EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Nerkowski	**v**	**Tesco Stores Limited**

Heard at: Watford **On**: 1 April 2019

Before: Employment Judge Skehan

Appearances

For the Claimant: In Person
For the Respondent: Mr Singer (Counsel)

JUDGMENT

1. The claimant's claim for unfair dismissal is unsuccessful and dismissed.

REASONS

Background

1. This is an old case arising from the termination of the claimant's employment on 4 December 2013. The claimant originally issued proceedings on 03/03/2014 but his claim was struck out under the old fee regime. The claimant's claim was reinstated by the employment tribunal following the decision in R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51, where the previous employment tribunal fees regime was deemed unlawful. It is therefore neither party's fault that the employment tribunal is requested to consider issues that happened in 2013.
2. It is common ground between the parties that since the termination of the claimant's employment, his workplace has been closed by the respondent. The respondent had not retained any documentation relating to the termination of the claimant's employment. The entirety of the documentation provided to the employment tribunal, was documentation that had been retained by the claimant and supplied to the respondent during the course of disclosure.
3. The claimant had the benefit of a tribunal appointed Polish interpreter during the course of the hearing.
4. At the outset of the hearing it was brought to my attention that the claimant had not either prepared or exchanged a witness statement in accordance with

the employment tribunal directions. The claimant told me that everything he wanted to say was in the documentation and he did not believe that he was obliged to provide anything else. I noted correspondence between the parties where the respondent explained to the claimant the need for him to provide a witness statement. As the claimant had not complied with the employment tribunal directions, the parties' mutual exchange of witness statements had been delayed. The claimant had received the respondent's witness statements on the Friday prior to the hearing.

5. I explained the process that would be followed by the employment tribunal to the claimant in that the respondent's witnesses had prepared witness statements and these statements would be accepted by the employment tribunal as the witnesses' main evidence. The claimant would then have the opportunity to put questions to the respondent's witnesses, relating to any part of their evidence with which the claimant disagreed, and the claimant would have the opportunity to put his case to the respondent witness.
6. The hearing commenced and the respondent called its first witness who adopted his witness statement and that statement was accepted as his evidence in chief. At this point the claimant told me that he did not have any questions for the respondent's witness. He said that he was not good in English and had only read the statements as far as his knowledge allowed. The employment tribunal noted the overriding objective to deal with the case fairly and justly ensuring that so far as practicable, the parties are on an equal footing. As the witness statements were relatively short, the hearing was adjourned for 30 minutes to allow the claimant to read through the statements with the interpreter. The hearing resumed at 11:10 am. At this point the claimant told me that he needed to consider the statements more carefully and he required advice to allow him to formulate the questions he wished to ask of the respondent's witness. The claimant requested that the hearing be adjourned to allow him a proper opportunity to do so.
7. I heard submissions from the respondent's representative who referred me to previous correspondence in the bundle from 20/11/2013 where the claimant confirmed that he had a good understanding of English. It was also the case that although the claimant received the witness statements on Friday of last week, the statements were drawn from documents that have been in the claimant's possessions since 2013. The statements do not contain 'new' information to the claimant. It was also noted that while it is neither parties' fault that this is an old case, should the matter be adjourned today it is unlikely for this hearing to be relisted prior to 2020. This further delay will severely jeopardise the prospects of holding a fair hearing and potentially result in considerable prejudice to the respondent.
8. In considering the submissions made by both parties and the overriding objective to deal with the matter fairly and justly and so far as practical ensuring that the parties on an equal footing, avoiding unnecessary delay and saving expense, I concluded that the claimant has had sufficient time to prepare for this hearing. Any delay in receiving the respondent's witness statement had been caused by a failure on the claimant's part to comply with the employment tribunal directions. Taking all the circumstances and the provisions of the overriding objective into account, no further delay to these proceedings would be allowed by the employment tribunal.

