EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M W Batista de Lima	**v**	J Sainsbury PLC

Heard at: Central London Employment Tribunal On: 21-22 November 2018

Before: Employment Judge Norris

Appearances
For the Claimant: Mr A Otchie, Counsel
For the Respondent: Mr M Khoshdel, Counsel

Background

1.1 The Claimant worked for the Respondent, a national supermarket chain, from 13 December 2012 until January 2018, as a baker at its Liverpool Road store.

1.2 He submitted a claim dated 1 June 2018 for unfair and wrongful dismissal, which the Respondent defended by response dated 10 September. The Claimant had also ticked "other payments" in the claim form, which he submitted as a litigant in person, but was unable to say what this was a claim for. We therefore continued on the basis of the two complaints above and the "Other payments" complaint was dismissed on withdrawal.

1.3 Standard directions were given. The Claimant was to produce a schedule of loss and supporting evidence by 10 September 2018. Lists should have been exchanged by 24 September, a bundle produced by the Respondent by 8 October and witness statements exchanged by 22 October. It is apparent that Ansah solicitors were instructed by the Claimant at some point and at any rate before 14 September, because they emailed the Employment Tribunal on that date (not copying in the Respondent) with what appears to be four emails making job applications and four pay advices from the Respondent. The Respondent says it did not receive the schedule of loss.

1.4 On 17 October, the Claimant's representatives emailed the Employment Tribunal complaining that the Respondent had not complied with the Orders in that it had not sent a list of documents and/or prepared a bundle.

1.5 On 19 October someone from the Respondent emailed to say that they had posted the bundle to the Claimant's representative. She said she had proposed to them that they exchange witness statement on 2 November. On 23 October, Employment Judge Snelson caused a letter to be sent, requiring the parties to

co-operate to complete preparations for the Hearing listed for 21 and 22 November.

1.6 At the Hearing, the parties were given a short period to discuss possible settlement, but in order to ensure that the hearing either proceeded as listed or I could take a four-day floating case, I restricted them to half an hour. Discussions were not fruitful, and we started the hearing shortly after 10.30

1.7 I was concerned by a number of points. No list of issues had been prepared. Mr Khoshdel said he thought those instructing him had believed the Claimant to be a litigant in person. As I have said above, it was clear they did not, but if they had it, would have been all the more incumbent on them to prepare a list themselves.

1.8 Further, Mr Opchie did not appear to know fully what his client's case was, particularly in the challenges to the fairness of the procedure; there were no pagination references to the bundle in the Claimant's statement (and very few in Mr Miller's); and no remedy evidence had been prepared on the Claimant's behalf. His statement ends with a claim for "compensation for unfair dismissal and breach of contract", and he had ticked "compensation only" in the claim form, but it appeared he was now potentially seeking re-instatement or re-engagement, for which the Respondent was not prepared. I sent the parties away while I read the papers, and indicated that the Claimant would need to prepare his remedy evidence overnight as there was none in the bundle or his statement; or we might have to come back a third day, which would be highly undesirable.

1.9 A Mr Rahman had also prepared a witness statement for the Claimant but could not attend on day one; and his evidence did not appear to be relevant to the issues before me once they had been established, and accordingly I gave no weight to his evidence.

1.10 I also record for completeness that there was considerable confusion over the Respondent's witness statements and whether they had been seen and approved by their makers before they were exchanged; but having required the Respondent's instructing solicitor Ms Yearall to attend after lunch on day one, and the Respondent having re-called Mr Miller, I was satisfied that they had, and that the suggestion they had not had been a genuine mistake.

List of issues

2. We agreed a list of issues as follows:

2.1 Unfair dismissal

a) What was the reason for the dismissal? The Respondent says conduct and has the burden of proof in this regard. The Claimant does not accept this and believes it was prejudice against him because of an issue he had had with his manager, Mr Debres, over hours of work;

b) If it was conduct, that is a potentially fair reason. Along classic *Burchell* lines, I would then need to determine whether that was a genuine reason

and whether belief in the Claimant's conduct was reasonably held following a reasonable investigation. The burden of proof here is neutral.

c) The challenges to the fairness as set out by Mr Otchie were that:

- Insufficient account was taken of the Claimant's health;
- The Claimant was criticised for his non-attendance at a number of meetings, when in fact he had not received the invitations to attend;
- He was bullied at the investigation meeting by the manager conducting it, Mr Nadar;
- Mr Debres's accounts of the incident that led to the Claimant's dismissal were inconsistent and hence unreliable.

