EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Hufton**

Respondent: **(R1) Rayburn Trading Limited**
(R2) Prestige Cosmetics Limited t/a Bargain Buys

Heard at: **Nottingham**

On: **Thursday 14 February 2019**

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

Representation

Claimant: **In Person**
Respondent: **Mr S Flynn of Counsel**

JUDGMENT having been sent to the parties on 18 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim lodged on 4 September 2018 for unfair dismissal. There was no wrongful dismissal claim brought by the Claimant. There was an agreed bundle of evidence before the Tribunal at the hearing. The Tribunal also saw 4 short clips of CCTV that had been used by the Respondent during the disciplinary process. Witness evidence was heard from the Claimant. For the Respondent: Ms Helen Christie, HR Consultant, Mr McIlwaine, Retail Development Manager of second Respondent (dismissing manager) and Mr Copeland, Operations Manager for the first Respondent (appeal manager).

Issues

2. The issues before the Tribunal were explained to the parties and were as follows:-

• Has the Respondent shown the reason for dismissal? The Respondent relied upon misconduct as a potentially fair reason. It was the Claimant's case that the real reason for her dismissal was a conspiracy to have her dismissed by the senior management team at the store due to complaints she had recently raised previously.

- Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal? The human rights aspects of the case was specifically raised with the parties on the second day of the hearing (this had been raised by the Claimant as part of her claim however as she was a litigant in person the issues arising were explained to both parties). In particular whether or not the Respondent's agents' (in so far as they are employees) search of the Claimant's property on 12 March 2018 was an infringement of her right to privacy under Article 8.

- Was the dismissal within the range of reasonable responses?

- Was there a failure to comply with the ACAS code?

- Did the Claimant contribute to her own dismissal?

Relevant Law

3. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996.

4. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303,** the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

5. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439**. The test was formulated in the following terms:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

- the starting point should always be the words of [s 98(4)] themselves;

- in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

- in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

- in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

- the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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'.

6. If the dismissal is procedurally unfair I must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

7. I must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

8. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. In Steen **v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Findings of fact

9. I have made the following findings of fact on a balance of probabilities. The Claimant commenced employment on 2 October 2012 as a Sales Assistant although she latterly worked in the stock room at the Bargain Buys store in Louth, Lincolnshire. The second Respondent Prestige Cosmetics Ltd is a limited company operating 5 stores in the area trading under the name of Bargain Buys and Wise Owl and employs 58 people. The first Respondent Rayburn Trading Ltd is a separate limited company and an associated company under the control of the same Managing Director. I find that the Claimant was at all material times employed by Prestige Cosmetics Limited. The Claimant accepted she had received the contract of employment between Prestige and herself contained in the bundle on commencing her employment. For these reasons I am dismissing the claim against Rayburn Trading Limited.

10. Until the events leading to the Claimant's dismissal she had an unblemished career and no history of any disciplinary matters. The Claimant's own evidence was that she had a mostly good relationship with her work colleagues both in and outside of work.

11. In August 2017 the Claimant lodged a formal complaint against Heidi Spring, Deputy Manager that she had bullied the Claimant. This was investigated by Mr McIlwaine who advised no further action would be taken in September 2017. In addition the Claimant had bought a number of health and safety concerns to the attention of the store manager Lyn Warner between November 2017 and February 2018 and in March 2018 complained to Mr McIlwaine and another person at Rayburn Trading Ltd that there were issues with her pallet truck that she used in the stock room. No action was taken by the Respondent to address these concerns but there was no evidence that the Claimant was subjected to any detriment for having raised them.

12. On 5 March 2018 Lynne Laking, Supervisor, reported to Heidi Spring that she had suspicions the Claimant was removing stock from the shop floor to the stock room where the Claimant largely worked alone and then taking them from the store at the end of her shift by concealing them in shopping bags. It appears there was an instruction to monitor the Claimant's movements following this report.

