



Case Number: 2301038.2015

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss C Packham

and

Respondent

Tesco Stores Limited

Held at Ashford on 6, 7 and, in Chambers, 13 February 2017

Representation

Claimant:

Mr D Packham, Father

Respondent:

Mr N Singer, Counsel

Employment Judge Kurrein

JUDGMENT

The Claimant's claim alleging unfair dismissal is not well founded and must be dismissed.

REASONS

The Claims and Issues

- 1 On 22 February 2015 the Claimant presented a claim to the tribunal alleging she had been unfairly dismissed. On 1 April 2015 the Respondent presented a response in which it asserted that the Claimant had been dismissed for offences of fraud or theft.
- 2 Those matters were the subject of criminal proceedings, and a succession of orders was made staying the proceedings in the employment tribunal pending the completion of the criminal proceedings. Those proceedings came to an end when the Claimant was acquitted of all offences at the Crown Court.
- 3 A notice of hearing together with a case management order was sent to the parties on 9 November 2016. A preliminary hearing took place on 18 January 2017 and a case management order, giving further directions for the conduct of the full hearing was sent to the parties on 19 January 2017.
- 4 The matter came before me on 6 February 2017 for a full merits hearing.

The Evidence

- 5 I heard the evidence of Mrs Angela Evans, store manager; and Mr David Firth, store director, on behalf of the Respondent. I heard the evidence of the Claimant on her own behalf. I considered the submissions of the parties and the documents to which I was referred. I make the following findings of fact.

Findings of Fact

- 6 The Claimant was born on 2 March 1991 and started her employment with the Respondent on 30 September 2009 as a part-time general checkout assistant at its Lunsford Park “Extra” store near Aylesford.
- 7 The Respondent is the well-known retailer, and needs no introduction.
- 8 After approximately five months she took up duties in the Kiosk, which sold lottery tickets, cigarettes and other small items. Not long after that she became a customer service assistant and worked on the customer service desk (“CSD”). The CSD dealt with numerous matters such as: –
- 8.1 general sales;
 - 8.2 returns of faulty goods;
 - 8.3 general returns under the Respondents returns policy
 - 8.4 Tesco bank services, such as deposits and withdrawals;
- It also acted as a point at which electrical product help and assistance could be given.
- 9 I accepted the Claimant's evidence that the majority of the training she undertook was “on the job”. However, the Claimant did undergo formal training on some aspects of the role, and that is evidenced by her training records. She achieved a variety of different grades in respect of specific duties such as silver level training for sales.
- 10 The Claimant continued to work for the Respondent throughout the period during which she studied and gained a degree in sports and exercise management. At the conclusion of that course, as the Claimant wished to pursue a management career, she applied for a place on the Respondent's internal management-training programme, but was not successful.
- 11 The Claimant became disillusioned with her work and took the decision to hand in her notice. Almost immediately she was summoned to see her managers who asked her to consider her position on the basis that she might be able to take up a position on the Respondent's management training programme and be given a permanent full-time contract.
- 12 As a consequence the Claimant became a full-time employee and started the "Options" management training programme in March 2013.
- 13 It is clear from the evidence I have heard that the Claimant was highly regarded by her managers. During her personal development programme, as part of the Options program, she received green and blue levels of assessment showing that she was either “meeting all expectations” or “outstanding”.
- 14 I accepted the evidence of Mrs Davis, who has many years of experience working for the Respondent. She thought highly of the Claimant and had supported her in her wish to become a manager and undertake the Options programme. She thought the Claimant had a lot of potential and had excellent customer service skills.

