



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr K Pickles

AND

Tesco Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Teesside

On: 14 September 2017

Before: Employment Judge Johnson (sitting alone)

Appearances

For the Claimant: Ms B Clayton of Counsel

For the Respondent: Ms C Petrucci of Counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

- 1 The claimant was represented by Ms Clayton of Counsel, who called the claimant to give evidence. The respondent was represented by Ms Petrucci of Counsel, who called to give evidence Mr Andrew Doe (Shift Manager) and Mr Colin Chapman (Distribution Manager). There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 183 pages of documents. The claimant and the two witnesses for the respondent had all prepared formal, typed and signed witness statements. Those statements were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the Tribunal Judge.

- 2 By claim form presented on 15 May 2017, the claimant brought complaints of unfair dismissal and wrongful dismissal. The respondent defended the claims. In essence they arise out of the claimant's dismissal on 9 January 2017, for reasons which the respondent says related to his conduct. The respondent alleged that the claimant had used a number of "thank you" vouchers, which had been distributed by the respondent to its employees at Christmas, in circumstances where he was not entitled to do so. The claimant admitted the misuse of the vouchers, but denied any dishonest intent. In the absence of any such dishonest intent, the claimant maintained that dismissal for misuse of the vouchers was an unreasonable response to his admitted misconduct.
- 3 The issues identified by the Tribunal as those which it would be required to decide were therefore as follows:-
 - 3.1 What was the respondent's reason for dismissing the claimant?
 - 3.2 If for misconduct, did the respondent hold a genuine belief in the claimant's guilt and were there reasonable grounds for that belief, following a reasonable investigation?
 - 3.3 If so, was the respondent's decision to dismiss the claimant one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances of the case?
 - 3.4 To what extent, if any, did the claimant contribute towards his dismissal?
 - 3.5 What, if any, remedy should be awarded to the claimant?
- 4 Having heard the evidence of the claimant and the witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of both Ms Clayton and Ms Petrucci, the Tribunal made the following findings of fact on a balance of probability:-
 - 4.1 The respondent is one of the largest supermarket chains in the country. It has numerous supermarkets and a number of distribution depots. It employs approximately 360,000 employees. It has its own designated HR Department.
 - 4.2 The claimant was employed as a warehouse operative at the respondent's distribution centre in Middlesbrough. His employment commenced on 24 September 2009 and ended when he was summarily dismissed on 9 January 2017. It is common ground that the claimant was a competent, hard working and well-liked employee, with a clean disciplinary record.
 - 4.3 The respondent has a written disciplinary policy, a copy of which appears at pages 30-38 in the bundle. Examples of "gross misconduct" are given at paragraph 12 on page 40 and include:-
 - *Fraud, including using Club card points or vouchers intended for someone else.*

- *Deliberate disregard/abuse of Tesco procedures eg misuse of the Privilege card policy.*

That section states at the beginning:-

“The following is a non-exhaustive list of serious breaches of Tesco rules/standards that are likely to constitute gross misconduct”.

- 4.4 The respondent provides certain privileges to its employees, including staff discount vouchers, bonus vouchers and “thank you” vouchers. The latter are distributed shortly before Christmas each year. Those schemes and vouchers are subject to specific terms and conditions, which are printed on the vouchers themselves or on the booklets which contain the vouchers. Examples appear at page 69-87 in the bundle. The majority of vouchers relate to a discount of £1.00 when more than £5.00 is spent. An example of the terms and conditions printed on the back of the coupon/voucher appears at page 69 in the following terms:-

“This coupon has no cash redemption value. One coupon per qualifying amount can be redeemed in a single transaction at the time of purchase. Age restrictions apply to certain products. This coupon can only be redeemed once and by the person to whom it was issued and holds the corresponding Club card. For in-store purchases, hand this coupon to the checkout operator to receive the benefit. For online purchases, enter the code starting with X or GR at the online grocery checkout at Tesco.com/groceries. Codes starting with X cannot be used with any other codes that start with X. The offer excludes alcohol, café, tobacco, Tesco Direct, fuel, lottery or travel kiosks, gift cards, E-Top Up, opticians, phone store, savings stamps, postage stamps, prescription, infant milk formula, travel money, F&F, wine by the case, Tesco Photo, deliver and collection charges, sellers at Tesco and other Tesco websites. Copied, damaged and defaced coupons will not be accepted. This coupon is and shall remain the property of Tesco Stores Limited and is not for resale or publication. Valid in the UK and IOM only.”

