EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Bikkannavar	**v**	(1) Ladbrokes Betting and Gaming Ltd (2) Sarah Wenman (3) Ladbrokes Coral Group Plc

Heard at: Watford **On:** 11, 12, 13, 16, 17 and 18 July 2018

Before: Employment Judge Smail

Members: Mrs G Bhatt MBE and Ms S Hamill

Appearances
For the Claimant: In person.
For the Respondent: Mr Richard Oulton, Counsel.

JUDGMENT

1. The Claimant's claim of unauthorised deductions from earnings is well-founded. He is owed salary in the sum of £848.25 between 21 November 2016 and 3 December 2016. This sum must be paid by the Third Respondent within 14 days, if not already paid.

2. All other claims made by the Claimant fail and are dismissed.

REASONS

Background

1. By a claim form presented on 27 April 2017 the claimant claimed unfair dismissal, race discrimination, owed monies and a notice payment. He was employed by Ladbrokes from 14 July 2003 until, we find, 3 December 2016 when he received a letter sent on behalf of the area manager Helen Askew confirming his dismissal without notice for gross misconduct. Initially he was employed as a shop manager. He became a marketplace manager (MPM) on 10 February 2013. He was in charge of five betting shops in Harrow and he reported to the area manager who in turn reported to the regional manager. There were at that time 10 regions.

Sarah Wenman was the regional manager for the London region. There were six areas in her region. The area manager for the area including Harrow was for the most part at least latterly at the relevant time Nick Comley. Mark Terstyanszky took over in October 2016. The scheduling of staff it seems was the responsibility of the MPM.

2. He was charged, first, with a serious breach of the company's policies, rules or procedures, wilfully or negligently, by allowing the Working Time Regulations 1998 to be breached in his market place. Secondly, he was charged with fraudulently misrepresenting colleagues' hours in order to conceal such breaches.

3. Helen Askew dismissed him following a disciplinary hearing on 21 November 2016 on the basis that he admitted to knowingly breaching the working time regulations on numerous separate occasions. She did not find herself that he had fraudulently misrepresented colleagues' hours and she stated that this aspect of the allegation had not been taken into account by her in her overall decision.

4. On appeal to Sarah Wenman, the decision to dismiss was confirmed following an appeal hearing on 28 December 2016. The decision was confirmed in a letter dated 24 February 2017. Sarah Wenman found that the claimant had deliberately scheduled colleagues to finish earlier than they in fact did finish to avoid the planned breaches being detected. She further found that despite knowing there would be a breach of the regulations, the claimant chose not to call an area manager for guidance. She believed he then altered the colleagues' schedules the following week to reduce the chances of those actions being discovered whilst still paying the colleague correctly. These constituted acts of gross misconduct, she believed.

The Issues

5. The issues that we are to address were identified at a preliminary hearing before Employment Judge Wyeth on 12 March 2018. He set out the following issues:-

    Unfair dismissal

    5.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason under s.98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

    5.2 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

(1) The claimant alleges that other market place managers were acting in the same way and committing the same breaches.

(2) The claimant alleges that the first respondent openly permitted staff to breach the WTR between Saturdays and Sundays.

5.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer? It is agreed that the first respondent offered the claimant the alternative sanction of demotion, but the claimant refused.

5.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

5.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? If so, with what percentage degree of probability and when?

5.6 Did the respondent breach the ACAS code and if so what uplift should be applied to any compensation, if the dismissal was unfair? The claimant alleges that the appeal officer delayed in investigating and did not properly investigate.

<u>Harassment related to race under s.26 of the Equality Act 2010</u>

5.7 Did the second respondent engage in unwanted conduct by unnecessarily delaying the appeal investigation and not allowing the three area managers namely, Mark Terstyanszky, Matthew Czaja and Helen Askew to investigate whether the market place manager comparators engaged in similar conduct?

5.8 Was the conduct related to the claimant's protected characteristic? The claimant relies on the fact that he is of Asian Indian origin.

5.9 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.10 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.11 In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to be considered as having that effect.

Direct discrimination because of race under s.13 of the Equality Act 2010

5.12 Has the first respondent and/or second respondent subjected the claimant to the following treatment falling within the Equality Act 2010, namely:

(1) His dismissal in November/December 2016;

(2) The second respondent's alleged wilful delay of the appeal from 28 December 2016 to 24 March 2017.

5.13 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators: Kamilla Norwind; Agnieszka Kapuscinska and Christopher Redford all of whom also were market place managers at the material time.

5.14 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

5.15 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time/limitation issues

5.16 The respondent took a time limit issue on unfair dismissal, and we find that this does not arise because we agree with the claimant that the effective date of termination was 3 December 2016.

Breach of contract

5.17 There was also a breach of contract claim, the respondent accepts that the claimant was dismissed without notice pay. Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct? This requires the respondent to prove on the balance of probabilities the claimant had actually committed the gross misconduct.

The law

Unfair dismissal

6. The tribunal has had regard to s.98 of the Employment Rights Act 1996. By s.98(1) it is for the employer to show the reason or if more than one, the principle reason for the dismissal a reason relating to the conduct of an employee is a potentially fair reason.

7. By s.98(4) where the employer has fulfilled the requirements of sub-section 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 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.

8. This has been interpreted by the seminal case of British Home Stores v Burchell [1978] IRLR 379, EAT, as involving the following questions

   (a) Was there a genuine belief in misconduct?

   (b) Were there reasonable grounds for that belief?

   (c) Was there a fair investigation and procedure?

   (d) Was dismissal a reasonable sanction open to a reasonable employer?