- 15 The Claimant underwent further training, such as in the management of the cash desk and the cash office, and was appointed as a trainee checkout manager. However, she was frequently involved in other areas such as in a management position on the CSD.
- 16 The CSD had two electronic tills, 100 and 101. Each was equipped with a card reader for credit and debit cards and had a “scanner” for barcodes. These various tools were used to:-
- 16.1 take payment for sales;
 - 16.2 accept Tesco bank deposits, both cash and cheques;
 - 16.3 pay cash for Tesco bank withdrawals;
 - 16.4 pay refunds for returned goods, in appropriate cases, by refunding cards or paying cash.
- 17 Each member of staff has an individual Operator Number and pin code to sign on to a till. These are meant to be kept confidential. I did not accept that rule was breached as commonly as the Claimant suggested. Every transaction on a till records that number, the date and time, the till number and the transaction number.
- 18 The Respondent’s sales and stock control systems are heavily computerised and of fundamental importance to its success and profitability. Each item that it sells has a unique barcode which is scanned at the point of sale and which:-
- 18.1 generates the price for the item;
 - 18.2 automatically applies any one-off or multi-buy discount
 - 18.3 automatically reduces the stock figure by the number of items sold on completion of the sale.
- The barcodes used by the Respondent may be unique to them, or they may be generated by the manufacturer or supplier and “adopted” by the Respondent.
- 19 The refund process is usually as follows:-
- 19.1 A customer may return goods bought from Tesco because they are faulty or they are no longer wanted or suitable.
 - 19.2 The CSD staff process such requests.
 - 19.3 The Respondent would prefer the customer to show the CSD staff the receipt for purchase, but does not require that to be done. If a receipt is provided it will, at the conclusion of the refund process, be signed by CSD staff as having been refunded and returned to the customer.
 - 19.4 The CSD staff will-
 - 19.4.1 use the appropriate keys on the till to enter the refund screen;
 - 19.4.2 in rare cases involving faulty electrical goods the customer’s name and address may be entered;

- 19.4.3 scan the barcode of the item being returned to generate a refund docket; or
- 19.4.4 if the barcode is not on or with the item, ask a member of staff to obtain the barcode from an item on the shop floor and enter the code by hand;
- 19.4.5 generate the refund docket and refund the customer by the payment method used at the time of sale so that card purchases are refunded to the card and cash is refunded for cash purchases. I accepted the Respondent's evidence that the majority of sales (60:40) and of larger value sales are carried out by card.
- 19.4.6 place the item to one side so that:-
 - 19.4.6.1 the manager, who has to later sign the refund docket if it is over £10.00, can check the item is physically present before doing so;
 - 19.4.6.2 the item can then be returned to stock.

Perhaps unsurprisingly, managers are not permitted to approve refunds they have processed.

- 20 The Respondent has in-house staff who work on stock control and stock-taking. It also engages external independent stock-takers for the year end following which it has to compile statutory accounts. Such a stock take had taken place shortly before the events with which I am concerned. I accepted the Respondent's evidence that its stock figures in respect of any one thousand items are 99.6% accurate.
- 21 That figure is very close to the maximum figure of 100%, but the difference in value is huge. It is referred to as "shrinkage". In a store such as that in which the Claimant worked it might amount to £200,000 per annum.
- 22 As part of her training the Claimant attended daily "Team 5" meetings at which sales figures and staff absences were discussed. She also attended "shrinkage" meetings weekly.
- 23 It is against the above background that, in addition to the in-store checks, processes, rules and security provisions, the Respondent also engages specialist fraud investigators. Those involved in the events that gave rise to this case carried out "data-mining" operations from overseas, where they had access to the Respondent systems for the purpose of their duties.
- 24 On about 14 August 2014 the Claimant took part in a weekly "Cash Loss (Non-Smart) audit. It is apparent from the records of that audit that those involved were unable to view any CCTV records of events over the past seven days to ensure safes being counted and the Cash Management System and Safe transfers were under dual control. They were marked "Red". I accepted the evidence of the Respondent that the Claimant would have realised from this that the CCTV was not recording at this time.
- 25 The Respondent's fraud investigators sent emails of concern to Mrs Evans, each flagged "red", and requiring further investigation as follows:-

- 25.1 3 September 2014, concerning operator number 1111, the Claimant;
- 25.2 4 September 2014, concerning operator number 6117, "AD"
- 25.3 8 September 2014, concerning operator number 4017, "LS"
- 25.4 8 September 2014, concerning operator number 1140, "LN"

Each report was accompanied by copies of relevant refund dockets, unsigned but downloaded from the Respondent's systems.