13. Four members of staff were involved in observing the Claimant's movements after this date namely Lyn Warner, Store Manager, Heidi Springs, Deputy Store Manager, Lynne Laking, Supervisor and Lynn Rooks. A pattern was allegedly observed on 5 dates on 1, 5, 7, 8 and 12 March 2018 of items being brought from the shop floor to the stock room and then disappearing from the stock room.

14. On 12 March 2018 the Claimant purchased a number of items from the store. She placed a large box of washing powder in her car and left the remaining items in a Bargain Buys carrier bag which she then placed in a different large green bag. This was observed on the CCTV footage which was seen at the hearing and took place at the till. The Claimant later placed the green bag with items of shopping in the staff room. Lyn Warner, Lynn Rooks and Heidi Springs observed between them 2 cases of Maxi muscle protein bars and a case of John West tuna and a bottle of lemon juice in the stock room.

15. At 4:30 pm that day Ms Warner and Ms Springs checked the contents of the Claimant's green bag in the staff room and found it only contained the shopping she had purchased earlier that day. Ms Springs then went home and Ms Warner decided to check the bag again at 4:40 pm on her own. Ms Warner's statement dated the following day alleged that she had found that the Bargain Buys carrier bag sat higher up in the green bag so she lifted it and saw underneath a case of John West tuna. She then went downstairs and asked Lynn Rooks to return with her. Ms Warner's statement said they both "saw the bag containing the case of tuna and 2 cases of Maxi muscle bars, we did not disturb the bag further but it could have contained other items; those were the only ones we could see easily". Ms Rooks's first witness statement dated 13 March did not corroborate Ms Warner's statement. Ms Rooks agreed that the Bargain Buys carrier bag was higher up and there were extra items in the

Claimant's bag but stated she did not get the chance to look in the bag properly as they heard the Claimant returning from the toilets. She did however confirm she had seen 2 cases of protein bars in the stock room earlier that day and that these were gone after the Claimant left the building.

16. Ms Rooks wrote a further statement on 16 March 2018 following an interview with Ms Warner in that she stated that Ms Warner had asked her to check the Claimant's bag with her as she thought there was a case of tuna in it. She goes on to say she was aware that there were two cases of something in the bottom of the bag about the same size as the protein bar cases and Lyn (Warner) pressed the side of the bag and saw the shape of tins of tuna. I pause here to say something about the search of the Claimant's bag on 12 March 2018 by Ms Warner which she initially undertook alone. It was disputed this was a search. I find that there was a search of the bag and the explanation that Ms Warner merely lifted something out to look inside is not accepted by me as not to have amounted to a search. The Respondent has produced 2 versions of a search policy in the bundle. One was contained in the staff handbook for Prestige Cosmetics, the other was a separate document marked Rayburn Trading. They were largely the same wording except the Rayburn policy purported to be contractual. I find that neither policy had ever been seen by the Claimant until the end of the appeal hearing which I refer to below. Although there was a staff handbook for Prestige Cosmetics neither Helen Christie or Mr McIlwaine could locate a copy of the handbook at the Louth store and I accepted the Claimant's evidence that she had never seen this before. Nonetheless the policy set out some key principles that the Respondent wished to adhere to should they undertake a search of their staff and/or their property.

17. These were in summary that the company could request a member of staff to undergo a search at any time and could include the staff member's personal effects, lockers, bags, workstation and the company may ask to search a staff member and their belongings without express grounds for suspicion of wrongdoing. A search should be authorised by a manager and if a search were to take place it would take place in private, although the person being searched or belongings being searched may have a witness present. Contrary to the policy the Claimant's bag was searched without both her knowledge and her presence or her opportunity to have a witness present during the search. There was no opportunity therefore for the Claimant to challenge the findings of the search or offer an explanation at the time of the items that were said to have been found in her bag.

