THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Miller**

Respondent: **Mr Rajeev Atchuthananthan, t/a Swallow Filling Station**

Heard at: **North Shields** **On:** **26 March 2018**

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

Representation:

Claimant: **In person**
Respondent: **Ms L Halsall (Consultant)**

RESERVED JUDGMENT AND REASONS

1. The claimant's claim for unfair dismissal is well founded and succeeds.

2. The claimant's claim for wrongful dismissal is well founded and succeeds.

3. The claimant's claim for holiday pay is dismissed on withdrawal by the claimant

4. The matter is to be listed for a remedy hearing on a date to be fixed, subject to the parties reaching agreement in the meantime and informing the tribunal of that agreement

REASONS

1. By an ET1 presented on 1 December 2017 the claimant claimed unfair dismissal and made other claims for payment of his notice pay and his accrued holiday pay.

2. The claimant informed the tribunal at the hearing that since the issue of his ET1 claim form he has received a pay slip which contained details of holiday pay and he is now satisfied that he has been paid his holiday entitlement. The claimant

withdrew his holiday pay claim and the tribunal indicated it would dismiss this aspect of his claim

Preliminary Point: Identity of the respondent

3. An issue arose as to the correct identity of the respondent. The respondent to the ET1 is Mr Atchuthananthan. The ET3 contends that this is incorrect and asserts that the correct respondent is "Swallow Filling Station".

4. The tribunal sought to clarify this at the beginning of the hearing. This is because "Swallow Filling Station" is not a legal entity. Ms Halsall identified that Mr Atchuthananthan was the owner of the business and operates it on a franchise arrangement. She accepted that the claimant was employed by Mr Atchuthananthan. This is consistent with previous arrangements before he had taken over the business, see [24], which relates to the claimant's contract of employment with D. Scott prior to the transfer to Mr Atchuthananthan.

5. Ms Halsall asserted that the correct identity of the respondent should be Mr Atchuthananthan, trading as Swallow Filling Station. The tribunal accepted that this identified a legal entity and also that this was consistent with the reality of the situation. The claimant was content to accept this amendment.

6. By consent therefore the tribunal ordered that the identity of the respondent be amended so as to read: "Rajeev Atchuthananthan trading as Swallow Filling Station".

The issues

7. At the start of the hearing the tribunal discussed and agreed with the parties the issues in this case that the tribunal is required to determine arising in connection with (i) the unfair dismissal claim and (ii) the wrongful dismissal claim.

8. The parties further agreed the appropriate notice period for any wrongful dismissal claim: the claimant was in continuous employment for 13 years and his notice period (by virtue of the statutory minimum imposed by s.86 ERA 1996) was 12 weeks' notice. The tribunal agrees that this is appropriate.

9. The issues for the tribunal, as determined at the outset of the hearing, are:

    (1) Has the respondent established the reason for dismissal of the claimant.

    (2) If so did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant.

    (3) Was the decision to dismiss within the band of reasonable responses.

    (4) Did the respondent follow a fair and reasonable procedure before moving to dismiss.

(5) If there is procedural unfairness has such unfairness made any difference (*Polkey* rule).

(6) Has the claimant engaged in blameworthy conduct contributing to his dismissal such that it is just to reduce any award of compensation.

(7) Is the claimant in repudiatory breach of contract and if not has the respondent wrongfully dismissed the claimant by failing to pay the claimant his notice.

The Facts

10. The tribunal heard oral evidence from Rajeev Atchuthananthan and from Sidney Tuke. The claimant gave oral evidence. All witnesses were cross examined. Each party made closing oral submissions. There was a bundle of documents of 65 pages placed before the tribunal. The claimant provided a further bundle of documents attached to a brief witness statement but both parties agreed that the additional bundle (which was not paginated) contained no further relevant documents that were not already in the paginated bundle.

11. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

Background

12. The respondent is a small employer, its ET3 stating that it has 4 employees. It operates a petrol filling station at Swallow Filling Station, Old Durham Road, Gateshead. A TUPE transfer had occurred in about October 2016 (the detail of which is not relevant to the present claim) and it therefore came about that the claimant worked for the respondent.

