EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss D Stokes	**v**	**Poundland Ltd**

Heard at: Norwich **On:** 3 and 4 April 2018

Before: Employment Judge Postle

Appearances
For the Claimant: Miss Bewley, Counsel.
For the Respondent: Miss Wilson, Counsel.

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was wrongfully dismissed.

3. The respondent is ordered to pay to the claimant compensation in the total sum of £20,930.48.

4. The respondent is ordered to make a contribution towards the claimant's costs in the sum of £2,000.00.

5. Recoupment does not apply to this award.

REASONS

1. The claimant brings a claim to the tribunal for unfair dismissal and wrongful dismissal particularly that the dismissal was procedurally and substantively unfair. The respondent resists that claim advancing that the reason for dismissal was conduct.

2. In this tribunal we have heard evidence on behalf of the respondent, from a Mr Johnathan Day who conducted the appeal, he gave his evidence through a prepared witness statement. Perhaps unusually the person who conducted the disciplinary, a Mr Lee Hinton was not present to give oral evidence, and no particular reason for his absence has been advanced other than he has left the respondent's employ. There was produced a statement from him although that statement was unsigned. The claimant gave evidence and called Miss Maria Murphy an employee of the respondent, both giving their evidence through prepared witness statements. The tribunal had benefit of a bundle of documents consisting of 178 pages.

Findings of fact

3. The respondent is a single price retailer operating in the United Kingdom and Europe. They have approximately 880 stores and employ some 18,000 people, furthermore the respondent has its own in house Human Resources team, servicing head office and the various stores.

4. The claimant commenced employment with the respondent on 13 July 2009 originally as an assistant manager within one year the claimant was promoted to store manager. The claimant has an unblemished record and by all accounts has been successful in her role. Problems did arise/friction with Mr Hinton when he was appointed the Area Sales Manager around 2015 and those issues are set out in the claimant's letter to the respondent at pages 34 and 36, these involve complaints against him on two separate occasions.

5. On 13 June 2017 at 9am, Ian Jones an area sales manager and Scott Ball acting store manager entered the claimant's office without warning or notification and advised that they were there to conduct an investigation into an allegation of theft which apparently had been reported on 9 June 2017. The claimant was not offered representation which is in breach of the company's policy as referred to on the investigation report form at page 65 which specifically refers to the right to be accompanied. The minutes of that meeting are at page 65-72.

6. It is clear as soon as the claimant was made aware of the allegations her response was she thought this was a vexatious and malicious allegation connected to a Mr Gary Yallop's performance management process at page 67. Mr Yallop had apparently been underperforming in his role as a supervisor and the claimant had been performance managing him. Mr Yallop was also due to have a final capability assessment following a disciplinary hearing which had taken place on 9 June 2017 at around 2pm. Mr Yallop makes the allegation of the theft of a bottle of drink coincidently at 4.30pm on the same day.

7. Mr Jones seems to have given scant regard to what the claimant said in response to the allegation, and apparently from the notes raised no further questions on the issue (page 67).

8. The allegation appears to be that a four pack of 'Don Simon' drinks, which the claimant was accused of taking them from the damages area and consuming without paying. The company policy requires all goods purchased to be counter signed by another member of staff and paid for by the end of the shift. Although the claimant was told there was CCTV footage of her taking and consuming the drinks (page 67), all the claimant was shown at the disciplinary was limited and a few seconds of the claimant walking past with a drink in her hand. Despite requests for full footage of the CCTV of her taking and consuming the drink this has never been produced. Apparently, the damages area for damage stock is located outside the office in the store next to a chiller cabinet. All out of date stock or damages are placed in the damages area and then scanned and recorded on a hand-held device, and a list is therefore printed and filed.

9. During the investigation meeting the claimant mentioned a conversation with a colleague, Mr Rob Warren earlier in the week about some Don Simon drinks being on the shop floor and out of date, and that is at page 67. It would appear Mr Jones did not investigate this with Mr Warren. The claimant could not recall whether she had or had not walked into the office with a drink. The claimant indicated that she had recently over the last month worked excessive hours, particularly 55 hours per week without an assistant manager and had dealt with a stock take on 6 June 2017 finishing at 2am in the morning and was frankly exhausted. So the detail of the last week such as whether she had taken a drink or consumed a drink on 9 June 2017 was not easily recallable. The claimant questioned whether the drinks had been in the damages area, and was informed they were. At Mr Jones' request they checked the damages report for 8-12 June 2017 and no Don Simon drinks were recorded as damaged. Clearly if an open packet of drinks was there, as Mr Yallop claims at page 63, it would have been in the damages report and shown up that damages report has not been produced.

