Case Numbers: 3201414/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr H Ignatious**

Respondent: **Tesco Stores Limited**

Heard at: **East London Hearing Centre**

On: **13-15 March 2018**

Before: **Employment Judge Ross**

Representation

Claimant: Ms J May, Solicitor
Respondent: Mr I McCabe, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **It is declared that the complaint of unfair dismissal is well-founded.**

2. **The Compensatory and Basic awards are reduced by 100%. The claim for compensation is dismissed.**

REASONS

1 The Claimant was continuously employed by the Respondent from 11 October 2010 until his summary dismissal on 23 June 2017. At the time of his dismissal, the Claimant was employed as a Team Leader at the Limehouse Tesco Express store.

2 By a claim presented on 26 October 2017, the Claimant brought a complaint of unfair dismissal having complied with the Early Conciliation procedure.

The Evidence

3 There was an agreed bundle of documents pages 1-241. The pages in this set of reasons refer to pages in that bundle. There was no challenge to the accuracy of the

notes of meetings and interviews in the bundle and I found these were all accurate, if not verbatim records.

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

For the Respondent:

4.1. Aaron Stammers, Store Manager at Tesco Metro at Canary Wharf, the dismissing manager;

4.2. Rebecca Dawkins, Area Manager, the appeal manager.

For the Claimant:

4.3. Ringmol, the Claimant's wife, a customer assistant at the Limehouse store;

4.4. The Claimant himself, who is now in employment again; and

4.5. Jackson Ignatious, the Claimant's brother and stock control manager at a large Tesco store.

Also, I read the witness statement of Kumrun Nahar who did not attend despite a witness order. I attached such weight as I saw fit to her evidence, which was very limited in the circumstances.

5 An interpreter (Malayalam) interpreted for the Claimant.

6 On the key issues, I found the Respondent's witnesses to be reliable. I was unable to accept key parts of the Claimant's evidences for reasons I shall come to. Generally, where there was a conflict of fact, such as over the degree of change in the layout of the aisles over the period from 17 April 2017 to the conclusion of the disciplinary hearing, I preferred the evidence of Mr Stammers. In cross-examination, the Claimant stated racism at this branch of Tesco lay behind the case or at least the allegation. I saw no evidence of this in the disciplinary process in this case.

The issues

7 The parties agreed a list of issues which I revised with their assistance. A copy was given to each party at the start of the hearing on 14 March 2018. I will not repeat this list here but refer to the issues in the course of these Reasons.

Findings of fact in respect of unfair dismissal

8 I heard and read a lot of evidence over a 2 day hearing, all of which I considered. The following are the relevant findings of fact.

9 The Respondent is a large, high street retailer. It employs more than 300,000 staff.

The Respondent's Disciplinary Procedure

10 The Respondent has a detailed disciplinary procedure which is dated June 2017, (see pages 34ff). Section 5 includes the following:

> "*We will always carry out a thorough investigation and agree the most appropriate steps to address any issues which we identify. We will do this within a reasonable time frame to allow for the most thorough investigation possible, usually taking no more than 14 days unless both parties mutually agree an extension or, if it is reasonable, to extend this timeframe to allow further investigation. To establish the whole story, the investigating manager may also look at other information such as CCTV footage, stock reports or customer complaints and may also need to interview some of your colleagues*".

11 The Respondent has a discretion to suspend, where there is evidence to suggest an employee committed gross misconduct or to provide time for a full investigation.

12 By Section 9, the invitation to the disciplinary hearing should include a copy of any "*paperwork/evidence*" relating to the disciplinary case.

13 Section 10 deals with the issue of sanction and Section 11 deals with the appeal stage. At Section 12, there are examples of offences likely to constitute gross misconduct. This includes the theft of Tesco property.

