



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Pendlebury

**Respondent:** VMS Solutions Limited

**Heard at:** Manchester

**On:** 24 October 2018

**Before:** Employment Judge Batten  
(sitting alone)

## REPRESENTATION:

**Claimant:** Ms L Pendlebury, Lay Representative

**Respondent:** Ms A Smith, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of constructive unfair dismissal is well-founded and succeeds.
2. This case shall proceed to a remedy hearing.

# REASONS

1. The claimant claimed constructive unfair dismissal arising from an allegation that he had stolen £2,000 from the respondent, for which he was suspended and subject to disciplinary proceedings. No disciplinary penalty resulted; however, the claimant resigned in response to his treatment and the allegation, which he said made it impossible for him to return to work. The respondent defended the claim and the matter came before the Tribunal for a one day hearing on Wednesday 24 October 2018.

2. The claimant was represented by his mother who has some trade union representation experience. The respondent was represented by Counsel, Ms Smith.
3. The Tribunal was provided with an agreed bundle of documents which had been compiled by the parties, together with witness statements. References in this Judgment to page numbers are references to the contents of the hearing bundle.
4. The claimant gave evidence himself and was cross examined. The respondent called as witnesses: Mr G Butler, its Managing Director; Ms H Ahmed-Chaudhry, its Quality Manager; Miss Holly Butler, formerly its Customer Liaison Manager; and Ms Jackie Lowndes, the Company Secretary. The respondent's witnesses all tendered written witness statements and were subject to cross examination.
5. This judgment is given with reasons because the case was listed for a one day hearing and the evidence and submissions of the parties were only concluded shortly before 4.00pm. There was insufficient time for the Tribunal to reach its judgment and accordingly judgment was reserved.

**The Issues**

6. The issues which the Tribunal identified as being relevant to the claim were discussed with the parties prior to the hearing and were agreed to be as follows:
  - 6.1 Did the respondent commit a fundamental breach of the claimant's contract of employment? In this respect, the claimant relies upon the implied term of trust and confidence which he says has been breached because of the allegation he faced and by the way of taking formal action against the Claimant without sufficient evidence to back up the allegation and by the way the disciplinary process was run.
  - 6.2 Did the claimant resign in response to a fundamental breach of contract?
  - 6.3 Were the actions of the respondent sufficient reason for resigning under the circumstances?
  - 6.4 Was the ACAS Code of Practice followed correctly by either party where appropriate?

**Findings of fact**

7. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they existed and the conduct of those concerned at the time. The Tribunal resolved any conflicts of evidence as arose on a balance of probabilities taking into account its

assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

8. The Tribunal's findings of fact relevant to the issues which have to be determined are as follows.
9. The claimant commenced employment with the respondent on 21 February 2012 as a Manufacturing and Production Operative. He worked in a low grade manual role in the respondent's organisation. From time to time the claimant was tasked to cover other people's work when they were away, including the work of the booking-in clerk who received and recorded goods coming into the respondent's business premises.
10. Within the bundle is the respondent's 'Material Control & Receiving Inspection Operating Procedure', which confirms that there is a procedure for receiving, identifying, verifying and controlling goods received by the company. The procedure's cope is stated to be that it covers raw materials and packaging materials which are delivered to the respondent for incorporation into customer contracts/orders. On the face of it, the procedure does not extend to everything that enters the respondent's premises, and not to cash or items outside of the production and despatch of customer orders. There is no mention in the document of the handling of personal items, or cash, directed to a particular individual and how those should be handled whether within or outside of the procedure.
11. On 14 March 2018, the claimant was covering the work of the booking-in clerk when he received a parcel from UPS delivery couriers. The parcel was one of several parcels received that day and was marked for the attention of Mr G Butler. The claimant signed to confirm receipt. The claimant did not unwrap or open the parcel but he removed the label in order to record the parcel on the respondent's system, either the computer system or a paper sheet. Whilst doing this, the claimant was interrupted by his manager, Mr Paul Taylor, who instructed the claimant to return to his substantive job in order to process tasks which were urgent. The claimant therefore left the parcel, together with other parcels, on the booking-in desk in the respondent's reception area. In the course of the day, other people used the booking-in desk or worked at or near it and noticed that there were 3 parcels on the desk at the time.
12. The next morning, 15 March 2018, the claimant was approached by Mr Taylor and was asked to look for a parcel addressed to Mr Butler which had arrived during the previous day. The claimant was unable to locate the parcel, because it was not on the desk where he had left the parcels from the previous day.
13. Later that day, 15 March 2018, the claimant was approached Holly Butler together with Mr Taylor, and was asked whether he had received a parcel addressed to Mr Butler during the previous day. The claimant was confused and said that he had not, whereupon he was shown a copy of a delivery receipt which had been obtained from UPS with his signature upon it. The

