



EMPLOYMENT TRIBUNALS

Claimant: Mr M Hyett

Respondent: Stock Bounty Limited t/a Country Fare

Heard at: Southampton **On:** 13 February 2020

Before: Employment Judge Rayner sitting alone

Representation

Claimant: Ms S Aly, Counsel

Respondent: Mr J Brotherton, Non Practising Solicitor

JUDGMENT having been sent to the parties on 25 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, on 20 February 2020 the following reasons are provided:

REASONS

1. By a claim received by the Employment Tribunal on 27 April 2018 the Claimant brought a claim of unfair dismissal.
2. Mr Hyett was employed as a preparation manager by Stock Bounty Limited T/A Country Fair from the 31 May 2015 until 23 February 2018.
3. The Respondent is a wholesaler providing catering supplies to local businesses across Dorset stop the company employs around 86 members of staff at the company site . Mr Hyett worked at the company site .
4. Mr Hyett gave evidence on his own behalf and I heard evidence from Mr Kris Hall, sales manager and Mrs Amelie Eames, human resources manager for the Respondents. Witness statements were provided from all those who gave live evidence.
5. The Tribunal was provided with an agreed bundle of documents of 171 pages.

Findings of Fact

6. The events which led to the Claimant's dismissal took place on 3 February 2018.
7. In the weeks leading up to 3 February 2018 there had been some concerns raised by managers about the availability of milk for the staff tea and coffee. There was a staff kitchen equipped with a fridge in which milk was kept.
8. There had been some concerns that the milk was running out frequently and not being restocked and therefore a suggestion had been made that an email should be sent around when there was no milk in the fridge.
9. The Tribunal was not provided with any details of any discussion but both parties agreed that these concerns had been raised
10. 3 February 2018 was a Saturday. Mr Hyett used the kitchen and sent an email to Peter Lukacs and Gavin Miller hard at 2008 in which he said *"Just come into work tonight and there is no milk in the fridge just FYI"*.
11. At 20.28 Mr Hatchett sent an email to four people, but not to the Claimant, stating that he had got two bottles of semi skimmed milk for the staff fridge and stating he would leave it to Rick to invoice on the Monday night. He noted that there had been no milk in the fridge when he started on the Saturday and requested that *as Rick is not in on the Saturday can you please allocate someone to do this*.
12. Mr Lucas replied the same night at 22.52 to the same four people stating, *strange as when I left there were 2 x 2 litre semi and 2 x1 litre skimmed*.
13. A further email from Mr Hatchett at 21. 10 to the same four people asked *what time did you leave by? I was the second person in that was half past seven Matt mentioned it to me asking to sort it out*.
14. The final email was sent at 21.12 from Pete Lucas again to the same four people saying, *10.00am thanks for putting it in I will sort out Monday*.
15. At this point all the Claimant knew was that he had raised a concern that there was no milk and asked for it to be sorted out.
16. The Tribunal was told that when milk was required by staff it would be taken from company stock which was nearing its used by date. This avoided the milk being wasted. It was then subsequently invoiced on a no charge invoice.
17. There is no evidence before the Tribunal to suggest that anybody had any reason to have concerns about the Claimant or his email at this point. Nobody had spoken to him to query why there was no milk or to suggest that there was any concern about the fact that no milk was available.
18. However, subsequently, Mr Millward who is the owner of the company decided to view the CCTV footage from that night. The footage was at some point printed onto two sheets of A4 and showed six photographs. The

photographs were in the bundle and were produced to the Claimant for the second disciplinary hearing. These photographs show a period of about thirty seconds from 20.06, the point just before the Claimant's email of 3 February was sent. Each photo shows Mr Hyett in the kitchen.