The investigation

14 On 24 April 2017, the Respondent received a Protector Line call in respect of the Limehouse Express store. The substance of this call is recorded in the notes at page 77. The complainant alleged that a colleague had stolen from the store. The date given was 18 April 2017 but all parties proceeded at all material times, on the basis that the incident took place on 17 April 2017. The note records that CCTV showed the Claimant putting two cans of alcohol into his bag as the complainant had alleged. The note also recorded there was no store manager for the complainant to raise his concerns with or he would have done so before.

15 As a result of this call, an investigation took place. Because there was no store manager at the Limehouse Express store, this was carried out by a manager from another store, Aravin Ramachandran who interviewed the complainant, Nirupan Arunthavanathan on 26 April 2017. In the interview, he stated that the Claimant had "*nicked*" the items at 23:57 on 17 April 2017. He said that he took the items and put them in his bag and left the store without paying for them. Mr. Arunthavanathan made other allegations about the Claimant which were not investigated nor made the subject of any charges. The Claimant maintained Mr. Arunthavanathan had a grudge against him. This was because the Claimant had reported Mr. Arunthavanathan, the Deputy Manager and Manager for their involvement in the removal of 5 bottles of champagne from the store. Mr. Arunthavanathan had returned from suspension on the day that he had made the allegation.

16 I heard no evidence that Mr. Arunthavanathan was punished for his involvement in the champagne incident, but the manager and deputy manager were dismissed for it. Mr Stammers was not involved in that incident at all and did not know of the Claimant until he was appointed as disciplinary officer in this case. From the evidence I heard, I preferred the evidence from Mr Stammers, that the Claimant was not treated

inconsistently to Umesh or Jagdesh**,** the deputy manager and manager involved in the incident, who were both dismissed. The Claimant could give no particulars of the allegation that the deputy manager was not dismissed.

17 The Claimant was not suspended until 20 May 2017. The reason for this was that the Limehouse store had no manager at the time and it is clear that no one in the Respondent organisation appreciated that, despite the evidence of the complainant, nothing had been done in respect of the investigation nor in respect of the decision whether to suspend the Claimant.

18 The Claimant was interviewed on 19 May 2017 as part of the investigation. The notes are at pages 116-120. In that interview, the Claimant and the investigating officer viewed the CCTV evidence. The Claimant states after this that it was him on the video and he could be seen putting two cans in his bag. The investigating officer stated that the CCTV shows that as soon as Mr. Arunthavanathan went out of sight, the Claimant could be seen taking two cans or bottles and putting them in his bag and then leaving the store.

19 During the investigation meeting, the Claimant's evidence included the following:

19.1. He had paid for the product taken by him but he did not know what product it was.

19.2. He was not sure who served him or who signed the receipt, this being the standard procedure for the Respondent when staff buy goods.

19.3. A few times, as on this occasion, the Claimant had paid for items earlier, put them back on the shelf and had only taken them later.

19.4. The Claimant assumed he used his Clubcard for the purchase. The Claimant also bought a Barclaycard statement which was for 18 April 2017 showing that £3.68 was spent at the Limehouse store. The Claimant's case was that this showed a payment at the store on 17 April.

20 As I have explained, the disciplinary procedure provides that an investigation is to be completed within a reasonable timeframe, usually taking no more than 14 days. In this case, there was a breach of these timescales due to the lack of a store manager to conduct the investigation.

21 By the time the Claimant was interviewed on 19 May 2017, the CCTV for the remainder of 17 April 2017 had been deleted, which was the normal procedure after 28 days. At the meeting on 19 May and at the subsequent disciplinary hearing, the Claimant asked for more CCTV to be considered.

The disciplinary hearing

22 By letter dated 14 June 2017, the Claimant was invited to the disciplinary hearing on 16 June 2017. The allegation was "*taking two cans of beer without paying for them*". It warned that dismissal was a possible outcome. The minutes of the first part of the disciplinary hearing are at pages 123-126.

23 Prior to this hearing, the Claimant was not provided with the evidence collected in the investigation including notes of his interview, the notes of the interview of Mr. Arunthavanathan, nor the documents to which Mr Stammers referred. This was in breach of the Respondent's disciplinary procedure.