claimant then accepted that he had signed for the parcel in question as he had done for a number of other parcels received that day.

14. The claimant was asked what he had done with the parcel and he said that he had put it on the pile with the others, that he did not open any parcels although he removed the label in order to book it in and that he was not sure of the exact time when this all happened but he thought it was around dinnertime. The claimant explained that he had “got side-tracked”. The claimant further confirmed that he left the parcel next to the computer on the right-hand side with 2 other cylinders, and that he last saw it there at approximately 4.00pm and he also said that the electricians had been in to the respondent’s premises later on that day.
15. The claimant did not know what the parcel contained and had thought that the delivery had perhaps been a car part that he would need to book in. However, he soon heard rumours that it contained money in cash. In fact, the parcel contained £2,000 in cash.
16. Later that day, 15 March 2018, the claimant was suspended from work on full pay, pending an investigation into an allegation of “gross misconduct concerning the theft of a tube containing £2,000 in cash addressed to Graham Butler”.
17. The respondent gave the claimant a letter stating that his suspension did not constitute disciplinary action and did not imply any assumption that he was guilty of any misconduct and that the matter would be kept under review.
18. On 19 March 2018, Ms Holly Butler, the Managing Director’s daughter and the Customer Liaison Representative, commenced an investigation.
19. On 19 March 2018, Ms Butler interviewed Julie Stevens, the respondent’s cleaner, in the presence of Ms Ahmed-Chaudhry. Ms Stevens confirmed that she cleaned the desk on 14 March 2018 and she recalled that she saw 2 small tubes or rolls which she moved next to the printer and she piled the labels into one stack on the right-hand side of the desk. Ms Stevens finished work at 4.00pm.
20. On 20 March 2018, Ms Butler interviewed Gavin Thompson from Corgi Energy about who had been on site with him when the electrical works were undertaken on 14 March 2018. Mr Thompson confirmed that 2 engineers had been on site: Alex Wright and Eldon Platt; and that one of the electricians, Mr Wright, was left on site whilst the other electrician went out to the wholesalers. He also said that sometimes his team would have parcels delivered directly to a site, although they were not expecting to pick up a pre-delivered parcel on 14 March 2018. He was not asked what he had noticed or whether he had seen the parcel in question or whether they might have picked up anything by accident.
21. Later on 20 March 2018, Ms Butler, Mr Taylor and Mr Thompson spoke by telephone to Mr Wright and Mr Platt, the two electricians, to ask them if they

used the Stores desk and did they see a tube-shaped parcel to which they answered “no”, commenting that they only used the boiler room and had to move a lot of boxes and parcels out of the way to gain access to it.