9. We have reminded ourselves of the guidance in Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23, CA. That at all stages of the enquiry the tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer bearing in mind there may be a band of reasonable responses. This develops the guidance given in Iceland Frozen Food Ltd v Jones [1982] IRLR 439, EAT, to the effect that a starting point should always be the words of s.98(4) themselves, and that in applying this section an employment tribunal must consider the reasonableness of the employers conduct not simply whether they the Employment Tribunal consider dismissal to be fair in judging the reasonableness of the employer's conduct. An Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many though not all cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view whilst another quite reasonably another. The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal is outside the band it is unfair.

Wrongful dismissal

10. That is to say dismissal without notice. An employee is entitled to notice of dismissal and compensation in lieu unless as a matter of fact as

determined objectively by the tribunal on the balance of probability, the burden on the employer, the employee committed a repudiatory breach of contract entitling the employer to dismiss without notice by way of acceptance of the breach.

Race discrimination

11. Race is a protected characteristic under s.9 of the Equality Act 2010. By sub-section 1, race includes; colour, nationality and ethnic or national origin.

Direct discrimination

12. Direct discrimination is defined by s.13 of the 2010 Act. An employer discriminates against another if because of a protected characteristic the employer treats the employee less favourably than the employer treats or would treat others.

Harassment

13. Harassment is defined by s.26 of the 2010 Act. An employer harasses an employee if the employer engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

Burden of proof

14. This is important in discrimination cases. By s.136(2) of the 2010 Act if there are facts from which the court could decide in the absence of any other explanation that the employer had contravened the provision concerned the court must hold that the contravention occurred. By sub-section 3, sub-section 2 does not apply if the employer shows that the employer did not contravene the provision. What this means is that the employee must establish facts which amount to a prima facie case of discrimination, if the employee does that the burden transfers to the employer to show that discrimination played no role whatsoever in the relevant decision making. See Igen Ltd v Wong [2005] IRLR 258, CA.

Findings of fact

The corporate structure

15. The first respondent was merged for company law purposes into the third respondent, as we understand it, from 1 November 2016 – either that or there was a transfer undertakings between the two. The operation changed on 1 January 2017 and new rules took effect, as we find, from April 2017. The correct corporate respondent for all legal obligations should liability be established must be the third respondent. Nonetheless

we refer to the first respondent to reflect what happened as a matter of chronological and historical fact, but liability will transfer to the third respondent.

16. If the second respondent, Ms Wenman is liable for any racial discrimination, she could be in theory jointly and severally liable with the third respondent to the extent of her liability. The second respondent was made redundant when the number of regions was reduced from 10 to 8 in December 2017. The second respondent has nonetheless given evidence voluntarily to us.

The Working Time obligations

17. By regulation 10 of the Working Time Regulations 1998 a worker is entitled to a rest period of not less than 11 consecutive hours in each twenty four hour period during which he works for his employer.

18. Ladbrokes had a policy designed to comply with these regulations. The policy was contained in the managers guide to the Kronos software which controlled the scheduling of employees. All MPMs were trained on this as was the claimant, firstly in July 2015 and by way of refresher training in April (2016). Extracts from the policy and the guidance are as follows: under the heading 'Kronos, effective scheduling and exceptions-management introduction' it is provided that:

> "As a market place manager you are responsible for creating efficient schedules for your market place shops and for managing your colleagues' timecards to make sure they reflect the time they actually worked/not worked. From October 2015 timecards will drive the pay for our shop-based colleagues. By delivering your role around scheduling, you are making sure that your market place team - the same team that you want to perform to a high standard every day - are at work and deliver what needs to be delivered and are paid promptly and accurately."

19. Under section 1 'planning your schedules' it is provided that:

> "All colleagues' schedules are to be entered fully into Kronos. Below you will find the performance criteria of what is expected of you when it comes to planning your market place schedules.' Those criteria included "complies with legislation and Ladbrokes' policy regarding working hours. Colleagues' work schedules do not breach the working time directive."

20. Under a section dealing with complying with legislation and Ladbrokes' policies, more information is given about the working time directive and the regulations. The basic rights and protections that the MPM is to know about are listed as follows:

- A limit of an average of 48 hours a week over a rolling 17 week period.
- A right to 11 hours rest a day between periods of work.
- A right to a day off each week.

- A right to an in-work rest break of at least 20 minutes if the work day is longer than 6 hours.

21. There is a box on that page headed 'What this means for you when planning schedules'. One of the elements is a colleague closing a shop at 10.10pm must not be scheduled into work on the following day until 9.10am at the earliest.

22. A section on entering schedules states that:

> "One of the major advantages of Kronos is the transparency it creates for you and your shop colleagues. It is very important that schedules are entered accurately into Kronos so that your shop colleagues are able to review and agree them."

23. They are then provided with performance criteria for entering schedules, one of these criteria is:

> "Enter full schedules for every colleague into Kronos (Monday/Tuesday) at least four weeks' in advance."

24. There is something said to be the 'golden rule of scheduling', which is that schedules can only be amended to reflect future changes for example when the shift is for a day later in the week or a future week, or that shift is for a session later in the day; and secondly, schedules must never be amended to reflect a past change of a shift that has already happened, eg previous day or days or a shift that has already started, i.e. earlier in the day.

25. Each area manager had an automatic report on schedule working time breaches prepared twice a week on Monday's and Wednesdays for the following week. This was explained to us by Helen Askew and we accept it from her. These reports identify future planned working times breaches which could then be rectified. It worked in advance only. We accept from Helen Askew that the practice was for the area manager to flag up the problems with the MPM and then trust the MPM to sort it out. So, where the schedule revealed clashes, that it to say a worker was not given 11 hours rest period between shifts, the software would flag it up and the area manager would communicate that to the MPM and expect the MPM to resolve it. The software ran from Sunday to Saturday, a point to which we return later.

