EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4104807/2019

Held at Edinburgh on 13 and 14 August 2019

Employment Judge: W A Meiklejohn

Mr Paolo Alexandre Mendes	**Claimant** **In person** **Ms E Cozzeia – Interpreter**
Farne Salmon & Trout Limited	**Respondent** **Represented by Mr P Chadwick, Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) the claimant was not unfairly dismissed by the respondent, and

(b) the respondent did not breach the claimant's contract of employment when dismissing him,

and according his claims of unfair dismissal and breach of contract (in respect of entitlement to notice pay) do not succeed and are dismissed.

REASONS

1 This case came before me for a final hearing in Edinburgh on 13 and 14 August 2019. The claimant appeared in person. Mr Chadwick appeared for the respondent.

2 The claimant is Portuguese. He speaks and understands very little English. He was assisted throughout the proceedings by Ms Cozzeia as interpreter.

Claims

3 The claimant had been dismissed by the respondent without notice. He claimed that his dismissal was unfair. He also claimed that his dismissal was in breach of contract and that accordingly he was entitled to notice pay.

4 The respondent's position was that the claimant had been fairly dismissed for gross misconduct and that, the claimant having committed a material breach of his contract by his gross misconduct, they were entitled to dismiss him without notice.

Evidence

5 For the respondent I heard evidence from –

Mr L Szymanski	Quality Assurance
Mr M Pearson	Line Manager
Mr A Ponton	Value Stream Manager
Ms H Stenhouse	Senior Production Manager

Mr Szymanski was the person who witnessed and reported the claimant's alleged misconduct. Mr Pearson was the person who investigated this. Mr Ponton was the person who dismissed the claimant. Ms Stenhouse heard the claimant's appeal against his dismissal.

6 For the claimant I heard evidence from –

The claimant himself	
Mrs A Mendes	Claimant's wife
Mr I Balthazar	Work colleague

Both Mrs Mendez and Mr Balthazar worked for the respondent. Mr Balthazar is also Portuguese and both he and the claimant gave their evidence through the interpreter.

7 I had a bundle of documents extending to 297 pages to which I will refer by page number.

Findings in fact

8 The respondent operates a substantial facility in Duns where they employ some 700 staff. Of these around half are British and the remainder comprises a mixture of various nationalities, with eastern Europeans forming the largest grouping. They produce cold smoked, hot smoked, ready to eat and natural salmon. Supermarkets are their principal customers. Quality control and hygiene standards are of great importance to the respondent. They are particularly concerned to avoid any risk of bacterial contamination during their production processes as this could have very serious consequences particularly for young or elderly consumers of their product. Staff training is provided, normally in English.

9 The claimant commenced employment with the respondent on 24 January 2005. He remained in their employment until he was dismissed on 22 January 2019. At the time of his dismissal he worked in the trimming hall.

Production process – maturation chill

10 So far as relevant to this case, the respondent's production process involved the following stages. Salmon would pass through the kiln where they were smoked. From the kiln they would be moved on trolleys to the maturation chill. The trolleys were each labelled with batch numbers. Pages 223-225 were photographs of trolleys with labels attached in the maturation chill. The salmon would spend 24 hours in the maturation chill. From there they would be moved (by an employee referred to as the chillman) to the trimming hall.

11 Within the trimming hall there was a monitor screen which showed (a) details of the trolleys in the maturation chill and (b) the trimming hall schedule. Pages 221-222 were photographs of the monitor screen. The trolleys were colour coded on the monitor screen – those shown in green were available to use, those shown in blue were awaiting a salt test and those shown in red were needing to be used in view of the length of time they had been in the maturation chill.

12 The only employees whose duties required them to be in the maturation chill from time to time were (a) the chillman, (b) the trolley wash operator (a Portuguese employee called Vitor who was a friend of the claimant) and (c) the blast operator. Quality assurance (Mr Szymanski) would also visit the maturation chill. It was part of Mr Szymanski's role to take bacteria swabs to test for listeria and other infections.