22. Also on 20 March 2018, Ms Butler interviewed an employee of the respondent, Jessica Towers, in the presence of Jackie Lowndes. Ms Towers confirmed that she did use the stores desk on Wednesday 14 March 2018 to do some samples and print labels off. She confirmed she was at the desk for at least “a good half an hour” until about 4.00pm. She noticed there were 2 black cylinders on the desk and a third similarly shaped object which she assumed was with the two black cylinders and she described the wrappings. She also said that there was “stuff all over the desk”.
23. On 20 March 2018, the claimant wrote a statement for the respondent which asked to be placed “on record”. The claimant stated that he was unaware of the contents of the package until he was told by management on Thursday 15 March. He said that he believed the parcel was on the desk within the delivery storeroom when he left work on Wednesday 14 March at 4.30pm and that Mr Taylor and 2 electricians were still present as he left the building. The claimant asked the respondent to consider that there were other people around at the time who had access to the delivery area and who may have seen or know where the package might be or may have moved it. The claimant further confirmed that when he was first asked if anyone had signed for the package he was not told the correct delivery company and so was unable to confirm if he had signed for it or not, and he said that by being placed on suspension it made him think that the respondent believed he had some involvement with the package going missing.
24. On 21 March 2018, the claimant was interviewed by Holly Butler in the presence of Ms Ahmed-Chaudhry, the respondent’s Quality Manager. The claimant was asked whether he recalled anything about receiving the parcel on 14 March 2018 and he said not. He was asked to describe the parcel and he said the label was wrapped round it and there was black duct tape on it. He said that he did not know who the parcel was addressed to, and when asked to explain why he removed the label from the parcel he said that he was starting to try to book it in and that he usually removes the label to do so. The claimant also explained that he was distracted because he had pallets to get ready and “Linda shouting for more pots” and it was easier to get his main job done rather than waiting around in the delivery area. The claimant also confirmed that the two nylon cylinders had been in a brown envelope and had been received the day before and had been left on the desk. The claimant further confirmed that he left when Mr Taylor came in and that he had waited for Mr Taylor because the electricians were there. The claimant believed the parcel was on the desk when he left for the day.
25. The claimant further stated that, on 15 March 2018, he went straight to the mixing room because he was asked to do a mix and that he did not know the parcel was missing until Mr Taylor came to ask him about it. The claimant said that he thought the parcel contained a car part which he normally booked

in and that he did not look properly or know that it was for Mr Butler until Mr Taylor told him the next day. The claimant said that he did not think the parcel was important as normally Mr Butler would notify somebody of important deliveries. The claimant described how he put the parcel on the right side of the monitor on top of the labels and with the nylon pieces behind, and that the label was on the keyboard or near it the next day and not where he had left it.

26. Also on 21 March 2018, Ms Butler and Graham Butler interviewed Mr Taylor about the parcel. Mr Taylor said that he met the electricians in the warehouse before 4.30pm and that they were working in the boiler room looking at cables. Mr Taylor said he could not remember what was on the desk but that he saw the two black nylon cylinders on 15 March 2018 and that he had seen them days before, on different days. He thought the electricians finished work at 18:20 and that he left 5 minutes after the electricians. Mr Taylor also confirmed that when he told the claimant there was a parcel for Mr Butler, the claimant said, "It's there" and went to grab it from the side of the desk and then discovered it was not there. Mr Taylor said that he had then told the claimant they needed to find the parcel quickly. Mr Taylor also confirmed that the electricians were left to work in the cupboard and that he was hanging on for them, and he might have been outside for a bit but he was in full view of them.
27. On 26 March 2018, the respondent wrote to the claimant to invite him to a disciplinary hearing on 28 March 2018, to answer an allegation that he had "stolen a parcel addressed to Graham Butler containing £2,000 on 14 March 2018". The respondent's letter said that the basis for the allegation was that the claimant was covering the role of storeman and received and signed for the parcel from UPS, that the claimant had admitted removing the label from the parcel and then placing this on the desk, that the parcel was later verified as being seen by Jessica Towers at 4.00pm that day and the following day the claimant had stated that he knew the parcel was addressed to Graham Butler, but that he changed his story on 21 March 2018, when the claimant said he did not know it was addressed to Graham Butler until 15 March 2018 when Mr Taylor asked him where the parcel was. The letter says that it enclosed "a summary of the findings of the investigation" and an investigation report although no such documents appear in the bundle. The claimant was sent copies of the notes of interviews it had conducted and which were to be used at the disciplinary hearing.
28. The claimant asked for his trade union representative to attend the disciplinary hearing and the respondent agreed to rearrange the disciplinary hearing for 6 April 2018 to allow this.
29. On 6 April 2018, the claimant was told that the hearing would be chaired by Ms Ahmed-Chaudhry with Holly Butler taking notes. Ms Pendlebury accompanied the claimant at the meeting and objected because both Ms Butler and Ms Ahmed-Chaudhry had been involved in the investigation meetings and she did not consider them to be impartial. The ACAS Code of Practice was mentioned, following which the hearing was adjourned for a

short period. Ms Ahmed-Chaudhry sought to clarify that she had only been a witness to the investigation and had taken no other part in it, but Ms Pendlebury continued to object. Ms Pendlebury also said that the claimant was being accused of a criminal offence, not just gross misconduct, and that she considered that the respondent did not have enough evidence to accuse the claimant of stealing. A short discussion ensued and eventually the meeting was adjourned as the respondent agreed that an independent manager should chair the disciplinary hearing.