- 26 In each case their concerns arose from very similar facts:-
 - 26.1 The operator had made a number of cash refunds.
 - 26.2 Each refund was of large value.
 - 26.3 The barcode for each refund had been entered by hand, not scanned.
 - 26.4 Some of the refunds had been made for identical items on more than one day for identical values.
 - 26.5 In many cases, including some made using the Claimant's operator number, the refund had been authorised by the Claimant.
- 27 At the time these emails were received Mrs Davis was not working at the store, but was engaged in a project following which, on about 4 September, she went on holiday. The matter was dealt with by her deputy, Ms G Buick, who was authorised to deal with her email.
- 28 I accepted the evidence for the Respondent that it is not uncommon for stores to receive emails from the fraud investigators which are shown to be wholly innocent following brief enquiries. In this case Mr Darren Smith, Non-Food Trading Manager, was appointed to investigate these matters. I have not heard any evidence from him and his methodology is not apparent from the documents themselves.
- 29 The Respondent has a disciplinary policy titled "Solving Problems at Work" with which Mrs Davis is familiar. The five pages of extracts from that document (which appear to have been included in the bundle as an afterthought) shed little light on what procedure should be followed in investigating instances of potential misconduct. The only passage that refers to an investigatory stage states that no action will be taken if, after a full investigation, there are no grounds for action.
- 30 By reference to the documents I have been able to construct the following timeline of Mr Smith's actions¹:-
 - 30.1 On a date unknown he obtained copies of till receipts, refund receipts, staff food purchase records, attendance records, electronic journal reports, till lift records, stock and other records.

¹ I append to this Judgement a copy of the spreadsheet analysis I compiled in the course of the hearing, showing the principal transaction in issue (e&oe), which the reader may find of assistance.

- 30.2 On the 8 September 2014 he saw the Claimant in private told her that some security issues had been raised and suspended her “due to the seriousness of the allegations”. She was informed that an investigation meeting would be held on 10 September 2014. That was confirmed in a letter of the same date and the Claimant was informed of her right to be accompanied.
- 30.3 On the 8 and 9 September he obtained stock records relating to specific items including:-
- 30.3.1 Courvoisier
 - 30.3.2 Pimms No 1
 - 30.3.3 Moet & Chandon
 - 30.3.4 Smirnoff
 - 30.3.5 Two brands of Electric Toothbrushes
 - 30.3.6 Pouilly Fume
- 30.4 At 17:25 on 9 September he interviewed “BM”, a manager who had authorised some of the refunds on 18 and 19 August 2014. He did not recall who had asked him to do so and recalled that, unusually, he had not seen the products because, he was told, they had already been returned to stock.
- 30.5 At 11:05 on 10 September he interviewed LS, a member of CSD staff. She had previously reported, and confirmed, that the Claimant had more than once asked to use her operator number “because a new cashier” was using hers or the till needed to be rebooted. The latter occasion was after LS had changed her password because of concerns about the Claimant using it. The Claimant told her she would cover LS’s break and when LS returned the Claimant asked her if she had changed her password, and if so, could she have the new password. LS, having been shown a number of refund dockets for the relevant dates confirmed to Mr Smith that the transactions they showed had taken place after she had signed out and left the store.
- 30.6 Mr Smith obtained LS’s time keeping records which confirmed she had electronically signed out at 15:06 on 5 September. Refund dockets for that day showed LS’s number being used to make refunds to a value of at least £1,791.92 between 15:15 and 16:01 that day.
- 30.7 At 12:00 on 10 September 2014 he interviewed LN, a member of CSD staff. LN told him that on 6 September 2014 he had taken a break during which he had used his staff discount to buy a snack “at about 7.30” pm. The Claimant had covered his break and asked to use his operator number as hers was being used by a checkout operator. LN stated that he had trusted the Claimant with his number because she had been promoted to manager and was in charge of the checkouts. When LN was shown a series of refunds made using his number between 18:56 and 19:51, totalling £825.85, he was shocked because he recalled only

processing one refund for over £10 that day. When LN returned from his break he saw the Claimant with a large suitcase and she told him she was going to refund it to “correct the till”. It was only later, when he went to sign-in to the till, that he realised that the Claimant had continued to use his number after he returned from his break.