13 The trimming hall was physically adjacent to the maturation chill. The claimant was unable to understand the monitor screen as it was in English and he did not look at it. From time to time he would, if there was a gap in the supply of fish to the trimming hall, go through to the maturation chill to check what fish were available. This was unnecessary as it was the chillman's responsibility to deliver fish from the maturation chill to the trimming hall. There was however no rule against the claimant entering the maturation chill and he would on occasions

speak with his friend Vitor when he did so (access to trolley wash area being via the maturation chill).

Events of 11 January 2019

14 Between 9.00 and 10.00am on 11 January 2019 Mr Szymanski was taking bacterial swabs in the trimming hall, in slice halls 1 and 2 and in blast areas 1 and 2. Page 193 was a record of swabs taken by Mr Szymanski in blast 1 and blast 2 timed between 9.40 and 9.48am. Mr Szymanski then walked towards the reception area. This took him along a corridor beside the maturation chill. There was a solid wall between the corridor and the maturation chill with a door sized opening.

15 As he passed this opening Mr Symanski noticed one of the trimming hall operators in the maturation chill. This person was standing next to a trolley with his back to Mr Szymanski and so could not see him. Mr Szymanski wondered what the trimming hall operator was doing in the maturation chill and stopped to observe him.

16 Mr Szymanski saw the person he was observing tear off a piece of fish and put it into his mouth as he started to walk back to the trimming hall. Mr Szymanski glanced at the trolley and saw that a piece of fish was missing from one of the fillets.

17 Mr Szymanski immediately went to speak to Mr Pearson who was the line manager responsible for the trimming hall. He told Mr Pearson what he had seen. The trimming hall could be observed from Mr Pearson's office. Mr Szymanski pointed out the operator he had seen in the maturation chill and Mr Pearson identified this as the claimant.

18 Mr Pearson and Mr Szymanski went together to the maturation chill where Mr Szymanski pointed out the fish with the piece missing. Mr Pearson took a

picture of this with his mobile phone (page 198). He did so within four or five minutes of Mr Szymanski's observation of the claimant in the maturation chill.

19 Mr Pearson contacted Ms Burn in Human Resources. She told Mr Pearson to ask Mr Szymanski to write an email detailing what he had seen. Mr Symanski sent an email to Ms Burn at 12.50pm, confirming what he had told Mr Pearson (page 188). Mr Szymanski said that he had other duties to perform and had sent the email when he returned to his office.

Suspension of claimant

20 Mr Pearson called the claimant into a meeting with himself and Ms Burn at 1.15pm on 11 January 2019. Pages 189-190 were the notes of that meeting. These were signed by the claimant. The meeting was conducted in English without an interpreter present.

21 The notes record that the claimant confirmed how long he had worked for the respondent, that he understood the respondent's hygiene policy and that he had gone to the maturational chill that morning to see Vitor for a chat. When asked about being seen consuming product the claimant answered "no". The claimant was then told that he was being suspended and would be required to come in for an investigation meeting. He was escorted from the premises by Mr Pearson.

22 The claimant said that he was unhappy with the meeting notes as he was sure he had said more than was recorded. Mr Balthazar said that he spoke with the claimant at about 1.30pm (ie shortly after the meeting at which he was suspended). The claimant told him that the quality controller had said that he saw him (the claimant) eating fish and that he had been suspended.

23 I was satisfied that the meeting notes were reasonably accurate and that the claimant understood what he was being accused of and that he was being suspended.

Investigation meeting

24 Ms Burn wrote to the claimant on 11 January 2019 (pages 191-192) confirming his suspension and requiring him to attend an investigation meeting with Mr Pearson on 16 January 2019. The allegation against the claimant was expressed in these terms –

> "It is alleged that on Friday 11th January 2019, you were seen consuming product in the maturation chill area which is a potential breach of our Hygiene Policy and could be considered as theft from the business."

A copy of the respondent's disciplinary policy (pages 29-35) was sent to the claimant with this letter.

