THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE HALL-SMITH**

BETWEEN:

Mr V Onyike **Claimant**

AND

Sainsbury's Supermarkets Ltd **Respondent**

ON: **4 October 2017**

APPEARANCES:

For the Claimant: **Ms E Mitchell, Counsel**

For the Respondent: **Mr S Liberadzki, Counsel**

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL is that:

1. The Claimant was unfairly dismissed by the Respondent.
2. The Claimant contributed to his unfair dismissal to the extent of 80%.
3. A remedy hearing will be listed

REASONS

1. By a claim form received by the Tribunal on 14 June 2017 the Claimant, Mr Victor Onyike, brought complaints of unfair dismissal and of wrongful dismissal against the Respondent, Sainsbury's Supermarkets Limited

2. At the hearing the Claimant was represented by Ms E Mitchell, Counsel who called the Claimant to give evidence before the Tribunal. The Respondent was represented by Mr S Liberadzki, Counsel, who called the following witnesses on behalf of the Respondent, namely Ms Hayley File, Deputy Manager, and Mr Peter Murphy, Store Manager. There was a bundle of documents before the Tribunal.

The Issues

3. The Issue before the Tribunal was whether the Claimant's dismissal for the potentially fair reason of conduct had been fair within the meaning of Section 98(4) of the Employment Rights Act 1996. Ms Mitchell on behalf of the Claimant helpfully provided a list of issues which included the following:-

    3.1 Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient grounds for dismissal?

    3.2 Was the Claimant's dismissal within the band of reasonable responses in all the circumstances?

    3.3 Did the Respondent follow a fair process in respect of the Claimant's dismissal?

    3.4 Did the Claimant's conduct in forgetting to remove earphones which were not playing music constitute a repudiatory breach of contract consisting of gross misconduct?

    3.5 There was a further issue relating to the length of the Claimant's continuity of employment with the Respondent, in circumstances where there was a break which had involved the Claimant in military service in Iraq, as a Territorial. The parties agreed in the absence of documentary evidence relating to such issue, that it could be considered at a Remedy Hearing, if relevant.

The Facts

4. The Claimant was employed by the Respondent as a Commercial Assistant. According to the Claimant his employment commenced on 1 December 1999. The Respondent contends that the Claimant's employment commenced on 15 March 2004.

5. It was common ground that the Claimant had had a period of employment with the Respondent from about 1999 until his Territorial Army duties had required him to serve a tour of duty in Iraq in 2003. In the absence of any

available documentary evidence at the Tribunal Hearing, the parties agreed that the issue of continuity of service could be considered in the event that a Remedy Hearing was listed.

6. I found that until the matters giving rise to his dismissal the Claimant was a very dedicated and conscientious member of the Respondent's staff and that he had a clean disciplinary record. Notwithstanding the issue about the Claimant's continuity of service, by the time of his dismissal in March 2017, he was a longstanding member of the Respondent's staff.

7. The Respondent is a very well known UK retailer and operates from a significant number of supermarkets and convenience stores. The Respondent also operates an online grocery and general merchandise business.

8. At the time of his dismissal the Claimant worked at the Respondent's store in Garrett Lane in Wandsworth and his duties as a Commercial Assistant involved him in working in the loading bay and delivery yard dealing with deliveries.

9. Included in the Tribunal bundle was a sketch plan and some photographs of the delivery yard area of the store, which catered for deliveries from articulated lorries and the loading and unloading of online shopping vans. The area was also referred to as the "back door".

10. I accepted the evidence of Hayley File who was Deputy Manager of the Wandsworth store from September 2016 until March 2017 that the delivery yard is a very high risk area having regard to the movement of vehicles, including articulated lorries, in and out of the yard and the loading and unloading operations which took place.

11. The Respondent very properly placed a high degree of emphasis on safety issues, having regard to the potential risk of injury to its staff working in the vicinity of the back door area or in the delivery yard.

