

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

At the Tribunal  
On 3 May 2013  
Judgment handed down on 21 June 2013

**Before**

**THE HONOURABLE MR JUSTICE KEITH**

**MRS C BAE LZ**

**MR C EDWARDS**

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MISS M MILLER

APPELLANT

WILLIAM HILL ORGANISATION LTD

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MS SINEAD KING  
(Representative)  
Free Representation Unit

For the Respondent

MR JOHN BENNETT  
(Representative)  
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## **SUMMARY**

### **UNFAIR DISMISSAL - Procedural fairness**

Dicta in **A v B** [2003] IRLR 405 and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 applied – finding of employment tribunal that the investigation by employers into employee's possible theft was sufficiently thorough set aside.

## **THE HONOURABLE MR JUSTICE KEITH**

### *Introduction*

1. The claimant, McCay Miller, was employed by the respondent, William Hill Organization Ltd, the well-known bookmaker, from 4 April 2005 initially as a cashier but later as the deputy manager of one of its betting shops, the one in St John's Hill in Clapham. She was summarily dismissed on 10 April 2010 because it was believed that she had taken money which should have been paid to William Hill's customers. She brought a claim of unfair dismissal. The claim was dismissed by an employment tribunal at London South (Employment Judge Balogun presiding). She now appeals to the Employment Appeal Tribunal against the dismissal of her claim. All the dates in this judgment relate to dates in 2010 unless otherwise stated.

### *The system operated by William Hill*

2. In order to appreciate the issues which the tribunal had to address, an understanding of the system operated by William Hill is necessary. A customer places a bet by recording the details of their bet on a betting slip. The betting slip is then taken to the counter where a member of staff scans it into William Hill's computerised system. A receipt is given to the customer. The receipt shows the date and time at which the bet was placed. Once that is done, the member of staff who took the customer's bet enters the details of the bet into the system, which can calculate, from the nature of the bet, the size of the stake and the odds, the sum due to be paid to the customer if the bet is a winning bet. The system will also record which member of staff entered those details.

3. If the bet is a winning bet, the customer takes their receipt to the counter and hands it to a member of staff. The receipt is then scanned, and that brings up on the screen the sum due to the customer. The customer is then paid their winnings. The system records the date and time

of that payment and which member of staff paid it. The receipt is retained behind the counter in case there are any queries about the bet later on.

4. The system automatically treats as void bets which are taken after the race or the event has started. That does not necessarily mean that a late bet can never be accepted. Late bets may be accepted in certain circumstances, and if a late bet is accepted, the details of the bet have to be entered manually into the system.

*The four questionable bets*

5. Following a routine audit by William Hill's security team, four bets processed by Miss Miller over a period of nine days between 24 February and 5 March were flagged up as irregular. There is no challenge to the tribunal's findings about what the audit revealed, and those findings are what follows.

6. (i) *The bet on 24 February.* On 24 February, a customer placed a £10.00 bet on a horse running in the 17.13 race at Thunder Alley. The race began at 17:15:48, and the bet was placed 3 seconds later. Miss Miller took the bet, even though she should have been aware from the alerts on her screen that the bet was late. The bet was automatically treated by the system as void, and the customer should have had his stake returned to him. If it was not returned to him, he would have assumed that the bet had been accepted. He would have been none the wiser that his bet had not been accepted unless the bet had been a winning bet and he had tried to collect his winnings.

7. The question which the security audit raised was whether the customer ever got his stake back. The system showed that the return of the stake to the customer had been processed by Miss Miller at 17:28:13. What caused that to be questioned was that when the footage from

the CCTV at the branch was viewed, the footage did not apparently show any customer at the counter at 17:28:13.

8. (ii) The bet on 27 February. On 27 February, a customer placed a £5.00 bet on a horse running in the 14.30 race at Kempton Park. The race had already begun. A relief cashier, Sandra Brown, took the bet, even though she should have been aware from the alerts on her screen that the bet was late. Again, the bet was automatically treated by the system as void, and the customer should have had her stake returned to her. The system showed that the return of the stake to the customer was not processed until 19:22:34, almost five hours after the bet had been placed, and that it was Miss Miller who had processed it. Again, the footage from the CCTV did not apparently show any customer at the counter at 19:22:34.

9. (iii) The bet on 4 March. This bet related to a tricast. In such a bet, the customer is betting on the three particular horses or dogs they have selected to come in first, second and third, either in a particular order, or in no particular order. Where a tricast relates to a dog race, there must be six dogs running. If a dog drops out, the bet is automatically converted into a forecast, where the customer is betting on which dogs will come in first and second.