18. The accounts that were made the following day of what was gleaned from the search were contradictory. Ms Warner said there was a case of tuna but Ms Rooks said that she observed the shapes of tins of tuna. The Claimant was not challenged on the bag contents by Ms Warner but permitted to leave the store. The Respondent relied upon CCTV footage as part of the investigation; clips were seen by the Tribunal. This showed the Claimant purchasing her goods earlier in the day on 12 March 2018 and then later leaving the store 5.02pm. Mr McIlwaine concluded from the CCTV footage that the green bag looked as if it had far more items than the Claimant had purchased earlier that day but it was common ground that the items could not be seen on the CCTV footage. Ms Warner was later interviewed by Ms Christie and Mr McIlwaine and asked why she had

not stopped the Claimant leaving the store. Her explanation was she wishes she had and regretted it and had wanted to see if the Claimant would pay, further that she was thrown by the fact it was 4 cases of stock that had been taken and also she considered she was still monitoring the Claimant. Ms Warner candidly accepted she should have stopped the Claimant.

19. I heard evidence from Mr McIlwaine that Ms Warner was an experienced store manager who had worked for larger retailers previously. The Claimant's unchallenged evidence was that Ms Warner had stopped shoplifters leaving the store on numerous occasions. The Claimant was at pains to point out that had she been stopped it would have proven she had not taken the stock in question.

20. Following the incident on 12 March 2018 the Claimant was permitted to work for 3 days without anything being raised with her but was then suspended on 15 March 2018. She was not permitted to contact colleagues under the terms of the suspension.

21. The Claimant attended an investigation meeting on 26 March 2018. The investigation was conducted by Lyn Warner even though she was the only witness who actually was alleged to have observed items in the Claimant's bag. I find that Ms Warner could not have approached this investigation impartially being such a crucial witness. Mr McIlwaine was asked about this when giving his evidence. He explained that Ms Warner was the only person who could have conducted the investigation. When he was asked why one of the other store managers could not have conducted the investigation he said that they did not have the experience. There was no explanation as to why Ms Christie could not have either have conducted the investigation being a HR consultant for the Respondent or supported another store manager in conducting the investigation.

22. As part of the investigation Ms Warner ran stock reports and these showed a discrepancy for John West tuna and Maxi muscle protein bars. The Claimant was questioned on items she had placed in the stock room on the 5 dates in question. Her explanation was that she could not recall some of the items but said part of her role was to check stock and deal with damaged stock, write offs, items needing labelling and other staff would also bring items to the stock room. The Claimant also stated as part of the investigation she might collect items from the shop floor with the intention of purchasing them and then change her mind and place them on a pallet. The Claimant could not remember what might have been in the green bag some 2 weeks previously. She was asked about a large blue bag she was observed taking home on 5 March 2018 and explained that it contained tea towels that she always took home to wash on behalf of the rest of the staff. The Claimant raised the issue of her bag being searched without her knowledge. Ms Warner denied searching the bag which evidently was not the case given that Ms Warner had made a statement herself on 13 March 2018 that she had looked into the bag. The Claimant also pointed to the fact that stock levels were always inconsistent.

23. Mr McIlwaine accepted under cross examination he had no idea how many tea towels and hand towels the Claimant had washed on behalf of

the store and therefore was not able to say how many would have been in the blue bag on 5 March 2018. He explained his concern was how a supposedly dirty tea towel had been folded flat across the top of the bag which he concluded was suspicious and there to conceal goods.

24. Ms Warner's investigation report went to Mr McIlwaine and a disciplinary hearing was arranged on 23 April 2018. The Claimant alleged that she had been denied the right to be accompanied as she was not permitted to speak to other staff but it was clear from the letter of 18 April 2018 that if she wanted to be accompanied by a work colleague the Respondent would make the appropriate arrangements. The letter inviting the Claimant to the disciplinary hearing set out 5 allegations of theft and the Claimant was sent all of the evidence on which the Respondent intended to rely as well as being provided the opportunity to view the CCTV footage at the disciplinary hearing itself. At the hearing itself the evidence relied upon was, in summary, Ms Warner and Ms Rook's statements about the bag search, that the Claimant's bag looked fuller at the end of the days in question, there was a suspicious tea towel folded flat, items had been observed in the stock room later disappearing and being missing on the stock reports run by Ms Warner.