30. Subsequently, on 11 April 2018, the claimant was invited to a re-arranged disciplinary hearing on 17 April 2018, to be chaired by Ms Lowndes, the respondent's Company secretary, to face the same allegation.
31. The disciplinary hearing was due to take place at 3.30pm on 17 April 2018. That morning, Ms Lowndes reviewed the evidence within the disciplinary pack and formed the view that there was no evidence that the claimant had picked up or removed or stolen the package from the premises.
32. Ms Lowndes opened the disciplinary meeting by announcing that she had reviewed the evidence and that the company decided that no further disciplinary action would be taken against the claimant in relation to the allegation. Ms Lowndes said that the respondent would provide him with a letter confirming their decision. Ms Lowndes asked the claimant to return to work at 9.00am the following morning, 18 April 2018 when they would have a meeting about his returning to the shop floor in light of what had happened.
33. In response, Ms Pendlebury stated that the claimant would be claiming constructive dismissal due to the fact that he felt he had been "bullied for the misuse of power through the means of undermining, humiliating and degrading treatment resulting in a fundamental breakdown of trust and confidence." She said that the respondent had made it impossible for the claimant to return in light of the allegation and that the claimant would put in a grievance and would be passing the matter to ACAS to deal with and that they would be writing to Graham Butler by the end of the week.
34. The respondent confirmed its position in a letter that day, stating that it had decided that "... no disciplinary penalty would be imposed."
35. On 20 April 2018, the claimant wrote to Mr Butler to confirm his resignation and indicated constructive dismissal due to the accusation of gross misconduct for stealing a parcel when the evidence provided showed no grounds for a disciplinary process, that the investigation was flawed and was an attempt to find evidence against him rather than to investigate how or why the parcel went missing, that he was given insufficient notice to prepare for the disciplinary meeting and that the ACAS Code of Practice had not been followed and that the disciplinary hearing on 17 April 2018 was not a hearing because he was simply handed a letter saying the company had decided no disciplinary penalty would be imposed. He said there had been no apology for the worry and or for accusing him of a criminal offence, and that he felt he had

been bullied by management. The claimant also stated that he did not take or remove the parcel from the building and that being accused of it had resulted in a fundamental breakdown in trust. The claimant also said he felt unable to return to work because, if something else was to go missing, he believed “the fingers would be pointing at me again”.

36. On 24 April 2018, Mr Butler wrote to the claimant to confirm receipt of his resignation and that his last working day would be 17 April 2018. The claimant was to be paid in lieu of holidays. Mr Butler said that the company carried out an investigation because of the serious nature of the incident and that the investigating officer had concluded there was sufficient evidence to proceed to a disciplinary hearing. Mr Butler also said that the company had a zero tolerance policy for bullying and harassment and that the claimant had not made any attempt during the disciplinary process or previously to inform the respondent that he felt he was being bullied by the management team.

### The Law

37. A concise statement of the applicable law is as follows:
38. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates their contract of employment, with or without notice, in circumstances such that the employee is entitled to terminate their contract by reason of the employer’s conduct.
39. The case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 held that the employer’s conduct that gives rise to a constructive dismissal must involve a repudiatory breach of contract, or a significant breach going to the root of the contract of employment, showing that the employer no longer intends to be bound by one or more of the essential terms of the contract of employment. In the face of such a breach by the employer, an employee is entitled to treat themselves as discharged from any further performance under the contract, and if the employee does treat themselves as discharged, for example by resigning, then they are constructively dismissed. If, however, the employee delays in resigning after the employer’s breach, the employee may be taken to have affirmed the contract and, if so, may lose the right to claim that they have been constructively dismissed.
40. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in any contract of employment. In Morrow v Safeway Stores plc [2002] IRLR 9, the Employment Appeal Tribunal considered that a breach of the implied term of trust and confidence is “inevitably” fundamental.
41. In Lewis v Motorworld Garages Limited [1986] ICR 157 CA, a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a ‘last straw’ even though the last straw by itself does not amount to a fundamental breach of contract.