10. On 4 March, a customer staked £30.00 in a tricast on three dogs running in a particular race. The bet was placed before the race had started. It was taken by Miss Miller, and she correctly entered the details of the bet. However, there were only five dogs running in the race, and just under ten minutes after the race ended, she re-entered the bet on the system, this time as a forecast. Two of the three dogs had come first and second in the race. The odds on those two dogs entitled the customer to a return of £48.15, which included both his original stake and his winnings. The system showed that Miss Miller had processed the payment of that amount to the customer at 13:17:04, just over an hour after the race. Again, the footage from the UKEAT/0336/12/SM

CCTV did not apparently show any customer at the counter at the time. Moreover, it showed the customer who had placed the tricast returning to the counter shortly after the race, placing another bet and paying the stake, but not collecting his winnings.

11. (iv) *The bet on 5 March.* On 5 March, a customer placed a £5.00 bet on a dog running in the 10.40 race at Fairview. Miss Miller took the bet, and correctly entered the details of it. However, before the race started, the dog on whom the bet had been placed was withdrawn. That meant that the bet was void, and the customer was entitled to the return of his stake. The system showed that Miss Miller had processed the return of the stake to the customer at 11:33:46, about 50 minutes after the race was over. Again, the footage from the CCTV did not apparently show any customer at the counter at 11:33:46.

*The investigation and the disciplinary hearing*

12. The CCTV footage was crucial, of course, to management's initial suspicions about what Miss Miller had done. The footage apparently showed that the four customers had not been paid the four sums totalling £68.15 at the time when the system said the sums had been paid to them. The suspicion was that Miss Miller had pocketed the money herself. Of course, this suspicion proceeded on the assumption that the timing mechanism within the computerised system (which recorded the time when the customers were paid) synchronised with the timing mechanism within the CCTV. If, for example, the timing mechanism within the CCTV had not been properly calibrated, the basis upon which suspicion had initially fallen on Miss Miller would fall away. There was no evidence before the tribunal about whether anyone had checked that the timing mechanisms within the computerised system and the CCTV synchronised with each other. Everyone appears to have assumed that they did. We will have to return to that later.

13. The tribunal's findings about what happened following this audit were that on 18 March Miss Miller was interviewed by Matt Russell, the District Operations Manager responsible for the branch, to discuss the bets which the audit had flagged up. This was not a formal interview because it was not known whether Miss Miller would be able to explain what had happened. The tribunal found that she had not been able to offer "a clear explanation" at that stage, and she was suspended on full pay pending a formal investigation.

14. The tribunal's finding that Miss Miller had not been able to offer "a clear explanation" at that stage was based on the evidence of the only witness called on behalf of William Hill. That was Tracey Vyras, another District Operations Manager, who was subsequently to make the decision that Miss Miller should be dismissed. The tribunal did not make any finding about what Ms Vyras meant by Miss Miller not being able to offer "a clear explanation" at that stage, but it was not necessarily a matter of criticism of Miss Miller, bearing in mind (a) the number of bets she would have taken and the number of receipts she would have processed in the course of a day, and (b) that Miss Miller had not been shown the CCTV footage by then, nor had she been told what the CCTV footage apparently showed. Indeed, Mr Russell's notes of the interview (which the tribunal saw because they were considered by Ms Vyras) do not state that he told her what it was that had caused the suspicion to arise. Miss Miller was only asked in effect what she could recall about the four bets, and Ms Vyras herself accepted in her witness statement (although the tribunal did not refer to it) that it was not "surprising or a problem" that Miss Miller only gave clear explanations later on, because her interview by Mr Russell was the first time that she had been asked to explain the bets. As it was, Miss Miller's evidence (which the tribunal again made no findings about one way or the other) was that she felt "totally lost" when she was informed that she was suspended, and that it did not occur to her that she was suspected of theft: she thought that she was being investigated for possible breaches of William Hill's procedures.



15. As the first step in the formal investigation, Miss Miller was interviewed on 24 March by Charlie Butler, William Hill's security investigator. That was when she was shown the CCTV footage for the first time. We shall come shortly to the tribunal's findings about the explanations which Miss Miller gave Mr Butler for the four bets, but following that interview, Ms Vyras wrote to Miss Miller on 1 April asking her to attend a disciplinary meeting with Ms Vyras "regarding the allegation of betting irregularities" on the four dates on which the bets had been placed. That meeting took place on 8 April. Following that meeting, Ms Vyras viewed the CCTV footage and considered what Miss Miller had told her. She decided that Miss Miller had to be dismissed. Miss Miller was informed of that. She appealed against her dismissal to John Hallahan, the Area Operations Manager, but her appeal was dismissed.

Miss Miller's explanations

16. The tribunal made detailed findings about the explanations which Miss Miller had given for each of the bets in the course of the disciplinary process. The tribunal's findings about what those explanations were are as follows, though we have amplified them where necessary to take into account additional facts which were common ground.

17. (i) The bet on 24 February. Miss Miller told Mr Russell that she may have forgotten to enter the details of the customer's bet into the system. By the time of the interview with Mr Butler, she had recalled that the customer had been a man called Bill. She told Mr Butler that Bill had not specified on the betting slip to which race his bet had related. As Bill was "dithering" about what race to place the bet on, Miss Miller placed the bet on the 17.13 race at Thunder Alley without taking Bill's stake from him. However, the CCTV footage showed Bill handing over the stake, and when that was shown to Miss Miller, she said that she had confused this bet with another bet. When she was asked why she had not given Bill his stake back at the

time, she said that Bill was a regular customer who placed many bets, and instead of asking for his stake back, he may have asked her to keep his stake for him so that he could use it for another bet.

18. The tribunal added three things to that. First, it would have been irregular for Miss Miller to place Bill's bet without taking his stake, though, of course, that related to the explanation she had given before she had realised that she had confused the bet she was being questioned about with another one. Secondly, and more importantly, once the CCTV footage showed that Bill's stake had not been returned to him, and Miss Miller had said that Bill may have wanted the money kept behind the counter for him, the tribunal noted that Mr Butler had found that explanation to be "extremely unusual", since three minutes afterwards, Bill had returned to the counter to place another bet, paying the stake of £10.00, rather than asking for the £10.00 being kept for him to be used. Thirdly, the tribunal noted that Miss Miller's account of what she thought might have happened did not explain why the system showed that Bill had had his original stake of £10.00 returned to him at 17:28:13 when the CCTV footage apparently showed that he was not at the counter then. We do not follow the tribunal's reasoning here. Bill did not physically get his stake back on what Miss Miller thought had happened: it had been kept behind the counter as his stake for another bet he may have wanted to place. But the fact that his stake had notionally been returned to him, even if not physically, was still something which had to be entered into the system.

19. (ii) The bet on 27 February. Miss Miller told Mr Russell that she could tell from the betting slip that the bet had been placed by a regular customer called Theresa. When Mr Butler told her that it had been a late bet, which had been taken by someone else, Miss Miller told him that she could not remember this specific bet, but she may have shouted out at the time to Theresa that the bet was late, and that she may have returned the stake to Theresa when Theresa

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came to the counter later on with the receipt for the bet and other bets. But when she was shown the CCTV footage which apparently showed that Theresa had not been at the counter at the time when the system showed that the stake on the void bet had been returned to Theresa, Miss Miller suggested that she may have returned the stake to Theresa earlier, that she had forgotten to enter that into the system at the time, and that she had entered that later on to ensure that the figures tallied. However, she did not explain what might have caused her not to enter into the system at the time the fact that Theresa's stake of £5.00 was being returned to her.

20. Miss Miller was to tell Ms Vyras that Theresa was in the habit of handing her betting slips in late, but Miss Miller accepted them because Theresa was a regular customer who spent a lot of money at the branch. That caused Ms Vyras to be concerned about something else. She asked Miss Miller whether, if a late bet had been a winning bet, Miss Miller would have paid out on the bet. Miss Miller said that she would have done. Ms Vyras was concerned that that meant that Theresa got the best of both worlds: her stake back if the bet was a losing bet, but her winnings if the bet was a winning one. However, that could be put to one side because Miss Miller was not dismissed because of any breach of William Hill's procedures. She was dismissed because it was believed that she was taking money which was due to customers.

21. (iii) The bet on 4 March. Miss Miller told both Mr Russell and Mr Butler that when the customer was placing the bet, he had asked her whether it would be converted into a forecast, and she had told him that it would be. The tribunal did not mention that Miss Miller had gone on to say that she had telephoned the manager of another branch, Sue Muller, to check that what she was telling the customer was correct, and that Ms Muller had told her that it was. Mr Butler was sceptical about that explanation because the CCTV footage showed the customer staying in the shop to watch the race, and yet when the race was over, and he would have known that his bet was a winning bet *if* he had known that it was no longer a tricast but a

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forecast, he did not collect his winnings. That made Mr Butler think that Miss Miller had not told the customer that his bet had been converted into a forecast, so that when only two of his selections came in the first three, he would have assumed that there were no winnings for him to collect. Again, that enabled Miss Miller to pocket the winnings. What the tribunal did not mention was what Miss Miller's explanation to Mr Butler for that had been. That was that she had thought that she had paid the customer his winnings later on when she had paid him his winnings on another bet.

22. Although the tribunal did not mention it, that was when Mr Butler showed Miss Miller the CCTV footage of the time when, according to the system, the customer had been paid the winnings on his forecast. It did not apparently show the customer getting his winnings. Instead, it showed Miss Miller straightening out a creased receipt and scanning it. Her explanation then was that she had paid him his winnings *earlier*, though she had not entered that into the system at the time, and that she had entered that later on. As for why she did not enter that at the time, she said that it was not possible always to do it at the time.

23. The tribunal found that Miss Miller gave a different explanation for what had happened to Ms Vyras. The tribunal did not say what that new explanation was, but it is apparent from Ms Vyras' evidence what it was. Whereas Miss Miller had previously been saying that the customer had asked her at the time he placed the bet whether it would be converted into a forecast, what she told Ms Vyras was that the customer had told her that "he should have got a forecast", which suggested that he had asked her that *after* the race. That would have been consistent with the fact that Miss Miller had re-entered the bet as a forecast after the race was over.

24. (iv) The bet on 5 March. Miss Miller told Mr Butler that she only had a vague recollection of this bet, and was not going to commit herself to what had happened, but she thought that the branch may have been having difficulties getting the results of the race. When the customer had presented his receipt after the race, and she had discovered that the dog had been withdrawn, she had told him that the bet had been void for that reason, and had returned his stake to him. She was then shown the CCTV footage which did not apparently confirm her account because there was no-one at the counter at the time when, according to the system, the stake had been returned. The tribunal did not say what Miss Miller's reaction had been when the CCTV footage was shown to her, but Mr Butler's note of the interview showed that she had said that she must have returned the customer's stake to him earlier, and that she had only entered that later on. She told Ms Vyras that that had been because the customer had told her that he had had to go to hospital.

25. In short, Miss Miller's explanations – if the customers' stakes for the first, second and fourth bets, and the customer's winnings for the third bet, had not been returned or paid to the customer at the time when the system said they were returned or paid (which is what management said the CCTV footage showed) – was that the stakes were returned and the winnings paid to the customers at some other time.

Ms Vyras' decision

26. The tribunal did not spell out the route by which Ms Vyras concluded that Miss Miller had pocketed the £68.15 due to be returned or paid to the customers on these four bets. It simply said that she had had reasonable grounds for her belief. But when one looks at Ms Vyras' witness statement, her reasons speak for themselves.

27. (i) The bet on 24 February. Ms Vyras was concerned about possible breaches of procedure involved in Miss Miller's initial explanation (that she may have placed Bill's bet without taking his stake) and in her accepting Bill's bet even though it was placed after the race had started. However, the critical point for Ms Vyras when it came to whether Miss Miller had pocketed Bill's stake was that the CCTV footage showed Bill placing another bet a few minutes after placing the bet which was void. He paid the stake for that bet. If Bill had wanted his stake for the bet which was void kept behind the counter so that he could use it as his stake for another bet, why did he not use the stake behind the counter for his new bet? This was a powerful point, and it was one which Mr Butler had put to Miss Miller, but it assumed that Bill had asked for his stake on the void bet to be kept behind the counter *before* he placed the second bet. The CCTV footage appears to support that assumption, but because the tribunal did not address this issue, we do not know whether the tribunal considered whether the assumption was a fair one to make.

28. (ii) The bet on 27 February. Again, Ms Vyras was concerned about possible breaches of procedure – by Ms Brown who had accepted Theresa's bet even though it was placed after the race had been started, and by Miss Miller's admission that she would have paid out on the bet had it been a winning bet (thereby enabling Theresa to get the best of both worlds). However, the critical point for Ms Vyras when it came to whether Miss Miller had pocketed Theresa's stake related to Miss Miller's explanation for why Theresa had not been at the counter when the receipt was processed. If Miss Miller had returned Theresa's stake to her earlier, why had she not processed the receipt through the system then?

29. (iii) The bet on 4 March. There were three things which caused Ms Vyras to be concerned about this bet. The first was Miss Miller's change of account (as Ms Vyras believed it to have been) about *when* Miss Miller had told the customer that his bet had been converted

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into a forecast. The second was the point which had concerned Mr Butler. If the customer had been told that his bet had been converted into a forecast, why did he not collect his winnings when he placed another bet? Why would he have waited to collect his winnings later on? And the third was a matter to which the tribunal did not refer, which was that the CCTV footage showed that just before the receipt was processed through the system, Miss Miller appeared to be straightening it out as if it had been screwed up. That might suggest that it had been thrown away by the customer, and we shall refer to the relevance of that later, though since the tribunal did not mention this at all, we do not know whether the tribunal considered whether Ms Vyras was right to regard this as significant.

30. (iv) *The bet on 5 March.* What caused Ms Vyras to be sceptical about Miss Miller's explanation that she must have returned the customer's stake to him earlier was why had she not processed the receipt through the system then. That would have been the obvious thing to do, and it would have taken no more than a few seconds, even if the customer was in a hurry to get to hospital.

#### *The CCTV footage*

31. The first ground of appeal relates to the CCTV footage. We have seen the footage for ourselves since it was shown (a) to Miss Miller by Mr Butler (apart from one segment of the footage relating to the bet on 27 February) and (b) to the tribunal. The footage consists of nine segments. They show (a) the four relevant bets being placed, (b) the four receipts being processed through the system, and (c) the customer on 4 March placing another bet and not collecting his winnings.

32. After Miss Miller's dismissal, William Hill were asked to provide a disc of the footage to Miss Miller, and it was only provided to her shortly before the hearing in the tribunal was

due to begin on 18 October 2010. For reasons we shall come to later, the tribunal said that it did not propose to look at the footage. The hearing was not completed on the day allotted to it. The second day of the hearing was over 12 months later – on 31 October 2011. We were not told why that was. But by then Miss Miller had had a chance to study the footage, and she wanted to rely on it at the second day of the hearing. Accordingly, the tribunal viewed it as indeed have we.

33. The key point originally taken about the footage by Ms Sinead King for Miss Miller was that the footage did *not* show what Miss Miller had been told in the disciplinary process it showed or what the tribunal said it showed. This argument related to the segments of the footage which were said to have shown that when the receipts were apparently being processed through the computerised system, the customers who had placed the bets were not at the counter. It was said that the footage shows no such thing.

34. That was conceded to be correct by Mr John Bennett for William Hill at the beginning of the hearing of the appeal – at least in respect of three of the four days. According to the timing mechanism within the CCTV, the footage for 24 February finishes at 17:26:59, whereas according to the timing mechanism within the computerised system, the receipt was processed through the system at 17:28:13, i.e. 1 minute 14 seconds later. According to the timing mechanism within the CCTV, the footage for 27 February finishes at 19:20:59, whereas according to the timing mechanism within the computerised system, the receipt was processed through the system at 19:22:34, i.e. 1 minute 35 seconds later. According to the timing mechanism within the CCTV, the footage for 4 March finishes at 13:15:59, whereas according to the timing mechanism within the computerised system, the receipt was processed through the system at 13:17:04, i.e. 1 minute 5 seconds later. And according to the timing mechanism within the CCTV, the footage for 5 March finishes at 11:32:59, whereas according to the timing

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mechanism within the computerised system, the receipt was processed through the system at 11:33:46, i.e. 47 seconds later. Indeed, the document prepared by the parties for the benefit of the employment tribunal set out what the parties agreed the CCTV footage showed. That was that on three of the four days, the CCTV footage had finished before the receipts had been processed through the computerised system.

35. That had been realised by William Hill before the hearing in the tribunal began. Indeed, Mr Bennett says that he told the tribunal that in his opening. Ms King's recollection is that he went further, and told the tribunal that the footage was neutral, that it was not going to be relied upon, but that he did not tell the tribunal why that was. It is unnecessary for that difference in recollection to be resolved, because whatever Mr Bennett says was the reason why, the tribunal decided that it was not going to view the footage at that stage. The important point for present purposes is that Mr Bennett told the tribunal that William Hill's case was going to be based on Ms Vyras' evidence, which was that she had not relied on the CCTV footage, but on the implausibility of the explanations which Miss Miller had given. Indeed, it is argued that the effect of Ms Vyras' evidence was that although she had viewed the footage before reaching her decision to dismiss Miss Miller, what she had "principally" relied on were (a) the notes taken by Mr Russell and Mr Butler of their interviews with Miss Miller which she had read before the disciplinary meeting, and (b) Miss Miller's "failure to address her suspicions arising from them".

36. There are two problems for William Hill with that. First, the tribunal does not appear to have taken that on board. There is nothing in its judgment which shows that it appreciated that William Hill was accepting that the footage viewed by Ms Vyras did not show the times when the receipts were processed through the system. Secondly, the need for Miss Miller to have to explain what had happened with the four bets to Mr Butler arose because she had been

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told that the footage showed that the customers who had placed the bets had not been at the counter when the receipts were processed through the system. The point therefore is that the tribunal would not have appreciated that when Ms Vyras came to consider those explanations she did not factor into the equation that those explanations had been given by Miss Miller at a time when she had been misled (albeit entirely innocently) about the case she had to meet.

37. There is a surprising postscript to all this. As we have already said, everyone proceeded on the assumption that the timing mechanism within the computerised system synchronised with the timing mechanism within the CCTV. In the week before this appeal was heard, Ms King was informed that that was not so. In truth, that would have been apparent from the footage itself if one had compared the segments of the footage showing the placing of the bets (as opposed to the segments of the footage purporting to show when the receipts were processed through the system) with the times at which the system said they were placed. Take the bet on 24 February as an example. The system revealed that Bill's bet had been placed at 17:15:51. However, the CCTV footage showed it being placed at 17:13:39. The difference is 2 minutes 12 seconds. Mr Bennett told us that that difference in the times on 24 February was repeated on 27 February, 4 March and 5 March. That meant that in order to synchronise the two timing mechanisms, 2 minutes and 12 seconds have to be removed from the times given on the CCTV footage. The adjusted times when the receipts were processed through the computerised system were when the times on the CCTV footage said 17:26:01 on 24 February, 19:20:22 on 27 February, 13:14:52 on 4 March and 11:31:34 on 5 March.

38. The CCTV footage at those times shows various things. At 17:26:01 on 24 February, the footage shows Miss Miller tapping the computer and writing something on a piece of paper as a customer who had just placed two bets walked away from the counter. At 19:20:22 on 27 February, the footage shows Miss Miller picking up a pen to write something on a receipt after

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she had for a minute or so been feeding either betting slips or receipts into the computerised system while no customer had been at the counter. At 13:14:52 on 4 March, the footage shows Miss Miller scanning a betting slip into the computerised system while the customer was at the counter and handing him a receipt. At 11:31:34 on 5 March, the footage shows Miss Miller re-ordering the receipts, putting them in a box and addressing an envelope while no customer was at the counter.

39. This analysis provides superficial support for what had been William Hill's original case before it was disavowed by Mr Bennett at the hearing in the employment tribunal. After all, in three of the four segments, there was no customer at the counter at the relevant time. But importantly, in only one of the segments was Miss Miller feeding a receipt into the system. That suggests that the two timing mechanisms are still not properly synchronised, even allowing for the adjustment of 2 minutes and 12 seconds to the timing mechanism within the CCTV. If the two mechanisms were properly synchronised, you would expect to see Miss Miller processing receipts through the computerised system. The upshot of all this is that, even if you take into account what Mr Bennett said needed to be done to synchronise the two timing mechanisms, the footage viewed by Ms Vyras still did not show the times when the receipts were processed through the system. Moreover, the fact that no-one picked up the difference in the timing mechanisms before it was spotted only shortly before this appeal was heard may say something about the quality of the investigation which preceded the decision to dismiss Miss Miller.

#### *The quality of the investigation*

40. That brings us to the second ground of appeal, which is by far the more compelling of the two. It relates to the quality of that investigation. We start with a few basic principles. Miss Miller was dismissed because it was thought that she had taken for herself a total of

£68.15 which had in fact been due to customers but which the customers had not realised had been due to them. That amounts to theft. In A v B [2003] IRLR 405, the Employment Appeal Tribunal (Elias LJ presiding) said at [60]:

“Serious allegations of criminal behaviour, 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.”

That was cited with approval (unsurprisingly because it was Elias LJ as he had by then become) in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 at [13]. The reason, as Elias LJ said in Roldan, was because the employee’s reputation will be seriously affected, and their ability to work in their chosen field or their chosen industry could be irreparably compromised, if they are dismissed because of misconduct which amounts to a criminal offence.

41. The core criticism of the investigation conducted by William Hill is that it did not take those steps which might have exculpated Miss Miller. The main one was that the only parts of the CCTV footage which were regarded as relevant were the sections which were shown to Miss Miller during the disciplinary process and which the tribunal viewed. The complaint is that the whole of the CCTV footage should have been viewed for two other things. The first is pretty obvious. Since Miss Miller was being accused of pocketing the stakes due back to customers on 24 February, 27 February and 5 March, and the winnings due to the customer on 4 March, and since she was saying that the customers had already had their stakes returned or winnings paid, the whole of the CCTV footage of the relevant day up to the time when the receipts were processed through the system should have been looked at to see whether that was true. If it showed the customers being paid, the allegation against her would have been

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completely undermined. That would not have applied to the bet on 24 February, of course, because Miss Miller's explanation for that was that Bill's stake had not been returned to him, but used for a later bet, but it applied to the other three bets.

42. The tribunal said this in para. 38 of its judgment about management's decision not to look at the rest of the footage:

**"It was submitted that the investigation was flawed because [management] did not go through the whole 5 hour footage of tape to see if it supported [Miss Miller's] explanation that she had paid the money out earlier. In view of the length of the tape – 5 hours – we consider that [management] was entitled to limit its consideration of the CCTV to the footage that it did, particularly as [Miss Miller] was unable to say with any degree of certainty that she had in fact returned payments to customers or when. [Miss Miller] could have requested to view the whole CCTV tape but did not do so at any stage prior to her dismissal or at the appeal stage. The reason for this may well have been that, rather than proving her innocence, the earlier footage may have strengthened the case against her."**

We are troubled by that passage for a number of reasons. We acknowledge, of course, that there is a limit to the steps which an employer should be expected to take to investigate whether there are facts which might exculpate the employee. How far an employer should go will depend on the circumstances of the case, including the time it will take, the expense involved (if any), and the consequences for the employee if the employee is dismissed. In this case, it would not have taken that long for someone to have gone through the CCTV footage, and no expense would have been involved.

43. We note the tribunal's comment that Miss Miller "was unable to say with any degree of certainty that she had in fact returned payments to customers or when". That is literally correct, but it implies that the tribunal thought that her explanations for what had happened were less clear than the evidence suggested. She *had* been telling Mr Butler and Ms Vyras that the customers in the last three bets had had their stakes returned or their winnings paid to them, and although she could not point to the precise time when that had happened, she had said that she had done that earlier. We also note what the tribunal said in the last two sentences in para. UKEAT/0336/12/SM

38 of its judgment. That might have been a relevant factor in Ms Vyras' reasoning for concluding that Miss Miller had pocketed the money herself (if Ms Vyras had given evidence along those lines and we were not told that she did), but it does not affect the issue about the adequacy of the investigation.

44. The second reason why it is said that the whole of the footage should have been viewed is this. If Miss Miller had pocketed the money herself, she had to have had the customers' receipts. Mr Bennett conceded as much. He said that there might be occasions when money was paid out to a customer when they were unable to present their receipt (for example, if they had lost it, but then they have to complete a special form), but he acknowledged that this was never explored in this case. So if Miss Miller had to have had each of the four receipts, where had she got them from? She could not have got them from the customers because they would only have handed them in if they were expecting the return of their stakes or their winnings – with the possible exception of Theresa, who Miss Miller said was in the habit of coming to the counter with a large number of receipts and asking the cashier whether she was due a return on any of them.

45. If Ms Vyras had thought about that at the time, it did not feature in her witness statement. Nor was it referred to by Mr Bennett when he opened William Hill's case. It cropped up for the first time in Ms King's cross-examination of Ms Vyras. That was when for the first time the suggestion was made that what must have happened was that the customers had discarded the receipts thinking that they were no longer of any value, and that Miss Miller must have picked them up herself, either from the floor of the branch or elsewhere in the part of the branch to which the public had access. That was the significance of the fact that Miss Miller appeared on the CCTV footage of 4 March to be straightening out a receipt as if it had

been screwed up. The complaint is that the CCTV footage should have been viewed to see if it showed Miss Miller picking up discarded receipts.

46. Mr Bennett said that viewing the footage for that purpose would not have helped. The CCTV did not cover the whole of the public part of the branch, and Miss Miller would have known that. Moreover, he said (though he acknowledged that this was not something which the tribunal had been told) that it was part of the duties of the staff to go into the public part of the branch from time to time to clear up discarded receipts. So whatever the footage showed, it would neither incriminate nor exculpate Miss Miller. The important point, though, is that none of this appears in the tribunal's judgment. Not just that the whole of the footage was not viewed, but not even that management acknowledged that Miss Miller had to have got the receipts if she had pocketed the money herself. That was potentially a very significant point, and the fact that the tribunal did not mention it suggests that the tribunal may have overlooked the point. That is not as surprising as it sounds: the tribunal did not produce its judgment until over four months after the second and final day of the hearing, and there was nothing in Ms Vyras' statement about it.

47. But it goes further than that. The CCTV camera is behind the counter facing into the branch. The cashier is in the foreground. For much of the time, the footage shows Miss Miller behind the counter. While she was seen behind the counter, she could not, of course, have been collecting discarded receipts. The argument here is that management should have viewed the CCTV footage to see when Miss Miller left the counter. Take the bet on 5 March as an example. There were about 50 minutes between 10.40 by when the customer would have placed his bet and 11:33:46 when the receipt was processed through the system. If the CCTV footage for that period had been looked at and it showed Miss Miller behind the counter at all times, she could not have collected the discarded receipt.

48. For these reasons, we do not think that the tribunal should have found that management had been justified in not viewing the whole of the footage. That was not a finding which it was reasonably open to the tribunal to reach on the evidence as a whole. In reaching that conclusion, we have borne in mind the warning given by the Court of Appeal in Yeboah v Crofton [2002] IRLR 64 at [93] about the risk that too close an examination by the Employment Appeal Tribunal of the evidence and the findings of fact made by the employment tribunal may lead the Employment Appeal Tribunal to substitute its own assessment of the evidence for that of the employment tribunal, and to usurp the fact-finding function of the employment tribunal. But for the reasons we have given, the only conclusion which the tribunal could have reached in the light of all the evidence, in our view, was that management's failure to view the whole of the footage meant that the investigation which had been carried out prior to the decision to dismiss Miss Miller was not as sufficiently thorough as the circumstances warranted.

49. There were other reasons advanced on behalf of Miss Miller for saying that the investigation was flawed. Where the customers could be identified, they should have been interviewed to find out whether they had been paid. Ms Muller should have been interviewed to see whether she corroborated Miss Miller's account of telephoning her on 4 March to confirm that a tricast is automatically converted into a forecast if a dog is withdrawn before the race begins. And the manager of the branch and Ms Brown should have been interviewed to find out whether they could confirm that Bill and Theresa regularly placed late bets. Mr Bennett had some pretty good answers to these points. You would never ask customers whether they had been paid. They would invariably say that they had not been even if they had. The issue with the call to Ms Muller was not whether but when it had taken place, and Ms Muller would not have been able to contribute anything to that. And the issue with customers

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like Bill and Theresa was not so much whether they were in the habit of placing their bets late, but whether on 24 and 27 February they were returned their stakes. The problem is that we do not know what the tribunal made of all this: the tribunal did not deal with these points in its judgment. But in the final analysis that does not matter since, for the reasons we have given, management's failure to view the whole of the footage meant that the investigation into what Miss Miller had done was flawed.

50. We should add that we were troubled by the fact that Ms Vyras' letter of 1 April did not spell out the real nature of her concerns. They were not so much "betting irregularities" but theft. That should have been made clear to Miss Miller, as well as the fact that if the outcome of the disciplinary process was to be that Miss Miller had been guilty of theft, Miss Miller's dismissal was likely to be regarded as the only appropriate disciplinary sanction. But again this does not matter in view of our conclusion about the quality of the investigation into what Miss Miller was thought to have done.

### Conclusion

51. For these reasons, Miss Miller's appeal must be allowed, and the tribunal's finding that she had not been unfairly dismissed must be set aside. Since the only conclusion which the tribunal could have reached was that the investigation into what Miss Miller had done had not been as thorough as the circumstances warranted, the only appropriate course open to us is to substitute for the tribunal's finding a finding that Miss Miller was unfairly dismissed by William Hill. Her case will have to return to the tribunal for the level of her compensation to be decided.

52. Since there may be issues over whether she caused or contributed to her dismissal by her conduct, and whether she could have been fairly dismissed if a sufficiently thorough

investigation into what she was alleged to have done had been carried out, it is appropriate to remit the case to the same tribunal, if possible. The tribunal should, of course, be alive to the possibility that it might be tempted, albeit completely unconsciously, to decide those issues in a way which reflects their present view of the case. We trust that they will guard against doing that.