EMPLOYMENT TRIBUNALS

Claimant **Respondent**
MR. S. LARRIER V **SUPERDRUG STORES PLC**

Heard at: London Central **On: 5 & 6 February 2019**

Before: Employment Judge Mason

Representation
For the Claimant: Ms. M. Grell, counsel
For the Respondent: Mr. N. Caiden, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

The Claimant was not unfairly dismissed and his claim for unfair dismissal is dismissed.

[The Remedy Hearing provisionally listed for 5 April 2019 is vacated]

REASONS

Background and issues

1. The Claimant was employed by the Respondent for 18 years as a Sales Adviser. On 13 March 2018, he was summarily dismissed for (alleged) theft of company stock. By a claim form presented on 4 June 2018, the Claimant brought complaints of unfair dismissal and race discrimination. The Respondent defended the claims by ET3 on 22 September 2018. At a Preliminary Hearing (Case Management) before EJ Norris on 17 October 2018, the Claimant withdrew the race discrimination complaint.

2. The only remaining complaint is unfair dismissal. At the Preliminary Hearing on 17 October 2018 EJ Norris, with the agreement of the parties, identified the issues to be

determined by the Tribunal which the representatives confirmed to me remain the same. The issues therefore are as follows:

3. Unfair Dismissal*:*

3.1 What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason under s.98(2) Employment Rights Act 1996 ("ERA"). It must prove that this was the reason for dismissal.

3.2 Did the Respondent have a genuine belief in the Claimant's misconduct?

3.3 Was that based on a reasonable investigation?

3.4 Did the Respondent follow a fair procedure in dismissing the Claimant? The burden of proof is neutral but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and these are identified as follows:

(i) There was inadequate investigation and the Respondent did not have a reasonable belief in the Claimant's guilt.

(ii) Specifically, in the investigation, the Claimant had a witness who attended the disciplinary hearing but he was not allowed to use that witness as he wished. The witness was Mr. Tony Cheung. No questions were asked of Mr. Cheung.

(iii) The cashier who was on duty at the time of the alleged misconduct (Lily) was also not present at the disciplinary hearing.

3.5 Was it reasonable for the Respondent to treat the reason as sufficient to dismiss the Claimant, having regard to its size and administrative resources? In other words, was dismissal within the band of reasonable responses open to a reasonable employer?

3.6 If the dismissal was unfair, did the Claimant contribute to the dismissal by his conduct, and, if so, to what extent (expressed as a percentage)?

3.7 If the procedure was unfair, does the Respondent prove that, if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event? And/or to what extent (expressed as a percentage) and when?

4. Other matters

If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

Procedure at the Hearing

5. I agreed with the representatives that if the Claimant succeeds, determination of his losses would be dealt with at a separate Remedy Hearing and we agreed a provisional date for a Remedy Hearing.

6. I was provided with a joint bundle of documents (1-129). Any reference in this Judgment to [x] refers to page [x] in the bundle. During the Claimant's verbal evidence, I also viewed CCTV footage lasting around 4 minutes taken on 26 January 2018.

7. On the first day of the Hearing, having established the issues, I retired to read the documents and witness statements. At Ms. Grell's request, and with Mr. Caiden's agreement, the Claimant gave his evidence first. Ms. Grell mentioned that the Claimant has a stammer and I readily agreed to allow him more time to answer questions and give breaks as required; in fact the Claimant gave his evidence fluently if a little too fast at times. I then heard from the Respondent's only witness, Mr. Victor Nwosu; Mr. Nwosu is Store Manager of the Fenchurch Street store and conducted the disciplinary hearing and made the decision to dismiss. The Claimant provided a brief written statement from Mr. Tony Cheung but as the statement is unsigned and Mr. Cheung did not attend, I explained this carried little evidential weight. On the second day, both representatives provided helpful written submission and made verbal submissions. I reserved my decision which I now give with reasons.

Findings of fact

8. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.

9. People involved or referred to in this case (in alphabetical order) are as follows:
   - Angel Cabrera ("AC"): Assistant Store Manager, Islington.
   - Tony Cheung ("TC"): Sales Adviser, Islington.
   - Reema Begum ("RB"): Assistant Manager, Fenchurch Street.
   - Shamara Begum ("SB"): Beauty Specialist, Islington.
   - Scott Lewis ("SL"): Store Manager, Islington.
   - Laclan Nazari ("Lily"): Fragrance Adviser, Islington.
   - Victor Nwosu ("VN"): Store Manager, Islington.
   - Kim Waite ("KW"): Regional Security Manager

10. The Respondent is the UK's second largest health and beauty retailer and operates a network of stores across the UK and the Republic of Ireland. The Claimant was employed by the Respondent as a Sales Adviser at its branch in Islington. His employment commenced on 24 January 2000; the parties agreed this is the correct date at the Tribunal hearing. He worked 12 hours per week; his shifts were 8.00 am until noon on Mondays and Wednesdays and from noon until 4.00 pm on Fridays. His duties included serving on the till, helping on the shop floor and also in the warehouse. On 13 March 2018 he was dismissed without notice on grounds of gross misconduct.