13. The claimant had commenced work at the filling station in April 2004. He was a cashier/customer service assistant. He was experienced in what he did and he worked full time. He worked on the day shift; his counterpart on the night shift was Sydney Tuke. The claimant identified that since the respondent had taken over the business, the number of employees at the filling station had been "whittled down" from approx. 8 employees effectively to just Mr Tuke and the claimant. The claimant suggested also that this was in large measure due to the difficulty that those employees had in working with Mr Atchuthananthan. The tribunal makes no findings of fact in that regard but notes it as part of the background to what transpired.

14. When the respondent took over the business, Mr Atchuthananthan worked from an office at the filling station. He was present most days. There was CCTV equipment in operation and monitor screens displayed the images in the office. These were visible at all times to those who were in office.

15. This case concerns the procedure by which the respondent dealt with stock that was past its sell-by date and/or damaged in some way, such that it was

necessary to remove the items from public sale. Mr Atchuthananthan stated that he had purchased the stock and no-one else had any permission to dispose of stock even if damaged or out-of-date. Some items were in fact known as "sale or return" items which are liable to be returned to the supplier. He stated that he had verbally requested employees to remove any such items from public display and to leave them in the rear of the premises for his review and decision. He might for example decide to reduce the price of damaged products, e.g. split multi-pack cans of alcohol.

16. His evidence was supported by Mr Tuke, who agreed that stock should be placed in the rear for Mr Atchuthananthan to decide what action to take. Mr Tuke specifically rejected the claimant's proposition put to him in cross examination that it was the practice for employees simply to dispose of stock or to take (damaged) stock home if they wished to do so and in particular without making any record of it.

17. The claimant's evidence is he was told verbally by Mr Atchuthananthan that in the event of damaged stock then the claimant was free to dispose of it or to take it home and there was no need to keep a record. A hypothetical example of a damaged tin of beans was put to the claimant: he accepted that he would put such at tin in the rear for any other employee to take if they wished as he himself would not have wanted a tin of beans.

18. The claimant was asked for further detail: he said that Mr Atchuthananthan had given him these instructions a single occasion. It was not in writing. The claimant said that there have been many occasions when (damaged) stock was taken by staff and he referred to "Doritos" and to mint sweets which were in damaged packaging and these were left at the till-counter and eaten by staff.

19. Mr Atchuthananthan stated that he would "never allow people to take home stock without paying" and he further questioned (rhetorically):" how come the claimant decides what is to be done with the stock?" He stated that it was his daily practice to check any identified damaged or out of date stock. The claimant did not recall any occasion in which Mr Atchuthananthan had reduced prices. Mr Atchuthananthan was not aware of any practice of employees taking damaged stock unless it was with his permission. Again, this was supported by Mr Tuke's evidence.

20. Having heard Mr Atchuthananthan's evidence, the tribunal finds that he was not aware of any widespread practice of employees taking damaged goods without his permission. The tribunal accepts his evidence that his intention was that he would check damaged stock himself. This is consistent with his intention to keep control. In contrast, if employees were permitted to take any damaged stock without seeking permission or making a record then there would be no control of stock exercised by the respondent. The tribunal considers that this is an unlikely state of affairs.

21. The tribunal finds that the claimant did not have permission to decide what to do with damaged stock in the way suggested by the claimant, that is, to decide whether to dispose or whether to take home or whether to leave for other staff.

The tribunal accepts Mr Atchuthananthan's evidence that if he had been made aware that this was happening then he would have investigated.

22. The relationship between Mr Atchuthananthan and the claimant from October 2016 and up to June 2017 had some tensions. There were disagreements. The claimant had sent a grievance to "head office" in November 2017, a reference the tribunal interprets to be the franchisor. There was no investigation of that, and it appears that the claimant did not follow it up. Sometime there after the claimant recalls a conversation in which Mr Atchuthananthan referred to the claimant as a "trouble maker" which the claimant interpreted as being Mr Atchuthananthan's reaction to the grievance. Whilst that may be so, there is insufficient evidence for the tribunal to reach that conclusion.

23. There was at least one further occasion, in May 2017, when a disagreement occurred. It related to the claimant's apparent failure to complete a "deductions from pay" sheet. The claimant has since described the incident as bullying and he complained that he was called "a liar" by Mr Atchuthananthan at the time, which Mr Atchuthananthan has denied. It is clear however and the tribunal so finds that there was an uncomfortable disagreement about whether the claimant had in fact placed a completed sheet on Mr Atchuthananthan's desk. The tribunal does not make any finding that Mr Atchuthananthan used the word "liar" but it recognises that the claimant did interpret what had happened it in that fashion.