- 30.8 He obtained the till record for LN which showed he purchased a snack at 19:55 on 6 September 2014.
- 30.9 At 13:05 on 10 September 2014 he interviewed LS, a member of CSD staff, who informed him of a recent incident when the Claimant had moved money from one CSD till to the other and asked her to correct the matter, which she couldn't, so reported the issue to the cash office.
- 30.10 At 13:55 on 10 September 2014 he interviewed the Claimant, who was accompanied by a colleague. The interview lasted about 4 hours. There were a number of breaks in the course of it, following which the Claimant confirmed she was happy to carry on.
- 30.11 In the course of that interview the Claimant:-
- 30.11.1 admitted that she had refunded “a few [suit]cases” because a customer had been overcharged;
- 30.11.2 asserted that she had not refunded the discount but the whole amount, and had done so in cash as that was the purchase method, and then re-charged the customer using the discount;
- 30.11.3 accepted that she worked on the CSD for about one hour on 5 September and “not for long” on 6 September and that she had used LS's and LN's numbers on the respective days as hers was “locked in”;
- 30.11.4 accepted that she knew she should not use any number other than her own;
- 30.11.5 accepted that she had carried out a number of refunds on 5 September 2014 using LS's number and that:-
- 30.11.5.1 none of them related to or showed an overcharge of re-charge; and
- 30.11.5.2 all of them were for cash.
- 30.11.6 accepted that she had given cash refunds at 15:22 and 15:40 on 5 September 2014 for, respectively, two and five, bottles of Courvoisier totalling £238.00 and stated that they were all for the same customer who had told her that the first two had been intended as presents, and he had changed his mind, and the other five were for a party;
- 30.11.7 accepted that at a time when she was using LS's number on 5 September 2014 her own number had been signed out of the other CSD till earlier, so could not have been “locked in”;
- 30.11.8 accepted that she may have covered LS's lunch break on 6 September 2014 and had tried to use LS's number several times but could not log-in so had asked LS if she had changed her password and when LS confirmed that was the case asked for the new password;

- 30.11.9 accepted that she had signed out of her own number earlier, so was not “locked in” or out;
- 30.11.10 when challenged as to the similarity of the goods involved in the refunds she made on 6 September 2014 between 16:19 and 17:00 using LS’s number, five bottles of Courvoisier and a Spinner suitcase (amongst others), asserted they were all normal cash refunds;
- 30.11.11 when challenged as to why, if the goods were returned and refunded, the Respondent’s stock records showed a remarkable correlation between the refunds and the stock shortages, asserted she had returned the goods to stock;
- 30.11.12 did not think it took more than seconds to process a cash refund, so the close timing between the various refunds she had given was not unusual.
- 30.11.13 could not explain how she had refunded a total of four Spinner cases on 5 and 6 September 2014 for cash, at full price, when the Respondent’s records showed only one discount sale;
- 30.11.14 recalled carrying out refunds on 6 September 2014 when she worked alongside LN and used his number “because he was signed in”, although she knew she shouldn’t.
- 30.12 At the conclusion of that interview, following a short break, Mr Smith re-suspended the Claimant and advised her that a disciplinary meeting would take place and that the Respondent was involving the Police. The Claimant was taken to another room where she was arrested and taken to the Police station.
- 30.13 On 10 September 2014 Mr Smith wrote and signed a lengthy statement for the purposes of the criminal investigation.
- 30.14 On 12 September he carried out a search of the stores sales records for sales of “Spinner” suitcases between mid-August and that date. It revealed that none of these cases, which were the subject of a promotion offer, had been sold at full price.
- 30.15 On 13 September 2014 he interviewed AD, a member of CSD staff, who had returned from holiday that day. She confirmed that the method used to refund an overcharge was to scan the item, use key F11 and then enter the overcharge amount and the correct price following which the till would tell the operator how much to refund. She was shown a series of refunds that were given on 28 and 29 August 2014 and stated that she should remember them as it was just before her holiday. She denied making any refunds in respect of Spinner suitcases, electric toothbrushes or a Dyson vacuum. She did recall refunding a microwave with a price of £54.50. She had never given anyone her number but:-
- 30.15.1 stated she may have failed to sign off;
- 30.15.2 said that the Claimant had offered to cover for her while she went for a cigarette break, and she had not signed off;