24 At the commencement of the disciplinary hearing, the Claimant stated he had not been provided with notes of the investigation. Mr Stammers offered to provide a copy of them, but the Claimant stated he would wait until after the meeting. Mr Stammers proceeded to read the statement of Mr. Arunthavanathan to the Claimant. The Claimant said that he had paid and relied on the Barclaycard statement, stating that he had paid with a card. Mr Stammers then explained that the Claimant's Clubcard account for that day only showed four non-alcoholic items were bought. The meeting was adjourned at this point, to allow the Claimant and his representative, Jackson Ignatious, to review the statement. I should point out that a Tesco employee gets 10% discount if purchasing goods in a Tesco store with a Clubcard.

25 After the adjournment, the Claimant stated "*I don't buy those items*" which refers to the four items highlighted on the Clubcard statement at page 219 for 17 April 2017. He stated he did not always use a card and sometimes paid in cash. The Claimant questioned how he could prove it if he paid in cash.

26 Mr Stammers tried to improve on his evidence by statements which were not in his mind at the time of the disciplinary hearing. He said in oral evidence that the £3.68 on the Barclaycard statement was likely to be the four items on the Clubcard statement for 17 April 2017. These added up to £4.17 which less 10% is £3.75. Mr Stammers also said that people did not use their Clubcard for purchases of less than £1, because no points were awarded. But from the statement on page 219, it is clear that this is wrong. These points did not mean I treated his evidence as not credible and it was not suggested to me he was lying. There was documentary evidence to corroborate his evidence on the central issues.

27 Mr Stammers adjourned to enable him to carry out some further investigation. By that time he was suspicious because he did not believe the Claimant's version of events added up. This is shown in Mr Stammer's comments recorded on page 125 and explained in his evidence. During the adjournment, Mr Stammers did attend the Limehouse store and viewed the CCTV footage of the incident where cans were taken from the shelf and placed by the Claimant in his bag. Mr Stammers tried but was unable to view the other CCTV footage. Mr Stammers considered what Mr. Arunthavanathan's motives in reporting the incident were and whether they were genuine. From what he saw, he concluded the CCTV corroborated the account given by Mr. Arunthavanathan of the Claimant's actions in taking the cans on 17 April 2017. In particular, he noted (which is evidenced at page 147) that the Claimant concealed both cans in his bag; he was not holding one.

28 Mr Stammers checked the Claimant's Clubcard usage and noted he had not purchased any alcohol or cans on 17 April 2017. He then went to the part of the alcohol aisle from where the CCTV had shown the Claimant taking the cans. At this point, he took a photo of the shelves and produced a list of all the barcodes for goods on the relevant parts of the shelves, as he believed them to be from CCTV. He sent the barcodes to the internal fraud investigation team. From this list, the fraud team were able to produce a list of all cash sales from items from the part of the aisle where the Claimant had taken the

cans. This is because the Claimant had not used his card to buy the items and said he may have used cash. The list from the fraud team is at page 213. This list or statement did not support the Claimant's version of events: two cans were not purchased by cash as part of any transaction.

29 Mr Stammers also considered what expected sales of "Jack Daniels" would be, considering his own store. He found sales at the Limehouse store were broadly in line for that date. Mr Stammers re-convened the disciplinary hearing on 23 June. At the meeting, he showed the Claimant the photo he had taken at the Limehouse store. The Claimant did not respond at the meeting that it was from the wrong aisle, nor that it was inaccurate in respect of the relevant area of the aisle, nor that the aisle's contents had changed since 17 April 2017.

30 Mr Stammers also showed the Claimant the print out of cash sales produced by the fraud team at page 213. He explained what is shown and why he believed it did not match the Claimant's version of events. Then he adjourned to allow the Claimant and his representative time to consider it. After confirming that they were fine to continue, the Claimant maintained that he bought two cans of beer and that Easter was a busy time, meaning that they had more customers paying cash. Mr Stammers also pointed out that expected sales for "Jack Daniels" in his store on a busy day was seven singles. He believed that was consistent with the report at page 213 of cash sales for relevant drinks.