25 The investigation meeting took place on 16 January 2019. Mr Pearson was accompanied by Ms R Sudlow of Human Resources. The claimant brought Mr P Viegas to translate. Pages 194-197 were the notes of the meeting. I was satisfied that these were reasonably accurate.

26 At the start of the meeting Mr Pearson asked the claimant if he understood the respondent's hygiene policy and the claimant confirmed that he did. Pages 36-37 were the hygiene policy. This included in the respondent's hygiene rules –

> "You must not consume food or chew gum within the production areas"

27 The respondent's disciplinary policy and procedure contained (at pages 33-34) a list of examples of gross misconduct, stated to be "likely to result in summary dismissal". These included –

- Theft, fraud or deliberate falsification of records
- Breach of Hygiene policy

28 At the investigation meeting the claimant denied that he had touched the fish. He said that he had gone to the maturation chill so see how many trolleys there were. When shown the picture taken by Mr Pearson (page 198) the notes record the claimant as saying that there were a lot of fish like that in the chill. Mr Pearson replied that this was a fresh tear. Mr Viegas responded that the claimant did not like salmon and only ate fish at Christmas.

29 Mr Pearson was able to say that it was a fresh tear because, during the smoking process, a crust forms on the fish ("pellicle"). Pellicle is formed due to the flesh being exposed to the smoke in the kiln which causes the flesh to change colour. In the picture taken by Mr Pearson (page 198) there was a difference in colour between the outside of the fish and the inside where exposed by the piece torn away.

30 When Mr Pearson told the claimant that someone had seen him tearing and eating the fish, the claimant replied that the person (saying this) was a liar and had no proof. He questioned why this person had not spoken to him. Mr Pearson replied that the person had come to him to report the matter and that he (Mr Pearson) had gone to the maturation chill straight away to look (for himself).

31 When asked if there was anything he would like to add, the claimant repeated that he had never touched the fish and that he did not like fish. He added that he saw people eating fish every day. When asked by Mr Pearson why he had not reported this, the claimant said that it was not his business to tell if people were eating fish but would do so in future.

32 The investigation meeting concluded with Mr Pearson telling the claimant that he had reason to believe that the claimant had consumed product and that the matter would now progress to "disciplinary".

Disciplinary hearing

33 Mr Ponton wrote to the claimant on 17 January 2019 (page 199) inviting him to attend a disciplinary hearing on 22 January 2019. The allegation against the claimant was expressed in the same terms as in the earlier letter of 11 January 2019 (see paragraph 24 above). The documents enclosed with Mr Ponton's letter were listed as –

- Statement – L Szymanski – 11.01.2019
- Suspension Meeting Notes – 11.01.2019
- Investigation Meeting Notes – 16.01.2019
- Photograph of teared product

According to Mr Ponton's evidence the statement of Mr Szymanski was actually a copy of his email of 11 January 2019 (page 188).

34 At the disciplinary hearing Mr Ponton was accompanied by Ms Burn as notetaker. The claimant attended alone, although he had been advised of his right to be accompanied in the invitation letter of 17 January 2019. Mr Ponton asked the claimant if he wanted a witness or translator. The claimant said that he wanted a translator and after a short adjournment Mr P Luengo joined the meeting as translator.

35 Pages 200-205 were the notes of the meeting. I was satisfied that these were reasonably accurate. Mr Ponton asked the claimant why he had been in the maturation chill on 11 January 2019. The claimant said that he went there quite often when there were "gaps on his line" (ie a break in the supply of fish from the maturation chill). He (the claimant) said that when this happens, he goes to check how much fish is left.

36 Mr Ponton reminded the claimant that when initially asked the same question (why he had gone to the maturation chill) he had said that he was talking to Vitor.

This was not quite accurate (on the part of Mr Ponton) as the claimant had actually told Mr Pearson at the meeting on 11 January 2019 that he had gone to see Vitor for a chat. He did not say at that time that he had actually spoken to Vitor.

