EMPLOYMENT TRIBUNALS

Claimant: **Mr Faisal Nazir**

Respondent: **Tesco Stores Ltd**

Heard at: Birmingham remotely by CVP
+
On: 9 and 10 November 2020 and (without parties) on 26 November 2020

Before: Employment Judge Battisby (sitting alone)

Representation

Claimant: Mr A El-Gorrou, lay representative
Respondent: Ms L Kaye, counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant was fairly dismissed.

REASONS

1. This is a claim for unfair dismissal and the issues to be decided were agreed between the parties as follows.

List of issues

1.1. Has the Respondent shown the reason for dismissal was conduct, a potentially fair reason within the meaning of s.98(2)(b) Employment Rights Act 1996? The Claimant asserts there was a "hidden agenda" to remove him from the business.

1.2. Did the Respondent act reasonably in the circumstances (having regard to the size and administrative resources of the Respondent) and in accordance with equity and the substantial merits of the case, in treating conduct as a sufficient reason for dismissing the Claimant (s98(4) Employment Rights Act 1996)?

1.2.1. The Claimant asserts the decision to dismiss was unreasonable because:

1.2.1.1. Mrs Kaye Hinton had authorised the vacancies prior to her departure;
1.2.1.2. The instruction not to employ any colleagues came from Mr

Kevin McHugh (Operations Support Manager) as opposed to Mr Philip Brown (Area Manager) and the Claimant's line manager;

1.2.1.3. The instruction from Mr McHugh not to employ came too late and so there is no proof of resistance to follow the instruction;

1.2.1.4. The Claimant had not employed anyone as there are no offer letters for the colleagues available;

1.2.1.5. The witness statements of Ms Rees, Mr Peplow and Mr McHugh do not suggest the Claimant committed an act of gross misconduct;

1.2.1.6. Mr Peplow made up the allegation that Quevin did not understand the induction because he did not like him.

1.2.2. Did the Respondent have a genuine belief in the Claimant's misconduct namely that he:

1.2.2.1. Employed a colleague without authorisation;

1.2.2.2. Employed a colleague "Quevin" who was unable to speak sufficiently good English.

1.2.3. Did the Respondent have reasonable grounds for its belief?

1.2.4. Did the Respondent conduct a reasonable investigation into the misconduct? The Claimant alleges the investigation was unreasonable because:

1.2.4.1. The Respondent did not make an effort to contact or interview Quevin;

1.2.4.2. No one was investigated according to Company policy;

1.2.4.3. The witness statements of Sinead Rees, Michael Peplow and Kevin McHugh do not include the name of the Investigation officer or the Respondent's notetaker.

1.3. If so, did the decision to dismiss fall within the band of reasonable responses open to a reasonable employer in the circumstances?

1.4. Has the Respondent followed a fair procedure?

1.4.1. The Claimant alleges that the text messages from Ms Rees and referred to in her statement were not provided to him.

1.5. If the Claimant is successful, to what remedy is he entitled?

1.5.1. Is it just and equitable to reduce any compensatory award (s.123 Employment Rights Act 1996)?

1.5.2. If the Tribunal finds that a fair procedure has not been followed, would the Claimant have been dismissed if that had not been the case (*Polkey v AE Dayton Services Limited* [1978] ICR 142)?

1.5.3. Did the Claimant cause or contribute to his dismissal and if so, by how much?

Background and the hearing

2. The claimant was dismissed from his position as store manager on 25

June 2018 and his claim was presented to the tribunal on 2 November 2018, following a period of early conciliation from 8 September 2018 to 17 October 2018. He sought, and continues to seek, re-instatement. Initially the claim included a complaint of race discrimination, but that was later dismissed by a judgment made on withdrawal issued by Employment Judge Findlay on 18 January 2019.

3. On 29 January 2019, standard case management directions were issued and the claim was listed for a hearing on 11 and 12 September 2019. Unfortunately, the hearing had to be postponed due to lack of judicial resources and was relisted for 27 and 28 April 2020. Due to the Covid19 pandemic and the Presidential Direction, that hearing was converted to a case management hearing. The parties agreed no further case management was necessary and it is a pity no revision was then made to the time estimate. The case was relisted for 9 and 10 November 2020 in person. This was later amended by agreement with the hearing being converted to a video hearing with the claimant attending the tribunal with his representative and all others including myself being remote – a so-called hybrid hearing.

4. At the hearing the claimant was represented by Mr El-Garrou. He attended the claimant's appeal hearing following dismissal in his capacity as a union representative, but he no longer holds that position. He explained that the claimant's grasp of the English language was basic. There was a 10 minutes break for him to take instructions on whether to apply for an interpreter. Mr El-Garrou then confirmed the claimant would be able to proceed and could answer questions perfectly well and this turned out to be the case, although on occasions some time had to be taken to repeat some questions and ensure the claimant did fully understand what was being put to him.

5. It was agreed I would deal first with the issues surrounding liability, contributory conduct and Polkey (the issue at para. 1.5.2 above). Remedy would be left to another time in the event of the claimant succeeding.

6. On behalf of the respondent, I heard evidence from Mrs Jenny Greenway (store manager and investigating manager), Mr Philip Brown (area manager and dismissing manager) and Mr Andrew Lapsley (former store manager, and now employed elsewhere, and appeal manager). They were all physically in separate places as were the respondent's counsel and instructing solicitor. For the claimant I heard his evidence. He was accompanied by Mr El-Garrou in the tribunal hearing room. I received the written statements of all witnesses.

7. As for documents, I was presented with an electronic bundle marked and I later received a hard copy bundle which I have marked R1. This is numbered 1-319. Where I refer to a document in this judgment all page reference numbers in parentheses are to this bundle. There was some time spent in cross examination of the claimant on his training records (37-77). The claimant did not admit they were his personal records as his name did not appear on them. They were considerable and covered a period of many years, so he was not willing to admit they related to him without further proof. Over the lunch adjournment on the second day the respondent produced the electronic version of the claimant's E-Learning Portal (37-55), which clearly identified the claimant. He accepted these appeared to show his E-Learning

records, but still disputed the accuracy of them, both in cross examination and in the written submissions.

8. I record here that the claimant and Mr El-Garrou accepted the typed transcripts of the following meetings were accurate:

   8.1. Investigation meeting (170a – 170g)
   8.2. Disciplinary hearing (194a – 194f)
   8.3. Appeal hearing (258a – 258f)

9. On the first day, after dealing with the preliminary matters and taking a break to read the notes of the 3 meetings, I heard the evidence of Mrs Greenway and Mr Brown. Towards the end of the afternoon Ms Kaye asked for a break to take instructions and then informed me that, while giving his evidence, Mr Brown had communicated a message to Mr Lapsley, who had replied. This had been done via a private WhatsApp group set up for the respondent's witnesses and their team to communicate. I understand the inappropriate message came to the attention of the respondent's lawyers and Ms Kaye, quite properly, brought it to my attention. She had read the message and assured me the question asked by Mr Brown was a broad one, which would not harm the propriety of the hearing nor taint the evidence of either Mr Brown or Mr Lapsley. She offered to show the exchange that had taken place. A sincere apology was offered to the tribunal and the claimant for what had happened. The situation was explained to Mr El-Garrou and he was given the opportunity to take instructions and seek to apply for a halt to these proceedings and a postponement. Having taken instructions, the claimant accepted the apology and agreed to proceed without any further ado. I decided that was appropriate in all the circumstances, particularly in view of the assurance given by Ms Kaye and the need to avoid any further delay in the hearing of this case. I issued a warning as to future conduct and the requirement not to communicate with witnesses in the course of their evidence both during the hearing and in breaks.

10. On the second day, I heard evidence from Mr Lapsley. The claimant's evidence then took from 11.15 till the end of the day, when I reserved judgment. It was agreed written submissions would be sent by the claimant, then by the respondent and then the claimant would have an opportunity, which he took, to send a written response. Those were all sent direct to me by 23 November.

The evidence and facts

11. The claimant was employed by the respondent from 23 August 2006. He rose to the position of deputy manager of a Tesco Express store in London before transferring to the Tesco Express in Hockley, Birmingham. He said he started in Birmingham in late December 2017. The respondent put it to him that he did not commence as the store manager until late January 2018 as he had not completed the necessary training till then. He did not agree. Unfortunately, I was not shown any document confirming the details of his promotion and switch to Birmingham, but it is not necessary to be precise about this date. The more important point is what training he received then or previously in connection with the recruitment of staff and I will deal with this later.

12. In late April 2018 the claimant applied for and obtained authorisation (126) from Ms K Hinton (former People Partner) to recruit new customer assistants for his store covering a total of 20 hours per week, and a special case appears to have been made as it states on the form there was at the time 'no hours currently available to recruit' (126). The authorisation was stated to be valid from 28 April to 7 May 2018. This was needed to replace staff who were about to leave. He conducted interviews in early May and, on 18 and 21 May, sent text messages to Sinead Rees, the People Partner who had taken over from Ms Hinton, to ask if he could make arrangements with Michael Peplow, the People Trainer, for three new recruits, whom he said he had interviewed two weeks before, to attend his next induction session. He referred to them as 'new starters' and said 'the keesing report' had been printed off. This is the Right to Work documentation. The text of 18 May (134) indicated that he had been reminded by Mr Peplow that he needed to get Ms Rees's authorisation before he could book the recruits on to induction training. She replied that it would be possible and simply asked if he could remind Kevin McHugh, the operations support manager, of the hours that he was intending to recruit them for 'so he is in the know' (134 – 135). Later, there was an exchange of emails between the claimant and Mr Peplow after Mr Peplow had confirmed the next induction would take place on 7-8 June. The claimant confirmed he would need two induction slots for Michael Kumah (hereafter referred to as 'Michael') and Quevin Evandro (hereafter referred to as 'Quevin') (137 – 138). It is not clear what happened about the third person, but it may be the claimant was confusing Michael with another person he had interviewed called Eugene (see below at para 20). Michael was an internal candidate who would not have needed an induction. Mr Peplow made no reference in these communications to any need for the claimant to get approval from Mr McHugh. All he required was the Right to Work 'Signed Declaration' for each new recruit (138) – this is referred to internally as the Keesing Declaration.

13. In early June 2018, Ms Rees contacted and asked Mrs Jenny Greenway if she could do an investigation into some allegations regarding the claimant. Mrs Greenway was experienced in handling such matters and was entitled to be asked under the respondent's disciplinary procedure. Ms Rees told her that, following the induction conducted by Mr Peplow, he had reported to Ms Rees that the claimant had sent two individuals to the induction, one of whom (Quevin) was unable to properly understand English and both of whom had been recruited by the claimant without him following the proper process or gaining proper approval. He had reported that the other individual, Michael, did not have the proper Right to Work documentation on file.

14. Ms Rees explained three allegations of potential misconduct that Mrs Greenway would need to investigate and briefly gave her the background. Without seeing any other material or investigating matters for herself, Mrs Greenway then drafted a letter dated 12 June, which was sent by email to the claimant (143). The letter asked the claimant to attend an investigation meeting at 11 am on the following day, 13 June. It explained that the purpose of the meeting was to discuss allegations of:

    14.1. employment of two colleagues without authorisation
    14.2. employing Michael without receiving/checking right to work documentation

14.3. employing Quevin who is unable to understand basic health and safety instructions whilst attending an induction

15. Under the respondent's Disciplinary Policy (78 – 88 at 81), the responsibility of the investigating manager to conduct 'the most thorough investigation possible' and to give the employee a 'full opportunity to explain [their] point of view and any mitigating circumstances'. The manager 'may also look at other information…, and may also interview some of [his] colleagues'. Once the investigation is complete the manager has to decide whether 'based on the evidence they have gained, as to whether they believe [his] conduct warrants [him] being invited to a disciplinary hearing'.

16. On the morning of 12 June, Ms Rees called for statements from Mr Peplow and Mr McHugh to support the investigation and asked for them to be provided by 3 pm. Mr McHugh sent her an email at 4:32 pm (153). She forwarded this to Mrs Greenway at 8:54 am the following day and also sent her an email from herself containing further information (149) and a copy of the statement received from Mr Peplow (150 – 151). She promised to send another e mail to Mrs Greenway with copies of some text messages that were relevant, but she never did so.

17. Mrs Greenway read the information sent to her and met with the claimant as arranged. The claimant declined to be accompanied at the meeting and was happy to proceed. There was also a note taker present and the notes of the meeting run to 17 pages (154 – 170). Unfortunately, page 4 of the notes is missing. The notes were transcribed for this hearing (170a – 170g).

18. At the start of the meeting, Mrs Greenway dealt with the first allegation, namely that the claimant had employed two colleagues without authorisation. She explained, as was the case, that she had received a statement from Mr McHugh, which said he had spoken with the claimant on 23 May 2018. She told him that, according to Mr McHugh, they had discussed his payroll forecast and he had been told that they were about to overspend £5,000 in quarter one and that a further overspend was forecasted for quarter two, so there was 'no way' he could recruit until the two forthcoming leavers were 'off the payroll' and the claimant should request that he look at it again with him in four weeks' time. Then she said she had a statement from Ms Rees about when the claimant had asked her about vacancies and she had told him that he would need to get authorisation from Mr McHugh; further that, when the claimant had initially asked Mr Peplow to organise an induction for the new recruits, Mr Peplow had told him that authorisation from Mr McHugh would be required. Mr Peplow's written statement had actually said he told the claimant to get authorisation from both Mr McHugh and Ms Rees (150). However, eight days after he had gone through the payroll forecast with Mr McHugh, the claimant had emailed Mr Peplow, asking for the inductions to go ahead. She asked for the claimant's response to all this.

19. The claimant's response was that the vacancies had been authorised by the previous People Partner, Ms Hinton, in late April 2018 and advertised. He explained that he had held the interviews prior to the conversation with Mr McHugh on 23 May, although he could not say exactly when he had held those. His text message to Ms Rees on 21 May said he had interviewed them 2 weeks before and, as a contemporaneous document prior to the allegation I accept that was the case. He had also completed the Keesing report. His

case is that he had made the job offers at that time and was trying to get them enrolled on induction. Again, I see no reason to doubt that evidence, which is in line with the text messages, which refer to them as 'new starters'. The claimant accepted that Mr McHugh had told him he could not recruit. He explained to her that he assumed, when booking the induction for the recruits with Mr Peplow, that he would speak with Ms Rees, as he worked closely with her, to check that the vacancies had been authorised. Nevertheless, he accepted that he should have sent an email to Mr McHugh about booking the new recruits onto the induction, but he had forgotten to do so. His case is that, having made the job offers and told the new recruits they would be given a date for induction, he could not retract them as it would be a breach of contract. I accept this was in his mind at the time and he was thinking the restriction on recruitment was in the future and not retrospective. He did not actually make that point to Mrs Greenway but, in her evidence, she accepted that would be the reality, if the job offers had been made.

20. They moved to the second allegation that he had employed Michael without receiving or checking the right to work documentation. The claimant explained that, when the vacancy was advertised, Michael was an employee of the respondent in another store. Around the same time, he also interviewed a new starter called Eugene on 12 May and the necessary documentation had been checked. The claimant suggested he had got the two of them confused so that, when he was calling Michael to send him on the induction, he had mistakenly thought that this was Eugene, for whom he did have the relevant documentation. The claimant said that he had spoken with Michael in early May 2018 and had then interviewed Eugene on 12 May. Later, on 31 May, he had called Michael and offered him a role and told him about the induction in early June, mistakenly believing that he was speaking with Eugene.

21. They went on to discuss the third allegation, which concerned Quevin and his standard of English such that Mr Peplow had been concerned that he would not be able to understand the respondent's health and safety instructions. The claimant explained that Quevin was the son of a colleague, who was already employed by the respondent at another store. When the position had been advertised, the father had been in touch to make a recommendation on behalf of his son. He then had a conversation with Quevin and, whilst he could see his English was not where it should be, the claimant had seen potential in him and felt that he could put him working on duties that did not require him to speak very much. All he would be requiring him to do was filling shelves. He would not need to interact with customers very much and the claimant would be able to communicate with him by way of signals to instruct him on the tasks to complete.

22. In his responses the claimant accepted that he had not gone through the normal interview process, but that he had had a general conversation with Quevin and that he believed the important thing was to check his right to work. The claimant's failure to follow the correct processes and his decisions made concerned Mrs Greenway. She wanted to understand whether or not his actions had arisen from a lack of training and experience as a manager. The claimant told her, as was the case, that this was his first store manager appointment and that previously he had worked as a deputy manager for four years and as a replenishment manager prior to that. He told her that he had sat in on some group hiring sessions while in London. There, he was not

expected to write up anything during the interview. In London others managed the administrative side of the recruitment process completely. At the investigation meeting he accepted he had not completed the relevant interview pack (90-98) in relation to Quevin. However, in evidence, he explained and, I accept, that the process was different from London and that, in the case of Eugene, he had apparently done the paperwork because it had been sent to him for completion by the People Partner. I was never actually shown it, though it seems to have been checked by Mrs Greenway.

23. After taking a short break to consider what had been said, Mrs Greenway reconvened the meeting. In relation to the second allegation of employing Michael without the necessary right to work documentation, she did not think there was a case to answer. She believed he had simply called the wrong person and the paperwork had been completed for the other person. However, she felt there was a case to answer in respect of the other two allegations. She believed the claimant had been issued with a clear instruction not to recruit and yet he then offered jobs to 2 people. As for the allegation regarding Quevin, she concluded that the claimant had not conducted the full interview because he knew Quevin struggled with his English and therefore he would not be able to understand the necessary training and would not be able to perform his job satisfactorily for the respondent. The meeting had lasted I hour and 50 minutes including the break of 11 minutes.

24. She did not undertake any further investigation and reported her conclusions straightaway in an email to Ms Rees dated 13 June (171 – 172). She referred the matter for a disciplinary hearing. She had no further involvement.

25. It was clear from her evidence that the respondent accepts that an offer to attend an induction training session amounts to a job offer and the first day of attendance at induction is the first day of employment. Quevin attended the first day of induction on 7 June, but did not return the next day and indeed never continued the employment. Mrs Greenway did not know the precise details as to what happened, but she understood he had been dismissed, and at some point, he returned to Portugal.

26. Mrs Greenway said she did not know if the claimant had offered Quevin employment before or after his meeting with Mr McHugh. Her handwritten note summarizing her conclusions (148) and her e mail to Ms Rees (171) show she concluded that the 2 job offers were made after the claimant's meeting with Mr McHugh on 23 May, namely on 31 May.

27. As for the respondent's recruitment procedure, Mrs Greenway explained that the relevant People Partner should authorise the advertising of vacancies. The operations support manager and area manager normally guide the store manager on the financial aspects and whether it is feasible to recruit. Usually that guidance takes place before the job advertisement, but sometimes afterwards. In response to questioning, she accepted the procedure was "confusing", despite her being an experienced store manager. I was never shown any written procedure, nor the actual details of any training for managers in relation to the procedure for authorising staff recruitment.

28. Mrs Greenway did not look into whether the claimant was correct in his

assertion that Michael was an existing employee. She said she was not aware of the text message on 8 June from the claimant to Ms Rees (141). She said Ms Rees had not told her about it, but it was referred to in the e mail from Ms Rees to her dated 13 June (152). It was one of the texts to which Ms Rees had referred in the e mail, but never sent. Mrs Greenway had not chased up Ms Rees to provide them.

29. Following Mrs Greenway's investigation, Ms Rees asked Mr Philip Brown to conduct a disciplinary hearing for the claimant. Mr Brown is the area manager responsible for 20 convenience stores, of which one was managed by the claimant. Prior to that, in early to mid-June 2018, he had become aware of incidents that needed to be investigated when Ms Rees had contacted him following Mr Peplow's induction for new colleagues in early June. She had informed him that the claimant had recruited somebody who could not speak or understand English to a sufficient level and another, for whom he had not prepared the necessary Right to Work documentation. In addition, she had said the claimant had not had authority to recruit the two individuals. Mr Brown had asked Ms Rees to arrange for a disciplinary investigation to be carried out.

30. Somebody, presumably Ms Rees, sent a letter (173) dated 18 June 2018 inviting the claimant to a disciplinary hearing on 20 June 2018. The letter said that the purpose of the hearing was to discuss allegations of:

    30.1. employment of two colleagues without authorization
    30.2. employing a colleague without receiving/checking right to work documentation
    30.3. employing a colleague who is unable to understand basic health and safety instructions whilst attending an induction

31. Before the disciplinary hearing Mr Brown received and read the material that had been made available to Mrs Greenway together with the handwritten notes of her investigation meeting with the claimant. He did not have, nor did he chase up, the text messages (133-136, 139, and 141-142, nor the e mail exchange (137-138). Mrs Greenway had also not looked into the authorization by Ms Hinton in April and had not seen or made available to Mr Brown the Vacancy Approval Form (126). The hearing went ahead as arranged and the claimant chose not to be accompanied. Notes were taken by a note taker and run to 11 pages (184-194). The notes were transcribed for this hearing (194a – 194f).

32. At the start of the hearing Mr Brown outlined the three allegations as set out in the letter. He asked the claimant to explain why he had employed two people. The claimant responded that a colleague, who worked for 15 hours, had handed in his notice in April and he had needed to replace him. He spoke to Ms Hinton and explained that he was going to struggle without cover. He sent a request for her to approve the vacancy and she did so. The advertisement went online. He saw people for interview in May. He had to hold up their start due to the unavailability of induction training. Later, in May, he was told to hold back on recruitment, but he had offered the jobs already before his conversation with Mr McHugh. Mr Brown then asked him for evidence that the jobs had been offered before Mr McHugh had told him not to. The note of the meeting records that the claimant produced documents and then referred to 'Michael currently employed by Tesco in Northampton;

and then Eugene is the other colleague'. The claimant was then asked why he had not taken on Eugene and he responded that he had meant to do so but, by accident, had telephoned Michael. Mr Brown asked about Quevin. The claimant said he did not have any notes in relation to Quevin. Mr Brown asked why he had not told Mr McHugh that he had offered the two positions. The claimant replied that he had been waiting for induction dates. He accepted he should have told Mr McHugh and that he should have copied Mr McHugh into the communications he had with Mr Peplow. A little later Mr Brown repeated the question as to why the claimant had not told Mr McHugh about the job offers. The claimant replied that he had told him, but may not have used the correct language. Mr Brown asked why the claimant had felt it was in order to recruit when there was a £5,000 overspend. The claimant replied that he was looking at the future and, in order to resolve the staffing problems in the store, it was first necessary to go overspent.

33. Mr Brown then turned to discussing how somebody had been recruited without the Right to Work information. The claimant explained that, in the first week of May, he had called Michael at the Northampton store, as he had understood he was moving to Birmingham and wanted to move stores. However, the claimant found out he would not be available until mid to late May, so he went on to consider others for the job. Then the induction dates became available and, instead of calling Eugene as intended, he got him mixed up with Michael and called Michael to invite him to the induction. Mr Brown then referred to an e mail dated 18 June 2018 from the wages department to the claimant (174) and I assume this must have been a document handed over by the claimant at the start of that hearing. It confirmed Michael was an existing employee seeking a transfer. Mr Brown put to the claimant that there would have been no need to arrange an induction for Michael as an existing employee. The claimant admitted he had made a mistake.

34. Next, Mr Brown asked the claimant with regard to Quevin how he had come to recruit somebody, who could not speak English. The claimant replied that, on his interview with Quevin, he could speak 'very minimum level of English' and that his intention was to employ him to stock the shelves. Mr Brown told him of Mr Peplow's concerns at the induction, that Quevin had been unable to answer any questions and he had been unable to sign off his induction, and he pointed out this would mean Quevin would not be able to make conversation with customers or understand basic rules around pricing and food hygiene thereby putting the respondent at risk; the claimant responded that he understood. His only excuse was that Quevin's father worked for the respondent and had recommended him. He needed help in the store, and stated he only intended to use him for shelf stacking, but he did agree with Mr Brown that he would not be able to understand the 'miles of regulations' (194d).

35. He explained his intention only to employ him on Saturday and Sunday evenings to provide support and there would be two others present. He believed that Quevin could communicate at a minimum level. The claimant acknowledged that, at the interview, he had not followed the standard interview questionnaire, but had asked questions using simple words for Quevin to understand (194d).

36. There was never any suggestion by the claimant that Mr Peplow had

made up what he was saying about Quevin's inability to understand the induction training because he did not like Quevin. The claimant never made any criticism that the statements obtained by Ms Rees for Mrs Greenway's investigation did not have the name of the investigator or any notetaker on them.

37. Mr Brown then summarised the position (194e). The claimant agreed that he had employed two people, offering them positions, but before Mr McHugh told him not to recruit. Next, the claimant confirmed he had wanted to offer Eugene a job, but he had offered it to Michael by mistake. Mr Brown gave his understanding that Eugene had been interviewed correctly, but not Michael, and that the claimant had got them mixed up and offered Michael the job after 23 May thinking he was Eugene. The claimant agreed with this.

38. After the claimant confirmed he had nothing more to add, Mr Brown adjourned the hearing for an hour to read the notes. When the hearing was reconvened Mr Brown told the claimant (194f) that he had decided the claimant had recruited a colleague after being told not to recruit anyone. He accepted the claimant's submission regarding the lack of the Right to Work documentation and so discounted that allegation. Finally, he stated the claimant had recruited somebody with such poor comprehension of English that it had put Tesco and himself at risk of prosecution and referred to health and safety risks and risks to members of the public, which he found inexcusable. He told the claimant he had 'fundamentally breached the trust and confidence between him and the company'. He said he had decided the claimant's actions amounted to 'gross misconduct' and that he should be dismissed. Nevertheless, he explained he had decided to offer the claimant a demotion on the basis that, if the claimant worked in a management team that supported him, his recruitment decisions would be subject to further scrutiny preventing him from making the same mistake again. He said he would confirm the decision in writing and provide details of alternative roles. The hearing lasted from14.00 to 14.37, when Mr Brown adjourned to consider his decision, resuming at 15.37 to announce it.

39. It was clear from the way he communicated his decision to the claimant, as recorded in the notes, and indeed it was his evidence, which I accept on this, that he regarded the second reason for dismissal i.e., Quevin's lack of English and its consequences as the more serious act, which he described as 'inexcusable' and a fundamental 'breach of trust and confidence'.

40. On the same day, Mr Brown prepared and arranged for a letter to be hand-delivered to the claimant confirming the outcome (195–196). The letter confirmed his belief that there was enough evidence to warrant dismissal but, in the circumstances, he had decided to offer him demotion instead. He offered him six alternative positions, each in a managerial role on salary and terms which, he believed, were not significantly different from his existing terms, albeit slightly less salary. The claimant was given five working days in which to accept one of the positions, failing which his last day of employment would be 25 June 2018. Mr Brown's reasons for the decision were: –

- employment of one colleague without authorisation
- employment of Quevin who is unable to understand basic health and safety instructions whilst attending induction due to his lack of

comprehension of English

41. At the end of the hearing Mr Brown had described this conduct as 'gross misconduct' and the terminology he used fitted with the respondent's disciplinary policy and definition of gross misconduct, examples of which are set out at paragraph 11 of the Policy (86), and include:

- Deliberate disregard of Tesco procedures
- Deliberate refusal to carry out a reasonable management instruction
- A serious breach of the Code of Business Conduct
- Any other action which, on a common-sense basis, is considered a serious breach of acceptable behaviour

42. The original allegation referred to the employment of two colleagues without authorisation, whereas the letter of dismissal only referred to one such employee and did not identify the person. I was confused by this as the language of his witness statement (para 17) was to the effect that he was finding that two employees had been wrongly recruited, namely both Quevin and Michael. In response to my questioning, Mr Brown confirmed this part of the dismissal decision was for recruiting one person after 23 May and he was very clear that he was referring to Michael. I asked how he reached this decision when Michael was already an employee and was just transferring stores. He responded that the claimant had been told not to increase his 'base payroll'. Later in his evidence however, under re-examination, he said he had discovered at the time that Michael was already an employee of the respondent. Then he said his earlier oral evidence had been mistaken and that the employee who had been recruited without authority was in fact Quevin. He said he had understood Quevin had only been employed after the claimant's meeting with Mr McHugh on 23 May. He did not explain how he had come to this conclusion notwithstanding the claimant's repeated assertions that he had recruited Quevin before that meeting and Mr Brown's acceptance in his statement that the claimant may have interviewed and made offers to Michael and Quevin prior to his conversation with Mr McHugh.

43. Despite his very confused evidence on this point, I accept it must be the case he was referring to Quevin, and not Michael, as the person wrongly recruited, even though he had gone so far as to try to justify his reasoning to me that it was Michael. The fact is he knew Michael was an existing employee seeking a transfer, so he did not have any reason to believe at the time that Michael had been newly 'recruited' by the claimant. However, I do find it more likely that Mr Brown did not properly analyse the evidence when forming his belief that the offer of employment to Quevin had been made after the meeting with Mr McHugh, but he believed strongly the claimant had not disclosed that offer to Mr McHugh when he should have done so in the light of the instruction not to recruit new staff, and he acted on that belief. This was confirmed in his evidence and also in answer to a question from me when Mr Brown agreed his real criticism of the claimant was his failure to do anything to rectify matters after his conversation with Mr McHugh

44. I asked if he had met Quevin to establish for himself the level of his English. He responded that Quevin had not turned up for the second day of induction and he understood from Ms Rees prior to the disciplinary hearing that Quevin had returned to Portugal. He accepted there was no prescribed

level of English required by the respondent, but the interview process is meant to 'coax it out' by getting answers to set questions.

45. It was the respondent's case that the claimant had received ample and sufficient training for his role as store manager particularly, in so far as is relevant in this case, regarding recruitment practices and processes, and also the legal risks in relation to Right to Work documentation, health and safety at work in respect of both staff and customers, and customer service. A good deal of time was spent on this in the questioning of witnesses. As explained above (para 7) many pages of training records were produced, which the claimant disputed as his. I find it more likely than not that they were his records, but the claimant could be forgiven for not readily accepting that, as his name was not on the hard copies and only course headings were given going back over a number of years. He was not shown details of the material covered on each course, nor any original material with his name on it. It was really his case that he had not received training in certain aspects of recruitment and, without further proof, he was not going to admit it. Whilst I am satisfied the claimant had received training on and was generally aware of the need for Right to Work (or 'Keesing') documentation and the relevant health and safety requirements as well as on how to conduct an interview, the respondent was not able to show to my satisfaction that any of the courses to which they referred dealt with the processes involved in getting approval to recruit and how that might be countermanded, nor as to the legal effect of that. This was more a question of practices in the local area and the claimant had only been in his role in Birmingham for about 6 months. These are what Mrs Greenway herself had described as 'confusing'. Again, I was shown nothing in writing, such as a memorandum or a handbook, that explained the procedures for managers.

46. One of the health and safety requirements on which the claimant had received training was to ensure staff had the right information, training and supervision to work safely. This was laid down in the 'Managing A Safe Place to Work and Shop Workbook' (109), which applied to him.

47. I was not shown anything that would have guided a store manager, when recruiting, of the standard of oral and/or written English required of prospective employees at any level of appointment, nor of any particular level that must be passed and how that is to be judged or by whom. I find the claimant was given no instruction on this and it was therefore left to his discretion as store manager using common sense. When interviewing a prospective employee, the respondent required an interview pack to be completed and I was referred to a copy (90-98). This consisted of a checklist of questions the manager was supposed to ask the candidate to be assured about aspects of their background; to record various aspects of the job had been explained; to ask for and record examples of service given to customers or how complaints had been handled, giving marks in the process and doing the same in relation to a host of other attributes that would make the candidate attractive to employ. In order for this form to be properly completed it would be necessary to converse in detail with the candidate or someone on his behalf. The form was not completed in the case of Quevin.

48. Although he denied it, I am satisfied the claimant completed training on 'Holding a good interview' and this was completed on 10 January 2018 (49). However, I was not shown the course content and I find that would probably

have just covered the interview process.

49. I find Mr Brown concluded that the claimant could have spoken up and requested more support, but that he had chosen to disregard the respondent's procedures. In reaching his decision to demote, he took into account the claimant's relatively short time in the role. Despite what had happened, he had not wanted to lose him as an employee, and anticipated the claimant would accept one of the alternative roles offered. He thought that, in a large store, the claimant would get guidance and development for the benefit of his career whilst still being on a similar salary.

50. In an e mail dated 24 June 2018 to Mr Brown (200), the claimant made clear he would not accept demotion and that he would appeal the findings. Mr Brown responded the next day (200) to confirm the dismissal would take effect immediately, but he could still appeal. He wrote a letter of appeal dated 3 July 2018 (197-199), in which he set out 11 grounds for consideration. Ms Rees dealt with this and appointed Mr Lapsley to deal with it. At the time he was a store manager who had been employed by the respondent for 28 years. Mr Brown was an area manager and Mr Lapsley's own line manager, but the respondent's disciplinary policy provides that any manager who has received the necessary training can deal with appeal hearings. He did have the necessary training and experience to deal with appeal. He first became involved when Ms Rees contacted him to check his availability. She explained the brief background to the matter and then sent him a copy of the claimant's appeal letter. She also sent him an appeal pack containing a number of documents and these included all the material that had been viewed by Mrs Greenway and Mr Brown and notes of the investigation meeting and disciplinary hearing. However, he did not have a copy of the text messages (133–136, 139 and 141–142). The date of the appeal was rearranged from 12 July to 2 August in order to accommodate the claimant's trade union representative, Mr El Gorrou.

51. At the start of Mr Lapsley's evidence before me, he sought and obtained my permission to amend paragraph 2 where it stated 'Phil had determined that Faisal had employed two colleagues without authorisation' to 'one colleague'. It is clear from the notes of the appeal (258a) that he was aware the decision to dismiss had been based on one employee's recruitment as per the dismissal letter.

52. Section 10 of the respondent's Disciplinary Procedure (85) informs the appellant that he should set out the reasons for the appeal. Examples given included such matters as the outcome being too harsh, incomplete investigation, lack of a fair hearing, new evidence and failure to properly take into account the appellant's version of events. It follows that the role of the appeal manager is to consider all such matters raised.

53. Mr Lapsley went through each of the 11 points of appeal. In essence the claimant was arguing that the investigation had not been sufficient, the allegations had not been proved, he was only newly appointed to the role, there was no misconduct involved and the penalty was too harsh. He suggested there was a 'hidden agenda' to remove him.

54. The meeting is recorded as having lasted 2 hours and 5 minutes. There were breaks lasting 44 minutes, so the discussion lasted 81 minutes. At

various points during the hearing Mr El Gorrou raised the issue of the claimant being new to the role and lack of training on the recruitment process.

55. On the allegation about employing Quevin after the meeting with Mr McHugh, like Mr Brown, he focused on the alleged instruction on 23 May not to employ, rather than considering the point that the offer had already been made and could not be retracted without a breach of contract.

56. On the allegation about Quevin's lack of English, there was simply a disagreement where the claimant sought to argue Quevin's English could be brought up to speed in 12 weeks and that the respondent had been wrong to rely on Mr Peplow's statement without speaking directly with Quevin.

57. After hearing what the claimant and Mr El Garrou had to say on each point of appeal, Mr Lapsley said he was making his decision based on whether the When Mr El Gorrou urged him a little later to consider the lack of training point, Mr Lapsley again said he was making his decision whether the outcome was too harsh (258f).

58. At the end of the hearing Mr Lapsley confirmed he was upholding Mr Brown's decision and that a letter would be sent. The letter from Mr Lapsley to the claimant was dated 2 August 2018 (259). He confirmed he agreed with Mr Brown's decision to demote him for 'gross misconduct'. In respect of each point of appeal he gave a short response to explain why each was being rejected.

59. The claimant commenced the ACAS early conciliation procedure on 8 September 2018 and it concluded on 17 October 2018. The claim was presented on 2 November 2018.

Relevant law and submissions

60. I am grateful to the parties for their written submissions. In so far as it is necessary to do so, I will draw attention to them here and in my conclusions.

61. Ms Kaye set out the relevant law and I adopt much of it and summarise the relevant legal framework as follows. Starting with the statutory definition of unfair dismissal, section 98 of the Employment Rights Act 1996 ('**the 1996 Act**') states:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) *[omitted]*

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

62. Accordingly, it is for the employer to show the reason for dismissal. Here the respondent alleges it was for misconduct. Having established a potentially fair reason, the tribunal must determine whether the dismissal was fair or unfair in accordance with the test under section 98(4).

63. In most unfair dismissal cases involving misconduct, the tribunal will consider three questions following the case of *British Home Stores v Burchell* [1978] IRLR 379, in which they were set out, namely whether:

a) the employer had a genuine belief in the employee's guilt
b) that belief was formed on reasonable grounds
c) the employer carried out a reasonable investigation in forming that belief

64. Tribunals are not obliged to follow these guidelines, although they are used in virtually every misconduct case.

65. The investigative exercise that was undertaken must be considered as a whole: *Shrestha v Genesis Housing Association Limited* [2015] IRLR 399, where Richards LJ held:

> '23 To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the *Burchell* test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is

necessary to carry out specific inquiry into them in order to meet the *Burchell* test will depend on the circumstances as a whole'.

66. The Court of Appeal in *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 clarified a point, namely that the tribunal must not substitute its own view as to what was reasonable or adequate in terms of the investigation. This means the need to apply the objective standards of the reasonable employer applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

67. To be clear and reiterate the point, I remind myself of the long-standing principle of law that, when determining whether dismissal is a fair sanction, the tribunal must not substitute its own view of the appropriate decision for that of the employer: *Rolls-Royce Ltd v Walpole* [1980] IRLR 34).

68. There is an area of discretion within which management may decide on a range of outcomes, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction such as a final written warning would have been reasonable, but whether the dismissal was reasonable: *British Leyland v Swift* [1981] IRLR 91. In *Tayeh v Barchester Healthcare Ltd* [2013] IRLR 387 it was held the tribunal had erred in finding that Ms Tayeh's dismissal had not been within the band of reasonable responses; it had substituted its own views as to the seriousness of the charges for those of the employer.

69. It is well-established law that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted; *Iceland Frozen Foods v Jones* [1982] IRLR 439.

70. The issues affecting remedy that I was to decide as part of the liability hearing concern the statutory reductions to any award of compensation and *Polkey. S*ection 122(2) of the 1996 Act states:

> 'Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly'.

71. Section 123(6) of the 1996 Act states:

> 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding'.

The same percentage of deduction will usually apply to both basic and compensatory awards.

72. In order for a deduction for contributory fault to be made for the

employee's misconduct, that conduct must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances: *Nelson v BBC (No 2)* [1979] IRLR 346*,* re-affirmed in *Frith Accountants v Law* [2014] IRLR 510*,* where the EAT also held '13…in so far as an employee is suffering by reason of some lack of capability, without any intention on their part, it will be very difficult if not impossible to hold that culpable of blameworthy'.

73. Ms Kaye referred to the case of *Bell v The Governing Body of Grampian Primary School* (2007) UKEAT/0142 and submitted that the claimant's conduct was conduct for which he can properly be held culpable. She submitted further that the claimant contributed to his dismissal by his conduct and/or that it should be just and equitable to reduce any compensation by 100% in that:

a) the claimant accepted in these proceedings he offered employment to Michael (albeit he was a current employee of R) on 31st May 2018, after his meeting with Mr McHugh;
b) the claimant accepted in the disciplinary process, he had offered Quevin a role with R after his meeting with Kevin [194d];
c) the claimant failed to raise any issue with management regarding the ongoing recruitment process at any time prior to the investigation commencing;
d) the claimant failed to follow the proper process and procedures for the recruitment of Quevin;
e) the claimant would have reasonably known Quevin would be unable to complete the induction and despite this, still put him forward for the same;
f) the claimant refused the offer of disciplinary demotion which could have been on a comparable salary.

74. With regard to the *Polkey* issue, Ms Kaye relies upon the case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 and submitted that, even if it is found the respondent failed to follow a fair procedure, any such failure would not have made any difference to the outcome and the claimant would still have been dismissed, even if a fair procedure had been followed.

75. In *Andrews v Software 2000 Ltd* [2007] IRLR 568 the EAT laid down the relevant principles to be applied by a tribunal when considering this issue namely, having considered the evidence, the tribunal may determine:

(i) that if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event;

(ii) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly;

(iii) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the case of *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615; or

(iv) employment would have continued indefinitely.

Conclusions

76. The reason for dismissal related to the claimant's conduct, namely (a) the employment of one colleague without authorisation and (b) the employment of Quevin who was unable to understand basic health and safety instructions whilst attending induction due to his lack of comprehension of English. The colleague referred to in ground (a) was also Quevin for the reasons given in the findings of fact at paragraphs 42 and 43 above. There was no disputing that, even though the original sanction was to offer the claimant demotion, the claimant would be treated as dismissed if he did not accept it.

77. I firmly reject the claimant's allegation that there was a hidden agenda to remove him from the business. The allegation was never particularised and it was not put to the respondent's witnesses, nor was it argued in the claimant's closing submissions. Clearly, if the respondent had wanted the claimant out, it could easily have dismissed him without giving him the option of taking a demotion on similar terms.

78. I turn to the 3 questions posed in the *British Home Stores v Burchell* case, which provide valuable guidelines in assessing the fairness or otherwise of the dismissal. On the first question I have already stated I am satisfied the respondent has shown the reason for dismissal. Then, in shorthand terms, the decision to dismiss has to be based on reasonable grounds after a reasonable investigation. On this part of the guidelines there is no burden of proof on the respondent and the 2 questions are neutral. Finally, whether or not the claimant actually committed the misconduct in question is irrelevant as far as the tribunal is concerned, and it is the employer's belief and how that was formed which counts and must be judged.

79. There was no real investigation by Mrs Greenway, apart from the lengthy interview with the claimant. However, she received evidence which had been requested by Ms Rees in the form of a 2-page statement from Mr Peplow and a short e mail from Mr McHugh and she had a verbal report followed up with an e mail from Ms Rees. The genuineness of these was never challenged by the claimant. Unfortunately, the text messages obtained by Ms Rees were not sent to her and she did not chase them up. When I first read the e mail from Ms Rees, I could see 4 separate references to the text messages and immediately I looked for them. This was the obvious reaction and yet neither she, nor Mr Brown, nor Mr Lapsley, who all read the same material, ever sought them. Nobody looked into how the original authorisation to recruit by Mrs Hinton had come about and nobody seems to have obtained a copy of the vacancy approval form. Even though Mr Brown had been prepared to work on the assumption that authorisation had been given prior to the claimant's meeting with Mr McHugh on 23 May, he was missing the context provided by these documents, which ought reasonably to have enabled him to take a broader and, perhaps, more generous view of the claimant's explanation surrounding the recruitment.

80. For all the managers involved in the process the allegation about recruiting without authorisation all boiled down to the meeting between the claimant and Mr McHugh. For them it did not seem to matter so much what had gone on

before. It was never in dispute between the parties that Mr McHugh discussed the payroll budget and forecasted overspend with the claimant and told him 'not to recruit'. They interpreted the evidence to show that the claimant had not, after that meeting, sought and obtained further authority from both Ms Rees and Mr McHugh before offering the positions to both Quevin and Michael and, in proceeding without that authority, he had deliberately disobeyed a senior manager's instruction.

81. The following questions should have occurred to them:

81.1. When were the offers made and to whom?
81.2. If made before the meeting on 23 May, how did that affect the position?
81.3. What was it reasonable for the claimant to have understood from the meeting with Mr McHugh and the language used?
81.4. What communications took place after the meeting?
81.5. What was it reasonable for the claimant to have understood from those communications?

82. At the start of the meeting with each manager when they put the allegation to the claimant, he was consistent throughout in saying the recruitment had been authorised and he had already interviewed the candidates and made offers before his meeting with Mr McHugh. Had they examined the contemporaneous documents in the form of the text messages and vacancy approval form, they should reasonably have established what I have set out at paragraph 12 above about the making and timing of the offers. Also, it seems Ms Rees in her e mail to Mrs Greenway (152) interpreted the texts to say that two candidates had already been offered a position, which would have been another reason to request sight of them, especially if one was going to conclude the offers came later i.e. after 23 May.

83. They would also have noticed the contradiction between what Ms Rees was saying in her e mail to Mrs Greenway of 13 June (152) and her text message to the claimant of 21 May (135). There is a world of difference between the need to obtain authorisation from Mr McHugh (the former) and simply informing him 'so he is in the know' (the latter). Also, they would have seen the clear contradiction between what they understood from Mr Peplow's statement about him telling the claimant he needed to get authorisation from Mr McHugh and Ms Rees (150) and the claimant's version supported by his text messages to Ms Rees on 18 May (134) and 21 May (135) where he refers to Mr Peplow telling him he needed her to authorise the 3 new starters to go on induction with no mention of Mr McHugh. They would have established that Ms Rees did give her confirmation that he could proceed as long as he reminded Mr McHugh of the hours he was recruiting them to work. They would then have realised that was the nature of his failing. None of them was able to check the facts again as, of course, they had seen none of this. I am certain any reasonable employer would have pursued the missing documents and information and investigated further before coming to a conclusion and it would have been proportionate to do so. A reasonable employer would have done so whether the claimant asked for them or not. It was part and parcel of conducting a fair investigation with so much at stake for the claimant. Had they done so, they would have seen the inconsistencies in the evidence and would have had to test the reliability of the evidence given in the investigation against the evidence of these earlier contemporaneous

communications when nobody was aware of the allegations to be made.

84. Turning to what the claimant should have understood from his meeting with Mr McHugh, his case is that he was already committed by then to the recruitment having made offers. In his eyes, he had had authorisation from Mrs Hinton which, only 2 days before, had been re-affirmed by Ms Rees, who worked closely with Mr McHugh. Accordingly, he was thinking the instruction not to recruit applied to any new recruits, not to ones whom he had already committed the respondent. There was no discussion with the claimant about how, if the claimant was right in his assertion that offers had already been made and accepted, the respondent was committed in contract law and how that may have affected things. I cannot see that any manager ever gave thought to the claimant's position at the time and his interpretation and viewed Mr McHugh's instruction as completely unambiguous to be acted upon without question. This is probably why Mr Brown was prepared to concede the claimant may have had authority and made the offers before the meeting on 23 May, but nevertheless he was still guilty of misconduct in failing to obey Mr McHugh's instruction, and Mr Lapsley upheld him.

85. Whilst the claimant acknowledged he should have informed Mr McHugh about the recruitment, it was in the context of what Ms Rees had told him, namely to keep him aware of the hours for which he was recruiting.

86. To Mr Brown the procedure for recruitment was obvious and clear to all managers, yet Mrs Greenway agreed it was 'confusing'. Normally one would be entitled to conclude that, if HR authorises a recruitment process, that is sufficient. Mr Brown thought it was all part of the training, but I am not convinced and have not been shown any document with a flowchart or whatever illustrating the necessary steps to be taken to recruit and the authorities required. The claimant had only been in the role for 6 months or so and his previous experience had been in London, where it was all handled differently. I am not satisfied any manager properly looked into this point and considered it before the decision was taken.

87. For the above reasons, I find the investigation was inadequate as far as the allegation about recruiting without authority is concerned. The allegations against the claimant were serious and he was warned he could face dismissal after 12 years' service and only recently having relocated from London to Birmingham. Whilst I find Mr Brown had a genuine belief, the decision was not based on a reasonable investigation. Had this been the only allegation, I would have found the dismissal unfair and gone on to consider the effect on remedy in line with the decision in *Polkey's* case and contributory conduct.

88. Regarding the other allegation it is beyond any doubt that the *Burchell* guidelines were satisfied. The initial concerns had all been reported in Mr Peplow's statement (150-151). It was pointed out by Mr El-Garrou that Mr Peplow had stated Quevin seemed 'quiet but very friendly and polite' inferring he was able to communicate (150). Although the claimant had appeared 'friendly and polite' to Mr Peplow, it could not reasonably have been accepted by Mr Brown that this bore any relationship with Quevin's ability to speak and understand English when taken with the rest of Mr Peplow's statement and what the claimant himself admitted. For example, Mr Peplow had gone on to say Quevin was 'really struggling to follow the content of the session, and was finding it very difficult to participate in group discussions (150). He added

Quevin 'did not speak at all after the initial greetings…and could only answer one question of the validation section in People Policies' – the only section completed in module one (151). He had refused to sign off his induction and had raised the concerns leading to the investigation. To Mrs Greenway he accepted there were no jobs that did not have an interaction with customers (170d) and it would have taken 12 weeks for him to achieve a minimum 'Hello' and 'Thank you'.

89. It was quite clear and admitted by the claimant during the investigation that Quevin spoke only a 'very minimum level of English' (194d). He accepted he did not follow the correct interview process. He accepted he had had to use simple words when he interviewed Quevin. It would have been reasonable for the respondent to have inferred this was because he would not have been able to understand and answer the questions and would therefore have failed to achieve the necessary score to pass the interview. The claimant had accepted Quevin's English would mean he could not interact with customers and he would not understand the basic rules around pricing and food hygiene, thereby putting the respondent at risk.

90. No further investigation was necessary in these circumstances. The claimant suggested in his evidence that Mr Peplow had taken against Quevin and did not like him. That does not come across in Mr Peplow's statement. It was never alleged at the time. However, even if Mr Peplow's concerns had been fabricated or exaggerated, the claimant's own statements were enough and that is what Mr Brown was reasonably entitled to conclude. There would have been no need to interview Quevin himself, even if he were still in the country and had made himself available, which seems unlikely in the circumstances.

91. The real issues here are whether the allegation was serious enough to lead to dismissal and, if so, whether the sanction of dismissal in the claimant's case was too severe or was within the range of reasonable responses of a reasonable employer.

92. It is clear from the training documents provided and the witness evidence that the respondent took the health and safety of its staff and customers and a high level of customer service as essential for the good of its business, which is obviously understandable. I am certain the claimant was aware of this from his long experience as an employee and his regular training and the respondent was reasonably entitled to believe that, despite anything the claimant had to say about his training.

93. Mr Brown considered the effect on the business of employing Quevin with his poor standard of English. He formed the view Quevin would not be able to interact with the customers and result in poor service. I can see that would mean, for example, not being able to answer questions such as where to find some item on the shelves. He believed Quevin would not understand his induction training and that would create a risk to the business in, for example, Quevin not understanding about the food hygiene rules and health and safety laws at a level to which all employees were required to be trained and have knowledge, whether employed as a just shelf stacker or not. His belief in these facts was genuine and entirely reasonable and based on a reasonable investigation.

94. It was reasonable for him to take the view that, in the context of the respondent's business, Quevin's standard of English was so poor that to employ him with these attendant effects and risks, was very serious in itself and was further compounded by the claimant's failure to use the correct interview forms. He had a reasonable belief that the claimant had been trained in the use of such forms and had used them in another case. However, even if he were to be excused due to his newness in the role and lack of recruitment experience, he could have reasonably concluded the claimant had shown a complete lack of common sense in employing such a person without at least taking it up with a higher authority to see if any dispensation could be granted.

95. Mr Brown decided there was sufficient misconduct to warrant dismissal. However, in view of the claimant's past performance, he felt dismissal should be the last resort and offered the claimant demotion in a lesser role but on not much less pay. He hoped the claimant would accept one of the roles, so he could be placed in an environment which would support him and enable him to develop his career. Dismissal would only occur if the claimant refused the demotion.

96. I find Mr Brown's decision was one which was well within the band of reasonable responses of a reasonable employer. It is clear to me this would have been the outcome even if he had only found the second allegation proven as he clearly saw that as the more serious misconduct and that would also have been within the band of reasonable responses of a reasonable employer.

97. There was an appeal at which the claimant was properly represented. Mr Lapsley took them through each point which they wanted him to consider. Whilst I find it unusual for Mr Lapsley to be hearing an appeal against his superior manager's decision, he was allowed to do so under the Disciplinary Policy and was properly trained and experienced in handling such appeals. I am satisfied he would have felt himself able to overturn the decision, and authorised under the Policy, had he felt it appropriate. I find the same criticisms apply to him as far as the decision to dismiss for recruiting without authority. However, on the other ground of dismissal, in my judgment, he took all the arguments raised by the claimant properly into account and was entitled to conclude the decision made by Mr Brown was reasonable on the facts and not unduly harsh.

98. The list of issues is essentially a list of principal issues I needed to decide taken from the statutory requirements and the *Burchell* guidelines. It is supplemented by individual allegations and assertions by the claimant in support of his case. I have resolved and given answers to the principal issues to be decided, after taking into account the claimant's allegations and assertions, and given my reasons, so do not feel it necessary to set them out again in list form.

99. Accordingly, the decision in this case is that the dismissal was fair in all the circumstances. However, whilst it is not obliged to do so, I hope the respondent will take on board the gaps and weaknesses identified in this judgment regarding its recruitment procedures and disciplinary investigation process. Also, it is very sad the respondent has lost his job and not found another. He still wishes to be reinstated. I hope he can now see where he failed with his conduct in this case and possibly, if both parties are willing, there could be discussions between them leading to his being re-employed in a suitable role.

Employment Judge Battisby
11 December 2020