31 Mr Stammers did not interview other staff members working on 17 April 2017. I find the main reason for this was his concern that they may not give impartial evidence. In addition, he did not believe they could recall a five second transaction from that date, when the Claimant's case was that he could not recall what he had bought. Towards the end of that meeting, in response to submissions that the Claimant should have been suspended earlier, Mr Stammers responded as recorded at page 150: "*suspension, you don't suspend until you have evidence they committed the crime, when the colleague came forward we investigated, it wasn't until it was proven that we would suspend*".

32 I find as a fact that this did not show Mr Stammers had pre-determined the outcome of the disciplinary hearing. This was a clumsy form of words by Mr Stammers. What Mr Stammers meant was that, until there was evidence of gross misconduct, the Respondent could not suspend. And it was not until there was evidence from Mr. Arunthavanathan and the CCTV that a case to answer of gross misconduct was shown. I did not find any evidence that Mr Stammers had pre-determined the outcome of the disciplinary hearing. If he had done, I could not see why he had adjourned it and carried out further investigation. In addition, I accepted his oral evidence on this point. Having seen him give evidence, while he may have held suspicions after the first hearing, he had not pre determined his decision.

33 At the conclusion of the hearing, the Claimant was summarily dismissed for gross misconduct. It was conceded by the Claimant that Mr Stammers did have an honest belief that he was guilty of theft. I accepted Mr Stammers evidence on this point at any event. He believed the Claimant was guilty of a serious act of dishonesty, which was gross misconduct. I found that Mr Stammers did have grounds for his belief for the reasons that he gave in evidence. In particular:

33.1 The CCTV footage showed the Claimant putting two cans of alcohol into his bag and the Claimant admitted doing this.

33.2 The evidence of Mr. Arunthavanathan that the Claimant took two cans without paying with concealment.

33.3 The Claimant could not give details of what products he took or how he paid for it. Mr Stammers found it surprising he could not recall these details but that the Claimant could recall paying for them earlier in the day and then placing them back on the shelves and collecting them at the end of the day. Mr Stammers thought the Claimant would remember these details because this purchase was not done in the normal way, because the items were put back on the shelf.

33.4 No transactions on 17 April matched the Claimant's account, given the Clubcard and cash transactions statements at page 219 and 213.

33.5 In twenty-one years working for the Respondent, Mr Stammers had never known any employee to purchase goods and then place them back on the shelf to take later. He found this very unlikely because there could be a risk of the product selling out. His experience was that staff would usually buy goods before their shift or in their lunch hour.

34 The investigation was, however, flawed; it was outside the band of reasonableness. Mr. Stammers did not have reasonable grounds.

35 It was put to Mr Stammers in evidence that the goods on the aisle would have changed between 17 April 2017 and the date he took the photo in June 2017. I accepted Mr Stammers' evidence that if the products had moved, they had moved only slightly because:

35.1. If he could see from the CCTV multipacks at the bottom, cans in the middle, bottles on the top, which is what his photo showed, and the Claimant had only taken two cans.

35.2. He had the same merchandising plan at his store and he knew there would have been no large change to this store. In any event, he had checked all the barcodes in the yellow box at page 221 to allow for any slight movement of product.

36 Mr. Stammers did not accept there would have been more cash sales on 17 April 2017 than those shown at page 213 because at his store, 84% of sales were paid by card.

37 Mr Stammers did consider the question of sanction separate to the findings of fact. He decided to dismiss because there was to his mind, proven theft and concealment. He concluded he could no longer trust the Claimant considering the offence proved. I accept his evidence that he had no satisfaction in dismissing a good team leader.