- 4.5 It was accepted by the respondent that these specific terms and conditions may vary from time to time.
- 4.6 At page 41 is a document headed “Frequently asked questions” which relates to the “thank you” booklets. The document states as follows:-

- *Can I have more than one “thank you” colleague booklet?*

No, if you were employed as a Tesco colleague on or before Friday, 21 October 2016, you are entitled to one thank you November/December 2016 colleague booklet.

- *Can I use more than one “thank you” colleague booklet?*

No, but if you have a partner or family member living in the same household, who is an eligible colleague and also in receipt of a thank you booklet, you can redeem all your thank you vouchers if you are both present at the point of purchase, subject to the voucher rules.

- *Can I use this thank you colleague booklet if I don't yet have a privilege card?*

Yes, though you may not be able to redeem some offers at Tesco Direct (online, on the phone or at the direct desk) without a privilege card or a second privilege card.

- *What are the potential consequences if I breach this policy?*

Providing this benefit is a significant investment for Tesco and we take any abuse of our benefit schemes very seriously. The security team monitor the use of privilege cards for any signs of abuse and will report any suspicious activity to the staff discount team. Any privilege card or misused vouchers can be confiscated at the till point for not complying with this policy and will be automatically cancelled and subject to further investigation. Any breaches may result in disciplinary action which could lead to your dismissal.

- *Who do I contact if I have questions about this booklet or my privilege card?*

Contact your people manager or Tesco.benefits@uk.tesco.com if you have further questions about your thank colleague booklet.

- 4.7 The respondent partakes in regular training of its employees in a number of matters relating to their duties. It was accepted however, that there was no specific training given about the use of the privilege scheme or “thank you” vouchers.
- 4.8 At the end of November 2016, the respondent’s employees were given their annual Christmas “thank you” vouchers. The claimant recalls that his “thank you” booklet contained two types of vouchers. Discounts were obtained against specific products and prices were deducted when a specific amount was spent in-store. The claimant acknowledges that certain purchases such as alcohol, tobacco and fuel were always excluded from the vouchers.
- 4.9 At this time the claimant’s wife was pregnant, having suffered a miscarriage the previous Christmas and having been told that there was a substantial risk of a miscarriage with her current pregnancy.
- 4.10 Three of the claimant’s colleagues had been given their annual “thank you” vouchers, but had indicated to the claimant that they did not intend to use them. The claimant asked one of those colleagues if he could have

one of their vouchers and the other two colleagues willingly offered to give their vouchers to the claimant. This of course was a breach of the terms and conditions which applied to those vouchers, as only the person to whom they had been allocated was permitted to use them unless they and the user lived in the same household.