- 30.15.3 the Claimant had covered her for another break from about 7 pm.
- 30.16 Thereafter he interviewed a number of other members of staff regarding the issues surrounding these refunds, the signatures on them, the cash office procedures and cash transfers to top up the CSD tills. One member of staff stated, without prompting, that some refunds were too close together in time to have been carried out properly.
- 31 On 16 September the Claimant wrote to the Respondent to request copies of all relevant documents and to ask for sight of the evidence at least an hour before her disciplinary meeting.
- 32 On 18 September the Respondent replied to inform the Claimant that investigations were continuing and no decision had been taken to hold a disciplinary meeting. That letter enclosed copies of the notes of the Claimant's interviews and her training records.
- 33 Mr Smith held a further investigatory meeting with the Claimant on 1 October 2014. At the start the Claimant, who was again accompanied by a colleague, complained of what had taken place and asserted that using other staff's numbers was commonplace.
- 34 In the course of that meeting the Claimant:-
- 34.1 denied using the managers' knowledge of processes she had gained to circumvent controls;
- 34.2 demonstrated her knowledge of processing refunds and use of other staff's numbers
- 34.3 denied knowledge of the particular fault with the CCTV;
- 34.4 asserted that she had never knowingly signed her own refunds: she had simply signed them in a batch when asked to do so by CSD staff;
- 34.5 asserted that she had always dealt with refunds in accordance with the procedures she had learnt on the job;
- 34.6 could not comment on why the stock losses correlated with the high value items that had been refunded;
- 34.7 had "topped up" tills when they were not short of cash because, on two different occasions, a customer had indicated an intention to make a large withdrawal later, but which had not then taken place;
- 34.8 accepted that shortly after this large cash refunds had been processed by her or by someone using a number she had used;
- 34.9 was told that:-
- 34.9.1 the Respondent suspected the sums involved were far greater than the £4,447.00 that had so far been identified;
- 34.9.2 she would be invited to a disciplinary meeting;
- 34.10 asked that any such meeting be delayed until her father's return from a work visit to Russia and Japan on 12 October 2014.

- 34.11 on asking for a copy of the documentary evidence was told she would be able to see it when she arrived for the disciplinary meeting.
- 35 On 1 October 2014 Mr Smith also handed the Claimant a letter to invite her to a disciplinary meeting on 6 October 2014. That letter:-
- 35.1 advised the Claimant that the charge against her was,
“Suspected fraud against the company”
- 35.2 informed the Claimant of her right to be accompanied.
- 35.3 enclosed a copy of “Solving Problems at Work”, but no other documents.
- 36 On 6 October 2014 the Claimant attended the meeting an hour early to consider the documents the Respondent was relying on. They consisted of a substantial bundle and at the start of the meeting Mrs Evans indicated her view that the time given to the Claimant was insufficient. The Claimant agreed, and asked for more time. She was told that “there are a lot of evidence there that doesn’t reflect well on you” and that she should digest the facts. Mrs Evans said the Claimant could collect a copy bundle at 5pm that day and that she would “give her 38 hours” to look at it and would reconvene at 9am on 8 October 2014. When asked if there was anything else she wanted the Claimant said “No, OK, want sorted”.
- 37 When she returned at 5pm the Claimant was given a substantial level arch file in which were numerous plastic wallets, each containing a number of pages of documents, altogether over 600 pieces of paper. There was no index or explanatory statement and no apparent order to the documents.
- 38 On 6 October 2014 Mrs Evans wrote to the Claimant to invite her to a disciplinary meeting on 8 October 2014. That letter:-
- 38.1 advised the Claimant that the charge against her was,
“Suspicion of Theft from the CSD using the incorrect processes”
- 38.2 informed the Claimant of her right to be accompanied.
- 38.3 enclosed a copy of “Solving Problems at Work”.
- 39 The meeting started at 09:15 and the Claimant was accompanied by a TU representative. At the start of the meeting Mrs Evans stated that she “was astounded by the level of believed fraud gone on by someone I trusted and put on Options” and made it clear that she thought the Claimant to be guilty of fraud, specifically stating “You will have to convince her it isn’t fraud as I believe at the moment that it is.”
- 40 In the course of that meeting:-
- 40.1 The Claimant accepted that on six occasions she had topped up a till shortly before a number of high value cash refunds had been recorded, but asserted she had followed the correct procedures in each case.
- 40.2 The Claimant accepted that she had used other staff’s numbers to make refunds when the member of staff was on a break, had left for the day or had a day off.