24. These events help to explain the claimant's belief that the respondent "wanted to get rid of me". Mr Atchuthananthan was quite properly asked about this directly by the claimant: Mr Atchuthananthan's response was that the claimant was a full-time experienced employee and that the respondent had no reason to get rid of the claimant when at the very least it would be very difficult to find and to train a replacement full-time worker and who would not have the claimant's experience.

Events of 1 June 2017

25. What triggered the disciplinary process was Mr Tuke's disclosure to Mr Atchuthananthan that he thought that the claimant had taken a bag of £1 coins (total £20) which had belonged to Mr Tuke's till/float at the point of handover from Mr Tuke's shift to the claimant's shift on 1 June 2017. There had been a conversation between Mr Tuke and the claimant at the time and Mr Tuke was not satisfied with the claimant's explanation for why he appeared to be in possession of a £20 bag of coins and Mr Tuke was missing a £20 bag of coins.

26. This prompted Mr Atchuthananthan to examine the CCTV footage. He found what he described as evidence of the claimant taking the bag of coins but what he also found on the CCTV was clear evidence of the claimant taking a multi-pack bag of crisps from a display next to the door and leaving the shop with the multi-pack.

27. Mr Atchuthananthan decided to investigate the incident relating to the crisps. He took no further steps in relation to the £20 bag. The tribunal accepts his evidence

that he had decided to deal with the crisps incident and that if appropriate then the £20 bag could be investigated further at a later stage.

The disciplinary process

28. The next day, on 2 June 2017, the claimant was called to a "fact find", as the respondent referred to it, which was conducted by Mr Atchuthananthan. The notes appear at [28-31]. The claimant believes that these have been completed at a later stage because he does not recognise them and he has not signed them. The claimant said that the notes taken at the time by Mr Atchuthananthan were much less legible. In fact, the claimant refused to sign the notes at the time and it is common ground that the claimant brought the fact-find to an end when he stated that he need to leave in order to visit his mother.

29. The notes follow the same format and appearance of Mr Atchuthananthan's later notes taken at the appeal hearing. The claimant, when asked in cross examination, does not identify any material omission from the notes and appeared to agree that generally the notes do reflect what was said. Mr Atchuthananthan confirmed that the notes at [28-31] were the actual notes taken at the time.

30. In these circumstances, the tribunal can see no purpose to be gained in the respondent seeking to produce a new set of notes. The tribunal is satisfied that the notes were taken at the time of the fact find on 2 June 2017.

31. At the fact find, the first question indicates that the respondent had become aware of evidence that the claimant had "walked off from the shop without pay". The answers also indicate that the claimant was aware of the incident in question. He stated that Mr Tuke had taken a damaged pack of crisps and had placed them on the counter; that the claimant had taken them from the counter and then placed them "ready to go" which meant that the claimant had re-placed the product on the display next to the door whilst he went to change into a Hi-Viz jacket before going to the forecourt. The claimant said that Mr Tuke had decided that the stock was damaged; and that "there is no price for damaged stock".

32. The CCTV was not referred to in the fact-find. The claimant was plainly aware of the nature of the allegation under investigation. The tribunal finds that the respondent did not interrogate the CCTV further in response to the claimant's explanation.

33. On 3 June 2017, the claimant was suspended [32]. The allegation was plainly set out and the claimant was invited to a Disciplinary Hearing to be conducted by Nirojan Yogarajah. The letter informed the claimant that if proven his employment was at risk.

34. The claimant did not return to work up until the termination of his employment. In addition to being suspended, in fact the claimant submitted sick notes from 3 June 2017. These sick notes initially referred to back pain but later became stress at work. The claimant submitted sick notes on a continual basis from 3 June 2017.

35. The claimant telephoned on 7 June to say that he could not attend the hearing due to his ill-health. The hearing was adjourned. This was repeated on 20 June 2017 when the hearing was adjourned for a second time.

36. The claimant was sent Occupational Health forms [34] and [36]. The claimant wrote on 15 August [35] to say that no consent form was attached to the letter at [34]. The respondent has no record of receiving the letter at [35]. In any event, coincidentally the respondent forwarded a further copy of the consent form on 15 August 2017. The claimant did not respond to the further letter. He does not recall whether in fact he did received the consent form. When pressed in cross examination, he stated that he was submitting sick notes and was not able to attend work. The tribunal infers that the claimant believed that he was not required to participate in the respondent's procedures whilst he was officially signed off sick.

