RM

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr MA Khan**

**Respondent:** **Tesco Stores Limited**

**Heard at:** **East London Hearing Centre**

**On:** **10 & 11 May 2018**

**Before:** **Employment Judge Brown**

**Representation**

Claimant: In person

Respondent: Mr Tom Gillie (Counsel)

# JUDGMENT

**The judgment of the Tribunal is that:-**

**1. The Respondent dismissed the Claimant unfairly.**

**2. It is 60% likely that the Respondent would have dismissed the Claimant fairly, following a fair procedure.**

**3. The Claimant contributed to his dismissal and an additional 10% reduction in the basic and compensatory awards should be applied to remedy for unfair dismissal.**

**4. The remedy hearing will proceed on 3 August 2018.**

# REASONS

**Preliminary**

1 The Claimant brought a complaint of unfair dismissal against the Respondent, his former employer. At the start of the hearing, I identified the following issues arising in the Claim and Response:

1.1 Has the Respondent shown the reason for dismissal and that it was a potentially fair reason? The Respondent contended that the potentially fair reason was misconduct, in the Claimant stealing "Floravital" iron and vitamin formula.

1.2 If the Respondent has shown the reason for dismissal and that it was a potentially fair one, did the Respondent acted fairly in dismissing the Claimant under *s98(4) Employment Rights Act 1996,* applying a neutral burden of proof? In particular:

1.2.1 Did the Respondent conduct a reasonable investigation? The Claimant contended that the Respondent did not take witness statements from witnesses and/or ignored other relevant evidence.

1.2.2 Did the Respondent have reasonable evidence for its decision that the Claimant was guilty of misconduct? The Claimant contended that the weight of evidence available to the Respondent indicated that the Claimant was not guilty of theft and that the store manager had authorised the Claimant to take the relevant item.

1.2.3 Was dismissal a reasonable sanction? The Claimant contended that he had been treated inconsistently compared with another employee and that the store manager had authorised the Claimant to take the item, so that the Claimant could not have known that it was wrong to do so. Accordingly, the Claimant contended that dismissal was not an appropriate sanction.

*Polkey*

1.3 If the Claimant was dismissed unfairly, what was the likelihood that the Respondent would have dismissed the Claimant fairly, following a fair procedure?

*Contributory Fault*

1.4 Did the Claimant cause or contribute to his dismissal and to what extent should the compensatory and basic awards be reduced to reflect this?

2 I heard evidence from the Claimant and from shift managers, Wasif Abbas, Mian Naeem Rafique, Waseem Ijaz, for the Claimant. I heard evidence from Arjun Malkotia, Store Manager and Dismissing Officer and Richard Frear, Area Manager and Appeal Officer. There was a bundle of documents and both parties made submissions. The Respondent included written submissions.

3 While the claim had been listed to be heard over 2 days, the Tribunal was only able to give one day's hearing over the 2 day listing, so there was only time for evidence and submissions on liability to be heard. The parties agreed that I would make a decision on liability and would set a date for a provisional remedy hearing on 3 August 2018 for half a day. The Claimant had not produced mitigation evidence, so it was necessary for further disclosure to take place in this regard, in any event. I reserved my decision.

## Findings of Fact

4 The Claimant commenced employment with the Respondent as a Customer Assistant on 8 December 2013. He was promoted to the position of Shift Leader in March 2015. The Respondent has a disciplinary policy, pages 35 – 46. In the disciplinary policy, there is a list of matters which can be considered to be gross misconduct. This includes, "Theft of Tesco's, colleagues' or customers' property," page 42.

5 It was not in dispute that, in line with its retail business, the Respondent periodically carries out stock-takes in its stores, to ascertain how much stock is being held in the store. These stock-takes are normally carried out by staff at the store; usually the store manager and/or shift leaders. The Respondent told me that during stock-takes, items can be found to be "not book stock." This means that the product is not "live" at the store. That could be for a number of reasons, including that it is a discontinued product which Tesco no longer sells, or it is a "mispick," meaning that the product has been sent to a store which does not sell that particular item.