12. A notice headed 'Safe Working Practic'e was displayed on the back door noticeboard and visible to members of staff such as the Claimant who worked in the area. The notice included the following:

> **Colleagues entering the service yard for any reason must wear high visibility clothing (personal protective equipment/PPE) at all times.**
>
> **The colleague in charge of the reception area has authority over ALL vehicle and people movements in this service yard. Any colleague asked to return to the unloading bay by this , must do so immediately.**
>
> **Colleagues who enter the service yard infrequently, must not enter the service yard when HGV vehicles are reversing onto the unloading bay.**

> **Any colleagues in the yard must be aware of vehicles entering the yard to ensure they don't place themselves in the path of a reversing vehicle.**
>
> **Any reversing vehicle presents a significant hazard to colleagues and others who may be within it's vicinity as the driver has limited vision.**
>
> **Care must be taken where delivery vehicles are operating a tail lift. Colleagues must be far enough away from the tail lift so that they cannot be hit by falling stock.**
>
> **There is a real danger of being struck by, knocked over, or trapped between a vehicle and a fixed object, such as walls, pillars, equipment, reception bay doors, service yard gates or This could have fatal consequences so care must be taken particularly when vehicles are reversing.**

13. The Respondent's approach towards safety issues was reflected in it's handbook for staff, which the Claimant received and in it's disciplinary policy which included the following as an example of gross misconduct, namely:-

> **A serious failure to follow company health and safety procedures.**

14. On 1 March 2017, Mr Mike Miller, Store Manager, saw the Claimant working on the back door wearing headphones. In a statement, page 62 Mike Miller recorded the following:-

> **On Wednesday 1 March whilst walking by high value cages and reviewing sealed control of these areas I noticed Victor was on the back door wearing headphones, I then walked over to Victor and challenged why he was wearing headphones and stated that this was unacceptable and that he is not authorised to do so.**

15. Mike Miller did not give evidence before the Tribunal and it was the Claimant's case that Mike Miller had merely signalled to him to remove his headphones. However, whatever the means of communication to the Claimant, I found that the Claimant understood that he was not to wear headphones whilst working in that area.

16. On 6 March 2017 the Claimant was observed by Khalid Laazizi, Deputy Store Manager wearing headphones whilst working in the goods receiving area. At the time Khalid Laazizi was with an environmental health officer who asked him whether it was standard practice to wear headphones and Khalid Laazizi replied no. The Claimant was asked about headphones and he said they were off and Khalid Laazizi said he should not have them on. A statement was taken from Khalid Laazizi at page 63 of the bundle.

17. On 7 March 2017, Churchill Archibald, Department Manager, wrote to the Claimant, page 66 informing him of the following:-

> **I am writing to ask you to attend a meeting on Tuesday 7 March 2017 at 11.30am. The meeting will take place in the training room …. The meeting is to investigate your alleged conduct, namely:-**
>
> > **A failure to follow company health and safety procedures. On 6 March 2017 you were observed wearing headphones whilst working on the back door.**
>
> **Please be aware this is not a formal disciplinary meeting.**

18. The Claimant was also informed that he could be accompanied at the meeting by either a work colleague or a trade union representative. The meeting took place on 7 March 2017. The Claimant confirmed that he had been wearing headphones but stated that he had no music on and that he had not been aware that he was still wearing them. The notes of the investigatory meeting are at pages 67-73. I found that the meeting was conducted wholly appropriately by the online manager. The Claimant was asked if he had been happy to continue without a representative and he replied yes. Michael Archibald decided that the matter should proceed to a disciplinary hearing. On 8 March 2017, Hayley File, Deputy Manager wrote to the Claimant page 74, informing him of the following:-

> **I am writing to confirm that you have been suspended on full pay until further notice. This follows your alleged gross misconduct; namely:**
>
> - **A failure to follow company health and safety procedures. On 6 March 2017 you were observed wearing headphones whilst working on the back door.**

19. The Respondent had approached the Claimant's conduct in wearing headphones as a matter of gross misconduct following Hayley File reviewing CCTV footage which had revealed the Claimant going out into the delivery yard wearing headphones. Hayley File considered that the matter was more serious because the CCTV footage had revealed that the Claimant had not remained on the back door but had gone into the delivery yard where he was at risk of the movement of vehicles such as articulated lorries.

20. On any view, notwithstanding the existence of health and safety requirements, in my judgment, it was a matter of commonsense for employees such as the Claimant working in the delivery yard to be fully alert and to ensure that their senses, such as sight and hearing, were not impeded or interfered with. Again in my judgment, it was reasonable for any employer to take the view that an employee's hearing would be

affected if that employee was wearing headphones, even if they were not relaying music.