The law

9. It is for the respondent to show that it had a genuinely held reason for the dismissal and that that is a reason that is characterised by Section 98 of the Employment Rights Act 1996, as a potentially fair reason for dismissal. There are 5 potentially fair reasons for dismissal under Section 98, these are conduct, capability, redundancy, breach of statutory restrictions or some other substantial of a kind so as to justify dismissal. If the respondent shows such a reason, the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for the dismissal as sufficient reason for dismissing the claimant, the question having been resolved in accordance with equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent got it right or wrong and this is not a further stage in an appeal.
10. In a case where the respondent shows that the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case Burchell -v- BHS, the factors to be taken into account are firstly whether the respondent had reasonably grounds for finding that the claimant was guilty of the alleged conduct. Secondly, whether the respondent carried out such an investigation, as was reasonable in the circumstances and thirdly, whether the respondent adopted a fair procedure in relation to the dismissal. Finally, whether the sanction of dismissal was appropriate, proportionate and a way fair. In relation to each of these factors, it is important to remember, at all times, that the test to be applied is the test of reasonable response.

The issues

11. There was a list of issues provided by the respondent that we visited at the start of the hearing and agreed that these were the specific questions to be addressed by the Employment Tribunal:
    11.1 Was there a potentially fair reason for the claimant's dismissal? The respondent say that the reason for dismissal was related to the claimant's conduct.
    11.2 Did the respondent hold a genuine belief in the claimant's misconduct? Was that genuine belief based on reasonable grounds following a reasonable investigation?
    11.3 Was the dismissal without notice within the band of reasonable responses of a reasonable employer?
    11.4 If the respondent is found to have unfairly dismissed the claimant on procedural grounds, should any award made by the tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the claimant, would therefore, have been dismissed in any event?
    11.5 It was agreed that the Employment Tribunal would not look at issues of remedy and in particular, would not address any argument in relation to 'contribution' by the claimant. These matters would be dealt with separately in the event that all or part of the claimant's claim was successful.

The Facts

12. I heard evidence from Mr Brash and Ms Brown on the respondent's behalf. Their witness statements were accepted as their evidence in chief. There was limited cross examination of Mr Brash by the claimant. The claimant did not cross-examine Ms Brown as he considered that her evidence was irrelevant in that she did not take any part in the disciplinary or appeal process. The claimant gave evidence on his own behalf. As the claimant had not prepared a witness statement, I referred him to the initial information he had written within his form ET1. The claimant confirmed that this information was true to the best of his knowledge and belief and this was taken as the claimant's evidence in chief by the Employment Tribunal. He was provided with the opportunity to add further information and he was cross examined. All witnesses gave evidence under either oath or affirmation.
13. The claimant was employed as a warehouse assembler by the respondent between 7 October 2007 and 4 December 2013, when he was summarily dismissed for theft. The claimant claims unfair dismissal only.
14. Mr Brash, at the time of the claimant's disciplinary hearing was employed by the respondent as a shift manager for the Welham Green distribution centre. He worked for the respondent for 16 years in total. Mr Brash told me that he was asked to deal with the claimant's disciplinary matter. All of the documentation available to the Employment Tribunal had been provided by the claimant. The claimant's work place has since closed down and the documentation lost, suspected to have been destroyed. For this reason the documentation provided to the employment tribunal was not as complete as would normally be expected.
15. A suspected theft from the respondent's store was reported by security staff member, Dean Lock, on 9 November 2013. The claimant was suspected of having stolen a video game. There was a miscommunication with door staff and the claimant was not stopped leaving the store. The claimant was identified as he had paid for other items and used his Clubcard. The claimant was suspended from his work on 14 November. Mr Williams carried out an investigation on behalf of the respondent. The claimant was accompanied to an investigation meeting with union representative, Mr Paul Smith. Notes of the meeting are available within the Employment Tribunal bundle.
16. The specific allegation in relation to stealing a video game worth £44 was investigated. CCTV footage was available at the time but not available to the Employment Tribunal and was shown at the time to the claimant. It was agreed that the claimant was in the CCTV footage, the claimant put the video game in question in his basket, went to the meat aisle, then to the clothing aisle and clothes were placed over the basket. Thereafter, the video game cannot be seen on the CCTV in the claimant's shopping basket. It is agreed that following this time, the claimant went to the changing room with 3 items of clothes. On leaving the changing room, the claimant returned the clothes. The respondent says the claimant put the shirt back taking extra time and care. The claimant says that he was intending to buy the videogame for his son however while shopping he received a telephone call from his wife who told him that the game was not needed. The claimant during the investigation said that he put the video game on a shelf. The

claimant also said later during the investigation that he put the video game under the clothes rail. On cross examination the claimant told me that as English was not his first language, he used shelf/rail interchangeable.