<u>The discovery of scheduling irregularity</u>

26. The police had complained to Ladbrokes about a rude member of staff in the claimant's market place. Sarah Wenman as regional manager examined Kronos to identify the relevant colleague. She noted that there were many discrepancies between the Kronos schedule and the shops' closing time. That is to say, the schedule suggested that the shop would close earlier because of the scheduled working hours of the employees, earlier than what was understood to be the closing time in general. So, for example, it was understood that the shop would close at 10pm, but cover

was only scheduled up to say 9pm. She passed the matter onto Mark Terstyanszky, the claimant's area manager, to investigate.

27. Ms Wenman claims to have played no further role in the matter until the appeal hearing. We accept that as certainly there is no evidence to contradict it.

28. On 20 October 2016, Mr Terstyanszky interviewed the claimant. The claimant says he did not have notice of this interview. He was asked how he would describe his knowledge of company policy and procedures and the claimant answered; "quite confident". He was asked whether he was aware of the company's working time directive policy; the claimant said that he was fully aware and had broken it under as he put it "unmanageable circumstances". He was asked whether he was aware that he required authorisation from a regional manager to breach, he said "yes he was fully aware". He was asked, are you aware that falsifying company records including Kronos Schedules and timekeeping data was an act of gross misconduct, the claimant replied; "that yes he was aware of the detail of scheduling that is relied upon by the respondent". It was then put to him there were in fact six examples:

    (1) So that David McKeon was scheduled to work 5pm to 8.40pm on 7 October 2016 a Friday, but actually worked until 10.08pm.

    (2) Limbu Abhishek was scheduled to work 6.40am to 7.40pm on 18 October 2016 a Tuesday and actually worked until 10.17pm.

    (3) Denise Wood was scheduled to work 8.40am to 9.40pm on 17 October 2016 and she actually worked until 10.06pm.

    (4) Kalpesh Mauji was scheduled to work 8.10am to 7.40pm on 12 October 2016 and actually worked until 10.10pm.

    (5) Rudra Rai was scheduled to work 6.40am to 7.40pm on 6 October 2016 and actually worked until 10.20pm.

    (6) Kamali James was scheduled for the 31st and inputted as 9.10 to 7.40pm on 27 August and amended on 31 August to 10.10pm.

29. The point is that all these colleagues were scheduled to open the shop the following day at the opening time meaning that there would have been a breach of the working time regulations.

30. The claimant could not give an example of seeking authorisation for this, he said he was not hiding anything, he was just trying to keep his shops open.

31. The claimant was then suspended and he was then invited to a further interview with the area manager, Matthew Czaja, an area manager from another area. This took place on 3 November 2016 and was a very

important interview, the claimant being fully on notice that these matters were being investigated by the respondent.

The Claimant's admissions in interview

32. The claimant alleged that there was significant pressure to keep shops open against the background of under staffing. He maintained that he would hope to find a manager to attend to close the shop between 7.40pm and 10.00pm as overtime. Where that was not possible, he would have to extend the hours of the manager on site giving rise to WTR problems where that same manager was scheduled to open the following day for example at 8.00am attending at 7.40am to open the shop. The claimant suggested that area managers would tend not to take calls towards the end of the day to give authorisation or guidance on early closure or on providing cover where possible. He suggested that other MPMs did this and an audit of Kronos would show that.

33. He pointed out the Saturday and Sunday loophole which is that because the software works Sunday to Saturday the software does not pick up WTR breaches Saturday going into Sunday. He suggested every staffing manager had committed these breaches over the years and no one had previously suggested this was fraudulent as being suggested against him. He stated that there was no financial gain to him in any of this. He suggested that a slap on the wrist in the form of a warning would be the appropriate sanction not dismissal for fraud for a thirteen year old servant such as him with a good record. The practice he said was widespread and voluntarily agreed by colleagues who were paid the extra hours when they stayed on the extra time until closing. He accepted he back-dated the schedules so timecards and schedules would tally and facilitate payment. He was asked about the purpose of the regulations, he understood they were about rest but he did not believe his workers were performing safety-critical roles where rest was needed to avoid endangering others.

34. As to the duration of the practice: he accepted that it had been going on roughly for six months in the form of extending at least for the last hour (until 10pm) where there was no cover. He acknowledged doing this more than twice a week because two of his shops closed at 10.00pm and opened at 7.00am, meaning staff had to attend at 6.40am in the morning, so if they were working until 10.10pm, it taking 10 minutes to close and starting the following day at 6.40am there was a rest period of only 8 hours 30 minutes, that it to say some 2 hours and 30 minutes short. At one point he sought to enter the opening time in the schedules at apparently 9.10am, but was told he could not schedule shops deliberately so as to give the impression they were opening late. He was forced then to keep the opening times on time which would be 6.40am for 7.00am in the case of the shop opening at 7.00am and then to schedule the closing time for those particular workers at 7.40pm, hoping for another manager to cover 7.40pm to 10.00pm as overtime. The claimant would schedule 2-4 weeks in advance as he was supposed to do under Kronos rules. He was asked how many times did the help come to cover, that is to say, how many

times would a manager attend by way of overtime and close the shop? We observe in passing it had to be a manager rather than an ordinary employee to close the shop. The claimant gave the answer, "None". This meant he regularly extended the times in breach of working time rules.

35. The Claimant suggested that his market place was more than 100 hours short of manager time in terms of scheduling availability. He said that line management - the area and regional managers - would refuse to authorise early closure. He was asked whether he could name any area manager in particular. He said he could not remember. He was asked for examples because Matthew Czaja could not recall himself being asked. One example was given when a shop was closed early given that there was that one example the claimant was asked why he could not close shops early more generally. He suggested that the area managers would not take the calls towards the end of the shifts and he had no authority to close early, forcing the claimant to extend the hours of the then working manager leading to subsequent WTR breaches. The claimant was asked whether he scheduled this way for shops other than South Harrow where we understand there are two shops. He answered, all the shops in Kamali's Southall and Wembley, and of his own shops possibly all of them. It is significant that he mentioned Kamali's Southall and Wembley; these are the shops of one of his comparator MPM's. It seems that he was assuming scheduling responsibility for these areas which is relevant in the context of his comparator cases, a point made by counsel for the respondents in submissions. But leaving that point aside for the moment, the claimant confirmed that on all these occasions colleagues voluntarily stayed on as he could not find a replacement manager at the last moment. It was correct he said that he could not organise any such cover at all. He maintained that he had seen other MPMs schedule in the same way, but could not remember who, but he had seen the Saturday/Sunday loophole. He did not report the matter. He suggested the area manager Mr Alistair Tiernan was aware because most of the breaches happened during his time. The claimant scheduled in this way when Nick Comley was the area manager. He accepted that he had received emails from Nick Comley about gaps in the Schedule because it is part of the area managers role to conduct future monitoring of the position. He alleged that he had informed Nick Comley about breaches but could not remember on how many times. The claimant accepted he amended the schedules at the earliest opportunity or on Monday before the cards were signed off for him for payment. This was to ensure that the pay for the managers was accurate. He accepted he might have forgotten to inform Nick Comley of every single breach, but he expected the area manager to spot the exceptions in the timecards in any event. The claimant did not accept fraud.

36. In our judgment and this appears to be the approach of both the dismissing and the appeal manager also, this represented a comprehensive account of the way in which the claimant had managed the scheduling. In contrast perhaps to the first interview, he was fully on notice at the point of the Czaja interview as to what the respondent was

investigating, and he would have had a considered position in respect of this. What is certainly significant amongst a number of other things, is that there was no occasion on which a manager came to work overtime to close, and that being the case, it is to be inferred that there could have been no occasion when the claimant planned that realistically. It seems therefore that he planned on each and every occasion what amounted to a breach of the Working Time Regulations.

The Nick Comley interview

37. Nick Comley the area manager was asked a series of questions on 11 November 2016 as part of the investigation. Again, this is an important source of information, Mr Comley was asked whether he authorised any WTD breaches, he replied that no he had not. It was made clear to the team, he said, that there could be no breaches of the WTD at any point. This was briefed in area team meetings and highlighted as exceptions for action through weekly schedule reviews. He exhibited reviews which he claimed gave a consistent message that WTD breaches were not condoned. He was asked whether the claimant had ever reported any previous WTD breaches to him after they had already taken place, and the answer was “Never”. The clear message to the team is that WTD could not be breached at any time. Mr Comley stated he would have investigated any breaches brought to his attention, but none ever were. It was put to Mr Comley that the claimant reported that he would conduct a schedule review and point out a number of gaps. Had he ever done a secondary check to go back and check if the gaps were covered? Mr Comley said follow up spot checks were completed exceptionally; the expectation was that the market place manager would action the requested changes without the need for further audit. He was asked if the claimant had ever made him aware that scheduling issues and pressures of work might lead to him scheduling in breach of the WTD, Mr Comley replied “No”. He categorically denied any such allegations and added that the claimant had one of the more established market places, that is to say established in the sense of the number of employees and managers, and so he did not understand the idea or where that notion would have come from.

38. He was asked whether he had ever communicated with the claimant about issues of the Working Time Directive or to other MPMs. Mr Comley replied there was mention of the WTD requirement as part of the marketplace manager training course in April 2016. This was delivered in area C which is the relevant area on the 26 April 2016 and the claimant was in attendance. The course ran over a period of three hours and slides were covered word for word; the rest was done on an ad hoc basis either to individual queries by MPMs or through feedback on schedule reviews. In addition, Mr Comley claimed he made it clear to his team that shops could not plan to open late and close early, they had to schedule a full day and escalate any gaps as needed. Mr Comley provided evidence to that effect.

The disciplinary hearing

39. The disciplinary hearing took place on 21 November 2016. The claimant re-iterated much of what he said in the very full interview discussion with Mr Czaja. Ms Askew found that the claimant had knowingly breached the regulations on numerous separate occasions. The claimant knew the regulations and he agreed that he had breached them. He was unsure whether he had called an area manager or a duty area manager to speak to them to avoid a breach. He was, in her judgment, well conversant with the process and the role of duty area managers. There was one example where he called Matthew Czaja which had led to an authorised early closure. Ms Askew found the matter serious enough to dismiss but because of his length of service and record she offered a demotion; and gave him four days to think about it. The claimant telephoned her on 25 November 2016 to say that he was not interested in the demotion.

40. We find that Helen Askew made it clear on 21 November 2016 that if demotion was not accepted dismissal would follow. However, the dismissal was confirmed by the letter dated 2 December 2016 and received by the claimant on 3 December 2016. That was his effective date of termination and we reject the respondents' case that the dismissal was effective from 25 November 2016. It was that letter which brought the relationship to an end. Helen Askew found as gross misconduct. In the course of the disciplinary hearing the claimant did say that if he was given 45 minutes he could demonstrate breaches by other MPMs. The claimant makes criticism of the level of investigation of other MPMs. By this time Mr Terstyanszky and Mr Czaja had made some enquiry of the practice of other MPMs and this had not revealed a scheduling practice with the modus operandi and frequency of the claimant.

The appeal

41. The claimant appealed by letter dated 12 December 2016. Of particular note is that he made the following points about other MPMs:

> "I have proof and dates of other colleagues of mine i.e Jasminder, Kamilla, Agnes, Chandra and also many MPM's in neighbouring RAD's are breaking the working time directive in many ways.
>
> - They are approving time cards of employees showing working without 11 hour break between schedules. (Whereas I changed the whole schedule as employees were getting underpaid if I only approved overtime in timecards, as others.)
>
> - They are putting employees to close on Saturday and open on Sunday without 11 hour break on schedule, which is not picked up by Kronos as an exception as it is start of a different week. Is that a breach or not? (the claimant asked).

- All MPM's are giving only one or two hour break to managers working 13 hour plus shifts, thus breaking working time directive of rest over 6 hour continuous working by a manager as managers start work at 6.40 or 8.40 to 22.10 but they get a cashier for 1 or 2 hour in the middle at odd times as we don't have staff to cover. Which is reflected in kronos cashier schedules."

42. The claimant provided 15 screen shots showing 13 examples of Saturday/Sunday breaches and two of week days in support. He alleged that he was being treated differently and being discriminated against as a result.

43. He asked, how could he be dismissed for gross misconduct if demotion had been offered? How in those circumstances could it be said that there had been a complete loss of trust and confidence between him and the company.

44. Further, he alleged that he had offered to prove on Kronos the extent of colleagues' breaches, but had been denied the chance.

45. The appeal hearing was on the 28 December 2016. The outcome was given on the 24 February 2017. Letters had been sent in the interim, on 12 January 2017 and 6 February 2017 to the effect that Ms Wenman's investigations were ongoing. There was no deliberate delay on the part of Ms Wenman in reaching her appeal outcome. There were matters for her to look at. Criticism was made of her by the claimant for running down his three-month time limit for making a claim to the tribunal, he suggested that was Ms Wenman's motive. That was not her motive, she did have things to look at, she had a number of matters to look at in the course of her investigations and in the background was the fact that Ladbrokes was merging into Coral which also was taking her time.

46. Ms Wenman's decision was much fuller than that of Ms Askew. Ms Wenman confirmed that once raised to an area manager during the investigation, the claimant's concerns were reviewed through the WTD report on LRS, which is the Ladbrokes system. No breaches were discovered. This report was run proactively on a weekly basis by the business report manager and ran through Sunday to Saturday, that is a full schedule week. Unfortunately, this did not pick up the items from Saturday night to Sunday morning. That was explained to the claimant by Helen Askew in their meeting. Whilst she was unable to discuss individual cases, she confirmed that this issue had been managed following internal review. She disagreed with the claimant's comments that he had been treated in an unfair or inconsistent manner. Her point was that the details in the claimant's case were very different to those supplied. He had knowingly breached the WTD on numerous occasions and the manner in which he had recorded colleagues' schedules had brought into question whether that was done fraudulently. As part of her investigation into the point, she had reviewed similar cases from this region and others. There was no evidence to suggest that the handling of the claimant's case was in

any way at odds with other cases of its kind although of course each case must be judged in its own individual facts, she said.

47. As discussed in their meeting, where appropriate, demotion would be offered as a reasonable alternative to dismissal. A customer service manager role would have been a viable option as the claimant would not have had to have had any scheduling or Kronos management responsibilities and therefore would not have had the opportunity to repeat the misconduct. Within their meeting the claimant suggested that Mr Tiernan former area manager had informed him that where breaches were unavoidable he should be informed the following day. The claimant stated that he felt this was still the approach being applied and that he had only ever breached the procedure because he was not allowed to close shops early.

48. Within the investigation pack a statement had been provided by Nick Comley which contradicted that view. Mr Comley referenced both training sessions and weekly scheduling audits in which it was made clear that breaches were not permitted at any time, and that an area manager should be contacted if cover could not be sourced to discuss the next steps. In addition, there was also reference to a telephone conversation he had with Mr Czaja the area manager following which there was authorisation to close the shop early to avoid a breach. Ms Wenman's conclusion on this matter was that her review found there was clear evidence that the claimant was aware of the business' stance and his responsibilities as a market place manager were to ensure that breaches did not occur. She rejected his claims that this was managed inconsistently and noted he was referencing the alleged practices of an area manager, that is to say Mr Tiernan, who had not worked in the business since March 2016.

49. She also noted, despite his claim as to what was the correct process, he did not contact an area manager at any time to discuss the breaches in question. Ms Wenman reviewed the overall decision made by Helen Askew and she revisited the issue of his dishonesty by describing the claimant's modus operandi. She did not support Ms Askew's assessment of this, she noted that the claimant recorded in Kronos on multiple occasions for colleagues to finish prior to the shop's advertised closing time. Within the investigation the claimant stated that he had planned to get another colleague to come and cover the final hour but there was no evidence to support this. On each occasion the colleague scheduled to work ended up staying until closing time and opened the next day, which caused the breach. He did not contact an area manager as required despite being aware that he was supposed to do so. He had stated that he was busy and had forgotten. She did not accept this mitigation given the number of times it occurred. She also did not accept his mitigation that he only did this in emergencies. In her judgment he had already pre-planned to have no cover for the final hour or so of trading, so knew of the issue long before it occurred. He then amended the colleagues' schedules to reflect the actual hours worked the following week just before the sign

off period closed rather than at the time as per process. He had stated that he must have been busy and forgotten to change them earlier, she did not accept that explanation as on each occasion he processed the changes in the same way.

50. She concluded that the claimant had deliberately scheduled colleagues to finish earlier than they did to avoid the planned breach being detected. She further felt that despite knowing there would be a breach he chose not to call an area manager for guidance. She believed he then altered the colleagues' schedules the following week to reduce the chances of those actions being discovered whilst still paying colleagues correctly. This all amounted to an act of gross misconduct and she confirmed the decision to dismiss.

51. From the note of the appeal hearing we also observed that Ms Wenman rejected the claimant's suggestion that he was under establishment by a figure in excess of 100 hours. On the screen information that she saw, he was over establishment by 3 hours and the establishment figure allowed for holidays.

Related disciplinary cases

52. Evidence has been put before us as to what other examples in the business Ms Wenman investigated of disciplinary action taken by the respondent. In our judgment this is significant evidence. On 28 September 2014 Ms Wenman herself dismissed a white British area manager for conduct very similar but not identical to that of the claimant. She dismissed the area manager whilst Mr Tiernan interestingly issued warnings to the MPMs who reported to the area manager and who had the defence that the area manager fully condoned what they did, a mitigation which in their cases was accepted. But in the proceedings with the area manager, Ms Wenman proceeded to show a number of Kronos timecards, LRS screen shots, Oracle timesheets and Kronos schedules that highlighted instances of colleagues deliberately being scheduled in Kronos incorrectly to hide breaches of the WTD. The Oracle timesheets for these instances all showed the correct number of hours worked but the Kronos schedules and timecards had been falsified in an attempt to disguise the breaches. He had confirmed that he had both approved and signed off each of the colleagues involved through Kronos, but claimed to say that he had not reviewed the details of the entries in any detail. He had confirmed his understanding of the WTD and agreed that the schedules provided clear examples of schedules being manipulated by breaches. The area manager had argued that he had not checked individuals through the signing off process, but he accepted that by taking on the responsibility for signing off, responsibility subsequently sat with him.

53. So, that case resonates strongly with the claimant's own case. Further, that area manager being a white British person serves as strong evidence contradicting the suggestion that Ms Wenman acted in any way on the grounds of race.

54. There was also a MPM dismissed for manipulating records on the 26 March 2016 in the Croydon area. It was recorded in his case that he had deliberately recorded incorrect and false timekeeping details for colleagues in his market place. He did this to circumvent the Working Time Regulations which stipulated that employees must have an eleven hour break between working shifts.

<u>Disclosure in the present employment tribunal process</u>

55. We now have the information that the claimant says should have been obtained in the investigation. This has been obtained pursuant to disclosure requests made by the claimant of the respondents. We have details of Working Time Breaches committed on the face of it by his comparators. We do note as we have said before that in his interview with Mr Czaja the claimant seems to have indicated responsibility for scheduling some of the hours in these colleagues' market places. This is a point made by Mr Oulton. On the face of it the disclosure reveals the following information.

56. The period for the evidence of the claimant's breaches originally put to him was 6-20 October 2016 although by admission he gave a full account of the extent of his breaches over a 6-month period. Three months were investigated pursuant to requests for disclosure, the relevant period being 1 August to 31 October 2016. In that period: in Kamilla Norwind's market place there were schedule breaches of less than eleven hours rest on 13 occasions, of those 12 fell on a Sunday. In respect of Agnieszka Kapuscinska: there were schedule breaches on 26 occasions, three fell on a Sunday. And in respect of Christopher Redford 75 entries were made under the claimant's direct line management and of those approximately 45 had scheduled periods of less than eleven hours and approximately 32 were not on a Sunday. The claimant scheduled for Mr Redford because at that point Mr Redford did not have the access codes for Kronos. So, certainly in Mr Redford's case the comparative evidence is qualified by the fact that the claimant was himself a party to the scheduling. But the claimant has a point, a point he also made before the appeal manager albeit based then on less evidence, that there are examples of a significant number of WTR breaches at Ladbrokes and it is certainly an unsatisfactory feature of the case that the software employed by Ladbrokes does not pick up the planned schedule breaches of the WTD over the period Saturday and Sunday.

57. However, it has been pointed out to us with some force by Ms Wenman that not all shops open early on a Sunday. It is only those where there is early opening 7, 8 or 9am whereby the potential for a problem exists. We accept from Ms Wenman that this point was taken to the business, we do not find that there was an intentional breach by Labrokes here to contradict the wording of its own policies so clearly set out in Kronos, but it

does mean the claimant can point out the fact that there are examples, a significant number of examples of breaches.

58. Ms Wenman is correct that the nature and extent of the breaches of the claimant's own conduct is at a different level from the information that was searchable in the course of disclosure for the purposes of this hearing relating to others. The claimant can point to no comparative examples across the comparators he identified of a scheduling modus operandi and scale to the same extent that he himself employed, that it to say regular deliberate under-scheduling of workers hours so as to fall short of closing time in the knowledge that he would extend those hours of the sitting manager so as to cover closure. Indeed, the only genuinely comparable cases of that in the evidence before us relates to the white British area manager who was dismissed for this by Ms Wenman and the MPM in Croydon who was also dismissed for it.

59. So, whilst the comparative evidence does show some significant breaches of WTD, the modus operandi, the extent and scale of it employed by the claimant is only identifiable in the two comparable cases in which disciplinary action in the form of dismissal is found. So, whilst the claimant makes a point here following his disclosure, it seems to us that the point does not go as far as it needs to for him.

60. Gross misconduct is defined in the Ladbrokes' policies that were applicable at the time as follows. In the disciplinary policy at paragraph 6.2.1 gross misconduct is:

> "Behaviour that we no longer have enough trust or confidence in the employee for a working relationship to be maintained. However, all cases will be investigated fully and any mitigating circumstances will be considered before deciding on dismissal and if appropriate consider alternative disciplinary action."

61. The claimant has rightly pointed out to us the fact that managers cannot condone gross misconduct, if they do they are to be treated also as committing gross misconduct so under 6.1.2 the failure by a manager or another employee to take appropriate steps in relation to what could amount to misconduct or gross misconduct by others may itself constitute misconduct or gross misconduct, and 6.1.2:

> "No manager or employee has the right to authorise any breach of company rules or policy, or condone any act of gross misconduct. Where someone gives permission to breach a rule or a policy, you should not do so, you will not be exempt from disciplinary action. All employees have a duty to report any actual or suspected acts of gross misconduct to their manager or Human Resources department."

62. The appendix defines examples of misconduct and gross misconduct. An example of gross misconduct is "a serious breach of the company's policies, rules or procedures wilfully or negligently". This was the provision with which the claimant was charged and dismissed for. The claimant did not establish that any particular manager in this case knew of what he was

doing and so condoned it and so was also guilty of gross misconduct. It is a feature of the modus operandi that he was employing that the prospective search for working time breaches would not show up the working time breaches, those reports addressed the future, not the past. The claimant of course amended the schedules after the event. That matter would not be shown up on the prospective searches. So, whilst he asserts the manager must have known, he did not establish it during the course of the disciplinary process, nor does he establish it before us.

63. A further point made by the claimant is that there are now new rules under the third respondent. We accept that these came into force on 1 April 2017 and so did not apply at the time he committed the breaches.

64. Nonetheless it is perhaps of interest to read out the differing provisions, so 'old world Ladbrokes' as it is put amounted to the relevant position and was described as "11 hour rule is strictly adhered to in Ladbrokes currently and colleagues are not allowed to breach". Old world Coral which did not apply to the claimant is put as follows, "colleagues are allowed to waive the 11 hour rule on one occasion per week as long as compensatory rest is provided". The new world rules said to exist now are that colleagues will be allowed to waive the 11 hour rule as long as compensatory rest is provided. Whilst it is of interest to note the development of the rule it does not help the claimant because he was subject to the old Ladbrokes position. We observe that the present formulation for Coral does not sit directly with the wording of regulation 10 of the Working Time Regulations 1998. We do not address whether it is in breach of that regulation or whether it can be construed as compliant with it. We note the point that it does not sit squarely with it and that issue of compliance with the Working Time Regulations 1998 will be for another day.

65. In evidence Ms Wenman referred to the new rules as 'a fit for the future'. This is a phrase taken directly from the document that sets out the old world and the new world rules, it is called 'Fit for the Future'. The claimant sought to say that Ms Wenman said in evidence that he would have not fitted into the new company and argued that there was a racial slant to this in the sense of 'not fitting in' which is a concept as sometimes indicating cultural clash and racial discrimination. Ms Wenman did not use the phrase 'fit' or 'fitness' in the context of the claimant as not 'fitting in' in a cultural or racial way. She did not say that, mean it or say anything approaching it. We find that the claimant sought to twist this reference in a misleading way to point to racial discrimination. This attempt was inaccurate and unfair.

<u>Tuition course</u>

66. As a matter of background evidence, the claimant sought to argue that in February 2016 he applied for sponsorship from the first respondent for a business analyst course and that Ms Wenman never got back to him about his application; this was an example of the discriminatory treatment he had to endure, he said. Ms Wenman gave evidence that she had informed him

that the application was not successful because the training was not relevant to his grade. Insofar as there is a conflict of evidence here, we prefer the evidence of Ms Wenman. We accept what she told us. We accept it is more likely than not that she would have told him the outcome and of the unsuitability for his grade. The claimant establishes no prima facie racial element to this matter whatsoever. The matter in any event has no relevance to what we are concerned with in this case.

Conclusions

67. Turning then to our conclusions.

Unfair dismissal

68. The reason for dismissal was misconduct. The First Respondent found a serious breach of the company's policies, rules or procedures – wilful. That was genuinely believed. The misconduct took the form of regular deliberate under-scheduling of workers hours so as to fall short of closing time in the knowledge that he would extend those hours of the sitting manager so as to cover closure. The deliberate under-scheduling meant that prospective audits would not detect rest break period breaches. The extension of hours worked to closing time did then breach working time rest break periods because the same manager would be opening the shop the following day within the 11 hours he or she should have been resting. The claimant admitted to a 6 month practice of regularly doing this.

69. There were reasonable grounds for the belief. In this case the claimant accepted he had done what he had done knowing it was in breach of the Working Time Directive. He had wilfully breached the company's polices and rules on working time. He admitted this from the very beginning in his interviews. There are reasonable grounds for the belief because he accepted it.

70. The claimant's case really has been towards penalty and whether his mitigation was properly considered and investigated. He, as it were, paid into the Czaja interview that a warning would be appropriate but dismissal was not. He has made two points in particular on mitigation. First, that other MPMs were acting in the same way and committing the same breaches; and secondly, the first respondent openly permitted staff to breach the WTR because of its Saturday and Sunday software loophole. As we have stated above it is right that at the time of dismissal and/or appeal the respondent had evidence there were other shops breaching Working Time Regulations. There had been the 15 examples provided to Ms Wenman by the claimant.

71. We accept that whilst there had been investigation of apparent breaches from Kronos reports undertaken, the detail we now have relating to Kamilla Norwind; Agnieszka Kapuscinska and Christopher Redford had not been obtained. We note from what the claimant said to Mr Czaja that

he may well have been involved in scheduling hours for the MPMs involved in this disclosure, but leaving that matter aside the investigations that had been undertaken at the time and the investigations that might have been undertaken leading to the disclosure we now have, did not show and would not have shown comparative evidence of the scale of the operation the claimant was following to manipulate scheduling so as to avoid Working Time Directive breaches.

72. The genuinely comparable cases that we do have before us are the examples of the two dismissals, one undertaken by Ms Wenman in her region and the dismissal of an MPM in Croydon. In those genuinely comparable cases colleagues were dismissed for manipulating records. Miss Wenman did consider this at the time.

73. The comparative evidence that disclosure has revealed does not go far enough to show that the respondent failed properly to take into account mitigation. The claimant was dealt with at all times by managers fully conversant with Ladbrokes' practices, rules and regulations. None of them recognised as being of genuine mitigation the matters being put before them, on the contrary the claimant was admitting 6 months' worth of regular Working Time Directive breaches at each of his own shops and at each of the shops in addition for whom he performed scheduling responsibility. The claimant has suggested that the respondent failed in the conduct of its investigation to investigate the availability of cover for him in the context of managers working overtime to come back to close. We find that to have been a misleading argument on the part of the claimant because as he told Mr Czaja's investigation there were no such occasion when this happened, so by submitting to us that there ought to have been an investigation of it, he fails to take into account his own position in Mr Czaja's investigation that it never happened. It was open to Ms Wenman to conclude that it was planned never to happen.

74. We note the Saturday/Sunday point. It is a point the claimant has rightly made but we do not agree that that goes so far as to show that there was deliberate manipulation of the respondent's software so as to conceal Saturday/Sunday breaches. It may be that the claimant took advantage of it for that purpose, but that was not the position of the first respondent. We accept that it is a rarity for shops to open at 7, 8 or 9am on a Sunday morning. The respondent's position was clearly set out in its policy documents.

75. In all the circumstances of the case the investigation was reasonable, especially given the extensive admissions of all the detail from the claimant himself. Given the extent and scale of those admissions, whilst there was of course a need to investigate, the respondent was entitled to take those admissions as showing the claimant's conduct. In summary then on investigation: there was reasonable investigation given the Claimant's admissions and the scale of his modus operandi. Had the investigation established what we now know from disclosure in this case, which we find would have been going beyond what in the circumstances

was reasonable, the position would not have changed because the evidence does not show that others were deliberately manipulating the schedules to conceal planned breaches of working time rest breaks. Even if we are wrong about what a reasonable investigation would have entailed, there would be a Polkey remedy reduction of 100% because the disclosure does not help the Claimant. What harms his case is the detail of the comparative disciplinary cases.

76. We find that dismissal was a reasonable sanction because the claimant had deliberately scheduled breaches without asking for area manager intervention over an extended period of 6 months on his own case. This was a calculated disregard for basic employment protection entitlements relating to rest. It amounted to a total disregard of company policy in breach of its rules and was reasonably regarded as gross misconduct. The offer of demotion did not detract from that position, demotion is an alternative sanction available under the policy. Ms Askew offered a role to the claimant which did not involve giving him the opportunity of manipulating Kronos schedules. In respect of that function of scheduling staff and that job, the respondent had lost all trust and confidence in the claimant. To offer him demotion did not in any way undermine that position.

Wrongful dismissal

77. The respondent was entitled to treat the claimant's actions as a repudiatory breach of contract for all the reasons set out above. He was in breach of policy, wilfully and deliberately, and was in breach of the relevant provisions of the disciplinary code. The effective date of termination was 3 December 2016. The claim was in time. We do have a question which can be followed up after this judgment is completed as to whether any pay might be owed between the 21 November 2016 and 3 December 2016, we do note in the original claim form there was a claim for unauthorised deduction of wages. That matter can be discussed in a moment if relevant.

78. We have noted the claimant's argument that he did not benefit financially from any of this. Well he may not have benefitted financially in terms of his own pay, but the manipulation of records certainly meant that he did not have to bother with dealing with his area manager about shortfalls in employees scheduling and he avoided the hassle of having to schedule his hours properly. So, whilst there was no financial interest in this practice, there certainly was a hassle-avoidance aspect to it.

Racial discrimination and harassment

79. There is no prima facie evidence whatsoever that any decision made in the course of this process was done on the grounds of the claimant's racial origin. The claimant is of Asian Indian origin, but the fact that Ms Wenman dismissed a white British area manager in almost identical circumstances shows race was not a factor in this case. The difficulty with the claimant's

criticism of the investigation is three-fold. Firstly, he admitted the detail of what he had done over a 6 month period in the Czaja interview revealing a very significant frequency of Working Time Directive breaches in the 6 month period. Secondly, the genuinely comparable cases are met with the same disciplinary outcome, namely dismissal. Thirdly, the position of the named comparators does not establish a comparable problem. As we have stated above the claimant's modus operandi and scale is of a wholly different nature from what is capable of being established as against the comparators. There was no conduct relating to the claimant which had the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. Nothing related to his race.

80. There was no unnecessary delaying to the appeal investigation. Ms Wenman had to consider matters in detail. The merger was also taking up her time, she told us. There was no instruction not to allow the three area managers namely, Mark Terstyanszky, Matthew Czaja and Helen Askew to investigate whether the market place manager comparators engaged in similar conduct.

81. As to direct discrimination, the Claimant was not treated less favourably than comparators by reason of the decision to dismiss. The comparable cases before us were met with the dismissal sanction. The comparators he puts forward as comparators are not comparable because the nature and extent of Working Time Directive breaches are of a far less deliberate nature and extent than his own. There was no deliberate delay on the part of Ms Wenman in reaching her appeal outcome. None of this was based on the claimant's race. There were matters for her to look at. Criticism was made of her by the claimant for running down his three-month time limit for making a claim to the tribunal, he suggested that was Ms Wenman's motive. That was not her motive, she did have things to look at, she had a number of matters to look at in the course of her investigations and in the background was the fact that Ladbrokes was merging into Coral which also was taking her time. There is no question of any delay being in any way related to race in any way whatsoever.

82. So, for all of those reasons the claimant's claims fail, subject to that one matter of a few days' pay.

____

Employment Judge Smail

Date: .31.08.18…………………………

Sent to the parties on: ...

....

For the Tribunal Office