21. The issue was in my judgment entirely straightforward, in circumstances where the Claimant had been seen by managers and on the CCTV footage wearing headphones when he had been instructed not to at the back door area. The Claimant himself accepted that he should not have been wearing the headphones but that it was his case they were not playing music at the material time and that he had forgotten to take them off.

22. The Claimant was written to by the investigating manager, Michael Churchill Archibald on 11 March 2017 page 79 inviting him to a further investigatory meeting in relation to the issue which had been elevated into an allegation of gross misconduct following the CCTV footage, page 79. The letter also informed the Claimant that he was entitled to be accompanied by a work colleague or a trade union representative. I considered that receiving a letter on Saturday to attend a meeting scheduled on the following Monday provided the Claimant with no realistic opportunity of obtaining a representative available for the meeting.

23. The meeting did take place on 13 March 2017 and the Claimant pointed out that there was not enough time to obtain a union representative but when asked if he was happy to continue the Claimant answered yes. During the course of the meeting the Claimant accepted that the store manager had told him that he was not allowed to wear headphones and that he took it off and apologised to him. The Claimant also asked why during the course of the earlier meeting he had not said that he had gone outside. The Claimant also maintained that he would have been able to hear anything coming and apologised and said he would never do it again. The notes of the meeting are at pages 80-84 of the bundle.

24. On the same day, 13 March 2017, Hayley File wrote to the Claimant requiring his attendance at the disciplinary meeting on Thursday, 16 March 2017 in relation to an allegation of gross misconduct involving the following:-

> **A serious failure to follow company health and safety procedures. On 6 March 2017 you were observed wearing headphones whilst working on the loading bay and delivery yard.**

25. The letter also informed the Claimant that he was entitled to be accompanied by a work colleague or a trade union representative and that it was a very serious allegation which, if upheld, could result in his summary dismissal for gross misconduct.

26. The hearing took place as scheduled on 16 March 2017. The Claimant requested to see the CCTV footage and after viewing it the following was put to him by Hayley File:-

> **We have just watched you on several times with headphones going in and out of the yard, yes?**

27. The Claimant replied by saying that he thought it was another day and not 6 March 2017 and stated it was a mistake and that he didn't mean to wear his headphones.

28. The Claimant also maintained when asked if he didn't think it was dangerous to work on the back door "when you can't hear", the Claimant replied:-

> **To be honest no. From my training as long as you are in high viz they can see you so no. I don't get where you're coming from.**

29. The Claimant also stated the following:-

> **The question I have is that I didn't mean to wear headphones on the back door. I just forgot. The store manager had just told me I shouldn't wear them and why but I don't see why this is. It's more for me to see than hear. I made a mistake and I don't think this is a big thing. If that is what it is I have nothing else to say. If I was taking my time I might not have had them on me. I have said sorry and I don't get the issue.**

30. At the conclusion of the hearing the Claimant was informed that he was summarily dismissed. In her decision making summary, page 99, Hayley File included the following:-

> **Victor did not see this issue wearing headphones/blocking his hearing until his last statement – throughout the meeting he insisted that he could not see the risk to himself.**

31. Although the Claimant had maintained that he had not been listening to music, at the Tribunal Hearing Hayley File stated that she considered on the balance of probabilities that he was listening to music on the basis of why otherwise would he have been wearing headphones. In my judgment having regard to the fact that the Claimant was wearing headphones at the material time I consider that Hayley File's conclusion was an entirely reasonable one.

32. The Claimant appealed against his dismissal. The Claimant's appeal was heard by Mr Peter Murphy, Store Manager at the Respondent's Putney store. Peter Murphy had previously worked with the Claimant at Wandsworth from 2008 to 2015.

33. It was the Claimant's case at the Tribunal Hearing that Mr Peter Murphy should not have heard his appeal in circumstances where the Claimant raised a grievance against him in February 2012, pages 42-43. Whether the allegations involving Peter Murphy in the grievance had any substance or not, the Claimant had raised serious allegations about Peter Murphy's

conduct towards him which in broad terms involved allegations that he had been picked on by Peter Murphy, generally treated less favourably by him.

34. In his evidence to the Tribunal Peter Murphy stated that he had not remembered that the Claimant had raised a grievance. The Claimant did not object to Peter Murphy hearing his appeal at the time and explained that essentially he did not want to *"rock the boat"* with the Respondent. Having regard to the nature of the grievance which focused on Peter Murphy's conduct, I considered Peter Murphy's evidence that he had not remembered that the Claimant had raised a grievance to be stretching credibility.

35. Peter Murphy upheld Hayley File's decision to dismiss the Claimant.

36. I heard submissions from Mr Liberadzki on behalf of the Respondent and from Ms Mitchell on behalf of the Claimant.

37. Mr Liberadzki submitted that the Claimant had committed a repeat offence involving deliberate disregard for the instructions he had been given and had not helped himself by challenging or querying the reason why the Respondent considered the wearing of headphones to be a safety issue.

38. In the event that the Tribunal was to find that the Claimant had been unfairly dismissed, Mr Liberadzki submitted that the level of contribution on the part of the Claimant should be as high as 80%.

39. On behalf of the Claimant, Ms Mitchell submitted that the Respondent's disciplinary policy had four levels of sanction and that the Respondent had invoked the most serious sanction of dismissal in circumstances where the previous incidents of the Claimant wearing headphones had not been treated by the Respondent as a disciplinary issue.

40. It had been contrary to natural justice for Peter Murphy to have conducted the appeal under circumstances where the Respondent accepted that there were plenty of individuals available who could have conducted the Claimant's appeal hearing.

41. There had been no express health and safety rule about the wearing of headphones, it had not been highlighted in training, and the Claimant had not been warned of the disciplinary consequences of wearing headphones.

42. The Respondent had focused on an assumption that the Claimant would do it again and had failed to take any adequate account of his seventeen years' employment with the Respondent. The Claimant had acknowledged that he had made a mistake and Ms Mitchell referred me to the disciplinary process documentation in the bundle where the Claimant had acknowledged that he had made a mistake.

43. Ms Mitchell submitted that the sanction of dismissal was outside the range of reasonable responses and that the Respondent's contention that the

Claimant's conduct was blameworthy to the extent of 80% was disproportionately high. There had been no significant blameworthy conduct on the part of the Claimant.

The Law

44. The Claimant had been dismissed for the potentially fair reason of conduct. In a conduct dismissal the Tribunal has to remind itself that it is not it's role to substitute it's view for that of the Respondent employer at the material time.

45. The guidelines of the EAT in ***British Home Stores Ltd - v – Burchell 1980 ICR 303*** are relevant namely the employer must show that it held a reasonable belief on reasonable grounds that the employee concerned was guilty of the conduct alleged, that it had undertaken a reasonable investigation into the allegation and that the sanction of dismissal was a reasonable one in all the circumstances.

46. It is for the Tribunal to review the process undertaken by the employer and to consider whether throughout the entire process the steps undertaken by the employer fell within the range of reasonable responses available to a reasonable employer. Further, the sanction of dismissal should amount to one which a reasonable employer could have invoked. It does not follow that a harsh decision is necessarily an unreasonable one.

47. The statutory framework is set out in Section 98(4) of the Employment Rights Act 1996 which provides:-

"(4) ….., the determination of the question whether dismissal is fair or unfair (having regard to the reasons 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".

48. The Claimant also contended that he had been wrongfully dismissed in breach of the notice conditions of his contract of employment. In order to justify a summary dismissa it is forl the employer has to show on the balance of probabilities that the employee concerned was guilty of gross misconduct, in other words conduct which so undermined the employment relationship between the parties that the employer was entitled to treat the contract as discharged, by the employee's conduct.

Conclusions

49. I reached my conclusions having regard to the evidence, to the submissions of Counsel on behalf of the parties they represented, and to the relevant law.

50. I considered that this was a very finely balanced case. The Claimant had been wearing headphones in the back door and loading bay areas. I was not impressed by the Claimant's contention that the risks were not significant in circumstances where there were no deliveries being made at that time and the gate to the yard was locked. The Claimant maintained that on the day in question he was the only one in possession of the key which could have unlocked the gate. However in circumstances where it was the Claimant's case that it was a mistake he was wearing headphones and that he had not realised he was wearing them, there remained the prospect on his own case that he might easily have continued to wear them at a busy time.

51. I further considered that the Respondent was entirely reasonable in its conclusion that the wearing of headphones would inevitably have impaired the wearer's hearing. I further considered that Hayley File acted as a reasonable employer in her conclusion that the Claimant could not understand the risk. In her reasons for her decision to dismiss, page 100, Hayley File included the following:

> **Although Victor said he was sorry for his actions at the end of the meeting and acknowledged the risk he maintained he could not see the risk for 90% of the meeting.**

52. In my judgment, the Respondent was wholly justified in treating the incident on 6 March 2017 as very serious, particularly having regard to the fact that the Claimant had only recently been told on two occasions not to wear headphones. However, I considered that a reasonable employer would not have imposed the sanction of summary dismissal in the circumstances of this case. In other words, the Respondent's decision to dismiss, in my judgment, did not fall within the range or scope of reasonable responses available to a reasonable employer.

53. On the previous occasions, the matter had not been raised into a disciplinary matter and the Claimant had merely been told that he should not be wearing headphones in the areas where he was working. Further in circumstances where the sanction of dismissal is the most serious sanction available to an employer, I consider that the Respondent's policy should have made it clear that the wearing of headphones amounted to a disciplinary issue which could result in dismissal. Had it been the case that the Claimant had been alerted to the potential consequences of wearing headphones and had repeated such conduct, dismissal might well have amounted to a reasonable sanction.

54. Again, the Claimant was a very longstanding employee of the Respondent and on the evidence I did not conclude that his long service had been

weighed sufficiently in the balance by the Respondent. Of course, it may follow that long service might not assist an employee under the threat of dismissal in circumstances where it might be said that he or she should have known better, but in the circumstances of this case there was no express prohibition relating to the wearing of headphones. The Claimant had not been previously disciplined for such nor had it been pointed out to him that it was a health and safety issue.

55. In my judgment having regard to the terms of the Respondent's own disciplinary policy I did not consider that in all the circumstances the Claimant's conduct, albeit involving an element of risk, involved a serious failure to follow company health and safety procedures in breach of the policy, in the absence of more specific express instructions. The Claimant understood the importance of wearing a high viz jacket but the wearing of headphones had not been identified by the Respondent as a health and safety issue.

56. I have concluded that although the Claimant's conduct in my judgment justified a high level of sanction, such as a final written warning, in all the circumstances the sanction of dismissal did not amount to one which a reasonable employer would have awarded. Accordingly, it is the judgment of the Tribunal that the Claimant was unfairly dismissed by the Respondent having regard to section 98(4) of the Employment Rights Act 1996.

57. I consider that there was a very high level of contribution, having regard to Section 123(6) of the 1996 Act, on the part of the Claimant. The Claimant had been warned on two occasions not to wear headphones at the back door and in the outside area but had continued to do so. I considered that the Respondent was wholly reasonable in not being impressed by the Claimant's explanation that it was a mistake and that he had forgotten, because the risk would amount to the same whether it was done deliberately or not.

58. Again, I considered that the Claimant presented a somewhat cavalier attitude towards the element of risk both throughout the disciplinary process and indeed at the Tribunal Hearing. I am unable to accept the submission of Ms Mitchell that the Claimant's own conduct was not significant and I conclude that there was a significantly high level of contribution to his dismissal having regard to his conduct, which I consider was to some extent aggravated by his endeavours to minimise the potential risk. In the circumstances, I consider that the level of contribution should be reflected at 80%.

59. Turning to wrongful dismissal, I do not conclude that the conduct alleged was so serious as to cross the threshold into misconduct amounting to gross misconduct. It was common ground that the Claimant had continued to wear headphones despite being told not to, but there was no express prohibition in any health and safety documentation, policies or rules of the Respondent to prevent their wearing in the locations where the Claimant had been working.

60. I have found as fact that the Claimant's conduct was blameworthy, but it does not follow that blameworthy conduct in itself amounts to gross misconduct justifying summary dismissal. In such circumstances, I have concluded that the Claimant was wrongfully dismissed by the Respondent in breach of his notice conditions. The Claimant's contract of employment was not available at the Hearing, but in any event he has significant statutory entitlement to a period of notice, pursuant to Section 86 of the Employment Rights Act 1996.

61. A Remedy Hearing will be listed.

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Employment Judge Hall-Smith

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Date: 1 November 2017