2.2 Wrongful dismissal
It is not disputed that the Respondent dismissed the Claimant without notice. My task is to decide whether it had a reasonable basis on which to do so, i.e. was the Claimant as a matter of fact in breach of his employment contract with the Respondent?

Findings of fact

3.1 In or around early November 2017, the Claimant was in discussions with his manager Mr Debres to vary his working hours. There had been two meetings in this regard by the date of the incident that led to his dismissal. The Claimant said in evidence before me, and I find as a fact, that he knew the third meeting would lead to his dismissal and he was "pretty happy" about that, because he would get his notice and a reference and leave on good terms after five years' service. He was less happy to be told that he would not get a redundancy payment. However, he was working a second job, with Marks and Spencer ("M&S"), to fit with his hours at the Respondent. He was unable to go with the variation to his hours that Mr Debres was proposing to implement.

3.2 We do not have specific dates of the meetings that had been held nor when the third meeting might have taken place but I find it would have been on or around 10 November, because the Claimant says in his witness statement:

"Later at the 2nd meeting I was told by Mr Debres that he found out the information from HR regional manager about the redundancy payment and that I was not going to be entitled to such a payment. I was also asked at the 2nd meeting if I would like to accept the changes and if not, on the 3rd meeting, I would be given the notice according to the company policy.

…all I asked him was to do the 3rd stage and last meeting as soon as possible preferably on the following Monday which was 3 days from that day.

… At the end of the following week, which was one week after the 2nd meeting, I was faced with such an uncomfortable situation where I was accused of swearing and raising my voice at him, leaving me with concerns that those allegations against me raised by Mr Debres on the 18th November 2017 were nothing more than a way he found to terminate my contract… ."

3.3 By way of further background, the Claimant had an eye condition in the days or perhaps weeks leading to the incident on 18 November. According to the information in the bundle, he went to the minor eye conditions clinic at Boots in Catford on 15 November. They thought he might have conjunctivitis and they referred him to Moorfields Eye Hospital for an ophthalmologist assessment.

3.4 The clinic's note states that as the Claimant worked next to Moorfields, he preferred to go there. He did not make an appointment because at the time his condition was manageable, but on 16 November, he spoke to Mr Debres on the phone to try to arrange planned time off later that week. His evidence before me was that he could have taken time off sick and the Respondent would have had to pay him; but he was giving the Respondent the chance to plan for his absence and arrange cover. That seems to me to be sensible, but for reasons which are not quite clear to me, Mr Debres did not see it like that and refused the planned leave.

3.5 Mr Debres's reluctance may be explained by looking at the approach he took on 16 and then again on 18 November, when the Claimant went to him in person to renew his request to leave for the hospital. By now, the Claimant says, his condition had worsened. He gave evidence that he had been told drops would be put in his eye during the assessment which might cause temporary blindness, so although he had time off from M&S all that week, it would not be sufficient to go to the hospital in the morning and then to his work at the Respondent in the afternoon, because he could not be sure he would be up to it. Mr Debres's note of the events of 16 and 18 November confirms that he asked why the Claimant couldn't go outside work hours or before his shift. He says in his note that when he asked this, the Claimant shouted at him and asked him why he was being funny, threatening to walk off the shift. Mr Debres says in his note that he himself remained calm and was only asking the questions that any manager would ask. He did not report the Claimant's alleged shouting on 16 November, but nor did he grant the leave.

3.6 On 18 November Mr Debres said that the Claimant did approach him with the letter from Boots. This contained errors in the Claimant's date of birth and the spelling of his name. The Claimant asked him to ignore these. Again, Mr Debres was asking the Claimant why he could not go on another day than Saturday which is the Respondent's busiest day of the week. He says that the Claimant told him he had not worked at M&S that day, but Mr Debres did not believe him because he knew he was contracted to work there. By his own account he asked the Claimant, “Do you expect me to believe that?” While therefore he may not have said the actual word “liar”, again on his own account, the Claimant asked if Mr Debres was calling him a liar.