6 The Respondent told me that, in those circumstances, store managers had the discretion to do one of the following:

6.1 Record the product as waste and arrange for it to be thrown away, or to be donated to charity, if it is still safe to consume, or if the product is simply one that is not usually sold by the store;

6.2 To turn it back into a "live" product and sell it.

7 The Claimant agreed that he had undertaken e-learning training modules on stock-taking, stock shrinkage, security and stock control. The Claimant said, however, that, in respect of some of these, he had been given the answers by the store manager. The content of these e-learning training modules was not seen by the Tribunal.

8 The Respondent's witnesses told the Tribunal that there had been a company directive to store managers that surplus rock salt should be disposed of. The Respondent's witnesses said that this included being given away to employees. I did not see the directive on this, or the wording of it.

9 During the hearing, I was told of a process called "clear as you go," which I understood to be a process whereby, during a stock-take, a manager would clear the relevant surplus stock, rather than reserving it to be turned back into live stock.

10 On 4 July 2017 the Claimant took two bottles of Floravital vitamin liquid from the store room at the Tesco Express store in Upton Park where he worked. The Claimant had

been off work that day, but had attended the workplace to complete some e-learning modules. The Claimant told one of his fellow shift leaders that he was taking the bottles. This information was later relayed to the store manager, who was called Ajit.

11 On 29 July 2017 Martin Netherdale, a manager, suspended the Claimant, pending an investigation into the allegation that the Claimant had stolen Floravital liquid iron and vitamin formula on 4 July 2017, page 47 – 51. The Claimant was invited to an investigation meeting to be held on 31 July 2017. The Claimant was told of his right to be accompanied at that meeting. The investigating manager was Omar Awan.

12 At the investigatory hearing on 31 July, the Claimant said he had been in the store on 4 July 2017 because his manager, Ajit, had requested that he complete e-learning that day. The Claimant said that he taken the Floravital vitamin liquid because, while Ajit had been on holiday, another manager, "Abs", had reviewed stock before a stock-take and had identified that the vitamin liquid was not on the books as stock and had said that all shift managers could take some of the liquid, as it was not book stock. The Claimant said that Abs had taken some of the liquid as well. The Claimant said that Abs was the store manager in East Ham Street. The Claimant said that there were two other witnesses to this Mian Naeem Rafique and Waseem Ijaz, both shift managers. He said that they were instructed by Abs to take stock from the store for their personal use and that they had seen Abs take it as well. The Claimant said that the Floravital liquid was "free" stock.

13 The Claimant said that he had taken the Floravital liquid from the back door of the store on 4 July because he was leaving with another employee, Wasif.

14 Investigatory interviews were conducted with Mian Naeem Rafique and Waseem Ijaz on 2 August 2017. Both said that Abs had told them and the Claimant that the Floradix liquid was not book stock and that they could take it.

15 Abs (Abdul Ahad) was also interviewed on 2 August 2017. He was asked about the day before the stock-take and whether he had come across any items that appeared to be free stock. Mr Ahad said that there was no free stock. He said, *"I cleared some clear as you go items on the shelf.. rock salt that needed to be wasted.. in bin or you guys can take it off."* Abs was asked about whether he had said to staff that they could take items because they were not book stock. He disagreed that he said that the liquid multi vitamins were free stock. Mr Ahad said that there was rock salt which was not on the system and that he had said that it could be wasted in the bin, or employees could take it off, because it was a "clear as you go" product. He said that he had only worked in the store for an hour or two and that he was disappointed that he was being accused of wrong doing.

16 The Claimant was interviewed at a further investigatory meeting on 8 August 2017, page 81. The Claimant was told that Mr Ahad had denied mentioning taking the free stock and that Mr Ahad had said that he was fully aware that the vitamins were not free stock, but needed to be counted. The Claimant said that, before and during the investigation, Ajit, his own store manager, had been in contact with Abs and with witnesses, forcing them not to give statements. He said that he did not understand why Ajit was getting involved while the investigation was going on. He said that it was not fair that Ajit was getting involved and influencing the outcome. The investigating officer said that he did not feel that Ajit had influenced the investigation that he could not go by

hearsay. He said that the Claimant's colleagues had verified what the Claimant had said. The investigating officer told the Claimant that he would move the investigation to a disciplinary stage, because he felt that the Claimant had a case to answer, page 81 – 84.

17 The Claimant was invited to a disciplinary meeting to be held on 5 September 2017, page 88. The Claimant was told that the purpose of the meeting would be to discuss the allegation of theft of Floravital liquid iron and vitamin formula on 4 July 2017. He was told that, as a result of the disciplinary hearing, disciplinary action could be taken against him, up to and including dismissal. The Claimant was told of his right to be accompanied.

18 The disciplinary hearing on 5 September 2017 was conducted by Arjun Malkotia, Store Manager. At the disciplinary hearing, the Claimant said that Abs had gone downstairs to check the stock and had then called all the shift leaders and said that the liquid vitamins were not on book stock, so that the store needed to get rid of it and that the liquid vitamins had been in the basement for over a year. The Claimant said that Abs said that all of them could take the stock home and have it. The Claimant said the he had not taken the stock that day because he was busy, but that on 4 July he had remembered that the vitamins were free stock and went to get them. He said that he was going home with Wasif and taking the liquid vitamins through the back door because he was getting a lift. The Claimant said that he had had plenty of opportunity to take the stock because it had been there for over a year, but he had only done it when the store manager had said that he could.

19 The Claimant agreed that he did not obtain further permission from his own store manager when he took the stock later, on 4 July, pages 89 – 101.

20 The Claimant attended a resumed disciplinary hearing on 11 September 2017, page 106. At that hearing, Mr Malkotia summarised what he had heard. He said that the Claimant had told him that Abs had allowed the Claimant to take the liquid vitamins; and that the Claimant had taken it weeks later, when he had come in to do e-learning; and that the Claimant had not obtained permission from the store manager at the time he took the vitamins. Mr Malkotia told the Claimant that he had decided to dismiss him because due diligence was not followed as an experienced shift leader and there was a resulting breach of trust between the Claimant and the company. He said that several weeks had passed between the Claimant allegedly being given permission to take the items. Mr Malkotia said that the Claimant had made no attempt to speak to the store manager when he took the items, so that there was a breach of trust.

21 At the Tribunal hearing, Mr Malkotia told the Tribunal that he had spoken to Abs himself, as part of his investigation. He said that he did not take note of his discussion with Abs, and did not share the content of the discussion with the Claimant. He said that he had also spoken to other store managers about the wider culture at the store where the Claimant worked. Again, Mr Malkotia did not take note of those discussions and did not share them with the Claimant. He said that he had undertaken these further investigations to get a wider understanding of the culture at the store and the culture amongst the shift leaders. The other store managers to whom he spoke were Abs, Ajit, the current store manager, and the store manager at Green Gate Local Express. Mr Malkotia said that he wanted to get an understanding of whether the shift leaders would unite and work together against a store manager. He did so because he considered that the statements that the

shift managers had given were very similar. Mr Malkotia said that he formed the view, having spoken to the store managers, that the shift leaders worked "as a pack." He said that he believed that the Claimant "would tell his friends" that he had taken the liquid vitamins. When asked in what way the Claimant and the other shift managers were "friends," Mr Malkotia said, "They are professional acquaintances who had worked together for a number of years".

22 Mr Malkotia also gave evidence about another employee who had been investigated in relation to taking apples, a Mr Sheik, page 154. Mr Malkotia said that he had not been involved in that disciplinary and that Mr Sheik Hussain had not directly admitted to taking the apples, there was no CCTV evidence that he had done so, whereas the Claimant had admitted to taking the liquid.

23 Mr Malkotia told the Tribunal that he checked the bookstock for the liquid vitamins and had seen that, at the time the Claimant took the liquid, the liquid had been converted back to "live" stock to be sold. He said that he did not give this information about "live" stock to the Claimant. He also said that he did not know why, if the liquid was live stock, it was still in the basement four weeks after it had been the subject of a stock-taking.

24 Mr Malkotia told the Tribunal that the Respondent is in retail business and stock control is paramount to the profitability of its stores. He said that the Respondent's employees have access to valuable goods and cash and that the company has to be able to have the utmost trust in their integrity. He said that he felt that the trust that he had in the Claimant was fundamentally undermined and, in addition, the Claimant, as a shift leader, was expected to demonstrate good practice and be a role model, but the Claimant's actions had not reach that standard.

25 On 11 September 2017 Mr Malkotia wrote to the Claimant, dismissing him. He said:

> "I am writing to confirm my decision to summarily dismiss you for gross misconduct. The reason (sic) for this are:
>
> (1) The decision was in line with the misconduct.
>
> (2) Due diligence was not followed as an experience to the shift leader.
>
> (3) There is now a breach of trust between yourself and the company.
>
> (4) You have shown no remorse to the misconduct."

26 Mr Malkotia told the Tribunal that "The decision was in line with the misconduct" meant that Mr Malkotia believed that the disciplinary allegation was correct – the Claimant was guilty of theft of Floravital liquid iron and vitamin formula on 4 July 2017.

27 Mr Malkotia told the Claimant about his right of appeal, page 125. The Claimant appealed, by email, on 12 September 2017 and attended an appeal meeting chaired by Richard Frear, Area Manager, on 17 October 2017, page 129 and 126.

28 At the appeal hearing, the Claimant repeated his explanation about why he had taken the two bottles of liquid vitamins. He said that he acknowledged that the liquid was Tesco property and that he should not have taken it as a senior employee, but a store manager had said that he could and that he had accepted that. Mr Frear told the Tribunal that he considered that he had heard nothing new in the appeal hearing, so he decided that the decision to dismiss the Claimant should be upheld. He said that there was no dispute that the Claimant had left the store with two bottles of vitamin liquid without paying for them. Mr Frear said that, at the time they were removed, the items were book stock. Mr Frear said that the way in which the stock had been removed from the store was suspicious in his view and inconsistent with someone who thought that their actions were legitimate. The items were removed at the back door and were removed 23 days after a covering manager had allegedly given permission to two of its shift leaders to take the stock home. Mr Frear said that, even if the Claimant had had permission, it would not have changed Mr Frear's decision on the appeal, because he would have expected the Claimant to act differently on the date when he had taken the stock. He said that the Claimant had received training in relation to stock control and was an experienced manager, who was expected to demonstrate best practice. Mr Frear said that, in fact, the Claimant's training was very up to date, in that, on 4 July 2017, he had carried out e-learning on stock control. Mr Frear told the Claimant at the appeal meeting that he had decided to uphold the decision to dismiss, page 143.

29 Mr Frear told the Tribunal that he did know about it Mr Malkotia's extra investigations. He knew that Mr Malkotia had interviewed Abs, for example, but that he did not put these interviews to the Claimant.

30 Messrs Ijaz, Naeem and Abbas all told the Tribunal that the store manager Abs had given them permission to take the vitamins home. They were cross-examined and maintained their assertions that this is what had happened. It was clear that they did not have English as their first language and their witness statements were similar. Mr Ijaz very honestly said that the statements had been written together. I considered that Mr Ijaz was open and candid in his evidence. He said that it was right that the shift managers should stand by the Claimant because he should not have been dismissed.

31 I accepted the evidence of Messrs Ijaz, Abbas and Naeem and found that Abs did tell them that the floravital vitamin liquid was not book stock and could be taken home. It was clear that Abs had said, at his investigation meeting, that he told employees that they could take rock salt, pursuant to a "clear as you go" practice. It was credible that he also said that year-old non-book liquid vitamin stock could be taken. I considered that Messrs Ijaz, Naeem and Abbas were credible in the evidence that they gave and that they genuinely corroborated each other. They accepted that they had written their own statements together. That admission enhanced their credibility, rather than undermining it.

32 It appeared that, contrary to the Respondent's initial assertion that stock would never be given to employees, there were circumstances in which the company did approve that items could be taken away by employees, in the case of the rock salt.

33 I was shown the documents relating to the case of Mr Hussain Sheik, who had been accused of stealing apples from the same store as the Claimant. Mr Sheik was investigated and attended a disciplinary hearing, page 154. In Mr Sheik's case, the disciplinary officer found that Mr Sheik was not guilty of theft, page 158.

## Relevant Law

34 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

35 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

36 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

37 In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

38 Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

39 The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

40 In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439

41 The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

42 It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

43 The ACAS Code of Practice 1: Disciplinary and grievance Procedures (2015) came into effect on 11 March 2015. By *s207(2) TULRCA 1992*, in any proceedings before an Employment Tribunal any Code of Practice issued thereunder by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining the question.

44 The ACAS Code of Practice 1: provides:

[9] If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct ..to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

..

[12] At the meeting the employer should explain the complaint against the employee and go through any evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. ..They should also be given a reasonable opportunity to raise points about any information provided by witnesses."

45 A decision to dismiss an employee may be unfair if it is inconsistent with the practice or policy of the employer with regard to other employees, but only in limited circumstances. In *Hadjioannou –v- Coral Casinos Limited [1981] IRLR 382,* at paragraph 25, the Employment Appeal Tribunal stated that Tribunals should scrutinize arguments based upon disparity with particular care. It is only in the following limited circumstances that the argument is likely to be relevant:

45.1 that an employee has been led by the employer to believe that such conduct will either be overlooked or at least not dealt with by the sanction of dismissal;
45.2 the evidence supports an inference that the purported reason is not the real or genuine reason for the dismissal or;
45.3 evidence as to the decision made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to dismiss the employee for that misconduct.

The EAT commented there will not be many cases in which the evidence shows that there were other disciplinary cases at the same employer which were truly similar or sufficiently similar to allow an employee to argue unfair inconsistency in dismissal decisions.

Procedural Unfairness - *Polkey*

46 If an employer has dismissed an employee in a way which is procedurally unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974. In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred, or at some later date. In making an assessment, Tribunals should apply the following principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

(1) In assessing compensation the task of the tribunal is to assess the loss flowing

from the dismissal, using its common sense, experience and sense of justice. In the normal case, that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.

(3) There will, however, be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal; but in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(7) Having considered the evidence, the tribunal may determine:
(a) that there was a chance of dismissal ….., in which case compensation should be reduced accordingly;
…….
(c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, or
(d) employment would have continued indefinitely.

Contributory Fault

47 By *s122(2) ERA,* where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA*, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

48 In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

48.1 The relevant action must be culpable and blameworthy

48.2 It must actually have caused or contributed to the dismissal

48.3 It must be just and equitable to reduce the award by the proportion specified.

49 It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The tribunal should then make the deduction for contributory fault, *Rao v Civil Aviation Authority* [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6)*, the tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996.*

50 In *RSPCA v Crudden [1986] ICR 205* it was held that, in light of the similarity in the provisions of *ss122(2) & s123( 6) ERA 1996,* only in exceptional circumstances would deductions to the compensatory and basic awards differ.

## Discussion and Decision

51 On all the evidence, I concluded that the Respondent had shown that the reason for dismissal was conduct. Mr Malkotia believed that the Claimant was guilty of the allegation against him – that he had stolen vitamin liquid from the Respondent's store on 4 July 2017. Mr Frear also believed that the Claimant was dishonest, albeit he also considered that the Claimant had not followed due process.

52 I then considered whether Mr Malkotia had reasonable evidence, following a reasonable investigation, of the Claimant's guilt in relation to this misconduct. I reminded myself that there was a broad band of reasonable responses available to an employer and that it was not for the Employment Tribunal to substitute its view for that of the employer.

53 The Respondent did undertake investigatory interviews with some relevant witnesses and invited the Claimant to a disciplinary hearing, to enable the Claimant to put forward his version of events before a decision was reached. Nevertheless, I decided that the Respondent acted outside the range of reasonable responses, and in breach of the ACAS Code of Practice, when Mr Malkotia interviewed other store managers, including Ajit, Abs and the store manager of the Green Gate Local Express, but failed to take a note of the evidence that he obtained and failed to provide it to the Claimant, either before the disciplinary meeting, or during it. This was particularly important because the credibility of Abs, on the one hand, and of the Claimant's witnesses, on the other, was of central importance to the decision on whether the Claimant was guilty of theft – whether he was dishonest and had the intention permanently to deprive, rather than simply not having followed the best practice or procedures.

54 I considered that failing to disclose the evidence that Mr Malkotia had obtained from Abs and the other store managers was also in breach of the rules of natural justice.

55 It was clear, from Mr Malkotia's evidence to the Tribunal, that he did rely on the evidence that he had obtained from the other managers in deciding to believe Abs and not the Claimant and his three witnesses.

56 Further, the Claimant had alleged that Ajit had influenced the investigation by speaking to Abs and to the relevant witnesses. That was an important part of the Claimant's response at the investigatory interviews.

57 While Mr Malkotia interviewed Ajit, he did so only in relation to Ajit's view of whether the other store leaders were credible, but did not address the Claimant's important allegation that Ajit himself had interfered with the evidence. In respect of an important allegation such as theft and dishonesty, it was outside the range of reasonable responses for the Respondent only to seek inculpatory evidence, which discredited the shift leaders, from Ajit, and not to investigate the Claimant's contrary assertion that Ajit and Abs had discussed the matter in advance, with Ajit alerting Abs to the investigation.

58 Further, I considered that Mr Malkotia had not shown the Claimant evidence about the change in the stock being "live". Again, he took that into account in his decision to dismiss. Once more, that was in breach of the ACAS Code of Practice.

59 Mr Frear's appeal did not cure these defects, in that Mr Frear did know about Mr Malkotia's extra investigations, but did not put these matters to the Claimant. He came to a decision without having the Claimant's input on these extra investigations.

60 The dismissal was procedurally unfair.

61 I accepted the Respondent's contention that Mr Sheik was not in the same position as the Claimant, in that Mr Sheik was not found to have been guilty of theft. The Claimant could not compare his treatment with that of Mr Sheik.

62 I went on to consider what was the likelihood that the Respondent would have dismissed the Claimant fairly, had a fair procedure been followed. It was somewhat difficult for me to make that assessment, because I was not shown any notes of Mr Malkotia's interviews with the other store managers and it was impossible to know what impression Mr Malkotia would have formed of Ajit and Abs' evidence if he had properly investigated the allegation that they had colluded and that Abs had been warned about the investigation.

63 Nevertheless, it was clear, on the evidence, that the Respondent was a retail body and expected its employees to act with integrity. It particularly expected shift leaders to be role models. Mr Malkotia considered that the relationship of trust and confidence was damaged by the Claimant's actions, in that he did not follow due diligence as an experienced shift leader when he removed the bottles 3 weeks later without seeking further authorisation. I considered that it was 60% likely that the Respondent would have dismissed the Claimant fairly, in any event. I took into account that the Respondent would have to have acted fairly and would have to have looked fairly for exculpatory as well as inculpatory evidence. I took into account that there were 3 other witnesses, who did support the Claimant's version of events, and that I was shown no notes of investigations which properly cast doubt on the credibility of those witnesses. As the Claimant pointed

out, the Claimant and his 3 witnesses were, together, 4 people who said that Abs had given permission for the liquid to be removed. Abs was one person, only, and did not have similar corroborating witnesses.

64 With regard to contributory fault, I accepted the evidence of the Claimant and his witnesses and concluded that Abs had, indeed, given the Claimant permission and others to remove the liquid. Accordingly, I considered that the Claimant was not dishonest when he removed the liquid from the store. It was clear that some products were given away - like the rock salt - despite the Respondent's initial assertion that this would never be the case. While the Respondent contended that there had been a directive from head office that rock salt could be given away, Abs did not say that that was the reason that the rock salt was given to employees; he simply described the rock salt as "clear as you go". I considered that there was no reason for the Claimant to have known that the status of the liquid had changed to "live" stock when the stock was still in the stock room and not being sold, having already been in the stock room for more than a year.

65 Nevertheless, I also took into account that the Claimant was a shift leader and was required, in the retail environment, to act as a role model and to be careful in his handling of stock. I decided that his actions, in not checking further with his own store manager before removing the stock, were culpable and blameworthy and contributed to his dismissal.

66 I had taken these latter matters into account in assessing the appropriate *Polkey* deduction. Taking contributory fault and *Polkey* deduction together, therefore, I considered that a 10% additional assessment of contributory fault was correct. A 10% reduction should be applied to both the basic and compensatory awards. It was not suggested to me by either party that different reductions should be applied to the basic and compensatory awards.

67 The remedy hearing will proceed on 3 August 2018.

Employment Judge Brown

9 July 2018