37 The claimant told Mr Ponton that he had gone to the maturation chill to look at the fish and then spoke to Vitor. Mr Ponton felt that the claimant was changing his story (as to why he had been in the maturation chill). In fairness to the claimant, it was apparent from the evidence that there were two reasons that he might choose to go to the maturation chill – either to check what fish were there (potentially to assess when he might finish work for the day) and/or to speak to his friend Vitor.

38 The claimant confirmed to Mr Ponton that he did not eat fish, and that he did not like it. He denied that he had ever eaten fish while at work. Mr Ponton asked the claimant why he thought someone (ie Mr Szymanski) had said that he had seen him (eating fish) and the claimant responded that Mr Szymanski must have presumed that he saw the claimant (eating fish).

39 Mr Ponton then showed the claimant the picture of the fish which had been torn. When the claimant said that there were a lot of fish like that Mr Ponton pointed out that the fish in the picture had been “ripped”. The claimant then said that it must have been someone before him.

40 Mr Ponton asked the claimant if it was a coincidence that he had been beside it (ie the trolley containing the torn fish). The claimant said “yes” and then accepted that he understood why this made the respondent “have doubt”. The claimant then said that he had been looking at the batches. Mr Ponton pointed out that the batch labels were next to the torn fish. This was confirmed by the photograph at page 198.

41 After a short adjournment, Mr Ponton told the claimant that he was terminating his employment by reason of gross misconduct. He said that he had a

reasonable belief that the claimant had consumed fish. He advised the claimant of his right of appeal. The claimant declined to read through and sign the notes of the meeting.

42 Mr Ponton wrote to the claimant on 23 January 2019 confirming his dismissal for gross misconduct. In his letter Mr Ponton summarised what had been said at the disciplinary hearing in these terms –

> "During our meeting you admitted that you were in the maturation chill area on Friday 11th January 2019. You said that you often go into this area when there are gaps in production and you had gone in to the area on this day to clean and check how much fish was on the trollies. You had not seen anyone else in the maturation chill and when asked about the trolley you were seen standing next to, you said that you were checking the batch number and did not consume any fish as you do not like it. When asked if you had noticed that the fish had been torn, you said that you had not noticed and that it was a coincidence that you were beside the trolley where this had happened. You presumed that if the fish was torn, someone else must have done this. You also said that in the past, you had seen other people consume fish in this area but admitted that you had never reported this fact to your Line Manager.
>
> A witness said they had seen you in the maturation chill area on Friday 11th January 2019, taking a piece of fish from one of the trollies then consuming it as you walked back to the Trimming Hall. At your initial meeting on 11th January 2019, where you were suspended, you said that you had gone in to the area to speak to one of your colleagues, however, at your investigation meeting on Wednesday 16th January 2019, you said you could not initially remember why you were in the area but then said you often go in to clean and to check how much fish is on the trollies. You had no reason to be in this area and when I showed you a picture of the fish which was on the trolley that you were standing at, you said that you had not noticed that a piece had been torn away. You then said that you

were beside the trolley checking the batch number, but I believe that if you were checking batch numbers, you would have had to bend down to see the labels attached to the trolley as they were not at eye level. If you had done this, you would have noticed if the fish was torn."

Appeal

43 The claimant exercised his right of appeal. On 23 January 2019 the respondent received two letters – one from Mrs Mendes (page 208) and one from the claimant (page 209). Ms Stenhouse wrote to the claimant on 25 January 2019 (page 210) inviting him to attend an appeal hearing on 6 February 2019.

44 On 26 January 2019 the claimant wrote to the respondent stating that he would like Mr G Laidlaw to be at the appeal hearing to speak for him and to have Mr Viegas there as well. I was told that Mr Laidlaw was a trade union representative. When the appeal hearing convened on 6 February 2109 Mr Laidlaw was not in attendance, being absent from work due to illness. Mr Viegas was there and also Ms A Nesbit as notetaker. Pages 212-214 were the notes of this meeting and again I was satisfied that these were reasonably accurate.