19. The Respondent suggests that the photographs show Mr Hyett taking two bottles of milk from the fridge, one after the other and pouring them down the sink and throwing the bottles away.
20. In the photographs, Mr Hyett has his back to the camera and the act of pouring the milk or any milk being poured cannot in fact be seen. Mr Hyett accepts that the pictures do appear to show him pouring milk away. He accepted this when he saw the CCTV pictures at the point of the second disciplinary meeting.
21. Mrs Eames stated in her witness statement that after he had viewed the CCTV, on Monday 5 February Mr Millward did two things. We did not hear evidence from Mr millward. Firstly, he took a photograph of a bin, which is now at page 74 of the bundle. Secondly, she states that Mr Millward viewed the warehouse footage of the Claimant entering the kitchen.
22. Mrs Eames was asked about the photographs at page 74 in cross examination. She could not say when she had first seen the photograph nor could she say when the photograph had been taken. She was unsure whether or not it had formed a basis of any decision which she subsequently made.
23. In the Respondent's pleaded case the Respondent says that Mr Millward had been checking the fridge daily on leaving the premises to ensure that managers were following his instructions, which was to ensure that the kitchen was stocked to provide milk for the employees on the evening and night shift.
24. It is also stated in the ET3 that the email trail conflicted with the witness evidence of Gavin Millward and Peter Lucas. It is stated that Shift clocking times were checked and CCTV footage in the warehouse showed that MH and TH were the only people who had been in the building since GM had checked the fridge.
25. The Respondent asserts that this is evidence that GM did properly investigate concerns about the Claimant's actions before deciding to take disciplinary action.
26. It is further stated in the ET3 that *"GM and PL witnesses alone suggested that MH made an incorrect claim in saying there was no milk. There was a clear case of misconduct in that it was suspected that the claim was made with dishonest intent. GM decided that this did not require any further investigation but needed to be discussed and addressed it formally.*
27. It is stated in the ET3 that it was Mr Millward who then made the decision to hold a disciplinary meeting with the Claimant.

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28. The Respondent's own disciplinary procedures include a formal and informal stage to deal with minor issues. The procedure also states that before any disciplinary punishment is imposed, the matter will be fully investigated. For more serious charges this will normally be an initial investigation stage carried out by a different person to the person conducting the disciplinary hearing. In simpler or less serious cases the investigation may be carried out during the disciplinary hearing itself. The procedure then states that as the investigation stage is informal the normal right to be accompanied will not apply. The policy also provides that where appropriate other members of staff may also be interviewed as witnesses.
29. The procedure requires twenty-four hours notice of a disciplinary hearing and the right to be accompanied to that hearing.
30. A letter was sent to the Claimant dated 9 February 2018 stating that he was required to attend a disciplinary hearing on Wednesday 14 February. The letter states that disciplinary action against him will be considered with regard to an incident which occurred on 3 February. The letter stated that a possible consequence arising from the meeting was a final written warning. It does not mention the possibility of dismissal.
31. This is all that is said and there is no further description of what the incident is alleged to be and nothing in that letter about any dishonest intent by the Claimant. This is the letter on the Respondent's own pleaded case was sent on the instruction of Mr Millward.
32. The invitation to a disciplinary meeting was sent out by Mrs Eames. The Respondent argues that the reason for the disciplinary hearing was stated clearly in the letter. I find that it was not.
33. On 11 February 2018 the Claimant sent an email to Mrs Eames asking for a copy of any evidence in the matter and sufficient information about the alleged misconduct or poor performance *to enable me to prepare to answer the case in the disciplinary meeting*. He asked that the information be emailed to him or made available for him to collect by Monday 12 February. This was a reasonable and sensible request for Mr Hyett to make.
34. On 12 February at 12.52 in the afternoon Mr Hyett again emailed the Respondent asking whether information would be sent to him or whether he needed to collect it. Mrs Eames told us that she had not been in work over the weekend and therefore did not see this email until the Wednesday which was the day of the hearing.
35. She then sent an email on Wednesday, 14 February 2018 at 9.53am. In the email she states that the meeting is to discuss a sequence of events which took place on the premises on 3 February. No decision will be made it says until Gavin Mr Millport and the claimant had discussed the events the letter states the email trail on the 3rd is a cause for concern as milk was checked by Gavin in theH kitchen fridge at 4 PM . This suggests misconduct which is why the hearing has been scheduled there was no need for any further investigation as no other parties are involved .

