

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 2206244/16

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Held in Edinburgh on 5, 6 and 7 June 2017

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Employment Judge: Susan Walker  
Members: Thomas Lithgow  
Mary Watt

Boniface Menzies

Claimant  
In Person

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Marks and Spencer PLC

Respondent  
Represented by:  
Ms Brewis -  
of counsel

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous judgment of the Tribunal is that the claims are dismissed.

**REASONS**

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**Introduction**

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1. The claimant presented a claim to the Tribunal which was received on 20 May 2016. Following preliminary procedure, it was confirmed that the claim contained complaints under the Equality Act 2010 ("The Equality Act") of direct discrimination because of race and/or disability; discrimination arising from disability; harassment; unfair dismissal; wrongful dismissal and a claim in relation to holiday pay.

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2. The claimant gave evidence on his own behalf and the respondent led evidence from Shona Clark (SC); Ryan Fletcher (RF); Amran Alia (AA) ;

**E.T. Z4 (WR)**

Ewan Szadurski (ES); Mary Power (MP) and Robbie Sarginson (RS). A joint set of productions was lodged and some additional documents were added by consent at the start of the hearing. These included a photograph of a packet of Bernard Matthews's ham provided by the claimant.

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**Issues**

3. The issues to be determined by the Tribunal at this final hearing were agreed in advance, and confirmed at the start of the hearing by the parties, to be as follows:

10 **Unfair Dismissal**

1. What was the reason for the Claimant's dismissal?
2. Was the reason for dismissal potentially fair within the meaning of s 98 (1) or (2) of the Employment Rights Act 1996?
3. If the reason for dismissal was misconduct and thus potentially fair, was the dismissal actually fair having regard to s 98 (4) of the Employment Rights Act 1996 and in particular the following:
  - (i) Did the Respondent have a reasonable belief in the Claimant's guilt?
  - (ii) Did the Respondent have reasonable grounds for that belief?
  - (iii) At the time it held that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?
4. If the Respondent did not adopt a fair and reasonable procedure was there a chance that the Claimant have been dismissed in any event; *Polkey v A E Dayton Services Ltd [1987] 3 All ER 974?*
5. Has the Claimant taken reasonable steps to mitigate his loss?
6. Did either party unreasonably fail to comply with a Code of Practice to which they were subject, and if so should the Tribunal reduce or increase

any compensatory award due to the Claimant (and if so, by what factor not exceeding 25%)?

5 7. By his conduct, did the Claimant contribute to his dismissal and should any compensatory award be reduced accordingly (and if so, by what factor)?

8. Did the Claimant engage in conduct which was culpable or blameworthy, and if so should the Tribunal make a reduction to any basic award to which the Claimant would be entitled (and if so, by what factor) to reflect this?

10 Wrongful Dismissal

9. Was the Claimant in fact guilty of Gross Misconduct?

Disability Discrimination

10. Does the Claimant have a disability for the purposes of the Equality Act 2010? If so:

15 Direct Discrimination claim:

11. Because of the Claimant's IBS, did Mary Power and Ewan Szadurski provide false evidence against the Claimant in connection with the disciplinary investigation that the Respondent undertook into the Claimant's dishonest appropriation of a packet of ham?

20 Discrimination arising from disability claim:

12. Due to the Claimant's absences from work, which arose in consequence of the Claimant's disability, did Mary Power and Ewan Szadurski provide false evidence against the Claimant in connection with the disciplinary investigation that the Respondent undertook into the Claimant's  
25 dishonest appropriation of a packet of ham?

13. Who is the Claimant's comparator in respect of these claims?

Race Discrimination

14. Direct Discrimination claim – was the Claimant treated less favourably on the grounds of his colour in the following respects:

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- (i) By Ryan Fletcher allegedly referring to the Claimant as a ‘nigger’ at the beginning of December 2015?
  - (ii) By Ryan Fletcher and Amran Ali allegedly submitting false evidence against the him?

15. Who is the Claimant’s comparator in respect of this claim?

10 16. Harassment on the ground of the Claimant’s colour: did Ryan Fletcher address the Claimant as “nigger” in December 2015? If so, did the same have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for him?