45 The claimant again asserted that he had not eaten the fish. He said that he only ate fish at Christmas and on special occasions. He questioned why Mr Szymanski had not approached him if he had seen him (the claimant) eating fish. Ms Stenhouse responded that it was not Mr Szymanski's job to approach a staff member but rather to escalate the matter to management.

46 Ms Stenhouse asked the claimant about changing his explanation for being in the maturation chill. The claimant said there had been some confusion and attributed this to there being no translator present at the meeting on 11 January 2019. He said he had understood the question at the time "but not 100%".

47 The claimant suggested that Mr Szymanski had been mistaken in what he thought he had seen. Ms Stenhouse read out Mr Szymanski's statement in which he said he had seen the claimant put the fish in his mouth. The claimant's response was that he had not seen Mr Szymanski at all.

48 The notes of the appeal hearing were read to the claimant by Mr Viegas in Portuguese and then signed by the claimant.

49 Ms Stenhouse wrote to the claimant on 8 February 2019 intimating her decision not to uphold his appeal. The relevant paragraphs of her letter were in these terms –

> "I have considered all of the evidence and the representations made by you during the hearing. You repeated that you do not particularly like fish and you do not eat fish except at Christmas or on special occasions. You were not aware that the QA was in the maturation chill while you were there. You could not give any reason as to why the QA would provide a statement saying he saw you put the fish in to your mouth if you did not do this. You explained you are upset at being dismissed from your job as a Process Operator and you would like to be reinstated and return to work.
>
> Having listened to your explanation of events it is my belief that you have eaten the fish when you were in the maturation chill. You have not provided any mitigation other than you do not really like fish and you have provided various explanations as to what occurred on this day. Therefore, having considered the information available to me I do believe that you have taken and eaten Company product which you were not authorised to do and I do believe you have breached the Company Hygiene policy both of which are gross misconduct."

Other evidence

50 Mrs Mendes said that the claimant did not like salmon. She had never seen him eating salmon. He only ate salted cod. When they were on holiday in Portugal she ate a lot of salmon but the claimant did not touch it. When they had barbecues at home there would be a lot of salmon but the claimant would not eat any. This was corroborated by Mr Balthazar who said that he had been at a barbecue at the claimant's home where the claimant cooked salmon but did not eat it.

51 Mrs Mendes and Mr Balthazar both gave evidence about fish coming into the trimming hall with bits missing. Mrs Mendes said that she had told her manager about a fish with a piece missing after the claimant's dismissal. Mr Balthazar said that fish go through the trimming hall every day with bits missing.

52 Mr Pearson and Mr Ponton explained that there were fish with bits missing but this would normally happen before the fish passed through the kiln. Damage would not be caused by the machinery. When the fish came out of the kiln, pellicle would have formed. The different colour of flesh shown in the photograph taken by Mr Pearson confirmed that the fish in question had been torn after passing through the kiln.

53 Both Mrs Mendes and Mr Balthazar said it was common practice for operators to go from the trimming hall to the maturation chill to see how much fish would be coming through, for example to see if they might get away early.

54 The respondent's training was normally delivered in English, although sometimes there would be translation into Polish and Portuguese. The respondent offered English lessons; the claimant had not taken this up.

55 Mr Ponton said that the claimant had started an e-learning course on chemicals but was not progressing through the pages on the screen, and he had stopped the claimant from using chemicals. He was also concerned that the claimant was having difficulty with the colour coding of the chemical labels due to his eyesight.

Schedule of loss

56 Following his dismissal the claimant was medically certified as unfit for work by reason of "stress reaction". Page 220 was a statement of fitness to work issued by the claimant's GP on 4 March 2019 confirming this as the reason for the claimant not being fit for work for a period of four weeks.

57 At the time of his dismissal the claimant's gross and net pay with the respondent were £315.20 and £272.04 respectively.

58 With effect from 8 April 2019 the claimant secured fresh employment as an agency worker. This continued until 14 August 2019. Between 8 April and 10 May 2019 the claimant earned £915.71. Thereafter he earned £282.60 per week.