- 4.11 On 7 December 2016, the claimant went to his local Tesco store to do his Christmas shop. As was his usual practice, he used the respondent's "scan as you shop" procedure, whereby items to be purchased were scanned as they were put into the shopping trolley and the total price then paid at the checkout. As part of this process, the claimant scanned all of the vouchers in his possession, including those allocated in his own booklet and those which he had been given by his three colleagues. At page 88-90 is a copy of the printed receipt for the items purchased by the claimant. The total expenditure is £260.51. Approximately £20.00 of discount was obtained for "multi-buy savings", plus an additional £24.06 "staff discount". There are then listed 87 coupons, each with a value of between £0.40 and £1.00 each. The total expenditure after the discounts was £138.86.
- 4.12 The claimant's transaction and the number of coupons used was identified by staff at the store and reported to management. Mr Ken Lowes (Shrink and Security Manager) at Middlesbrough identified that 60 x £1.00 Christmas coupons had been used, the effect of which was to reduce the price paid from £240.62 to £138.86. It is accepted by the respondent that their fraud investigation team usually only investigate transactions where more than three books have been used, otherwise they would spend an inordinate amount of time investigating transactions where in fact the vouchers were being redeemed by members of the same household.
- 4.13 On 2 January 2017 the claimant returned to work after the Christmas break and was immediately asked to attend an investigatory meeting. He was accompanied by his representative Mr Colin Rodwell. The claimant was told that he was being investigated for a potential act of gross misconduct relating to his use of the "thank you" booklets during his shopping expedition on 7 December 2016.
- 4.14 The investigation was carried out by Mr Peter Burrows, the claimant's Team Manager. Minutes of the investigatory meeting appear at page 100-110 in the bundle. The typed version is at page 110A-E. Mr Burrows produced the receipt from the claimant's purchases and referred to the number of vouchers which had been used on that occasion. The claimant was told that he was only supposed to use one booklet of vouchers and that it appeared that three or four booklets had been used in this single transaction. The claimant asked for time to consult with his trade union representative and immediately thereafter said to Mr Burrows:-

"I adjourned to speak to Colin and realised the seriousness of this investigation. Obviously from what you have said there is a limit on the number of books one person can use and I hold my hands up

as this is my mistake. I did not realise there was a limit to the booklets. As to how I had more booklets to the one issued to myself, there are colleagues who I work with who had no interest in them and gifted me them."

It was pointed out to the claimant by Mr Burrows that it clearly states on the back of the booklet that employees can only use one booklet unless they are part of a family living in the same household. It was put to Mr Pickles in the following terms:-

"From what you have said you were not aware that more than one could not be used and you received the other booklets from colleagues at work."

The claimant replied:-

"Correct yes".

- 4.15 The claimant conceded that there was no partner or family member in the same household as him. He was then asked if he understood that it was his responsibility regarding the booklet and that it was his responsibility to read through the booklet and the terms and conditions thereon. He was asked if he had any reading difficulties that would have prevented him gathering that information from the booklet. The claimant's reply was:-

"No. I understand that the warning is on the booklet. I did what many people do and looked at the vouchers and did not read the back of the booklet. I just read face of vouchers. I don't believe that I'm the only person not to read the back but others have not used the booklets and I hold my hands up for that one. As I have used vouchers it looks like I'm not entitled to and obviously I don't know what Tesco policy is for the extra vouchers, I'm happy to offer a deduction from my wage equal to the amount I have used extra."

- 4.16 Mr Burrows then replied:-

"I'm not aware of Tesco policy for this, you have asked questions so I will try to find answers. Thanks for being honest. In summary, info that I have given you is regarding Xmas shop where extra vouchers were used. You said you were not aware that only one could be used and if you had read that information you would not have used them."

The claimant replied:-

"Yes would not be worth it putting job at risk."

- 4.17 The claimant's trade union representative Mr Rodwell stated:-

"I think listening to Keith he made a genuine mistake. It was not a deliberate act. I know from vouchers I received nobody reads the small print, going forward I think we will in future. And I think its commendable that he has offered to pay the money back to the company. That's it."

4.18 After a short adjournment to consider matters, Mr Burrows concluded that the claimant's conduct could potentially be treated as gross misconduct and that the matter should be referred to a disciplinary hearing.

4.19 By letter dated 5 January 2017 (page 111) the claimant was invited to attend a disciplinary hearing on Monday, 9 January to answer an allegation of "*alleged misuse of Tesco thank you book vouchers*". The letter included copies of the investigation interview notes, background e-mails and photocopies of the thank you book vouchers. The letter states:-

"As this hearing may result in disciplinary action being taken against you, up to and including your dismissal from the company, you are entitled to be represented at the hearing. This can be either a Tesco colleague or an authorised trade union representative. This is a serious matter and you should make every effort to attend."

4.20 The claimant attended the disciplinary hearing on 9 January. On this occasion he was represented by Mr Tony Doonan. The minutes of the disciplinary hearing appear at pages 112-117 in the bundle. The typed version is at 117A-C. The meeting started at 15:40 and ended at 16:47. The meeting took place before Mr Andrew Doe, the claimant's Shift Manager. Mr Doe read the documentation from the investigation carried out by Mr Burrows. He invited the claimant to give his explanation as to what had happened. The claimant replied:-

"Done investigation where discovered could only use one booklet when I used them I didn't realise that. Held hands up and still do. Made mistake and apologise for it with regards to reasons. I got book and looked at what vouchers were and how long valid for – didn't read small print. Done my big xmas shop and when come back to work pulled in for investigation. If I had known could only use one then I would have. Next year will only use one."

The claimant was asked from where he had obtained the other books and stated that he had received them from colleagues on his shift who either didn't want them or who had already taken what they wanted. The claimant said that this led him to believe that they too did not know that only one booklet could be used by each employee. The claimant insisted that he did not know that it was wrong and that he had "*held hands up from the beginning*". Mr Doe suggested that the claimant had only admitted the offence because he had been caught out. Mr Doe indicated that he needed to look at what monetary gain had been obtained by the claimant in using the vouchers. He made it clear to the claimant that it

was his responsibility to be aware of the terms and conditions. Mr Doe did say to the claimant that authority had been “*very open and honest*”. Mr Pickles replied by stating that he was not going to put his job at risk for the sake of £60.00.”

- 4.21 Mr Doe postponed the hearing at 16:00 hours and reconvened at 16:40. He stated:-

“I’ve gone through and back through the investigation. I have no other decision to dismiss. This is due to a monetary gain. This is a lot of money. The Ts & Cs and took on board what Tony said the Ts & Cs are clearly displayed on the back of the booklet, been with since 24/9/09 so being here eight Christmases and had similar voucher schemes in the past. Due to length of service, can’t use ignorance as an excuse. Finally as this played I head you didn’t go to till you used self service.”

- 4.22 Mr Doe’s last point above meant that he regarded the claimant’s conduct as having been more suspicious because he had used the “*scan as you shop*” scheme, rather than take his shopping and the vouchers to a personally manned till. The claimant protested that he always used the “*scan as you shop*” procedure whenever he did his shopping. Mr Doe responded that if the claimant had gone to the till then the cashier would have stopped him from using the vouchers.

- 4.23 At page 118-123 in the bundle, is a checklist to be completed by the disciplinary officer who is dealing with a case of misconduct. Mr Doe completed this document and has ticked the following boxes:-

- *Decide if the employee is entirely at fault or was someone else really responsible, or was it some failure outside the employee’s control.*
- *Where there is a case of gross misconduct, did the employee know about the rule that has been broken or could he/she have reasonably known? Also assess whether the rule might not have been applied consistently in the past.*
- *When potential gross misconduct is involved ask yourself the question; “Given all the circumstances is it reasonable for me to come to the conclusion that I can no longer have any trust and confidence in this employee and therefore I can no longer tolerate his/her continued presence in this company?” If the answer is “Yes”, then there has been a fundamental breach of contract. If the answer is “No” or if you are uncertain, then the misconduct will not have been gross, but some other form of disciplinary action may be appropriate other than dismissal.*

- 4.24 The claimant’s dismissal was confirmed by letter dated 12 January 2017, a copy of which appears at page 125 in the bundle. It states:-

"I am writing to confirm my decision to summarily dismiss you for gross misconduct. The reasons for this are:-

- 1 You gained a substantial monetary discount by using the thank you vouchers that you were not entitled to.*
- 2 The Ts &Cs are clearly displayed within the booklet. By using these vouchers you are taking responsibility for their correct use.*
- 3 Lack of understanding of these Ts & Cs is not a defence as it is your responsibility to ensure that you use them correctly.*
- 4 By using the scan and shop function you negated the interaction at the till where you may have been challenged as to why you were using excessive amounts of vouchers. This however does not negate your responsibility.*
- 5 You have been with the company since September 2009 therefore you have had a number of similar schemes available to you."*

The claimant was advised of his right to appeal.

4.25 By letter dated 17 January 2017 (page 126-127) the claimant submitted a formal appeal. The claimant set out the history of the matter then states at point 11, the following:-

"Mr Pickles defence is that –

- a he did not know that what he was doing was wrong.*
- b he used vouchers that were intended to be used and used them in the manner intended.*
- c it is common practice for employees to give spare vouchers to one another, which is known to Tesco.*
- d there was no attempt at deception or fraud."*

In the previous paragraph the claimant states:-

"In summary, this is not a case of gross misconduct. If Tesco wants to enforce a policy that employees can only use the voucher book that they are given and that any employee who does not intend to use his or her vouchers should dispose of them by shredding or similar and must not give them away, then Tesco needs to modify its communications to its employees to make this clear."

The appeal letter requested that the claimant be reinstated with reimbursement in full for his loss of earnings.

- 4.26 The appeal hearing was conducted before Mr Colin Chapman on 3 February 2017. Before the appeal hearing, Mr Chapman read the appeal pack which contained all of the notes and evidence from the investigation and disciplinary hearing. The claimant attended the appeal hearing and was again accompanied by his trade union representative Mr Doonan. Minutes of the hearing appear at pages 131-140 in the bundle. A typed version is at pages 140A-E. The claimant was invited to take Mr Chapman through his grounds of appeal. The claimant accepted that he was aware that there were terms and conditions within the booklet, but insisted that he had not read them. When asked why he had not done so, the claimant replied that he had simply read the vouchers and their validity dates. The claimant maintained his position that some of his colleagues do not shop at Tesco and that due to him having a child on the way, they “showed kindness to him and gifted their vouchers to him.” Mr Chapman immediately accepted that there was no suggestion or allegation that the claimant had stolen any of the vouchers. Mr Pickles reminded Mr Chapman that the respondent’s security officer had accepted that employees were not allowed to use more than one booklet but that the company would not investigate transactions where less than three booklets had been used, because of the family member/household proviso. Mr Chapman questioned the claimant’s use of the “*scan as you shop*” scheme and wondered whether this was a means by which the claimant sought to avoid detection. The claimant again insisted that the vast majority of his shopping at Tesco was always via the “*scan as you shop*” procedure. This was eventually conceded by Mr Chapman. The claimant’s length of service was again raised. The claimant considered this to be a factor which should operate in his favour, due to his length of service and clean record. Mr Chapman thought otherwise, indicating that the claimant’s length of service would mean that he had received vouchers frequently in the past and should therefore have been well aware of the restrictions on their use.
- 4.27 Mr Chapman adjourned the meeting to enable him to make some further investigations with Mr Bagg, the security manager. Mr Bagg indicated that the claimant did often use the “*scan as you shop*” process. Mr Bagg also stated that the respondent had to budget for the uptake of the Christmas “*thank you*” vouchers by taking into account the proportion of employees who would use them, based on the previous year’s usage. Mr Bagg indicated that if employees used their colleagues’ unused vouchers, then this would cost the respondent more money than they otherwise would have expected. Mr Bagg again conceded that the fraud investigation team restrict their searches to those who use over three booklets. However, Mr Bagg indicated that the number of vouchers used by the claimant put him “*in the top 10-20 employees in the UK who appeared to have abused the scheme.*” Mr Bagg also suggested that those other employees had been dismissed for mis-use of the vouchers. The contents of Mr Chapman’s discussion with Mr Bagg were not put to the claimant and he therefore did

not have an opportunity to challenge any part of it, particularly that his offence put him in the top 10-20 of offending employees.

4.28 Mr Chapman's conclusions were:-

- (a) the claimant should have known about the terms and conditions on the back of the vouchers;
- (b) it was not material how the claimant came about the booklets;
- (c) that the claimant had failed to provide the names of any persons who had been involved in misuse of the vouchers, but who had not been dismissed;
- (d) that the claimant had not been deceitful, particularly with his use of the scan as you shop scheme;
- (e) that the claimant's length of service was relevant to whether the claimant should have known about the terms and conditions attached to the vouchers, especially given the volume of vouchers he was putting through the till.

Mr Chapman considered that in all the circumstances, the claimant had not raised anything which truly mitigated his actions and that the claimant's misuse of the vouchers was a particularly serious issue. Mr Chapman was satisfied that there had been a full and thorough investigation and disciplinary process and concluded that the claimant's dismissal should be upheld. That was confirmed in writing to the claimant by letter dated 1 March 2017 (page 149).

4.29 Under the respondent's disciplinary policy, the claimant had a right to a second appeal, which he exercised by letter dated 7 March 2017 (page 150). This second appeal letter repeats the grounds set out in the first appeal letter of 17 January and maintains that the claimant did not set out to be deceptive and that he was not the only one who did not know about the terms and conditions attached to the vouchers. The claimant specifically pointed out the confusion between Mr Lowe and Mr Bagg about the exact terms attached to the vouchers. The claimant also pointed out that his financial gain of approximately £60.00 was not a lot of money and that he had offered to repay it.

4.30 No evidence was given by the second appeal officer Mr Andy Vallis. That appeal took place on 20 April. The minutes appear at pages 154-160C. The second appeal was dismissed, as is set out in the letter of 28 April 2017 at page 161 in the bundle. The relevant extracts are:-

"Your grounds of appeal were:-

1 *The decision made was too harsh, this was an act of misconduct not gross misconduct, this was not a deliberate act.*

During the adjournment I fully considered your points raised and reviewed the case file and your personal file. When we reconvened I described my response to your points as follows:-

1 *I believe that it is known by our colleagues that there is only one voucher booklet given per colleague.*

2 *The rules and terms and conditions of the vouchers are clearly stated both on the voucher and in the colleague booklet.*

3 *What you have done is wrong and it is not a minor incident.*

In summary taking all of the above points into consideration, I believe the decision to dismiss you from the company was fair and within the bands of reasonable responses, therefore I am upholding the decision to dismiss you from the company. This is the final stage of the Tesco internal process.”

4.31 The claimant presented his complaint to the Employment Tribunal on 15 May 2017.

5 In spirited cross-examination of the two witnesses called on behalf of the respondent, Ms Clayton for the claimant focussed particularly on the following points:-

5.1 That the respondent had not provided the claimant with any training about the use of the various discount vouchers and in particular about the terms and conditions attached to them.

5.2 Those involved at the investigation stage, the dismissal stage and the appeal stage appear to have accepted that the claimant had been honest about his version of events.

5.3 That no weight should have been attached to the “scan as you shop” point.

5.4 That the claimant’s length of service and clean record should operate more in his favour than against him.

5.5 That any culpable conduct by the claimant should more properly be regarded as a mistake, rather than a deliberate act of dishonesty.

5.6 The respondent had not shown that any other employees who may have been involved in misuse of the voucher scheme had been dismissed.

5.7 That having been put through the disciplinary procedure for his transgression on this occasion, the claimant was unlikely to involve himself in any similar actions in the future.

6 Ms Petrucci's case as put to the claimant was that:-

6.1 The claimant was fully aware of the terms and conditions which attached to the vouchers and their use.

6.2 If he truly was not aware, then he should have been aware due to the number of times he had used the vouchers throughout his employment.

6.3 That the claimant's explanation that some of the terms and conditions on the various vouchers were "*unclear*", must mean that the claimant had on some occasion read at least some of those terms and conditions.

6.4 That he had not given the names of anyone or provided any examples of persons who had been similarly involved in misuse of the vouchers, but who had not been dismissed.

6.5 That even if the claimant had regularly used the "*scan as you shop*" process and that therefore it should not have been taken into account in his case, he would still have been dismissed in any event.

6.6 That the claimant's "*honesty*" during the investigation and disciplinary process related to his admission that he had misused the vouchers (albeit unknowingly) but did not mean that he was unaware about the various terms and conditions.

6.7 That abuse of the voucher system is regarded by the respondent as a particularly serious matter, properly regarded as gross misconduct and therefore justifying summary dismissal.

7 **The law**

The statutory provisions engaged by the claims brought by the claimant are set out in sections 86, 94 and 98 of the Employment Rights Act 1996:-

"86 Rights of employer and employee to minimum notice

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

8 There is an abundance of authority from the higher courts, designed to give guidance to the Employment Tribunal as to the correct interpretation of those statutory provisions. With regards to the claimant's complaint of unfair dismissal, the judgment of Lord Justice Aikens in the Court of Appeal case of **Trevor Orr v Milton Keynes Council [2011] EWCA-Civ-62** is of particular assistance. Lord Justice Aikens said:-

The case law on the interpretation and application of section 98 is vast. Indeed, it could be said that the section has become incrustated with case law." For the purposes of the present case, the relevant principles established by the cases are as follows:-

"(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss the employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before the tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Employment Tribunal has to decide whether the dismissal was fair or unfair. That requires first and foremost the application of the statutory test set out in section 98(4)(a).

- (4) *In applying that subsection, the Employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the "real reason". That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*
- (5) *In doing the exercise set out at (4) the employment tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.*
- (6) *The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt, for that of the employer. The Employment Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted."*

9 It is well accepted that the range of reasonable responses test applies equally to the investigation into the alleged misconduct, as it does to the decision to dismiss. (**Sainsbury Supermarkets Limited v Hitt**). The investigation, whilst not required to be perfect, must be reasonable in all the circumstances. An employer cannot have reasonable grounds for believing an employee to be guilty, unless there has been a reasonable investigation.

10 Ms Clayton challenged the reasonableness of the respondent's investigation on the following grounds:-

10.1 There was no investigation into whether any training had been provided to employees about use of the voucher scheme.

10.2 There had been no investigation into what sanctions had been imposed on any other employees who had been found to have misused the voucher scheme.

10.3 That the claimant and his representative had been unable to comment upon the allegation that the claimant's misuse of the vouchers put him in the "top 10-20" employees found to have abused the scheme.

- 11 The Tribunal found that the respondent's investigation into the allegations against the claimant was reasonable in all the circumstances. The Tribunal found that there was no requirement or obligation upon the respondent to train its staff in the use of the vouchers. There is no evidence that any such training had been provided in previous years. The Tribunal found it reasonable for the respondent to rely upon the commonsense of its employees to read and acquaint themselves with the relatively straightforward terms and conditions applicable to the use of the vouchers. If the claimant genuinely believed that other employees abused the system, but had not been dismissed, then it was for him to provide at least some substantive details which the respondent could then investigate. The point about the claimant being in the "top 10-20" was of little significance – if anything, it showed how serious the respondent treated the number of vouchers which had been used by the claimant.
- 12 The Tribunal found that Mr Burrows, Mr Doe and Mr Chapman all genuinely believed that the claimant had committed an act of misconduct by using that number of vouchers on that particular occasion. Indeed the claimant did not deny doing so. It was a matter of record. Whilst all of the respondent's witnesses accepted that the claimant was being "honest" by immediately admitting his use of the vouchers, that did not mean that they accepted that he had been "honest" when denying any understanding of the terms and conditions on the basis that he had not read them. The Tribunal accepted the evidence of Mr Doe and Mr Chapman that they believed that the claimant was being less than honest with them when he gave that explanation. The Tribunal found that it was reasonable for the respondent's witnesses to conclude that if the claimant had read and was not aware of the terms and conditions, then he certainly should have been aware.
- 13 The Tribunal found that the respondent's witnesses genuinely believed on reasonable grounds, after a reasonable investigation that the claimant had committed an act of misconduct in his misuse of the "thank you" vouchers.
- 14 The Tribunal then had to consider whether the decision to dismiss the claimant was one which fell within the range of reasonable responses. That question has to be answered taking into account equity and the substantial merits of the case. The claimant's case was that he was highly unlikely to repeat the offence, once he had acknowledged that there were terms and conditions attached to the vouchers and that misuse of the scheme would lead to disciplinary action and may lead to dismissal. Ms Clayton put to the respondent's witnesses that a far more appropriate sanction in circumstances such as these would have been a written warning or even a final written warning. The evidence of the respondent's witnesses was consistent in that they regarded "*any abuse of our benefit schemes to be very serious*". That is made clear in the "*Frequently asked questions*" section of the "thank you" vouchers booklet. The Tribunal accepted the respondent's evidence in this regard. The respondent budgets for an anticipated take up of the vouchers, which takes into account the likelihood that many of the vouchers will not be used. If those vouchers are then used by other employees in breach of the conditions, that will result in a loss to the respondent. Whilst the Tribunal accepted the claimant's evidence as to what his financial gain had actually been, namely approximately £60.00, it is not the sum which was

important to the respondent, but the nature and gravity of the act of misconduct. The Tribunal found that it was reasonable in all the circumstances of this case, for the respondent to treat the claimant's conduct as gross misconduct. That was a reasonable response to the admitted misconduct.

- 15 The Tribunal took into account the nature of the respondent's business, the nature of the claimant's employment and the nature of the voucher scheme itself. The Tribunal found that some reasonable employers would have concluded that this amounted to a serious act of misconduct. The Tribunal found that some reasonable employers would have reasonably categorised it as gross misconduct, justifying summary dismissal. The Tribunal found that the respondent's decision to dismiss the claimant for his misuse of the voucher scheme was a decision which some reasonable employers may have reached in all the circumstances of the case. The claimant's claim of unfair dismissal is therefore not well-founded and is dismissed.
- 16 Turning now to the claim of wrongful dismissal, the provisions of section 86 of the Employment Rights Act 1996 state that the right to a statutory notice period does not affect any right of either party to treat the contract as terminable without notice by reason of the conduct of the other party. Ms Clayton and Ms Petrucci agreed the claimant was entitled to his statutory notice or pay in lieu of notice, unless the Tribunal was satisfied that the respondent was entitled to summarily dismiss the claimant without notice because of his conduct. In simple terms, had the claimant committed a fundamental breach of contract and thus indicated that he no longer intended to be bound by one or more of the essential terms of the contract? Ms Clayton bravely argued that the respondent could not have believed that the claimant had evidenced an intention no longer to be bound by the essential terms of the contract, because once he realised that there were terms attached to the vouchers and that any abuse of those terms would lead to disciplinary action, then he was highly unlikely to commit any similar offence in the future. The Tribunal was not persuaded by this argument. The Tribunal was satisfied that the claimant had admitted committing an act of misconduct. The Tribunal found that this had been a significant and serious act of misconduct, which amounted to a fundamental breach of contract and one which entitled the respondent to dismiss him summarily. For those reasons the complaint of wrongful dismissal is not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
10 October 2017
JUDGMENT SENT TO THE PARTIES ON
11 October 2017.
AND ENTERED IN THE REGISTER**

Case Number: 2500559/2017

**G Palmer
FOR THE TRIBUNAL**