



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Ijaz Ahmed

v

Tescos Stores Limited

Heard at: Watford

On: 26-27 November 2015

Before: Employment Judge Henry

Appearances

For the Claimant: Mr Jason Braier - Counsel

For the Respondent: Miss Lorna Hopps - Solicitor

JUDGMENT

- 1 The claimant has not been unfairly dismissed.
- 2 The claimant has not been wrongfully dismissed.
- 3 The claimant is not entitled to a payment in respect of notice on being summarily dismissed from the respondent's employ.
- 4 The claimant's claims are accordingly dismissed

REASONS

- 5 The claimant by a complaint presented to the tribunal on the 22 May 2015 complaints of unfair dismissal, wrongful dismissal, an entitlement to notice and a claim for holiday pay on termination of employment.
- 6 The claimant's claim for holiday pay was withdrawn and has not been considered by this tribunal.
- 7 The claimant commenced employment with the respondent on the 24 September 2001. The claimant's employment was terminated on the 11 March 2015; the claimant then having been employed for 13 complete years.

Issues

- 8 The issues for the tribunal's determination were agreed between the parties and presented as follows:
 - 4.1 Was there a potentially fair reason for the claimant's dismissal pursuant to s.98(2)(b) of the Employment Rights Act 1996.
 - 4.2 As the reason for dismissal was conduct, did the respondent hold a genuine belief in the claimant's misconduct?
 - 4.3 If the respondent did hold a genuine belief in the claimant's misconduct, was it based on reasonable grounds?
 - 4.4 Did the respondent follow a reasonable investigation?
 - 4.5 Was the dismissal within the band of reasonable responses?
 - 4.6 Was the dismissal fair in all the circumstances pursuant to s.98(4) of the Employment Rights Act 1996?
 - 4.7 If the respondent is found to have unfairly dismissed the claimant what is the appropriate remedy arising? Specifically would re-instatement or re-engagement be a practicable remedy to award or should any remedy be limited to compensation only?
 - 4.8 If the respondent is found to have unfairly dismissed the claimant should any award made by the tribunal be reduced for contributory fault?
 - 4.9 If the respondent is found to have unfairly dismissed the claimant on procedural grounds, should any award made by the tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the claimant, would, therefore, have been dismissed in any event?

Wrongful dismissal

- 4.10 Was the claimant, in fact, guilty of misconduct serious enough to justify his summary dismissal?
- 9 The tribunal heard evidence from the claimant and Mr Viney Arya – store manager of the respondent's South Hayes Tesco Express his behalf, and from Mr Harvey White – store manager at the respondent's Hendon Metro Store, and Mr Kiran Sudan – store operations manager of the respondent's group of convenience stores, on behalf of the respondent.
- 10 The tribunal had before it a bundle of documents exhibit R1. The witnesses evidence in chief was received by written statements upon which they were

then cross-examined, save for Mr Arya, who did not give oral evidence to the tribunal.

- 11 From the documents seen, and the evidence heard, the tribunal finds the following material facts.

Facts

- 12 The respondent is an international grocery and general merchandise retailer operating within 12 countries, employing over 530,000 employees of which 3,300 stores are within the United Kingdom, employing some 310,000 employees.
- 13 The claimant was employed as a store manager of the respondent's Canons Corner Express Store, in London.
- 14 The Canons Corner Express Store employs between 20 and 25 staff, operating a shift scheme of work of about five staff per shift.
- 15 The store is approximately 2,200 square feet in area, and has a store room approximately 20ft by 30ft, identified by the claimant to be the approximate size of the tribunal hearing room
- 16 It was conceded by the claimant that, as the store manager, he held overall responsibility for the welfare of staff, and was responsible for the running of his store. The claimant subsequently qualified his responsibility as being such, whilst he was physically at the store.
- 17 The respondent's disciplinary procedure is set in a booklet "solving problems at work staff guide" which is given to all employees on induction, and available at all times in the respondent's personnel department. The guide sets out the procedure to be followed for matters of misconduct, and identifies the sanctions operable, which by the provision as to disciplinary procedures, it makes provision for an informal procedure, stating:

"In the first instance, your line manager will discuss the decline in the required standard of conduct or capability with you informally. Tesco and Usdaw expect that the majority of issues will be resolved informally...."
- 18 A formal procedure is thereafter set out and provides:

"If the issues cannot be resolved informally or through the next steps and agreed timescales, or if the situation becomes too serious, the disciplinary procedure will be the formal way for your manager to raise a concern with you. This is to help you take the necessary and corrective measures to improve your conduct or capability, not to punish you."
- 19 There is then set out a number of disciplinary stages, being; Stage 1 – verbal warning, Stage 2 – first written warning, Stage 3 – final written warning, Stage 4 – suspension/demotion/dismissal.