59 At the date of the Tribunal hearing the claimant's current earnings were £250.87 per week.

60 The claimant enjoyed the benefit of pension contributions by the respondent at the rate of £73.32 per month at the date of his dismissal.

61 The claimant incurred travel costs of £56.00 while attempting to secure fresh employment. He did not receive any state benefits. Mr Chadwick confirmed that the respondent was not arguing that the claimant had failed to mitigate his loss.

Comments on evidence

62 The respondent's witnesses gave their evidence in a straightforward way and were all credible.

63 The claimant and his witnesses gave their evidence to the best of their ability. Doing so through the interpreter (in the case of the claimant and Mr Balthazar) made it more difficult to assess their credibility.

64 The key area of conflict in the evidence was between Mr Szymanski and the claimant regarding whether the claimant had torn off and eaten a piece of fish in the maturation chill on 11 January 2019. I preferred Mr Szymanski's evidence to that of the claimant on this point.

65 Mr Szymanski had gone directly to report what he had seen to Mr Pearson. Mr Pearson's account of what Mr Szymanski had told him was consistent with Mr Szymanski's evidence. The email from Mr Szymanski to Ms Burn at 12.50 on 11 January 2019 was sent at a time when his recollection of events should have been clear, and was consistent with his evidence to the Tribunal.

66 It was understandable that the respondent's witnesses perceived that the claimant had changed his story during the disciplinary process on the issue of why he had gone to the maturation chill. There may have been some element of "lost in translation" but it had counted against the claimant that his explanation had not been consistent.

Submissions

67 Mr Chadwick addressed the unfair dismissal claim and invited me to find that the respondent had shown that they had dismissed the claimant for a reason relating to his conduct. This was a potentially fair reason for dismissal.

68 In the determination of whether the respondent had acted reasonably or unreasonably in treating the claimant's conduct as sufficient grounds for dismissal, the burden of proof was neutral. The Tribunal should not substitute its own view. The decision had to be based on the evidence available to the respondent.

69 Mr Chadwick referred to **British Home Stores Ltd v Burchell 1978 IRLR 379**. He submitted that the respondent had a reasonable belief that the claimant had eaten the fish. They had reasonable grounds for that belief given the evidence of Mr Szymanski. They had carried out a reasonable investigation.

70 Mr Chadwick further submitted that the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to them.

71 Mr Chadwick was critical of the claimant's concern about the accuracy of the meeting notes, suggesting that the claimant was concerned only where the notes were unhelpful to his case. The claimant had been given the chance to look at and sign the notes. He had not signed the disciplinary hearing notes but had not raised any concern about their content at his appeal.

72 There was no dispute about the content and relevance of the respondent's hygiene policy. All of their witnesses had confirmed that employees were not permitted to consume product. If they did so, they were likely to be dismissed.

73 Hygiene was the respondent's most important policy. Contamination of their product could result in death. There were clear business ramifications for the respondent in terms of complying with their customers' standards.

74 Consumption of product was also theft.

75 The claimant had been observed by Mr Szymanski eating fish. The evidence had disclosed no reason why Mr Szymanski should make a false allegation.

76 The claimant's explanation for being in the maturation chill on 11 January 2019 had been contradictory. He would not have been able to read the labels and could not tell by looking at the trolleys which were due to be taken to the trimming hall. Mr Chadwick submitted that the claimant's evidence was deeply unsatisfactory.

77 Mr Chadwick argued that the claimant had understood what was happening at the meeting on 11 January 2019 notwithstanding there being no interpreter. He had responded to Mr Pearson's questions and had reported the outcome to Mr Balthazar.

78 There had been an interpreter at each of the subsequent meetings and therefore no lack of understanding by the claimant at any stage. The claimant had been given a full and proper opportunity to state his case.

79 The claimant had accepted that the tear in the fish could only have occurred after it came out of the kiln and by an individual tearing it. The evidence about other damage to fish was therefore irrelevant.