42. If the employee shows that they have been constructively dismissed, section 98 of the Employment Rights Act 1996 sets out a two stage test to determine whether that dismissal was unfair. First, the employer must show the reason for dismissal or the principal reason, and that reason must be a potentially fair reason for dismissal. The respondent has not in this case advanced a reason for dismissal.
43. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98(4) of the Employment Rights Act 1996, namely whether, in all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.
44. The issue of the reasonableness of a dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, and the Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439.
45. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct or capability. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.
46. The Tribunal also considered a number of cases to which it was referred by the respondent's Counsel in submissions on liability. The cases were:
- Robinson v Crampton [1978] IRLR 61,  
Fife & McGrouther Limited v Byrne [1977] IRLR 292

The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

### **Submissions of the Parties**

47. At the end of the hearing of the evidence, both parties made submissions.
48. Counsel for the respondent focussed on the claimant's conduct in signing for the parcel, handling it and removing the label and, in doing so, submitted that the claimant had responsibility for it but failed to follow procedure, left the parcel unattended, not booked in and not given to Mr Butler. It was submitted that it was reasonable for the respondent to suspend and investigate the claimant because it was more likely than not that the claimant was responsible for the loss. In addition, the respondent highlighted the claimant's

contradictory responses in the course of the investigation. The respondent argued that there was no breach of the claimant's contract of employment and that the claimant had not resigned immediately in response to the allegation of theft and that he could have raised a grievance about his treatment but chose not to do so.

49. The claimant's representative made submissions that the claimant had been singled out for investigation; he was very worried about the loss of the parcel/money and the fact that he was accused of stealing was distressing particularly when the evidence came out and did not fit the allegation. It was submitted that the claimant had tried to help the investigation. He had then wanted to resign when he received the first disciplinary letter with an allegation of a criminal offence but his mother/representative had made him go through the investigation and disciplinary process in the belief that to resign would look like he was guilty. The delay in resigning was therefore because of the duration of the disciplinary process and it was submitted that the claimant was not asked to return to work unconditionally but was required to attend a meeting and that he believed that the respondent still held him responsible for the loss of the parcel.

### Conclusions

50. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way:-
51. The allegation laid against the claimant in the disciplinary process was one of theft of the parcel and the cash inside it. That is a very serious allegation to make. However, on the investigation conducted and the evidence produced, the Tribunal considered that the respondent had no basis for making such a serious allegation. In the circumstances, the allegation of theft was capable of destroying trust and confidence.
52. In formulating the allegation of theft, the respondent relied on the fact that the claimant had changed his account of events and the whereabouts of the parcel when asked, as he was, by different people at different times. Such behaviour may raise suspicion but it does not amount to evidence of guilt. Individuals who are questioned about a matter that they know to be serious may feel nervous and under suspicion and may become confused or misunderstand what they are being asked. In this regard, the Tribunal took account of the fact that, in giving evidence, the claimant came across as an individual who could be easily confused and who lacked a full understanding of the matters he was being questioned about. Nevertheless the claimant struck the Tribunal as being at all times honest and truthful, as having been deeply hurt to be labelled as a potential thief and desperate to clear his name.
53. Counsel submitted that it had been reasonable to suspend and investigate the claimant. That may be so, but the basis for the suspension, as put in submissions, was the respondent's view that it was more likely than not that the claimant was responsible for the loss. The Tribunal considered that such a

view is not sustainable in light of the evidence gathered and the knowledge the respondent had about others being around or using the desk that day, coupled with the apparently chaotic state of the desk with “stuff all over the desk” and the fact that parcels were left there sometimes for days. There was in fact nothing to suggest that the claimant had “stolen” the parcel, the only link being that he had signed the receipt and removed the label with the intention of booking it in, through the respondent’s record system.