15 Holiday Pay

17. Is the Claimant entitled to any outstanding holiday pay and if so, in respect of what sum(s)?

Jurisdiction

18. Are the Claimant’s claims in time?

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**Findings of fact**

4. The Tribunal considered the following facts to be admitted or proved:

25 Working environment

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- (i) The claimant worked for the respondent from 25 November 2011 to 12 February 2016 as a Customer Assistant in the Food Section.
- (ii) The claimant worked early shifts, usually 05.00 – 10.00 or 05.00 – 13.00. The claimant had keys to the store and often opened up in the morning. He also had a mobile phone for work use, including call out.
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- (iii) The claimant worked with other Customer Assistants, including RF and AA. They worked well together and had a friendly relationship at work.
- (iv) The claimant’s line manager from September 2016 was ES.
- (v) The claimant’s work involved distributing and collecting stock in the store. The customer assistants went up and down in lifts between the cold store and the shop floor.
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- (vi) The claimant’s work included unloading deliveries and “breaking down” the contents of pallets and then distributing them. This was done in the cold store and was physical and demanding work. It also included returning unused stock to the cold store. Some of the customer assistants played music during this task either with
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- headphones or loudly through their phones.
- (vii) Staff could buy food from the respondent using a discount card. There was also a cafeteria where food could be purchased and staff could bring in food and store it in a fridge.

Policies and procedures

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- (viii) The respondent had a rigorous search policy. Managers were required to carry out a significant number of random searches each week, the details of time and type of search were provided to them. These could be pocket searches, bag searches or locker searches. Staff were aware of the Staff Searches

Policy/Guidelines which was provided at induction, was available on the intranet and was on the staff notice board.

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- (ix) The Searches policy provided that for a bag search, the member of staff be asked to show the contents of the bag and if necessary, remove items so that a thorough search could be completed. The individual was required to sign the search register once the search had been completed.
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- (x) The Searches Policy provided for all types of searches *“If the individual cannot provide a receipt for M & S products or they are in possession of a large sum of unexplained cash, credit receipts or gift cards, then an investigation should be carried out in line with Company Procedures.”*
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- (xi) The Searches Policy continues *“ If the investigation cannot be carried out immediately e.g. End of day then the products or cash should be stored away securely by the Search Manager pending investigation”*.
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- (xii) The respondent has a policy called *“Conduct and You”* which is provided to staff at Induction, is available on the intranet and also on the notice board. This is a single page document that sets out what might be classed as misconduct. It states that the list is not exhaustive and that minor cases of misconduct should normally be dealt with informally. It also states that *“There will be many cases where following a formal route is necessary due to the serious nature of the misconduct – this could result in formal disciplinary action including dismissal”*.
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- (xiii) The policy includes a box called *“Gross Misconduct”* described as *“Incidents that are very serious, cause serious damage or cause the Company to fundamentally lose trust and confidence in the employee”*. The examples include *“Dishonest behavior e.g. any*

*kind of theft (including Date Expired Food and items deemed unsuitable for sale)”*

5 (xiv) On a date between the end of November and 24 December 2015, RF was working in the cold store. He was listening to the sound track from a film called “Straight Outta Compton”. The sound track was of loud rap and hip/hop music where the word “nigger” was used routinely. When the claimant arrived, RF greeted him using that word, imitating the way that the people in the film had greeted each other. He did not intend to offend the claimant using the term. The claimant’s perception of the event was that this was intended to be a friendly greeting and that RF thought he was being “a cool dude”. The claimant told RF that this was not an appropriate way to greet him as a black man. That was the end of the matter as far as the claimant was concerned. He did not report the incident and his working relationship with RF continued to be friendly.

Disability

20 (xv) The claimant has suffered from Irritable Bowel Syndrome for several years. This condition fluctuates and he can go for several months without symptoms. His symptoms can be alleviated by medication. The condition can cause a stich like pain when he is lying down. It does not usually affect him while at work although he can sometimes be short of breath.

25 (xvi) The respondent has an Attendance at Work Policy which provides for trigger points and disciplinary action to be taken for certain levels of absence. The claimant had a number of absences which led to him receiving a 12 month written warning because he reached a trigger point under the policy.

30 (xvii) That warning had expired by the time ES became his line manager and the claimant then had more absences. ES referred

him to Occupational Health to check if there was an “*underlying health problem*” in terms of the Attendance at Work Policy. That is described as a condition which has a substantial and long term detrimental effect on an individual’s physical and/or mental health and which has occurred or is likely to occur more than once and is due to the same underlying medically diagnosed cause or is currently undergoing professional medical investigation to ascertain diagnosis. It states that the condition could have an intermittent effect or be progressive in nature.

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10 (xviii) If an employee is considered to have an underlying health problem, the manager would consider adjustments to how absence was managed.

(xix) The conclusion from the referral was intimated on 22 January 2016 and was that “*Mr Menzies reported to have symptoms of IBS and when they flare up seemed to have impact on work. Typically IBS can often be managed by changing diet and lifestyle and understanding the nature of the condition. Mr Menzies should be capable of improving his level of attendance at work in the long term by following medical advice of his medical practitioner.*”

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20 The incident on 21 January 2016

(xx) On this morning, the claimant was working with AA. AA went to put some stock in the fridge in the cold hall. The claimant said to him that there was a packet of ham in the “Dine-In” stock. He said to AA not to move it. Packets of ham would not normally be stored with “Dine-In “ stock. AA took from the comment that the claimant had placed the ham there and intended to take it for his own use.

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(xxi) AA looked in the fridge and saw a packet of M & S ham. He telephoned Es and told him that the claimant “had his eye” on a packet of ham.

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- (xxii) ES came down with another manager, Tam Westaby, and looked in the fridge. He saw a packet of M & S “everyday” breaded ham. He decided not to move it but to wait and see what happened.
- (xxiii) AA asked RF to watch the ham. The claimant said to RF *“I’ll be back in a minute, I’m going to demolish something”*. RF believed he put something in his pocket. He phoned ES to tell him he thought the claimant had taken the ham
- (xxiv) AA then went on his break and observed the claimant take clothing out of his rucksack in the locker room, put something in and then cover up with the clothing. He advised someone called Neil McAllister about this and Neil McAllister phoned ES.
- (xxv) ES contacted MP, who was Foods Commercial Manager at that time, and asked her to accompany him to do a search. They stopped the claimant at the back door of the store on his way out and asked to search his bag. A packet of M & S ham was found in his bag. MP asked the claimant if he had a receipt for the ham? The claimant said he didn’t have one. MP said that he needed to have a receipt for M & S products and the claimant said he didn’t know he had to keep a receipt. MP then asked when he had bought the ham and he said a few days ago. MP completed the search register which shown the time and date of search, the employee’s name and what (if anything) was found. She noted that a packet of M & S ham was found and the claimant signed the sheet. The claimant then left, taking the ham with him.
- (xxvi) ES then asked for a check to be run by the Internal Theft and Loss Department to see whether the claimant had bought such an item recently using his card. The report showed that he had not.
- (xxvii) ES’s manager then instructed Sophie Ellis to carry out an investigation.

5 (xxviii) She interviewed RF, AA and ES on 24 and 25 January 2016. She considered the search policy and the search register completed by MP. She also considered a witness statement from MP. She interviewed the claimant on 29 January and then re-interviewed AA and ES and interviewed MP.

10 (xxix) In his interview the claimant denied the allegations. He said that he brought the food in for his lunch and it was “farmfoods branded”. He said the ham was always in his bag. He said he was aware of the search policy which was to prevent theft. He said that he was not aware of the need for receipts. He denied that he had made the remarks alleged by RF and AA.

15 (xxx) Ms Ellis concluded that there was sufficient evidence to believe that the claimant *“acted in a dishonest behavior through the theft of a food product, that he concealed that food product in his bag in the locker room and that he failed to pay for that food product”* and that there was therefore a disciplinary case to answer.

20 (xxxi) The claimant was invited to a disciplinary hearing on 3 February 2016 by letter dated 29 January 2016. The invite letter included the investigation report and witness statements and documents referred to in the investigation report.

(xxxii) For various reasons the disciplinary hearing did not take place until 9 February 2016.

25 (xxxiii) During this period the claimant asked ES if he could bring forward booked holiday as he did not feel comfortable being at work while under investigation. ES said he would find out and then, having contacted PPS ( the HR function) he advised the claimant that he would be suspended pending the conclusion and would not need to use his holidays.

30 (xxxiv) The disciplinary hearing was heard by SC who was a manager in a different department. The claimant was accompanied by an

5 employee representative, Eddie Thompson. SC went through the allegations made by ES, MP, AA and RF. In response to each the claimant said "allegations denied". He said he would get an opportunity to put his side. SC said she was giving him the opportunity to state his case on each allegation. The claimant said he wanted confirmation on a camera. He also said that the search report was not completed when he signed it. He said he wasn't asked where he bought the product. He asked why the product hadn't been taken from him? The claimant then said he needed to go as he had an appointment and so the hearing was adjourned to the 12 February 2016. The claimant was again accompanied by Eddie Thompson. At this hearing the claimant raised issues about breaches of the search procedure. He said that the register hadn't been completed when he signed it, he said that ES had removed the item from his bag when the employer should do this, he also said that the item should have been secured, The claimant said he thought it was a witch hunt because another colleague, Grant, had been disciplined following an incident when he shouted at the claimant. He pointed out that he had been suspended for dishonesty but allowed to keep the store keys and call out phone.

15 (xxxv) After a break, SC gave her decision which was that she found the allegations to be upheld and her decision was to dismiss immediately. She advised that the claimant had 5 days to appeal.

25 (xxxvi) SC confirmed her decision in writing on 15 February 2016. The claimant was advised he had a right of appeal.

30 (xxxvii) The claimant submitted an appeal. The reasons were that the manager's decision was not fair and reasonable and company policy was not followed. He stated that the search policy required that if an investigation could not be carried out right away the product should be stored away securely,. However in his case the

5 ham was returned to him and he was allowed to leave. He was not informed that he was being investigated and only suspended when the initial disciplinary hearing was canceled. He stated that the manager behaved unreasonably by not taking account of breaches of procedure and relying unduly on unsubstantiated statements from AA, RF, MP and ES.

10 (xxxviii) The appeal was heard by RS, a Store Manager in Carlisle. At the claimant's request the appeal was heard in Carlisle and not in an Edinburgh store. The claimant was accompanied by Eddie Thompson. The claimant said he wanted to clear his name and he was not a thief. The claimant questioned RS about the fact that he had spent some time in a store in Edinburgh and asked if he knew MP? RS said that he did know MP but not well. He had not spoken to her about the appeal. The claimant also asked if he  
15 knew ES. RS said that he did not. The claimant said that the respondent had policies and these had not been followed. The item should have been confiscated and an investigation carried out immediately unless it was the end of a business day. He also stated that he was advised he was under investigation 8 days  
20 after the event. He asked in what circumstances can an individual can be suspended? RS said this would usually be where there was gross misconduct or a person puts others at risk. The claimant then discussed the timeline of his suspension and the disciplinary hearings.

25 (xxxix) RS asked why the claimant thought fictional allegations would be made against him? The claimant said "*I am here really to see the evidence that would support these allegations*". Again RS asked what reasons the individuals would have had for making the allegations. The claimant referred to the policy and said that the  
30 ham should have been confiscated. He said that the question would be why an experienced manager did not follow procedure?

5 (xl) RS asked if he had anything to add or new evidence? They took a break. After the break the claimant said that he remembered an incident with RF where RF had called him a “nigger”. He said he had told him you can’t call anyone that. He said his reaction had been to educate him and not report him. RS asked if this could have affected his statement. The claimant talked about how RF had thought it was an acceptable way to speak. He then talked about the incident involving Grant. He also mentioned the search register again saying that he had only his first name and the type of search on it and that he had not been told he was under investigation. RS asked if there was any reason why ES and MP would make it up and the claimant said no reason but if they believed it was M & S ham it should have been confiscated.

15 (xli) RS then emailed MP and asked her to answer some questions about the search. She confirmed that the claimant had taken the ham out of his rucksack and that it was M & S ham. She said she could see this clearly and repeated it out loud when she wrote it down on the register. RS asked why she had not confiscated the ham. MP said she wasn’t thinking she should keep it as 2 managers had documented it and the claimant had signed the register. She confirmed that all the parts of the register had been completed before the claimant signed it. She said she thought it was straightforward and didn’t expect there would be any queries about the search itself.

25 (xlii) RS intimated his decision in writing. He upheld the decision to dismiss. He said that if the register was not complete or there was any dispute about the branding of the ham, he would have expected the claimant to raise this at the time. He acknowledged that the ham was not taken from the claimant but he believed there was enough evidence that the ham was an M&S product. He considered that an investigation did start promptly after the incident although he accepted that the claimant was not told

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5 specifically that if he could not provide proof of purchase then he would face investigation but he considered that this this did not detract from the fact that an item was found in the claimant's possession without a receipt. He believed there was substantial evidence to support the investigating officer in her conclusion. RS did acknowledge that the claimant should have been suspended promptly following the outcome of the investigation on 29 January. However he noted that the claimant was suspended on his first day back at work. He indicated that he would recommend that management in the store be "refreshed" about parts of the Search Policy. He would also report the claimant's statement that a racist comment had been made to the store manager.

**Observations on the evidence**

15 5. There were significant areas of dispute. Firstly, the incident in December in relation to the use of the word "nigger". RF denied in evidence that this incident had taken place at all and said that he had never used that word. He also said that employees did not play music in the cold store. ES confirmed that music was played in the cold store and this damaged RF's credibility in the eyes of the Tribunal. The claimant conversely was convincing on this incident. He was consistent from the first time he referred to the incident (during the appeal) and the level of detail he gave about the claimant having watched the film "Straight Outta Compton" and listening to the soundtrack was compelling. This also fitted with the fact that the claimant understood the context in which the remark was made and did not make a complaint about it.

30 6. It has to be said that this was in marked contrast to most of the rest of the claimant's evidence which the Tribunal found to be evasive and inconsistent. The claimant appeared unable to answer in a straightforward way to simple questions. The Tribunal considers it is more likely that RF would be untruthful about this allegation because of the stigma of being considered a racist. On that point, the Tribunal considered that the claimant was very

honest when he described his reaction to the incident. He saw it as a misguided act of a young man rather than anything malicious and he treated it as such, pointing out to RF that he should not use the term but not making any complaint about it. He described their subsequent friendly working relationship as unaffected.

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7. In relation to the events of the 21 January, the Tribunal accepted the evidence of AA, ES and MP and, with some reservations because of its findings on his credibility on the other incident, RF. The various accounts of the witnesses interwove and it would be extremely unlikely that they would all conspire to create this narrative. Even if RF and AA had taken against the claimant for some reason and had decided to make up a story about this it was extremely unlikely that AA would report the incident with a packet of ham and an unconnected packet of ham be found in the claimant's bag. ES and MP would also have to be part of this conspiracy. ES said he saw the packet of ham in the fridge and both ES and MP have maintained throughout that it was M & S ham. There was simply no credible motive suggested as to why they would lie about this. There was no reason that MP would ask for a receipt unless she believed the product was M & S. The only possible explanation therefore would be that they were mistaken. The claimant suggests it was another brand of ham and produced a photograph of the type of ham. This was pink and green packaging with "Bernard Matthews" in large writing. This was different from the simple clear packaging with black backing and a black M & S logo as described by ES and MP. The Tribunal considered that managers and employees working with these products on a daily basis would be able to recognize them very easily and would not confuse them with other products. The only explanation would be that MP and ES were lying and for the reasons stated above, the Tribunal considered this to be implausible.

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8. The claimants evidence about the packet was very unconvincing, When it was suggested to him that he had just taken the photograph produced to the Tribunal recently, the claimant suggested he had not. When it was put to him that the sell-by date was in June, he suggested that it had been taken

the previous year. When it was suggested that if that was the case there was no reason why he had been unable to produce it on the first day of the hearing, he suggested it was because it was on his sister's phone. The Tribunal found this all very unsatisfactory. They further took into account that the claimant did not say when questioned on 21 January that it was not an M & S product. The Tribunal did not accept his evidence that he was unaware of the policy. He may not have read the policy but it was clear that searching took place very regularly; the claimant himself said he had been searched 100s of times. The Tribunal considered that employees would be well aware that they needed to be able to show that they had purchased any M & S products, as was confirmed by all the witnesses except for the claimant. When the claimant was asked for a receipt, the simplest thing would have been for him to say "why do I need a receipt? It's from farmfoods". Unfortunately for the claimant, this means that the Tribunal has concluded that he did in fact steal the ham.

### **Relevant law**

#### **Direct discrimination**

9. Section 13 of the Equality Act 2010 provides that direct discrimination occurs where a person treats another less favourably than he treats or would treat others because of a protected characteristic (including race and disability). It is not necessary to point to an actual person who has been more favourably treated, although how others have in fact been treated may be relevant evidence. The Tribunal should construct, if necessary, a hypothetical comparator whose relevant circumstances are not materially different to the claimant's except for the protected characteristic. Tribunals do not have to construct a hypothetical comparator if they are able to make findings as to the "reason why" the treatment occurred without doing so.

#### **Discrimination arising from disability**

10. Section 15 of the Equality Act provides:-

(1). A person (A) discriminates against a disabled person (B) if—



- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

5 (2). Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

### **Harassment**

10 10. This is a specific type of unlawful act under the Equality Act section 26. It is defined as engaging in unwanted conduct related to a protected characteristic and which has the purpose or effect of:

- violating a person's dignity or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

15 11. In considering whether conduct has that effect ( if that was not the purpose) the Tribunal will take account of the perception of the recipient, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

### **Time limits**

20 12. Section 123 of the Equality Act provides that claims to the employment Tribunal must be made within 3 months of the act complained of. That period may be extended if the Tribunal considers it is just and equitable to do so.

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### **Unfair dismissal**

13. The Employment Rights Act 1996 (the "ERA") sets out the right not to be unfairly dismissed. It is for the respondent to prove that it had a potentially fair reason for dismissal in terms of section 98(1). In the present case it is

contended that the reason is one relating to conduct. In such cases , the case of *BHS v Burchell* 1980 ICR 303 provides that the Tribunal must find that the respondent had a genuine belief in the misconduct, and that that belief must be based on reasonable grounds having carried out a reasonable investigation. It is not required that the Tribunal consider whether or not the claimant was in fact guilty of the alleged misconduct and the respondent's belief is assessed at the time the decision is taken to dismiss. Evidence that comes to light subsequently is not taken into account.

10 14. If the Tribunal is satisfied there is a potentially fair for dismissal, it must then assess whether in the circumstances (which includes the size and administrative resources of the respondent) the decision to dismiss for that reason was fair or unfair. Section 98(4) of the ERA provides that the determination of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

15 15. This test of fairness is really one of reasonableness and the law recognises that different employers acting reasonably may make different decisions based on the same circumstances. It is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have "substituted its own view" for that of the reasonable employer. Rather the question for the Tribunal is whether the decision to dismiss (and the procedure adopted) fell within the "range of reasonable responses" open to a reasonable employer. If so, the dismissal is fair. It is only if the decision to dismiss falls outside that range that the dismissal is unfair. (See for example, *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17).

20 25 30 16. The Tribunal will also consider the procedure that was followed. A failure to follow a fair procedure may cast doubt on the reason for dismissal or may, in itself, mean that the decision to dismiss was not reasonable. However, the Tribunal must assess the overall fairness of the procedure and not merely whether there was a failure to comply with a contractual procedure.

**Wrongful dismissal**

17. This is a claim of breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more). However, an  
5 employer does not have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice).

10 **Holiday pay**

18. Employees are entitled by the Working Time Regulations 1998 to 4 weeks paid annual leave a year plus 8 additional days. When a contract is terminated, for whatever reason, the claimant is entitled to payment for any  
15 accrued but untaken annual leave.

**Submissions**

19. The respondent provided detailed written submissions in which they invited the Tribunal to dismiss all the claims. In summary, the submissions were as follows:

20 **Direct race discrimination**

(1). The claimant cannot show prima facie evidence from which the Tribunal could conclude, in the absence of any other explanation, that it has committed an act of discrimination. The reason why RF and AA gave evidence against the claimant was because the claimant had  
25 stolen a packet of ham, Any employee regardless of race would have been treated the same. RF and AA's oral evidence was consistent with that of ES and MP.

**Harassment**

- 5 (2). The comment was not made and this is suggested by the fact that the claimant did not raise it contemporaneously. He did not raise it in the investigation interview nor at the disciplinary hearing. He raised it in the appeal but only in mitigation towards the end of the hearing. If the remark was made, it did not have the proscribed purpose or effect.

Disability discrimination

- 10 (3). It is for the claimant to show that he satisfies the definition of disability. The contemporaneous OH report indicates that he is asymptomatic and able to carry out his role. He is not taking any regular medication and has not scheduled appointments with his GP. The claimant is unable to establish he was disabled at the relevant time.

- 15 (4). If he was to be found to be disabled, MP did not have any knowledge of it. ES had been supportive of the claimant's health issues. It makes no sense that ES would falsify evidence. The only reason MP and ES gave the evidence they did was because that was the truth.

Discrimination arising from disability

- 20 (5). MP had no knowledge of the claimant's IBS or sickness absence. ES, again, had been supportive of the claimant's recent sickness absence. The claimant never suggested that ES or MP were falsifying evidence because of his sickness absence and this makes no sense.

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Unfair dismissal

- 30 (6). The reason for dismissal was the theft of a packet of ham. The respondent's policies make it clear this is likely to be regarded as gross misconduct. The investigating officer had 4 witnesses and their

account was not contradicted by the claimant. There was also the search register. Dismissal was well within the band of reasonable responses.

5            Wrongful dismissal

(7).    The witness statements and the search register suggest that the claimant had in fact stolen the ham. Three of the witnesses saw the ham itself. The claimant failed to give any adequate explanation to contradict those accounts and his responses to questions was at times evasive. His responses during the appeal were equally unclear. The claimant was guilty of gross misconduct.

(8).    The claimant said merely that he was glad that the case had finally been put forward and he feels he can now move on. He said he was not interested in an award – he had brought the case to clear his name.

**Discussion and decision**

20.    Unfair Dismissal

(1).    Dealing first with the claim of unfair dismissal, the Tribunal has to consider whether the respondent has established a potentially fair reason for dismissal. The question in connection with this complaint is not whether the claimant had in fact stolen the ham, as alleged, but whether the dismissing officer genuinely believed he had and whether she had reasonable grounds for that belief having carried out a reasonable investigation. The Tribunal had no hesitation in concluding that she did have a genuine belief that the claimant had been guilty of theft. There was no evidence whatsoever that SC had any other reason in mind. She was not aware of the claimant's disability nor his absence record, nor was she aware of his interaction with RF. There was no evidence that the managers were under pressure to cut staff numbers. On the contrary, MP gave evidence

that she was having difficulty using all the staff hours she had been given and that the respondent recruited for the claimant's position after he was dismissed.

5 (2). Did she have reasonable grounds for that belief having carried out a reasonable investigation? The Tribunal considered that SC was a straightforward witness. She had been asked to carry out a disciplinary hearing where an investigation had found there was a case to answer. She had the evidence of two managers who said the claimant had been found with an M & S product in his bag. She had a search register that appeared to have been signed by the claimant that said that M & S ham had been found in his bag. There was also the evidence of RF and AA who had seen the claimant acting suspiciously and raised the alarm. The claimant denied the allegations, claiming that the product was in fact bought from another store. However he had not said that at the time of the search. At the reconvened hearing, the claimant focussed on the procedure. However he did not provide any explanation for why all these people would fabricate accounts. The Tribunal considered that the investigation was reasonable in the circumstances. The elements of the *Burchell* test were met and the respondent had a potentially fair reason for dismissal – a reason relating to conduct.

15 (3). The Tribunal then considered whether the dismissal was actually fair having regard to s 98 (4) of the ERA including the procedure which was adopted. The Tribunal had no doubt (and it did not understand the claimant to be suggesting otherwise) that dismissal for theft was within the band of reasonable responses. The respondent had stringent measures in place to combat theft. Members of staff had access to products and cash and it was reasonable for the respondent to take a very firm approach to dealing with suspected theft. The policies about searches and about conduct were well publicised. The claimant had not put forward any mitigating factors that SC could take into account.

5 (4). The claimant focussed on errors in the procedure followed. The Tribunal considered it would have been preferable if the claimant had been told immediately after the search that he was under investigation. It would have been preferable if the ham had been retained (although as the claimant alleged the allegation was fabricated, possibly he would say that the ham was not the same ham). It would have been preferable if he had been suspended immediately after the investigation concluded there was a case to answer. He also focussed on an allegation that ES had taken the ham out of his bag and that the claimant should have done so.

10 (5). The Tribunal did not consider that any of these matters affected the overall fairness of the process. A search was carried out by 2 managers and a record provided of what was found (signed by the claimant). That was sufficient evidence of what was found in  
15 circumstances where the claimant did not dispute at the time that he had an M & S product in his bag. Whether ES or the claimant took the ham out of the bag, again, has little significance as the claimant was not suggesting that the ham had been planted in his bag. The claimant also raised issues about the appeal officer, RS, having  
20 known MP. The Tribunal did not consider this to be a flaw in procedure. It was clear that RS did not know MP well. He arranged to have the appeal in Carlisle and he raised questions with MP about some of the things the claimant had said. MP's account was, after all, confirmed by ES. Although the claimant raised the issue of the  
25 comment made by RF at the appeal, he did not suggest then that this would have impacted on the statements and there is no reason to suggest it would have impacted on ES and MP's statements.

(6). For these reasons the claim of unfair dismissal is dismissed.

30 Wrongful Dismissal

- 5 (7). The claimant was dismissed without notice and the claimant has a separate claim for that. This is technically a breach of contract claim and the question for the Tribunal is whether the claimant was in fact in fundamental breach of contract. In simple terms, does the Tribunal find it more likely than not that the claimant stole the ham. It is important to stress that this is not the test that would be applied in a criminal court. There is no consideration here of reasonable doubt.
- 10 (8). There were two possibilities. Firstly, that there was an elaborate conspiracy to frame the claimant. The Tribunal considered this was implausible. Even if RF had a grudge against the claimant, and even if AA colluded in that ES and MP would also have had to be part of an conspiracy. The Tribunal did not think this was likely.
- 15 (9). The second alternative was that MP and ES were mistaken about the ham and it was from another store. The Tribunal again considered this unlikely. People like ES and MP who worked with these products everyday would recognise them even if they only saw the product briefly. The photograph shown by the claimant was clearly branded "Bernard Matthews" This would be clear from a distance. The colours were also different.
- 20 (10). The Tribunal also considered that the claimant did not say at the time of the search that this was not an M & S product. The Tribunal considered that even if they had not read the policies, staff at the respondent, including the claimant would be aware that they were likely to be searched and would be aware of the need to have a receipt for M & S products when in the store. They would also be aware that there would be serious consequences if they were found to have stolen something. When MP asked for a receipt, the obvious response would be "why do I need a receipt, it's not an M & s product?" Instead the claimant said he had bought it a few days previously. The Tribunal also thought it was unlikely that the claimant would have brought in cooked meat and left it in his bag all shift
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rather than out it in the fridge to eat later. The claimant did not say that AA had been mistaken about the ham in the fridge – rather that this was fiction. It seemed to the Tribunal something of a coincidence then that the claimant was then found with ham in his bag. The claimant’s reactions to questions at the investigation were also not convincing, He just said he denied the allegations. A more convincing reply would have been to insist that the product was not M & S. Similarly the tribunal considered it relevant that in later hearings he focussed on alleged procedural failures more than the substance of the complaint. If he was innocent of the charge, they would have expected him to protest this at every opportunity.

- (11). The Tribunal therefore concluded that it was more likely than not that he did steal the ham.
- (12). Is that a material breach of contract? Theft is, almost inevitably, gross misconduct, no matter the value of the item, and no reason has been provided why that should not be the case here.
- (13). For these reasons, regrettably, the Tribunal concludes that on the balance of probabilities the claimant was guilty of gross misconduct and the claim for notice (wrongful dismissal) is dismissed.

**Disability Discrimination**

21. Does the Claimant have a disability for the purposes of the Equality Act 2010? There was minimal evidence here before the Tribunal about the effect of the claimant’s IBS on his day-to-day activities. The onus is on the claimant to provide this and the Tribunal felt unable to conclude that the claimant had a disability for the purposes of the Act. However, in any event, there was simply no evidence whatsoever that the claimant’s condition , or his absences from work, had any effect on his dismissal or led MP and ES to provide false evidence The respondent had a policy to manage levels of absence. ES had sought an occupational health referral that could have

assisted the claimant (although in fact it did not). These claims are dismissed.

**Direct race discrimination and harassment**

22. The Tribunal has found that RF greeted the claimant using the word  
5 “nigger”. The date of this event is unclear but on the claimant’s account it  
was before 24 December 2015. Even if the event was on 23 December, that  
claim should have been presented no later than 22 March 2016. The claim  
was presented to the Employment Tribunal on 20 May 2016. The claimant  
has not given any reason it would be “just and equitable” to extend time. He  
10 made no complaint about the remark at the time and only raised it at the  
appeal as an afterthought. The complaints of direct discrimination and  
harassment in relation to this incident are dismissed.

23. The Tribunal considers it is also important to say, in connection with the  
harassment claim, that it would have found that the incident did **not**  
15 constitute harassment in terms of the Equality Act. In the particular  
circumstances of the case, the greeting did not have the purpose of creating  
a hostile work environment etc (and the claimant appears to agree with that)  
nor did it in fact have that effect. The claimant’s own evidence was that he  
thought it was intended as a friendly greeting, repeating a greeting he had  
20 heard in the film and the soundtrack. On the claimant’s own evidence, he  
simply advised RF that he should not use that term but made no complaint.  
The claimant gave evidence that there was no change to his working  
environment after the incident and he and RF continued to have a friendly  
relationship.

24. This leaves the complaint that the claimant was treated less favourably  
25 because of his race by Ryan Fletcher and Amran Ali allegedly submitting  
false evidence against him. The Tribunal did not find that the evidence  
submitted by AA or RF to be false. On the contrary it was confirmed when  
ES and MP found the ham in the bag. Therefore the alleged less favourable  
30 treatment did not occur. That claim is dismissed.

**Holiday pay**

25. The final issue relates to holiday pay. The claimant did not provide any evidence in this regard and the respondent did not address it in its submissions. The Tribunal assumes therefore that this part of the claim is not being pursued and can be dismissed.

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Employment Judge: Susan Walker  
Date of Judgment: 16 June 2017  
Entered in register: 21 June 2017

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And copied to parties

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