80 Referring to the evidence of the claimant and his witnesses about whether the claimant ate fish, Mr Chadwick submitted that this contrasted with what the claimant had told the respondent. He had not said to the respondent that he never ate salmon. What he had said was that he did not like fish and only ate it at Christmas and on special occasions. He had not told the respondent that the only fish he ate was dried cod.

81 Mr Chadwick submitted that the respondent had followed a fair and thorough process. There had been a gross misconduct offence warranting summary dismissal. Mr Ponton had taken account of the claimant's length of service, but this actually counted against the claimant as he would be well aware of the hygiene policy.

82 Turning to the breach of contract claim, Mr Chadwick said it was for the respondent to show that the claimant's offence warranted dismissal without notice. Hygiene was their most important policy. Breach of it was clearly stated to be a summary dismissal offence.

83 The claimant made a brief submission in which he argued that there had been no investigation at all. The respondent had just wanted to dismiss him. If there had been a proper investigation, they would not have done so.

Applicable law

84 I will deal with this briefly. The right not to be unfairly dismissed is contained in section 94(1) of the Employment Rights Act 1996 ("ERA"). In terms of section 98(1) ERA it is for the employer to show a potentially fair reason for dismissal. The potentially fair reasons include the employee's conduct. Where the employer has shown a potentially fair reason for dismissal, the determination of the question of whether the dismissal is fair or unfair in terms of section 98(4) ERA –

> "(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."

85 The Tribunal has jurisdiction to deal with breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. This covers claims by an employee for recovery of damages from the employer. Section 86 ERA sets out the right of an employee to a minimum period of notice of termination of employment. Failure by an employer to give that notice is potentially a breach of contract giving rise to a claim for damages by an employee. However, section 86(5) ERA provides that the section –

> "does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

86 In **British Home Stores Ltd v Burchell** the Employment Appeal Tribunal set out the matters a Tribunal has to consider and decide in a conduct dismissal case –

(a) The employer must establish the fact of his belief in the employee's guilt of the misconduct,

(b) The employer must show that he had in his mind reasonable grounds upon which to sustain that belief, and

(c) The employer must have carried out as much investigation as was reasonable in all the circumstances of the case.

87 In **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439** the Employment Appeal Tribunal said that in many cases there is a "band of reasonable responses" to the employee's conduct within which one employer might reasonably take one view and another employer might quite reasonably take another view. A dismissal falling within the band of reasonable responses would be fair.

88 In dealing with a disciplinary issue the employer must follow a fair procedure. What constitutes a fair procedure is informed, but not dictated, by the ACAS Code of Practice: Disciplinary and Grievance Procedures 2015 (the "Code"). Where a provision of the Code appears to a Tribunal to be relevant to any question arising in the proceedings before, the Code shall be taken into account in determining that question (in terms of section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992).

Discussion and disposal

89 I was satisfied that the respondent had shown that the reason for the claimant's dismissal related to his conduct. The allegation was that he had consumed

product in the maturation chill. This was conduct (or rather alleged misconduct) on the part of the claimant. It was a potentially fair reason for dismissal. There was no evidence or argument from the claimant that there had been some other reason for his dismissal.

90 I approached the question of whether the respondent had acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him by considering the matters referred to by the Employment Appeal Tribunal in **British Home Stores Ltd v Burchell**.

91 Firstly, did the respondent believe the claimant was guilty of the allegation that he had consumed product in the maturation chill? I found that they did so. The disciplinary process would not have been initiated had Mr Pearson not formed the view that there was evidence of the claimant tearing off and eating a piece of fish.

92 Secondly, did the respondent have reasonable grounds upon which to sustain that belief? Again, I found that they did so. They had the report from Mr Szymanski of what he had seen when observing the claimant in the maturation chill on 11 January 2019. When Mr Szymanski spoke to Mr Pearson, the claimant was identified as the person Mr Szymanski had observed. Mr Pearson and Mr Szymanski went to the maturation chill where Mr Pearson took a photograph of the fish with a piece torn off.

93 When questioned about the allegation that he had consumed product, the claimant gave an inconsistent explanation of why he had been in the maturation chill. I could accept that this might have been to some extent a matter of translation but the respondent was entitled to take that inconsistency into account.

94 While there was evidence of fish with bits missing passing through the trimming hall, the evidence relating to the specific fish from which the claimant was found to have torn off and eaten a piece supported the view that this had occurred in

the maturation chill. This was because the photograph taken by Mr Pearson (page 198) clearly showed the difference in colour between the pellicle formed within the kiln and the area of flesh exposed by a piece of the fish being torn off.

95 Thirdly, had the respondent carried out as much investigation as was reasonable when they formed their belief of the claimant's guilt? I found they had done so. The key piece of evidence was Mr Szymanski's account of what he had observed the claimant doing in the maturation chill. The respondent had obtained a statement from him, in the form of his email to Ms Burn on 11 January 2019, reasonably quickly after the incident.

96 Apart from the claimant himself, there were no other witnesses to what had happened in the maturation chill. The claimant was spoken to on 11 January 2019, again reasonably quickly after the incident.

97 Photographic evidence of the fish from which a piece had been torn was obtained while the fish was still within the maturation chill and this was done promptly after the incident was reported by Mr Szymanski.

98 The respondent might have done more to look into the claimant's assertion that he did not like fish and only ate it at Christmas and on special occasions. The fact that the claimant's wife was also employed by the respondent meant that this could easily have been pursued. However, even if the respondent had been told in the course of their investigation that the claimant did not eat salmon, this would not have explained what Mr Szymanski had observed and about which his evidence was clear.

99 I was satisfied that dismissal fell within the band of reasonable responses open to the respondent. It could not be said that no reasonable employer would have dismissed in all the circumstances of this case. Indeed, in view of the clear evidence provided to the respondent by Mr Szymanski and the importance to them of strict compliance with their hygiene policy, it is difficult to conceive that any employer would have come to a different decision.

100 I reminded myself of the provisions of the Code. This sets out the "keys to handling disciplinary issues in the workplace" under a number of headings –

- Establish the facts of each case
- Hold a meeting with the employee to discuss the problem
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Provide employees with an opportunity to appeal

I was satisfied that the respondent had followed the Code in all material respects.

101 Accordingly I decided that the claimant had not been unfairly dismissed by the respondent and his claim of unfair dismissal did not succeed.

102 I then considered the claimant's claim for notice pay which proceeded on the basis that his dismissal had been a breach of contract in respect of which he was entitled to damages. Unlike the unfair dismissal claim where I must not substitute my own view for that of the employer, in dealing with the breach of contract claim I had to decide for myself whether the respondent had acted in breach of contract. I could, if I considered that it was appropriate to do so, come to a different view on the evidence from that of the respondent.

103 For the respondent to be entitled to dismiss the claimant without notice, the claimant's contract of employment had at the time of dismissal to be terminable without notice by reason of the claimant's conduct.

104 The evidence of Mr Szymanski was clear and uncontradicted by any other evidence. He had seen the claimant tear off and eat a piece of fish. That was in breach of the respondent's hygiene policy and also amounted to theft.

105 Mr Szymanski's evidence was supported by the photograph taken by Mr Pearson. The contrast in colour between the flesh exposed where the fish had been torn and the rest of the skin indicated that the removal of a piece had occurred after the fish had been removed from the kiln, in other words it had to be within the maturation chill. There had been only a short interval between Mr Szymanski observing the claimant and his returning to the maturation chill with Mr Pearson so that, on the balance of probabilities, it had been the same fish.

106 I decided that the respondent had not acted in breach of contract when they dismissed the claimant without notice as they had been entitled to do so by reason of his conduct, and his breach of contract claim did not succeed.

Date of Judgment: 21 August 2019
Employment Judge: Sandy Meiklejohn
Entered Into the Register: 27 August 2019
And Copied to Parties