Case Number: 3200856/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Gaffar**

Respondent: **Tesco Stores Limited**

Heard at: **East London Hearing Centre**

On: **23, 24 & 28 November 2017**

Before: **Employment Judge Ross (Sitting alone)**

Representation:

Claimant: Mr T Wong (Counsel)

Respondent: Ms S Liberadski (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The complaints of unfair dismissal and breach of contract are not upheld.**

2. **The claim is dismissed.**

REASONS

1 The Claimant was employed by the Respondent from 21 October 2000 until 17 March 2017 when he was summarily dismissed. The stated reason for his dismissal was gross misconduct.

2 The Claimant complied with the Early Conciliation procedure. By a claim presented on 28 July 2017 the Claimant brought complaints of unfair dismissal and breach of contract.

The Issues

3 The parties agreed that the first part of the hearing should deal with liability only, together with question of any *Polkey* deduction or contributory fault. The parties agreed the following list of issues revised from a draft prepared by the Respondent.

Unfair dismissal

1. What was the reason for dismissal?

2. Was it for a potentially fair reason? The Respondent contends that the reason was conduct.

3. Was the decision to dismiss procedurally fair?

4. If procedurally fair did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer?

The Claimant's case is that the dismissal was procedurally or substantively unfair because:

4.1. The Respondent did not have a fair reason under s.98(1) or (2) ERA 1996;

4.2. the Respondent had failed to carry out such investigation as was reasonable or fair in the circumstances;

4.3. reached a decision outside the band of reasonableness and, in particular, failed to consider alternative sanctions to dismissal and failed to consider the Claimant's length of service and his clean disciplinary record.

The Respondent contends that it satisfied the steps set out in *BHS v Burchell* [1980] ICR 303.

5. If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event had a fair procedure been adopted?

6. Did the Respondent unreasonably fail to comply with the ACAS code?

7. Did the Claimant contribute to his dismissal? If so what percentage deduction is just and equitable to (a) the Basic award and (b) the Compensatory award?

Breach of Contract:

8. Whether the Respondent has breached the contract of employment by failing to pay notice pay. The Claimant contends that he is entitled to notice pay.

The Evidence

4 There was an agreed bundle of documents page 1 - 338. The pages in this set of Reasons refer to pages in that bundle. In addition, I was handed a single sheet entitled "payment for time worked by Mrs F Kazi 2/3/2016 to 27/7/2017", which I marked R1.

5 I read witness statements and heard oral evidence from the following witnesses:

5.1 Lee Carbery (Store Manager)

5.2 Andy Holsten (Area Manager)

5.3 Bartek Blaszek (Area Manager)

5.4 Farhana Kazi (Former employee of the Respondent)

5.5 The Claimant.

5.6 Harison Ignatius.

6 In addition I read statements from the following witnesses:

6.1 Mohammad Alam

6.2 Kumrun Nahar

6.3 Rinku Gomes

6.4 Masouk Elahi

6.5 Rahim Alam

6.6 Sharmin Sultana

6.7 Monwara Begum

6.8 Iftekhar Mahmud.

7 Where there was any conflict of fact, I preferred the evidence of the Respondent's witnesses, whom I found to be credible and reliable. I regret that I found that certain parts of the evidence of the Claimant and his witnesses were simply not credible, which caused me to prefer the Respondent's witness evidence.

8 Whilst I am mindful of the need to differentiate my findings of fact under the unfair dismissal complaint from those in respect of the breach of contract complaint, it is

important that I give one example (from several) to demonstrate why I found parts of the Claimant's evidence incredible and why I could not accept several allegations of fact. In particular, I found his evidence about the lack of any relationship with Ms Kazi outside of work to be simply untrue, for the following reasons:

8.1 The Claimant's evidence and that of Ms Kazi before me was that they did not go on holiday together. Their evidence was that by chance the Claimant and his family met Ms Kazi and her family on a cross-channel ferry to France and that after the ferry they went their separate ways. In summary, their evidence was that by chance they met the next day at Notre Dame Cathedral in Paris. They denied that they had arranged to meet there. The Claimant gave evidence as to the meeting on the ferry and that the families had met the next day at Notre Dame. I found these two coincidences (the meeting on the ferry and the meeting at Notre Dame) to be very improbable given:

8.1.1 The number of cross channel ferries spread throughout the day and

8.1.2 The number of tourists in and around Notre Dame each day, given this is one of the most famous tourist spots in France, if not Europe.

8.2 In the investigation meeting held with the Claimant on 24 January 2017 Ms Thomas asked the Claimant if Ms Kazi was related to him in any way or a close friend outside of work the Claimant responded "*does it matter?*"; when the question was put again, he asked to adjourn the meeting (see page 203 – 204). I find this was an evasive response in the circumstances to a reasonable question.

8.3 In the same investigation meeting at page 205 there was the following exchange:

"*RT when you went on holiday to France did you socialise with Farhana?*

AG: yes

RT: was she on holiday with you

AG: Yes

RT: to be clear she is a colleague but you are saying she joined you on holiday in France last year

AG: yes last year"

This shows expressly that Ms Kazi was on holiday with the Claimant. Later the Claimant stated that he had been on holiday with her for "*maybe a week*" (page 207).

8.4 Contrary to the evidence given to Ms Thomas in oral evidence the Claimant's evidence was that he had only met Ms Kazi and family by coincidence on the ferry and that they had not planned to meet up in France. He claimed that they met by coincidence the following day at Notre Dame.

8.5 During the investigation meeting the Claimant had informed the Respondent that he had not been on holiday with any other colleague (page 206). In oral evidence before me, he stated that in 2013 he had met his duty manager in Cornwall. This appeared to be some form of attempted justification for meeting Ms Kazi by coincidence in Paris.

8.6 I found Ms Kazi's evidence about the relationship between the Claimant and herself was not credible.

9 To my mind, the Claimant's evidence was so inconsistent and incredible on the issue of whether there was a relationship between himself and Ms Kazi outside work (that is some form of social relationship) that I concluded that he did not tell the truth because there was something to hide. In the absence of any honest explanation from him, I concluded that the Claimant had a close relationship with Ms Kazi.

10 Although this finding in itself was not relevant to the unfair dismissal issues in themselves, it was relevant in showing that the Claimant was likely to be an unreliable witness wherever there was an issue of fact.

Findings of fact in respect of unfair dismissal

11 The Respondent is a large grocery and general goods retailer employing around 300,000 people with an annual profit of about £1 billion.

12 The Claimant was employed as a store manager for the Limehouse Express Store at the time of his dismissal. This was a small store; colleagues working the same shift would be likely to see each other, unless they were working in the bakery. The Claimant's duties included completing the store's weekly payroll records using the Respondent's payroll system.

The Investigation

13 Mr Carbery received information from the Operation Support Manager, Mr Hoondle, that the Claimant had been paying a colleague, Ms Kazi, even though she had not been working at the store. Ms Kazi's contractual hours were one day per week, on Fridays.

14 On 1 September 2016, Mr Carbery attended the store to interview staff members. Mr Carbery chose 12 colleagues of Ms Kazi who might have been working similar hours to her and who had been at the store for more than one year. He attended on three occasions so he spoke to a cross-section of colleagues working various shifts.

15 The evidence Mr Carbery collected including the following:

15.1 Rahim Alam. Her evidence was that she joined in October 2015 and had never seen Ms Kazi (although she originally began in the bakery on Thursday, she then work more hours including Friday each week).

15.2 Julie Costa (Team Leader) she had worked five days per week Monday – Friday since joining the store in September or October 2015. She did not remember Ms Kazi and had never met her.

15.3 Jagdish Kerai (Deputy Manager from May 2016) his evidence was that he joined the store in week 12 of the Tesco year. He was not allowed to do payroll by the Claimant until he was given the password in week 21 (the Tesco year for this purpose began on 1 March 2016). He was allowed to do it when the Claimant went on his extended holiday. He had never seen Ms Kazi; when he found her processed as a leaver on 19 July 2016, he asked the team leaders and customer services assistants, but no one had seen her and he was told that she had not worked there for one to two years, although he received different answers. He had spoken to Ms Ignatius, Ms Costa and Ms Rinku.

15.4 Dhalia Kumrunnahoy: she had not seen Ms Kazi since before Christmas 2015.

15.5 Harrison Ignatius (Team Leader) he had not seen Ms Kazi for one year six months; the Claimant had told him she was on a "lifestyle break" when he asked.

15.6 Farhana Choudhry: she was contracted to work 7 hours, but did overtime sometimes. Her contracted day had been Friday before. She had never seen Ms Kazi in two years.

15.7 Kapil Lingham (Deputy Manager): he had left the Limehouse Store in May 2016, having begun there in September 2015. The Claimant would not let him sign off payroll, and he only did it once. He had never met Ms Kazi in 8 months working there; when he asked colleagues why she was on the payroll he was told she had gone on a career break. Mr Lingham also produced photos showing Ms Kazi had been manually clocked in on occasions.

16 It is important to note that these witnesses were all shown the transcript of their evidence at the time it was given. There was no evidence anyone objected that the notes were inaccurate. I find that they were accurate, if not verbatim, records.

17 It was the Claimant's case that the Respondent (whether Mr Carbery or someone else) had put pressure on these witnesses. I prefer Mr Carbery's evidence that no pressure was put on any witness. I found he was an honest witness.

18 I rejected key parts of Mr Ignatius's evidence as not credible, for several reasons:

18.1 Mr Ignatius had signed as correct notes of his interview with Mr Carbery (see page 151 – 152). His evidence in interview was very different from his oral evidence before me.

18.2 The only material fact that could explain that change was, I concluded, that Mr Ignatius had been dismissed for theft and was bringing an unfair dismissal claim of his own.

18.3 There was a key inconsistency between his oral and written evidence. In his witness statement evidence about the events surrounding his interview, he stated as follows:

> "*Once they called me inside the staff room, Mr Hoondle who was already known to me introduced to me the area manager and the reasons why they came. He then said that they want to share with me something and started to explain that store manager Gaffar was doing something wrong and they want to sack him. He explained that allegedly Gaffar was paying Farhana without she been working there and because I was working there for long and also as a Team Leader, I have to give a really 'good statement' against Gaffar that I have not seen her in-store for 1 to 2 years*."

In response to my questions, however, Mr Ignatius' evidence was different. He said that Mr Carbery was not present when he had the above conversation with Mr Hoondle, which took place behind the staff room door, and that he did not know if Mr Carbery knew what had been said to him. He embellished his account further by stating that Mr Hoondle and himself were talking in Hindi in some words, and so Mr Carbery may not have known what was said. I rejected this account as untrue because of the inconsistencies. I find that there was no such conversation with Mr. Hoondle. Moreover, there was no reason why Mr Carbery needed to bother to pressure Mr Ignatius, when he had several other witness statements stating similar things.

18.4 Mr Ignatius' account that he had been told that the Respondent wanted to "*sack*" the Claimant was very unlikely because it would be imprudent and the litigation risk would be significant, with a popular manager like the Claimant

18.5 This allegation was never particularised in the ET1. I do not believe the Claimant's evidence that he could not or did not speak to Mr Ignatius before filing this ET1.

19 I heard no direct evidence from the other witnesses interviewed by Mr Carbery. Although witness statements were filed for certain of these witnesses, the witnesses were not called. For the avoidance of doubt, I prefer the evidence of Mr Carbery to these witness statements where there was any conflict of fact.

20 Mr Carbery and the people manager, Ms Scollen tried to contact Ms Kazi by telephone in order to interview her. There was no reply and no voicemail facility.

21 The Respondent did not interview Ms Kazi but in the circumstances this did not take the investigation outside the band of reasonableness. Given the evidence collected was from over 50% of relevant witnesses, including team leaders and deputy managers, it was not necessary for the Respondent to interview Ms Kazi to form a reasonable belief that the Claimant had been paying a former employer for periods when she was not at work.

22 After these interviews were completed, there was a delay before the Claimant was interviewed. As far as I can tell from the evidence, this was due largely to the Claimant's absence through sickness after his return from holiday, and then a failure to attend a meeting.

23 Mr Carbery had handed the investigation over to Ms Thomas who returned from maternity leave. There was no need for any written handover as the Claimant suggested: it was perfectly reasonable to hand over as Mr Carbery did.

24 In addition, the Respondent collated further evidence arising from the interviews with Ms Kazi's colleagues, including rotas for weeks 51 and 52 of 2015 – 2016 of the Tesco year (which relates to February 2016) and weeks 1 – 20 of the 2016 Tesco year. These documents do not show that the Claimant was rostered to work on any of those weeks. Clocking in records were also collected.

25 Ms Thomas was able to interview the Claimant on 24 January 2016 and again on 31 January 2016. The break was because the Claimant requested it. The notes of these interviews are at pages 196 – 214 and pages 215 – 235 respectively. I find that these are broadly accurate notes, made by a note-taker, Ms Colin.

26 In the investigatory interview, the questions included a focus on whether the Claimant had a social or family relationship with Ms Kazi, and he was asked whether he socialised with Ms Kazi in France, to which the Claimant stated that Ms Kazi was on holiday with him for a week. It would have been obvious to the Claimant from the nature and content of the questions to him that the Respondent was investigating whether payments to Ms Kazi when she was not working were made deliberately. It is important to note the Claimant's case at page 208: his case was that Ms Kazi had worked at the store in 2016 until the end of March or early April 2016, not that the payments were a mistake by him or misconduct by someone else. He said his colleagues were not telling the truth in their interviews.

27 The clocking in records of Ms Kazi also were put to the Claimant. These showed mainly manual clocking in. It was obvious that it was being put that these were done by him, falsely: see page 214:

> "*Gaffar this is every week. We know every week you sign off payroll*."

28 The Claimant's case was that his colleagues had made up their evidence and that Ms Kazi had worked a lot of overtime in January to March 2016. He was asked why Jagdesh Kerai would lie, but gave no explanation.

29 In interview, the Claimant accepted all the colleagues would be listed on the rota for their shift (see page 228). Ms Thomas had all rotas to week 20 of 2016, and noted that Ms Kazi was not on any, which was consistent with the witnesses who had been interviewed. To this the Claimant responded that the rotas could be amended and that this was part of a plan. On further questioning, the Claimant said he had evidence that people had been told what to say. He was asked why he did not bring such evidence and he said he could not. Ms Thomas informed the Claimant that she needed to know the names of the colleagues if he wanted her to investigate further. The Claimant did not provide Ms Thomas with any names of witnesses either at the interview or thereafter.

30 At the conclusion of his interview on 31 January 2016, the Claimant was informed that he would face a disciplinary hearing because the evidence suggested "*you are paying Farhana Kazi while she was not at work*". I find that this is a clear statement that the Claimant was acting deliberately in paying Ms Kazi.

Disciplinary Hearing

31 The Claimant was informed of the disciplinary hearing by a letter at page 239. The charge was:

> "*Allegation that an ex-colleague from Limehouse Express was still being paid but not working in the store*."

32 The letter warned that the hearing could result in disciplinary action up to and including dismissal. Given the content of the investigation, and given the evidence even on his own case that the Claimant did almost all payroll sign-offs, it was obvious to the Claimant that this allegation was wide enough to include the allegation that the payments to Ms Kazi were being done deliberately; and, in any event it was the Claimant's case to that point that Ms Kazi had worked up until about April 2016 and merely been paid for her work.

33 The disciplinary hearing was heard by Andy Holsten. Prior to the disciplinary hearing, he had read all the investigation documents and Ms Kazi's personnel file. He completed a disciplinary checklist as part of his role, which is at page 240 – 248 in the bundle, which provides some evidence that a fair disciplinary process was followed.

34 At the disciplinary hearing, the Claimant asked Mr Holsten to look at Ms Kazi's training record card, which he claimed would show that she was attending work at the material times. Mr Holsten adjourned the hearing to obtain those, and these are at page 66 – 73.

35 Mr Holsten honestly believed that the Claimant's signature on the training record card pre-2015 appeared to be the same as her signature on the passport and contract of employment (page 64 and 65) whereas the signature for 2016 appeared to him to be different.

36 There was no requirement on Mr Holsten to obtain expert evidence about whether signatures were made by the same hand. The question is whether the investigation overall was reasonable, including his examination of signatures. In evidence, he

explained the signatures were only one factor in his assessment of whether gross misconduct had been committed.

37 Mr Holsten rejected the Claimant's case that there was a conspiracy against him for several reasons:

37.1 He did not consider this credible and in any event the Claimant's case had been that Ms Kazi was at work and so was entitled to pay.

37.2 The Claimant was store manager and in control of the payroll system. He was accountable for the payroll and the evidence in the investigation was that the Claimant had not allowed any deputy manager access prior to August 2016.

37.3 Any conspiracy required two deputy managers (Mr Kerai and Mr Lingham) to conspire against him, independently, but in the same way (because they had worked in the store at different times).

37.4 It was a small store so the Claimant would have noticed if Ms Kazi was being paid due to the acts of others.

38 Notes of the disciplinary hearing which are accurate but not verbatim are at page 286 – 333.

39 Having reviewed all the evidence, Mr Holsten decided to summarily dismiss the Claimant for gross misconduct. I have found that Mr Holsten had an honest belief based on reasonable grounds that the Claimant was knowingly continuing to pay Ms Kazi after she ceased to attend work at some point in 2015. In essence, he found the Claimant was guilty of fraud. I accepted his grounds for his belief are basically as noted in his handwritten summary at page 335, which he used to read his decision at the disciplinary hearing to the Claimant. These grounds included:

39.1 There was no updating information in Ms Kazi's personnel file since 2014.

39.2 All the evidence from the investigation pointed to the fact that Ms Kazi was not attending work whereas the Claimant's case was that she had continued to work until around April 2016. He considered sufficient colleagues (more than 50% of the store) had been interviewed.

39.3 As store manager, the Claimant had complete control over the payroll system. The evidence in the investigation suggested he had not given the password to a duty manager until he went on annual leave in August 2016.

39.4 Ms Kazi was paid for 22.5 hours for overtime in week 14 in 2016 (paid 1 June 2016 which was over two months after, on the Claimant's case she stopped working).

39.5 The Claimant was paid four weeks holiday in the first weeks of the holiday year 2016 – 2017, which was contrary to the Respondent's holiday booking policy, which the Claimant would know.

39.6 In week 19, a large amount was paid to Ms Kazi, before the Claimant went on leave.

39.7 The Claimant was not mentioned in more than 20 weeks of rotas covering material times, which meant that no staff would ask where she was. The Claimant was in control of producing rotas.

39.8 There was evidence that the Claimant had been consistently clocked in manually. Over 7, weeks she had been clocked in manually 32 times.

39.9 Two deputy managers working at different times were both saying the Claimant had not let them do payroll.

39.10 The alleged signature of Ms Kazi on the passport was different to those on later documents of the training records. Mr Holsten added that little weight could be given to the training records because these can be completed at a later time.

39.11 The Claimant had gone on holiday with Ms Kazi. They had some form of relationship outside work.

40 Having heard Mr Holsten give evidence, whilst his evidence was brusque in style, I concluded that he had not pre-judged the outcome of the hearing. He had not had previous dealings with the Claimant and he was an experienced hearings officer. I found that Mr. Holsten was an impartial chairman, but that he was taken aback by the Respondent's evidence from the investigation and the gravity of the matter, and by the Claimant's approach, which was that Ms Kazi had been working all the time to April 2016 and that there was a conspiracy against him. This explains the question to the Claimant about whether he was a disaster with payroll or was the allegation true, because Mr Holsten had trouble accepting the Claimant's evidence. The question was fair enough in this retail setting: if the Claimant was in control of payroll, he knew what was happening.

41 Moreover, I found that the Claimant could have called any witnesses that he wanted to call at the disciplinary hearing. This included Ms Kazi if he thought she could give him useful evidence. As I have indicated already, the Claimant had some form of close relationship with Ms Kazi. I inferred that he had her telephone number or some means of contacting her before the disciplinary hearing (when she was no longer an employee). The Claimant and Ms Kazi had planned to go on holiday together and such a plan must have involved means of communication outside work.

42 Mr Holsten did consider whether any lesser sanction was appropriate, evidenced by his checklist. But given that he found the Claimant was guilty of fraud in effect, and given this is a retail business requiring trust from store managers, I find that he did not spend long considering sanction, which is why there was no discussion of sanction in his summary notes at page 335.

43 In essence, Mr Holsten found the Claimant was guilty of gross misconduct because of:

43.1 The severity of the offence and the sums involved.

43.2 He believed that the Claimant and Ms Kazi had gone on holiday together which he reasonably believed pointed to an element of collusion.

43.3 Only the Claimant could authorise payroll, or would know who had authorised the payroll.

43.4 He believed that the Claimant was guilty of something representing manipulation of the Respondent's systems.

44 For the same reasons, the magnitude and the breach of trust, although Mr Holsten did take into account the Claimant's employment record, he decided that the appropriate sanction was summary dismissal.

45 The Claimant was summarily dismissed on 17 March 2017, which was confirmed by a letter at page 304.

The Appeal

46 The Claimant appealed (by grounds which are at page 306 – 307).

47 The appeal was heard by Mr Blaszek. The notes of the appeal are at page 823 – 833. These are an accurate if not verbatim record of the appeal on 16 May 2017.

48 I accepted Mr Blaszek's evidence in respect of the appeal. I find that he had not pre-judged the outcome. In most ways, the appeal was in the form of a review, but the Respondent would have allowed the Claimant to produce relevant new evidence had he asked to. The Claimant did not call any witness evidence.

49 Mr Blaszek did consider the fairness of the investigation and the hearing. He concluded that there was sufficient evidence to support Mr Holsten's conclusions. He considered the question of sanction. He upheld the decision to dismiss.

Findings of fact in respect of breach of contract and contributory fault

50 Whether the breach of contract succeeds depends on whether I prefer the evidence of the Respondent's witnesses or the evidence of the Claimant about whether the Claimant was in fact guilty of gross misconduct. If I accept the Claimant's evidence, he is not guilty of gross misconduct but has been the target of a conspiracy. I should emphasise that the Claimant accepts that Ms Kazi was paid when she should not have been because on his case she stopped work in April 2016 and her evidence was that she stopped in the first week of April 2016.

51 In respect of the evidence of the Claimant and Ms Kazi about the nature of their relationship, I rejected it in large part. I concluded that there was some sort form of close relationship between Ms Kazi and the Claimant, whether it was a family tie or a bond of friendship does not matter. My reasons for rejecting the evidence of the Claimant on the nature of the relationship have already been stated. My reasons for rejecting the evidence of Ms. Kazi on this issue of fact are as follows:

51.1 Ms. Kazi's evidence was that she did not go on holiday with the Claimant. I found her evidence (and that of the Claimant) about the meeting with the Claimant on the ferry and by Notre Dame to be so highly improbable as to be false.

51.2 At paragraph 4 of the witness statement of Ms. Kazi, she stated that "*at the beginning of 2016*", she moved from Barking to Harlow. However, in oral evidence, the Claimant stated that she moved at the beginning of April 2016. When questioned about this discrepancy, Ms. Kazi stated "*April is the beginning*" of the year, which seemed to me to compound the inconsistency by adding something that was plainly wrong.

51.3 When asked why her name was not on the rota in the weeks preceding April 2016, and why there were so many manual clock-ins, and that this suggested she was not working in those weeks, the Claimant stated that she worked "*12 weeks too hard*". I rejected this evidence as very unlikely given the documentary evidence of the rotas, the manual clocking in evidence, and the statements of eleven former colleagues in the investigation, who basically said that they had not seen Ms. Kazi since before Christmas, and with whom Ms. Kazi (on her own evidence) had a good relationship.

51.4 The Claimant had approved Ms. Kazi's entire annual holiday to be paid in the first month of the holiday year. Ms. Kazi admitted this was more than she was allowed under the Respondent's holiday pay arrangements (which are part of the Handbook, at page 43).

51.5 Despite the fact that Ms. Kazi was paid when, on her own account, she was not working in June 2016, she did not inform the Respondent or offer to repay any money.

51.6 In week 14, 2016, Ms. Kazi was paid for 22.5 hours overtime. When asked about this, she claimed it was for three shifts working during the Easter holidays and in February a shift of overtime had not been paid. It is unlikely that a member of staff whose weekly wage was normally only around £55 (for one day per week) would not have raised the non-payment of three relatively valuable overtime shifts and ensured that these were paid well before then. Moreover, these alleged shifts are not shown on the rota.

52 From these findings of primary fact, I was able to conclude that Ms. Kazi had a close relationship with the Claimant.

53 I found that it was likely that Ms. Kazi gave false evidence because she was trying to help out the Claimant, someone with whom she had some form of social or family tie.

54 From my assessment of the Claimant's evidence, I concluded that he had deliberately ensured that she was paid for periods when she was not working for the Respondent. For the reasons I have explained, I found his claim that there was no form of social relationship between himself and Ms. Kazi to be untrue. I inferred from a combination of his untrue and unreliable evidence, and the evidence of Ms. Kazi, that it was likely that he had ensured that Ms. Kazi was paid for periods when she was not at work as a result of their relationship.

The law

Law in respect of Unfair Dismissal

55 In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within s.98 ERA.

56 A potentially fair reason is one which relates to conduct: s.98(2)(b) ERA.

57 The Tribunal directed itself to section 98(4) of the Employment Rights Act 1996 which I will not repeat here. The burden of proof on the issue of fairness is neutral.

58 In conduct cases, in considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

58.1 Did the employer have an honest belief that the employee was guilty of misconduct?

58.2 Was that belief based on reasonable grounds?

58.3 Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See BHS v Burchell [1980] ICR 303)

59 I directed myself to the principles which it must apply when applying section 98(4):

59.1 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

59.2 On the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

59.3 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See Foley v Post Office and HSBC Bank plc v Madden [2000] IRLR 3.)

60 The Tribunal reminded itself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see Sainsbury plc v Hitt [2003] ICR 111. I directed myself to the following passage in Hitt, with emphasis added by me, which I found to be relevant to this case:

> "*The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades.* ***The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.*** *The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out*."

61 Reading Hitt and Foley together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer. Moreover, it is to be noted that in Hitt, further investigation was carried out during an adjournment of the disciplinary hearing.

62 Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In A v B [2003] IRLR 405, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of this case, the employee's reputation or ability to work in his or her chosen field of employment is potentially in issue. A careful investigation was required, and exculpatory evidence must be sought as much as evidence against the employee.

Breach of Contract: gross misconduct

63 Gross misconduct is conduct which is so serious that it goes to the root of the contract. By its very nature, it is conduct which would justify dismissal, even for a first offence.

64 In Sandwell v West Birmingham Hospitals NHS Trust UKEAT/0039/09 (a case concerning the relationship between gross misconduct and unfair dismissal), the EAT held that gross misconduct must amount to willful or deliberately negligent breach of the employer's rules. The relevant passage is instructive:

> *"110…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 of the sanction in unfair dismissal or in 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 [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in Pepper v Webb [1969] 1 WLR 514 at 517):

"Now what will 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 page 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 Chronicle (indicator Newspapers) Ltd [1959] 1 WLR 698 at page 710 Evershed 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] ICR 737 at page 759."

65. I reminded myself of the guidance provided by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] IRLR 261 that, in an unfair dismissal case heard with other complaints, a Tribunal must make separate and sequential findings of fact on certain issues, such as contributory fault, constructive dismissal and discrimination complaints. I considered it appropriate to make separate findings of fact in this case on the issue of whether the Claimant had as a matter of fact breached his contract of employment by committing gross misconduct. (These findings of fact are set out above).

Submissions

66. I read written submissions prepared by Counsel, supplemented by oral submissions. Without taking anything away from the diligence and competence of Counsel for the Respondent, Mr. Wong for the Claimant made excellent submissions, given the time he had to prepare (owing to a late instruction). Amongst other submissions, he contended:

66.1 The stated reason (payment of an ex-colleague) was different to the actual reason for dismissal given by Mr. Holsten, which was basically fraud. He referred me to *Panama v LB Hackney* [2003] EWCA Civ. 273, contending that the Respondent had failed to particularise the allegation, because dishonesty and intention were not pleaded.

66.2 Given the guidance in *A v B* (above), the investigation was outside the band of reasonableness; and he referred me to *Panama v LB Hackney* [2003] EWCA Civ. 273, contending that the Respondent had failed to particularise the allegation, because dishonesty and intention were not pleaded.

66.3 Mr. Holsten had, in effect, closed his mind to possible alternative facts and sanctions. The allegation particularised was not necessarily gross misconduct.

67. I took into account all the submissions of each party, even if I have not referred to them all individually, which is not necessary and would be disproportionate.

Conclusions

68. Applying the facts found and the above law to the issues outlined at the start of this set of Reasons, I have reached the following conclusions.

Issues 1 and 2

69. Conduct was the reason for dismissal. I accepted the evidence of Mr. Holsten, and made the relevant findings of fact above.

70. I considered *Panama v London Borough of Hackney*. In that case, the employee learned that the allegation was one of fraud only during cross-examination at the Tribunal. The Court of Appeal cited with approval the following passage from *Hotson v Wisbech Conservative Club* [1984] IRLR 422, where the EAT held:

> "We are very well aware that the proceedings before an Industrial Tribunal are informal — and long may they remain so. That was the Parliamentary intention. But, when once dishonesty is introduced into a case, the relevant allegation has to be put with sufficient formality and at an early enough stage to provide a full opportunity for answer. One of the hazards of the Tribunal system, and part of the price necessarily paid for informality, is that misadventures are bound to occur from time to time, as result of which that necessary formality of expression and that opportunity of answering are denied."

71. In my judgment, whilst I fully accept the principles set out in *Hotson* and *Panama*, the facts in the present case are very different to those in *Panama*. In the present case, Mr. Gaffar can have been in no doubt, whether during or after the investigation, that the employer was investigating its suspicion of dishonest or fraudulent behaviour. In particular:

71.1 The charge letter warned that the hearing could result in disciplinary action up to and including dismissal.

71.2 Given the content of the investigation, and the very close questioning that he received about the nature of his relationship with Ms. Kazi, it would have been obvious to him that the employer was investigating whether the payments were deliberate or not.

71.3 Given the evidence even on his own case that the Claimant did almost all payroll sign-offs, it was obvious to the Claimant that the allegation set out was wide enough to include the allegation that the payments to Ms Kazi were being done deliberately.

71.4 Moreover, it was the Claimant's case that Ms Kazi had worked up until about April 2016 and had merely been paid for her work. Mr. Holsten's questions were directed to the inconsistency of how so many staff had not seen

Ms. Kazi at all over a sustained period, and she was not on relevant rotas, and yet she had been paid. In addition, there had been a high degree of manual clock-ins.

Issue 3: Procedural fairness

72. It should be apparent from the findings of fact set out above that I found the dismissal to be procedurally fair. I did not accept the criticism that Mr. Holsten had proceeded with "wilful blindness" and had not considered the range of possibilities in terms of the facts and sanctions which could be the outcome of the charge. I found that he was an experienced retail manager and hearings officer. It was not that he was blinkered; on the contrary, it was his experience as a retail manager that led him to weigh the evidence before him and narrow the range outcomes and sanctions as he did.

73. As explained above, neither Mr. Holsten nor Mr. Blaszek had pre-judged their hearings. There was a proper appeal, at which any new evidence could have been raised by the Claimant.

74. Mr. Wong argued that the Respondent should have instructed a handwriting expert in respect of the signatures on the training record; but the inquiry by an employer need not be equivalent to a criminal prosecution by the police, and no such investigation was required in this case, not least because of all the other evidence that the Respondent had collated.

75. The Claimant also argued that all other staff members, and Ms. Kazi, should have been interviewed. I do not accept this; I accepted the evidence of Mr. Carbery that he had interviewed a fair cross-section of staff who were likely to have seen Ms. Kazi if she was working.

76. Having taken account of all the submissions, I find that the procedure applied overall was well within the band of reasonableness, even taking account of the resources of this large, profitable, employer.

77. In addition, I record that during the hearing and in the Claim itself, no point was taken that the Respondent had breached a specific provision of its disciplinary policy or procedure, which is why no reference is made to it in these Reasons.

Issue 4

78. Applying my findings of fact, particularly those at paragraphs 39-44 above, the decision to dismiss was well within the band of reasonableness open to this employer.

79. I accepted the evidence of Mr. Holsten: he had an honest belief that the Claimant was guilty of acting fraudulently, by continuing to arrange payment for Ms. Kazi after she had ceased to work at the store in 2015.

80. I concluded that there were reasonable grounds for that belief, in the form of the material evidence before Mr. Holsten, particularly the evidence from the other staff members and those matters set out at paragraph 39 above.

81. I considered whether Mr. Holsten's decision to dismiss was within the band of reasonableness. I concluded that it was. He decided to dismiss for all the reasons that he gave. This was a very serious offence, and a serious breach of trust by a manager in control of the payroll at his store.

The remaining issues under the complaint of unfair dismissal

82. Strictly speaking, having reached these conclusions, I need not consider issues 5 to 7. I have decided to give my conclusions in respect of issue 7 (contributory fault) in any event, in case I am found to have made an error of law in my conclusions above.

83. As my findings of fact show at paragraphs 50 – 54 above, the Claimant did act in a blameworthy way. He deliberately continued to pay Ms. Kazi after she ceased to work at the store. He knew what he was doing. I conclude that he knew this was dishonest, which helps to explain the lies about the nature of his relationship to Ms. Kazi.

84. In short, the Claimant was entirely at fault for his dismissal. It would be just and equitable for any compensatory award to be reduced by 100%.

Issue 8: Breach of Contract

85. I concluded that the Claimant was guilty of gross misconduct for all the reasons set out at Paragraphs 50 – 54 above. The Respondent was entitled to summarily dismiss him. The claim for notice pay must be dismissed.

Employment Judge Ross

21 December 2017