Case Number: 3347072/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr M Zia	**v**	**(1) Poundland Limited** **(2) Mr Stephen Perkins**

Heard at: Watford **On:** 13, 14, 15 & 16 November 2017

Before: Employment Judge Manley

Members: Mr M Bhatti MBE
Mrs G Bhatt MBE

Appearances

For the Claimant: Mr Schama, Counsel.

For the Respondents: Mr Thornsby, In-house Advocate.

RESERVED JUDGMENT

1. The claimant was dismissed for a reason relating to his conduct. The principal reason for his dismissal was not because he had acted as a statutory companion.

2. That dismissal was unfair.

3. The claimant was not directly discriminated because of his race, religion or sex.

4. The claimant was not harassed on the grounds of race, religion or sex.

5. The claimant was not victimised because he had carried out a protected act.

6. The discrimination complaints against the first respondent and all complaints against the second respondent are dismissed.

7. It has been agreed that a remedy hearing will be held on **16 March 2018.** It is listed for one day and orders appear at the end of this judgment to ensure that the hearing is effective.

RESERVED REASONS

Introduction and issues

1. The claimant brought claims of unfair dismissal and race, religion and sex discrimination by a claim form presented on 25 October 2016. At a preliminary hearing on 13 January 2017 the issues were set out. They are agreed to be as follows:-

1. ***Unfair dismissal claims***

1.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

1.2 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they have been set out in the claim form and list of issues for this preliminary hearing.

1.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

1.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

1.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event (the Polkey issue)? And/or to what extent and when?

1.6 Was the claimant's dismissal in any event automatically unfair? Was the reason or principal reason for dismissal that he had acted as statutory companion?

2. ***Section 13: Direct discrimination on grounds of race and / or religion and / or sex***

2.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely in its initiation, investigation (including suspension) and the outcome of the allegation which led to his dismissal? It is confirmed that the claims of direct discrimination relate only to that procedure and conclusion.

2.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators, and on one actual comparator 'RS' (whose circumstances are set out in the ET1, and whose identity was known to both representatives*).*

2.3 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment? It relies upon its stated case as to the reason for investigation and dismissal.

3. ***Section 26: Harassment on the grounds of race and / or religion and / or sex***

3.1 Did the respondent engage in unwanted conduct as set out at section 2.1 above in relation to the same events?

3.2 Was the conduct related to any of the claimant's protected characteristics?

3.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. ***Section 27: Victimisation****.*

4.1 Has the claimant carried out a protected act? While the claimant has pleaded a number of protected acts, one is admitted and is therefore common ground.

4.2 Has the respondent dismissed the claimant because the claimant had done a protected act?

5. ***Remedies***

5.1 If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.

5.2 There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.

2. The tribunal was therefore concerned with a complaint of unfair dismissal. The first respondent bears the initial burden of proof in relation to the reason for dismissal and there is a neutral burden for deciding whether the dismissal was fair or unfair. As the first respondent argues this is a conduct dismissal, we are likely to be applying guidance as in British Home Stores v Burchell (see below). The claimant also argues that his dismissal is automatically unfair because he had acted as a statutory companion and the burden of proof rests on him to show that that was the reason or principal reason for his dismissal.

3. The claimant also brings complaints under Equality Act 2010 relying on a number of protected characteristics:- race, religion and/or sex. The claimant is Pakistani, Muslim and male. The claimant claims that he was directly discriminated against and the same matters also amounted to harassment. He complains that he was victimised because of a single protected act namely accompanying a 'Ms L' to a grievance hearing where disability discrimination was raised.

Hearing

4. The tribunal met with the parties to agree what time might be needed for pre-reading and a timetable for the rest of the hearing was agreed. There were some initial difficulties about documents but these were mostly overcome by discussion and agreement. There was a bundle of documents and some additional documents were added; the bundle being over 300 pages. We also took account documents which were handed in but they do not feature greatly in our considerations.

5. The tribunal heard from witnesses as follows; from the claimant and, on his behalf, Mr V Manne. For the respondents, we heard from Mr S Perkins who was the investigating officer and is the second respondent; from Mr A Jaria who was the dismissing officer and from Mr Clark who was the appeals officer.

Facts

6. Because this judgment is a public document and will be placed on-line, we only use names where necessary. Other people referred to in the evidence but from whom we have not heard are referred to by their initials wherever possible.