25. The Claimant again challenged the bag search at the hearing. She was told by Ms Christie that the bag that had been searched was not a handbag but a shopping bag in a public place. It was suggested a number of times to the Claimant that Ms Rooks had witnessed the stock in her bag on 12 March 2018 but as I found above this was not the case. The only direct evidence that the Claimant had been caught with any stock of the Respondent was that of Ms Warner.

26. I do not find that there was a conspiracy against the Claimant by the senior management team. There was no evidence to support this allegation and it did not make any sense in any event. The Claimant asserted Heidi Springs was the driver of the conspiracy but Ms Spring had not made the allegations, Lynne Laking had. Also, Ms Spring's evidence was that she had not seen any items in the Claimant's bag. If she did have a grudge against the Claimant it would make sense that she would have said there was goods in her bag but she said the contrary.

27. Following the disciplinary hearing Ms Christie and Mr McIlwaine interviewed Lyn Warner to ask her about the conspiracy allegation and why she had not challenged the Claimant on leaving the store and the bag search on 23 April 2018.

28. On 27 April 2018 Mr McIlwaine wrote to the Claimant advising that she was summarily dismissed for gross misconduct. All 5 allegations of theft on the separate days were upheld. Mr McIlwaine weighed up all of the factors and whilst he agreed that the search was not the best practice he concluded that the fact something had been found in the Claimant's bag as a result of the search outweighed the fact that best practice had not been followed in respect of the search.

29. The Claimant appealed by letter of 1 April 2018. There were 4 grounds of the appeal and the Claimant specifically raised that the bag search in her view was illegal and infringed her right to privacy.

30. An appeal hearing took place on 29 May 2018 with Martin Copeland. There were no issues taken with the procedure of this hearing. The search policy was referenced at the beginning of the hearing but I find that no copy was provided to the Claimant until the end of the hearing. Mr Copeland upheld the decision to dismiss the Claimant by letter of 15 June 2018.

Conclusions

31. I reached the following conclusions. I find that in respect of the reason for the dismissal I accept the Respondent's reason put forward was conduct and this was a potentially fair reason. I rejected that there was another reason namely a conspiracy to get rid of the Claimant following complaints she had made.

32. Turning now to Section 98(4) and the reasonableness, first of all I have taken into account that the Respondent is a relatively small employer and I have considered their size and administrative resources of the Respondent. I also take into account that the Respondent are entitled to take very seriously allegations of theft of their stock being a retail environment and such allegations potentially amounting to criminal activity.

33. Looking at the reasonableness of the investigation generally I start by saying that having regards to the principles of natural justice there is great difficulty with the investigation being conducted by Lyn Warner due to her being a key and pivotal witness to the allegations being the only witness who said that she observed items of stock in the Claimant's bag. It is difficult to see in these circumstances how Lyn Warner could have conducted an impartial investigation. She interviewed other staff members and evidently those staff members were aware that Lyn Warner had told them that she had seen items in the Claimant's bag and this could have affected their recollection. This is evidenced by the different statement that Lynn Rooks gave a few days later.

34. The ACAS Code of Practice specifies that an investigation should be conducted by a different person to the disciplinary hearing. This in my view is analogous to a position that an investigation should not be conducted by a key witness. I have concluded that this in itself rendered the investigation procedurally unfair. I do not accept Mr McIlwaine's explanation that no one else could have conducted the investigation for reasons I have set out above. In particular I take into account that Mr Copeland was bought in from Rayburn and there was no explanation why another manager could not have been brought in from Rayburn to have conducted the investigation if none of the other store managers or Ms Christie were genuinely unable to conduct the investigation.