11. The Islington store is classified by the Respondent as a "red" store because it suffers more than most from "stock shrinkage" (i.e. theft) in particular of beauty products. I accept VN's evidence [w/s 40] that the Respondent "*places the highest importance on stock control and minimising theft*" and has to treat any instance of theft "*very seriously*". CCTV is in operation at the store.

12. Claimant's terms and conditions of employment

12.1 The Claimant's key terms and conditions are set out in a Contract of Employment [48-56] dated 21 September 2009 [48-56]. Paragraph 11 provides that the Claimant must comply with disciplinary rules to be found in the Policies and Procedures Manual and sets out a right of appeal against disciplinary action.

12.2 The Respondent's Disciplinary Procedure (undated) [extracts 33-40] sets out (amongst other things):

(i) the procedure to be followed with regard to an investigation prior to a disciplinary hearing;

(ii) the procedure to be followed at the disciplinary hearing itself;

(iii) the various outcomes ranging from verbal warning to summary dismissal;

(iv) examples of offences likely to be deemed gross misconduct resulting in summary dismissal including "*Theft of property, goods, cheques, vouchers or cash belonging to us or employees"*; and

(v) the right of appeal against any disciplinary decision.

12.3 The Claimant was taken to these documents on cross-examination and confirmed that he understood that theft (including paying less than the correct price) was an act of gross misconduct and could lead to dismissal.

13. It is not in dispute that the Claimant had a completely clean disciplinary record prior to his dismissal. Sometime in 2000, (in his words w/s 6-8) he witnessed a theft in progress at the Islington store; he and another employee gave chase and retrieved the stolen items. On another occasion, in about 2007, he was assaulted at work by thieves. The Respondent has not challenged these assertions and I therefore accept these events occurred. I also accept that these incidents would have been formally noted by the Respondent.

14. The Respondent sometimes places discounted beauty products in a basket at the end of the beauty aisle. This is called the "dumpbin". I accept VN's evidence that full-size (reduced price) products were also in the dumpbin and had a barcode.

15. On **26 January 2018**, the Claimant says he had a disagreement with another employee, Lily, regarding a proposed purchase by him of some perfume. I accept this to be the case; whilst the Claimant does not mention this particular disagreement in his witness statement, he says "*she always had issues*" with him [w/s 21] and the Respondent has not challenged this.

16. On **26 January 2018**, at the end of his shift, the Claimant purchased some goods at the Islington store and was served on the till by Lili. He presented at the till two make up pouches (or bags) containing beauty products. The Claimant has not challenged the veracity of the till receipt for the purchase of the pouches [59] provided by the Respondent. This shows two items each described as "B. GIFT" were purchased at the price of 37 pence each, total 74 pence; the cashier was Lily; the time was 16.21 on 26 January 2018. It is common ground that the Claimant paid 37 pence for each of the two pouches and did not pay anything extra for the contents

17. The following facts are not in dispute:

17.1 The pouches were in the "dumpbin". They had been there for about a month (Claimant's verbal evidence).

17.2 A photograph of one of the pouches [76A] shows a label attached with a barcode listing free contents of 5 sample (or miniature sized) beauty products including lipstick and eye shadow. In verbal evidence, on cross-examination, he confirmed that, in accordance with the label on the pouches, the contents of the pouches should have been samples (or miniatures), not full-size products

17.3 The pouches were reduced in price because they did not contain the full contents as shown on the label (i.e. 5 samples) and if they had contained all the samples, they would have been full price.

17.4 There was no written guidance given to staff regarding this promotion.

17.5 The sample sized products were not available for individual sale and did not have a barcode.

17.6 Full size products have their own barcode.

18. The Claimant worked in the usual way between 26 January 2018 and 2 February 2018.

19. On **2 February 2018**. Lily wrote as follows [64]:

> "*I Laclan Nazari* [Lily] *have been working at Superdrug Chapel Market branch as a Fragrance Adviser since 26th October 2016.*
> *On the 26 January 2018, I was serving [the Claimant] at my till, which was till 8 and he was buying a B. product make-up bag. The shape of the make-up bag was bulky and abnormal. So I opened it to see inside and saw that there was more than one product inside. I questioned [the Claimant] about this, asking him how comes there are so many inside, usually there is one or two things maximum and he replied "Don't worry about it, they are going to throw it all away at the end of the day". I accepted, taking his word and completed the transaction.*
> *Out of curiosity and for my own information, I mentioned this to the Assistant Manager and that was when I had realised the impact of what had happened".*

20. KW was appointed to investigate and met with the Claimant on **2 February 2018**. SL attended the meeting as note taker. The manuscript notes of that meeting [61-64] were provided to the Claimant who signed to confirm that he had read the notes and that they were an accurate record of what was discussed [61]. The meeting lasted from 12.10 until 12.35. It was clear that the reason for the hearing was investigation of alleged theft of company stock. The Claimant was asked about his purchase of the two pouches which had been in the "dumpbin". SL explained that when the pouches came into the store in December 2017, they only contained one beauty item and so were priced at 49 pence and then reduced to 37 pence. The Claimant said there had been 3 items inside. KW asked him if he had opened the pouches and put stock in them; he replied: "*they was mashed up so I changed th*em".

21. The Claimant was then suspended on full pay and KW wrote to the Claimant on **6 February 2018** [65] confirming his suspension due to an alleged act of gross misconduct namely "*theft of company stock*". The Claimant confirmed in verbal evidence that he knew this was a serious allegation which could lead to his dismissal.

22. The Claimant wrote to the Respondent (letter undated) [66] protesting against his suspension and pointing out that he had been employed for 18 years; this letter is date-stamped as received **14 February 2018**.

23. VN was appointed to conduct the disciplinary hearing. VN is store manager of the Fenchurch Street Store and had never met the Claimant. He reviewed the notes of the investigation meeting [61-63], Lily's statement [64] and looked at the CCTV footage.

24. On **19 February 2018**, VN wrote to the Claimant [67] inviting him to attend a disciplinary hearing on 28 February 2018. Again, the nature of the alleged gross misconduct was specified as theft of company stock. VN advised that CCTV evidence would be available to view at the disciplinary hearing and that the Claimant had the right to be accompanied. The hearing was rescheduled to 8 March 2018, at the Claimant's request, to allow his "*chosen companion*" to attend [68]. It was then rescheduled again to 12 March 2018 because his "*chosen companion*" was on holiday. The Claimant did not at any time correct the Respondent's understanding that TC was to attend the disciplinary hearing in the capacity of his companion.

25. The manuscript notes of the first day of the disciplinary hearing on **12 March 2018** [70-80] were provided to the Claimant who signed to confirm that he had read them and that they were an accurate record of what was discussed [70]. The notes show:

25.1 The manager conducting the hearing was VN and RB took notes; TC was noted to be the Claimant's "*accompanying individual*"; the hearing lasted from 11.06 to 12.51 [70].

25.2 The Claimant said he picked the products from the dumpbin "*in camera view*" [71].

25.3 When asked what was in the pouches, he did not directly answer the question and replied:
""I was told it was 74p. I was surprised it was so cheap. I know you pay for products individually. They didn't serve me properly. I was shocked it was so cheap. I opened bag – 3 items. Didn't like what was in there – so I changed them. Changed certain things". [71]

25.4 VN asked the Claimant why he put stuff in the pouches; the Claimant replied:
"*Bag explains what you should get in there but they weren't in there so I put them in myself. They should've called management*" [71].

25.5 The Claimant produced both pouches and VN took a photo. [In verbal evidence at the Tribunal hearing, the Claimant accepted that the pouches contained at least one full-sized product and that the contents did not match the items listed on the labels; he said that the reason full-sized products were in the pouches was because that was what his mother gave him when he asked her for the pouches; however, he did not give this explanation at the disciplinary hearing].

25.6 The Claimant said he had selected the "*best quality*" for his mum [72]. He said "*in one bag there was stuff in there and in the other there wasn't so I put stuff in there*" [72].

25.7 The Claimant said there was no barcode on one of the pouches [73].

25.8 He was asked why he didn't ask anyone if he was unsure and replied: "*It's not my responsibility as a customer. That's her fault. She should've checked."*

25.9 He denied that when he went to pay for them Lily commented that the pouches looked bulky and he denied that he had said to Lily that "*it doesn't matter as its going to get thrown away anyway*". He said she had asked him who they were for and he had told her they were for his mum.

25.10 He repeatedly blamed Lily. He said if Lily knew that the incorrect products were in the pouches, she should have called someone - *"she didn't do her job properly*" [73]. He later said that Lily should have checked it and "*It's not a customers fault. She should've called someone*." [74] and "*I thought she knew what she was doing. Why did she take so long to realise something was wrong?"* [76] and that it was "*Lily's job"* [76]

25.11 VN asked the Claimant if there was anything he wanted to ask; the Claimant explained about his earlier disagreement with Lily [73].

25.12 He was asked how many products he put in the pouches; he replied "*one bag had 2 and one had 3*" [73].

25.13 At 11.44 VN adjourned to look again at the CCTV with RB. The hearing resumed at 11.50 and VN advised the Claimant that he was "*certain its more than 3 items*" [74]. The Claimant replied: "*I told you I changed the goods. How come she [Lili] didn't get investigated*?". He said he put in the bag what he wanted for his mum. He thought it was 6 products but his mum told him it was 5.

25.14 He said he was only part-time and "*not sure of everything*" and that he had asked TC and SL but no one was *"sure how much should be in the bag*" [75].

25.15 VN said: *"They were "big" products*"; the Claimant replied "*They were in the reduced dumpbin. I didn't look at labels. I got what I thought should've been in the bag. I just changed the colours.*" [75]

25.16 The Claimant then viewed the CCTV footage which lasts about 4 minutes. The Claimant said the CCTV footage only showed him putting 3 items in the pouch [76].

25.17 At 12.51, VN adjourned the hearing to the following day.

26. I accept VN's evidence [w/s 23-24] that during the adjournment, he made enquiries to be "*absolutely sure what items the pouches should have contained*". I accept that he obtained verification from Head Office that the pouches originally contained all 5 samples as shown on the label and had been sold at full price (£4.99) and that by 26 January 2018 they had been reduced to 37 pence as they only contained 1 or 2 samples.

27. The notes of the second day of the disciplinary hearing on **13 March 2018** [77-80] were provided to the Claimant who again signed to confirm that he had read the notes and that they were an accurate record of what was discussed [77]. The notes show:

27.1 The disciplinary hearing manager was again VN and RB took notes; TC was again noted to be the Claimant's "*accompanying individual*"; the hearing lasted from 11.10 to 12.24 [77].

27.2 VN said he had talked to HR and others and had been told that there were only one or two items in each pouch, hence the price reduction. VN asked the Claimant why he did not speak to the store manager SL. He replied:
"*I saw goods, Chose what I wanted. Thought Lily knows what she's doing. She should've looked. Bag should get checked by cashier. [SL] is always busy. No one was around. Lily should know what she's doing*" [78].

27.3 VN put it to him that as a member of staff he should know what is right and what is wrong. The Claimant replied:
"*Make up always needs to get checked on till. Why should I go out my way I was in a rush that day as well. It's so long ago I don't remember*" [78].

27.4 VN put it to him that the things that he took out of the pouches were small and the items he put in were big. He replied: "*I put the best things in for mum*" [78]

27.5 At 11.17 VN adjourned the meeting and reconvened at 11.50. I accept VN's evidence [w/s 27-29] that during the adjournment, he spoke to AC and SL who confirmed that the Claimant would have known what should be in the pouches, that he knew that they were reduced because they did not contain all the items and that AC and SB were in store at the time and the Claimant could have asked if he was unsure.

28. After the adjournment VN told the Claimant he had spoken to HR and to various people who had confirmed that what was in the pouches were samples [78].

28.1 VN advised the Claimant that as a staff member, he should have asked someone - it was his responsibility to be careful particularly as the Islington store was a "red" store which suffered with "shrinkage" of stock. The Claimant responded that it was not his responsibility and repeated that the "*cashier should have checked*" [79].

28.2 VN again stated: *"Products came out bag and different went in. Your word against numerous people*". The Claimant replied: "*There was only one miniature in one and nothing in the other".*

28.3 VN said "*What you put in had barcodes*"; the Claimant replied "*No one knows what was meant to be in there"*. [79]

28.4 VN adjourned the meeting at 11.58 and having spoken to HR, resumed at 12.16. VN then advised the Claimant that he was being dismissed and that he had the right to appeal within 5 days of receipt of a letter confirming the decision. He was asked if he had anything to add and said that he thought it was unfair and "[Lily's] *still working" "[Lily's] done the mistake and she's still working" [80].*

29. In addition to the manuscript notes, there are transcribed notes of a recording of the disciplinary hearing [80a-80t]. These are not disputed but I have placed little weight on them as they are difficult to comprehend in view of the frequent and I was taken only to p80s during the evidence. At the end of the meeting, the tape continued running and the notes show that an "*unknown female*" entered the room and spoke to the Claimant; the "*unknown female*" was critical of VN and said that VN had said the Claimant was "*going to get the sack*" [80s]. At the Tribunal hearing, the Claimant identified the "*uknown female*" as Loretta, Assistant Manager. VN denies that he was

not impartial and I accept this given that VN did not know the Claimant prior to the disciplinary proceedings and I place no weight on this part of the recording as Loretta did not attend the hearing and has not provided a witness statement.

30. With regard to the CCTV footage, which I viewed at the Tribunal hearing, this shows the Claimant at the dumpbin for a period of around 4 minutes. The Claimant appears to be looking into the dumpbin and bending slightly to reach into it. I accept that he is seen "rummaging" in the dumpbin for the full length of the footage but it is unclear what he is putting in or taking out of the pouches; however, on cross-examination, the Clamant accepted the CCTV shows him putting things into a pouch. At the Tribunal hearing, the Claimant said in the footage he is holding his phone in his right hand which could have been mistaken for a flat pouch; however, this was not said at the investigatory meeting or the disciplinary hearing and does not appear in his witness statement.

31. I accept VN's evidence [w/s 41] that, in reaching his decision to dismiss the Claimant, he considered:

31.1 The Claimant's length of service and clean disciplinary record. He did not request the Claimant's full HR records but the Claimant did not ask him to do so. He accepted in verbal evidence that the theft was out of character in the context of an 18 year clean record.

31.2 In his view, this was deliberate theft, not a mistake; after 18 years as a Sales Advisor, the Claimant knew that he should not replace or add products and would not be able to purchase full-sized products for 37 pence.

31.3 The Islington store was a "red" store with "high shrinkage".

31.4 A lesser sanction was not appropriate because the Claimant refused to take responsibility for his actions and repeatedly blamed Lili. Furthermore, his account was misleading and VN concluded he had lost trust in him and that he was likely to steal again.

32. At the Tribunal hearing, I asked the Claimant to clarify how many products were in the 2 pouches before he changed the contents; he told me that there were originally 3 samples in one bag and the other bag was empty. In his witness, statement, the Claimant says "*There was a damaged item in one of the bags which I took out to swap with the same item, but in a better condition that was loose out on the tray for sale*" [w/s 20]. However, on cross-examination, he said he put 2 products in one of the bags and 3 in the other. He said he changed some things as they had been used or he didn't like the colours. He accepted that if products were in the pouch that were not meant to be in there, this was theft; therefore regardless of the absence of written procedures and the fact the Claimant worked part-time, he accepted that he knew he should not add or swap items in the pouches. However, he maintains his innocence and says that Lili should have checked.

33. On **22 March 2018**, VN wrote to the Claimant [82-83] confirming that he was summarily dismissed for gross misconduct for theft of company stock with effect from 13 March 2018:

33.1 VN rehearsed key parts of what the Claimant had said at the investigatory meeting and at the disciplinary hearing and concluded:

> *"After considering all the evidence provided to me I have a reasonable belief that the act of gross misconduct has occurred and you have replaced the miniature product versions for full size products and added extra products to the bags. I have taken into account your length of service also my reasonable belief that you gave deliberately misleading testimony and demonstrated lack of accepting responsibility during the disciplinary process, which seriously undermines the company's trust and confidence in you*"

33.2 VN specified that the Claimant had 5 working days from the date of the letter within which to appeal.

34. The Claimant says he appealed and relies on a letter dated **15 March 2018** [81]. However, I find that the Respondent did not receive this letter; I accept VN's evidence that he was not at any time advised by the respondent that the Claimant had appealed and it is reasonable to assume that he would have been made aware and consulted by HR if this letter had been received..

35. The Claimant did not appeal after receipt of the letter dated 22 March and I find that, on the balance of probabilities, the Claimant did not in fact validly appeal against the decision to dismiss.

The Law

Unfair dismissal

36. **Section 98 (1) ERA:**

In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or if more than one the principal reason for the dismissal); and

(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

37. **Section 98(4) ERA:**

37.1 Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.

37.2 In accordance with the tests set out in **British Home Stores Ltd v Burchell [1980] ICR 303** the Tribunal must consider:

(i) Did the Respondent believe the Claimant was guilty of misconduct?

(ii) Did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and

(iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

37.3 Range of reasonable responses

(i) When assessing whether the **Burchell** tests have been met, the Tribunal must ask whether dismissal fell within the range or band of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure including the investigation (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**). The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

(ii) The starting point should always be the words of section 98(4) themselves and in applying the section the Tribunal must consider the reasonableness of the employer's conduct. The tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine, in the particular circumstances of each case, whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking.

38. Compensation

38.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA p**rovides for a compensatory award**:** "*... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

38.2 Contributory conduct:

(i) **Section 122(2) ERA** states:
"*Where the tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*"

(ii) **Section 123(6) ERA** states:
"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".

(iii) Before making any finding of contribution:

a. A claimant must be found guilty of blameworthy or culpable conduct; that enquiry is directed solely towards the conduct of the claimant and not towards the conduct of the employer or other employees.

b. For the purposes of a contributory fault reduction the employee's conduct must be known to the employer at the time of dismissal and have been a cause of the dismissal.
c. Once a finding of blameworthy or culpable conduct is made the Tribunal must make a contributory fault reduction, the proportion of the reduction being such amount as it considers to be just and equitable.