10. During an adjournment in the investigatory meeting the claimant provided Mr Danny Quinton's name to Mr Jones as he was with the claimant on 9 June 2017 when the alleged incident is said to have taken place. In fact, Mr Quinton had followed the claimant into the office for a conference call that was due to take place around 4pm and therefore might be able to assist or recall the events of that afternoon. Apparently, Mr Jones called Mr Quinton and at first he got no answer, then Mr Quinton apparently called back and the claimant was requested to leave the office. Clearly a conversation took place, there is no record or statement ever been produced subsequently and at the appeal, Mr Jones extraordinarily denies ever speaking to Mr Quinton (page 140).

11. At the end of the meeting the claimant was suspended and a letter confirms that at page 73. The letter makes it clear that the claimant is

to have no contact with staff members during her suspension. The procedure is then that the investigating officer, in this case Mr Jones should make a report after carrying out further investigations. It appears no further investigations were carried out, no statements were taken from Mr Yallop, Mr Warren or Mr Quinton, and no report was ever produced.

12. Mr Hinton another area sales manager was tasked with the disciplinary hearing, and the letter inviting the claimant to the disciplinary hearing dated 14 June 2017 (page 74), for a meeting on 16 June 2017 was clearly too short notice. Ultimately the disciplinary hearing was rescheduled, the letter refers to further investigations though none were produced, reminds the claimant again not to contact staff, the allegations were set out and the right for the claimant to be accompanied was confirmed.

13. In the meantime, the claimant sent two separate letters to Human Resources dated 13 and 16 June 2017 at pages 64 and 78. One was a grievance against Mr Yallop believing he was simply being malicious and vexatious responding to her performance management of him, and the other was the claimant's concerns that the investigation had not been conducted fairly or impartially and requesting that another investigation take place. No reply was ever received to either of these letters let alone an acknowledgement.

14. The disciplinary hearing as I have said was rescheduled to 19 June 2017 and the claimant was accompanied by another employee, a store manager Miss Murphy. Notes were taken and Mr Hinton chaired the disciplinary hearing. Discussions took place at the outset of the meeting about the claimant's two letters. The claimant did not agree to have the grievance dealt with as part of the disciplinary hearing, that would be quite unusual in any event. Further, that Mr Jones (who carried out the investigation) was not impartial, the claimant still wanted further investigations and a new investigation – that was apparently ignored.

15. The claimant was then shown for the first time CCTV evidence simply showing the claimant walking past the camera carrying a drink followed by Mr Quinton, also carrying a bottle. There was no footage of where the drinks came from or what happened to them. The only evidence produced was an email dated 12 June 2017 timed at 20:06 hours from Mr Yallop at page 63 which simply said:

> "Just a short message regarding what happened Friday was before conference call on the 9 June. Saw Debra and Danny with a bottle of drink, one from the four pack juice we sell Don Simon I believe, was a number of packets on the damages out of date. Saw a packet with just two in and put two and two together. Watch back the CCTV and can clearly see Debra enter the office with said drink and Danny goes towards drinks and enters office with one in hand. Hope this helps if need anything else drop me an email Gary (Yallop)."

16. The claimant's representative Miss Murphy asked about receipts from the tills should be checked, which she suggested should have been done in any event as part of the investigation (page 91). These were never produced or checked. When the question was raised as to what Mr Quinton had said to Mr Jones, Mr Hinton's response was that he had not been spoken to as he had left the business. In fact, Mr Quinton had resigned by letter of 10 June 2017 to take up a new position (page 62). In fact, quite extraordinarily, Mr Hinton's comment about Mr Quinton was:

> "That he had not been spoken to ie Mr Quinton as he looked guilty because he resigned."

