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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Elsanosi

**Respondent:** Vaultex UK Limited

**Heard at:** London Central **On:** 23 & 24 August 2017

**Before:** Employment Judge Goodman

**Representation**
**Claimant:** In Person
**Respondent:** Ms G Hirsch, Counsel

**JUDGMENT** having been sent to the parties on 29 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. This is a claim for unfair dismissal after the Claimant was dismissed for gross misconduct on 14 February 2017.

2. To decide the claim the Tribunal has heard evidence from Ben Coulson, Centre Manager at the Kings Cross Cash Centre where the Claimant worked, who made the decision to dismiss him and from John O'Sullivan, Regional Manager of the South Region who heard the appeal against dismissal, as well as from the Claimant Nizar Elsanosi.

3. The Tribunal had a bundle of documents containing the notes of various meetings, letters and the Respondent's policies. The version of the

disciplinary policy contained in this bundle, as has been accepted by the Respondent is not the one that was sent to the Claimant. In the bundle are V6; the one sent to the Claimant by the Respondents is an undated policy, which was different in the text to the V4, which was established from the evidence to have been the relevant policy.

4. At the conclusion of the evidence, the Tribunal heard submissions from each side. The Claimant relied substantially on the written submission that had been pre prepared.

**Findings of Fact**

5. The Respondent is a joint venture between Barclays and HSBC Clearing Banks to collect cash and redistribute it under an agreement with the Bank of England called the Note Circulation Scheme.

6. Under the requirements of this scheme staff employed by the cash handling business must be vetted on commencement of employment with a criminal record check, a credit check and other checks about their employment history including investigation of substantial gaps in it. Once accepted for employment, there is re-vetting at 3 yearly intervals. Their requirement of the note circulation scheme is because of the obvious temptations to staff (and perhaps also organised criminals), of working in a business which consist of handling very large volumes of cash in notes and coin.

7. The Respondents have produced a vetting procedure which was not available to the Claimant but was available to managers. It is specific to note and coin centres, and begins: “vetting is undertaken to ensure Vaultex does not introduce unnecessary risk to the business”. After a very detailed account of what checks are carried out on new starters, it deals, towards the end of the policy, with assessing the relevance of criminal convictions and financial difficulties; it says “individual cases will be reviewed on their merits”. This section provides a general framework and guidelines for when there is adverse information on the disclosure certificate and/or credit check report. In relation to the current employees it begins: “it is mandatory for an

employee to make his or her manager aware as soon as possible of any convictions they believe have been reported against them and about any financial difficulties". It then says that the manager should assess the potential risk for the business and propose informal or formal actions, and goes on: "if during the re-vetting process any adverse information is returned and an employee omitted to inform his or her manager about the criminal conviction or financial difficulties, the situation should be investigated and formal disciplinary procedures invoked at the appropriate stage after consultation with HR.", then "If there is a decision to produce a file note to follow informal disciplinary procedures, it should be done on a face to face basis and consideration should be given to the role that the employee is working on in their skills and experience, the integrity of the individual, seriousness and nature of the criminal offence or financial problems, as well as any mitigating circumstances such as disclosed in the information. In each case an exception from the HR Director must be granted.

8. There is then a paragraph about exceptions, which provides that on a credit check referral if an employee has advised the Line Manager that at some point in their history they have had a court order recorded against them, the vetting team must adhere to the following process which includes "documentation to confirm that the debt in question has been cleared or is actively being paid off."

9. The Claimant was referred on hiring to a policy document called "Knowing our Responsibilities at Vaultex, a Guide for all Employees". This summarises the Company's policy on a number of matters such as absence, alcohol and drugs, annual leave, money laundering and so on. T section called Personal Data: says "your continued employment with Vaultex is subject to a satisfactory references and credit and criminal checks which will be reviewed regularly, it is important that you tell Vaultex if there are any changes to a criminal record or credit status while working for us, including any current Police investigations. Failure to do so could lead to disciplinary action or dismissal."

10. It continues that employees must "declare close personal relationships with suppliers or customers where there may be a conflict of interest", before moving on to other matters.

11. Each year, at least for the last three years, of the Claimant's employment, all employees were required to undergo online training and the computer record of this shows that up to 10 minutes was allowed for an employee to read through this document and then tick to say that he had done so.