38 By letter of 23 June 2017, the dismissal of the Claimant was confirmed and he was notified of the right of appeal.

The appeal

39 The Claimant appealed by the grounds set out at page 171. The appeal was heard by Rebecca Dawkins. Notes of the appeal are at page 172-196. The appeal was heard over two dates commencing 15 August 2017 and concluding on 15 September 2017.

40 In the appeal, Ms Dawkins went through each of the grounds of appeal. At the appeal, the Claimant had the documentary evidence shown to him at the disciplinary hearing. He was represented by a trade union representative. Before the second day of the appeal, Ms Dawkins contacted the fraud team to double check an electronic journal report for cash sales again, using the same information that Mr Stammers had provided. This produced the same result in the form of a report in the terms of page 223.

41 It was argued at the appeal, and it was argued before me, that Ms Dawkins also had a closed mind having pre-determined the appeal. I did not accept this. By the time Ms Dawkins made the comment relied upon at page 191 ("*I don't believe that if there was CCTV all day, it would show you paying"*) she had received confirmation from the fraud team of the number of cash sales, in the form of the report, and she had just addressed the Claimant's evidence that he had paid for the items and put them back on the shelf. She did not believe or understand this part of the case. In her experience, she had never heard of such a practice. It was reasonable and fair for the appeal manager to explain to the Claimant at this stage of the hearing, what her concerns were and to get his response.

42 Ms Dawkins completed her rationale in note form at page 206-208. This is further evidence that she did not pre-judge the outcome because she provided detailed reasoning. She considered sanction and decided to uphold the decision to dismiss due to the Claimant's position of trust and her belief that he had not paid for items. Ms Dawkins had listed her ground for upholding the decision.

43 The appeal outcome letter is at page 201. I accept its form is not helpful. Learning points are for the Respondent and are not appropriate in such a letter, but this did not make the process unfair or unreasonable. Indeed the letter did set out why each ground of appeal was either rejected or partially upheld.

44 As for ground 1, Ms Dawkins accepted in evidence that the investigation could have been more thorough. She accepted in evidence that it would have been best practice to interview three staff members working at the date and time when the Claimant was working but she did not believe that this would have changed the outcome given the evidence that the Respondent did have from CCTV, sales data and Clubcard data which she classed as "*hard pieces of evidence"*. Ms Dawkins also relied on the fact the Claimant had produced no evidence to prove purchase of the items.

45 As for ground 2, delay, Ms Dawkins fed back a learning point that there should not have been a delay in dealing with the investigation, which she did not believe would have made any difference to outcome.

46 As for ground 5, Ms Dawkins accepted there was a breach of procedure and that the Claimant was not told the company was moving from the investigation to a disciplinary hearing stage. She concluded this made no difference to the outcome.

As for ground 6, this was also partially upheld because Ms Dawkins acknowledged the Claimant should have been sent the notes of his evidence before the disciplinary hearing. Again, she concluded this had no effect on the outcome because the Claimant had the opportunity to read it before the hearing started.

Findings of fact in respect of contributory fault

47 On the issue of whether the Claimant took two cans of alcohol without paying, I reminded myself that an allegation of theft is a serious allegation of a criminal offence. The standard of proof remains the civil standard but there must be cogent evidence of the offence for that standard to be satisfied.

48 I am satisfied that, on 17 April 2017, the Claimant did take two cans of alcohol without paying. I found that it was likely that the cans were spirit based, probably "Captain Morgan" or "Jack Daniels" as shown in the photograph on page 222. My reasons for these conclusions are as follows:

48.1 There was CCTV evidence that the Claimant placed two cans in his bag at the end of the shift. The Claimant's case originally had been that he put one in the bag and had one in his hand. This is not consistent with the CCTV evidence.

48.2 There was the evidence of Mr. Arunthavanathan which was consistent, on this issue, with the CCTV. There was evidence of concealment by the Claimant.

48.3 There was the evidence of two experienced managers with a combined retail experience of over thirty-five years. They had never heard or seen cases where items purchased were then put back on the shelf. I preferred their clear and consistent evidence on this to the evidence of Jackson Ignatious, which I did not accept; he never mentioned his claim to have seen such activity at two stores during the disciplinary process, which I find inconsistent with his position as the Claimant's representative at those hearings.

