EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr O Majekodunmi	**v**	City Facilities Management (UK) Ltd

Heard at: Reading **On:** 7, 8 & 9 March 2017

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: In person
For the Respondent: Mr A Moore (Solicitor)

RESERVED JUDGMENT

1. The claimant's complaints of unfair dismissal, unlawful deduction from wages and failure to pay holiday pay are not well founded and are dismissed.

REASONS

1. The claimant appeared in person. The respondent was represented by Mr Moore, solicitor. The claimant gave evidence in support of his own case. The respondent relied on the evidence of Mrs Victoria Williams and Mr Simon Ebborn. I was provided with a trial bundle containing 301 pages of documents. Several documents were added to the trial bundle when produced by the claimant on the third day of the proceedings.

2. The issues to be decided in this case were set out in an Order made on 19 February 2016 and set out at page 39 of the trial bundle.

3. The claimant has previously brought proceedings against the respondent in the Employment Tribunal and the County Court. The matters giving rise to the claims that the claimant has brought have overlapped. In this case, the claimant brings a complaint of unlawful deduction from wages. In the case brought against the respondent and Asda Stores Ltd (case numbers 2700862/2014 and 2701090/2014) ("the Manley Tribunal") the claimant made a complaint about unlawful deduction from wages.

4. In discussion about the issues in this case, the claimant said he wanted to claim unpaid wages going back to the start of his employment. The judgment in the Manley Tribunal dealt with unlawful deduction from wages. Wages claims that arose before 13 July 2014 have already been determined by the Manley Tribunal or alternatively such claim could and should have been raised in the earlier case. I made a ruling that I would not be considering claims of unpaid wages that arising prior to 13 July 2014.

5. The claimant contended that there had been a late disclosure of documents respondent, namely pay slips. The respondent contended that the pay slips were disclosed to the claimant at the appropriate time following a request by the claimant and that they were subsequently provided to the claimant again when he requested the documents. I have not found it necessary to determine whether the documents were provided in time but for some reason things went wrong or whether one of the parties is not accurately reporting to me the events around disclosure of the pay slips. The position was that the claimant wanted the pay slips produced and he stated that he intended to use them in his efforts to make good his claim about unpaid wages after 13 July 2014.

6. When the disclosure of the pay slips was being discussed, it became clear that the claimant did not know how much he was claiming as unpaid wages. The value of his claim for unlawful deduction of wages was not ascertained. I directed that the claimant's case of unfair dismissal be presented first. This was because the claimant had not been able to formulate his claim for unpaid wages.

7. The matter was dealt with in this way to give the claimant the opportunity, as he asked, to consider the pay slips and work out how much he was owed in unpaid wages. The position was the same in respect of the claimant's claim about holiday pay.

8. After the evidence on unfair dismissal had been presented, the claimant was asked, on the third day of the hearing, to set out the claim for unpaid wages and holiday pay. The claimant's response was to say that he had been advised to rely on the schedule of loss in the trial bundle.

9. The schedule of loss relied on by the claimant was from case no 2700862/2014. It was one of the claim forms before the Manley Tribunal. The judgment of the Manley Tribunal on the claims was that:

   "4. The first respondent paid sums due to the claimant later than they fell due which was an unauthorised deduction of wages, the claimant has shown no financial loss consequential upon that late payment."

10. The claimant's complaints about unpaid wages were decided by the Manley Tribunal. The claimant has not given any evidence about any other unpaid wages. The claim for unpaid wages is therefore dismissed.

11. The claimant's complaint about unpaid holiday pay is not explained. The only evidence that was led on the issue was in the cross-examination of the claimant. The claimant was shown his final pay slip which showed that the gross sum of £593.76 was paid to the claimant as holiday pay of which the claimant received a net payment of £559.71. The claimant denied that this was correct. He did not deny that the money was paid to him. He did not say how much the correct amount which should have been paid to him was. He has failed to produce any evidence from which I could conclude that the respondent has failed to pay him any holiday pay due to him. This claim is therefore dismissed.

12. The claimant raised the issue of CCTV footage. The respondent has stated that the CCTV footage in question no longer exists. I understood the claimant wished me to make an order requiring the respondent to disclose the CCTV footage. There has already been an order for disclosure in this case. That disclosure order would have required the CCTV footage, if it existed, to be disclosed. The claimant has not shown that the CCTV footage, contrary to the respondent's claim, does in fact exist to lead me to make an order for specific discovery of the CCTV footage or make some other order in respect of breach of the order by failing to disclose it. The issue has been exhausted for the purposes of case management orders. I explained to the claimant that if there were issues around the way that the respondent has dealt with the CCTV footage, they could be dealt with by him in the cross-examination of the respondent's witnesses.