12. It was clarified with the Respondent's witnesses that it was all it was. There was no other discussion of the document and no test, quizzes or explanation. Mr O'Sullivan suggested that earlier than three years there had been face to face training within a classroom, but the Claimant denied that this had occurred. Any training he had was limited to health and safety matters and work processes. As neither Mr O'Sullivan nor Mr Coulson had mentioned this until being questioned, it is resolved in the favour of the Claimant. The change may have arisen on the change from Securitas to Vaultex.

13. The Claimant commenced work with the Respondent in 2006 as an agency worker. In 2008 he became an employee. At that time the company was Securitas; it is now Vaultex. His employment was as a Cash Processor, meaning that bags of cash and coin were brought to him and he entered the amounts onto the computer. This may account for an ambiguity said to affect his credibility, namely that he denied handling cash, by which he meant that he did not at the time of dismissal, as he had at earlier stages, have to carry it about the premises. Nevertheless, the Claimant readily accepted that being employed in the Cash Centre meant that there was an opportunity to steal, and that it was right that the employer should check staff background with this in mind.

14. At the date of dismissal, the Claimant had a clean disciplinary record, and there is nothing to suggest that he was regarded as anything other than an exemplary employee. He took a period of unpaid leave in 2015 to go to Sudan when his father died.

15. He was paid £24,000 per annum. Mr O'Sullivan volunteered, that the Respondent's pay rates were relatively low, when explaining that even small debts registered against staff indicated a risk that individuals might be tempted to dishonesty.

16. In 2016, the Claimant suffered an acute kidney injury. In or around he was hospitalised for a period, thereafter, he suffered for a period from pain, vomiting and leg weakness. His absence was sufficiently prolonged for him to be sent to the Occupational Health Service for a report, and he returned to work on a phased return to work in what is said to be "October time", although none of the witnesses before the Tribunal were able to say when the Claimant returned on a phased return, or when he returned to full time work although he seemed to have been back to work full time in January 2017.

17. The Claimant lives with his disabled brother, who suffers from Spina Bifida and has regular kidney dialysis, and is in receipt of income support and disability living allowance. Around 2012, the Claimant took out a mobile phone contract with Vodafone in his own name, but it was for his brother to use and his brother was responsible for the bills.

18. It seems that after about three months, the bill came to £300, which brothers were shocked by as they had understood that 020 numbers to landlines would be free. They went to a Vodafone shop to query it. They understood that they had been told it would be sorted. Around that time, it seems, the phone was cut off. No further action was taken by the Claimant to settle or dispute the bill. He also suggests that nothing further was heard from the phone company. He viewed the phone as his brother's responsibility, both to pay the bills and to deal with any outstanding action.

19. In the autumn of 2015 it seems that Vodafone took action to collect the debt through a debt collection company. At this time of course the Claimant was ill. He says that he was not concerned with finance or work, only his own health. He says that he was unclear if there had been earlier

correspondence. No one who gave evidence to the Tribunal has stated what correspondence there was, when, or what was in it, none is available in the bundle.

20. In October 2016, the Claimant completed a form for the triennial credit check. In January 2017, the credit reference agency returned the credit check. It showed that a County Court Judgment in the sum of £1,884 had been registered against his name on 13 October 2015.

21. The Claimant was called to a fact finding meeting with his Line Manager, Claire Chalcraft-Pears. He was shown the record. He had only found out about the CCJ recently. He said that he did not know the Respondent's policies and procedures about this. He explained that it was about his brother's phone and that they were disputing the amount.

22. On 30 January, the Claimant was called back for a further meeting with Claire Chalcraft-Pears. It was put to him that he had completed the "knowing your responsibilities" test the previous August, is (the tick box procedure) and that he would have done only a few weeks before finding out about the possible Court action from the phone company. The Claimant said that he knew his brother had received a letter about the outstanding bill but had not been told more and did not know it had gone to Court. He said that his brother had received had received a letter from an agency letting him know that they were taking action in the Courts. He was asked if he had any documentation to show that it was his brother's phone bill. He said he did not: "I was trying to sort the issue out last year and as I was not well for a period of time, I did not get around to sorting it out."

23. He was told he would be suspended on full pay, not allowed back to work, and must empty his locker and hand in his locker key. He was asked to call each working day. He was asked to bring in evidence, something to prove the phone bill is in his brother's name.

24. The Claimant was sent a letter of the same date confirming the suspension and at that point the Claimant got a grip on the problem. He and his brother

went to solicitors and swore affidavits to the effect that although the contract was in the Claimant's name, it was his brother's phone and his responsibility to pay. He also contacted the debt collector and made an agreement to pay £50 per month in instalments. A direct debit was set up on his brother's account to discharge the debt. There are documents to show that these actions were taken on those dates and these were made available to the Respondent's managers in the hearing.

25. On 13 February 2017 there was a disciplinary hearing chaired by Ben Coulson. The letter sent to the Claimant inviting him to the disciplinary meeting said that it was a formal disciplinary procedure for gross misconduct to consider the following allegation: non disclosure of the County Court Judgment. He was sent documents about the investigation, the documents about his responsibility for training and the disciplinary policy and procedure. He was told of his right to be accompanied and that if the allegations were upheld he might be dismissed with or without notice, or given a written warning.

26. At the hearing the Claimant explained about having been cut off in 2012, at which point the bill was £300, but there was a dispute about whether they should have been charged the calls to landlines. This brother opened the post. Challenged, about getting into difficulty, or in particular, that it was going to court, and that he did not mention it to anyone at work, the Claimant said his brother told him about it and said they "may be" taken to Court. He told his brother to sort it out. He did not tell anyone at work because he thought it was "not a major thing as everyone is in debt." He confirmed again that he was unwell, and added again that he did not know what a 'CCJ' was. He had been under the impression that he only needed to go to the employer if he went to court and as it had not got to court, he did not appreciate it had reached that stage of seriousness. He said he did not feel as though it would need to be taken to courts: nothing had been heard from the creditor until September 2016. He was asked if there was anything further he wanted to add, he stated that the direct debit had been set up, but of course the Judgment was still outstanding.

27. After a 30 minute adjournment, Mr Coulson came back to say that he had decided to dismiss him for gross misconduct, for non disclosure of a County Court Judgment. He based his decision on the fact that he knew the amount owed to Vodafone, that the contract was in his name, he had been notified in September 2016, and had failed to notify about Vaultex at that time. That was his responsibility. Although not minuted, at this point the Claimant, in consultation with his representative, asked Mr Coulson if he could be allowed to resign instead of being dismissed for gross misconduct, bearing in mind the difficulty this would cause him in seeking alternative employment. Mr Coulson said no, the decision had already been made.

28. It was confirmed in a letter of 14 February, which said that he had been dismissed because of non disclosure of County Court Judgment issued 13 October 2016, in breach of 'knowing our responsibilities' completed by him on 28 August 2016. His dismissal was without pay in lieu of notice.

29. The Claimant was advised of his right to appeal and he did. In his letter of appeal he said: "I would like to challenge the decision of my dismissal by reason of non disclosure of County Court Judgment of my disabled brother's phone bill. I believe the grounds for decision of dismissal was unfair as this phone bill was not mine, confirmation in front of solicitor letter, and I did not attend Court on neither judgment decision when I submitted the check disclosure form.

30. The appeal was heard on 24 March 2017 by Mr O'Sullivan. There was extensive discussion of what the Claimant knew and when. The Claimant explained again that he did not know what a County Court Judgment was or that it required him to notify his employer, he thought he only had to notify if he went to Court about any matter, whether criminal or civil. It was clear from discussion that the Claimant had his own phone, which was paid up to date, indeed there was a third phone relating to a company in his name and that of his brother also paid up. It was confirmed again that a direct debit had been set up on the brother's account. There was discussion of the nature of his responsibilities, and that he had to inform the Respondent if his credit status was changed. After a 26 minute adjournment, Mr

O'Sullivan concluded that the dismissal should stand. It was the Claimant's responsibility on the contract. He could not delegate his responsibility to his brother, and it became clear that he considered the Claimant had been less than frank about what he knew at any stage. For example, having initially suggested that he had not seen any letters until the debtor contacted them in September 20156 In an adjournment in the appeal, the Claimant had telephoned his brother and came back to say that in fact it seemed there were more letters available.

31. At this Tribunal hearing it was put to the Claimant that the Respondent had an employee assistance policy with Aviva who could be contacted in confidence to get help on personal difficulties, including debt advice, and that if he was in difficulties in 2015 he should have got in touch. There was no evidence from the Respondent's witnesses that this was put to the Claimant at investigation or disciplinary appeal meetings, nor was it mentioned in their statements, and the Claimant denies that in fact he had been handed a leaflet, further, and as he was off sick he would not have access to the internet.

32. In clarifying his reasons, Mr Coulson said in evidence that the Claimant lived with his brother, and if he did not know, he should have known that there was difficulty, because the bills were in his name.

33. Mr Coulson was also asked, in the context of the risk to the Respondent, about whether the Claimant himself was in financial difficulty, as it was all about his brother's responsibilities. In his view the reason for dismissing the Claimant related to the Claimant's integrity in failing to be frank with the Respondent about a County Court Judgment, impending or actual. Both Mr Coulson and Mr O'Sullivan confirmed that the general procedure for the Respondent if there was a County Court Judgment, or some other difficulty such as an IVA or a bankruptcy, against an employee's name, it should go down the road to dismissal, unless there were reasons not to dismiss. Mr Coulson as example someone who got into difficulty in this way at the same time as the Claimant. He had discovered from an online credit check that he had County Court Judgments registered against him of which he was

unaware. He went to his manager to talk about it, and to show that he had paid it off. In these circumstances he was not dismissed. The difference in was that the Claimant was not trying to pay it off, at any rate until he had been suspended from work.

**Relevant Law**

34. The law on unfair dismissal is set out in Section 98 of the Employment Rights Act 1996. It is for the employer to show that the reason for dismissal was one of the potentially fair reasons set out in the statute, these include dismissal for conduct. It does not seem to be seriously in dispute that conduct was the reason for the dismissal. Mr Coulson saw the reasons as a serious breach of confidence and lack of integrity, rather than that the Claimant was in financial difficulties, Mr O'Sullivan confirmed that the Claimant was not likely to steal, but he was concerned by the integrity point, and the fact that he did not disclose it the Judgment.

35. Once the reason is established, it is for the Tribunal to decide, having regard to the size and administrative resources, and equity and the substantial merits of the case, whether it was fair or unfair to dismiss the employee for the reason given.

36. Where conduct is the concern, Tribunals heed the guidance to set out in *British Home Stores v Burchell [1978] ICR 376*. Tribunals must consider whether the employer held a genuine belief in the guilt of the employee, whether that belief was founded on reasonable investigation, and the employer had reasonable grounds for holding that belief, and finally the overall test, whether a reasonable employer would dismiss for that reason. In considering this, Tribunals must bear in mind that there may be a range of responses to particular misconduct by reasonable employers, and it is not for Employment Tribunals to substitute their own judgment for that of a reasonable employer.

37. Where gross misconduct is concerned, as Tribunals are reminded by the EAT in *Sandwell & Birmingham Hospital NHS Trust v Westwood UKEAT*

*0032/09*, that what is gross misconduct is a question of mixed law and fact. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee. It must be wilful, in other words, a deliberate or wilful flouting of the essential contractual conditions. In the alternative, it may gross negligence.

**Discussion**

38. Reviewing first the employer's belief and the grounds on which it was held, there was an investigation, and there was no doubt that a County Court Judgment had been registered against the Claimant in the sum of £1,884, and no doubt that the difference between the original £300 bill and this amount includes some element of interest, court fees and costs.

39. The Respondent accepted that the debt was incurred on the brother's phone, although the Claimant's name was on the contract. The Respondent also accepts that the Claimant himself appears not to have been in financial difficulty. The basis of their decision, as both decisions makes clear, was that of integrity, namely that the Claimant should have told them about it. It was not just that it only came to light on the credit check in January 2017, it was their perception that on each interview with the Claimant (the two investigation meetings, the disciplinary meeting and the appeal meeting) more facts came out in each successive meeting; they also felt there had been some internal contradictions, for example, while the Claimant suggested he had not know anything about it at all in 2015, it became clear on a call to his brother that there may be more letters, and the question arose why, if that was the case, he had not asked his brother, who lived with him, before that.

40. When it comes to whether a reasonable employer would dismiss for a particular reason, it has to be said that there are some matters are treated as misconduct which need not be spelled out to staff. Most employees know or should know that stealing from an employer even of quite small amounts, is likely to lead to dismissal; such matters are always viewed

seriously. Most employees would be aware that assaulting co-employees will lead to dismissal; the same with deliberate disobedience.

41. Tribunals have always also accepted that in certain workplaces or certain businesses, some rules are enforced strictly which may not be important in other businesses; as an example, that because of the high number of fatalities on construction sites, employers impose very strict rules on their employees and contractors about wearing helmets on site as summarised in the blunt message "no hat no job". In other examples in Tribunal cases, the mere possessions of smoking materials in an oil refinery or an ammunition factory, will lead to instant dismissal. In these cases it is established that provided that the rules are made known to staff, an employer is entitled to treat these matters as crucial to his business given the nature of the risk.

42. In the context of this employer, the risk is obvious, that where staff have the opportunity to steal cash (or arrange for its theft by others), an employer is entitled to demand that they had clean criminal records, and are not in financial difficulty, and so vulnerable to temptation. In this case it is clear that the Respondent had a policy that they would dismiss unless there were real mitigating factors. What is less clear is how much that was spelled out to staff. The behaviour policy seems to be the only document available dealing with what an employee is required to disclose. Nowhere in that document is there mention of a CCJ, an IVA or bankruptcy. It refers to a "changing credit status" without being specific as to what that means.

43. The Claimant explained that he had training on health and safety issues, and work processes, but it was never explained to him what "changing credit status" meant. He appears not to have been aware of what a "CCJ" was. In his understanding he knew that if there was a criminal conviction, or if he had to go to court, that was something he must disclose, but as for being in debt, many people, he explained have loans these days, and that was not regarded by his employers as something they must be told about. On whether the Claimant himself was aware the matter was going to court, and whether the employer was satisfied of that, they accepted that it was

not his own debt, they also knew that he had been ill in the relevant period (the warning of court action and the judgment itself) and was either on a phased return or had not yet returned at the date of the County Court Judgment. If had it been investigated they would have deduced that the relevant correspondence would be arriving at a period when he was seriously ill. They doubted that it had come to his attention only recently, but never asked to see the documents, even when at the appeal meeting they learned there might be more documents to view. They also knew that it was not a question of the Claimant getting into debt because he could not afford it, but that he (or his brother) disputed the basis on which the charge was made. The Claimant said at this hearing, (although it is not clear that he said this to his employer at the time), that if it had gone to court he expected to dispute the bill on the basis that it was not money owed to Vodafone.

44. The vetting procedure made it clear that vetting was addressed to the risk to the employer's business of dishonesty by staff, and that an exception can be made where arrangements have been made to clear of the debt. There was evidence before both Mr Coulson and Mr O'Sullivan that a direct debit had been arranged, (although not until he had been suspended, at a point when the Claimant finally got to grips with the fact that this was his problem and not his brother's). They also accepted that the Claimant himself was not in financial difficulties, which brings us to the real reason for dismissal, which was lack of integrity. The Respondent made clear that they thought the failure to disclose the change in status was the harm, not the debt. The question therefore arises as to whether this was in fact gross misconduct, having regard to the need to consider whether it was wilful flouting of an underlying condition of the contract. Not all breaches of trust are fundamental to the contract. The implied term of trust and confidence is the term relied on by the Respondent in submission. The Respondent had no evidence that the Claimant had lied to them. They had been offered many reasons to explain why was not aware of the problem, or why it did not take steps to bring it to their attention, such as the fact that it was not his debt, that he was not himself in financial difficulties, that he had serious ill health at the time court action was threatened, that his brother had been asked to

look at the correspondence and deal with it. Against the background of the facts of this case, it is hard to conclude that this was a wilful flouting of rule, an essential term of the contract. The fact that the Claimant was not aware from training of anything other than "changing financial status" having to be reported suggests that there must be substantial doubt as to whether it was a wilful flouting. His own understanding of it is not incredible. If it was not gross misconduct, would a reasonable employer have dismissed in these circumstances? The Claimant had a long and clean record, satisfactory performance, the Respondent accepted that there was no evidence he was himself in financial difficulty, and he had had a period of serious ill health. Further, once the problem was brought to his attention, within a very short period he had arranged to set up a direct debit for his brother to pay it off.

45. In these circumstances, the Tribunal finds it hard to see that any reasonable employer would have dismissed in these circumstances, that is, dismissed without notice for gross misconduct, leaving a slur on his character as the Claimant clearly perceived at the disciplinary meeting when he asked if he could resign it is particularly crucial that staff had not been told that what it was they had to declare if they were not to be dismissed.

46. In consequence, the finding of the Tribunal is that the Claimant was unfairly dismissed.

Employment Judge Goodman
25 September 2017