48.4 I found the Claimant's account of buying two cans of alcohol and returning them to the shelf to be inherently implausible, in part for the reason given by Mr Stammers, that someone else could have bought them. The additional point I make is that once a person buys two specific items, these become their own property and it is an instinct to keep their own property for their own use.

48.5 The Claimant's explanation for his alleged strange behaviour, in buying then returning to the shelf, changed over time. In his witness statement at paragraph 8, he said he would not leave alcohol in the kitchen as a number of Muslim staff members would be offended. But he never gave that explanation at any point in the disciplinary process. In oral evidence, the Claimant said he did it because he was very busy on the shift in question, but he had not offered this explanation in the investigation meeting nor in the disciplinary hearing. I rejected both these explanations as not credible.

48.6 The photograph taken by Mr Stammers was consistent with what he saw on CCTV. Given the evidence from the Clubcard statement of the sale on 19 April 2017, it is likely that the Claimant took two cans of "Captain Morgan" rum with coke, but I doubt the exact product matters. The point is that none of the prices on the shelves of two cans would add up to £3.68, the amount on the Barclaycard statement.

48.7 There was no evidence that the Claimant had paid for the two cans. I would have expected most purchases by a Tesco employee to be made with a Clubcard given the 10% discount. But the Clubcard statement and the fraud team report demonstrate it was most unlikely that the Claimant had paid for the goods.

48.8 Finally, I found the Claimant's evidence that he could not recall how or when he purchased the cans on 17 April 2017, and that he could not recall what he bought, not to be credible. I accepted the evidence of Mr Stammers about this for the reasons he gave.

The Law

49 A potentially fair reason is one which relates to conduct: see section 98(2)(b) Employment Rights Act 1996 ("ERA").

50 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 could justify a dismissal even for a first offence.

51 I directed myself to section 98 (4) ERA which provides as follows:
"*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 reasons shown by the employer)*
(a) depends on whether in the circumstances including the size and administrative resources of the employers 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.

52 The burden of proof on the issue of fairness is neutral in conduct cases, in considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

51.1. did the employer have an honest belief that the employee was guilty of misconduct?

51.2. was that belief based on reasonable grounds; and

51.3. was that belief formed on those grounds after such investigation as was reasonable in the circumstances? *(*see *BHS -v- Burchell* (1980) ICR 303*)*.

53 I directed myself to the principles which I must apply when applying Section 98(4) ERA are:

53.1 the Tribunal must not substitute its own view for that of the employer as to what was the right cause to adopt for that employer;

53.2 on the issue of liability the Tribunal must confine itself to the facts found by the employer at the time of the dismissal;

52.4 the Tribunal should ask did the employers action fall within the band of reasonable responses open to an employer in those circumstances. (see *Foley –v- Post Office* [2000] IRLR 3*).*

54 I reminded myself 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 *Sainbury's Plc –v- Hitt* [2003] ICR 111*).* 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.

55 I was referred to *Lloyds Bank –v- Fuller* [1991] IRLR 336*, Paragraph* 27 (a passage used by the Industrial Tribunal in that case) and *West Midlands Co-Operative Society v Tipton*. I directed myself that whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. This is part of the ratio in *Fuller*. In the more recent case of *South Maudsley NHS Foundation Trust –v- Balogan* UKEAT0212/14*,* the EAT held at paragraph 9:
"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other.

56 Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. Each case turns on its own facts as is noted in the case of *Fuller.* In *A v B* [2003] IRLR 405, the EAT, with Mr Justice Elias presiding, held that the relevant circumstances include the gravity of the charge and their potential effect on the employee. At paragraph 59, he explained:
"*A serious allegation of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is being conducted by laymen and not lawyers. Of course even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against him*."

Applying section 123(1) ERA 1996

57 If a Tribunal finds a dismissal unfair on procedural grounds but the employer can show that it might have dismissed the employee if a fair procedure had been followed, the Tribunal may make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed in any event (see *Polkey-v-Dayton Services* [1988] ICR 442*).*

Contributory fault

58 Section 123(6) ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by the action of the Claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

59 Section 122(2) ERA provides that the Tribunal must reduce the Basic award where it concludes that the conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the Basic award.

60 I reminded myself that I should consider the deduction made under section 123(1) if considering whether it was just and equitable to make a deduction under section 123(6), and if so, what deduction.

Submissions

61 I heard oral submissions. I doubt if any more could have been said on behalf of either party. The fact that I do not deal with a particular submission is not evidence that I have not taken it into account. I have taken into account all the submissions.

Conclusions

62 Applying my findings of fact to the issues agreed with the parties and applying the law set out above, I have reached the following conclusions.

Issue 1: what was the principal reason for dismissal?

63 The principal reason for dismissal was a reason relating to the conduct of the employee, namely the allegation of theft which Mr Stammers found proved. There was no real dispute on this.

Issue 2: was the decision to dismiss procedurally fair?

64 Despite considering Section 98(4) ERA, I concluded that the decision to dismiss was procedurally unfair. I can explain my reasons by going through the particulars of unfairness listed in the list of issues.

Issues 2.1, 2.7 and 2.11

65 The decision to dismiss was not based only on the evidence of a fellow employee

with a grudge. Firstly, there was no real evidence that NA held a grudge against the Claimant, only that he had a motive to hold one. There was no evidence he was punished following the Claimant's earlier complaint in the champagne incident.

66 The decision to dismiss was based on the evidence collected by Mr Stammers, including viewing the CCTV, the relevant aisle, the Clubcard report and the cash sales report produced by the fraud team. Mr Stammers did not take any proceedings on the rest of NA's allegations. He did not conclude that they were true and as far as can be seen from the disciplinary hearing and contemporaneous evidence, he did not take them into account at all. He focused on the allegation of theft corroborated as it was by CCTV in the first instance. This was a fair way to deal with NA's evidence and there was other evidence.

Issues 2.2, 2.3 and 2.6

67 In this case, there are a number of procedural defects which distinguish it from other cases, even though the statutory question under section 98(4) ERA is still the test to be applied. Delaying the investigation and the conclusion of a disciplinary process may often not prevent a dismissal being fair; the question is really what happens during the delay and what prejudice does the delay bring about or potentially bring about.

68 In this case there was potential prejudice to the Claimant. Here, he was facing a charge that he had committed theft, a criminal offence. The investigator was required to look for potentially exculpatory evidence. I have considered *A v B* which points to the need for more careful investigation in this type of misconduct case. In particular, given the resources of this employer, this was not just feasible but part of its procedure as Ms Dawkins recognised.

69 The investigation here was outside the band of reasonableness for several reasons. First, this case involved a single question of fact. It was not a complex investigation. Had the investigation been carried out under the terms of its policy (within 14 days), the staff working with the Claimant could have been interviewed. They may have recalled events on 17 April 2017. Mr Stammers said he did not interview them partly because they would not recall a transaction so long ago. This rather proves the point. Moreover, Ms Dawkins admitted it was best practice for them to be interviewed. Given the offence of theft was alleged, this was a case where the Respondent's best practice was required.

70 Second, by the time of the investigation and the disciplinary, all the other CCTV for the day of that incident had been deleted. This was potentially exculpatory evidence and it would not have been deleted but for the breach of procedure and the delay in the investigation. For these reasons, I agree with Ms May, the delay and its consequences did compromise the fairness of the procedure and the dismissal.

Issue 2.5

71 Mr McCabe admitted that it was reprehensible that the Claimant was not given the evidence before the disciplinary hearing but said that it had no impact on the second part of the disciplinary hearing and no real impact in this case, on the issue whether the Respondent believed his story. In my judgement, this was a serious breach in procedure which combined with the above made this dismissal unfair. The Claimant could not have known the case against him before that hearing without the details of the witness evidence

(even if not the name and the whole statement), notes of his interview and the Clubcard statement obtained by Mr Stammers. In addition, prior to the second part of the hearing, he was not sent the full report from the electronic journal using cash sales of certain items, nor was he sent the photo. There was no reason given for these failings, which were a clear breach of Section 9 of the Respondent's disciplinary procedure and a clear breach of the ACAS Code such is at paragraph 9. Whether or not this had in the event an impact on the outcome, this was unfair to the Claimant. He was denied the opportunity before the hearing to consider the documents and maybe put forward a different response. In addition, the original allegation was that he had stolen two cans of beer. This allegation was never amended even if the Claimant could have been in no doubt that he was alleged to have taken cans of spirits during the second part of the disciplinary hearing.

Issue 2.4

72 The electronic journal reports were obtained from the fraud team for a specific purpose. It was not unreasonable for the Respondent not to provide a report of all transactions on the day.

Issue 2.8

73 Ms May conceded that both Mr Stammers and Ms Dawkins held an honest belief in the guilt of the Claimant as I have explained in the findings of fact. Dismissal was not a pre-determined outcome. The reason why the Claimant was not suspended until 19 May 2017 was due to the lack of a store manager. It was an oversight that the Claimant continued to run the store. This seems clear from Mr Stammers' evidence and the documentary evidence.

Issues 2.9 and 2.10

74 I accepted the Respondent's evidence that it did take into account mitigation but decided to dismiss for the reasons Mr Stammers gave. Given the findings of gross misconduct and the Claimant's denial, an account which Mr Stammers rejected, it is apparent why no alternatives to dismissal are mentioned in the dismissal letter and the appeal letter. Both Mr Stammers and Ms Dawkins concluded the Claimant could not be trusted. In those circumstances, the decision to dismiss appeared to be within the band of reasonableness open to them, subject to the procedural failings identified above.

Issue 4 – Whether any Polkey deduction should be made

75 I found that the officers in this case had an honest belief based on reasonable grounds in the guilt of the Claimant, despite the procedural failings. Mr Stammers had evidence before him to support those grounds. I concluded on the evidence before me the procedural breaches had no effect on the outcome of this case, which is really the point Mr McCabe was making. A 100% Polkey deduction is appropriate for both Compensatory and Basic awards. My reasons are as follows:

75.1 In respect as whether there was evidence that the Claimant had paid for the items, the lack of CCTV from the whole day and the lack of interviews with those working when the Claimant was working was addressed by Mr Stammers obtaining the report from the fraud team showing relevant cash sales and obtaining his expected sales from his store.

75.2. The Claimant produced no evidence at the disciplinary or the appeal or here that he had paid for two cans of alcohol from the area from which they were taken. The Barclaycard statement was for a sum which did not match the price of any two cans shown in the photo at page 222.

75.3 The Claimant did not call a witness working in the Limehouse store in April 2017, either to the disciplinary or to the Tribunal to support his claim that he sometimes paid for items and put them back, or this was a practice that did occur.

75.4. The failure to give him the evidence in advance made no difference in this case. The Claimant had the opportunity to consider it at the disciplinary hearing and to bring any rebuttal evidence to the adjourned part of the disciplinary hearing.

Issue 5 – Contributory Fault

76 Given the findings of facts set out above, it is just and equitable to reduce both the Basic and the Compensatory awards by 100%. I have considered what is just given the deduction in issue 4 above. This is a case where I found proven dishonesty in a retail setting which the Claimant denied at every stage. In my judgment, a deduction of 100% would be just and equitable.

Summary

77 The judgment I make is, therefore, that it is declared that the complaint of unfair dismissal is well-founded and, secondly, the Basic and Compensatory awards are reduced by 100%. The claim for compensation is dismissed.

Employment Judge Ross

5 April 2018