37. This was also the claimant's reason for not responding to the further invitation to a disciplinary hearing [41] now fixed for 5 September 2017. The claimant was also asked in cross examination why he did not follow the suggestion for example that he could submit written representations. He stated that he "was not fit enough to do any of the suggested options" and that "his sick note was his response to the letter". Again, when asked why he did not submit the representations forming his appeal [43] at an earlier stage, he said that it was because he was signed off work. He also added that he did not know that his employment "would be terminated so quickly". He did accept that he had been warned that it might happen [32].

38. The Disciplinary Hearing progressed with no further response or representations from the claimant. Mr Yogarajah was not available and Mr Atchuthananthan was the decision maker.

39. There is a detailed explanation of the outcome [42] which the claimant accepts provided him with a clear explanation. The letter identified that the claimant's failure to attend the hearings was a "separate issue of misconduct" and which was treated by the respondent as "a further act of misconduct" which would entitle the respondent to terminate the claimant's employment. The letter continued that the claimant's action, as set out in the 3 June 2017 letter, namely the removal of the crisps, amounted to gross misconduct justifying summary termination of employment.

40. The claimant appealed [43] on 7 September 2017. An Appeal Hearing took place on 14 September 2017. There are notes at [60]. The appeal was dealt with by Mr Ruman Khan, described as a shift manager. Mr Khan had no prior connection with the claimant. The notes record that the claimant described that he had taken crisps from the side of the counter. The claimant is told that Mr Tuke denies his part in that. The claimant was not provided with any statement or note of what Mr Tuke had said to the respondent. The notes indicate that the CCTV was viewed and it showed that the claimant had removed crisps from the shelf display.

41. There was no further explanation from the claimant that the CCTV should have shown that the crisps had been on the till-counter. He was challenged about that in cross examination: in response, the claimant said that he said to the appeal hearing, "hold on, I've got questions" and he was told that "there's no time" and that the appeal hearing was "over". The notes at [60] indicate that the appeal hearing took 47 minutes and that included the time taken for the claimant to leave the room while the CCTV was set up. The appeal officer was not called to give evidence to the tribunal. The tribunal finds in all the circumstances that the claimant was unable to give a full explanation particularly in relation to the CCTV footage.

42. The appeal outcome is at [46]. It specifically cites "discrepancies" with the CCTV which showed the claimant taking "non-damaged crisps from the shelf without being prompted and swiftly leaving the garage". The appeal outcome makes no reference to the claimant's version of events that he had placed them against the shelf after having taken them from the till-counter. This had been his explanation when the fact find had taken place. He had been prevented from explaining this at the appeal. The appeal outcome reaffirmed that the failure to explain non-attendance was a further occasion of misconduct.

The Law

43. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(2) states that a reason falls within this subsection, inter alia, if it relates to conduct.

44. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Birchell [1980] ICR 303, the tribunal must consider a three-fold test: (i) the employer must show that he believed that the employee was guilty of misconduct, (ii) that he had in his mind reasonable grounds upon which to sustain that belief, (iii) that at the stage at which the employer formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.

45. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "termination of the question whether dismissal is fair or unfair…. (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".

46. For the purpose of section 98(1) and 98(2) the burden of proof is on the respondent. What matters is whether the respondent has established the operative reason for the dismissal: see Brady v ASLEF [2006] IRLR 576.

47. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the

tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

48. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact**.** Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment.

49. Secondly, section 122(2) ERA provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) ERA provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Before any such deduction, a tribunal most make three findings (in accordance with Nelson v BBC (no2) [1979] IRLR 346): (i) that there was conduct which was culpable or blameworthy; (ii) that the dismissal was contributed to some extent at least by the claimant's culpable or blameworthy action, (iii) that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

50. In relation to a claim for notice pay: a claim for notice pay is a claim for breach of contract: see Delaney v Staples [1992] ICR 463. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. It is necessary for the respondent to show that the claimant had actually committed a repudiatory breach of contract: see Shaw v B&W Group UKEAT/0583/11.

Discussion

51. Has the respondent established the reason for dismissal? Mr Atchuthananthan was the decision maker and it is the facts (or beliefs) known to him at the time of the dismissal that will be determine the issue.