- 40.3 The Claimant accepted some refunds were very close together but asserted it might be one customer with different receipts. She did not accept that making three refunds in three minutes (or less, 16:41, 16:42, 16:43) totalling £500 was unusual.
- 40.4 The Claimant accepted that she had signed sixteen refunds carried out by her
- 40.5 The Claimant accepted that she had used LS's number when her own number was not locked in any way.
- 40.6 The Claimant accept that a lot of the evidence was "stacked against me" and there were a lot of coincidences, but asserted that staff had been interviewed with "closed" questions.
- 41 Following an adjournment Mrs Evans identified six coincidences that the Claimant relied on and asked the Claimant if that was right, why were the coincidences and errors showing up as stock shortages. She interpreted the Claimant's answer, that she had put all the returned stock in the correct place, to be another coincidence and concluded that the Claimant was lying.
- 42 The Claimant then read aloud a letter in which she protested her innocence, expressed disgust at the way she was treated and complained of inadequate time to consider the documents, which had not included any CCTV records, and of suffering stress and anxiety. She stated she was seeking legal advice.
- 43 The meeting ended at 12.05, there having been several breaks, with the Claimant being informed that she was summarily dismissed. That was confirmed in a letter of the same date, which advised her of her right of appeal, the reason being,
- "Theft of cash from the customer service desk through fraudulent processes on refunds"
- 44 The Claimant completed an appeal form on 14 October 2014 asserting that:-
- 44.1 the investigation was inappropriately conducted and incomplete;
- 44.2 the evidence showed numerous refunds by different members of staff, without direct identification of her as being responsible;
- 44.3 the hearing had been unfair;
- 44.4 the manner in which witnesses were interviewed was incorrect;
- 44.5 she had not been given adequate time to consider the evidence;
- 44.6 she had not been given, or given access to, CCTV material.
- 45 At some point prior to the appeal hearing Mrs Evans set out in eight bullet points the reasons why the dismissal should be upheld. In summary these were:-
- 45.1 Using other's numbers
- 45.2 Cash transfers followed closely by cash refunds
- 45.3 Abnormal level of keyed-in barcodes

- 45.4 Stock deficiencies matching refunds
- 45.5 Speed of many refunds
- 45.6 Knowledge that CCTV was defective
- 45.7 Signing sixteen high value refunds she had processed
- 45.8 Using refunds to manipulate a till short error that did not exist.
- 46 By a letter of 11 November 2014 the Respondent invited the Claimant to an appeal meeting with Mr Firth on 14 November 2014. This was subsequently amended to be on 10 December 2014. The Claimant was advised of her right to be accompanied.
- 47 The Claimant, far from criticising the conduct of that hearing, was grateful for Mr Firth's understanding of her position and his manner toward her. She had set out her appeal in writing in a lengthy document. The meeting lasted a little less than 45 minutes and, following a half-hour adjournment, Mr Firth informed the Claimant that he had concluded that the decision of Mrs Evans was reasonable in light of the very complex investigation and her appeal did not succeed. He then gave the Claimant the opportunity to read a pre-prepared statement.
- 48 In a letter of 9 January 2015 Mr Firth confirmed his decision, setting out under fourteen headings each issue raised by the Claimant and his conclusion in respect of it.

Submissions

- 49 I hear oral submission on behalf of the parties. It is neither proportionate or necessary to set them out here.

The Law

- 50 It was common ground that I had to apply the provisions of S.98 Employment Rights Act 1996:-

98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c)
- (3)
- (4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

51 I also considered the principles arising from the following authorities, of which I had given advance notice to the Claimant’s father:-

British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439

Sainsbury’s Supermarkets Ltd v. Hitt [2003] IRLR 23

Taylor v OCS Group Ltd. [2006] IRLR 163

Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

Further Findings and Conclusions

52 My principal findings of fact are set out above, and it is not appropriate to repeat them.

The Reason

53 it was not in dispute that the Claimant was dismissed for a reason relating to her conduct, which is a potentially fair reason.

The Respondent’s Disciplinary Policy

54 Bearing in mind the size and resources of the Respondent I thought it surprising that its policy contained only one sentence concerning the manner in which investigations might or should be conducted, and that almost in passing,

“If, following a full investigation of the facts and discussion, there are insufficient grounds for disciplinary action, the case will be dismissed.”

I was also unaware of what, if any training, Mr Smith had in carrying out investigations.

The Investigation

55 On the basis of all the evidence before me I am satisfied that Mr Smith carried out an extremely detailed investigation into the issues that had been raised by the fraud investigators and the questions that arose from his initial enquiries. Many of his actions, but by no means all, are set out above.

56 Although he did not attend as a witness there was little challenge to the steps he had taken. I did not think the Claimant’s criticism of his questions as being “closed” was justified.

57 The Claimant was clearly concerned and upset that she did not see the email from the fraud investigators of 3 September 2015, raising concerns regarding her transactions, until disclosure in these proceedings. Whilst I thought that unfortunate, I could not see that any unfairness arose from that. The relevant transactions had been raised with her in the course of the disciplinary proceedings and she had been provided with copies of the till rolls recording them.

58 I was, however, concerned at the sheer volume of the material that was compiled as a consequence of this investigation. I accepted the Claimant's evidence as to how and when that was presented to her, and deal with it further below.

The ACAS Code of Practice

59 I have had regard to the following particular provisions:-

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

....

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case

60 Unfortunately I was unable to make a full assessment of the extent to which these provisions had been complied with because the Respondent had not included all the documents provided to the Claimant at that time in the hearing (or a separate) bundle. However, as set out above, I accepted the Claimant's evidence regarding the disciplinary bundle.

61 It is right to repeat my finding that Mrs Evans postponed the original disciplinary hearing because she thought the Claimant had not been given enough time to consider the documents she was allowed to see just one hour before that hearing. That decision by Mrs Evans was clearly reasonable.

62 In my view, however, Mrs Evans' decision to "allow" the Claimant a further thirty-eight hours was unreasonable as being contrary to the Code of Practice and outside the band of reasonableness afforded to employers. My reasons are as follows:-

62.1 Although the Claimant was likely to be familiar with many of the types of documents in the bundle the case against her was based on a detailed analysis of the content of some six hundred pages of documents, some of which were photocopies of multiple till receipts, which would frequently require to be cross-referenced to other, unidentified, documents.

62.2 It is not known whether, for instance, the Claimant was provided with some or all of the interview notes of her colleagues. In any event, the Respondent clearly reserves the right to anonymise such documents which might have affected a reader's understanding of their relevance..

62.3 The documents were not indexed, or in any known order.

62.4 Whilst I am in no doubt that the Claimant is intelligent, the detailed analysis required to understand the full import of all the documents would require many, many hours of detailed consideration and note-taking somewhat akin to the work a lawyer or detective would perform in preparing a case.

- 62.5 In reality the thirty-eight hours was just one working day, a time frame I consider wholly inadequate.
- 62.6 That position was exacerbated by the fact that Mr Smith did not compile an investigation report in which he set out his findings by guiding the reader through the documents and the relevant cross-references and giving a reasoned conclusion as to why disciplinary proceedings are appropriate.
- 62.7 It is my experience that many organisations and businesses far smaller and with fewer resources than the Respondent commonly require such investigation reports to be compiled for the benefit of both the employee and the decision-maker. Whilst I do not by any means suggest that this is or was necessary to avoid unfairness the lack of such a report made the time allowed to the Claimant far less reasonable than it might otherwise have been.

The Hearing

- 63 I thought it unfortunate that Mrs Evans had expressed the views she did at the start of the hearing, but I did not consider her to have been of such a set frame of mind that she had pre-judged the matter.
- 64 Subject to my above finding regarding the disciplinary bundle, I was satisfied on the basis of all the evidence before me that the hearing was conducted fairly. Although long the hearing was punctuated with regular breaks. The Claimant agreed without demur that the hearing should continue. Mrs Evans put matters to the Claimant, referred her to documents or the content of policies and gave her a reasonable opportunity to respond to them.
- 65 In the course of the hearing the Claimant accepted that the matters disclosed by the documents she was asked about were “suspicious” and things were “stacked up” against her. I concluded that as a consequence of the investigation meeting, her consideration of the hearing bundle, and the manner in which facts were presented in the disciplinary meeting, she had clearly gained a sufficient understanding of the allegations against her to give a full answer to the issues raised.
- 66 I am reinforced in that view by the fact that she did not raise any new issues of substance in the course of the hearing before me and in cross examination confirmed the accuracy of what she had said in the course of the hearing.
- 67 Having considered the documents before me, all of which were relied on by Mrs Evans at that hearing, I have concluded that Mrs Evans had reasonable grounds to reach the conclusion that the Claimant was guilty of theft. I was also satisfied that that belief was honestly held. My reasons, in summary, are as follows:-
- 67.1 The various coincidences, such as:-
- 67.1.1 customers twice, on separate occasions, expressing an intention to shortly make a large withdrawal, but then changing their minds, so that the Claimant’s action in adding cash to the till enabled numerous high value cash refunds to be made shortly afterwards;

- 67.1.2 customers twice or more, on separate occasions, returning almost infeasible quantities of brandy or Pimms, which the Claimant accepted she processed;
- 67.1.3 the fact that all these cash refunds were made by hand entering the product code, it being highly unlikely that not one of the returned products had a bar code that could be scanned;
- 67.1.4 the numerous returns of suitcases for full value cash refunds, when the cases had been sold at a discount, not all of which could be explained by the Claimant's unorthodox method of processing such returns;
- 67.1.5 the high correlation between the items for which cash refunds had been given and the absence of that stock from the Respondent's records.
- 67.2 the fact that all the large cash refunds were processed either by the Claimant or close to a time at which she was, and admitted, using another employee's pin number;
- 67.3 the fact that refunds were processed at a time a staff member was absent using the pin known to the Claimant;
- 67.4 the speed at which multiple refunds were processed, it being clear that other members of staff thought it impossible to have carried out a refund "properly" in the time taken;
- 67.5 the Claimant's acknowledged improper use of her colleague's pin numbers;
- 67.6 the Claimant's acknowledged impropriety in countersigning her own cash refunds, it being inconceivable that having made such large cash refunds it is inherently improbable that she would have forgotten that fact.
- 68 In this context I also considered Mrs Evan's honest belief to be reinforced by her initial reluctance to accept that she had been so wrong concerning the Claimant's character when she promoted her and put her on the "Options" programme. She was clearly upset by her misjudgement.

Sanction

- 69 In all the circumstances of this case the sanction of dismissal was clearly reasonable and proportionate to the offence proved against the Claimant.

Fairness

- 70 In light of what I consider to be a substantial breach of the Code of Practice I have given careful consideration to the decision in Newbound v. Thames Water Utilities Ltd [2015] IRLR 734, and the provisions of S.98(4)(b) Employment Rights Act 1996.
- 71 I have concluded, particularly in light of the Claimant's clear understanding of what was alleged against her at the disciplinary hearing, that the breach was not so serious as to render this dismissal unfair. The evidence against the Claimant was overwhelming, and she understood that to be the case at the time.

72 Having regard to all my above findings I am satisfied that the Respondent's conduct giving rise to the decision to dismiss the Claimant for theft was entirely reasonable and fair.

Contribution

73 In the event that this dismissal was thought to be procedurally unfair in any way I make a finding that in that circumstance:-

73.1 the Claimant contributed to her dismissal to the extent of 100%; and

73.2 in all the circumstances of the case it would not be just and equitable to award her any compensation.

74 I do not make a finding that the Claimant was, in fact, guilty of theft: that is not my function. However, it is clear to me, as it was and is to the Claimant, that she repeatedly and knowingly breached important policies designed, at least in part, to prevent theft or fraud when in a responsible management position.

Conclusion

75 It is my Judgment that the Claimant's case is not well founded and must be dismissed.

Employment Judge Kurrein
3 March 2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss C Packham

and

Respondent

Tesco Stores Limited

Held at Ashford on 6, 7 and, in Chambers, 13 February 2017

Representation

Claimant:

Mr D Packham, Father

Respondent:

Mr N Singer, Counsel

Employment Judge Kurrein

ANNEXE 1