- 20 In identifying the stages, the guide provides *“a stage as described below would normally be followed in sequence, however, if the offense is sufficiently serious, disciplinary action can be taken at any of the stages, however you can appeal against any action taken....”*
- 21 The guide further makes provision for offences of gross misconduct, which provides:
- “The following is a non-exhaustive list of serious breaches of Tesco rules and standards which are likely to constitute gross misconduct
-
 - Deliberate disregard or abuse of a Tesco procedure, for example: misuse of your privilege card, falsification of Tesco or any statutory documents, clocking someone else in or out, refusal to comply with the right of search procedure.
 - ...
 - Any other action which on a common sense basis is considered a serious breach of acceptable behaviour.”
- 22 The procedure thereafter sets out an appeal process which provides:
- “If you feel that the disciplinary action that has been taken against you is unfair, you may appeal on the following grounds:
- The penalty was too harsh
 - The penalty was inconsistent with action taken in previous, similar cases
 - The investigation was not complete
 - You were not given a fair hearing
 - New evidence needs to be considered”
- 23 The respondent operates a training program for staff to become management, which is increased for an individual to become a site manager. The claimant underwent appropriate training, the particulars of which are at R1p38-40. In particular, it is noted that the claimant received training as to; enrolment of new starters on the payroll system, and was aware of documentation that should be in place for new starters. The claimant also underwent the respondent’s training as to, immigration and the right to work in the UK; identifying the necessary steps that must be followed by management on recruitment, to include documentary evidence that must be produced and kept on file, and recording the employee’s status to work in the UK. A copy of the claimant’s “right to work in the UK” work book, is at R1p41-61.
- 24 On the 11 December 2013, it is noted that the claimant received a written warning on grounds of, *“two critical red people audits, failure to act within 26 days to correct all critical issues from first audit, leaving the business at risk,* issued as there was a significant volume of anticipated paperwork missing from the files of staff, including up to date “right to work evidence.” The warning expired on the 12 March 2014.
- 25 The respondent operates a confidential complaint line, called “protector line” and by which they received complaint about the claimant of; allowing

individuals to work in-store without necessary evidence of their right to work in the UK, that he had been purchasing discounted stock which he then sold at an internet café owned by his wife, and that illegal workers had been using a member of staff's clocking in card whilst that member of staff had been on leave.

- 26 On the respondent investigating these complaints with the deputy manager, Mr Russell, the complaint was satisfied and no further investigation was pursued.
- 27 On the 2 January 2015, a further complaint was received on the respondent's protector line, which stated:

"It has been over three months since we first made our complaint to the protector line and almost over two months since you came to our store and spoke to some of our colleagues, (we don't know what that colleague told you but most of them want to speak to you when you start proper investigation) since that day there has been no update whatsoever regarding the complaint. The rest of us are still waiting to speak to you regarding this matter.

We suspect that our store manager has got the names of the individuals who set the complaint forth as he is trying to make our work harder than it already is. If the situation in store gets any worse we have no other option but to take the complaints directly to the police, UK boarder agency and/or Tesco Head Office along with all the video and photographic evidence we have in our possession because that 2 people who came to work in our store are illegal immigrants in this country and one of them in Home Office detention centre as they caught him while he tried to do fake marriage and our manager knows all of these things and these people work in his private shop which located in Watford. He take greeting cards from our store and sell in his own shop and many Tesco products are selling there. Hope you'll take action about this....."

- 28 On the 12 January 2015, an investigatory meeting was held with the claimant, conducted by Mr Rafak Razak, store manager metro, into the allegations from the protector line; notes of the meeting are at R1p178-182. The claimant gave an account as to his wife's store and of persons of the name Bilal, giving an account as to three Bilal's having worked temporarily within the store. The claimant was also shown a picture of the alleged non-Tesco employee, Bilal, whose image in the picture the claimant stated he did not recognise. Mr Razak determined to suspend the claimant on full pay, informing the claimant that he would need to provide evidence of the individuals' right to work in the store.
- 29 The claimant was duly suspended, the respondent's "record of investigatory suspension" form recording: *"Following the incident on the 2 January 2015 regarding: alleged misappropriation of Tesco stock to sell in a third party internet café and alleged allegation of allowing a non-Tesco employee to work in Canons Corner, the company required time to investigate the events..."*. The claimant was further advised that he would remain off work on full pay and that he would be advised when to return to work to attend a further meeting and that, that meeting may be disciplinary in nature.

30 The suspension record further provided:

“If the meeting is of a disciplinary nature you should be aware that it could result in your summary dismissal from the company and, in accordance with the grievance and disciplinary procedures, you have the right to be accompanied by either an employee representative of your choice or your shop steward. You are also advised that you may call any relevant witnesses to attend the interview.....”

31 The claimant thereon signed to acknowledge receipt.

32 Between the 15 January and the 7 February 2015, the respondent, by their Ms Wenham, Personnel Manager, held interviews with staff of the Canons Corner Express Store, interviewing 16 of the 21 members of staff then employees of the Store. In this respect, it is the respondent's evidence that, at the material time of the interviews, three members staff had been new recruits, and therefore did not have material evidence to give regarding the event, and of the others, they had been on holiday or otherwise absent from work without permission. This evidence has not been challenged.

33 In respect of the members of staff giving statements, nine of the staff confirmed that they recognised the individual Bilal, as being a non-Tesco employee and as having worked in the store, and of these nine members of staff, six confirmed that they had seen Mr Bilal working in the store on more than one occasion. Four members of staff also gave statements that, they had seen a further individual Mr Ubaid (Musthag), also a non-Tesco employee, working in the store. A statement was also received that payments of overtime had also been authorised by the claimant, for another member of staff, a Mr Shabaz, despite that member of staff being on annual leave at the material time, and that Mr Shabaz was paid additional sums to enable the claimant to pay Mr Bilal and Mr Musthag in cash; it being submitted that, Mr Shabaz's details were used by Mr Musthag and Bilal when Mr Shabaz was on leave, who would then be paid in cash on Mr Shabaz receiving his salary to account for the periods whilst he was on leave.

34 By letter dated the 18 February 2015, the claimant was invited to an investigatory meeting, the letter providing:

“ Following allegations for alleged misappropriation of Tesco stock and allegations of allowing non-Tesco employees to work at Canons Corner, you are required to attend an investigatory meeting on Thursday 24 February

This is an investigatory meeting, not a disciplinary meeting and as such you are entitled to representation.

You may have a representative with you who can be either

- a person who is employed by the union as an official
- another union official who is certified by a union as having received training in acting as a workers companion at disciplinary and grievance procedures

- a fellow Tesco employee.

.....”