36. The letter then set out a summary the sequence of events. The summary which is at page 80 at the bundle makes reference to an email from Pete L confirming that milk was put in the fridge before he left for work and also makes reference to warehouse footage, which it says shows the claimant went into the kitchen area prior to his, the claimants, email. It states that before he left work, Gavin checked the kitchen on Monday morning and found two empty cartons with use by date of 8 February. "Warehouse footage shows that he went to the kitchen area prior to the email. There was no footage of MH going to the kitchen area. This information suggests that there was milk in the fridge when you sent your email saying there was no milk. This is what needs to be discussed in the meeting today."
37. There is no mention in this summary of CCTV footage which suggests that the Claimant poured away or disposed of any milk and also no suggestion of dishonesty by the Claimant that needs to be investigated.
38. The meeting took place with Mr Millward in the Chair and Mrs Eames taking notes. From the note of the meeting taken by Mrs Eames it is evident that Mr Millward started the meeting by setting out what he thought had happened.
39. He said that he had looked at the CCTV footage and could see that TH had not entered the kitchen area but that MH the Claimant had done so and on the Monday when he came into work and checked the bins he could see empty milk cartons. He goes on to say "*the only conclusion I can come to is that the two litres of red milk that I saw on Saturday afternoon were in the bin on Monday. I can only conclude that someone has poured this milk down the drain and emails myself and PL to either get someone into trouble or create problems for other people. I am not sure about the motives*".
40. Mr Millward was expressing his view of what had happened, on the basis of some investigating he had done himself, on a matter which he was intending, at that point, to make a decision about.
41. There was at that point no specific accusation that the Claimant had poured milk way nor that the claimant had been dishonest nor is there any clarity about what he was being accused of.
42. The Claimant responded that he was unhappy about the way the matter was being dealt with and that he should have been told what the investigation was about.
43. He told Mr Millward that on the evening of 3 February, when he was working, he went to make a drink and there was no milk and so he emailed PL. There was then a conversation between him and Mr Millward about how milk ended up in the bin and the conversation became heated. During the course of the discussion, Mr Millward produced a photo of the kitchen bin with two empty milk bottles on top of it.
44. The Claimant was very unhappy about the process followed at the meeting and raised his concerns that the company were not complying with the ACAS Code of Practice. He said that the person who conducts an investigation should not also carry out a disciplinary hearing. He was then told that there

hadn't been an investigation. He was told by Mrs Eames that the meeting was to discuss the incident but that it was not a disciplinary meeting. This was a clear contradiction of what had been said in the letter and the Claimant then referred to the letter which clearly said that it was a disciplinary meeting.

45. Mrs Eames was taking notes during this meeting, and her note records that during the course of the conversation Mr Millward stated words to the effect that *"that's not what I am talking about, its the fact you have gone in there, there is milk there, you've opened them two, emptied them in the sink then you've emailed Pete and said why is there no milk. I've come into work and there is no milk". I'm trying to think why he would do that.*
46. To this the Claimant responded "I haven't done that". At this point, Mr Millward appeared to refer to CCTV footage that he said proved it and that he had seen.
47. This is the first time that the Claimant was told that the CCTV footage was of him and the first time her was told that it seemed to suggest that he was pouring away the milk. He had not at this stage been shown the footage.
48. There was then an altercation and during the course of it Mr Millward suggested that the Claimant was lying and asked the Claimant if he would continue to lie to his face if he saw the photographs which proved what Mr Millward was saying. The Claimant asked whether there were photos and Mr Millward said "he would produce a photograph of you pouring milk, what are you going to do, are you going to resign". The Claimant said he wouldn't and asked Mr Millward if he would fire the Claimant and there were then cross accusations in which Mr Millward again accused the Claimant of being dishonest and the Claimant maintained that he was not.
49. At this point Mrs Eames intervened and pointed out that there was no physical evidence. Mr Millward responded that "he knew that he [the Claimant] had done it. He suggested that he, Mr Hyett, was trying to frame another manager for not doing something and that he, Mr Hyett, was *blatantly lying to my face this is not ok, not me trying to get rid of him, he is lying*". The meeting was then stopped by Mrs Eames.
50. Following the meeting Mrs Eames appointed Mr Batchelor, Transport Manager to carry out an investigation. She wrote to the Claimant on 15 February 2018 stating there was a need for an investigation by a senior employee who had not been involved in the incident and that they would need to have a look at the CCTV footage.
51. Mr Batchelor duly investigated the matter. We have heard no evidence from him but we have been told by the Respondent that he did not interview Mr Millward, Mr Lucas, or the Claimant. What he did do is look at the emails and the CCTV and produce a two-page investigation report. In this report he states that he had read the emails, that he read the exchange of emails between the parties and that he had reviewed the CCTV footage. He concluded from the CCTV footage that the Claimant had poured milk away.

52. The CCTV timeline which he looked at appears to include at least some images before and after the 6 that were provided to the Claimant and which the Tribunal has in the bundle.
53. He concluded that it was apparent that milk was in the fridge and was disposed of by Mr Hyett and required some explanation from Mr Hyett.
54. He says that it appeared that Matthew [Hyett] had emailed Peter with information regarding the milk not being there when clearly it was. He then concludes that *Mathew falsely stated that there was no milk and wilfully disposed of company goods without recording them as waste or purchasing them.*
55. His conclusion is drawn without having interviewed the Claimant at all and is therefore prejudging the matter. The Claimant was not shown the CCTV evidence and was not given an opportunity to explain the CCTV, nor was he asked for an explanation at all at this point prior to the disciplinary hearing. Mr Batchelors conclusion followed closely on Mr Batchelor's own observation that he cannot know the reasoning behind Mr Hyett's actions.
56. Following this report being provided to the Respondent, a decision was made to hold a disciplinary meeting and on 20 February 2018 the Claimant received a letter giving notice of a hearing to take place on 23 February 2018. The reason for the meeting was stated as being the sequence of events which occurred on 3 February 2018. The letter included the findings of Ray Batchelor. In this letter it is stated that the most severe consequence arising from the meeting is a summary dismissal without notice.
57. The evidence from the Respondent's witness Mrs Eames was that the reason for the change in the potential outcome was that the allegation was about the Claimant's dishonesty.
58. I find that the information available before the first hearing and the information available before the second hearing was exactly the same and I find that the only change between the first and second meeting in reality was that there had been the heated conversation at the first meeting, and a an investigation by Mr Batchelor. The first meeting had been stopped and apparently abandoned, and the investigation had not included any interview or discussion with the claimant at all.
59. I was told by Mrs Eames that she had realised that the first disciplinary meeting needed to be stopped because the company were not following a proper procedure. She recognised that there was a need for a proper investigation and that the matter should be stopped at that point and recommenced in order that it could be dealt with fairly.
60. I find that this was in all the circumstances a wholly appropriate and necessary step to take and that she was reasonable in stopping the first disciplinary meeting and effectively drawing a line under it.
61. The second meeting took place and Mr Batchelor started off by explaining that he had been asked to carry out an investigation and he then described what he had looked at.

62. The next thing that happened was that the Claimant accepted, having now seen the CCTV that there was evidence that he had disposed of the milk. He was then asked why he had done so and what the motive was for this. This was the first time he had been asked to explain what had happened and why. This was 20 days after the incident.
63. He said at that meeting that he didn't recall on any particular day throwing milk away. He made the point that it was nearly three weeks ago and that since that last meeting there had been five occasions when there had been low amounts of sugar and milk. He said it was quite common for there not to be milk or very little milk and that is probably why he didn't remember that particular day. He also said that the only reason that he could think of that he would throw milk away was if it was out of date or if he had misread the date on it. He did raise a query about the dates on the bottles but said that was the only reason he could think of. He also said in reference to the last meeting, that since then his wife had been in hospital three times in the last month and that on the particular day he had moved out of his house and into a caravan that he had also been on holiday and that he had a lot going on and that he simply didn't recall that day or at that time throwing the milk away. He said *in the last meeting I was telling the truth as far as I knew*. He was asked why he had emailed shortly after throwing the milk away to say there was no milk and said that he must have thought it was out of date.
64. During the discussion that followed in that meeting he explained again that his wife had been in and out of hospital and that he didn't remember doing it but didn't believe he was lying. There was a break and following the break Mrs Eames gave her decision.
65. Her decision is set out at pages 115 – 116 of the note of the meeting. In it she states

“this is the meeting with Matthew Hyett, Ray Batchelor and Amele Eames adjourning for the conclusion of the disciplinary. So, I have listened back to the original recordings to make my notes and I can conclude, this is in my opinion, your actions do amount to malpractice, in that you disposed of company products and immediately declared afterwards that there had been no milk available. I do find it difficult to believe that you would think that there would be no milk available which your email states just two minutes after you have disposed of it. Your disposal of the milk was not declared anywhere so that is not acceptable practice.

Your actions alone do not account to the severity of a dismissal but I must consider that you have already had a first written warning on file from 16 August 2017 for your failure to disclose information relating to an investigation that involves stock. That incident raised doubts surrounding the relationship and trust between yourself and the owner of Country Fare. These doubts have been voiced to you by him.

In our first meeting when he asked “what happened to the milk”? You clearly stated that there was no milk in the fridge when you arrived and

that you thought that Mr Millward could be declaring that there was milk in the fridge when he left the premises in a bid to discredit you.

This is Mr Millward's business he has appointed you in a senior position of trust as a key holder and on a shift pattern in which you are entrusted to enter and remain alone on the premises where necessary. As a manager you are trusted with the overseeing of stock. The incident damages the relationship of trust and I conclude that Mr Millward would find it impossible to allow you to continue in your position as a keyholder especially due to your suggestions in our first meeting that he was deemed to be committing malpractice. It does seem clear that your relationship with your manager Mr Millward is quite fragile and I am not sure it is repairable".

She goes on to consider the values and ethics of the organisation:

As a manager you are required to be in agreement with our core values..... You have demonstrated negligence as a manager regardless of if it was due to a memory loss or if there was a clear motive behind it, it is still negligence of stock so I conclude that the outcome of this disciplinary meeting is a summary dismissal with payment in lieu of notice".

66. Following the meeting the Claimant received a letter dated 26 February 2018 stating a decision was made to issue a summary dismissal with payment in lieu of notice "due to a clear breach of trust between you and your employer and a breach of Country Fare's core values".
67. Neither an allegation of breach of trust or a breach of the core values had been set out as allegations in the letter giving notice of the disciplinary procedure and neither matter had been investigated by Mr Batchelor. Mr Millward's trust was said to have been breached but he had not been interviewed and nor had he given any evidence to the disciplinary hearing nor had he provided a witness or any other statement. The Claimant did not know and could not reasonably have been expected to know before or during the disciplinary hearing that this was the issue that he was being accused of.
68. On 1 March 2018 the Claimant submitted an appeal and said he was appealing "on the grounds of unfair dismissal for failing to follow disciplinary procedures as set out by yourself". An appeal hearing took place before Mr Hall on 7 March 2018. Prior to that Mr Hall had reviewed the emails, the investigation report, the photographs, CCTV, the notes of the hearing and the letter of the dismissal. He accepted in evidence before me that he was conducting a review and not a full rehearing of the matter.
69. In his witness statement he states that from the subsequent evidence found by Mr Batchelor in the investigation and the photographs, that it clearly showed the Claimant had opened the fridge, took the milk and poured it out and that the Claimant had denied that he did this on 14 February but that the Claimant had then admitted to doing this when confronted with the evidence at his disciplinary hearing on 23 February.

70. In the evidence before me Mrs Eames accepted that neither letter sent to the Claimant had set out the allegations being made against him. She suggested that whilst the letter did not include them the Claimant was nonetheless well aware of the allegations being made and she suggested that he was aware of the allegations because of the discussions that had taken place at the first meeting.
71. The Claimant in his evidence before me was asked whether he knew what the allegations were and he said he did. When asked what he thought they were he referred to what was set out in the letter of 3 February and the subsequent letter inviting him to the meeting on 23 February.
72. Counsel for the Claimant Ms Aly makes the valid point that it is unclear from the letters written at the time, unclear from the notes of the meeting, unclear from the letter dismissing the Claimant and even unclear from the Respondent's own witness evidence what the real reason for the dismissal was. It is certainly unclear from all of those documents what the allegations against the Claimant were. The only place where we find this explained at all is in the disciplinary hearing notes. It is not even set out in the dismissal letter.
73. The explanation from Mrs Eames includes a number of possible reasons, none of which are set out and none of which were itemised as allegations.
74. It is now clear having heard the evidence from the Respondents that the root of the concern was an allegation that the Claimant had deliberately lied about milk being in the fridge when he came to work. The concern as I now understand it, having heard all the evidence was that the Claimant had written an email stating there was no milk when in reality the Respondent considered that there was milk in the fridge. The Respondent therefore concluded that the Claimant must be lying.
75. This was not set out in the letter and was only really highlighted or elucidated in those terms by the representative for the Respondents during the course of this hearing.
76. When this was set out in those terms, and before me, the Claimant gave an explanation, which was that he would not have written an email saying that *milk had gone off and I have thrown it away and therefore there is no milk* because he would not have considered that necessary. All he considered was necessary was to say there was no milk which was true so far as he was concerned at the time he wrote it. The Claimant did not provide this explanation to the Respondents at any time and the obvious reason he did not do so was because he had not grasped the nature of the allegations being made against him, because they had not been made clear or specific to him.
77. Since the Respondent had not properly formulated this allegation, this is hardly surprising. The Claimant was asked in cross examination whether he accepted that the second disciplinary meeting had corrected any deficiencies in the first meeting. He did not consider that it had done so and he stated that he didn't accept it because the second meeting had used information from the first meeting. He considered that had the first meeting not taken

place he would not have been dismissed but would probably have been given a final written warning.

78. The Relevant Legal Provisions

79. Both counsel and instructing solicitor before me referred to the legal principles. I have taken into account section 98 ERA 1996, the ACAS Code and the well-known case law including the test set out in cases such as *Burchell* and I have reminded myself, as I have reminded both parties in this case, that the role of the Employment Judge in an unfair dismissal hearing is not to determine whether or not I think the Respondent should or should not have dismissed the Claimant, but whether or not the Respondent's decision to dismiss was a fair one, in that it was in the range of reasonable responses for this employer and in the circumstances of this case.
80. Unfair Dismissal and Misconduct.
81. Section 98 ERA 1996 provides that it is for the employer to show the reason or the principal reason for the dismissal and that it is a reason falling within section 98(2) ERA 1996. Section 98 provides that a reason relating to the conduct of an employee can be a fair reason of that employee.
82. Whether or not the dismissal is fair or unfair is determined in accordance with section 98 ERA 1996, which provides that the question of whether a dismissal is fair or unfair depends on whether in the circumstances including the size and administrative resources the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and that that shall be determined in accordance with the equity and the substantial merits of the case.
83. In cases such as this one involving dismissals for reasons relating to an employee's conduct, the Tribunal has to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303;
- a. did the Respondent genuinely believe that the Claimant was guilty of the misconduct alleged;
 - b. was that belief based upon reasonable grounds;
 - c. was there a reasonable investigation prior to the Respondent reaching that view?
84. Crucially, it is not for the Tribunal to decide whether the employee actually committed the act complained of.
85. I remind myself that the employer has the burden of proving that he or she genuinely believed that the Claimant was guilty of the misconduct alleged but that the burden of proof is neutral in respect of 2nd and 3rd parts of the test
86. I remind myself that a conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. Without following such steps, it will not in general be possible for an employer to show that it acted reasonably in treating the conduct reason as a sufficient reason to dismiss. What this requires of the employer
- a. a full investigation of the conduct, and

- b. a fair hearing to hear what the employee wants to say in explanation or mitigation.
(See for example *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL, per Lord Bridge).
87. When considering whether or not an employer has adopted a reasonable procedure, I remind myself that I must use the range of reasonable responses test that applies to substantive unfair dismissal claims. The range of reasonable responses test or the use of an objective standard of the reasonable employer which is the test I must apply will apply as much to the assessment of the whether or not the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the question of whether or not it was reasonable to dismiss for the conduct reason.
(see for example, *J Sainsbury plc v Hitt* 2003 ICR 111, CA per Lord Justice Mummery)
88. I remind myself that an employer may have a genuine belief that an employee has committed an act of misconduct but that for a dismissal to be fair that belief must be based on reasonable grounds after as much investigation is reasonable in all the circumstances.
89. I remind myself that a reasonable investigation will usually require an employer to gather all relevant information and that in most cases this will include an early discussion with an employee in order to gain an explanation of events.
90. I also remind myself of the need for impartiality. An employer must keep an open mind and not prejudge the outcome. If an outcome is prejudged it may be sufficient to render a dismissal unfair.
91. I also remind myself that a fair process will usually require an employer to make specific and not general allegations against an employee and lastly remind myself that where there is a possibility of dismissal of an employee section 98(4) ERA 1996 will require a higher level of rigour in the investigation and disciplinary process.

Conclusions

92. On the basis of the findings of fact set out above and applying the legal principles I therefore draw the following conclusions
93. I therefore considered firstly what the real reason for the dismissal was and I then considered whether or not the decision to dismiss was reached following a fair process and whether the decision to dismiss was reasonable in all the circumstances.
94. In this case I find that the real reason for dismissal was misconduct. Whilst there have been suggestions of other reasons I don't find that there were any. I find that Mrs Eames had formed a belief that there was misconduct and although she had made reference to a range of other factors which I address below, the crux of the issue for her was an issue of misconduct.

95. I conclude that the initial meeting that took place was a wholly unfair meeting. The only manager, Mr Millward, had made up his mind before ever speaking to the Claimant that the Claimant had not only done something wrong but that he had been dishonest. He had clearly communicated that to Mrs Eames and he had formed his opinion on the basis of evidence which he had viewed but which he had not provided to the Claimant and which he did not tell the Claimant existed until well into the meeting. The Claimant had specifically asked to be provided with evidence so that he could prepare, but he was not provided with the information in advance, and was only provided with a summary of information and not the information or the CCTV documentation itself, and then only on the day of the hearing.
96. Whilst reference was made in the letter to warehouse footage, the disciplinary letter made no reference to an allegation or a suggestion that the Claimant had disposed of milk at all, but simply said information suggested that there had been milk in the fridge.
97. The requirement to tell the Claimant in any circumstances what they are accused of and to provide information to them so that they may comment is absolutely fundamental to a fair process. The fact that it didn't happen at an early stage in this case meant that the Claimant was deprived of an opportunity at an early stage of seeking to explain what may have happened, and at a time when matters were fresh in his mind.
98. Instead, he was accused of dishonesty and lying by his line manager in circumstances where he had not seen the information which the line manager clearly had seen the information. This was unfair in this case,
99. Where there is a suspicion of or an allegation of dishonesty it is important that individuals are told at an early stage of the process what is being suspected or alleged against them and that they are provided with any information which a manager or the employer is relying on as supporting the allegation, so that they can answer the allegations.
100. Whilst Mrs Eames was quite right to stop the first disciplinary meeting and whilst she was right that it ought to have been abandoned, the reality was that it influenced Mrs Eames herself.
101. Mrs Eames, who made the decision to dismiss, had been at that first meeting and on her own evidence, she was influenced by and took into account what had been said at the meeting by Mr Millward and by the responses made by the Claimant. The Claimant's responses at that time were made in circumstances where he had not been provided with evidence and not been told what he was accused of, and anything he said was therefore said in circumstances where he did not know what the issue was that he had to deal with.
102. I conclude that Mrs Eames was not able to view the matters in an impartial manner and it is obvious from her evidence to the Tribunal that whilst she may not have realised it, she was not impartial. She was clearly influenced by and took account of the comments made at a meeting she herself had considered unfair and inappropriate and which she felt required terminating. She had felt that the process should be stopped and restarted in a fair

manner. I conclude that the process of determination at the second disciplinary was unfair because it took account of what was said at the unfair and abandoned first meeting.

103. The Respondent took into account matters arising from an unfair meeting which was called a first disciplinary meeting but which the Respondents now say was an investigation meeting. Whilst I reached the conclusion that Mrs Eames formed a belief which may well have been her honest belief, it wasn't based on a full and reasonable investigation and was not based on independent factors. The appeal process did not remedy the defects but simply reviewed them and conclusions for very much the same reasons. It was flawed in the same way.
104. The process was also unfair, because there was no full and proper investigation. Mr Batchelor was independent and was rightly appointed but he did not in fact interview any of the individuals involved. He drew a conclusion without having interviewed either Mr Millward or Mr Hyett.
105. Had he interviewed the Claimant at an early stage, shown him the CCTV evidence and explained to the Claimant that the concern was that his words in his email appeared to be in conflict with his actions, it is entirely possible that the Claimant would have provided the explanation to Mr Batchelor, which he provided before this Employment Tribunal.
106. It is also probable that the Claimant would have stated at an earlier stage that whilst he did not recollect pouring milk away, that the CCTV evidence clearly showed that it had happened, because he did accept that, once he was shown the evidence.
107. Had that happened, there would have been no real basis for the suggestion that he was lying about the matter deliberately and it is likely that there would not have been an altercation with Mr Millward over his honesty.
108. I conclude that had a process been followed properly and fairly there is a high probability that although the Respondent would still have raised the matter in a disciplinary, that they would not have dismissed the Claimant. Part of the reason for my conclusion is the comments made by Mr Millward at an early stage in the process that he was not trying to get rid of the Claimant.
109. I have also considered the investigation into matters such as the invoices. In her evidence Mrs Eames had stated that one of the reasons why she stopped the first meeting was because she thought there needed to be more investigation and one of the matters she thought needed investigating was invoices. This was stated in evidence to us.
110. However, in cross examination she accepted that she never did consider any of the invoices in order to consider the possibility that the milk bottles been taken from the fridge were the same ones as in the bin or to consider the suggestion that milk might have been out of date. This was also not considered by Mr Batchelor.

111. I have also considered the failure of the Respondent to give Mr Hyett any opportunity to comment on his previous disciplinary warning before making the decision to dismiss.
112. I conclude that whilst the respondent had a genuine belief in the claimants misconduct, that the belief was not formed after all necessary investigation had been carried out and I also find that the process followed was not one which a reasonable employer would have followed because Mrs deans took into account matters which has arisen in a meeting which she herself had considered to be fundamentally flawed and had stopped in order to draw a line under it.
113. I considered the size and administrative resources of this organisation. I recognised this is a small business and that Mrs Eames whose the only person with HR responsibility had not carried out a disciplinary before. However, there was a formal written disciplinary procedure and both Mrs Eames and Mr Hall confirmed that they had read the ACAS guidance. Whilst both of them have I have no doubt sought and tried to behave fairly. Mrs Eames' fundamental error was in hearing the matter which she had previously been involved in, failing to outline the allegations in making her decision to dismiss based on conclusions of allegations which had not been spelt out to the Claimant and by taking into account which had occurred in the first meeting.
114. In all the circumstances of this case, taking into account the size and administrative resources and all the circumstances of the case I conclude that the respondents decision to dismiss was not reasonable and was not within the range of reasonable responses for this employer. The dismissal was therefore unfair.
115. The Respondent states that this is a case where the principles from *Polkey* should apply in that even had a fully fair process been followed, the Claimant would still have been dismissed. I have therefore considered whether or not a fair procedure would have resulted in the same outcome and I find it would not.
116. Firstly, as already indicated a fair procedure would have involved a full and proper investigation at an early stage in which the Claimant was shown all the evidence before any conclusions were drawn.
117. Had this happened the Respondents would in all probability have received different answers from the Claimant and a full explanation at a point when they still had open minds.
118. The point is that at an early stage prior to disciplinary allegations being framed the Claimant would have had a fair opportunity to explain his actions and crucially to understand the concerns of his employer. Given the concerns that had been raised it is, I find, on the balance of probabilities highly likely that the Respondents would still have held a disciplinary hearing and it is probable that the allegations would have been phrased in terms of the

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Claimant's disposing of milk and stating in an email that there was no milk. I accept that the conflict between the email and the CCTV was a matter of concern from the Respondents which they would have wanted to consider further. However, without the suggestion that the Claimant had lied and without the antagonism caused by the first meeting and with a fair process and an early opportunity to provide a full explanation I find and conclude the Respondent would not have dismissed.

119. I reached this conclusion partly because of the Respondent's own assessment of the matter, at an early stage when the evidence and information that they had was the same as that which existed subsequently. At the first stage before the first aborted disciplinary hearing, the maximum sanction being suggested was a final written warning. It was only following the events of that meeting that the possible sanction was increased to summary dismissal and I find that the only reason for that was the existence and the fact that that unfair meeting had taken place.
120. It follows, that I conclude that in this case, had a fair process been followed the maximum sanction that would have been imposed would have been a final written warning and the Claimant would not therefore have been dismissed.

Employment Judge Rayner
27 March 2020