13. The claimant made an application for Witness Orders. The claimant's application was not well structured. He did not have the names of the proposed witnesses, he did not have their addresses, the claimant did not know if they were still in the employment of the respondent or, if they were in the respondent's employment, where they now worked. The relevant witnesses are persons who made statements which appear in the trial bundle at pages 65-70. The claimant wished to cross-examine the makers of the statements as to the truth of the content of the statements. The statements were considered by the respondent when deciding whether to dismiss the claimant.

14. The cross-examination of the makers of the statements as to the truth of the content is not a matter that is necessary to decide the claimant's case. In an unfair dismissal case, I must decide whether the respondent's actions in investigating the allegations of misconduct was fair or unfair. It is not for me to carry out an investigation into the allegations of misconduct as though I were the employer. The truth of the contents of the statements is not a matter I must decide. What I must do, having regard to all the relevant circumstances of this case, is look at how the respondent considered the statements, whether the respondent considered them true and whether the respondent was reasonable in so doing.

15. I refused to make Witness Orders against the makers of the statements because it is not necessary for the fair determination of the issues in the

case for the makers of the statements to be cross-examined by the claimant as to the truth of their statements. The claimant has failed to provide sufficient information for me to conclude that an effective service of a Witness Order could be made.

16. During the hearing, the claimant raised the point that documents were not included in the trial bundle which should have been included in the trial bundle. Mr Moore, solicitor for the respondent, said that any document that the claimant provided to him for inclusion in the trial bundle had been included. Mr Moore denied that any documents that the claimant wished to be included in the trial bundle had been omitted. Initially the claimant did not refer to any specific document which had been subject to this fate. He did vehemently assert that Mr Moore was wrong when he stated that documents had not been omitted from the trial bundle. I directed that the claimant could produce any document that he wished to refer to in the cross-examination of his witnesses or in giving his own evidence that had been so omitted.

17. The claimant did not produce any documents until the morning before the third day of the hearing when the claimant sent to the respondent, and copied to the tribunal, at 06.21 am, an email to which were attached 10 pages of documents. Of these documents, the only documents that the claimant had referred to in his own evidence and in questioning of the respondent's witnesses was an interview of the General Store Manager, Jeremy Smith, conducted by Agnes Becsei on 20 March 2014 during her investigation of the claimant's grievance.

18. When the hearing resumed on the morning of the third day, the claimant also produced a further set of documents, 22 in all. Save for one document, all the documents contained in the email were again provided to me together with other documents that had not been provided in the email. Of these further documents, all of which I read and considered, only four of these appeared to me to have been relevant to the issues I had to decide.

19. The relevant documents were: a letter from SM Mills to the claimant dated 20 June 2014 calling the claimant to a disciplinary interview on 27 June 2014; a letter from Mohammed Jellal to the claimant dated 25 February 2014 inviting the claimant to a disciplinary investigation on 1 March 2014; a note of the investigation meeting on 1 March 2014 (at which the claimant was not present); a statement made by Jim Connolly for the Manley Tribunal.

20. During the evidence of Mrs Victoria Williams, it was necessary for me to tell the claimant that he should ask questions which can assist me in reaching a decision in this case. I emphasised that the claimant should ask the witness questions about what she did or did not do and that he should put to her things that she should or should not have done and that he should ask questions about why she reached the decision that she did in this case.

21. I did this because his questions were at times so obscure that I was not able to understand what possible relevance they had to the issues that I had to decide in this case. The questioning of Mr Ebborn was ended by me at the point where I felt the claimant was no longer asking him questions but had begun to harangue him.

22. I made the following findings of fact.

23. The respondent provides facilities management and cleaning services for Asda Stores throughout the United Kingdom. The claimant was employed by the respondent from 22 February 2011. He was initially working for the respondent at the Asda store at Park Royal and then was transferred to the Asda store at Slough, Berkshire. The store cleaning manager employed by the respondent was Jim Connolly.

