with various frequency, but all in the past and where disciplinary sanctions had now been enforced. More particularly there was no reasonable finding as to what, in the admitted absence of actual knowledge, the Claimant could or should have done to *identify* this so-called culture which in the event was only brought to light after some three months of investigation. The charge was not that the Claimant had somehow failed to *promote* an alternative culture, but that he had failed to *identify* that which was alleged to have been in existence.

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39. The appeal was by way of review and not rehearing. In so far as Mr Robert Beaumont purports to add an additional reason for dismissal that “it is therefore my belief that you were aware of discount card misuse within the store prior to investigation” this is neither a genuine nor a reasonable belief which is sufficient to justify termination. This is solely a reference to Mr Lown having identified that there was evidence of card numbers not having been properly entered. This was addressed by putting up a notice, as expressly approved as sufficient by Mr Lown at that time. The procedural failure is not in itself any evidence of actual misuse. Mr Beaumont’s further statement that “the likelihood of coincidental observations of your colleagues’ actions would have been high” is pure speculation, and his belief that this therefore meant that the Claimant would have had actual knowledge, absent any suggestion in the statements that he did, is again neither genuine nor reasonable having regard to set of facts, knowns and unknowns, that form the reason for dismissal.
40. I agree with Mr Gloag that there is a suggestion that this decision was consciously or subconsciously influenced by the perception of the Claimant as a failing manager, who was already subject to separate performance procedures, and not by a fair consideration of the actual case against him. Whether or not that means that he may have been dismissed in any event is potentially an issue for remedy.

EMPLOYMENT JU DGE LANCASTER

DATE 3<sup>rd</sup> May 2024