7. The tribunal find the following relevant facts. The claimant commenced employment with the respondent on 24 June 2013 as a sales assistant. He was promoted to supervisor and from February 2015 he worked as the assistant store manager in the Southall Store. He had previously worked

in other stores in the London area and was moved from Twickenham in October 2015 after there was a request from him to move.

8. The first respondent is a substantial organisation. It is a well-known retail outlet. We heard that there were around 850 Poundland stores with three regional managers and around fifty area managers. There are also several business managers. Each store would have a manager or an assistant manager, and in some stores, there are both a manager and an assistant manager. There are also supervisors. There are over 18,000 employees.

9. As would be expected, the first respondent has several written policies, although those that we were shown were relatively limited. We were shown a copy of the disciplinary procedure which included the process to be followed and the list of common possible sanctions, ranging from verbal warnings through to dismissal without notice. We also saw the "non-exhaustive" list of matters that would be considered to be gross misconduct and minor misconduct issues. We were also told that the first respondent has a security contract with a firm that provides security guards to the stores and the hours need to be agreed with the store manager and the business manager.

10. The issue which arose about the claimant related to his use of what is referred to as the *'free items'* button on the till. The claimant's case is that he was trained in the use of this button by two people, a store manager 'PS' and an assistant store manager 'RS'. He said that he was told that he could use the free items option for giving items to charities, community, police and encourage customers to buy more products. He said that he was told that from when he started with the first respondent.

11. There is very little documentary evidence about the free items button. In a document which we have seen which appears to be a manual with respect to the tills and which most of the witnesses were familiar with, there is reference to it. On that page under payments options, '*free item*' is shown as one along with '*cash, credit/debit card, cheque and centre voucher'*.

12. Next to that, it says this:-

> "*Free item – to process items that a customer is being given by head office as compensation."*

The first respondent's case has shifted a little on the use of the free items button. In paragraph 6 of the response, it said this:-

> *"This button had previously been used when donating goods to community projects, police officers or charities; however such a practice had been withdrawn and communicated as such across the business approximately three years ago."*

13. There is no written policy with respect to use of the free items button. We heard different versions as to what the practice was and how it changed as will be clear from these findings of fact.

14. The claimant accompanied and/or represented several colleagues at internal grievance and disciplinary meetings. We saw evidence of him representing a 'MT' in December 2015; a 'Ms K' in January 2016 and we know that he accompanied 'Ms L' to a grievance hearing somewhat later. Mr Perkins attended one of those hearings and took notes. His evidence was, and the tribunal accepts, that he didn't remember that the claimant was the same person when he investigated the use of free items button by the claimant some time later.

15. During March 2016, there were incidents at the Brixton store which was not the store where the claimant was working, although Mr Manne was. Mr Manne was aware of the claimant because of grievance hearings they had attended with respect to a colleague 'KH'. In any event, 'Mr RB' was the area manager. The same 'Ms RS' who had trained the claimant earlier (paragraph 10) was the store manager at Brixton and she is his comparator for the discrimination complaints. First, some cages were left outside and they were then stolen the next day. Ms RS sent a list of key holders to Head Office which did not include her name but the tribunal does not know whether she was or was not a key holder. A second burglary then took place and it was found that the door had been left unlocked. The losses were likely to be in the thousands of pounds. This led to an investigation which Mr Perkins undertook. Mr Perkins is a Profit Protection Field Team Officer and had previously been a store manager. During his investigation, it seems that some items were left in black bags when the policy is to leave items in clear bags so it is clear whether they are saleable or not. Mr Manne gave evidence that he believed saleable stock was contained in the black bags. Mr Perkins believed it might not have been saleable. The tribunal makes no finding with respect to this matter as it is not relevant to our determinations. Mr Perkins completed a report into the burglaries and made various recommendations with respect to action to be taken. He understood that the business manager would take matters forward with respect to investigating what, if anything, the Brixton employees needed to answer with respect to those incidents.

16. As far as matters concerning the claimant more directly are concerned, an initial investigation was undertaken with respect to the claimant's use of the free items button which is dated 14 May**.** A six-page report written by one of the first respondent's Profit Protection Investigations Officers was before us. It is headed *'Initial investigation into the frequently occurring denomination of free items present in the bankings undertaking at 1579 Southall store*'. This investigation followed an email which raised concerns about the use of the free items button. The report stated that the *'free items function is no longer used'.* It went on to say there had been no request for the store to use the free items buttons and records:-

> *"According to customer relations the only time 'free items' is issued is via vouchers which have must be individually scanned. An example of this voucher can be found at Appendix C."*

There is then an example of a voucher for £3.

17. The initial investigation states that "*the store are using free items functions on a regular basis. As this is no longer used in the business, wrong doings may be taking place. Majority of these 'free items' denominations are conducted by the same two colleagues".* The claimant and another colleague 'MA' are then named. It goes on in this way:-

> *"If the store are using this money to hide cash, shorts and falsifying the audit trail they are lying to the company and committing fraud.*
>
> *If the store are stealing this money they are committing theft.*
>
> *If the store are genuinely giving this money to the customers under goodwill gestures there is a strong need for re-training."*

18. The report contains detailed findings from the PIMMS system which is the first respondent's computerised till system. This shows data from the 1 January to the 13 May and shows the claimant and others using the free items buttons on several occasions. It calculates that the claimant was accountable for £312.65; MA for £62.15; SY £38.40; SF £33.31 and IB who was the store manager for £1.00. Having received that investigation report, Mr Perkins started to investigate further.

19. He first spoke to the claimant on 2 June (which was after the Brixton investigation). We have seen handwritten notes of meetings that he had with the claimant (and with others) with note takers being present. One of the problems is that these notes are not always as clear as they might be, and they are clearly notes rather than verbatim answers. As far as the tribunal is aware, there is no suggestion that the person interviewed has agreed the contents.

20. In summary, the claimant was asked to explain 'free items' and he answered:- *"you can use for community or police*" Mr Perkins asked him who said that to him that and the claimant replied, "*Miss PS & R*" (a reference to RS). The claimant was asked to explain, and he went on to refer to *"any school function, police, someone spending big money in store"*. It was then put to the claimant that the amount was large at £312.65, asked him whether that was a surprise which he said that it was. The notes show that the claimant went on to say *"If I don't understand [illegible] asking I do that [illegible] I put myself at risk, I've been told by her I have done whatever told by her, I haven't done any intentional and I am ready to pay from my pocket [illegible] improper training."*

21. Next, he was asked about specific incidents of the use of free items button but these all post-date the initial investigation so cannot have been

included in the £312.65 sum. He was asked about one on 26 May in relation to four wine glasses. It appears from the notes that they then looked at CCTV footage although the claimant was not clear whether he could recall that or not. There was then a brief discussion about an incident on 20 May which appears to be about a bottle of water and a further incident on 29 May which the claimant could not recollect.

22. He was then asked about the 8 May 2016 which concerned "*toilet roll, mouthwash and drink to a lady security guard*". This incident does appear in the list in the initial investigation. The claimant was asked if he wants to '*have a look'* and it is not clear whether they then looked at the CCTV footage. The claimant answered, "*can't remember everything, it's not intentionally, just because of someone told me (manager)"*. A decision was taken to suspend the claimant and by letter of 15 June this was confirmed. The letter stated that it was "*in relation to your actions which have resulted in a financial loss to Poundland over a prolonged period*".

23. Mr Perkins then spoke to several people in the Southall store. He spoke to the store manager IB who told him that his training manager had been the claimant and that he had told IB "*free item for bulk sale if customer buying more stuff and if customer complains*". The tribunal heard no evidence that IB or any of the people spoken to were told that this was something that they should not have done.

24. Mr Perkins interviewed MA and he was asked whether the claimant had trained him and he answered "*yes*". He asked what reasons he gave and he said "*if any customer complains, we give stock as free item. If customer buying bulk we give some free items"*. Mr Perkins asked MA "*during that period you had any conversation with anyone else that this is not right way to use*" and MA replied "*no"*. As far as the tribunal is aware, no action was taken with respect to MA even though he was also identified as a person using the free items button frequently.

25. Mr Perkins then spoke to another member of staff GS who had been there 8 or 9 months and was a supervisor. This staff member said that they had never had any training on the free items button, they knew nothing about it, and had heard no one talking about it.

26. Mr Perkins interviewed SY who was a supervisor and had been there for 3 years. She explained that the previous manager "*told me that if sales are down I can tell customers if they spend say £10 we give say £2 off*" She was asked whether any other reasons and she replied "*no*". She was asked whether anybody else said she could give free items away and she said, "*Mohammed Zia told me also £20,£40 give free item*". She confirmed that no one had said that free items could be given to staff.

27. Mr Perkins spoke to FS who had been there 8 years and was a supervisor. This staff member said that they understood that they could give free items for charity and maybe one or two items for charity in exchange for Poundland's name being used, but for no other reason. They explained

that '*Hussain from Slough'* had trained them in this. They said that they had never discussed free items and were given no additional training.

28. In summary, none of those spoken said they had been told not to use the free items button. Most said they had been told they could use it but for a number of different reasons. When spoken to they were not told they should not have used the free items button or to stop using it. Mr Perkins did not speak to the managers the claimant said had trained him because he believed they had left the business. He did not realise that the RS that the claimant referred to was one of the managers in Brixton.

29. Mr Perkins did not complete a written report beyond having carried out those interviews. He told us that he decided to pass the matter for a disciplinary hearing. He recollected that he must have had some notes of his own but he did not have those and we have not seen them. He also recollected that he must have informed HR and he might have sent an email to them but we did not see that email.

30. In any event, the letter which was sent to the claimant was drafted by HR and was sent in Mr Perkins name. That letter invited the claimant to a disciplinary hearing and warned him that the matters were serious and could amount to gross misconduct and dismissal. The matters were as follows:-

> *"Mis-appropriation of company stock in that you gave away free items to customers and since January 2016 this has accumulated to a financial loss of £312.65 to the business.*
>
> *Negligence within your role as assistant store manager in that you instructed your subordinates to falsely give away items to customers resulting in a financial loss to the business."*

31. The claimant was informed that Mr Jaria would hold the disciplinary hearing.

32. Mr Jaria told us that he had been with the first respondent since 2015. He had had training in disciplinary proceedings with previous employers. He did not know the claimant. He told the tribunal that he was used to carrying out disciplinary hearings and held about seven to eight a year.

33. We have seen handwritten notes of the disciplinary hearing held on 4 July. Given that the hearing commenced at 12.10pm and does not appear to have completed until about 3.15pm, these notes cannot cover all that was said. They also are difficult to read but we believe that we have managed to read those parts which are most relevant. Mr Jaria's evidence was that he had seen the interview notes before the hearing but he was unclear as to whether he had had the initial investigation report. In the tribunal bundle, there was also another initial investigation report into another matter involving the claimant but that was not progressed and Mr Jaria was not sure whether he had seen that.

34. At the meeting, he asked the claimant to explain free items and the notes record this reply:-

> *"After my three years they said you can't give like this and after 3 years so they told me (profit team). They said what you are able to told. Ms S trained me on this, I used under her supervisor of her. Have work for 4 BMs now. So no one has given me warning. So I have done what I have been trained"*

35. He repeated that he had been trained and had never been told he was doing wrong. He accepted that he had trained his staff and referred to community service and customer complaints. Questions were raised about he had been told the free item button was for and his answer is recorded as *"(1) service community; (2) customer complaint; (3) (illegible)*". The meeting then moved on to consider free items used for an instance involving a security guard but the tribunal is not sure which matter this is. The claimant appeared to explain that he had given an item which was possibly water to a security guard because he had stayed late. Various discussions ensued around this matter of the security guard and opening hours, and authority with respect of that matter.

36. There was a short adjournment and then there was concentration on other matters which related to "*lady security guard on 8 May*". The claimant was asked to explain this. Although the claimant said he could not remember there is a note of an explanation given later which simply says, "*forget shopping*". The claimant's explanation with respect to that was explored later at the appeal. At this stage, it seemed to be the matter which most concerned Mr Jaria and he concluded the meeting by telling the claimant that he was to be dismissed. The notes record that he said "*I've come to a decision after which I have seen today and which you have said about your training. It does not mean you can give stock to security. I have made a decision to terminate your contract with immediate effect from today if you think the decision is wrong you can appeal to my line manager Colin the next seven days after receiving the letter.*"

37. Mr Jaria was asked when he gave evidence whether he had consulted the respondent's disciplinary procedure. He said he had not seen it and it was not necessary to consider it. He said that the letter of dismissal which was in his name had been drafted by HR and he had not seen it before it was sent. This letter set out the matters of concern as stated in the invitation letter (para 30 above). It then stated that whilst Mr Jaria had considered the claimant's explanation for using the free items button as *"a gesture of goodwill*" as mitigation, concern was expressed about extending that gesture to the security guard. He then referred to the items given as water, toilet roll and unrelated items. Mr Jaria (or whoever wrote the letter) appears here to be mixing up two transactions involving two different security guards. The tribunal now understands that there was one incident which involved a bottle of water for a security guard who the claimant said had worked over his shift and another (toilet roll etc) were items a "lady security guard" had bought and left behind. The letter said Mr Jaria

believed the claimant had not given reasons for extending goodwill in that case. He said that he could not find evidence to support it, and was concerned about it. It was said that he had lost trust and confidence in the claimant as assistant store manager. He concluded "*I believe that the only reasonable outcome to this process to be your summary dismissal from the company*". Mr Jaria told the tribunal that he believed there was no alternative because it was a loss to the company. He said that he did not believe there was any dishonesty in the claimant's action and he understood that the claimant's case was that he had been trained in this way.

38. The claimant appealed against his dismissal with a detailed letter which is 9 pages long. That letter raised concerns about the possible discriminatory actions particularly of Mr Perkins. Mr Clark later summarised the grounds of appeal and there is no suggestion that he did so incorrectly. Although the claimant appealed a little late the first respondent allowed that appeal to proceed. Although he lodged the appeal on 4 July, he was not invited to an appeal meeting until 12 October. That meeting eventually took place with Mr Clark on 26 October. The claimant was accompanied to this meeting as he had been to the previous meeting. At the appeal meeting claimant handed in further submissions; these raised concerns about his dismissal including the fact that he had been trained to use the free item buttons; the failures that he saw in relation to Mr Perkin's investigation, and mentioned the allegation of discrimination. He particularly raised concerns about what had happened at the Brixton store.

39. The tribunal have seen notes of the meeting with Mr Clark. Mr Clark told the tribunal that he looked at the dismissal letter and the appeal letter before he saw the claimant but did not see the interview notes or the initial investigation report until later. The discussion at the hearing related to the claimant's grounds for appeal and his understanding in the use of free items button. It began to concentrate on the aspect of the three items on 8 May for £3 that related to the lady security guard. The claimant explained it in this way:- "*So far as I remember she only worked for three days, she bought three items she forgot to pay back. I asked one of my cashiers and she said yes she remembered and put back the stock*". The claimant was asked the name of the cashier and he said, "*I think Mr Lakhwindar*". The claimant was asked whether those goods were paid for and he said he believed that they had been.

40. Further discussions took place with respect to the claimant's appeal; in particular his allegations of discrimination and the meeting closed a little over an hour later. Mr Clark indicated that he would carry out some further investigations. Mr Clark did indeed speak to Mr Perkins and we saw a copy of the record of that meeting. Mr Perkins explained how he had carried out the investigation and what he remembered from it. He believed that free stock was being given away and that he was unhappy with the claimant's answers as they seemed to be inconsistent. Mr Perkins was then asked about the Brixton investigation. He said that was '*a breakdown*

in procedure and not person gaining an advantage'. He said that Southall meant '*we have lost money through one person's actions*". He was asked whether the fact that there was a difference in religion, male/female had any influence on him and he replied *"No".*

41. The tribunal also saw a typed note of a conversation with Mr Burness, who was the business manager responsible for the Brixton store, on 18 November. Questions were asked about the incident at Brixton. He said that the matter was '*comprehensively being investigated*' and *'there was no fault found of any particular colleague due to the poor quality security originally in place'*. Towards the end of that note, this is recorded:-

> *"As an experienced former manager of the area I asked if he was aware of the gifting of stock to local functions. Richard informed me he was not aware of any such practice and would have anyone saying this to stop immediately. I asked Richard if he was aware of this practice in his area and if goods were given to customers as a way of handling complaints. He was not aware of this practice."*

42. When Mr Clark was giving evidence, he added that he had spoken to several people about the practice around the free items button. This was not contained within his witness statement, nor in the appeal outcome letter which we come to shortly. His evidence was that he had spoken to several business managers and they had said that the practice of using the free items button in relation to customer complaints had ceased some time previously. He mentioned the names of business managers around the country. When asked further about this, he said he did have notes of those discussions, but they were not before the tribunal and it was not possible for us to get them during the course of the hearing. When further questions were asked, he added that he had also spoken to the customer service department with respect to the free items button custom/practice and was told that it had ceased at some point perhaps in 2014. Mr Clark understood that business managers had been told that the practice was to stop and that it would be cascaded to store managers and then to staff. There was no evidence as to when this might have happened and indeed whether it had happened at any stores.

43. Mr Clark considered the claimant's appeal. He did not tell the claimant of about new information he had (including that mentioned in the paragraph above). Mr Clark told the tribunal that his main concern had been the items put through as free items for the lady security guard. He had looked to find the cashier whose name the clamant had given but had not seen that name on the rota.

44. By letter of 28 November a detailed outcome for the appeal was sent to the claimant. The grounds of his appeal were summarised as follows:-

> *"a) Your dismissal was unfair.*
> *b) The actions of the Investigation Officer were prejudiced against you.*

c) The Investigating Officer failed to check CCTV prior to 1 January 2016.
d) Your employment was terminated as you had negligently trained others.
e) You did not fail in your role as an Assistant Store Manager.
f) You were discriminated against by Mr Perkins.
g) Poundland failed to deal with your appeal in time."

45. All points of appeal were rejected save for the aspect of the failure to deal with it in reasonable time for which apology was given. Mr Clark said that he believed a fair and reasonable process had been followed, the claimant had been given the chance to present his version of events and he believed that the dismissal was appropriate.

The Law

46. The law which we are bound to apply in this area is set out in the Employment Rights Act 1996 (ERA) particularly Section 98. Section 98 (1) and (2) contain the potentially fair reasons for dismissal including "conduct". The burden of showing a potentially fair reason rests on the respondent.

47. In this case the claimant complains that the reason is an automatically unfair reason, namely because he accompanied colleagues to internal hearings. Sections 10 Employment Relations Act 1999 provide for the right of a worker to be accompanied at disciplinary and grievance hearings. Section 12(3) of that same Act provides that a dismissal of a worker will be automatically unfair if:-

"*the reason (or, if more than one, the principal reason) for dismissal is that he*
a) –
b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section"

48. As to the fairness or otherwise of the dismissal, if we are satisfied that there was a potentially fair reason, Section 98 (4) ERA states;-

"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"

49. We are also guided in our deliberations, if this is a conduct dismissal, by the leading case of British Home Stores v Burchell [1978] ICR 303 which sets out the matters which we should consider including whether the first respondent had a genuine belief in the conduct complained of which was founded on a reasonable investigation and whether a fair process was followed. As was said in BHS v Burchell:-

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further".

50. The investigation should be one which is fair and reasonable and the band of reasonable responses test applies to that part of the process as well as to the overall consideration of the fairness of the sanction (Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23). We must also not substitute our view for that of the respondent, a point emphasised in Iceland Frozen Foods v Jones [1982] IRLR 439 (and re-affirmed in Foley v Post Office and HSBC Bank Ltd v Madden [2000] ICR 1283). Rather, we must consider whether the dismissal fell within a range of reasonable responses.

51. The tribunal should also have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2013) which sets out principles for handling disciplinary matters including those where misconduct is suspected.

52. The claimant also brings complaints under Equality Act 2010. The relevant sections read as follows:-

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

26 Harassment

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) -

(3) -

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) this section applies only where the person subjected to a detriment is an individual.

(5) the reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) a reference to the court includes a reference to—

(a) an employment tribunal;

57. The burden of proof provisions as set out in s136 EQA apply to all discrimination complaints. It is for the claimant to prove the primary facts from which the tribunal could conclude there has been discrimination. If there are such facts, the burden shifts to the respondents to demonstrate that any such treatment is without discrimination.

58. S23 EQA provides that when looking at comparisons for Sections 13 *"there must be no material difference between the circumstances relating to each case*".

59. The tests for each section under EQA and ERA are as set out in the issues and will therefore be clear from our conclusions. Both parties made short written and oral submissions which were helpful to us in our deliberations. There is no dispute about the legal tests to be applied as set out above.

Conclusions

60. We deal first with the **discrimination** complaints. The first question at issue 2.1 for direct discrimination is whether the respondents have subjected the claimant to less favourable treatment in the initiation, investigation (including suspension), the outcome of the allegation and then the dismissal. For this we must ask whether there are primary facts from which we could conclude that there was any less favourable treatment because of any of the protected characteristics as claimed by the claimant. Whilst we do go on to find there were several serious defects in the disciplinary process, the dismissal and the appeal, there is no evidence whatsoever that that related to any of the protected characteristics relied upon by the claimant. First, with respect to a hypothetical comparator, this would be a female of a different religion and different race/nationality. There are no facts which indicate to the tribunal that such a person of whom there were concerns about the use of 'free items' button or a similar procedural irregularity would have been treated any differently. Those staff members interviewed by Mr Perkins who were not subject to disciplinary proceedings appeared to be male and female with names suggesting a range of races and religions.

61. With respect to the actual comparator relied upon (RS), the tribunal are quite satisfied that those events at Brixton were very different. The

claimant has told us that that comparator is Indian, Sikh and female and we have no contradictory evidence about that. However, we do not know the protected characteristics of other people involved at the Brixton store and there is nothing to suggest that that person was any more to blame or that there were more concerns about her than anyone else. They are completely different circumstances. There are no facts from which we could conclude that any less favourable treatment related to those protected characteristics has been shown. Even if we were so convinced, we are satisfied that the respondents carried out a very different procedure in relation to problems at the Brixton store which had some historical difficulties as compared with that of the claimant. The claimant is not able to show direct discrimination.

62. As for harassment under issues 3.1 to 3.4, the claimant, when cross examined, said that the harassment was when he represented someone at a hearing which answer seemed to relate to his victimisation complaint. It is not clear whether the harassment complaint is pursued. For completeness, if we assume that the unwanted conduct relied upon is the investigation, disciplinary proceedings and dismissal, we find that it was not related to any of the protected characteristics the claimant relies upon. There is no chance that the claimant could succeed in such a claim.

63. As far as victimisation under issues 4.1. and 4.2 is concerned, this relates to one grievance meeting that the claimant attended with a work colleague where disability discrimination was mentioned. Whilst that amounted to a protected act, there is absolutely no causal connection between that and his dismissal. Mr Perkins, who referred the claimant to a disciplinary hearing, did not recall his involvement. Mr Jaria, who took the decision to dismiss, was not aware of it and nor was Mr Clark. The claimant's complaints of direct discrimination, harassment and victimisation fail and are dismissed. All complaints against Mr Perkins are therefore all dismissed.

64. We turn then to complaint of **unfair dismissal**. The first question for the tribunal is 'What was the reason for dismissal?' The claimant at issue 1.6 has suggested that it might be automatically unfair because he had been a companion under Section 10 Employment Relations Act 1999 at several internal hearings. It is not disputed that the claimant did accompany several people at internal hearings and Mr Perkins was aware of one of those but did not recollect it when recommending disciplinary action. As is accepted by the claimant and stated above in the victimisation claim, Mr Jaria was not aware when he took the decision to dismiss. The tribunal is not satisfied there was any causal connection between that and the decision to dismiss the claimant.

65. We turn then to the question of whether the first respondent has shown that the dismissal was for a potentially fair reason. We accept that the first respondent did dismiss the claimant because of his use of the free items button. We therefore accept that the reason for dismissal was because of the claimant's conduct.

66. We look then to consider whether the first respondent had a genuine belief in the misconduct. This is where the first respondent's case begins to get into serious difficulties. We have considered first what is said to be the misconduct that the first respondent relied upon. Although the issue of the claimant "*instructing your subordinates to falsely give away items*" was mentioned in the letters to the claimant, it is clear these letters were not written by the people who took the decisions and did not entirely reflect what they concentrated and decided on. The fact of the matter is that the claimant was dismissed because he had used the free items button fairly frequently and, in particular, used it on an occasion in relation to a lady security guard for £3 of stock (and possibly another security guard for one bottle of water). The first respondent accepts that there was no dishonesty in the claimant's actions. It also accepts that he told them that he had been trained to use the free items button in that way. The first respondent needed to be clear about what the misconduct was. We were not assisted by paragraph 6 of the ET3 which was accepted by the first respondent at this hearing as being incorrect. It was suggested in the initial investigation that the free items button had been a practice which had then stopped, but the evidence on how or when it was stopped is opaque and inconsistent. The first respondent had no evidence that the claimant or indeed anyone in the Southall branch had been told at any time not to use the free items button. When asking what was the misconduct complained of by the respondent, we do not accept that it is at all clear what it was. Indeed, it varied from what was contained in the letters and oral evidence.

67. We then consider the reasonableness of the investigation. We find that there was inadequate investigation into what training had been given to the claimant and other staff members. Nor did the investigation discover how and when the use of the free items button was said to have been ceased and how or whether that was communicated to staff and, in particular, to the claimant. The tribunal accepts that the claimant did indicate at some point that he should not have given items to a security guard but he also said that he believed he was working within what he had been trained. Given the evidence that it was these relatively minor amounts of £3 or £1 that caused concern, we do not know why the first respondent has not shown any action taken with respect to other staff members. The first respondent could not and did not have a reasonable belief that this was misconduct given the evidence they had of other people also using the free items button in the Southall store.

68. Although the initial investigation report appeared reasonably sensible and raised issues which might well have required investigation, we have concerns about how the subsequent interviews were carried out, the standard of the notes that were kept and the assumptions made on the basis of them. As we understand it, Mr Perkins did look at something called the 'Z reports' and he looked at CCTV footage. He did not speak to the trainers as he believed they had left the business but that does not really explain why he did not consider what training more generally was given with respect to the free items button. He did not clarify the alleged

changes to the practice and specifically what information if any was passed to the people operating the tills, when it was passed and how it was passed. The tribunal has insufficient evidence about how lengthy or difficult a process of checking in other stores might have been. We can see from the initial investigation that it appears to have been relatively straight forward to produce a list of names of people using the free items button and we are not sure why that could not have been done for comparison purposes in other stores. We are confused as to why Mr Perkins did not produce a written report which summarised his findings. We find that the investigation was not reasonable in the circumstances. It was not within the range of reasonable investigations for an employer of this size and with these administrative resources.

69. We turn then to the disciplinary meeting. The tribunal found Mr Jaria's evidence surprising. It indicated a clear lack of training for disciplinary managers. Mr Jaria admitted to being completely unaware of the first respondent's own disciplinary procedure and he seemed to concentrate on one matter only, which, on any account was a minor matter. His evidence was inconsistent and he was unclear as to what evidence he had before him. He failed to take into account any mitigating factors such as the claimant's clear statement that he had been trained and had trained others in the use of the free items button and his clean disciplinary record. He failed to consider any alternatives to dismissal and indeed seemed to be unaware that they existed in the respondent's procedure. The disciplinary hearing contained some elements of fairness in that the claimant could explain things from his point of view. The poor notes of the hearing made it difficult for the tribunal to understand what was said and the basis of Mr Jaria's decision.

70. Finally, we look at the appeal process. Although it seemed at first that the appeal was a relatively thorough matter, we then heard new and surprising evidence about other investigations which had happened which the claimant and the tribunal had not heard about before. Not only did Mr Clark not return to the claimant with this new evidence, but he chose or forgot to put it in his appeal outcome letter, and it was not contained within his witness statement. In any event, what he found out remains unclear and did not really help the tribunal with exactly what the first respondent's case is about be the practice of using the free items button. There are several procedural difficulties which lead us to find that the dismissal was procedurally unfair.

71. We turn finally to the question of whether dismissal was within the range of reasonable responses. We find that it was not. We repeat what we have said about the difficulties Mr Jaria had in showing that the dismissal was fair and repeat them briefly. First, the claimant had a clean disciplinary record. Secondly, he had been trained in this way and there was no dishonesty or personal gain and indeed he had offered to repay the money. The first respondent has no one to blame but itself for the very poor methods of communication. The evidence before the first respondent was largely supportive of the claimant's case rather than against him.

Bearing in mind there is nothing in writing with respect to this practice, and certainly nothing which warns the employees that, if they use it, they will face misconduct and possibly gross misconduct charges, it was outside the range of reasonable responses to dismiss this employee. The dismissal was unfair.

72. The tribunal does not accept that this is a case where a reduction will be appropriate for contributory conduct. Given that we find the misconduct is opaque and the lack of action taken against others, we do not find that the claimant did contribute to his dismissal. Clear information, training and precise rules are what is needed and they were absent in this case.

73. Nor do we accept that there should be a Polkey reduction. The dismissal was substantively as well as procedurally unfair.

74. Finally, we do not find there are any unreasonable failures to follow the ACAS Code except for the delay in the appeal and we are not therefore minded to increase any awards we later make for that reason.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The claimant will send a realistic updated schedule of loss to the first respondent by **19 January 2018**

2. The first respondent will send a realistic counter schedule of loss to the claimant by **2 February 2018**

3. The parties will agree a joint hearing bundle for the remedies hearing by **16 February 2018**

4. Any witness statements relevant to the remedy issues are to be exchanged by **2 March 2018**

5. The parties will seek to agree what was the claimant's gross and net weekly pay; the amount of the basic award and any other aspects capable of being agreed. A document setting out the main areas of dispute should be agreed and sent to the tribunal by **9 March 2018**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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Employment Judge Manley

Date: 03 January 2018

Sent to the parties on: .....

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For the Tribunal Office