52. The tribunal finds that there was a background of friction and disagreement between the claimant and Mr Atchuthananthan. The tribunal accepts that it was the claimant's perception that the respondent was trying to "get rid of me". The trigger for the disciplinary process came from the disclosure by Mr Tuke in relation to the £20 bag of coins. Mr Tuke was plainly implying if not expressing a belief that the claimant had taken the money. It was to be expected that Mr Atchuthananthan would want to interrogate the CCTV and in doing so he discovered the claimant's actions in removing the packet of crisps from the display and leaving the store. This CCTV evidence on its face was highly suggestive of the claimant taking goods without paying for them.

53. In those circumstances, it is entirely foreseeable that the respondent would investigate further.

54. In the event, the respondent did not rely on concerns relating to the £20 bag of coins but could presumably also have done so if it was seeking a way in which to "get rid of" the claimant. The reasons for the dismissal are explained to the claimant in detailed terms by the respondent in the outcome letter; the decision to proceed in the claimant's absence was only taken after 2 prior adjournments and in the face of the claimant's failure to respond to the letter dated 29 August 2017 [41].

55. These features are inconsistent with the actions of an employer which was simply determined to "get rid of" the claimant. The tribunal finds that the respondent's letter of dismissal set out the facts and matters genuinely in the mind of Mr Atchuthananthan when he made his decision to dismiss. The tribunal is satisfied that the respondent has established that the reason for the claimant's dismissal was the potentially fair reason of conduct.

56. Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal approached this question having regard to the principles set out in Birchell but always bearing in mind that it remains necessary to return to the central question which is posed by s.98(4).

57. What is the nature of the misconduct relied on by the respondent? The outcome letter [42] refers to two matters.

58. First, it is said that the claimant's failure to attend any of the scheduled meetings was an act of misconduct which entitled the respondent to dismiss with notice. This was (plainly) not part of the initial investigatory meeting and it was not foreshadowed as an allegation of misconduct in the letter informing the claimant about the Disciplinary Hearing fixed for 5 September 2017 [41]. In fact, the respondent's position as at 29 August 2017 was that it was sympathetic to the claimant's medical condition and that it needed medical information to decide whether or not to re-schedule the meeting.

59. The claimant had no indication that his absence was in itself thought to be misconduct let alone sufficiently serious to put his employment at risk. Indeed, there is no dispute that throughout the period in question the claimant was medically unfit to work. Equally, the respondent's hands were somewhat tied because the claimant had not returned the Occupational Health consent forms and had not responded to queries regarding his medical condition as it impacted on the question of whether to reschedule the meeting.

60. The claimant's failure to attend the original scheduled disciplinary hearing on 7 June 2017 (which was in any event the subject of a last minute telephone call of apology by the claimant) and the rescheduled hearings meant that there was limited information available to the respondent. However, the claimant's actions cannot reasonably be described as misconduct. Furthermore, given the absence of any real attempt by the respondent to inform the claimant that the respondent might view his non-attendance as a conduct matter, the tribunal considers that the respondent had no reasonable grounds for believing that the claimant had conducted himself led in a manner that amounted either to gross misconduct or serious misconduct such that it was justified in terminating employment.

61. If the reason for dismissal had been the claimant's failure to respond and/or non-attendance at the scheduled meetings, the tribunal would have no hesitation in concluding that the claimant's dismissal was unfair.

62. The outcome letter [42] identifies an additional allegation of "taking part in activities which cause the company to lose faith in your integrity namely, theft of company property…". The respondent concluded that the "matters of concern which were outlined in [my] letter of 3 June 2017", which related to the theft of the crisps, amounted to "gross misconduct justifying the summary termination of your employment with immediate effect". This allegation of misconduct was the reason why the claimant was dismissed without notice.

63. The respondent had reasonable grounds for believing that the claimant had taken the crisps without paying for them. The CCTV evidence plainly identified the claimant doing so. The claimant's explanation that the crisps were damaged and had been identified by Mr Tuke and placed by the till-counter was denied by Mr Tuke when Mr Tuke was asked by Mr Atchuthananthan during the investigation. The underlying practice of taking damaged stock was denied by Mr Atchuthananthan who himself put to the claimant in the fact find that "you don't have any rights to take the stuff away without pay".

64. Was there a reasonable investigation? The claimant had alleged at the fact find that Mr Tuke had found the crisps to be damaged. A reasonable employer would have asked Mr Tuke. The tribunal is satisfied that Mr Atchuthananthan did ask Mr Tuke but no statement from Mr Tuke was made available to the claimant at any stage of the disciplinary process. The claimant alleged that he had been told verbally by Mr Atchuthananthan that he could take damaged stock. This was plainly within the knowledge of Mr Atchuthananthan who asked the claimant

specifically during the fact find about why the claimant felt he could take the damaged stock.

65. The claimant alleged that he had taken the crisps from the till-counter before placing them in the display next to the door. This should have led the respondent to interrogate the CCTV further to see whether the claimant had simply picked up a packet of crisps from the display or whether he had placed it in the display himself having taken it from the till-counter. That was an action available to the respondent at any time after the fact find and regardless of whether the claimant was responding to letters or attending any scheduled meetings. This would also have cast light on whether Mr Tuke's evidence was reliable. The claimant was not shown the CCTV footage in the fact find.

66. The respondent should have checked the CCTV footage to see if it corroborated the claimant's explanation. The respondent's position is that even if the CCTV had established that the claimant had taken the crisps from the till-counter, it remained the respondent's belief that the claimant was not entitled to take the stock. Even so, a further investigation of the CCTV in the light of what the claimant had said would have helped to inform the question of whether the claimant had been dishonest.

67. The decision to proceed with the disciplinary hearing was taken after two prior adjournments and in circumstances where it was far from clear when the claimant's sickness would recover. He had been signed off sick for 3 months by the time of the Disciplinary Hearing. He had not responded to the most recent correspondence asking for further information and offering him the opportunity to provide written submissions. A reasonable employer in the positon of the respondent was entitled to decide to proceed.

68. The appeal hearing took place but there remained an insufficient investigation of the CCTV footage. Mr Atchuthananthan had in his evidence to the tribunal suggested that footage is only kept for 1 month but footage was still available at the date of the appeal and would have been available from the point of the fact find. The tribunal finds that the appeal hearing did not properly provide the opportunity to explore the claimant's explanation and potentially thereafter a further review of the CCTV footage.

69. The decision to dismiss the claimant was because the respondent had upheld the allegation of theft. The tribunal recognises that the value of the stock was modest but reminds itself that its task is not to substitute its own decision as to the reasonableness of the action taken by the employer. The decision to dismiss the claimant for theft albeit an item of small value was a decision that fell within the band of reasonable responses.

70. However because of the failure of the respondent to carry out a sufficient investigation of the CCTV footage and the failure to provide the claimant with any statement relating to the information obtained from Mr Tuke combined with the inadequate appeal procedure the tribunal concludes that the claimant was

unfairly dismissed. The claimant was entitled to basic principles of procedural fairness and a reasonable employer would have investigated the CCTV footage, would as a minimum have provided the claimant with a statement or similar from Mr Tuke, and in particular given the absence of the claimant from the Disciplinary Hearing, a reasonable employer would have afforded the claimant the opportunity at the appeal hearing to provide explanations. The tribunal asked itself the question posed by s.98 (4) namely: did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal concluded that the answer was no.

71. The tribunal went on to consider whether the respondent would or might have dismissed the claimant even in the absence of these defects. The question that the tribunal had to answer was this: what would have happened had the respondent carried out a sufficient investigation, as identified in the preceding paragraph?

72. The tribunal considers that there was no dispute about the fact that the claimant had taken crisps from the display next to the door of the premises. The respondent acted as it did when dismissing the claimant substantively because the claimant had acted contrary to the practice in relation to damaged goods. A statement from Mr Tuke would have confirmed this practice (as Mr Tuke reaffirmed in evidence to this tribunal). A further investigation of the CCTV might have identified that the claimant had placed the crisps on the display but it would not have altered the respondent's belief that the crisps had been taken by the claimant when the claimant had no right to do so.

73. The tribunal reminded itself that it should not be deterred for considering this point by the fact that it involved some element of speculation.

74. If these procedural defects had been rectified, if the respondent had looked further at the CCTV footage, and provided the claimant with a statement from Mr Tuke and enabled the claimant to provide more explanation as part of the appeal process, the tribunal concludes that it was 100% likely that the respondent would have terminated the claimant's employment. The tribunal concludes that the respondent would still have held a reasonable belief that the claimant knew he had no right to take the stock without paying for it.

75. In relation to unfair dismissal therefore it is appropriate to award the claimant only a Basic Award but no compensatory award.

76. The respondent contends that any award should be reduced by reason of contributory fault. The conduct relied upon by the respondent was "the ignoring of letters when off sick". Ms Halsall affirmed this in her closing submissions to the tribunal. The tribunal finds that the claimant did telephone the respondent on both 7 June 2017 and 20 June 2017 to explain that he could not attend the hearings. The tribunal also finds that the claimant did respond on 15 August 2017 [35] when he told the respondent that no consent form had been provided to him. The

tribunal accepts that the claimant had provided sick notes to the respondent covering the whole of the relevant period. The claimant said that he regarded his sicknote as "his response" to the letters sent to him.

77. It was unfortunate perhaps that the claimant did not take further steps and indeed to provide some written representations. However, his failure to do so is not conduct which can properly be described as culpable or blameworthy as envisaged by Nelson no.2 and by s. 122(2) and s.123 (6) ERA. The tribunal finds that it would not be just and equitable to reduce any Basic or Compensatory award by reason of the claimant's contributory conduct.

78. Turning to wrongful dismissal, the tribunal observes that it is necessary for the respondent to show that the claimant had actually committed a repudiatory breach of contract. An allegation of theft would if proven be capable of amounting to a repudiatory breach. The tribunal reminds itself that the respondent's genuine belief as to the claimant's dishonesty is not itself a sufficient finding for the purpose of establishing whether in fact the claimant had committed a repudiatory breach.

79. The claimant did not dispute the fact that he had taken crisps from a shelf display next to the door. The fact that the CCTV footage shows this taking place is not sufficient evidence to establish that the claimant had committed an act of dishonesty. Had the CCTV footage established that the claimant had placed the crisps himself into the shelf display it would have suggested that he had some other motivation. The tribunal cannot exclude the claimant's version of events in the absence of any more information from the CCTV. The tribunal is not satisfied on a balance of probabilities that the claimant had committed an act of theft simply by removing the crisps from the shelf display.

80. The claimant states that he took the crisps because of his understanding that damaged stock could be taken by staff. There was no written procedure which dealt with this. Again, the CCTV evidence is not inconsistent given the claimant's explanation that he had placed the crisps on the display whilst he went to obtain a Hi-Viz jacket however unlikely that might seem to the respondent.

81. Mr Atchuthananthan disputed that employees could choose to take damaged stock but if it was a settled practice that all stock must be available for Mr Atchuthananthan to review, then the tribunal would have expected to have received at least some evidence or record keeping in relation to price reductions and stock control. The only evidence at [59] relates to checking chilled items for their sell by dates. Furthermore, that fact that he disputed that employees could take damaged stock does not of itself equate to a finding that the claimant knew that he could not take damaged stock.

82. The tribunal concludes that for the claimant to have actually committed a repudiatory breach of contract when he removed the crisps from the premises, it is necessary for the respondent to establish on a balance of probabilities that the

claimant knew that he had no right to do so, in particular that he had no right to take damaged stock. The respondent has not satisfied the tribunal of this on evidence put before the tribunal. It is not a question of whether the respondent held an honest or reasonable belief: the tribunal is not satisfied on a balance of probabilities that the claimant had actually committed a repudiatory breach of contract. His wrongful dismissal claim therefore succeeds.

Conclusion

83. The matter must now be listed for a remedy hearing.

84. However, in the light of the fact that the claimant is unrepresented, the tribunal has set out some provisional observations in the light of its conclusions. It may prove possible for the parties to reach agreement and avoid the need for a further hearing. They should be encouraged to do so. These observations do not finally determine remedy and the tribunal will determine remedy at a remedy hearing once the parties are aware of the tribunal's findings and have the opportunity to make representations.

85. The tribunal observes that the claimant is entitled to a basic award for unfair dismissal without reduction by reason of contributory conduct but no compensatory award. The basic award may be calculated by reference to the claimant's length of employment up to the date of termination which was 13 complete years (the claimant having been continuously employed since April 2004).

86. The calculation of the claimant's wrongful dismissal claim is based on the claimant seeking his notice pay. The parties agreed at the outset of this hearing that the claimant's entitlement to notice would have been 12 weeks, and any such payment is awarded as damages for breach of contract which on the information available to the tribunal is unlikely to be taxable.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

12 April 2018