17. The claimant subsequently received a letter of dismissal (page 105) which upheld the allegations of theft by consumption and breach of company policy. Thereafter the claimant contacted Mr Quinton for a statement as she had now been dismissed, which he produced at page 110. The claimant appealed initially by letter of 2 July 2017 requesting amongst other things particularly copies of meetings between Mr Yallop and Mr Hinton said to have taken place on 19 June 2017, it is said a grievance meeting took place apparently at the same time as the disciplinary hearing was taking place. The respondent refused to produce these on the grounds of data protection. The claimant's full appeal letter was dated 5 July 2017 (page 113) and sets out detailed grounds including the statement she had now obtained from Mr Quinton which throws light on what might have happened on 9 June 2017.

18. The appeal was originally arranged to be heard by a regional manager, and for reasons best known to the respondent that did not happen and Mr Day another area sales manager was appointed. Some four weeks later the appeal hearing is arranged for 1 August 2017 (page 119).

19. Again, there was a note taker and the claimant was accompanied by Miss Murphy. Notes of that meeting are found at page 121 onwards and almost immediately the meeting had to be adjourned as Mr Day did not appear to be in possession of all the papers (page 126). The claimant was again denied the notes of the grievance meeting that is said to have taken place with Mr Yallop on 19 June 2017. Mr Day adjourned the appeal meeting on the basis that he was not in a position to take a decision and further investigations were needed. However, it is not clear what further investigations took place because there is absolutely no evidence before this tribunal of any further investigations having taken place and there was no attempt to speak to Mr Warren despite his name being raised on a number of occasions as possibly throwing light on what happened on 9 June 2017 or at an earlier date, and that is set against the fact that Mr Warren is still employed or was at the time by the company.

20. The appeal appears to have been conducted largely as a tick box exercise. Mr Day giving scant consideration to the points of appeal. The appeal was not upheld and the outcome is provided in a letter of 23 August 2017 (page 138).

The Law

21. The law is found in s.98 of the Employment Rights Act 1996 – a potentially fair reason to dismiss is conduct, that is not the end of the matter, one then has to have regard to s.98(4), that where the employer has fulfilled the requirements of sub section one the determination of the question of 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 employers undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case.

22. Conduct cases also follow a well-trodden route of the well-known case of British Home Stores Ltd v Burchell, here the employer must show it believed the employee was guilty of misconduct and, had in mind reasonable grounds in which to sustain that belief, and at the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. Clearly where there are serious allegations such as theft by a member of staff, such investigations must be very thorough.

Conclusions

23. It is clear in this case that there was a flawed investigation, not only was there concern that Mr Jones was bias. The claimant was clearly entitled to be represented at the investigation meeting and the company form makes that clear (the one used by Mr Jones for the investigatory meeting) the suggestion that it is only at formal investigation meetings there is a right to be accompanied does not hold water as this was a serious allegation against a manager, and by its very nature must have been a formal meeting.

24. Following the investigation meeting such as it was carried out by Mr Jones there was no further investigations carried out and no report was prepared as required by the company's own procedure. There were no further investigations carried out and there was no attempt to record a statement from Mr Quinton as clearly Mr Jones had spoken to him, no proper statements were taken from Mr Yallop or Mr Warren all of which were relevant and had been raised at the investigatory stage. The disciplinary hearing - we will never know quite what reasonable grounds Mr Hinton had to sustain that belief, the decision maker is not here to support that. What was the basis for his decision? We do not know.

25. There was Mr Yallop's motives which were potentially very malicious and vexatious given the timing of his own performance management meeting and the making of the allegation some two hours later.

26. There was a complete lack of a reasonable investigation, there was no I repeat investigatory report, despite the claimant raising issues these were not investigated. There was a lack of CCTV evidence and Mr Jones' notes of the conversation with Mr Quinton, where are they? Mr Jones subsequently denies that he ever spoke to Mr Quinton. The damages report was never produced, there was no checking of the tills, the claimant had previously been an honest manager with an unblemished record and there was no reason to believe by the disciplinary officer this manager was dishonest.

27. Furthermore, the claimant followed the instructions she was given by the suspension letter and the letter inviting her to the disciplinary hearing by not speaking to staff, hence the reason why she could not obtain statements from Mr Quinton and Mr Warren previously. On balance there was no reasonable grounds on which to sustain the belief that the claimant was guilty of misconduct, particularly as the investigation was neither reasonable, thorough or balanced. As for the wrongful dismissal the claimant would succeed as there is no evidence that the claimant has breached her contract and is therefore entitled to her notice pay.

Remedy

28. The tribunal then went on to deal with remedy. After hearing representations from both Counsels on the issue of future loss, up lift and contributory conduct under s.123(6) of the Employment Rights Act 1996.

29. The tribunal took the view in relation to uplift although there was some form of investigatory meeting albeit flawed there was disciplinary and an appeal hearing a 25% uplift was in those circumstances not appropriate. However, having regard to the manner in which the process was conducted and the flaws the tribunal have identified, an appropriate uplift is still 15%.

30. Dealing with contributory fault, the tribunal have considered whether this is appropriate and on balance feel that there is some blameworthy conduct by the claimant in taking the drink, and not being able to explain/recall what circumstances it was taken, does therefore warrant on the just and equitable principle a small reduction, and I assess that at 10%.

31. As regards future loss, the claimant suggested 52 weeks and the respondent thinks that is excessive. I take the view with this case behind and the judgment in the claimant's favour and given the current employment market the claimant will find suitable employment of a similar income within the next 26 weeks.

32. The awards are therefore as follows:-

Basic Award		£5,134.50
Immediate loss		
30 June 2017 to 3 April 2018 – 40 weeks at £409.38		£16,375.20
Pension loss at 25 weeks – £8.58 (Jessops gave her pension)		£214.50
	Sub total	£16,589.70
Less income derived from B&M		£847.00
Less income derived from Jessops		£5,758.75
	Sub total	£6,605.75
Immediate loss total		£9,983.95
Future loss		
26 weeks at net loss £179.03		£4,654.78
26 weeks pension loss at £8.58		£223.08
Loss of statutory rights		£300.00
Expenses		£100.00
	Sub total	£5,277.86
	Sub total	£15,261.81
15% up lift		£2,289.27
	Sub total	£17,551.08
Less 10% contributory fault		£1,755.10
Contributory award balance		£15,795.98
Plus Basic Award		£5,134.50
Total Award		**£20,930.48**

33. Recoupment does not apply in to this award.

34. At the conclusion of the remedy both parties' counsels think that the pension loss is slightly out and they have agreed simply to deduct £210.00 from the total award.

Application for costs by the claimant

35. At the conclusion of the remedy hearing Miss Bewley for the claimant made an application for costs on the grounds that the respondent had behaved unreasonably, particularly most of the Counsel's preparations being for the cross examination of Mr Hinton. The respondent served a witness statement on behalf of Mr Hinton and did not indicate that he would not be attending, there was certainly no indication from the respondent's solicitors. The first Counsel heard that Mr Hinton was not attending was yesterday morning. The reason being that Mr Hinton was no longer employed. The fact of the matter is that Mr Hinton has not been employed by the respondent since August last year, yet a statement had been taken and served, though unsigned.

36. Further, an offer was made through ACAS by the respondent recently for £250 to the claimant, on the basis if accepted they would not pursue costs against the claimant.

37. Miss Bewley summarises that the respondent has behaved unreasonably and therefore should pay the claimant's costs.

38. Miss Wilson for the respondent resisted the application for costs, and says the case was listed for three days and time has been saved. Unfortunately, Mr Hinton did not attend because he is no longer employed by the respondent.

The tribunals conclusion on the costs application

39. The power to award costs arises under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, particularly rule 76 which states:

> **"76.**—
> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) ……"

40. That requires a two-stage process – have any of the circumstances referred to above arisen, if so should the tribunal exercise its discretion to award costs.

41. The tribunal takes the view, serving a witness statement of a major witness who conducted the disciplinary hearing in the knowledge that that witness was never going to attend, and further the witness statement not even been signed and their failure to notify the claimant/representative until the morning of the hearing is unreasonable conduct. That was clearly underhand and devious.

42. To suggest the reason the witness was not going to attend because he was no longer employed by the respondent is not accepted by the Tribunal. The respondent/solicitor have known that Mr Hinton has not been employed by the respondent since August last year.

43. The tribunal is therefore satisfied the respondent behaved unreasonably in the conduct of these proceedings, furthermore whilst the claimant was a litigant in person putting pressure on the claimant offering her £250 to settle in default of which they would pursue her for costs simply to the Tribunal compounds their unreasonable conduct.

44. I am therefore exercising my discretion and order the respondent to make a contribution towards the claimant's costs in the sum of £2,000.00.

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Employment Judge Postle

Date: 2 / 5 / 2018

Sent to the parties on: .....

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For the Tribunal Office