3.7 The versions diverge from there. Mr Debres says the Claimant said, “Fuck you, fuck you bruv, fuck you”. The Claimant says that Mr Debres replied, “Yes, you are a liar”.

3.8 Both men agree that Mr Debres went off to get Mr Ashraf Miah, deputy manager, and as a result of their conversation, Mr Miah suspended the Claimant. Mr Miah has also done a note. Neither he nor Mr Debres gave evidence before me. Mr Miah's note says that Mr Debres told him the Claimant

swore at him. He continues that the Claimant called Mr Debres a liar, so he tried to get the Claimant to calm down and take a seat in the canteen. The Claimant was clearly unhappy and required the managers to take a copy of his referral letter, which they did. Mr Miah also printed off a suspension checklist. As he was going to fetch it from the printer, he says that the Claimant shouted at him if he was going to suspend him to get it over and done with so that he could leave. He repeated this in the manager's office, having fetched his coat, standing up and refusing to be seated. Mr Miah verbally suspended him and the Claimant left the room. A witness, Pauline (Counters Manager) was apparently present. There was no statement from her in the bundle. I gather she was not asked for a statement for the purpose of the disciplinary proceedings.

3.9 In addition, the Claimant says that during the first part of the incident, which took place on the stairs, two female colleagues whose names he did not know had walked past. He acknowledges that CCTV would not have assisted with the conversation itself, because it does not record audio, but it might have helped identify them and whether they had overheard the salient part of the discussion. It seems to me that they would not, because according to the Claimant's evidence before me, neither of them was there for the last 30 seconds of the discussion, which is when the Claimant is alleged to have shouted and sworn. So that is not a defect in the Respondent's process, to fail to find them or to look at the CCTV. At best, they would have said that the Claimant was not being aggressive when they went past but that is not the allegation against him.

3.10 The Claimant came in for an investigation meeting on 4 December, conducted by Mr Nadar. It appears to be common ground, as reported in writing by both Claimant's union rep and the Respondent's own notetaker, that during this meeting both the Claimant and Mr Nadar became frustrated. The notetaker in fact said that Mr Nadar "lost it" with the Claimant and that they were arguing a lot. The notetaker said it was unsatisfactory, although everyone had had the chance to ask anything they wanted to.

3.11 At any rate, Mr Nadar decided to forward the matter for a disciplinary. His outcome summary gives the reason for this as the Claimant having "*no concrete proof of the allegations made on his behalf*" and that the two statements are "*the evidence of his inappropriate behaviour*" and "*arising from meeting*".

3.12 In other words, the Claimant's conduct at that meeting, at which as I have said it is common ground Mr Nadar himself became frustrated and lost control, appears to have been added to the allegations against the Claimant. Mr Nadar does not appear to have made careful findings or (where there is a dispute, given the Claimant the benefit of the doubt as required by the guidance to the ACAS code 2016). Indeed, he says there was no witness to back the Claimant up. Having not himself heard from either Mr Miah or Mr Debres however, and hence having not tested their versions at all, Mr Nadar concluded that they were telling the truth and that the Claimant was not.

3.13 Mr Nadar forwarded the matter for a disciplinary hearing. In the meantime, the Claimant raised a grievance, known as a "fair treatment", about Mr Nadar's behaviour in the investigation and as I have said, the two witnesses, who might fairly be said to be one from each side, agreed that Mr Nadar had "lost it", although it is fair to say that the notetaker had also found the Claimant himself to be argumentative.

3.14 The Claimant was invited to, but did not attend, a grievance hearing with a manager, Mr Meaney, on 29 December. The outcome of the grievance was that he should raise his points at the disciplinary hearing. The Claimant appealed that outcome to Mr Miller. Mr Miller, who did give evidence before me, reached the same conclusion, having decided that Mr Meaney was right to proceed in the Claimant's absence. I agree. These allegations related to the disciplinary process. The rightful place for them to be addressed was in the disciplinary hearing and not as a standalone grievance.

