EMPLOYMENT TRIBUNALS

Claimant: **Mr O Turk**

Respondent: **Whitbread Group plc**

Heard at: **Leeds** **On:** **12 and 13 January 2017 and 28 February 2017 (in chambers)**

Before: **Employment Judge Bright (sitting alone)**

Representation

Claimant: Miss A Hashmi (Counsel)

Respondent: Mr B Prajapati (Solicitor)

JUDGMENT

The Claimant was fairly dismissed. The unfair dismissal claim is dismissed.

The claim for damages for breach of contract is dismissed on withdrawal.

ORDER

The Respondent's name is changed to Whitbread Group Plc.

REASONS

Claims

1. The Claimant claimed unfair dismissal and breach of contract by a claim form presented on 21 September 2016. At the hearing the claim of breach of contract was withdrawn, the Claimant having been paid in lieu of notice. The claim for damages for breach of contract is therefore dismissed.

Issues

2. It was agreed at the outset of the hearing that the Respondent's name be corrected and that the issues to be decided were:

   2.1. What was the reason for the dismissal? Was it the Claimant's conduct, or another potentially fair reason within section 98(1) or (2) of the Employment Rights Act 1996 ("ERA")?

   2.2. Did the Respondent act reasonably or unreasonably in all the circumstances, including the size and administrative resources of its business, and in accordance with equity and the substantial merits of the case, in dismissing the Claimant for that reason? In particular:

      2.2.1. Did the Respondent have a genuine belief in the Claimant's misconduct, based on reasonable grounds, following a reasonable investigation?

      2.2.2. Did the Respondent properly investigate the explanations put forward by the Claimant in mitigation?

      2.2.3. Was the Claimant treated consistently with other store managers who failed to achieve the Respondent's targets?

      2.2.4. Was a fair procedure followed? In particular, did the Respondent provide the Claimant with relevant statements and/or documents prior to the disciplinary hearing?

      2.2.5. Were the Respondent's managers in collusion to ensure the Claimant's dismissal?

      2.2.6. Was it unfair for Mr Dick to hear both the grievance and disciplinary?

      2.2.7. Did the Respondent consider other sanctions than summary dismissal?

      2.2.8. Was dismissal within the range of reasonable responses of a reasonable employer in the circumstances?

   2.3. If the Claimant was unfairly dismissed, would he have been dismissed in any event and, if so, should a reduction be made to any award and, if so, to what extent?

   2.4. If the Claimant was unfairly dismissed, did he contribute to or cause his own dismissal, and if so, should there be a reduction in any award and, if so, to what extent?

Submissions

3. Miss Hashmi for the Claimant made detailed submissions, which I have considered with care but do not rehearse here in full. In essence, it was submitted that:

   3.1. The Claimant had 8 years' experience as a manager and had previously been meeting expectations during the period 2009 to 2014. The performance of the Claimant's store (page 276) was not below that of other stores in the region, taking account of the different demographic, location and other factors affecting the Claimant's store and Costa Checks. No other manager was taken to a disciplinary process. The Claimant was treated inconsistently.

3.2. The Costa Checks had got harder, expectations were increasing, while budget and manpower were decreasing. The target of 85% set by Mr Baxter was impossible and the Costa Check was a mere snapshot in time. The stores which seemed to do well were quiet stores frequented by professional people. It was not fair to compare the Claimant's store with those stores and the Respondent failed to take account of the Claimant's mitigation.

3.3. There were procedural failings. The grievance and disciplinary meetings were conducted by the same person, contrary to the ACAS Code of Practice. The Claimant's final written warning had expired at the time of his dismissal. There was a delay before the appeal, Mrs French did not properly investigate and the appointment of another manager to the Claimant's job before the outcome was a clear indication that the dismissal was pre-judged. There should be an uplift to any reward to compensate for the inexcusable delay and other unreasonable breaches of the ACAS Code.

3.4. There was collusion by the managers. The friendship of Mrs French, Mr Baxter and Mr Dick went beyond work and social media posts related to non-work events completely discredit their evidence.

3.5. There were alternatives to dismissal. The Claimant had long service, an exemplary record and was in general a good performer. The Claimant could have been suspended but instead was permitted to work a full 2 months after the investigation and was clearly not considered a risk to the business.

3.6. There should not be any reduction under **Polkey** or for contribution.

4. Mr Prajapati for the Respondent made detailed oral submissions, which I have considered with equal care, but do not rehearse here in full. In essence, it was submitted that:

4.1. The Claimant's dismissal was fair. The Claimant was dismissed for his consistent failure to achieve the required score at Costa Checks. This presented a risk to the business and could bring it into disrepute. The dismissal was for conduct, which is a potentially fair reason.

4.2. The test in **British Home Stores Ltd v Burchell [1978] IRLR 379** is the appropriate one. The Claimant knew what a Costa Check was, what it involved and what was expected of him. In 2015/2016 none of the Costa Checks in his store achieved even close to the 85% or 90% targets set. The Claimant accepts that the scores were an accurate reflection of the store and standards. The Claimant was aware of the consequences of failure and that he was accountable. The Respondent's managers had a genuine belief in the Claimant's guilt based on the failure of the Claimant's store to pass Costa Checks. The Respondent's belief in his guilt was therefore on reasonable grounds. In terms of investigation, the Costa Check scores spoke for themselves and Mr Baxter saw the failings for himself. The Claimant did not question the authenticity or veracity of the checks. The Claimant accepted that he was responsible for his store's underperformance over the previous 12 months.

4.3. The Respondent's decision to dismiss the Claimant was within the range of reasonable responses. The Tribunal must not substitute its view. The

Respondent's witnesses have explained why they took the view that the Claimant was a risk to the business and all agreed that Costa Checks were needed to maintain the necessary standards. Mr Dick considered alternatives to dismissal, but felt that summary dismissal was the appropriate sanction. Mrs French considered alternatives and, at appeal, concluded that the Claimant's conduct was misconduct not gross misconduct, albeit that it anyway resulted in his dismissal, following the previous final written warning. The Claimant does not appear to challenge that final written warning and it was not manifestly unfair, such that the Tribunal is entitled to look behind it.

4.4. The Claimant was not treated inconsistently. The outcomes for other managers were different because the facts and context were different in their cases. The Respondent's managers did not collude to dismiss the Claimant. The social media posts all relate to work events or social events tagged onto formal work events.

4.5. The dismissal was procedurally fair. The Claimant was given an opportunity to put his version of events and explain. He was provided with the relevant documents and informed of the allegations and potential outcome before the disciplinary meeting. When the Claimant raised an issue relating to Mr Murphy, Mr Murphy recused himself. Mr Dick was entitled to hear both grievance and disciplinary meeting and the Respondent was not in breach of the ACAS code. The Claimant raised no complaint at the time regarding Mr Dick hearing the disciplinary, he was given the outcome in writing and afforded the right of appeal. The appeal was held by a more senior manager who looked at the whole case again.

4.6. If the dismissal was unfair, had the Respondent acted as the Claimant suggests it should have done, there would have been no difference to the outcome, as there was a consistent failure by the Claimant to meet the required standards. Also, the Claimant was 100% to blame for his dismissal as he showed blameworthy conduct, letting standards slip in the store for which he was responsible.

Evidence

5. The Claimant gave evidence on his own behalf and called:

   5.1. Mr Tom Harrowell, former Store Manager at Leeds Briggate store;

   5.2. Mr Konrad Koszek, Assistant Manager at Bradford Forster Square store.

6. The Respondent called:

   6.1. Mr Ross Baxter, HR Business Partner, formerly Retail Development Manager;

   6.2. Mr Stuart Dick, Business Development Manager, formerly Retail Development Manager;

   6.3. Ms Karen French, Regional Operations Director.

7. The parties presented an agreed bundle of documents to which a further document was added by consent at page 296. I read only the documents to

which I was directed. Page numbers in these reasons are by reference to the page numbers in the bundle.

Findings of fact

8. Having considered all the evidence, I made the following findings of fact. Where a conflict of evidence arose I resolved it, on the balance of probabilities, in accordance with the following findings.

9. The Claimant worked for the Respondent from 16 November 2003 until his dismissal on 22 June 2016. The Respondent is the owner of Costa Coffee, a well-known multinational coffee house chain with outlets in almost every retail centre in the country. The Respondent employs some 45,000 employees in Great Britain.

10. The Claimant worked his way up from barista at a Costa Coffee outlet in Leeds to Store Manager at a store at Bradford Forster Square retail park from August 2012. During the period 2009 to August 2013 it was not disputed that the Claimant was meeting or exceeding expectations in terms of his performance (page 279a).

11. It was not disputed that cleanliness of stores was important to the business and that media reports relating to a store in Liverpool had previously damaged the Respondent reputation. I find, from the evidence of the Respondent's managers, that it was a concern to the business that problems with cleanliness might bring the business into disrepute and that it was therefore important that high standards be maintained in all stores at all times. Mr Baxter accepted that the Respondent became more focused on cleanliness, hygiene and other brand standards from around 2014.

12. It was agreed that stores were audited by way of regular 'Costa Checks'. These comprised inspections of the store by either retail managers or specialist auditors, and allocated scores for coffee excellence, store excellence, service excellence and safety excellence. The questions criteria such as pest activity, cleanliness, deliveries, fridge temperatures, use of approved products, food storage, staff uniforms. It was not disputed that store cleanliness and coffee quality were among the key performance indicators for the Respondent and were a key component of the Costa Checks. Stores were provided with detailed guidance on what the Costa Check comprised and tips for achieving a high score (pages 45 - 69). The pass mark during the period leading up to the Claimant's dismissal was 90% across the business and store managers were held ultimately responsible for the scores achieved in their own store.

13. The Claimant accepted that he had overall responsibility for his store at Bradford Forster Square. He recruited and managed his own team and, although Costa Checks might occur on days when he was not the duty manager at the store, he bore ultimate responsibility for the store's scores. It was not disputed that the Claimant's store had been refurbished and its size doubled, but the Claimant was nevertheless expected to manage the store in such a way that the targets were met.

14. Following poor Costa Check scores at the Claimant's store (e.g. 73.7% on 8 January 2014) Mr Baxter began a series of meetings with the Claimant to discuss his performance and agree action points for improvement. I accepted Mr Baxter's evidence that, although the Claimant improved his performance in some areas which Mr Baxter acknowledged at the time, the Claimant continued to fail to achieve some of the targets set, in particular controlling the store's labour budget. In July 2014 he was issued with a first written warning for poor performance relating to the labour budget. On the basis of his discussions with the Claimant, Mr Baxter attributed the decline in the Claimant's performance to his disappointment that sales in the new store were not meeting expectations, leading him to become disillusioned with the brand.

15. Following a Costa Check in November 2014, Mr Baxter prepared a further action plan to improve the store and its results. In January 2015 Mr Baxter visited the Claimant to discuss how he was working towards his action plan and concerns about his labour budget. Following a disciplinary process, on 27 April 2015 Mr Dax Murphy issued the Claimant with a final written warning for performance, in connection with his failure to achieve his monthly labour budget and follow reasonable management instructions. Although the Claimant stated at paragraph 22 of his witness statement that he felt the decision to issue the final written warning was a foregone conclusion, it was not put to the Respondent's witnesses that the Claimant was challenging the probity of that final written warning and the Claimant did not appeal against it at the time. That warning was for 12 months and was therefore 'live' until 26 April 2016. Further action points were subsequently agreed and Mr Baxter continued to monitor the Claimant's progress and provide support. Mr Baxter made numerous suggestions for improvement, arranged visits to and from other successful managers and held regular meetings and email exchanges with the Claimant. I find, from the documents, that Mr Baxter provided the Claimant with ongoing support and it was clear to the Claimant what improvements were required, the importance of improvement and the likely outcome of failing to achieve it.

16. The Claimant's scores in the Costa Checks during this time were: 75% on 13 May 2015; 78.8% on 27 August 2015; and 75% on 9 November 2015. Cleanliness of the store and coffee quality was a recurrent issue during those Costa Checks. On 15 November 2015 Mr Baxter developed a new action plan and informed the Claimant that his expectation was that the store would achieve 85% in the next quarter, followed by the national target of 90% thereafter.

17. Mr Baxter conducted a Costa Check at the Claimant's store on 18 February 2016 at which it scored 65%, with particular issues raised around cleanliness, coffee practices and store presentation (page 127). The Claimant was not present at the store on that day but it was accepted by Mr Koszek, the duty manager, that the store was not clean and I accepted Mr Baxter's evidence that it was the worst he had ever seen it. Mr Koszek accepted in cross examination that he told Mr Baxter the Claimant was to blame.

18. I found it surprising that, following that Costa Check on 18 February 2016, Mr Baxter waited until April 2016 to commence the investigation. That delay would seem to imply that any risk to the business was not perceived as sufficiently serious to warrant urgent action. The Respondent's ET3 makes no mention of the Costa Check in February 2016 and cites an aborted Costa Check on 13 April 2016 as the reason for the investigation meeting on 22 April 2016. However, I accepted Mr Baxter's evidence at paragraph 21 of his witness statement that it was the check on 18 February 2016, coming as it did on top of the cumulative poor performance of the previous 12 months, which was the trigger for his investigation and subsequent disciplinary process. The dates support that assertion, as it is not disputed that the investigation meeting was originally scheduled for 8 April (prior to the partial Costa Check on 13 April 2016), although it was rescheduled. I accepted the reasons set out in paragraph 22 of Mr Baxter's witness statements for the delay. I accepted Mr Baxter's evidence that he concluded the Claimant's poor performance was a conduct matter because of the prolonged period of underperformance, particularly in relation to key performance indicators, with little if any progress despite extensive support and emphasis on the importance of improving standards. It was clear that the Claimant had previously met the required standards for a number of years.

19. Mr Baxter's investigation consisted of meeting with the Claimant on 22 April 2016 (pages 134 – 144) to discuss his failure to achieve standards and a review of the Costa Checks in that financial year, the action plans and previous disciplinary history. Mr Baxter documented in his Investigation Outcome Report (pages 145 -146) the factors he considered, including a further Costa Check score of 78.8% on 25 April 2016, and reached the conclusion that a disciplinary process was appropriate. He therefore passed the matter on to Mr Dax Murphy, Regional Development Manager for North Yorkshire and issued an invitation to a disciplinary meeting, setting out the allegations and documents which would be considered (pages 151 – 152).

20. The Claimant submitted that the Respondent, in particular Mr Baxter, singled him out for investigation and disciplinary action. He pointed to Mr Baxter's praise for another store on the day of the Claimant's disciplinary hearing and the initial failure to pay the Claimant company sick pay for his period of sickness from 25 April 2016. However, I accepted the explanations offered by Mr Baxter for both of those decisions. In relation to the first, Mr Baxter accepted that his actions had been indelicate but he had reasons for making the distinction between the Claimant's store and the other. In relation to the second point, I accepted that Mr Baxter made a genuine mistake about the Claimant's entitlement to sick pay and, as soon has he discovered that he had discretion to pay company sick pay, he agreed to do so. I also accepted Mr Baxter's evidence that he was not aware of the Claimant attending or being turned away from a talented managers' training event.

21. There was insufficient evidence of any plausible reason for Mr Baxter to have singled the Claimant out. The Claimant even stated during the investigation meeting on 10 April 2015 (page 91) that it was clear to him that Mr Baxter did not want to get rid of him. I accepted Mr Baxter's evidence that he believed his relationship with the Claimant to be good; he had played football with the Claimant, the Claimant attended Mr Baxter's wedding celebrations and Mr

Baxter assisted the Claimant with a visa form. Mr Baxter had been managing the Claimant since 2012 and the Claimant did not recount any concerns about Mr Baxter before his performance came into question.

22. Miss Hashmi submitted that the Claimant's Costa Check scores were no worse than those of many other stores but that he was the only manager taken through disciplinary proceedings. She placed emphasis on page 276, a spreadsheet showing that the 21 stores in the region achieved a variety of scores between 67.1% and 92.4% for Costa Checks from March to May 2016, with the Claimant's store (scoring 78.8%) listed eighth from bottom. Mr Koszek and the Claimant gave evidence that Mr Baxter intentionally gave the Claimant's store low marks. The Claimant's ET1 states that the Claimant was "persistently managed to score 89% during these assessment periods…the shop was wilfully kept below the 90% success rate". However, the clear evidence from the documents is that the Claimant's store was not coming close to achieving the pass mark or even Mr Baxter's more lenient target of 85%. It would have taken more than one or two percent for the Claimant's store to have passed the checks and the Claimant's evidence does not tally with the documentary evidence. Moreover, the Claimant offered no coherent explanation as to why Mr Baxter would have been motivated to deliberately set the Claimant up to fail.

23. I preferred Mr Baxter's evidence that he and the auditors, who carried out quarterly checks and about whom the Claimant has not complained, applied the same standards to all stores. It was agreed that other stores failed to achieve the pass mark and some performed worse that the Claimant's store. It was not disputed that Mr Baxter began performance managing the other managers whose scores were unsatisfactory. Mr Baxter was cross examined at length regarding his treatment of those other managers. I found his evidence on this topic frank, for example he was prepared to accept that he had acted unwisely in praising another store's performance on the day the Claimant was attending his first disciplinary meeting. Mr Baxter accepted that, at the time of the Costa Checks scores cited on page 276, the Claimant's was not the worst performing store and he accepted that no other manager had been put into disciplinary proceedings. His detailed explanation of the differences between the Claimant and the other managers' circumstances was clear, cogent and plausible and the Claimant did not dispute the differences cited. I therefore accepted Mr Baxter's evidence that the other managers either resigned or improved or, in the case of certain stores (e.g. new stores) it was deemed that more time should be allowed. The Claimant was the only manager who continued to underperform over the period of 12 months, in a store in which there was no clear reason for that failure. The Claimant was therefore the only manager who was taken through a disciplinary process, because the circumstances of his underperformance were different to those of the other managers. There was insufficient evidence of any other reason for the different treatment. The Claimant's evidence, by contrast, was inconsistent; at paragraph 17 of his witness statement, he recounted that Mr Baxter had dismissed other managers in a similar position to him without proper cause, but in evidence he argued that he was the only manager who had been disciplined.

24. Miss Hashmi submitted that the Respondent's belief that the Claimant was a risk to the business because of poor health and safety in the store was unfounded. She pointed to a 'wincard' at page 258 as evidence that the Claimant's store passed health and safety checks every month from February 2015 to January 2016. However, I accepted the Respondent's evidence that there was only one external CMI audit of health and safety per year and, if the store passed that audit, the remaining months were all marked as green or 'passed' on the wincard. The Claimant was not being audited on health and safety more than one a year, except by way of the Costa Checks. The wincard was not therefore good evidence of the ongoing cleanliness of the Claimant's store.

25. Mr Murphy commenced the disciplinary process with the Claimant on 13 May 2016, but the Claimant raised concerns about Mr Baxter's treatment of him. As Mr Murphy was friendly with Mr Baxter, the disciplinary process was postponed to allow investigation of the grievance and Mr Murphy opted to pass it to another retail manager, Mr Dick.

26. The Claimant's grievance against Mr Baxter was raised in the course of the disciplinary hearing and centred on Mr Baxter's perceived unfair treatment of him and lack of support. Mr Dick interviewed Mr Baxter on 1 June 2016 about the Claimant's complaints and heard the Claimant's grievance and disciplinary hearings consecutively on 14 June 2016. I accepted Mr Dick's evidence that he did not have any previous knowledge of the Claimant and had been advised and believed that there was no problem with the grievance and disciplinary proceedings being heard consecutively by the same manager. It is clear from the documents that the Respondent provided the Claimant with the relevant documents prior to the grievance and disciplinary hearings. The minutes of the grievance hearing (pages 172 – 183) show the Claimant being given a full opportunity to make his case. I accepted Mr Dick's evidence that he did not uphold the Claimant's grievance, which the Claimant substantiates, despite the contradictory wording in the meeting minutes. Mr Dick concluded that Mr Baxter had not treated the Claimant unfairly or inconsistently and had provided support. There is insufficient evidence of any reason for Mr Dick to have reached that conclusion falsely.

27. At the disciplinary hearing the Claimant was again given the opportunity to explain his poor performance and put forward arguments in mitigation. He argued that the poor scores in his store were a result of the time the checks were carried out, the large size of his store, the demographic profile of the customers, the location of the store and a number of other factors. However, I accepted Mr Dick's evidence that these were all matters the Claimant was expected to manage as part of his role. I accepted Mr Dick's evidence at paragraph 16 of his witness statement that the Claimant did not appear to show any ownership or accountability for what had happened at his store and was not taking responsibility for his lack of action, but instead blamed Mr Baxter. I accepted Mr Dick's evidence that it came to light in the course of the disciplinary meeting that the Claimant had become disillusioned with the brand and alluded to starting his own business, making clear that he had become disengaged from his day job with the Respondent. Mr Dick concluded that the Claimant was capable of improvement but had no appetite

to do so and was blaming others rather than take responsibility for improving standards himself. He was therefore a risk to the business.

28. I accepted Mr Dick's evidence at paragraph 22 of his witness statement that he had been advised by the Respondent's human resources department that, because his meeting with the Claimant was taking place more than 12 months after the final written warning, that warning could not be taken into account in terms of sanctions. Mr Dick accepted in cross examination that he did however take account of it as part of the history of the Claimant's performance relevant to his failure to improve and adhere to health and safety and brand standards in 2015/2016. I accepted that Mr Dick considered issuing a further final written warning but concluded that the Claimant would continue to fail to comply with the standards expected. He therefore concluded it was appropriate to summarily dismiss the Claimant for gross misconduct, in line with the examples of gross misconduct given in the disciplinary policy (page 449f), which included "behaviour likely to seriously damage the relationship between guests and the Company, and/or bring the Company into disrepute".

29. In the outcome report (pages 201 – 202) Mr Dick concluded that the Claimant had failed to perform his duties as store manager and had no desire to change or improve. He recorded that "Considering the history of underperformance, the length of time of the underperformance, the lack of improvement, the support given to aid improvement, the lack of desire to improve and the potential risk to our customers and brand, I have decided to dismiss [the Claimant]". There was insufficient evidence of any reason for Mr Dick to have reached that conclusion falsely and I find that his belief that the Claimant's actions were gross misconduct was genuine.

30. Mr Dick texted the Claimant to ask him to telephone later in the day. During the telephone call Mr Dick informed the Claimant of his dismissal, ahead of a letter being sent, dated 22 June 2016 (page 203). I accepted Mr Dick's evidence as to his reasons for informing the Claimant in this manner and I find that there was no intention to upset the Claimant.

31. The Claimant appealed against his dismissal. The Claimant set out his 13 points of appeal in his email dated 10 August 2016 (page 212). His grounds of appeal were, in essence, the lack of consistency with how other managers were treated, lack of evidence, failure to consider his arguments in mitigation and Mr Dick's lack of impartiality. I find that Mrs French conducted a full rehearing at the appeal hearing on 25 August 2016 and gave the Claimant a full opportunity to state his case (pages 214 – 226). In the course of that meeting, the Claimant told Mrs French that his store was not always clean. Following the appeal meeting, Mrs French conducted further investigations into the points raised by the Claimant, including examining Mr Dick's decision making, Mr Murphy's involvement and Mr Baxter's management of the Claimant. I was satisfied that the appeal process followed by Mrs French was thorough. Mrs French came to the conclusion that the Claimant's treatment had been consistent, he had been provided with sufficient support, training and warnings, and the decision makers were impartial. I accepted that she genuinely concluded that the Claimant was an experienced and capable manager who knew what he was required to do, had been warned and

reminded and provided with support, but had no intention of improving the store or complying with brand standards. I accepted her evidence that she considered alternatives such as demotion, suspension and re-training, but in light of that conclusion she considered that the Claimant had no appetite to change. She therefore concluded that dismissal for misconduct was appropriate in the circumstances, rather than gross misconduct. In upholding the dismissal she took into account the Claimant's 'live' final written warning from April 2015. The Claimant was therefore paid in lieu of his notice period.

32. Although there was a lengthy delay before the Claimant was notified of the appeal outcome on 12 October 2016, I accepted the reasons for the delay set out in paragraphs 16 – 21 of Mrs French's witness statement. There was insufficient evidence for me to find that the appeal outcome was intentionally delayed to cause the Claimant to miss the deadline for bringing his employment tribunal claim, as alleged, and in fact, he brought that claim in time.

33. I do not find that the Respondent's appointment of a replacement manager in the Claimant's store indicated that the outcome of the Claimant's appeal was a foregone conclusion, as alleged. I accepted Mrs French's plausible evidence that the Respondent determined that it needed a store manager in place at the Claimant's store and that there was another smaller store with a store manager vacancy which the Claimant could have filled had his appeal been successful.

34. The Claimant submitted that there was collusion between Mr Baxter, Mr Dick and Mrs French, leading to his dismissal. He argued that they were friends and pointed to evidence from social media that they had socialised together. However, it was clear from the documentary and witness evidence of all of the Respondent's witnesses that the social media postings showed work-related social events. Miss Hashmi submitted that these events were not work-related because they did not occur at work or during working hours. However, I accepted the evidence of the witnesses that the events occurred in the context of work events and they were clearly related to the professional relationships of the witnesses. In any event, even if the witnesses were friends, there was insufficient evidence before me to find that such friendships were in any way connected with the Claimant's dismissal or that the managers had any reason for seeking the Claimant's dismissal other than that submitted by the Respondent.

The Law

35. I had regard to Section 98 of the Employment Rights Act 1996 ("ERA"). The onus is on the employer to show the actual or principal reason for dismissal. Conduct is a potentially fair reason for dismissal falling within section 98(2) ERA.

36. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the tribunal to decide. Section 98(4) ERA reads

The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.

37. The test of whether or not the employer acted reasonably is an objective one, that is tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden [2000] IRLR 827**)). The Tribunal must not substitute its decision for that of the Respondent. The range of reasonable responses test (the need for the Tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt [2003] IRLR 23**).

38. In determining the fairness of a dismissal for alleged misconduct, the Tribunal should normally apply the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**. The Tribunal should consider whether the Respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This lays down a three stage test: 1) the employer must establish that he genuinely did believe that the employee was guilty of misconduct; 2) that belief must have been formed on reasonable grounds; and 3) the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The burden of proof is on the employer on point (1) but it is neutral on the other two points (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129; Sheffield Health and Social Care NHS Trust v Crabtree [2009] UKEAT/331/09**). Whether or not the employee is actually guilty of the misconduct is not relevant to the fairness of the dismissal.

39. In deciding whether a conduct dismissal falls within the range of reasonable responses, a Tribunal may also consider whether the Respondent:

    39.1. had sufficient regard to the claimant's length of service and disciplinary record;
    39.2. gave sufficient regard to arguments in mitigation;
    39.3. gave consideration to alternatives to dismissal; and
    39.4. followed a fair procedure, in accordance with the ACAS Code.

40. The ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") confirms the importance of warnings as part of the disciplinary or capability process, stating at paragraph 19: "Where misconduct is

confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning." An employer wishing to dismiss an employee for not performing his or her duties properly following an earlier warning should ensure that the warning is relevant to the current problem.

41. It is only in limited circumstances that it is legitimate for a tribunal to 'go behind' a final written warning given before dismissal; where the warning was allegedly issued in bad faith, manifestly improper or issued without any *prima facie* grounds. Where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, there would need to be exceptional circumstances for a tribunal to, in effect, reopen the earlier disciplinary process.

42. Where a previous warning has expired, there is a distinction to be made between relying on it as the reason for dismissal (which would render the dismissal unfair) and treating it as relevant background. An employer who, when considering any mitigating circumstances in relation to potential dismissal for fresh misconduct, takes into account that the claimant had a previous expired warning for similar misconduct may be acting fairly.

43. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts or beliefs which were known to the employer at the time of the dismissal. The employee's assessment of his own behaviour is irrelevant.

44. For a dismissal to be fair it must be in accordance with equity. The Respondent's treatment of the Claimant should not therefore be inconsistent with its treatment of other employees in similar circumstances. Fairness does not mean that similar offences will always call for the same disciplinary action however. Each case must be looked at in its particular circumstances, which can include the attitude of the employee to his conduct. A comparison can only be drawn where the circumstances of the employees in question are truly parallel.

45. In considering the issue of contribution under s122(2) ERA and s123(6) ERA, a three stage approach is set out in **Nelson v BBC (No2) [1979] IRLR 346**, namely that there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by the action that was culpable or blameworthy, and finally, that there must be a finding that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

46. The case of **Polkey v AE Dayton Services Ltd [1988] ICR 142**, concerns whether, if the dismissal was unfair, the claimant would have been dismissed in any event had a fair process been followed.

Determination of the Issues

47. I find that the reason for the Claimant's dismissal was his failure over a 12 month period to improve standards in his store to a level which the Respondent deemed acceptable. I am persuaded that, given the Claimant's long history with the Respondent and length of experience as a store manager, his previous record and the other circumstances of his failure to improve, the Respondent was correct to identify the Claimant's poor performance as a question of attitude, not incapability. It was therefore a matter of conduct.

48. As stated in my findings of fact, there was insufficient evidence for me to find that the Respondent's managers were in collusion to secure the Claimant's dismissal and the Claimant has put forward no cogent alternative reason for his dismissal. While he is not required to do so and the burden of showing the reason for dismissal rests on the Respondent, the lack of any other explanation weighs heavily in favour of the credibility of the Respondent's witnesses when they all assert that it was the Claimant's failure to improve and attitude which were the reason he was dismissed. The documentary evidence supports that conclusion, including the undisputed notes of the disciplinary and appeal hearings where the Claimant agreed that his store was not always clean, did not accept responsibility for those failings, sought to blame others and explained that he was disengaged and considering starting his own business. The Respondent has shown that the reason for the Claimant's dismissal was his conduct and conduct is a potentially fair reason for dismissal cited in section 98(2) ERA.

49. In considering whether the Respondent acted reasonably or unreasonably in all the circumstances, including the size and administrative resources of its business, and in accordance with equity and the substantial merits of the case, in dismissing the Claimant for that reason, I have reached the following conclusions.

50. Mr Dick, the dismissing manager, and Mrs French, the appeal manager, both genuinely believed that the Claimant was guilty of misconduct. Although they differed as to the severity of the misconduct (Mr Dick identified it as gross misconduct, while Mrs French was more lenient in her assessment that it was merely misconduct), they both had a genuine belief that the Claimant could have achieved the required standards, knew what those standards were, but was not committed to doing so. I did not accept the Claimant's argument that the managers were in collusion and trying to get him dismissed. The evidence he cited that they were friends outside of work was unconvincing and, even if they were friends, there was insufficient evidence of any motivation for them to collude against him or seek to get him sacked. On the contrary, the lengths to which Mr Baxter went to provide the Claimant with support and to encourage him to improve his store and the thoroughness with which Mrs French conducted the appeal process suggested that they were genuine and acted with integrity. Nor did I concur with Miss Hashmi's submission that the Respondent's failure to suspend the Claimant and his continued employment for some 2 months after the Costa Check on 18 February 2016 were an indication that he was not a risk to the business. It was, in part, the Claimant's responses to questioning during the investigation

and disciplinary which led to the Respondent's conclusion that he would not improve and therefore posed a risk to the business.

51. The grounds for the managers' belief in the Claimant's misconduct were clear from the evidence. There were the Costa Check scores in his store over the period of 12 months in 2015/2016, culminating in the check on 18 February 2016 (which was the worst Mr Baxter had ever seen the store) and a later check which was abandoned because the state of the store was so bad it required remedying immediately. There was the history of the Claimant's failure to improve his store's performance in the past, resulting in a written warning and final written warning. There was the evidence from Mr Koszek to Mr Baxter that the Claimant was to blame. There was the Claimant's own admission that he was demotivated, was thinking about starting his own business, and that his store was sometimes not clean. I consider that those were reasonable grounds from which the managers could conclude that the Claimant's poor performance amounted to misconduct, rather than merely incompetence or incapability.

52. I consider that there was a reasonable investigation from which the Respondent's managers were entitled to form their belief in the Claimant's misconduct. The Costa Check scores spoke for themselves, as did Mr Baxter's own observations of the store's cleanliness on the occasions when he carried out checks or visited the store. Mr Baxter repeatedly spoke to the Claimant about his concerns and about ways of improving matters and Mr Baxter's observations of the Claimant's failure to improve were therefore pertinent to the investigation. Mr Baxter also conducted an interview with the Claimant and with Mr Koszek to discuss the allegations of failure to improve or achieve the required standards.

53. There were further investigations carried out by Mr Dick and Mrs French as and when the Claimant raised further issues and I find that the Respondent's investigations fell well within the range of reasonable responses of a reasonable employer in the circumstances. Mrs French, in particular, went to lengths to communicate to the relevant managers and to question them about their decision making. It is clear from the documents that Mrs French interviewed Mr Dick on 14 September 2016, contrary to Miss Hashmi's submissions.

54. Miss Hashmi, for the Claimant, focused in particular on the issue of consistency, on the basis that other stores' scores were the same or worse than his but he was the only manager taken to disciplinary proceedings. As the case law makes clear, each case must be considered on its own circumstances, and it is only where the facts of two employees are truly parallel that the failure to treat them consistently may make the decision to dismiss unreasonable. For the reasons set out in my findings of fact, I was satisfied that the circumstances of the other managers were not sufficiently parallel to draw comparisons with the Claimant's treatment. In fact, in so far as they were similar, i.e. their stores scored poorly in Costa Checks, they were treated the same as the Claimant because they were put into performance management measures. It was only further down the performance management route that their circumstances diverged from his.

55. In terms of the procedure followed by the Respondent, I find that the Respondent provided the Claimant with all the relevant statements and documents prior to the disciplinary hearing, that the Claimant was given a full opportunity to state his case and that he was afforded a full right of appeal. Both Mr Dick and Mrs French took account of and conducted further investigations into the Claimant's arguments in mitigation.

56. I considered at length the question of whether the Respondent could or should have relied on the previous final written warning at the disciplinary and appeal. It is clear from the timing of the invitation to the investigation that the misconduct which triggered the investigation occurred during the currency of the previous warning. The date of the disciplinary and appeal meetings is immaterial in my view and paragraph 19 of the ACAS Code is clear, contrary to Miss Hashmi's submissions, that where further acts of misconduct occur within the currency of a final written warning, the Respondent can rely upon that warning. The Claimant did not appeal that warning and did not put to the Respondent that it was improper or invite me to look behind it.

57. The final written warning related to a failure to improve store performance in respect of labour budgets rather than coffee quality or cleanliness. However, those elements are all part of the overall performance of the store and achievement of brand standards. I therefore consider that Mr Dick and Mrs French did not act outside the range of reasonable responses in taking them into account. Even if I am wrong and Mrs French should not have relied on the previous warning and final written warning as the basis for a 'totting up' dismissal, I find that both she and Mr Dick were entitled to take warnings for performance matters into account in considering what sanction was appropriate in response to the Claimant's 12 months of further underperformance. There is no requirement that employers artificially pretend that previous misconduct never took place.

58. Miss Hashmi submitted that Mr Dick should not have heard both the grievance and disciplinary hearings. However, there is nothing in the ACAS Code to suggest that would automatically render a dismissal unfair. Rather it must depend upon the circumstances of the case and, in this case, Miss Hashmi has not explained why Mr Dick hearing both might have made the decision to dismiss unfair. Whilst it might normally be different managers hearing a grievance and disciplinary, in this case the subject matter of the grievance related directely to the disciplinary allegations. The Claimant was complaining about Mr Baxter's treatment of him in relation to and in response to the investigation into his own performance. The ACAS Code specifically provides for grievances and disciplinary to run concurrently where they deal with similar issues. I do not consider that Mr Dick's role as decision maker in both was outside the range of reasonable responses or had any impact on the fairness of the dismissal.

59. I had concerns about the length of time taken to investigate the allegations and the delay before the appeal outcome was notified. However, I am content, having heard the evidence of Mr Baxter and Mrs French in relation to the delays that, whilst unfortunate, they were not intentional and were not unreasonable in the circumstances.

60. I have given careful consideration to the question of whether the decision to dismiss the Claimant for his misconduct was too harsh, given his length of service. While I consider that dismissal for poor performance is harsh, I cannot say that dismissal (rather than, say, a further final written warning) is outside the range of reasonable responses for a reasonable employer in these particular circumstances: There was a persistent failure to achieve the required standards, which risked the Respondent's reputation, where those standards were clear and there were guidance, support and warnings in place and the Respondent had made real efforts to help the Claimant. I accepted that both Mr Dick and Mrs French considered alternatives to dismissal but, in the circumstances, concluded that the Claimant was unlikely to improve his performance or commitment to the business. I find that the managers took account of the Claimant's long service, but in fact it weighed against him in part because he had previously managed to achieve the required standards. Miss Hashmi submitted that he had an exemplary record, however that was clearly not the case given the Claimant's previous written warning and final written warning. I find that the Respondent's decision to dismiss was within the range of reasonable responses of a reasonable employer in the circumstances.

61. If I am wrong and the Respondent's decision to dismiss was procedurally unfair, I would find that the Claimant would have been dismissed had a fair procedure been followed in any event. The Claimant has not suggested that the delay in the investigation or appeal affected the outcome, nor that Mr Dick hearing the grievance and disciplinary meetings had any impact on the outcomes of either process. Had Mrs French not made reference to the final written warning, it is not clear to me that she would have issued a warning in preference to dismissing the Claimant for misconduct. Given what she said about her conviction that he would not improve, it seems likely that she would have dismissed him for misconduct in any event and that such a decision would have been within the range of reasonable responses. Although I have sympathy for the Claimant, in light of his admissions that his store was not always clean, that he had become disillusioned and his placing of blame on other people and failure to accept responsibility for the poor scores, I find that his persistent poor performance was culpable and blameworthy and caused his dismissal. I would find that, under the principles in **Polkey** and under sections 122(2) and s123(6) ERA it would be just and equitable for any award to be reduced by 100%.

Employment Judge Bright

Date: 14 March 2017

Sent on: 14 March 2017