38.3. Mitigation:

Section 123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

38.4 **Polkey**:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

Submissions

Respondent's submissions

39. Mr. Caiden submits that the Claimant's claim must fail for the following reasons:

39.1 The Claimant was dismissed for a potentially fair reason, namely conduct (s98(2)(b) ERA):

(i) The disciplinary policy and terms and conditions defines gross misconduct and examples include theft.
(ii) It was made clear to the Claimant from the outset that the allegation was theft of company stock and this has never varied.
(iii) There is no evidence that points to any other reason.
(iv) The Respondent honestly believed and dismissed the Claimant for theft and the burden under s98(4) is plainly met.

39.2 The Respondent had reasonable grounds for believing the misconduct having conducted a reasonable investigation and a 2 day disciplinary hearing:

(i) The Respondent had a witness statement from Lily [64], the till receipt [59] CCTV evidence, the pouches (and contents) which the Claimant provided at the disciplinary hearing.
(ii) The Claimant was interviewed at the investigatory and disciplinary hearings and admitted nearly all pertinent facts; he admitted changing products in the pouches; he

did not deny at the disciplinary hearing that the contents did not match the label nor that there were full-sized (bar coded) products in the pouch.

(iii) The suggestion that VN should have looked at CCTV of the till was not in the list of issues agreed at the PH or in the pleadings or the Claimant's witness statement. In any event, this is not relevant as the CCTV footage would not show if both pouches had a barcode.

(iv) There was no need for VN to request the Claimant's employment records; VN had regard to the Claimant's length of service and clean record.

(v) The Claimant's account at the disciplinary hearing was inconsistent; he did not engage with the questions asked and blamed Lily.

(vi) There was no obligation on the Respondent to require Lily's attendance at the disciplinary hearing (**Rhondda Cynon CBC v Close [2008] IRLR**). In any event, nothing turned on her evidence as all key facts were admitted and the verbal exchange with Lily at the till is irrelevant.

(vii) His claim that he was not allowed to use TC as a witness fails as TC was in fact a companion and there is nothing to indicate that the Claimant wished to call him as a witness. In any event, TC did not witness the alleged theft.

(viii) VN was impartial; the evidence of the "unknown female" in the transcript is effectively a hearsay statement.

39.3 The procedure was within the band of reasonable responses:

(i) The procedure was in accordance with the ACAS Code:

a. The Claimant was informed of the charge and the need to attend a disciplinary hearing, he had ample opportunity to respond and submit evidence;

b. The Claimant was offered and exercised the right to be accompanied.

c. The Claimant was informed of the decision to dismiss and of the right of appeal.

(ii) The Claimant has not advanced any real case in terms of procedural flaws in his witness statement other than use of TC as a witness and Lily not attending the hearing but these aspects do not render the procedure unfair for the reasons set out above.

39.4 Dismissal was within the reasonable band:

(i) The Respondent found dishonesty.

(ii) The Claimant repeatedly gave differing accounts; he was untruthful and evasive.

(iii) The store was one where there were issues of "shrinkage".

(iv) He did not accept responsibility for his actions and kept blaming Lily. He did not aks others if he was unsure. There was no evidence that he would take correct action in the future.

(v) It was entirely within the band for the Respondent to conclude that the Claimant was dishonest and that trust and confidence had been destroyed.

(vi) The Claimant's length of service was considered but this did not sufficiently detract from the above.

39.5 If the dismissal was unfair, compensation should be nil or minimal given that the Claimant significantly contributed to his own dismissal (100%) and/or he would have been dismissed in any event (**Polkey**).

Claimant's submissions

40. Ms. Grell submits as follows:

40.1 The Claimant accepts that the reason for his dismissal related to conduct, which is a potentially fair reason.

40.2 It is accepted that prior to the disciplinary hearing there was limited prima facie evidence of misconduct in the form of the letter from Lily [64].

40.3 However, VN could not have thereafter genuinely believed that the Claimant had committed gross misconduct:

(i) The CCTV was inconclusive and Lily gave no indication in her letter that she believed the Claimant had committed theft.

(ii) VN's belief was not reasonable as it was not based on a reasonable investigation; it was not a conscientious investigation as required when the consequences are particularly serious for an employee (**A v B [2003] IRLR 405 and Ball v First Buses Ltd 3201435.2017 ET November 2018);** the failings were as follows:

a. failure to call Lily as a witness; the dispute with Lily was relevant and at the heart of the matter; she was the key person involved;

b. failure to consider relevant CCTV evidence specifically of the Claimant's exchange with Lily at the till which would have shown if one or both pouches had barcodes if VN had "zoomed in";

c. failure to call TC as a witness;

d. failure to request the Claimant's employment records from HR which would have disclosed the previous occasions when the Claimant had prevented theft and established his good character; they should at least have been considered [**A v B** para 60);

e. failure to make any enquiries into whether any formal written guidance about the discounting promotions policy had been provided to staff.

40.4 VN was not impartial as evidenced by the comments of the "unknown female" [Loretta] at the end of the disciplinary hearing. This transcript of the recording at the disciplinary hearing was provided by the Respondent and its inclusion in the bundle has not been disputed. Also at one point, VN says it is "*our word against yours*" which shows his state of thinking.

40.5 It was not reasonable for the Respondent to treat the reason as sufficient to dismiss the Claimant having regard to its size and administrative resources:

(i) The Respondent is a large company with significant administrative resources.

(ii) The Claimant's dismissal did not come within the band of reasonable responses because:

a. In accordance with **Ball v First Buses Ltd**, it is outside the band of reasonable responses for an employer with the administrative resources of the Respondent not to make further enquiries before dismissing the Claimant given his long-standing and unblemished service.

b. The investigation was not thorough and a thorough investigation would have established that there was considerable confusion and lack of transparency around the discounting promotions process.

c. The Claimant's long and clean disciplinary record means no reasonable employer would have dismissed him.

d. The Claimant did not believe he was being dishonest (**Ivey v Genting Casinos [2017] UKSC 67).** The Claimant paid for his items and therefore did not believe he had committed theft. As a part-time employee, he was not always aware of information surrounding each promotion and relied on Lily as the cashier to alert him to any problems when he went to pay at the till.
e. His explanations were not inconsistent; some items were broken and some replaced.
f. He cannot show remorse for something he does not believe he has done.

40.6 **Contributory fault**: The Claimant did not contribute to his dismissal because he did not commit theft. He did not have the required mental element of dishonesty in accordance with **Ivey v Genting Casinos** (paras 39-42). He is a decent person and his actions were reasonable; he paid for the items.

40.7 **Polkey:** Even if the Respondent had adopted a fair procedure, the Claimant's dismissal would have been unfair. No gross misconduct would have been found to have been committed by the Claimant if a fair procedure had been followed and he would have been given a verbal warning at most.

Conclusions

41. Applying the relevant law to the findings of fact to determine the issues, I have concluded that he was not unfairly dismissed for the following reasons.

42. The Respondent has shown that the reason for the Claimant's dismissal was a potentially fair reason, specifically his conduct (s98(1) ERA). This is accepted by the Claimant.

43. I have concluded that the dismissal was procedurally fair:

43.1 The initial investigation:

(i) The investigation was initiated as a result of Lily mentioning the transaction on the 26 January to an Assistant Manager; Lily then wrote the letter on 2 February 2018 [64]. Ms. Grell accepts Lily's letter was limited prima facie evidence of misconduct and therefore the investigation meeting on 2 February 2018 was justified.
(ii) The investigation meeting was conducted by KW and the Claimant raised no objection to her suitability.
(iii) The Claimant took no issue with the accuracy notes of that meeting which he signed as accurate [61].
(iv) Thus far, the investigation was sufficiently thorough to fall within the band of reasonable responses of a reasonable employer as was the decision to suspend the Claimant (on full pay) and to progress to a Disciplinary Hearing.

43.2 The Disciplinary Hearing ("DH")

(i) VN conducted the hearing; he was of sufficient seniority and experience to do so and I have found that he was impartial (para. 29 above). I am not persuaded by Ms. Grell's submission that his impartiality was undermined by VN saying to the Claimant it is "*our word against yours*"; he used this expression once in the context of a long disciplinary hearing.
(ii) The Claimant was given due notice of the hearing which was postponed twice to allow his companion (TC) to attend.

(iii) It was clear to the Claimant that the allegation was "*theft of company stock*" and that this could result in his dismissal; he was therefore aware of the gravity of the situation.
(iv) He was given copies of the investigation notes and Lily's letter prior to the hearing and watched the CCTV footage at the disciplinary hearing.
(v) He was given the opportunity to state his case; the meeting took place over two consecutive days and lasted in total just under 3 hours.
(vi) I do not accept that there was any requirement to call Lily to the disciplinary hearing. She had provided her account in her letter and as Mr. Caiden points out there is no general requirement to call a witness to a disciplinary hearing.
(vii) I do not accept that there was any failing on the part of the Respondent with regard to TC's role at the disciplinary hearing. It was entirely reasonable for VN to assume that TC was present not as a witness but to accompany the Claimant in accordance with the Respondent's procedure [33] and the ACAS code:
a. The disciplinary hearing was postponed twice to allow the Claimant's "chosen companion" to attend [67 and 68] and TC was the only person who attended with the Claimant.
b. TC did not say anything at the disciplinary hearing and did not provide a written statement at that time.
c. The Claimant signed the notes in which TC was noted to be the Claimant's "*accompanying individual*" [70].

In any event, there is no suggestion that TC witnessed the Claimant purchasing the goods on 26 January, only the disagreement with Lily beforehand and VN did not taken issue with this.

43.3 <u>Further investigations prior to the decision to dismiss</u>:
(i) I fully accept Ms. Grell's submission that a conscientious investigation was required given the Claimant's long and unblemished service and the potentially particularly serious consequences for him. However, I have concluded that the investigation as a whole, whilst not perfect, was sufficiently conscientious in all the circumstances.
(ii) The investigation must be considered in light of the following:
a. The Claimant acknowledged that he had swapped or added products to at least one of the pouches and that he did not pay separately for the contents of the pouches;
b. The till receipt evidenced that both pouches had barcodes.
c. The Claimant produced the pouches at the disciplinary hearing and the contents included full-sized products with their own barcode. The Claimant was given an opportunity to explain but failed to do so; his explanation that these products were in the pouches when his mother returned them to him was not put forward at the disciplinary hearing.
(iii) VN did in fact make further enquiries (para. 26 and 27.5 above and these were sufficient in light of the above.
(iv) It would perhaps have been best practice for VN to consider the Claimant's HR records which, it is reasonable to assume, would have mentioned the incidents in 2000 and 2007. However, I do not accept that this was necessary given that VN did not question (and took into consideration) the Claimant's long and unblemished service. In any event, the incidents the Claimant refers to took place more than 10 years prior to the relevant time (26 January 2018).

(v) I do not accept that it was a failing for VN not to consider the CCTV showing the till. It would not have shown what was said by the Claimant and Lily; the till receipt evidences that both pouches had bar codes; whether or not Lily looked in the pouches is not relevant to the Claimant's own culpability, only possibly her own.

(vi) Ms. Grell submits it was a failing for VN not to make enquiries into whether any formal written guidance about the discounting promotions policy had been provided to staff. However, it has not been suggested by the Respondent that any guidance has been issued and VN made his decision on the basis no written guidance was given, so such investigations would have been pointless.

44. I have also concluded that the decision to dismiss fell within the band of reasonable responses:

44.1 I accept Lily's letter and the CCTV alone are inconclusive but this was not the only evidence relied upon by VN who also considered:

(i) the Claimant's admission that he had swapped or added products to at least one of the pouches and that he did not pay separately for the contents of the pouches;

(ii). the till receipt evidenced that both pouches had barcodes;

(iii) the Claimant produced the pouches at the disciplinary hearing and the contents included full-sized products with their own barcode; and

(iv) the Claimant's inconsistent accounts.

44.2 VN took into account the Claimant's 18 years service and clean disciplinary record but weighed against this:

(i) The serious nature of the conduct;

(ii) This was deliberate theft, not a mistake. I disagree with Ms. Grell's submission that this was not theft because the Claimant did not believe he was being dishonest; it is the Respondent's perception of his actions which are relevant.

(iii) The Islington store is a "red" store and the Respondent has to treat any instance of theft "*very seriously*", particularly at that store;

44.3 VN concluded a lesser sanction was not appropriate given the Claimant's complete lack of any acknowledgment that he had done anything wrong and insistence on blaming Lily. Another employer in the same circumstances may have chosen not to dismiss the Appellant but it was certainly within the band of reasonable response for VN to do so.

45. I have found that the Claimant did not appeal against the decision to dismiss (para. 35 above).

46. In conclusion, in accordance with the tests set out in ***Burchell***, the dismissal was fair:

46.1 VN genuinely believed the Claimant was guilty of misconduct. He had in his mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

46.2 The procedure followed fell within the range of reasonable responses of a reasonable employer. The investigation, whilst not perfect in every respect, was not so flawed as to render the dismissal unfair based on the objective standards of a reasonable employer in these particular circumstances.

46.3 Dismissal fell within the range of reasonable responses of a reasonable employer given all the circumstances of the case (as rehearsed above) both substantive and procedural and the size and administrative resources of the Respondent's undertaking. The Respondent did not require proof "beyond all reasonable doubt" – that is the test laid down in criminal law - and my task as an Employment Tribunal judge is to decide whether the dismissal of the Claimant fell within the band or range of reasonable responses open to a reasonable employer in the same situation; it is the Respondent's conduct which the Tribunal must assess, not the unfairness or injustice to the Claimant. It is not for the Tribunal to impose its own standards and I have fully accepted that another employer may well have chosen not to dismiss the Claimant but as I have concluded that the procedure and decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted, the dismissal was fair and the Claimant's claim of unfair dismissal must fail.

Signed by:

Employment Judge Mason
12 February 2019

Judgment sent to Parties on

13 February 2019