35 The investigatory meeting duly took place on the 24 February, chaired by Ms Bir-Staunton – operations manager. The claimant was accompanied by his union representative, Mr Kirti Shah. Notes of the investigatory meeting are at R1p282a-282k. The claimant was taken through the allegations and asked questions, and had the statements of witnesses read out to him. He was further questioned as to the individual Bilal, the image of whom was again shown in a picture, which the claimant again stated he did not recognise.

36 The tribunal pauses here and notes the following record of the investigatory meeting:

“ MS – Did you have Bilal working in your store?

IA – No

MS – Do you know Ubaid?

IA – No

MS – Did he work in store?

IA – No

MS – Picture shown of Bilal, nine staff recognise him

IA – Have you got a better picture?

MS – No, do you recognise this picture?

IA – No

MS – How many staff in store?

IA – Around twenty

MS – Do you know each member?

IA – Yes, this is definitely not my staff.

MS – Each person’s statement I have read. Nine members have recognised and have said they have worked with him.

IA – I still do not recognise this photo

MS – So you accept this statement from all members?

IA – I have not seen him

MS – Why do you think all these people recognise him and you don’t?

IA – I don’t know

MS – I have shown them this picture and they all have said this is Bilal. Yet you have no knowledge

IA – I am not there seven days a week to say he has worked there

MS – I could put a picture of Mickey Mouse, why think they recognise him. Bilal has worked in your store. This is 100% over Christmas.

IA - Don’t know

MS – Why do you think they are saying this?

IA – Don’t know. Have treated all like of a family, not sure what issue they have against me.

MS – My issue with Bilal he has not got RTW, he has worked in your store.

IA – I have never seen this guy before. Have interviewed a lot of people.

MS – Are you saying these people are lying?

IA – No

MS – He has got uniform. Your store have worked with him and you don’t know.

IA – I don’t know

MS – He is not on payroll either and he has done a lot of hours and you don't know who he is?

IA – Don't know

MS – Move on to Ubaid. Do you know him?

IA – No.....”

- 37 Following the meeting, the claimant was again issued with a “record of investigatory suspension” which again set out the allegations, stating that, the company required time to investigate the alleged incidents and the claimant's involvement in them, being advised that he would again be written to, to attend a further meeting which may be of a disciplinary nature.
- 38 On the 1 March 2015, the claimant attended a Watford High Street Tesco's store and collected from the store manager, notes of the suspension meeting of the 12 January 2015, notes of the investigatory meeting of the 24 February 2015 and statements of staff.
- 39 On the 2 March 2015, the claimant sought copies of video and CCTV recordings, stating:
- “ Thank you for the copy of statements which was received on the 1 March 2015. I have read the statements. But would like to have images, video clips and CCTV recording which was shown to few staff as mentioned in the statement.
- Which will help me to explain myself better in dispensary (sic) meeting and also help me to seek legal advice.....”
- 40 By correspondence later that day, the claimant was advised that there was no CCTV footage or video clips shown to colleagues, and that the only item that had been shown to colleagues was the picture that had been shown to him, which picture was undertaken to be sent and was duly sent to the claimant, recorded as being sent on the 2 March 2015 at 5:38.
- 41 For completeness, it is noted that further investigations were conducted into the claimant's wife's shop, for which an interview with Ms Wenham was had on the 2 March 2015, in which Ms Wenham gave an account of having purchased a Tesco card at a reduced price from the claimant's wife's store. A copy of the statement is at R1p298a. Her statement is not however material to the issues for this tribunal's determination, the issue pertaining to the claimant's wife's store not being an issue upon which the claimant's employment was terminated.
- 42 By correspondence of the 4 March 2015, the claimant was invited to a disciplinary hearing for the 6 March 2015, the correspondence providing:
- “This meeting is to discuss the allegation made against you, details of which are: misappropriation of Tesco stock and allowing non-Tesco employees to work in Canons Corner.”
- 43 The claimant was thereon advised of his entitlement to representation and furnished with a copy of the staff guide, “solving problems at work” to assist

in his preparation for the meeting, and further advised that, *“this hearing may result in disciplinary action being taken against you, up to and including dismissal”*.

- 44 On the 5 March 2015, the claimant was presented with the outcome of the investigatory meeting of the 24 February, advising of the reasons for moving the matter to a disciplinary hearing, that:

“My reasons for referring to disciplinary are as follows:

I generally believe there has been an act of misconduct. The reasons for this are:

1. There was a picture (from CCTV) of Bilal working in Canons Corner Express, wearing Tesco uniform and Tesco name badge at Christmas (wearing a Tesco Christmas fun at work hat). Bilal is not a Tesco employee.
2. A number of colleagues were able to identify and recognise Bilal from the picture and describe that he had worked alongside them.
3. A number of colleagues in Canons know and have worked with Bilal and Ubaid over many months.
4. New starter colleagues started in December, did not get inducted until January. Colleagues working without being inducted.
5. Reasonable belief that stock has been taken from Canons without payment for family business.

Having weighed up the above, I have come to a clear decision about the action to take place and shall be moving the meeting to a disciplinary meeting.”

- 45 By telephone on the 5 March 2015, the claimant contacted Ms Wenham, personnel manager, and informed her that he was unable to attend the disciplinary hearing as he could not adequately prepare for, and arrange union representation for the hearing before the 6 March as scheduled, requesting further time.
- 46 The claimant was subsequently written to, the correspondence dated the 5 March 2015, re-arranging the disciplinary hearing for the 11 March, where again the claimant was advised of his right to representation and again furnished with a copy of the staff guide, “solving problems at work” and advised that disciplinary action up to and including dismissal could ensue.
- 47 For the purposes of the disciplinary hearing, which was to be chaired by Mr Harvey White – store manager of the respondent’s Hendon Metro Store, Mr White requested that there be a further review of CCTV footage, following which, CCTV footage was identified relevant to the allegations against the claimant. This footage was not then furnished to the claimant prior to the disciplinary hearing, but was viewed at the hearing.
- 48 The disciplinary hearing took place on the 11 March 2015, notes to which are at R1p333-341. The claimant attended, represented by Ruth Hayles, a colleague.
- 49 Before the tribunal, the claimant has argued that, having been unable to obtain union representation he had asked Ms Ruth Hayles to represent him, but had not been aware that she did not have appropriate experience. The

claimant has also submitted that he had sought a further postponement of the hearing for the 11 March, on account of his daughter having had a hospital appointment on the 9 March 2015, further arguing that due to his daughter's disabilities and critical situation he should have been in hospital and not at the meeting. In this respect, the tribunal notes the recorded minutes of the disciplinary hearing on Mr White introducing the meeting, that:

“HW - I am taking this meeting today, Lakis is taking notes, you have your rep.
Why not USDAW
RH – I feel offended by that
HW – No offence intended as normal practice for USDAW representation.
IA – I am fine, I am happy
HW – Are you fit and able to be in this meeting?
IA- I'm fine today.....”

50 Following Mr White setting out the allegation for consideration, the claimant requested an adjournment, returning to advise that the issues for determination were now different from those identified at suspension, in that, he had been informed that there was only one allegation being pursued, namely that due to non-Tesco personnel, but that on the invitation letter to the disciplinary hearing a second reason had been identified of which he was unaware. Mr White did not find this to be the case. The tribunal has not observed from correspondence relevant to the allegations against the claimant any reference to a single allegation. In this respect the claimant states he had been informed this orally.

51 On Mr White thereafter asking the claimant whether he wished to make an opening statement to state anything new or to bring matters to his attention, the claimant explained that he believed the allegations were false, that because he had been dealing with his team they wanted to get back at him and that there was a gang history at Canons Corner, giving a number of accounts why staff would be against him, further stating that, he believed the statements of witnesses had been forced and were not accurate or genuine, which submissions were then summarised by Mr White in these terms:

“You said all these allegations are false, no missing stock, no illegal working and the colleagues are against you. You are a company man a long time with the company, committed to.....”

52 Mr White then proceeded to address the issues and in respect of Bilal, the claimant identified that he had sought CCTV footage but had been told that none existed, to which Mr White advised of the CCTV footage he had obtained, which was then viewed by the claimant. On viewing the CCTV footage, the claimant was clear that he did not recognise the individual identified, despite the footage showing the claimant to be standing beside the individual in the Canons Corner store's warehouse. The claimant equally denied recognising the photograph of the individual Bilal.

53 There was extensive questioning of the claimant as to the nature of the evidence against him, why he could not recognise the individuals identified

in circumstances where the majority of his staff were able, and in circumstances where it was reasonable that the claimant ought to have had some knowledge of the individuals in his store.

- 54 Following intensive questioning as to the character seen in the CCTV footage, identified as Mr Ubaid Musthag, Ms Hayles, on behalf of the claimant, raised issue of the CCTV footage being new evidence having been presented in breach of procedure and to which the claimant had then not been able to prepare, and that it was unfair and unreasonable as he had previously been told that CCTV footage did not exist, and that the claimant was now under tremendous stress being asked whether he recalled staff. Mr White advised that his task was to get to the truth, apologising that the claimant had not been given the CCTV evidence earlier.
- 55 Despite further questioning as to the claimant's knowledge of Mr Bilal and Ubaid Musthag, the claimant maintained his lack of knowledge. The claimant was also extensively questioned as to why his staff would have fabricated their evidence against him, exploring the explanation proffered by the claimant being of his performance managing staff, the claimant subsequently qualifying his assertion, stating that he had not taken formal action but had taken informal action for which there were no records.
- 56 In respect of the image on the CCTV footage, the tribunal notes this record of the claimant's evidence to the disciplinary hearing that:

"HW – Do you recognise this gentleman?

IA - Yes. Imran and one guy, a guy with trainers.

WH – Do you recognise this gentleman with the short hair? His name is Ubaid at 9.47am 22/10/14 on Weds.

IA – I don't recognise him. Loads of people come to my store. I need to ask who was on shift that day.

HW – Ubaid has a Tesco uniform on, there are others members if (sic) staff that come and go, do you recognise that person?

IA – Talad .

HW - Who is that? Look like you?

IA – Yes me and the other one Ubaid. Then OJ the other person I don't recognise and I said in previous, they could have come from other stores.

HW – So Ubaid is standing two feet beside you with uniform, you don't recognise for the record that gentleman, you don't recognise him, you were beside him?

IA – No he must have come from a different store.

HW – With regards to Ubaid, you don't recognise?

IA – No, a lot of people come from outside. I was packed up on the days.

HW – You are SM, you have a responsibility to know who is working in your shop.

IA – I don't know who arranged him.

HW – This person is beside you, in your warehouse. It doesn't sound like a great reason that you don't know.

IA – Yes, I have not, I did not give them uniform.

HW – Your explanation so far for the record, who is this person? Who is allegedly Bilal.

IA – I can't recall. Can we adjourn?"

57 There was then an adjournment between 11.09 and 11.35am which on reconvening, the following is recorded:

“HW – Are you ok to continue with meeting?

IA – Yes.

HW – Do you once again recall the colleague who is allegedly Bilal?

IA – No, can't recall, it must be someone that was maybe arranged in store.

58 It was Mr White's conclusion that, it was wholly implausible that the claimant did not recognise the two individuals; the claimant being responsible for the staff at the Canon Corner Store. In reaching his conclusion, Mr White explained that; there was no evidence that Mr Bilal and Mr Mushtaq had ever been employed by the respondent, the CCTV footage showed Mr Mushtaq in the warehouse with the claimant at the Canons Corner store with the claimant shown to be standing next to Mr Mushtaq, that the claimant's denial of knowledge of Mr Mushtaq was unconvincing, that nine colleagues could identify Mr Bilal as working in the respondent's Canons Corner store from the picture taken from the CCTV footage which showed him wearing a Tesco Stores uniform, that the claimant's explanation that he was conducting various performance reviews of employees at the store as a reason why the nine colleagues might lie in stating that they recognised Mr Bilal was unsupported by any evidence of poor performance or otherwise warnings given to the nine colleagues by the claimant, that store managers at Bushey Heath and Watford High Street stores, being the stores which the claimant alleged Mr Bilal and Mr Mushtaq were employed at, could not recognise Mr Bilal or Mr Mushtaq, and that, the allegations that Mr Bilal and Mr Mushtaq had been paid in cash out of overtime monies credited to Mr Shabaz's bank account had been made by several of the claimant's colleagues, it being noted that several days after Mr Shabaz's investigation interview, he resigned from his employment with the respondent due to "stress", such that the allegations could not be investigated any further. However, despite this, based on the statements received and the timing of Mr Shabaz's resignation, Mr White considered that it was reasonable to conclude that Mr Shabaz had been receiving overtime monies which he was not entitled to, and had paid Mr Bilal and Mr Mushtaq this money, which corroborated the allegation that the claimant had been allowing individuals to work in his store who did not have the right to work in the UK.

59 It is also noted that, Mr White considered the record of Mr Mushtaq having applied for a position with the respondent, which having reviewed the application, concluded that it did not confirm that Mr Mushtaq was employed by the respondent; there had been no indication that Mr Mushtaq's work in the store had been in any way connected with that application, eg, a work sample, and on which basis he had not found evidence to support the claimant.

60 Having made the above determination, Mr White concluded that this conduct represented a material breach of the expected standards in conduct expected of a store manager, and that it constituted gross misconduct. Mr White in considering the allegations against the claimant, further gave consideration to mitigating circumstances presented by the claimant, as to

his daughter's health. However, given the seriousness of the claimant's conduct, which involved a serious element of dishonesty, he felt it had breached the basis of trust between him and the company. Mr White further gave consideration to the claimant's length of service and employment history, however, giving consideration to the severity of the claimant's actions and his status as a senior member of staff, he nevertheless felt that it was appropriate that his employment be terminated immediately.

61 Mr White accordingly summarily dismissed the claimant for gross misconduct, of allowing non-Tesco persons to work in Tesco Canons Corner store without permission or just cause.

62 In respect of the payment to Shabaz, the tribunal notes from the payroll records that Mr Shabaz appears to have been in receipt of additional money with his salary through payroll; Mr Shabaz being paid for overtime during a period when he was actually on annual leave at the end of October, when Mr Shabaz being on holiday and receiving holiday pay, had more than 95 hours of overtime processed into his pay, Mr White giving evidence to the tribunal that, this affirmed his conclusions reached at the disciplinary hearing, together with the timing of Mr Shabaz's resignation, it was reasonable to conclude that the allegations that he had been paid money that he had not earned, in order to cover the wages of Mr Mushtaq and Mr Bilal, as approved by the claimant, were on a balance true. Mr Shabaz's payroll records are at R1 p134-162.

63 The claimant's dismissal was recorded by the respondent's "record of summary dismissal" form, which was duly signed by the claimant and his representative. The form directed the claimant as to his right to present of an appeal against dismissal

64 The claimant's dismissal was confirmed by letter dated 11 March 2015

65 The claimant duly presented an appeal, the grounds of appeal stating:

"I believe the decision taken was not reasonable and fair due to the above cited points:

In addition there were breaches of the process.

And the decision appeared to be pre-determined"

66 The points to which the claimant referred, as cited above, being that:

- The penalty was too harsh
- The investigation was not complete
- He was not given a fair hearing, and
- New evidence needs to be considered.

67 Arrangements were subsequently made for the appeal hearing to take place on 21 April 2015, the date arranged to accommodate the claimant's USDAW union representative, which was finalised on 31 March.

- 68 On 10 April 2015, the claimant was notified of the arrangements for his appeal.
- 69 The claimant subsequently, prior to the appeal hearing, sent detailed reasons of appeal which are at R1 p347-351, expanding on his grounds of appeal, inter alia providing that; he had not been allowed to obtain evidence from the Canons Corner store despite being told that he would be so allowed on suspension, that he had not been updated during his suspension for six weeks, that not all staff had been questioned, that only 16 staff out of 22 staff had provided statements, and that no reason had been given why. That staff should not have been interviewed at the Canons Corner store, so as to be outside Canons Corner's influence, and should have been with a neutral OM. That one of the staff had requested an interpreter but instead forced to give a statement in circumstances where he would not have understood the questions. That he had asked for all evidence prior to the disciplinary hearing but had been told there was no CCTV evidence, only to find this not to have been the case at hearing. That he had been referred for disciplinary action in circumstances where he had not been appropriately apprised, having been advised that he was to face a single allegation of allowing non-Tesco staff to work at Canon's Corner, being Mr Bilal. That most of his questions at the disciplinary hearing were not recorded in the interview notes and that he had not been given sufficient time to digest the staff's statements before he was expected to provide an answer, and that having sought a postponement of the first disciplinary hearing, on speaking with the HR manager, and having questioned why he was not facing the single disciplinary charge, he subsequently received notice of five allegations then being against him for the purposes of the rescheduled disciplinary meeting. That the claimant had asked Mr White for time to recall mentally, the individuals in question, being Mr Bilal and Mr Mushtaq, but was not given the requested time. That there had been inconsistency of treatment and that the claimant had not been aware that a possible outcome of the hearing could be dismissal. That the decision to dismiss had been rushed. That it was normal practice for work experience students to "come and go" in the store and that there was no policy for this practice. That there was a gang culture in the store which was well known to the union and that the claimant had disciplined employees previously, which caused them to have issues with him, and that in mitigation, the circumstances of his daughter's illness had not been taken into consideration.
- 70 The appeal hearing was heard on 21 April 2015, chaired by Mr Kiran Sudan, Store Operations Manager "Area 908, South West London". The claimant was accompanied and represented by Mr Chis Hope, USDAW Area Organiser. It is noted that an Employee Relations Manager attended as note taker, however, the tribunal has not been presented with notes of the appeal hearing.
- 71 It is Mr Sudan's evidence that, at the commencement of the hearing he summarised the basis upon which the claimant's employment had been terminated and the claimant's grounds of appeal, being that:

- 71.1 The penalty was too harsh,
71.2 The investigation had been incomplete, and
71.3 That his disciplinary hearing had been unfair
for which the claimant then went in to detail, describing each ground of appeal. Mr Sudan's evidence hereon is provided at paragraph's 11-19 of his written statement, which I do not here rehearse otherwise than to note that each of the claimant's grounds of appeal were addressed.
- 72 Before the tribunal, Mr Sudan was challenged as to not having further interviewed those witnesses that had been on leave at the time of initial interviews, Mr Sudan's evidence being that he felt he had enough evidence from the other staff that he did not then need to seek further evidence.
- 73 In respect of the evidence of witnesses, in respect of Mr Mushtaq being disparate, Mr Sudan was satisfied that in the small store as Canon's Corner was, the evidence of staff was plausible as to their sightings.
- 74 On Mr Sudan being questioned as to Mr Mushtaq's presence being accounted for by reference to work experience, it was identified that there was a formal procedure for work experience which had not been followed. In this respect it was the claimant evidence that arrangements were made in store locally. The evidence of the respondent's witnesses, which the tribunal accepts, and would accord with an organisation of Tesco's reputation, that work experience is organised formally, be it through Job Centre Plus, or schools, and that there was no such scheme of work where there was unpaid work experience arrangements, and that it was inconceivable that persons would work without pay, such that they would have to have been processed for payroll purposes, which had not been the case.
- 75 On being challenged as to there being a gang culture within Canons Corner store, Mr Sudan was clear, having had checks made of personnel files, that there was nothing thereon evincing such a culture, and in respect of Mr Sudan being questioned as to staff being performance managed, and being so managed informally, for which there would not then be a formal record, Mr Sudan was again clear that, even where staff is performance managed informally, there would still be a record kept on file of such informal action.
- 76 With regards the CCTV footage, having acknowledged that it is good practice for such evidence to have been available beforehand, with respect the case against the claimant and the purpose for which the CCTV was used, being that for identification only, where the claimant was in that persons company, the only issue was whether the claimant recognised the individual, such that he was not prejudiced by not having access to that information previously, there being nothing to prepare for.
- 77 With regards the severity of sanction, the disciplinary hearing being challenged for failure to duly consider the claimant's employment history, length of service and daughter's health condition, Mr Sudan explained that a significant amount of time at hearing before him was given to the claimant in this respect, and in respect of inconsistency of sanction, Mr Sudan had had

enquiries made of the cases referred to by the claimant, identifying that they were not comparable cases; the respective cases involving payment of cash in hand, or otherwise employing family and friends, which in the event both cases had been dropped.

- 78 It was Mr Sudan's finding that, the decision to summarily dismiss the claimant be upheld, informing the tribunal that the respondent takes a "firm but fair stance with regard to employee dishonesty; as a retailer being responsible for a large number of employees and ensuring insurance, tax and immigration compliance for each person, the trust that we must have in our employees is of the utmost importance and where we no longer feel able to trust an employee going forward, we have no alternative but to remove them from the business subject to anything raised in mitigation. Given the reason for dismissal and the process that ensued, it is my view that the relationship between the claimant and the respondent was broken down irretrievably".
- 79 The appeal decision was confirmed to the claimant by letter dated 25 April 2015.
- 80 The claimant presented his complaint to the tribunal on 22 May 2015.

The law

- 81 In an unfair dismissal claim the burden is initially on the employer to identify a potentially fair reason for dismissal so as to satisfy s.98(1) and (2) of the Employment Rights Act 1996.
- 82 It then fall to be determined whether or not the dismissal was fair. The determination 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 the reason as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case (s.98(4)of the Employment Rights Act 1996)
- 83 The tribunal must consider whether the employer's conduct fell within the range of reasonable responses, of the reasonable employer, in all the circumstances of the case, without substituting its own decision as to what was the right course to adopt for that of the employer. The burden is neutral at this stage; the tribunal must make its decision based upon the claimant's and the respondent's assertions with neither having the burden of proof and reasonableness.
- 84 The tribunal has to decide whether the employer, on discharging the employee on the grounds of the conduct in question, entertained a reasonable suspicion amounting to a belief in that guilt of the employee, of the acts, at that time. This involves three elements:

84.1 The employer must establish the facts of that belief,

- 84.2 It must be shown that the employer had reasonable grounds upon which to sustain that belief, and
- 84.3 The employer at the stage at which they formed that belief on those grounds, must have carried out as much of an investigation into the matter as was reasonable in all the circumstances of the case.
- 85 The employer does not have to prove beyond a reasonable doubt that the employee was guilty of the misconduct, but merely that they (the employer) acted reasonably in treating the misconduct as sufficient for dismissing the employee, in the circumstance as known to them at the time. It is not necessary that the tribunal itself would have shared the same view in those circumstances. Furthermore, it does not matter if the employer's view, if reasonable at the time, is subsequently found to have been mistaken.
- 86 Where there are admissions, the scope for the investigation is limited.
- 87 I pause here to note that, for the purposes of wrongful dismissal, it is for the employer to establish, on a balance of probabilities, that the employee had committed the act amounting to a breach. To this extent the employer must establish the employee's guilt, which has been expounded by Langstaff J President, in British Heart Foundation v Roy [2015] UK EAT/0049/15/RM at paragraphs 6 and 7, that:
- “6 Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the employment tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to questions either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. The question is, indeed, whether the misconduct actually occurred.
- 7 In a claim for wrongful dismissal the legal question is whether the employer dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory/that is, in the modern expression of the phrase (see Tullett Prebon Plc and others v BGC Brokers Lp and others [2011] EWCA Civ 131, [2011] IRLR 420) whether she “abandons and altogether refuses to perform” the contract.
- 8 Just as all contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is undoubtedly bound by the term that the employee is to provide loyal service to the employer.... If an employer, knowing of the repudiatory conduct dismisses an employee for it, the employer is, by doing so, accepting the employee's breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. In short, if an employee is guilty of repudiatory conduct, ... then except perhaps in the most exceptional circumstances (which for myself I cannot readily bring to mind, but I am prepared to accept may possibly exist), an employer is entitled to dismiss that employee without

notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination."

- 88 Turning back to considerations for unfair dismissal, any procedural defect must always be sufficiently serious to render the dismissal unfair. The tribunal must note that the Acas Code is only a guide, and is not a mandate to, failure to comply with every detail does not render a dismissal unfair. In considering compliance with the Acas Code the employer's size and resources are to be taken into account.
- 89 Once unfair dismissal is found, where the tribunal considers that any conduct of the employee before the dismissal, was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. (see s.122(2) of the Employment Rights Act 1996).
- 90 Where the tribunal finds a dismissal was to any extent caused or contributed to, by any action of the employee that was foolish, perverse or unreasonable, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable, giving regard to the offending acts. (see s.123(6) of the Employment Rights Act 1996).
- 91 The tribunal has also reminded itself of the case Sandell and West Birmingham Hospitals NHS Trust v Westwood UK EAT/003203/2094/LA, per his honour Judge Hand QC, as to the tribunals duty in considering gross misconduct at paragraph 109, that:

" 109. ...It is not clear to us what the breach of trust policy actually was ... Assuming that is a breach of trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly, the conduct alleged must be capable of amounting to gross misconduct. Secondly, the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve with the theft of goods or money. That gives rise so far as to the character of misconduct is concerned. Stealing is gross misconduct. What is usually an issue in such cases is the reasonableness of the belief that the employee has committed theft.

110. In this case it is the other way around. There is no dispute as to the commission of the acts alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment, the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness in the sanction of unfair dismissal or the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee; see Wilson v Racher [1978] ICR 428 C8 per Edmund Davis LJ at page 432 (citing Harman LJ in Pepper v Webb [1969] 1WLR 514 at 517):

“Now what would justify an instant dismissal? something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract”.

And at paragraph 433 where he cites Russell LJ in Pepper (page 518) that the conduct “must be taken as conduct repudiatory of the contract justifying summary dismissal”. In the disobedience case of Laws v London Chronicles (indicator newspapers) Limited [1959] 1WLR 698 at page 170 Eversheds MR said:

“The disobedience must at least have the quality that it is wilful: it does (in other words) connote a deliberate flouting of the essential contractual conditions”.

So the conduct must be a deliberate and wilful contradiction of the contractual terms.

112. Alternatively, it must amount to very considerable negligence, historically summarised as gross negligence. A relatively modern example of “gross negligence”, as considered in relation to gross misconduct is to be found in Dietman v LB Brent [1987] IR 737 at page 759.

113. Consequently, we think that the employment tribunal was quite right to direct itself... that “gross misconduct” involves either deliberate wrongdoing or gross negligence... It fell to the employment tribunal to consider both the character of the conduct and whether it was reasonable for the trust to regard the conduct as having the character of misconduct on the facts.”

Submissions

92 The tribunal received written submissions from the respondent upon which further oral submissions were made, and received oral submissions on behalf of the claimant.

93 The tribunal was further referred to the following authorities:

Iceland Frozen Foods Limited v Jones [1982] IRLR 439,
Shrestha v Genesis Housing Association Limited [2015] IRLR 399,
Clarke v Civil Aviation Authority [1991] IRLR 412,
Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854,
British Heart Foundation v Roy (16 July 2015) UK EAT/0049/15/RN,
Steen v ASP Packaging Limited [2014] ICR 56,
GG McFarlane v Relate Avon Ltd [2010] IRLR 196,
London Ambulance Service NHS Trust v Small [2009] IRLR 563,
British Leyland UK Limited v Swift [1981] IRLR 91,
Gair v Bevan [1983] IRLR 368,
Denco Limited v Joinson [1992] 1 All ER 463,
C A Parsons and Co Limited v McLoughlin [1978] IRLR 65,
London Borough of Harrow v Cunningham [1996] IRLR 256,
AEI Cables Limited v McLay [1980] IRLR 84,
Strouthos v London Underground Limited [2004] IRLR 636.
Polkey v A E Dayton Services Limited [1987] IRLR 503,
Parker Foundry Limited v Slack [1992] IRLR 11

W Devis and Sons Limited v R A Atkins [1977] IRLR 314

Conclusion

- 94 The tribunal finds that the reason for dismissal was conduct, namely that, the claimant allowed non Tesco employees to work in the Canons Corner store, exposing the respondent to potential immigration, tax, insurance breaches, and breaches of its internal policies and procedures for recruitment, and can found a fair dismissal pursuant to s.98(2) of the Employment Rights Act 1996.
- 95 The tribunal finds that on the respondent receiving complaints on its "Protector Line", raising issue as to the claimant knowingly having non-Tesco staff working within the Canons Corner store, and of misappropriating the respondent's stores, it was reasonable for the respondent to investigate those allegations. The tribunal further find that, on the respondent having obtained the claimant's initial response on the allegations being put to him, and on the claimant having denied knowledge of the image of Mr Bilal, in a photo, who was alleged to have been working at the Canons Corner store, in the claimant's capacity as Store Manager, and for further investigations to be carried out, it was reasonable for the respondent to suspend the claimant in those circumstances; the claimant being in a position, as store manager, to have influenced any investigations.
- 96 I am satisfied that on the claimant being suspended, it was made clear to him, the purpose of the suspension and of the matters to be investigated, namely, the alleged misappropriation of Tesco stock to sell in a third party's business, and of allowing a non-Tesco employee to work in the respondent's Canons Corner store.
- 97 On the claimant being suspended, I find that the respondent carried out such investigations as were reasonable, namely, interviewing 16 out of a possible 22 staff, in circumstances where staff had been absent at the material time the interviews were being conducted or otherwise new staff who could not then have given material evidence to the events, such that further enquiries were not necessary at that stage.
- 98 On the respondent's concluding their investigations, I am satisfied that the claimant was fully apprised of the allegations then existing against him and furnished with the evidence upon which the respondent relied, and was able to reasonably know the case that he was to meet.
- 99 I am satisfied that, the claimant following his request for a postponement of the disciplinary hearing as initially scheduled, so as to seek representation and prepare his case, had by 11 March 2015, been afforded such time as was reasonable for him to fully prepare for that hearing. Indeed, I am satisfied that this was the case on Mr White addressing the issue at the outset of the disciplinary hearing, the claimant being clear as to his being represented and being in a position to proceed with the hearing.

- 100 I find that the claimant, at the disciplinary hearing, was given a full opportunity to present his case; all material evidence being put to the claimant for which the claimant was given every opportunity to proffer his response. In this respect, I pause to comment specifically on the claimant's submission that, he had not been furnished evidence of the CCTV footage as was presented in the hearing and that he was unable to address the issues arising there from. I do not find the lateness of this evidence to be material, in that despite the claimant being presented with the CCTV footage at hearing, he was given the opportunity to view the same, following which he had requested and obtained an adjournment, and having returned, fully addressed the issues arising from the CCTV footage and indeed, the claimant did not thereafter seek further time to consider the CCTV footage. I am accordingly satisfied that the claimant had fully addressed the evidence at hearing. It is also here material to note that, at this hearing before the tribunal, the claimant has not presented any argument flowing from the CCTV footage itself.
- 101 On the evidence before Mr White, I am satisfied that there was such evidence upon which a reasonable employer could have reached the decision that Mr White did. On the evidence before Mr White, there was cogent evidence that the claimant had knowingly had working within the Canons Corner store, non-Tesco employees, and from which there is sufficient evidence upon a balance of probabilities, to find that the claimant had indeed done the act complained of; the evidence of staff in the store being extremely probative together with the CCTV footage of the claimant in the proximity of Mr Ubaid Mushtaq, that, as the Store Manager, were the individual not known to him, he would have been obliged to make enquiries of that individual, if for no other reason, as Mr White suggested in evidence, otherwise than to make the individual welcome and to introduce himself as Store Manager, in circumstances where the store manager holds responsibility for staff within their store, the claimant then present and holding responsibility for the store. At the very least, there was a clear dereliction of duty, exposing the respondent in engaging individuals that did not have the right to work within the United Kingdom and to insurance breaches. I am in accord with Mr White's appreciation of the evidence that, on a balance of probabilities, the claimant had allowed non-Tesco employees to work in the Canon Corner store, and was sufficient to amount to a repudiatory breach.
- 102 I find that the claimant's acts were a wilful contradiction of the contractual terms of the claimant's responsibilities as Store Manager, which at the very least was gross negligence, and sufficient to amount to an act of gross misconduct.
- 103 On the claimant having committed an act of gross misconduct, I find that the sanction of dismissal was then within the reasonable band of sanctions available to the respondent, indeed, Mr Braier on behalf of the claimant, concedes this point.

- 104 On the sanction of dismissal being available for the respondent's consideration, I am satisfied that Mr White gave full consideration to the claimant's length of service and disciplinary record, together with the circumstance of his daughter's health, that in all the circumstances of the case, this tribunal cannot say that a reasonable employer would not have terminated the claimant's employment, in the circumstance.
- 105 I accordingly find that the dismissal of the claimant for reasons of gross misconduct was fair.
- 106 For completeness, on the claimant presenting an appeal against dismissal, he was thereon afforded every opportunity to fully present his case. All grounds of appeal were specifically addressed and the claimant given a further opportunity to give his account for the evidence presented against him in defence of the allegations. I find that the claimant having been apprised of all evidence against him, had been given the opportunity to call such further evidence in his defence as he had wished, that were there any failings at first instance, the claimant had by his appeal hearing been given a full opportunity to defend the allegations against him.
- 107 On the tribunal's finding as to the claimant having done an act amounting to a repudiatory breach, and for which the respondent terminated the employment relationship, I find that the claimant has not been dismissed in breach of contract. The claimant has not been wrongfully dismissed.
- 108 I accordingly find that:
- 108.1 the claimant has not been unfairly dismissed.
 - 108.2 The claimant has not been wrongfully dismissed.
 - 108.3 The claimant is not entitled to a payment in respect of notice on being summarily dismissed from the respondent's employ.
- 109 The claimant's claims are accordingly dismissed.

Employment Judge Henry

Date: 24 February 2016

Sent to the parties on:

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For the Tribunal Office