35. Turning now to the investigation itself. I have carefully considered whether the evidence before the Respondent could have led to a reasonable belief that the Claimant was guilty of theft. There was circumstantial evidence namely the stock checks, the CCTV and the items in the stock room as well as the evidence from Ms Warner and Ms Rooks. The stock reports suggested there was a short fall of Maxi muscle protein bars. Mr McIlwaine accepted that stock levels could be inconsistent but he was

entitled to take this into account in reaching his overall conclusions. In respect of the CCTV, with respect to Mr McIlwaine this was flimsy at best. To say that a bag looked heavier or looked bigger at the end of the day and therefore the explanation is that it contained stolen goods in my view was not a reasonable conclusion to have reached. There could have been anything in the bag and the explanation in respect of the tea towels was not properly considered.

36. Also Mr McIlwaine accepted there were items left in the stock room all the time not just by the Claimant and there were many different reasons why, such as relabelling, damage etc. The fact that those items were no longer in the stock room at certain times in my view did not form sufficient reason for the Respondent to conclude that the Claimant had stolen those items. Therefore I have concluded that other than the statement of Ms Warner the evidence that the investigation referred to was at best circumstantial.

37. I now consider the bag search. Tribunals are required to give effect to Convention rights when considering S98 (4). In my judgment, the right to privacy was engaged and I do not accept that the Claimant had no expectation of privacy by virtue of her bag being in a public place. The search policy was never brought to the attention of the Claimant but even if it had been her bag was in the staff room which is a place designated for use by staff and this was not a public place.

38. As Article 8 was engaged, was it justified for the Respondent to have interfered with this right by searching the Claimant's bag without her knowledge or permission? I have given this matter very careful consideration. It is a question of balance between the Respondent's right not to have their goods stolen and prevention of crime against the Claimant's right to privacy.

39. In reaching the decision that the bag search was not justified I have taken into account how the bag search was carried out in contravention of the Respondent's own policy. This contained good practice and procedures for searches in particular the right to have a witness present so that results of any such search could be corroborated and observed by the person who was having their property searched. These safeguards were denied to the Claimant.

40. The outcome of the bag search was highly influential on the investigation and the decision to dismiss the Claimant. It had a direct impact on the decision to dismiss. In light of the bag search and how it was conducted, as well as Ms Warner conducting the investigation, I find that the dismissal was unfair in accordance with Section 98(4).

41. I now consider what would the outcome of the dismissal been, had the Respondent followed a fair procedure. There were two issues with the procedure. Firstly the bag search and secondly that Ms Warner conducted the investigation. If someone else had conducted the investigation not Ms Warner they would still have been faced with a statement from Ms Warner which entirely contradicted a statement from the Claimant. I have also taken into account Ms Rook's evidence and that she made observations that could be corroborative and was not involved in the bag search. For these reasons I am finding that there was a 50 per cent chance that had someone else conducted the investigation they would have accepted the

evidence over Ms Warner to that of the Claimant. If there had been no bag search that infringed the Claimant's right to privacy there was other corroborating evidence. Having regard to these factors I am assessing the percentage chance the Claimant would still have been dismissed but for the procedural irregularities at 50%.

42. In respect of contributory fault. I am required to identify the conduct which is said to give rise to possible contributory fault. This is difficult to do so in this case as other than the conduct for which the Claimant was dismissed – theft – there is no conduct that could be deemed contributory. This is not a case where there was evidence that Claimant did something culpable but that it was not so serious as to warrant dismissal. It was in essence all or nothing. If the Claimant had stolen the goods she was of course 100% culpable. The dishonesty was vehemently denied by the Claimant. It is not the function of this Tribunal to conclude the Claimant stole the goods. Therefore the answer to the question on contributory fault must be in this case that I could not determine contributory fault.

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Employment Judge Moore

Date 18 April 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE