

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 9 November 2012

Before

THE HONOURABLE MRS JUSTICE COX DBE

MRS C BAELZ

MRS L S TINSLEY

MR B STUART

APPELLANT

LONDON CITY AIRPORT

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS NABILA MALLICK
(of Counsel)
Direct Public Access

For the Respondent

MR JOHN MEHRZAD
(of Counsel)
Instructed by:
EEF
Broadway House
Tothill Street
London
SW1H 9NQ

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Claimant's claim of unfair dismissal was dismissed because the Tribunal found that his employers' decision, that he had acted dishonestly and in breach of trust, was based on reasonable grounds, after a reasonable investigation. The Claimant's appeal was allowed to proceed to a full hearing on one issue, namely whether the Tribunal's decision that the employers' investigation into the allegation of gross misconduct was a reasonable investigation, was a decision that was reasonably open to them, on the evidence and findings made.

In the particular circumstances of this case, and where the Claimant had asked for further investigations to be carried out which would support his account that he was at no time acting dishonestly, his employers' failure to do so was held, on appeal, to be objectively unreasonable and the Tribunal's conclusion to the contrary was unsustainable. The EAT unanimously agreed that this was one of those rare cases where they should interfere with the ET's decision on this issue.

THE HONOURABLE MRS JUSTICE COX DBE

Introduction

1. The Claimant, Brian Stuart, is appealing against the judgment of the East London Employment Tribunal, promulgated with reasons on 23 September 2011, dismissing his claim for unfair dismissal.

2. The central issue is the reasonableness of the Respondent's investigation into an allegation of dishonesty and breach of trust against this Claimant. The stark question for us to determine is whether, in the particular circumstances of this case, the Employment Tribunal's decision, that the Respondent's belief as to the Claimant's misconduct was a reasonable belief arrived at following a reasonable investigation, was a decision which was reasonably open to them on the evidence; and therefore whether it is a decision with which this Appeal Tribunal should interfere.

3. Before turning to the facts we make it clear that, at the sift stage, the challenge to the Tribunal's decision was permitted to proceed to a full hearing on that one issue, namely the reasonableness of the Respondents' investigation. That is the challenge which is apparent from the grounds of appeal. We mention that because Ms Mallick, appearing for the Claimant, included in her skeleton argument challenges to other aspects of the Tribunal's decision, in particular their findings that the Claimant had had an opportunity to be heard in the disciplinary process, and that dismissal was within the range of reasonable responses. When we raised this with her she accepted that those criticisms had not been made in the Notice of Appeal, and she did not seek permission to amend her Notice in order to argue them. She did not pursue them before us and we shall therefore say no more about them.

The facts

4. On the evidence the Tribunal found the following facts.
5. The Claimant had worked for the Respondent as a Ground Services Agent since October 2005. He was one of 430 employees working in the Ground Services Department at London City Airport. He had an unblemished record of service and the most recent staff appraisal graded him as ‘excellent’.
6. The Tribunal set out the Claimant’s account of events and it is not disputed that this was the account he gave at the investigative stage. On the evening of 21 December 2009 the Claimant entered Nuance, the duty free shop, to buy some Christmas presents. He chose some items which he stated that he held at all times in his hands; he accepted that he did not use a basket. He first went to pay for them at an un-manned till point, where he queued with another customer before a member of staff told him to go and pay at another till point because that one was closed. He moved over to a different till and began to queue again. During the whole of this period he stated that the items he had chosen were clearly visible in his hands.
7. What then happened was that he was beckoned over to a seating area immediately outside the shop by another Nuance staff member called Lynette, where she had a conversation with him about the snowy conditions at the airport that day. The Claimant then realised that he was due back from his break shortly and he moved to a refrigerated counter nearby to buy a drink. He still held in his hands the items for which he intended to pay. However, while he was selecting a drink, a police officer came to speak to him, on the basis that he was suspected of dishonestly removing goods from Nuance without paying for them.

8. The Respondents were informed and the Claimant was suspended on full pay, with effect from 21 December, pending an investigation into alleged gross misconduct involving breach of trust.

9. The matter was then investigated by the Respondents, as his employers. Statements were taken from Mr Gilani, the Nuance store manager, and from a Nuance staff member, Ms Adenike Adenekan. Strangely, in view of the significance of her evidence, which was very much in dispute, Ms Adenekan did not give evidence, either at the disciplinary hearing or before the Tribunal. Mr Gilani did, on both occasions, and the Tribunal also had his statement which had been made at the time. Mr Gilani's evidence was that Ms Adenekan had reported concerns that an airport employee inside the shop, later accepted to be the Claimant, was secreting items from the purchasing section under his jacket. The Claimant vigorously denied that. As a result of Ms Adenekan's report Mr Gilani went on to the shop floor, where he stayed for between 10 and 15 minutes. During that time he saw that there were no other customers in the shop and no queues. He stated that baskets were available for customers but that the Claimant was not carrying a basket.

10. It is common ground that, save for noticing that the Claimant was not carrying a basket, which was not in dispute, Mr Gilani did not himself see the Claimant do anything suspicious while he was there. He then gave Ms Adenekan the task of watching the Claimant and left the shop. A short while later Ms Adenekan came to find him to say that the Claimant had left the shop and that she was 100% certain that he had taken items from the shop. Mr Gilani then approached airport security and the police became involved. The Tribunal accepted Mr Gilani's account of events.

11. The Claimant attended a disciplinary hearing held by Mr Dodds on 19 January 2010. In advance of this hearing, Mr Dodds had read the statements from Mr Gilani and Ms Adenekan and had also read a statement from the Claimant. The statements were apparently before the Tribunal, as were the notes of the disciplinary hearing, but we have not been taken by counsel for either party to any of those documents. At the Tribunal Mr Dodds gave evidence that the Claimant did not believe he had actually left the shop. While he accepted that he had moved over to the drink counter, he insisted that he still intended to pay for the items he was holding and he thought he was still within the general shop area. The Claimant pointed out that he had made many purchases from the shop previously and he produced documentary evidence showing that he had always paid for them.

12. In view of the Claimant's assertions as to the layout, Mr Dodds adjourned the disciplinary hearing to go and look at the layout himself. In his view the shop had clear boundaries. In particular he found that there was a line of black mosaic tiles edging the shop, which effectively separated the retail units from the general area. In addition, staff in the different stores wore different uniforms and there were different store signs above each one. Mr Dodds concluded that the Claimant had therefore left the boundaries of Nuance without paying for the goods. He summarily dismissed the Claimant on the basis that there had been a clear breach of trust. There were clear boundaries between the stores and the Claimant had definitely left the duty free shop boundaries. At paragraph 18 the Tribunal found as follows:

"Mr Dodds believed Mr Gilani's evidence that there was no intention by the Claimant to pay for the goods and he believed this over the Claimant's contention to the contrary."

13. It is common ground before us that the breach of trust found to have occurred in this case was based entirely on what Mr Dodds regarded as dishonest conduct by this Claimant. It is also clear that Mr Gilani's conclusion, accepted by Mr Dodds, as to the Claimant acting dishonestly

and having no intention of paying for the goods, was based at least in part on the allegation contained in Ms Adenekan's statement, that this Claimant had concealed items under his jacket before he left the store. In relation to dishonest conduct that observation, if correct, was clearly consistent with dishonesty.

14. The Claimant appealed against his dismissal, repeating his assertions that there were no clear boundaries marking the different shops and that he was not aware of the boundaries, and maintaining his account that he had always held the goods in his hands and intended to pay for them.

15. The appeal hearing was conducted by Mr Shields. Having heard the Claimant's account of his movements, he too adjourned the appeal in order to go and look at the layout of the store for himself. Having done so, his evidence to the Tribunal was that the statements that he had seen indicated that the Claimant had concealed the items at all times. Further, in his view, the area in which the Claimant was apprehended could not be confused with the duty free shop area. In upholding the decision to dismiss, he based his decision on a number of factors, including the fact that the marking between the shops was clear; that when he was apprehended the Claimant was standing in an area which contained restaurant seating; and that the shops were marked with different lights and there was visible shop front signage.

16. In relation to the three witnesses called by the Respondent the Tribunal found as follows:

"We found that all three witnesses were consistent as to the tile marking of the boundaries and we accept their evidence on this point. We also find that the Claimant was outside this boundary and we find that at the point he was apprehended he had not paid for the goods. Mr Shields accordingly upheld the dismissal."

17. In his ET1 the Claimant complained that his dismissal was unfair. He maintained his assertion that the shop boundaries were not clearly marked, and he alleged that the UKEAT/0273/12/BA

Respondent's investigation was not sufficiently thorough to permit the finding of dishonest conduct and breach of trust. In particular, he complained that the Respondent failed to question the cashier at the till point, where he had initially gone to pay for the items, or the staff member, Lynette, to whom he had gone to speak. He also alleged that the Respondent failed to obtain and consider relevant CCTV footage, which would have shown his movements inside the store and would have supported his account that he had never attempted to conceal any item.

The Tribunal's decision

18. There is no dispute that the Tribunal had regard to the relevant legal principles, which are well known and long established. It was accepted that the Respondent had shown the reason for this Claimant's dismissal to be a potentially fair reason, namely gross misconduct. The Tribunal therefore had to determine whether the dismissal was fair in accordance with section 98(4) of the **Employment Rights Act 1996**; that is whether in all the circumstances, including the size and administrative resources of the employers' undertaking, the employer acted reasonably or unreasonably in treating the Claimant's misconduct as a sufficient reason for dismissing the employee and whether his dismissal was in accordance with the equity and substantial merits of the case.

19. They directed themselves to the cases of **BHS v Burchell** [1978] IRLR 379 and **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23. They held that the question they had to determine was whether the Respondent had a genuine belief as to the Claimant's misconduct based on reasonable grounds and following a reasonable investigation. It was necessary to decide whether, throughout the entire disciplinary process, the procedure adopted by the Respondent and the decision to dismiss were reasonable and were within the band of reasonable responses of a reasonable employer.

20. The Tribunal correctly directed themselves that it was not for them to carry out any further investigation, and that they should not substitute their own standards as to what was an adequate investigation. The investigation had to be judged on the basis of what "...could be objectively expected of a reasonable employer". They further noted that the fact that the Claimant was subsequently acquitted of the criminal charge of theft, as this Claimant was, could not affect the fairness of otherwise of the Respondent's decision to dismiss summarily for breach of trust at the time that decision was made.

21. The Tribunal found that both Mr Dodds and Mr Shields had a genuine belief in the Claimant's misconduct. They then dealt with the Claimant's complaints concerning the reasonableness of the investigation as follows:

"25. The Claimant made a number of challenges to the reasonableness of the investigation and we have considered whether the Respondent's failure to carry out the steps the Claimant suggested were sufficient to make their belief unreasonable or make their investigation a flawed one. To deal with these in turn:

(i) **The failure to interview the other shop tellers in Nuance.** We find that the Respondent had evidence from Mr Gilani and Ms Adenikan. This contradicted the Claimant's statements. The Respondent was entitled to go no further in their investigation and it was reasonable to rely on this evidence alone without seeking any further evidence.

(ii) **Failure to interview Lynette.** The conversation with Lynette took place outside Nuance. It was not disputed that the Claimant was in this area. It is not therefore relevant evidence which would have helped the Respondent make its case any further.

(iii) **They did not obtain CCTV footage.** It was agreed that there was no CCTV footage available to the shop that could have been available for the central area. Mr Dodds' evidence was that from his view it would not have added anything. We consider had the Respondent looked at it, it could have shown two things:

(i) were the goods concealed and

(ii) were the tile markings clear

(iv) **In relation to the tile markings both Mr Dodds and Mr Shield inspected the site themselves and were able to form a direct view of the boundary issue.** They did not believe the Claimant having viewed the space for themselves. It was reasonable for them, having formed a view therefore for the Claimant's credibility on this point not to go any further and to view the CCTV footage in relation to the concealment of goods. While we consider that some employers would have done so the failure to do so is not so unreasonable as to render the process unfair in these circumstances."

22. The Tribunal's finding as to the CCTV footage, referred to at subparagraph (iii) is unclear. However, it is common ground before us that, while there was no footage for the UKEAT/0273/12/BA

central area outside the shop, the CCTV footage to which Mr Dodds referred as not adding anything was the CCTV footage from inside the shop, which was available.

23. The Employment Tribunal then went on to find that this Claimant was given every opportunity, at both the disciplinary and the appeal hearings, for his case to be heard. They therefore found that aspect of the process to be fair. They also found that the decision to dismiss was within the range of reasonable responses, stating as follows at paragraph 27:

“We find that in this case dismissal was within the reasonable range of responses. As this is an issue of honesty and the Claimant was employed in a position of trust we cannot say that no reasonable employer would have dismissed on these facts.”

The appeal

24. On behalf of the Claimant, Ms Mallick readily accepts the very high threshold to be crossed in seeking to persuade us that the Tribunal’s conclusion as to the reasonableness of this investigation is unsustainable. We were referred in the course of argument to the judgment of the Court of Appeal in **Salford Royal NHS Foundation Trust v Rolden** [2010] IRLR 721 and to the words of Elias LJ at paragraphs 51-52:

“It is not disputed that the Tribunal properly directed themselves in accordance with the principles established in *Burchell v British Home Stores* as further explained in a case of this kind by *A v B*. In these circumstances, save at least where there is a proper basis for saying that the Tribunal simply failed to follow their own self direction, the EAT should not interfere with that decision unless there is no proper evidential basis for it or unless the conclusion is perverse. That is a very high hurdle. In *Yeboah v Crofton* [2002] RLR 634 Mummery LJ said that this would require an ‘overwhelming case’ that the decision was one which no reasonable tribunal, properly appreciating the law and the evidence, could have made.

In my judgment, that is the test that has to be applied here.”

25. In **Sainsbury’s v Hitt**, after referring to the unfortunate lack of clarity in the authorities since **BHS v Burchell**, Mummery LJ said this at paragraphs 29 - 30:

“29.....Unfortunately, it appears that the law has not been made as clear as it should have been, since experienced members of the Employment Appeal Tribunal have in this case interpreted what was said in *Madden’s* case, in relation to the objective standards of reasonableness and the range of reasonable responses test, as not applying to the question whether an investigation into the alleged or suspected misconduct was reasonable in the circumstances of the case.

30. In my judgment, the Appeal Tribunal have not correctly interpreted the impact of the decision of the Court of Appeal in *Madden's* case. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

26. In this case Ms Mallick submits essentially as follows. The allegation made against this Claimant was a serious allegation of criminal misbehaviour, going directly to his honesty as an employee employed in a position of trust, as the Tribunal found. The Claimant, who had unblemished record of honest service, denied acting dishonestly. It was therefore necessary, in order for the Respondent's investigation to be found objectively to be a reasonable one, for them to investigate all the circumstances carefully. In this case, she submits, it was necessary for the Respondent to do more than simply decide whether the Claimant actually left the boundaries of the Nuance shop without paying for the goods. In particular, there was a significant dispute as to his conduct inside the shop and whether, as alleged, the Claimant had ever sought to conceal the items in his jacket. This allegation went right to the heart of the issue of dishonesty and breach of trust, and the Respondent, as the Claimant's employers, should have done more to investigate it themselves and not simply relied upon the statements given by Nuance staff.

27. She therefore submits that this is one of those rare cases where the Employment Tribunal's conclusion as to the reasonableness of the Respondent's investigation is perverse. Ms Adenekan did not give evidence at the disciplinary hearing and Mr Dodds proceeded on the basis of her written account, accepted by Mr Gilani, when other evidence, readily available and directly relevant to the question of dishonesty and the Claimant's concealment of items in the store, had not been investigated. She relies in this respect on the evidence that the till assistants could have given, to the evidence of 'Lynette' and to the CCTV footage which would have shown the Claimant's movements inside the store.

28. Ms Mallick drew our attention to a number of authorities in support of these submissions, but she relies principally on the decision of the Employment Appeal Tribunal in the case of A v B [2003] IRLR 405 where, at paragraphs 60-61, they said as follows:

“60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.

61. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.”

29. She further relies on observations by the Court of Appeal in the Salford case, where Elias LJ said (at paragraph 73):

“The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no or very little other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of one side or the other.”

30. More recently, in Crawford v Suffolk Mental Health Partnership Trust [2012] IRLR 402, the Court of Appeal (Elias LJ) said this, at paragraph 27:

“Moreover, as I observed in the Court of Appeal in *Salford*, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as is the case here, the employee’s reputation or ability to work in his or her chosen field of employment is likely to be affected by a finding of misconduct. The court was approving a passage to that effect in *A.v B ...*”

31. Relying on these statements, Ms Mallick submits that the Respondents in this case were faced with two conflicting accounts as to what had happened inside and outside the store. Mr Gilani, who had seen nothing untoward himself inside the store, relied upon what he had been told by Ms Adenekan as to the Claimant concealing items under his jacket, which the Claimant consistently denied. He was then told that the Claimant had left the shop without paying for items, which the Claimant explained by reference to matters which were inconsistent with a dishonest intention. In these circumstances, Ms Mallick submits that the Tribunal were in error in holding that the tests in **Burchell** and **Hitt** had been met. The Respondents' failure, as part of their investigation, to obtain and consider important and potentially exculpatory evidence, to which the Claimant as their own employee had referred, and which went to the heart of dishonest intention, rendered that investigation one which fell outside the range of reasonable investigations in such circumstances. The Tribunal's conclusion to the contrary was therefore, in her submission, perverse.

32. On behalf of the Respondent, Mr Mehrzad submits that the Tribunal's reasoning cannot be impugned. It was for this Tribunal to assess the evidence and their judgment should not be subjected to, "pernickety critiques". That submission contained a reference to the decision of the Court of Appeal in **Fuller v London Borough of Brent** [2011] IRLR 414 in which Mummery LJ, giving the judgment of the court, made these observations, so far as material, at paragraphs 28 and 30:

"28. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing error of law or reaching a perverse decision on that point.....

30.....The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular

passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.”

33. Such a critique, Mr Mehrzad contends, is what Ms Mallick has presented in this case. This Appeal Tribunal should not over-analyse the Employment Tribunal’s reasoning process, which was sufficiently clear, and should not substitute their own views of the evidence and the facts. Mr Mehrzad submits, essentially, that the Tribunal correctly directed themselves as to the relevant law, in particular as to the pitfalls to be avoided. They applied the law correctly to the facts found and arrived at the conclusion that this investigation was reasonable. They took the Claimant’s criticisms as to the unreasonableness of the investigation into account, together with his unblemished record, and had regard to all the relevant factors before concluding that the Claimant’s dismissal was fair. The appeal should therefore be dismissed.

Discussion and conclusion

34. We have carefully considered the competing submissions of counsel in this case, mindful of the high hurdle that must be crossed if the perversity challenge is to succeed. We are mindful, in addition, of the need not to substitute our own views for those of the Employment Tribunal. As Mummery LJ pointed out in Hitt, the reasonableness of the employers’ investigation is to be considered by the objective standards of the reasonable employer, having regard to the particular circumstances of the case.

35. It is in considering the particular circumstances of this case, however, that we have unanimously concluded that the hurdle has been crossed. We find the submissions of Ms Mallick compelling. The Tribunal recognised, at paragraph 27 of their reasons, that the disciplinary charge brought against this Claimant raised directly a question of his honesty, as an employee with an unblemished record holding a position of trust within the Respondent’s Ground Services Department. It is not in dispute that the breach of trust for which this

Claimant was dismissed was the act of dishonesty he was found to have committed. Nor is it in dispute that Mr Dodds, as the decision maker, took into account in arriving at his decision, the evidence in Mr Gilani's statement concerning the concealment of items by the Claimant under his jacket while he was in the shop. Whether or not the Claimant had in fact concealed those items was therefore an important factor in the Respondent's investigation into an allegation of dishonesty.

36. However, as the Tribunal found, Mr Gilani had not himself seen the Claimant concealing any items under his jacket. At the disciplinary hearing he relied in respect of this allegation on the written statement from Ms Adenekan, who did not give oral evidence either at that hearing or before the Tribunal. Although Mr Gilani had attended the shop floor while the Claimant was inside, and had noted that the Claimant was not carrying a basket, that was not in dispute. The absence of a basket was not, in any event, indicative by itself of a dishonest intention not to pay for the items. Mr Gilani had therefore seen nothing untoward himself while he was inside the shop. Ms Adenekan's subsequent account, that the Claimant had left the shop without paying for the items he was carrying, was found to be the case, although the circumstances in which that had happened were explained by the Claimant by reference to other evidence, which he asked his employers to investigate.

37. We agree that the allegation of concealment, the question whether the goods were at all times being held in his hands and were clearly visible, and the circumstances in which the Claimant moved out of the store without paying for them, were therefore circumstances which, viewed objectively, went right to the heart of the allegation of dishonest conduct and of breach of trust in this case.

38. We do not accept Mr Mehrzad's submission, that the allegation against this Claimant was of a relatively minor nature and did not therefore merit what he termed 'heightened scrutiny'. Comparisons between different acts of misconduct are not always helpful, because it is the context that is important. For an employee employed in a position of trust, as this Claimant was, an allegation of dishonestly taking goods from the premises where he works without paying for them, in breach of that trust, is always serious and will therefore require careful investigation. As was made clear in the case of A v B, that investigation should include evidence which might potentially be viewed as exculpatory, or as consistent with the innocent explanation that is offered. In our view this is particularly the case where the Respondents, who were required to investigate the matter after Nuance brought it to their attention, were investigating a serious allegation against their own employee, at a time when he was suspended from his employment.

39. In these circumstances the Employment Tribunal's findings at paragraph 25 are, in our judgment, unsustainable. Mr Gilani's evidence that the Claimant had no intention of paying for the items was based, at least in part, on the report to him from Ms Adenekan as to concealment, which was challenged and in respect of which the Claimant had asked his employers to make further inquiries. It is precisely because the statement from Ms Adenekan contradicted the Claimant's account that, viewed objectively, further inquiry by his employers, in particular as to potentially exculpatory evidence being referred to by the Claimant, was required. The shop assistants at the tills in Nuance could have confirmed both the Claimant's initial approach to a till, to queue and pay for the items, and the fact that the selected items were at all times visible in his hands and not concealed. The staff member, Lynette, could have confirmed both that she had beckoned the Claimant over to her, supporting the explanation offered by the Claimant for leaving the shop area in the first place, and the fact that he was openly holding the items in his hands.

40. In relation to the CCTV footage, it was accepted that there was no CCTV footage of the central area. We agree that, even if there was, it would have added nothing of value to the question of tile marks and boundaries, given the inspection of that area by both Mr Dodds and Mr Shields. However, CCTV footage of the Claimant's movements inside the store was likely, viewed objectively, to be of considerable assistance in relation to the allegation of concealment and therefore of dishonest conduct. This is surely one of its main purposes inside the store. It was potentially exculpatory evidence which could have supported this Claimant's oral account, and cast doubt on Miss Adenekan's written one, as to his conduct inside the store.

41. For these reasons we cannot accept Mr Mehrzad's submission that, even if these matters had been investigated, they would have made no difference to the outcome. It appears from the Tribunal's decision that the focus of the Respondent in this investigation was on the Claimant's reference to the lack of clear boundaries between the outlets. After their inspection of the area the Respondent rejected this suggestion as unreasonable, or as not credible, as they were entitled to. Ms Mallick makes no complaint about that. However, the boundary markings dispute was only one aspect of the dishonest conduct and breach of trust found to have occurred, and for which the Claimant was summarily dismissed. Further, the defects to which we have referred were not corrected on appeal.

42. For these reasons, notwithstanding the high hurdle that must be crossed in a challenge of the kind made in this appeal, we consider, in the particular circumstances of this case, that the Claimant has crossed it. On the facts found, the Tribunal's conclusion that the Respondent had formed a reasonable belief as to this Claimant's dishonesty and breach of trust on reasonable grounds, following a reasonable investigation, was unsustainable. We therefore allow the appeal. After hearing further submissions from both counsel we consider that this case will

UKEAT/0273/12/BA

have to be remitted to a fresh Tribunal for re-hearing, in particular as to whether and to what extent the Claimant can be said to have contributed to his dismissal.