24. In the period following his transfer from Park Royal to Slough, the claimant considers that he has been a victim of discrimination on the grounds of his race arising from the way that he has been treated by Jim Connolly and others whilst working at Slough. This case is not concerned with those complaints of discrimination. Matters relating to discrimination were considered in the Manley Tribunal. Aside from the matters related to unpaid wages and holiday pay referred to earlier, this case is concerned about the claimant's dismissal and in respect of that complaint, the case is one which concerns unfair dismissal. I am not dealing with any complaint about discrimination relating to the allegation of dismissal.

25. The chronology of events giving rise to the dismissal begins with an incident on 22 January. There is a dispute between the claimant and the respondent as to exactly what happened on 22 January. The respondent's position is that there was a request by Jim Connolly, the claimant's manager, for the claimant to speak to him about an incident which had occurred on 4 January, the claimant became excitable and refused to speak to Mr Connolly without the presence of his lawyer. The claimant states that on 22 January, he was told by Mr Connolly that he was being suspended from work, that on that day he was suspended. The claimant did not return to work. The respondent takes issue with the contention that the claimant was suspended then.

26. On 11 February 2014, the claimant received a letter dated 10 February 2014. The contents of that letter read as follows:

> "I was very concerned to hear that you were absent from work since 25 January 2014 and that you have not reported for work again since. I hope that you are well but I have no record that you have contacted us with the reason for not being in work. Please would you telephone me at the store before 12 noon on 13 February 2014 to let me know why you are not in work."

27. That letter is signed 'Jim Connolly'. The claimant states that when he received this letter, he returned to work wanting to understand why this

letter had been sent to him bearing in mind that he had been suspended on 22 January.

28. The claimant's account of what occurred on 11 February 2011 is as follows:

28.1. The claimant went to the store to speak to Mr Connolly. The claimant asked Mr Connolly to take a copy of the letter that he had received. Mr Connolly refused.

28.2. The claimant says that Mr Connolly said to him that "there was something wrong with your head". (This comment was later part of a grievance brought by the claimant. In respect of this comment the grievance was upheld.)

28.3. The claimant said that he told Mr Connolly that he "should stop lying about me". The claimant was ordered out of the office. The claimant was told that if he did not go security would be called to remove him.

28.4. Others joined them in the office and began to abuse the claimant. The claimant said he had informed the police what was going on and said "Why are you people threatening me?" The claimant was outnumbered and feared for his safety.

28.5. The claimant was forcefully told to leave and threatened with removal by security. The claimant went to clock out and leave. Mr Connolly blocked his way telling him that he could not clock out or sign before leaving the store.

28.6. The claimant was manhandled and forcefully removed out the back door causing an injury to his shoulder.

28.7. As he was leaving, the claimant remembered that he had to buy some milk and so he went back into the store. The security officer manhandled him into the store and subjected him to a false imprisonment before handing him a notice that banned him from all Asda stores.

28.8. The claimant left and went to the police station where he made a statement about the incident.

28.9. The claimant wrote to the respondent and to Asda on 11 February 2014 asking for the CCTV recording to be preserved.

29. The parties agree that the claimant was issued with an exclusion notice (see page 64). The claimant was subsequently issued with another exclusion notice which was sent to him by post (see page 183). Nothing turns on the fact that the claimant was issued with two exclusion notices by Asda stores.

30. On 13 February, Julie Marriott and Jim Connolly made statements about the incident on 11 February.

31. On unspecified dates, statements about events on 11 February were also made by Peter Bott, Gerry Timon, Basam Hatam and Mary Bromley. These statements were subsequently considered during the disciplinary hearing.

32. On 14 February, the claimant was written to by the respondent and invited to attend an investigation hearing on 17 February 2014. The first allegation listed as under investigation read as follows:

> "Allegation of demonstrating threatening and abusive behaviour towards an Asda General Store Manager and other management colleagues on 11 February 2014 leading to a breach of the Dignity at Work policy."

33. Also, on 14 February 2014, the claimant made a grievance (see page 73). The grievance included the following:

> "It is clear CFM staff are not on equal fundamental right with Asda management. Therefore, City staff can be subjected in collaboration to various forms of systematic exploitation, subjective allegation of theft, harassment, racial discrimination, hardship, victimisation, privacy invasion. It is also clear that CMF protect Asda management in Slough by failing to respond to my complaints for months."

34. The claimant subsequently received another letter from the respondent, this time on 25 February 2014, in which he was invited to attend an investigation meeting to take place on 1 March 2014. This letter was from Mr Mohammed Jellal. The letter is not included in the trial bundle. The notes of the meeting which took place on 1 March at which the claimant did not attend are also not in the trial bundle but they include nothing other than a reference to the fact that the claimant did not attend the meeting.

35. The claimant's grievance was investigated by Agnes Becsei, the Regional Cleaning Manager. In conducting her investigation of the claimant's grievance, she spoke to Jim Connolly on 19 March 2014 and, on 20 March 2014, she spoke to several other people including Jeremy Smith, the General Store Manager. Agnes Becsei spoke to the claimant on 13 March 2014 in respect of his grievance and finally, on 9 April, she concluded on the claimant's grievance.

36. Her conclusions were that there were not sufficient grounds to substantiate the claimant's grievance (page 76 and 77).

37. The claimant was informed that he has the right to appeal against the decision on the grievance.

38. On 15 April 2014, the claimant wrote a letter following the receipt of the grievance outcome and this letter was treated as an appeal against the

grievance outcome. The claimant's grievance appeal was considered by Mr Peter Bott, the Regional Facilities Manager, and he informed the claimant of the outcome of his appeal in a letter dated 19 May 2014.

39. In the appeal decision, Mr Bott noted, amongst other things, that at the start of the appeal hearing, he

> "Requested access to the CCTV footage of your activities in the store between 15 July 2014 and February 2014 including the Saturday and Sunday shifts, your original personnel file, a copy of the signing in and out sheets from July 2013 to February 2014, and an explanation as to why you have had to wait until now for a response to your letters. Your request for CCTV footage is unable to be accommodated as none of this footage exists any longer. All the CCTV footage is automatically erased after a period of 28 days."

40. Mr Bott's conclusion was that the claimant's grievance was partially upheld on the grounds of the comment made by Jim Connolly about the claimant's mental health. However, Mr Bott did not find that there was sufficient evidence to substantiate other claims made by the claimant.

41. On the conclusion of the grievance process, the respondent resumed the investigation into the claimant's alleged conduct on 11 February and on 3 June 2014, the claimant attended an investigation meeting to discuss the disciplinary allegation.

42. The investigation meeting was conducted by Seb Turek. Also present at the meeting was Andy Heer. The claimant was told that the purpose of the investigation hearing is to allow him the opportunity to provide an explanation for the allegations that were set out in the letter of 14 February 2014. The claimant was asked to say what happened.

43. The claimant's response was to say that:

> "I would like to thank you for inviting me to this meeting. I never thought this situation would come to this point. My response is already made. I don't want to waste any more time."

The claimant continued:

> "Regarding today's meeting, I don't have much to say without CCTV being available."

44. The claimant was asked to tell his version of events on 11 February and he responded:

> "Without CCTV, whatever I say has no significance."

45. The meeting was adjourned for a short while and then resumed. When the meeting resumed, the claimant insisted that his response was that everything that he wanted to say in response to the allegation was

contained in the letter of 3 June which he provided to Mr Turek. The meeting then concluded.

46. The claimant's letter of 3 June is contained in the trial bundle at page 87. In the letter the claimant demands that CCTV footage is produced "before I will make further comment concerning the allegations." The claimant also provided a letter dated 22 May 2014 (pages 89 and 90). That letter too made no specific reference to the incidents which occurred on 11 February.

47. On 13 June 2014, Sarah May Mills wrote to the claimant inviting him to attend a disciplinary hearing to take place on 18 June 2014 at 10.00 am at the Asda Slough store. Sarah May Mills subsequently wrote to the claimant again on 20 June 2014 rescheduling the disciplinary hearing to take place on 27 June 2014 at the Asda store. The claimant wrote a letter to the respondent on 16 June 2014 in which he set out several complaints. Because of that letter which was provided to Ann Ainsworth, the Head of Retail People, a decision was made that the disciplinary matter would be put on hold while the matters raised by the claimant were investigated. The claimant was subsequently invited to attend a mediation session with the respondent.

48. On 13 July 2014, the claimant commenced proceedings against the respondent in the Reading Employment Tribunal in case number 2700862/2014. On receiving the claimant's Employment Tribunal claim, the respondent again decided to put the disciplinary matters on hold and await the conclusion of those proceedings in the Employment Tribunal before considering the disciplinary matters arising from 11 February. In about September 2014, the claimant started a second case against the respondent and ultimately the Manley Tribunal between 14 and 16 April 2015 in the Employment Tribunal sitting at Watford heard the case and gave judgment on 6 May 2015.

49. Following judgment in the Manley Tribunal, the respondent considered it was appropriate to continue with the disciplinary process in respect of the allegations concerning the claimant's conduct on 11 February 2014.

50. The claimant was invited to attend an investigation meeting to take place on 10 June. The letter from Mark Williamson inviting the claimant to attend the meeting included a passage which reads as follows:

> "Now that the tribunal has concluded, we consider it appropriate to consider the disciplinary issue again. Given you previously refused to engage with us in the investigation meeting, we think it would be sensible to reconvene the meeting and give you a second opportunity to participate properly."

51. The claimant spoke with a member of the respondent's HR team on 9 June and confirmed that he would not be attending the investigation meeting. The claimant explained that he was unwilling to attend the

investigation meeting as his appeal against the tribunal decision was yet to be heard.

52. On 12 June 2015, Mr Williamson wrote to the claimant about his failure to attend a meeting with him on 10 June 2015. Mr Williamson considered that the claimant's failure to attend was without a reasonable explanation. In his letter, he referred to the conversations that the claimant had with the HR team on 9 June. Mr Williamson also referred to a letter from the claimant in which he sets out his reasons for not attending. Mr Williamson then goes on to say as follows:

> "Having considered the letter requesting you to attend an investigation meeting, I am of the view that the purpose of the meeting is clear. The letter confirms all the information you require to enable you to adequately prepare for the meeting and understand its purpose. Your explanation that you are awaiting the outcome of your appeal to the Employment Tribunal's decision is not reasonable. The appeal is wholly separate to the issues to be considered at the investigation meeting."

53. Mr Williamson then went on to explain that he had continued with the investigation meeting, considered several documents which were listed in his letter (see page 136) and then he set out these conclusions:

> "I have concluded that there is evidence to suggest that you
>
> 1 Acted in a threatening and abusive manner towards an Asda General Store Manager and other management colleagues on 11 February;
>
> 2 That such behaviour led to a banning order being issued to you; and
>
> 3 Your behaviour may have brought City and Asda's name into disrepute and may amount to a breakdown in trust and confidence.
>
> In the circumstances, I consider that there is sufficient evidence for me to pass this matter to a disciplinary officer to consider if it should proceed to a disciplinary hearing."

54. The matter was then passed on to Mrs Victoria Williams to deal with the claimant's disciplinary hearing. On 24 June, Mrs Williams wrote to the claimant requesting him to attend a disciplinary hearing to take place on 2 July. In her letter, she detailed the allegations to be considered and enclosed the documents that were relevant to the case.

55. The claimant emailed Mrs Williams and requested the disciplinary hearing be postponed due to his trade union representative being unavailable before September 2015. Mrs Williams responded that she was willing to delay the matter but she was not willing to delay the matter until September, but invited the claimant to attend a hearing to take place on 2 July. The claimant responded the following day and requested a further five days from 2 July to attend the hearing. Mrs Williams agreed that the hearing would take place on 10 July 2015. On 10 July 2015, the claimant attended the meeting alone.

56. At the start of the meeting, Mrs Williams asked if the claimant wished to be accompanied at the meeting. The claimant said no. He confirmed that he was happy to proceed with the hearing. The claimant refused to answer questions regarding the incident on 11 February and repeatedly said that he had appealed the tribunal's decision and that the matter was before the judge. The claimant gave Mrs Williams several documents and said that they contained all he had to say.

57. There were 18 pages in the documents that the claimant handed to Mrs Williams. During the hearing before me, the claimant insisted that he had handed Mrs Williams a pack of documents containing 54 pages. This is not correct. What the claimant handed to Mrs Williams was a pack containing 18 pages of documents. The note-taker at the hearing made a reference to 18 pages of documents. Mrs Williams' recollection was that there were 18 pages of documents. The claimant recorded the meeting that took place with Mrs Williams and subsequently provided a transcript of that recording. On at least three occasions during the transcript that he provided, the claimant refers to providing Mrs Williams with 18 pages of documents. I am therefore satisfied that the claimant is wrong when he says that he provided 54 pages of documents to Mrs Williams. As will become clear later, the point at which he handed 54 pages of documents was at the meeting with Mr Ebborn. It appears that the claimant has muddled and elided the two occasions when he gives documents.

58. The documents that the claimant gave to Mrs Williams are listed in a section headed "documents provided by you at the meeting" in the decision outcome letter sent to the claimant on 22 July 2015 (page 145). During his evidence to me, the claimant insisted that he had provided the documents at pages 242-253 to Mrs Williams at the disciplinary hearing on 10 July. Although the claimant asked Mrs Williams several questions about the documents that he provided to her, at no stage did the claimant put to Mrs Williams that he provided her with the documents at page 242-253. These documents are a handwritten statement of 12 pages dealing with events which occurred on 11 February 2014.

59. It is undated and it is unclear when this document was first produced by the claimant. At one stage, the claimant said in his evidence that he prepared this document when he got home after the incident on 11 February 2014. However, the first time that this document appears to have been considered by the respondent was at the appeal stage. I am satisfied on the evidence that has been provided to me that the statement from pages 242 onwards was not provided to Mrs Williams when she conducted her disciplinary hearing.

60. It is to be noted that during the hearing that she conducted, Mrs Williams on several occasions informed the claimant that it was his opportunity to provide his version of events. However, the claimant's response was that he would not engage in the meeting and would not answer any questions.

61. Not providing the statement at page 242 is consistent with the approach that the claimant was taking at this stage. To have provided the statement at page 242 would have been inconsistent with the approach that he was taking at the meeting. Had he provided the statement I would have expected his response to her enquiries about providing further information to point out that he had provided the statement.

62. How the claimant responded to that enquiry was to say on several occasions something like what is recorded on page 154 of the trial bundle in the transcript that the claimant provided which reads:

> "18 pages – that is all I am going to submit for whatever question you have in there have explain in detail whatever in writing in black and white. The matter is before the judge at the EAT and the judge have cease of it. I see no reason why I should come in here and be discussing what is before the judge."

63. Mrs Williams did seek out the claimant's version of events and she did this by considering the claimant's grievance dated 2 July 2015 which had been addressed to Mr Williamson. This contained a version of events on 11 February 2014. This was the version of events that Mrs Williams considered to assist her in understanding what the claimant's position was.

64. Following the meeting, Mrs Williams reviewed all the documents and she concluded that the claimant had acted in a threatening and abusive manner towards employees of the company and Asda. She concluded that the claimant's behaviour was inappropriate and unacceptable, that he was aggressive, abusive and threatening. She concluded that the claimant had only left the store when he was advised that if he did not, police was be contacted and that the claimant had gone back to the store within minutes of leaving and had to be removed by security. She concluded that his conduct on this occasion amounted to gross misconduct.

65. Mrs Williams decided that the appropriate sanction was dismissal. She concluded that it was a serious matter. The claimant had been abusive not only to his manager but to other colleagues, his behaviour was unacceptable, and consequently she decided to dismiss him with immediate effect. She informed the claimant in a letter of 22 July 2015 that he had the right of appeal against her decision.

66. The claimant appealed the decision to dismiss him by a letter of 28 July 2015.

67. The claimant was invited to attend an appeal meeting on 27 August 2015. The claimant attended on 27 August but the meeting did not take place as the respondent did not have anyone available to conduct the appeal on that date.

68. The claimant was invited to attend another meeting for the appeal on 8 October 2015. The claimant attended on that occasion again. The

claimant was unaccompanied. He confirmed that he was happy to proceed even though he was unaccompanied.

69. The appeal meeting was conducted by Mr Simon Ebborn. During the meeting, the claimant provided 54 pages of documents for Mr Ebborn to consider. Included in the 54 pages of documents was the statement which appears in the tribunal bundle beginning at page 242 which set out the claimant's version of events on 11 February.

70. During the appeal, the claimant was asked if he wanted to make any other points during the appeal but the claimant insisted that everything was said in the documents that he had provided. The claimant indicated that he was unwilling to comment further than the documents that had been provided.

71. When the claimant was asked if he was happy to proceed with the meeting, he indicated that he was not happy but he was willing to continue with the meeting. When Mr Ebborn told the claimant that he would like to understand the points of his appeal, the claimant's response was to say that it was all contained within the documents that he had submitted at the meeting.

72. Mr Ebborn considered the documents that he had before him which included those which had been submitted by the claimant.

73. Mr Ebborn considered the points which had been raised by the claimant in his grounds of appeal and addressed each of them in his letter dismissing the claimant's appeal sent to the claimant on 23 October 2015.

74. In his decision, Mr Ebborn stated that he could find no grounds to overturn the dismissal of the claimant and dismissed the claimant's complaint.

75. Mr Ebborn concluded that there was clear evidence on which to reach the conclusion that the claimant had acted in a threatening, intimidating and abusive manner and it as his view that it was reasonable to dismiss the claimant given the nature and manner of his conduct on 11 February 2014 as found by Mrs Williams.

76. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.

77. Where an employer has shown a potentially fair reason the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be

determined in accordance with equity and the substantial merits of the case.

78. The respondent must show that: it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the tribunal itself would have shared the same view of those circumstances.[1]

79. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting its own decision as to what was the right course to adopt for that of the employer) must decide whether the claimant's dismissal "fell within a 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 falls outside the band it is unfair"[2]. The burden is neutral at this stage: the tribunal must make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

80. I have come to the following conclusions in this case.

What was the reason for the dismissal?

81. The respondent says that the claimant was dismissed for misconduct. The claimant says that the reason for his dismissal was not related to his conduct but was arising from the fact that he had asserted a statutory right. The evidence which was given by Mrs Williams shows that the only matter that she considered was the claimant's conduct on 11 February 2014. The appeal hearing conducted by Simon Ebborn considered the decision which was taken by Mrs Williams. There is no indication that any factor other than the claimant's conduct on 11 February 2014 was the reason for the claimant's dismissal.

82. Having heard the evidence of the claimant, Mrs Williams and Mr Ebborn, I am satisfied that the reason for the claimant's dismissal was the claimant's misconduct as alleged to have occurred on 11 February 2014.

Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? Was there a reasonable investigation?

83. At the investigation meeting. The claimant was first invited to attend an investigation meeting on 17 February 2014, and then on the 1 March 2014 these meetings did not take place. The investigation into the disciplinary matter was put on hold until after the claimant's grievance was concluded.

[1] British Home Stores Limited v Burchell [1978] IRLR 379
[2] Iceland Frozen Foods v Jones [1982] IRLR 439

84. The investigation meeting was resumed on the 3 June 2014. On that occasion the claimant requested CCTV footage and refused to say anything further about the incident on the 11 February 2014. The disciplinary matter was suspended while the claimant's employment tribunal claim was proceeding.

85. The claimant's approach had been to fail to provide any information that might have assisted the investigation into the events on the 11 February 2014.

86. At the disciplinary hearing conducted by Mrs Williams the claimant's approach was to not engage with the matters under consideration. He stated that the matter was being considered by the Judge in the Employment Appeal Tribunal and he gave no evidence to Mrs Williams about the events on the 11 February.

87. At the appeal hearing the claimant handed in a statement but again failed to engage with the respondent in respect of the matters under consideration and raised by him in his appeal.

88. The claimant's conduct frustrated the investigation, disciplinary hearing and appeal processes. The claimant's failure to engage with the process resulted in the claimant's case not being put to the respondent as it could have been. This was the claimant's decision and choice to adopt this course when he was offered to the opportunity at each stage to engage with the process he failed to do so.

89. The incident on 11 February 2014 resulted in the claimant being excluded from the Asda store. The investigation into the events on 11 February resulted in a statement being given by Julie Marriott in which she described the claimant's conduct. There was also a witness statement from Jim Connolly in which the claimant's conduct is again described. Both statements were taken two days after the incident occurred. It is not clear from the face of the other statements when they were taken but statements from Peter Bott, Gerry Timon, Basam Hatam and Mark Bromley all deal with events on 11 February.

90. All these statements are describing behaviour of the claimant which shows him to have been shouting and behaving aggressively. There was information before Mrs Williams which could justify her concluding that the claimant had behaved in a way which amounted to gross misconduct.

91. I have considered whether there was any evidence which pointed to the claimant's innocence. It is important to bear in mind that at the time that Mrs Williams conducted her disciplinary hearing, the claimant did not produce any statement about events as they occurred on 11 February 2014. The closest that the claimant had come to giving his account of events was contained in statements made on 2 July 2014 in which he was raising a grievance. This is the first time that the claimant was alleging that he was the victim of an assault. However, the information that the claimant

was producing was limited. The claimant's attitude at the disciplinary hearing was such that it was not possible for Mrs Williams to explore with the claimant his version of events going beyond the limited statements that had been given in the grievance.

92. Having considered the material that was before Mrs Williams, I am satisfied that there was a reasonable basis for her to conclude that the claimant was guilty of misconduct. There was material, if accepted, which entitled her to conclude as she did. At appeal the claimant's account is given in a statement handed to Mr Ebborn, he considered it and having done so accepted Mrs Williams conclusion was correct.

93. On the material that has been presented before me, the conclusion that the claimant was guilty of misconduct is one that a person fairly and objectively considering the material could have come to. They could have reached a different decision at the appeal stage if the claimant's account was accepted as correct but it was equally open to them to reach the conclusion reached here.

Was the decision to dismiss the claimant a fair sanction – that is was it within the reasonable range of responses of a reasonable employer?

94. Mrs Williams concluded that the claimant's behaviour was aggressive, abusive and threatening. The respondent's disciplinary and grievance procedure, amongst the instances of gross misconduct, included violence, assault or dangerous horseplay, threatening, abusive or bullying behaviour towards colleagues, customers or the public. The conclusions that Mrs Williams came to about the claimant's behaviour is within the definition of gross misconduct set out in the respondent's disciplinary and grievance policy. This document was provided to the claimant together with his statement of terms and conditions of employment.

95. The claimant's account of the incident on 11 February was that he was the victim of an assault. This version of events was not accepted by Mrs Williams. The claimant's attitude towards the disciplinary hearing made it difficult for her to assess or test the claimant's case. The claimant did not tell Mrs Williams what his version of events was so she could judge that against other evidence. He offered nothing to explain or mitigate his conduct, Mrs Williams had to search for an account providing an explanation for the claimant form other sources such as the 18 pages he provided her.

96. In contrast to the claimant's attitude, Mrs Williams had several statements made by people describing the claimant's conduct consistently as aggressive, abusive and threatening conduct. The evidence before her pointed to gross misconduct. It is within the range of responses of a reasonable employer to dismiss for gross misconduct where the specific conduct is within the parties agreed definition of gross misconduct.

Was the delay unfair?

97. The claimant appealed against his dismissal. There was a significant delay between the dismissal of the claimant and the hearing of his appeal. The claimant appealed in good time he did not delay. The dismissal was communicated to the claimant in a letter on 28 July and the appeal hearing did not take place until 23 October 2015. This was an unconscionably long time for the claimant to wait for an appeal and might in other circumstances have been sufficient to show that the procedure followed by the respondent in dealing with the claimant's appeal was unfair. However, I have concluded that in the circumstances of this case, the inordinate delay did not result in unfairness to the claimant. My reasons for so concluding are as follows.

    97.1. The claimant's disciplinary hearing had been delayed from 2014 to 2015. The reason for this delay was because the claimant had brought proceedings in the Employment Tribunal and the respondent considered that it was appropriate for those Employment Tribunal proceedings to be concluded before they dealt with the claimant's disciplinary matter arising from events on 11 February.

    97.2. This was a justifiable way to proceed in the circumstances of this case. It is the claimant's position that everything that happened to him on 11 February 2014 needs to be seen in the light of the events which led up to it. The matters which had led up to events on 11 February were the subject of grievance processes that the claimant brought and were the subject matter of the Manley Tribunal.

    97.3. The conclusions in the matters which give rise to the Manley Tribunal, if decided in the favour of the claimant, would have been significant factors to consider as to whether the claimant's conduct on 11 February was aggressive, threatening and abusive or could be mitigated for some other reason. If it was found that the claimant had in fact been the subject of discrimination in the way that has been alleged by him, this would have been an important matter to consider when considering the events on 11 February.

98. Once the disciplinary hearing recommenced at the end of the Manley Tribunal proceedings, the claimant's attitude in the meeting with Mrs Williams was to refuse to participate on the basis that there was an outstanding appeal. The participation of the claimant was limited as can be seen from the claimant's own transcript of what took place at that meeting. The claimant's approach had not significantly changed by the time of the appeal which had occurred in October 2015. The claimant presented the respondent with several documents and said that those documents were the ones that should be considered by Mr Ebborn.

99. Having regard to the claimant's approach to the hearing, I am not satisfied that there was not any unfairness to the claimant caused by the delay in holding the disciplinary appeal other than the mere fact of the delay

between July and October 2015. Had the respondent acceded to the claimant's request at the disciplinary hearing the delay would have been even longer.

100. While I am satisfied that it was a long delay, I am not satisfied that the delay has resulted in any unfairness to the claimant.

101. The respondent had a genuine belief in the claimant's misconduct. At the point that it formed that belief the respondent had reasonable grounds on which to sustain that belief. The respondent carried out as much investigation as was reasonable. The decision to dismiss the claimant was within the range of responses of a reasonable employer.

102. The claimant's complaint about unfair dismissal is not well founded and is dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 22 March 2017

Judgment and Reasons

Sent to the parties on: 24 March 2017

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For the Tribunal Office