



EMPLOYMENT TRIBUNALS

Claimant: Mr A Aderugbo
Respondent: Sainsbury's Supermarkets Ltd

Heard at: London South **On:** 2-3 March 2020

Before: Employment Judge Davidson

Representation

Claimant: In person
Respondent: Miss I Ferber, Counsel

RESERVED DECISION - JUDGMENT

It is the unanimous decision of the tribunal that the Claimant's claim for unfair constructive dismissal fails and is hereby dismissed.

Employment Judge Davidson
17 March 2020

REASONS

List of Issues

1. The list of issues agreed at the start of the tribunal hearing was as follows:

- 1.1. The claimant alleges a breach of the implied term of trust and confidence. What does the claimant say the respondent did which was in breach of the implied term of trust and confidence?
- 1.2. Does the claimant say there was a 'final straw'? If so, what was it?
- 1.3. Did the respondent breach the implied term of trust and confidence in the manner alleged?
- 1.4. If so, was that breach fundamental?
- 1.5. If so, did the claimant resign in response to that breach, or did he resign for some other reason?
- 1.6. If the claimant was constructively dismissed, what was the reason for the dismissal? The respondent says it was misconduct.
- 1.7. Was that a potentially fair reason?
- 1.8. Was the dismissal fair in all the circumstances?
- 1.9. If the dismissal was unfair, should the claimant's basic award and/or compensatory award be reduced to reflect his contributory fault?
- 1.10. Has the claimant mitigated his loss and, if not, should his compensation be reduced?

Evidence

2. The tribunal heard from the claimant on his own account and from Sophie Taylor (Head of Stores, formerly Area Manager) and David Mackenzie (Store Manager) on behalf of the respondent. The respondent submitted a witness statement from Amanda Fleming (Head of Total Loss and Security) but she is no longer employed by the respondent and did not attend the tribunal.
3. There was also a bundle of some 300 documents before the tribunal. Facts
4. The tribunal found the following facts:
 - 4.1. The respondent operates a nationwide chain of supermarkets, including smaller convenience stores known as 'Sainsbury's Local'.
 - 4.2. The claimant began working for the respondent on 24 September 2012 as store manager at the Great Suffolk Street Local store in London.
 - 4.3. In November 2017, the claimant received a final written warning for failing to deliver the requirements of the Store Manager role by misuse of his procurement card. The warning was expressed to remain active for 12 months from 7 November 2017.
 - 4.4. On 11 June 2018, the claimant transferred from the Great Suffolk Street store to Waterloo Blackfriars Road Local store as part of a reorganisation of management personnel. Another manager, Kieran Wilson, took over from the claimant at Great Suffolk Street.

- 4.5. On 25 June 2018, Kieran Wilson wrote to Sophie Taylor reporting that there was a cash shortage at Great Suffolk Street of £2,800. On 4 July 2018, Sophie Taylor contacted the claimant to see if he could explain the cash loss. The claimant said he would look into it and he replied to her on 25 July explaining that the discrepancy could be explained by the difference in the way the closing figures were presented at the end of the week.
- 4.6. Sophie Taylor was not clear about the explanation and asked the claimant to go through the matter with Charlotte Smith, who had specific expertise in cash handling. On 31 July 2018, the claimant sent an email to a number of recipients including Sophie Taylor, signed by himself and Charlotte Smith, concluding that the store had been making the till declarations incorrectly and that the loss was a theoretical loss rather than a physical cash loss.
- 4.7. On 2 August 2018, there was a conference call between the claimant, Charlotte Smith and Sophie Taylor in which the cash loss issue was discussed. At the end of the call, Sophie Taylor decided that she was sufficiently concerned that the matter should be investigated formally. As she was going to be on holiday, the matter was passed to Cyrus Dana, Area Manager for investigation.
- 4.8. On 13 August 2018, Cyrus Dana invited the claimant to attend an investigation meeting at 3.30pm on the following day, 14 August 2018. The claimant attended and the issue of cash handling procedures was discussed. Shortly before 5pm, when the meeting adjourned for a break, the claimant informed Cyrus Dana that he needed to leave at 5pm to be home to relieve his childminder. Cyrus Dana told him he should make alternative arrangements as he did not want to rush the process.
- 4.9. The meeting recommenced shortly after 5pm and there was a further break at 5.09 during which Cyrus Dana considered his decision. The meeting reconvened at 5.28 by which time the claimant was anxious about his children. After Cyrus Dana informed the claimant that he had decided to put the matter forward for a disciplinary hearing, he told him that contact would be made separately at which the claimant would have access to the notes of the meeting and the evidence he used. The claimant then rushed off without checking the notes.
- 4.10. On 16 August 2018 the claimant was verbally invited by Gemma Westfold, ASA, to a disciplinary meeting scheduled for 12.30pm on Friday 17 August to be conducted by Paul Miller, Area Manager. By 3.30pm on 16 August, the claimant had not received written notice of the meeting, as required by the respondent's disciplinary procedure. He did not have the investigation

notes or the evidence relied on by the respondent. The date of the planned disciplinary hearing (17 August) was the claimant's last day of work before holiday.

- 4.11. On 16 August 2018, the claimant raised a grievance and he was told on the morning of 17 August by HR that the disciplinary meeting would not be going ahead on that day. The claimant left for his booked annual leave of three weeks.
- 4.12. Prior to leaving for his break, the claimant sent a long email to Sophie Taylor giving her background to various ongoing issues in the store so that she would be aware of these if anything happened while he was away. He did not make specific arrangements for cover or give the store staff any handover notes.
- 4.13. During the claimant's absence on holiday, a number of issues arose which prompted three separate managers in surrounding stores to comment on the apparent lack of planning and handover prior to the claimant's holiday absence. On 28 August 2018, Adam Ralph, Store Manager at Waterloo told Sophie Taylor that the person covering the claimant's store had been left without login details for various systems and with no till number or alarm codes. When Adam Ralph logged in to the payroll system, he found that the payroll entries had not all been completed or were incorrect.
- 4.14. On 3 September 2018, Charlotte Smith told Sophie Taylor about the same issues which had been identified by Adam Ralph and on 4 September Kieran Wilson told Sophie Taylor that no cover had been arranged to open the store on Sunday morning over the bank holiday weekend and no access codes had been left by the claimant. Kieran Wilson managed to access the systems as the codes had not been changed since he was the store manager.
- 4.15. On 14 September 2018, shortly after the claimant's return from holiday, he raised a grievance under the respondent's 'Fair Treatment' policy complaining about the lack of notice of the investigation hearing conducted by Cyrus Dana, pointing out that he was at risk of dismissal due to a prior final written warning and that the process appeared to be rushed, which he considered unfair to him, particularly in view of the seriousness for him of the potential outcome. He also complained that the meeting overran despite him making it clear he had to leave at 5pm to pick up his children. He concluded that there was collusion with a view to dismissing him.
- 4.16. The claimant requested that his grievance be dealt with by an independent manager from another area. On Thursday 27 September 2018, a grievance

hearing was held at Elephant & Castle, conducted by Andy Meecham who was a store manager from another area, as requested by the claimant.

- 4.17. At the end of the meeting, Andy Meecham gave his verbal decision which was to uphold the grievance partially. He accepted the claimant's complaints that he did not receive sufficient notice of the disciplinary hearing scheduled for 17 August and that he did not receive the notes of the investigation and the evidence presented. He apologised that the meeting had run late when the claimant had childcare responsibilities. However, Andy Meecham did not uphold the claimant's complaint that there was collusion. He found that there was no evidence to suggest a lack of impartiality. He went on to agree with the claimant's request for the disciplinary to be held in another area and conducted by a manager from another area and he assured the claimant that he would be provided with all the notes and evidence prior to such a meeting.
- 4.18. On 3 October 2018, the claimant appealed against the finding of 'partial mistreatment' and contended that the disciplinary process should not go ahead given the failures in the process. He had not received the grievance outcome letter but was aware of Andy Meecham's decision as it had been given verbally at the end of the hearing. He was aware that the deadline for presenting the appeal was 14 days from the date he received the outcome.
- 4.19. On 15 October 2018, an employee at the claimant's store, Verna McKenley, made a statement complaining about the way she had been treated by her colleagues. Her initial complaint related to the CTM (Customer and Trading Manager) and she went to report this to the claimant, as Store Manager. She alleged that the claimant then became aggressive towards her. She telephoned Sophie Taylor and left a voicemail message. When Sophie Taylor picked up the message, she could make out the claimant shouting in the background and raising his voice. She took the view that the claimant's conduct warranted suspension on full pay pending an investigation. She arranged for a suspension letter to be given to the claimant the following day.
- 4.20. On 19 October 2018 the claimant attended for work. The respondent's CCTV showed that his clock-in time appeared to be earlier than his arrival time and the time records showed that the start time appeared to have been altered.
- 4.21. On 30 October 2018, the claimant's grievance appeal was conducted by Amanda Fleming. The claimant told Amanda Fleming that he had not received the written outcome letter from Andy Meecham and had only

received the outcome verbally. Amanda Fleming agreed to give him a copy of the outcome letter but did not adjourn the appeal hearing. During the course of the hearing, the claimant stated that he was 'done with Sainsburys'.

- 4.22. Immediately after the end of that meeting, Andy Johnson, Retail Excellence Manager, stepped into the room and issued a suspension letter. He did not identify the reasons for the suspension other than to say the allegations could constitute gross misconduct.
- 4.23. On 6 November 2018, the claimant attended an investigatory interview into the following allegations:
 - a) a serious breach of the company's cash handling procedures leading to a loss of £2,800
 - b) multiple failings/failure to fulfil his management responsibilities leading to his holiday on 18 August 2018
 - c) speaking to a colleague in an aggressive and inappropriate manner
 - d) on 19 October 2018, arriving at the store at 8.24am yet manually clocking in at 8.10am.
- 4.24. The meeting was conducted by David Mackenzie, Store Manager from a different area. At the outset of the meeting it was put to the claimant that he amended the clock-in record to show himself arriving 14 minutes earlier than his actual arrival time (which can be shown by CCTV). The claimant was unable to explain what had happened but denied any wrongdoing.
- 4.25. They then discussed the handover and cover while the claimant was on holiday. David Mackenzie also put to the claimant that he had been aggressive towards Verna McKenley and gave the claimant an opportunity to give his account of the incident.
- 4.26. At the meeting, the claimant informed David Mackenzie that he needed to leave at 5pm. The meeting was therefore adjourned with a view to continuing it on 8 November. In the event, the claimant postponed the second meeting due to sickness absence and the meeting resumed on 13 November 2018.
- 4.27. Mr Mackenzie repeated the allegation regarding the claimant's behaviour towards Verna McKenley. They listened to a voice recording and the claimant confirmed it was his voice but he said the recording was of a different conversation from the one mentioned in Verna McKenley's statement. He accepted that his voice was raised on the recording but explained this as being justified due to Verna's conduct towards him. The

claimant told David Mackenzie that he should take statements from the other people who were present.

- 4.28. David Mackenzie then went back to the cash handling issue. The claimant accepted that he may have used the wrong procedures due to not having been trained correctly. During the meeting, David Mackenzie checked the correct cash procedures as he was not, himself, familiar with these.
- 4.29. David Mackenzie decided, on the basis of the allegations admitted by the claimant and the evidence in support of allegation denied by the claimant, that the matter should go forward to a disciplinary hearing. He took this decision before following up with the other individuals present at the incident with Verna McKenley on the basis that it was a matter for the disciplinary hearing.
- 4.30. Another manager, Praful Patel, was asked to conduct the disciplinary hearing. The claimant was sent the pack of evidence relied on by the respondent. This pack did not include the corporate EPOS documents relating to cash procedures but the claimant did not request these in advance of the hearing. The original date of 26 November 2018 was postponed on two occasions due to the unavailability of the claimant's representative and it was agreed that the hearing would take place on 4 December 2018.
- 4.31. On 3 December 2018, the claimant resigned. He said he had lost trust and confidence in the respondent and found his position had become untenable.

Determination of the issues

5. The tribunal determined the issues as follows:

5.1. The claimant alleges a breach of the implied term of trust and confidence based on his claim that the disciplinary and grievance processes followed by the respondent were unfair and that the respondent's management team just wanted him to be dismissed.

5.2. The claimant relies on the following submissions:

5.2.1. The cash handling allegation is tainted because the claimant has never been provided with the underlying corporate EPOS documents, with Sophie Taylor simply relying on Kieron Wilson's word.

5.2.2. The investigation meeting conducted by Cyrus Dana was rushed and the claimant was required to stay beyond 5pm, which is the time he had to

leave due to childcare responsibilities. This put the claimant at a disadvantage and put him under pressure.

- 5.2.3. The disciplinary hearing was originally set for the day after the investigation and the requisite notice and evidence was not provided. Although this was later acknowledged by the respondent as incorrect, the claimant relies on this as evidence that his managers were in a hurry to dismiss him, bearing in mind he was in a precarious position as he was on a prior warning.
 - 5.2.4. In response to the allegation that the claimant failed to carry out a proper handover when he went on holiday, the claimant alleges he sent his manager a detailed email regarding various issues within his store. He accepted that he did not do the best handover but put this down to being tired and disillusioned at the time.
 - 5.2.5. The claimant objects to the respondent using a voice recording as evidence against him as he contends it is a breach of the respondent's data protection obligations towards him. He also contends that other witnesses to the incident should have been interviewed as part of any investigation.
 - 5.2.6. He contends that the respondent has created an atmosphere of unfairness towards him and the cumulative effect has made it impossible for him to receive a fair hearing. He contends that the flaws in the investigation and disciplinary process regarding the cash (accepted by the respondent following the grievance hearing) should mean that the entire issue is at an end. This is what happened on another occasion in July 2018 when an employee facing a disciplinary hearing put in a grievance which resulted in the charges being dropped against her.
 - 5.2.7. He was forced to resign prior to the disciplinary hearing scheduled for 4 December because he believed that it was inevitable that he was going to be dismissed. He took the view that the representations he made at investigatory hearings were not accepted by the investigating manager and it was therefore almost certain that the disciplinary manager would take the same view and disregard his representations. In his view, this amounted to an injustice, the outcome of which would be a dismissal on his record. In order to avoid that inevitable outcome, he resigned.
- 5.3. The respondent denies that there has been a breach and maintains that there were valid grounds for all the actions taken. As there was no disciplinary hearing, there was no dismissal, although it is accepted that dismissal was a possible, even likely, outcome.

Did the respondent breach the implied term of trust and confidence in the manner alleged?

- 5.4. I find that there are a number of flaws in the respondent's procedures in particular the following:
 - 5.4.1. The investigation into the cash handling issue was rushed and there was no need for Cyrus Dana to require the claimant to stay beyond 5pm. He could have adjourned the meeting. His reason for pressing on was to 'do it properly' but, due to the claimant's distracted state because he had to leave, it was not done 'properly';
 - 5.4.2. Similarly, the planned disciplinary was arranged with undue haste, given that the issue was not urgent and had been a matter of discussion for several weeks. Even if the claimant was about to go on holiday, that is not a reason to cut corners, particularly in relation to issues of fundamental fairness such as being given adequate notice and being provided with evidence of the disciplinary allegations to be answered;
 - 5.4.3. Andy Meecham could have carried out a more thorough investigation into the surrounding circumstances of the Verna McKenley incident once he had heard the claimant's representations.
- 5.5. The claimant concluded that these matters indicated an intention on the part of local management to ensure a dismissal. As he was on a final warning, he was aware that dismissal was a probable outcome should the disciplinary hearing go ahead and therefore the lack of due process on the part of the respondent had serious implications for the claimant as it was likely he would lose his job.
- 5.6. There are a number of other matters which the claimant relies on which I do not consider flaws in the process. These are:
 - 5.6.1. The use of the voicemail recording as evidence of a disciplinary allegation against him. I do not accept the claimant's proposition that the respondent is prevented by data protection laws from using this. As I am not satisfied that it is a breach of the respondent's data protection obligations to the claimant (as its employee), I do not find that this is a breach of contract.
 - 5.6.2. I do not accept that the flaws in the disciplinary process, which were acknowledged by the respondent through the grievance procedure, necessarily means that the allegations against the claimant should disappear. Where a grievance upholds that an investigation process is

flawed, that may, in some cases, be a reason to drop the allegations. In this case, the flaws in the process could be corrected. The respondent was entitled to require the claimant to answer the underlying allegations notwithstanding the procedural defects.

- 5.6.3. I do not have evidence on which I can conclude that the disciplining manager would not have taken the claimant's representations into account. The fact that an investigating manager considers that there is a case to answer is not the same as the respondent finding that the allegation is upheld. The point of a disciplinary hearing being separate from an investigatory hearing is that the allegations can be put to the employee, with the supporting evidence, and the employee has an opportunity to answer the allegations and make representations. If the employee considers that a dismissal after such a process is unfair, that can be challenged at the employment tribunal.
- 5.6.4. There is a suggestion that the number of separate disciplinary allegations against the claimant may be indicative of an undue zeal to take action against him which, if established, could support his constructive dismissal claim. However, the claimant has not challenged the various facts which underly the allegations. There is evidence that each of the events which have formed part of disciplinary allegations did take place. As he did not go through a disciplinary hearing, I cannot determine what the representations he would have made and what outcome the respondent would have reached.
- 5.7. I must consider whether the respondent's treatment of the claimant, taken as a whole, amounts to a breach of contract. I must remind myself that the claimant never reached the point of being dismissed and I cannot therefore form a view as to whether the likely dismissal would have been fair or unfair.
- 5.8. As a general proposition, I find that an employer following its own disciplinary procedures is unlikely to be in breach of contract unless the way in which those procedures are followed are such to indicate an intention not to be bound by the implied term of the contract. In other words, if the procedure is followed in name alone but there is no real engagement, there is a potential case for constructive dismissal.
- 5.9. In this case, I do not find that the various flaws I have identified in the process are sufficient, either taken individually or as a whole, to amount to a fundamental breach of contract. I note that the respondent engaged with the claimant in a grievance process and upheld some of his complaints. The respondent was prepared to appoint managers from another region to conduct the investigation and disciplinary hearings as requested by the claimant.

This indicates a willingness to be bound by the procedures which govern the relationship between employer and employee.

- 5.10. In assessing whether the number of disparate disciplinary allegations suggest a zeal to dismiss the claimant, I note that the claimant had reached the conclusion that he did not have a future with the respondent in midAugust, prior to his holiday. He was aware of the cash handling allegations and the fact that he was on a final written warning. He knew that any finding of misconduct (even if not gross misconduct) could result in his dismissal. He was fully expecting that to take place on 17 August and it was only delayed due to the respondent failing to comply with its own time rules. He did not leave handover notes because he did not expect still to be employed when he went on holiday.
- 5.11. The failure to do a proper handover led to more allegations of misconduct. It is possible that his general mood of resignation to being dismissed contributed to the other allegations of misconduct. I find, therefore, that the accumulation of disciplinary allegations is not a sign of the respondent finding things to use against the claimant in order to secure his dismissal. It is more likely to be a symptom of the claimant's negativity towards his role and the respondent, as evidenced by comments he made indicating that he knew he had no future with the respondent.
- 5.12. It was the claimant's choice to resign in advance of the disciplinary hearing so that his employment record would show a resignation instead of a dismissal. He did not consider that there was any chance of the disciplinary outcome being anything other than dismissal. I find that this was his view but the reason for that outcome being the most likely is that there were allegations of misconduct, some of which he had no explanation for. In the context of him having a live final written warning on file, he predicted that he would be dismissed and chose to avoid that outcome by resigning.
- 5.13. In the circumstances, I do not find that the respondent fundamentally breached the implied duty of trust and confidence. The claimant's complaint of constructive unfair dismissal fails and is hereby dismissed.

Employment Judge Davidson
17 March 2020

Case No 2300601/2019