17. A second investigation meeting was held on 28 November 2013. During this meeting, the respondent wanted to clarify how the claimant said he disposed of the video game. The claimant said he put the game under a clothing rack and pushed it underneath the clothes. The claimant noted some discrepancies in other evidence produced on relied upon by the respondent, including that there were three, not four packs of mince in the claimant's shopping basket as stated by Mr Lock. The claimant also noted that the item of clothes had been referred to inconsistently as a shirt or a jumper.
18. The disciplinary procedure was carried out by Mr Brash. The disciplinary meeting was held on 2 December 2013. The allegation of theft was specified and the notes of that meeting are available in the bundle. Mr Brash discussed the incident in detail with the claimant. The claimant denied theft and said that he left the video game in the store and threw the game under the rack. Mr Brash considered the claimant's submissions alongside the investigation documentation and the CCTV footage. He considered the evidence for and against the claimant including the claimant's length of service, his disciplinary record and any mitigating factors.
19. Mr Brash noted from the CCTV that when picking up other items and placing them in his basket, the claimant had moved the videogame in question to a new position in the shopping basket but did not remove the game from the basket. The claimant had ample opportunity to return the game within the car aisle or the entertainment aisle, which was only 2 aisles from where the claimant was. Mr Brash considered the claimant's behaviour to be unusual and did not accept his assertions that he had forgotten about the videogame. Mr Brash considered the claimant's assertion that he had thrown the videogame under the clothing rail however this was not supported by the CCTV footage. Mr Brash could see a rectangular shaped item in the fleece sleeve after the claimant had carefully returned it to its original position having taken it into the changing rooms. Mr Brash formed the reasonable belief that the claimant had removed the game from its security case in the fitting room and placed the empty security case in the fleece sleeve. Mr Brash said that the conclusion was supported by the fact that the empty security case was found inside the sleeve of the item of clothing which the claimant had tried on. Mr Brash formed the reasonable belief that the claimant had stolen the videogame. Mr Brash considered the representations made by and on behalf of the claimant and did not believe that any of the challenges compromised the fairness of the investigation. Mr Brash concluded that the claimant has committed an act of gross misconduct and considered the appropriate sanction. Mr Brash considered that theft was a serious issue that could not be condoned by the respondent and that dismissal was the appropriate sanction. Mr Brash summarily dismissed the claimant by letter dated 4 December 2013. The claimant was informed of his right to appeal. The claimant appealed on 4 December 2013.

20. The claimant received an initial appeal acknowledgment and attended a meeting initially scheduled for 18 December 2013 that was held on 9 January 2014. The appeal was handled by Mr Moore, Miss Brown took notes at the meeting. Mr Moore is no longer employed by the respondent. Miss Brown's witness statement is helpful to the extent that it records her part in taking the notes. The notes of the appeal meeting record Mr Moore telling the claimant that the outcome would be with him in 1-2 weeks. The claimant was invited to a further appeal meeting scheduled for 5 February 2014. The claimant told me during the course of cross examination that he attended this meeting. There is no written outcome of the appeal, although I did not hear from Mr Moore. Mr Brash states that he had been told by Mr Moore that the appeal was not successful.
21. In an unfair dismissal claim I would expect to hear from the individual tasked with the appeal and/or see the outcome letter. This case is unusual in that the respondent had not retained any documentation and the individual tasked with the appeal was no longer employed by the respondent. I can see from the documentation and from the evidence of Ms Brown that there was initial appeal meeting with detailed notes, and a reconvened meeting that was attended by the claimant. I find it unlikely, seeing that the vast majority of the work associated with the appeal on Mr Moore's part was concluded, that the appeal would simply be abandoned at that point. It is also the case that the claimant had the assistance of the trade union during the course of the disciplinary process. I consider it more likely than not that the appeal process was concluded and not upheld, as suspected by both Mr Bush and Miss Brown, either orally at the reconvened appeal hearing and/or in writing following that time.
22. I was referred to the claimant's contract of employment and the respondent's disciplinary procedures. Within the respondent's disciplinary procedure, I note the references to the potential sanction of summary dismissal in the event of gross misconduct. Theft is identified as constituting gross misconduct

Determination

23. Turning to the list of issues that I need to determine from today's claim, it is clear from the evidence provided that there is a potentially fair reason for the claimant's dismissal, that being misconduct. In particular, the theft of a video game from the Hatfield store. I next look at whether the respondent had a genuine belief based on reasonable grounds. The belief on the part of the respondent stems from an incident report from Dean Lock, one of the respondent's security personnel. The claimant was identified by his Clubcard, used to buy other items. There is nothing to suggest that the respondent did not hold a genuine belief and I find that a genuine belief was held by the respondent on reasonable grounds.
24. I turn now to the respondent's investigation. The test for an investigation in relation to a claim for unfair dismissal is an investigation that falls within the band of reasonable responses of a reasonable employer. The claimant was allowed the opportunity at the time to review the CCTV evidence. It is common ground between the parties that the claimant was in the store, picked up the game, placed it in the basket and that the game disappeared from CCTV view from the basket. The claimant did not pay for the game.

The claimant is not consistent in respect of his explanation as to where he left the game. The investigation also includes evidence in respect of the claimant trying on clothes and returning a shirt with particular care and attention. The CCTV shows a rectangular shaped object, consistent with the security case for the game in the sleeve of the shirt tried on by the claimant. The investigation does not appear to directly cover how and who found the security case cover. I note Mr Brash's evidence, that the security case was located by the respondent in the sleeve of the shirts tried on by the claimant. While this is a potential flaw in the investigation, I consider taking into account the evidence provided by Mr Brash, that it is more likely than not that this evidence was available to the respondent at the time of the dismissal. For the avoidance of doubt, even if it was not I, do not conclude, taking a the entirety of the investigation into account, that it is sufficient to render the investigation outside the band of a reasonable investigation conducted by a reasonable employer. There is also some inconsistency in relation to the terminology used for the item of the clothes and it is variously referred to within the documentation as a shirt, a jacket or a fleece. There is no suggestion that there is any confusion in respect of the actual items of clothes referred to, and Mr Brash's evidence in respect of this matter is accepted and I consider the terminology used to describe the items of clothing not to constitute any flaw in the procedure. Taking the entirety of the evidence as a whole in relation to the investigation carried out by the respondent, I conclude that the investigation falls within the band of a reasonable investigation from a reasonable employer.

25. I next to turn to the actual dismissal itself, to see whether or not this is a fair dismissal. I am not deciding if the claimant stole the item as alleged. I am deciding whether the respondent made a decision that falls within the band of reasonable responses from a reasonable employer. The case centres on a short period of time when the claimant says he returned the video game as set out above, but where his actions cannot be ascertained from the CCTV. It is unfortunate that the claimant was not stopped leaving the store but that does not prevent the respondent from considering the matter under its internal procedures. I accept the evidence provided by Mr Brash as plausible and reasonable and backed up by the available records of the respondent's investigation. He considered the evidence available to the respondent and did not accept the claimant's explanation. The claimant provided inconsistent responses as to how or where he returned the videogame within the respondent's store. These inconsistencies together with what Mr Brash saw on the CCTV the, being the claimant carefully return an item of clothes with what appeared to be a security box in the sleeve, led him to reject the claimant's account and conclude that the claimant had stolen the videogame. This was a conclusion that Mr Brash was entitled to make. Mr Brash said that he considered the claimant's length of service yet believed that the allegation of theft was a serious allegation of gross misconduct and that summary dismissal was the appropriate response. I was not referred to any other mitigating factors relied upon by the claimant at the time of dismissal or during the course of the hearing. Taking all of the evidence into account, I consider that this decision falls within the band of reasonable responses from a reasonable

employer. Finally, I have found that the claimant was provided with the right of appeal.

26. I have looked specifically at the procedure followed by the respondent, I have found that the respondent carried out a reasonable investigation, the decision to dismiss fell within the band of reasonable responses and the claimant was afforded an appeal. I have not been provided with any specific criticisms of the procedure other than the matters highlighted above relating to the investigation. There is nothing that I have been referred to that would lead me to conclude that the claimant's dismissal should be considered unfair for reasons of procedure. To the extent that any potential flaw was sufficient to constitute an unfair dismissal, I find it most unlikely that any such flaw would have made any difference to the eventual outcome and that the claimant, would therefore, have been dismissed in any event.
27. For the reasons set out above, the claimant's claim for unfair dismissal is unsuccessful and dismissed.

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Employment Judge Skehan

Date: 10 April 2019

Sent to the parties on: 16 April 2019

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For the Tribunal Office