3.15 The Claimant was clearly dissatisfied with this. A disciplinary hearing had been scheduled to follow the grievance appeal, but the Claimant left shortly after it began, claiming that he had soiled himself. His union representative also left. Mr Miller's evidence, which I accept, was that the union representative had to get to a football match.

3.16 The notes of the hearing are highly questionable because both the Claimant and Mr Miller say that the Claimant told Mr Miller he had a stomach ache, but there is no entry in the notes to that effect. In any event, the Claimant's evidence before me as to the soiling was extremely vague and unclear, which was a surprise, given that it was something so critical. He suggested at one point that he had soiled himself during the first meeting and at another that it was during an adjournment between the first and second meetings. I did not find his evidence on the point credible, and not was it plausible that having soiled himself at either of those times (and on his account, smelling of faeces and having had to throw away his underwear), he would then have returned and apparently started another meeting as if he was going to proceed with it.

3.17 After careful questioning from me to try and place the point where the soiling allegedly occurred, I am still unable to say what the Claimant's position is. I conclude on balance of probability that it did not happen. I find therefore that it was the Claimant's choice not to attend the disciplinary which went ahead in his absence, chaired by Mr Ward.

3.18 Mr Ward did not interview Mr Miah or Mr Debres either. He had notes of discussions taken by another manager, Mr Carroll, as well as Mr Miah and Mr Debres's original statements. Like Mr Nadar, however, he concluded that the written evidence was sufficient for him to believe their version of events over the Claimant's. He based this on the fact that two separate individuals were alleging it ("*Reasons for decision: Due to 2 separate individuals alledging [sic] aggression/aggressive behaviour; 1 individual alledged [sic] swearing aggressively; [the Claimant] denies this*"), he found that the Claimant "*was aggressive and used intimitading [sic] behaviour towards 2 managers*" and he said that this was totally unacceptable. It appears he may have considered

briefly imposing a final written warning, but then decided instead to dismiss without notice.

3.19 Mr Ward did not give evidence before me, but it appears that the entirety of his decision-making is based on the inadequate investigation already carried out by Mr Nadar; there is no apparent consideration of any mitigating circumstances, the Claimant's length of service or clean disciplinary record, nor has he taken into account the severity of the offence, or the lack thereof. As I record below, these defects were not considered on appeal.

3.20 It was Mr Issa who conducted the appeal against dismissal on 16 February. He also did not interview Mr Miah or Mr Debres. He did give the Claimant the opportunity to have his say. He said however that he found the Claimant "uncooperative" and gave evidence before me that this referred to the Claimant's "manners". He felt there was enough evidence to uphold the dismissal, because he said he thought it was for the Claimant to prove his case and the Claimant had not done so. Nonetheless, although he did not uphold the allegation that the Claimant swore, he did find that the Claimant was "aggressive" towards both Mr Miah and Mr Debres, without giving any explanation for that. His "Reasons for decision" summary states:

"*I feel [the Claimant] was uncooperative at the start of the meeting and throughout, I feel if [the Claimant] didn't like this from the start. [sic]*
I believe there is enough evidence that [the Claimant] was aggressive towards [Mr Debres]
I believe that [the Claimant] was aggressive towards [Mr Miah]
I do not understand why it took [the Claimant] four day [sic] to attend the eye hospital and why did he have to go on that Saturday.
From all the evidence I feel the right decision was made."

3.21 By his own admission Mr Issa also did not take into account the Claimant's clean record or length of service, and dismissed the appeal. He told me that aggression is akin to theft, in that nothing in a person's record will outweigh aggression against "several people on several occasions". When I asked him to whom he was referring he said it was Mr Debres, Mr Miah and Mr Ali.

3.22 Mr Ali is a former colleague of the Claimant who had written a statement on 29 December 2017 and described himself and the Claimant as being "good friends". In fact Mr Ali did not witness the incident for which the Claimant was dismissed, nor in his statement did he say that the Claimant was aggressive but he did say that he had heard the Claimant on an unknown date on the phone to Mr Debres being "loud and impolite". As I have noted, Mr Debres had not made any such allegation at the time and it is unclear whether this was the call on 16 November or on a completely separate occasion.

3.23 There was no further right of appeal and accordingly the Claimant remained dismissed.

Law

4.1 This is a "classic" misconduct unfair dismissal claim. The relevant law is at section 98 of the Employment Rights Act 1996 (ERA), under which I must first

consider the Respondent's reason for dismissing, and whether it was a potentially fair reason. In deciding what was the reason I have regard to *Abernethy v Mott Hay and Anderson*[1]: a reason is a set of facts or beliefs known to the employer.

4.2 Next, under section 98(4) ERA, I have to consider whether the dismissal was fair or unfair having regard to the reason shown by the employer, which depends on whether in the circumstances, including the size of 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 shall be determined in accordance with equity and the substantial merits of the case.

4.3 *British Home Stores v Burchell [1978] ICR 376*, reminds Tribunals in the context of a dismissal for a conduct reason, that I must examine whether the reason given was genuine, whether the employer had reasonable grounds for that belief, including conducting a reasonable investigation of the facts on which to base that belief, and finally whether dismissal for that reason was within the range of responses of a reasonable employer. I must not substitute my own judgment but must consider whether any reasonable employer would dismiss for that reason.

4.4 I also considered *Taylor v OCS Group Limited*[2], in that a defect in one stage of the process can be rectified at a later stage; the process should be reviewed as a whole.

4.5 Under sections 114 or 115 ERA, I may, on a finding of unfair dismissal, make an order for reinstatement or re-engagement respectively; and if the latter, I must specify the identity of the employer, the nature of the employment, the remuneration, any amount payable including arrears of pay for the period from termination to re-employment, any rights or privileges to be restored and the date by when the order must be complied with.

4.6 Finally, pursuant to section 122(2) ERA, where the conduct of a claimant before dismissal was such that it would be just and equitable to reduce the amount of a basic award, the Tribunal shall reduce that amount accordingly.

4.7 In relation to the wrongful dismissal claim, it was not disputed that the Claimant was dismissed without notice, and the Respondent is therefore required to show that he was in repudiatory breach of contract, justifying the failure to give him notice or to pay him in lieu.

Conclusions

Unfair dismissal

Genuine belief

5.1 It is fanciful to suggest that because the Claimant did not accept variation to his hours, Mr Debres "had it in for him". The Claimant was, on his own account, liked and respected. He had had no prior issue with Mr Debres. It does not make sense that Mr Debres would be so enraged by the Claimant's decision

[1] 1974 IRLR 213
[2] 2006 IRLR 613 CA

not to accept the variation to his hours that he would invent a situation to dismiss him without notice, nor that Mr Miah would play along with that. Mr Debres was not the decision-maker who dismissed the Claimant or conducted the appeal. Both parties agree that there was an incident at which Claimant was at best frustrated and at worst annoyed. I find that the Respondent did have a genuine belief in the Claimant's guilt.

<u>Reasonable belief</u>

5.2 The reasonable belief held by the Respondent must be in the Claimant's guilt of the conduct alleged and it must follow a fair investigation. Mr Nadar's investigation meeting with the Claimant however was not fair. He "lost it" with the Claimant.

5.3 I must consider whether this unfairness was later corrected in terms of the investigation by other managers. The Claimant at no stage had the chance to question his accusers and to put inconsistencies or discrepancies to them. This started at the investigation but continues through even to the appeal stage. Neither of the actual decision makers – Mr Ward and Mr Issa - met the complainants. Nor did the complainants give evidence before me, and therefore the Claimant's evidence as to what took place during the incident has not been challenged in this hearing.

5.4 Further, none of the managers appears to have put their mind to the fundamental issue of whether the Claimant was under serious provocation when the incident took place. The incident, which is said to have taken place on the stairs (i.e. not in front of anyone else and certainly not the customers) was a complete one-off and took place in circumstances where the Claimant was asking to leave so that he could go to hospital. This was not for a hidden condition but for something visible to those around him. He had a letter to that effect. The letter contained errors; but if Mr Debres did not accept it as a genuine document, he could have allowed the Claimant to go, and then investigate and deal with him under the disciplinary procedure if appropriate when he returned.

5.5 It was not the reasonable reaction of a reasonable employer to start questioning an employee about where they had been that morning and why they had not gone another time to the hospital when they had already tried to arrange time off two days earlier. Mr Debres's suggestion that the Claimant was in effect presenting him with a *fait accompli* (my words) would have been avoided if he had engaged with the Claimant two days earlier. Nobody ever interviewed Pauline, who witnessed at least the part of the incident involving Mr Miah.

5.6 Accordingly, it was not a reasonable belief based on a reasonable investigation that the Claimant was guilty of gross insubordination. In any event, Mr Ward has not given reasons for his conclusion that the circumstances warranted summary dismissal rather than (say) a final written warning. Indeed, he appears not even to have contemplated dismissal with notice. Hence the dismissal was unfair. These defects were not cured on appeal, because although Mr Issa found no swearing, he did not consider whether this meant the sanction imposed should have been reduced. He did not consider that it was, if anything, momentary aggression in the context I have described and therefore

in light of the Claimant's record and service, whether he should be reinstated with a final written warning.

5.7 Even if I am wrong on that, I conclude that it was not in the band of reasonable responses to dismiss. The hallmark of a reasonable dismissal is consideration of at least one, if not all, of these factors: mitigating circumstances, length of service, a prior clean record, the severity of the offence and alternatives to dismissal. It does not appear that either Mr Ward or Mr Issa had any of those factors in mind when they made their decisions.

Polkey

5.8 Finally on liability, I look at *Polkey* and contribution. I find that if the Claimant had not been summarily dismissed on 16 January 2018, he would have been dismissed on notice shortly afterwards because he said so himself in evidence. In fact, he would already have been dismissed, probably in late November, following the failure to reach agreement on the variation to his hours. As I have noted, he said he knew this and was "pretty happy" about it. I find that he would have been dismissed by mid-December at the latest. He was paid until the disciplinary hearing in January and hence has no losses attributable to the dismissal.

Contribution

5.9 However I still consider contribution because of the basic award and because it would feed into the question of whether reinstatement or re-engagement would be appropriate. I have found that there were numerous points where the Respondent was unreasonable and its processes flawed. That is not to say that the Claimant was without fault. I believe he was (not unreasonably) irritated by Mr Debres's approach on 16 and 18 November. He was unhappy about Mr Nadar's conduct at the investigation, again not entirely unreasonably, although I note he was also described as argumentative; but it is the manager's role to control a meeting, by taking a break if they are finding it difficult. This is a question of training for the Respondent and I do not make any reduction for the Claimant's conduct in this regard.

5.10 The Claimant was however unreasonable in failing to attend the grievance hearing without good reason. I did not accept his evidence that he became so overcome with anxiety on the way to the hearing that he could only email somebody who was not at work. I do accept that there is no phone number for the hearing manger on the invitation letter, and again that is a question for the Respondent to address. But his evidence was he tried to ring and could not get through to Ms Patel, and then did not check his emails to see if she had an out of office message on, even though it was 29 December when many people are off work, as indeed Ms Patel was. I also do not accept that the Claimant had good reason to have trepidation about going to explain to an independent manager what had happened to him, accompanied by his representative.

5.11 The Claimant then attempted to divert the process from taking its course by appealing the grievance outcome, even though he was told to raise all these points in their proper place at the disciplinary. He continued to try to thwart the process by leaving after the commencement of his disciplinary hearing. I have said that I do not accept his evidence of soiling himself.

5.12 The test is whether the Claimant caused or contributed to his dismissal by any action. Had he stayed at the disciplinary hearing, he could have explained his case. He could have given the evidence he gave me and asked his union representative to make points if he could not. Instead he chose to leave and not to ask his representative to make any points at all.

5.13 I am also in little doubt that on 18 November the Claimant was at least, as I have said, frustrated, if not angry with Mr Debres, and I have found that he had some reason to be so. Mr Issa concluded that the Claimant did not swear and so I do not seek to go behind that finding. If the Claimant did raise his voice, and his unchallenged evidence was that he did not, it would not have been entirely inappropriate. I consider it likely that there was tension between the two men, if not swearing, and that the Claimant was in very small part to blame. But I put his contribution to his dismissal at 5%.