54. In the circumstances, the Tribunal considered that the best that could be argued was that the claimant had been careless with a job he had to carry out, but his actions must be seen in the context of the claimant’s manager calling him away and insisting he attend to urgent jobs elsewhere, when the manager knew what work the claimant was doing, and the evidence of witnesses to the fact that parcels sat on the desk sometimes for several days. The Tribunal considered that the respondent’s systems for booking in parcels and for ensuring that the booking-in process was completed upon receipt lacked rigour and that, together with the actions of the claimant’s manager, had all contributed to the loss of the parcel. The Tribunal found as a fact that the respondent had no procedure for the receipt of general or personal parcels and the procedure relied upon is not applicable to the circumstances of the parcel in question or to the receipt of large amounts of cash in unmarked and unannounced packets. The respondent’s rationale for and practice of receiving substantial cash payments in parcels or tubes via the post or a parcel delivery network, which led to the loss for which the claimant was held responsible as the employee signing receipt, was never properly explained to the Tribunal. The claimant happened to be the person who received and signed for the particular parcel without knowledge of its contents or importance to Mr Butler. The claimant was working at the booking desk for part, but not all, of the day in question – to present those circumstances as supporting the very serious allegation of theft was a step too far.
55. In the course of the respondent’s investigation, 2 employees were interviewed who had been at or worked at the desk on the day in question. A list of questions was prepared and delivered to each but there was little probing of the responses. The respondent’s cleaner saw nothing unusual, moved the parcels to next to the printer and tidied the labels into a pile. She recalled that 2 items were present – the time of her cleaning the desk is not recorded. Ms Towers was working at the desk for half an hour “until about 4pm” and recalled there being 3 items on the desk, that the claimant had pointed out 2 of them as being for Mr Butler and a third similar object which she was able to describe in some detail. The claimant said that he had left 3 parcels on the desk, that he had not returned to work on booking in items received that day, and that the 3 parcels were there after the time of the last ‘brew’ at around 4pm. The claimant also said that when the electricians arrived he rang Mr Taylor who came down to meet them and the claimant left. The questions asked of the electricians’ supervisor are not recorded but he said that his colleagues were on site and that the electricians were not expecting a parcel and would not pick up one unless they were expecting it. There were no questions about what he may have seen on the desk. The 2 electricians on

site were interviewed by telephone and asked if they had used the desk and seen a tube-shaped parcel. They said not, although they said they had to move a lot of boxes and parcels to gain access to the boiler room but they were not asked about the parcels they did move. Mr Taylor was not interviewed but had been around at the end of the day and at the time the electricians were in the building although he was not always with them. The evidence gathered tended to suggest that the parcel was on the desk until at least 4pm on the day, that others were around then and later, although there was no evidence that the respondent had cast its investigation wider than the claimant or sought to establish, and interview, everyone who had come by the desk at any time that day, Mr Taylor being an obvious candidate for interview because he had been to the desk to instruct the claimant to leave the parcels, and he was around at the end of the day. In addition, the respondent has clocking in procedures to determine who may have been around on the day in question together with CCTV which was not consulted.

56. The claimant was suspended before the investigation took place and the Tribunal formed the view that the investigation flowed from the respondent's assumption that the claimant had some involvement in the loss. In light of the fact that no other individual was investigated, the submitted view of the respondent which led to the suspension of the claimant, that it was more likely than not that the claimant was responsible, tends to support what the claimant's representative put forward in submissions, namely that the claimant was singled out for investigation. The same prepared questions were put to all those interviewed, despite that many of the questions were irrelevant to the circumstances of the individuals who were interviewed, and had the appearance of the respondent going through the motions of an investigation without really knowing what to look for. The Tribunal considered that the respondent adopted the approach that the claimant must be guilty and that it closed its mind to any other possible explanations or other employees.
57. In all the circumstances, the Tribunal considered that the claimant was unreasonably and improperly accused of having stolen the tube containing £2,000 without substantiation. Such a serious allegation, of criminal conduct, amounted to a fundamental breach, destroying trust and confidence.
58. The claimant's case is that the decision to embark upon a disciplinary process and the process itself were a fundamental breach of contract or part of a series of breaches. The Tribunal considered that, in light of the conduct of the investigation, focussing on the claimant, the progression to a disciplinary hearing on the evidence gathered is inextricably linked. The last act of the respondent in the disciplinary process was Ms Lowndes telling the claimant that the respondent would take no further disciplinary action against him in relation to the allegation. That act alone might not be a fundamental breach. However, following the case of Lewis, the Tribunal considered that the respondent's actions in raising the allegation of theft and pursuing a disciplinary process against the claimant amounted to a course of conduct which cumulatively amounted to a fundamental breach of contract, thereby entitling the claimant to resign when he did, even though the last straw, by

itself, did not amount to a fundamental breach of contract. The claimant therefore resigned in response to the respondent's fundamental breaches of his contract.

59. In reaching the above conclusion, the Tribunal took account of the respondent's submissions that the claimant had not resigned immediately in response to the allegation of theft, when it was first made, and that he chose not to resign in the face of the allegation. The claimant's evidence was that he fully intended to resign when he was told he was accused of theft but that his mother had persuaded him not to. The Tribunal considered that it was not unreasonable for the claimant to be guided by his mother or to take the view that a resignation might have the appearance of guilt to the respondent and therefore the claimant's resignation once the disciplinary process had been stopped by Ms Lowndes did not amount to any unreasonable delay.
60. The Tribunal took note of the precise words that Ms Lowndes used in making her announcement at the start of the disciplinary hearing on 17 April 2018. She had sensibly realised that the evidence did not show that the claimant had stolen the missing parcel and that it would be inappropriate to issue any disciplinary sanction for such. She therefore announced that "no further action would be taken". However, the Tribunal considered that a decision not pursue disciplinary action is not the same as the respondent saying it accepted that the claimant did not steal the parcel. There remains a doubt.
61. The claimant's case was that he felt he could not return to work for the respondent in light of what had happened. He was clearly distressed by events and the accusation laid against him. He pointed to the fact that there had been no apology for the worry he had been caused or for accusing him of a criminal offence without evidence, and that he felt he had been bullied by management. The Tribunal accepted the claimant's evidence that he had been very upset to be accused of theft, that everybody who worked for the respondent knew that the management held him responsible and that he felt unable to return to work because, if something else was to go missing, he believed "the fingers would be pointing at me again".
62. The respondent's explanation for its position was that there was not sufficient evidence to support the allegation, and so the disciplinary process was stopped. The Tribunal was mindful of the respondent's expressed view, that it was more likely than not that the claimant was responsible for the loss; the implication being that the respondent still considered that the claimant may be guilty. In that context, the Tribunal considered that it was reasonable for the claimant to be concerned that he might remain under suspicion and that fingers may be pointed at him in future such that he could not return to work. Nothing was done by the respondent to allay the claimant's fear in that respect.
63. On 24 April 2018, the respondent's Managing Director wrote to the claimant to confirm receipt of his resignation. Mr Butler repeated the view that the investigating officer had concluded there was sufficient evidence to proceed to

a disciplinary hearing, despite that subsequently Ms Lowndes had decided there was not. Mr Butler also made the point that the claimant had not complained about his treatment at any time. The Tribunal considered that the timing and manner of the announcement to stop the disciplinary process, coupled with the failure to offer any apology and the content and tone of Mr Butler's letter accepting the claimant's resignation all suggest that the respondent was not interested in securing the claimant's return to work and that it continued to believe that the claimant was to blame for the loss of the money.

64. In all the circumstances, the Tribunal has concluded that the respondent was in fundamental breach of the claimant's contract of employment. The claimant resigned in response to that breach and did not delay in so doing. The claimant was therefore constructively dismissed. The respondent has not pursued its case in terms of advancing any lawful reason for the claimant's constructive dismissal and accordingly the Tribunal finds that he was unfairly dismissed.
65. The case will proceed to remedy on a date to be fixed.

Employment Judge Batten

Date: 18 January 2019

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

22<sup>nd</sup> January 2019

FOR THE TRIBUNAL OFFICE

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