Wrongful dismissal

5.14 As to the wrongful dismissal, I find that the Claimant should not have been dismissed without notice. I have not seen any evidence or heard from any witness to the incident on 18 November other than the Claimant himself, and nothing that would demonstrate to me on the balance of probabilities that the incident occurred as Mr Miah and Mr Debres asserted. They have not given evidence on oath, as the Claimant has. His claim for his notice pay therefore succeeds.

6. In conclusion: the Respondent had a genuine but not a reasonable belief in gross misconduct. It did not conduct a reasonable investigation, and summary dismissal was not in the band of reasonable responses. There is a contribution of 5%, and 100% *Polkey*.

Remedy

7.1 I explained to the Claimant's representative that I was open to making an order for reinstatement or re-engagement. But I gathered it would have to be the latter, at another store, to suit the Claimant's hours which are no longer in operation at his previous location. I adjourned for the Claimant to have time to give his Counsel instructions, given that he had still not dealt with the issue in his witness statement. This was despite me having told the Claimant that he should prepare his remedy evidence overnight, and he had failed to do so.

7.2 When the parties returned, the Claimant confirmed he was seeking reinstatement or reengagement. We heard evidence from Mr Issa as to remedy. He said that at the same time as the Claimant was having his hours changed, everyone in the bakery stores in the entire company were being treated similarly as part of the national plan. Each store had a bakery that was starting either too early or too late, so hours would start from at the earliest four or five o'clock in the morning. The Respondent used to have night shift bakers.

7.3 The Claimant thought that he had worked the following hours: Monday 15.00 to 23.00, Tuesday 13.00 to 20.00, Friday 15.00 to 20.00 and Saturday 12.15 to 20.00, a total of 30 hours. He had Wednesday, Thursday and Sunday off. The Respondent says however that he worked Monday 15.00 to 23.00, Tuesday

14.00 to 22.00, Friday 13.00 – 21.00 and Sat 13.00- 21.00. He was offered Monday 10.00-18.00, Tuesday 14.00-22.00, Friday 10.00 to 18.00 and Saturday 12.00-20.00, but did not find those hours acceptable.

7.4 The Claimant said that Mr Debres told him that he could apply for any other job. He had not made any such applications, either before or after his dismissal. He complained that once he was dismissed, he had not had access to "Inside Move", which he said provides many more vacancies than there were instore. However, Mr Issa confirmed that Inside Move is available publicly. In any event, this would not explain why the Claimant had failed to make applications while he was still employed.

7.5 I expressed serious concern that the Claimant, represented as he was by solicitors, had failed to make any investigation into potential roles he could do with the Respondent. He was unable to suggest a role or a branch at which he might work. I was not prepared to adjourn the hearing to another day, in light of the fact that the Claimant had had plenty of opportunity to deal with remedy, both beforehand and during the hearing itself, e.g. overnight between days one and two, while I was reaching my decision and during the brief adjournment I had given him.

7.6 In the circumstances, I concluded that the Claimant could not be reinstated because his job no longer existed in a form that he was prepared to do, because of the national change in hours; and he could not be re-engaged because there was no job brought to my attention which he could do. I could not have made an order that was compliant with the provisions of section 115, and it would not have been in keeping with the overriding objective to have adjourned the hearing so that the parties could return on a third day to deal with the re-engagement issue. The Claimant was clearly not happy with this, but I had given him ample opportunity to bring to the Tribunal the evidence required to make such an order, and it was no fault of the Respondent's that he had not.

7.7 I ordered the Respondent to pay a basic award of £1,121 to the Claimant, which takes account of the 5% contributory fault that I have found. His loss of statutory rights was put at £400, reduced to £380 again to take account of the 5% contribution; and he is to be paid his five weeks' notice of £1,180, without deduction. This is a total of £2,681.00.

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Employment Judge Norris

11 January 2019

Sent to the parties on:

14 January 2019

For the Tribunal: