Case Number: 3313733/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Butt	v	Asda Stores Limited

Heard at: Watford, via CVP **On**: 17 and 18 March 2021

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: In person
For the respondent: Mr Jonathan Heard, of counsel

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal does not succeed and is accordingly dismissed.

2. The claimant's claim of wrongful dismissal, i.e. for damages for breach of contract through the respondent's failure to give him notice pay, does not succeed and is dismissed. The respondent was entitled to dismiss the claimant summarily because of the claimant's refusal to attend his workplace.

REASONS

Introduction; the claims

1 In these proceedings, the claimant claims that he was dismissed unfairly and that he was wrongfully dismissed. The respondent accepted that it had dismissed the claimant. The claimant had ticked the box for "arrears of pay" in box 8.1 of the claim form. However, after I had had a careful discussion with him about his claims, he made it clear that the compensation that he was seeking was all

dependent on a finding that he had been dismissed either wrongfully, unfairly, or both wrongfully and unfairly. He was not, it was clear by the end of the hearing on 17 and 18 March 2021 before me, claiming anything else in respect of lost wages.

2 The parties agreed a number of facts, which meant that the evidence which I needed to hear was limited and related mainly (but not only) to the contractual terms that the claimant worked under.

The evidence which I heard

3 I heard oral evidence from the claimant on his own behalf, and on behalf of the respondent from

3.1 Mr Yamoah Kusi-Mensah, who is employed by the respondent as a Deputy Store Manager at its Hayes store;

3.2 Mr Peter Sweetser, who is employed by the respondent as a General Store Manager ("GSM"); and

3.3 Mr Matthew Cork, who at the material time was employed as a Deputy Store Manager at the respondent's Enfield Home Shopping Centre.

4 A 465-page bundle was put before me. I read the parts of it to which I was referred. Several further documents were put before me during the hearing. Where I refer below to a page, I am referring to a page of the hearing bundle.

5 Having heard that oral evidence and considering the relevant documents, I made the following findings of fact.

The facts

6 The claimant worked for the respondent from 22 September 2003 (see page 38) to 7 December 2018 (see page 352). He was first employed under the job title "Asda - Assistant". That was shown by the offer letter dated 18 September 2003 at pages 37-39. That letter stated that the claimant's contractual terms were set out in the letter and the "Colleague handbook" to which it referred, in the following terms:

> "This offer letter along with your Colleague handbook, which you will receive at induction, are your terms and conditions of employment with Asda."

7 The claimant received a copy of that handbook on 29 September 2003, as shown by the signed receipt of that date at page 40. He received an updated version of the handbook on 21 January 2004, as shown by the signed receipt at page 42. Neither handbook was put before me.

8 The claimant's place of work at that time was the respondent's Spondon Store. In 2007, the claimant transferred to work at the respondent's Feltham Store, to work as a "Grocery Colleague", as stated in the offer letter dated 12 June 2007 at pages 46-47.

9 On 13 August 2013, the claimant's working hours were varied, as shown by the document at page 58, where the claimant was described as a "Shop floor assistant" in the "Grocery [Dept]". By 2018, the stock which the claimant usually replenished was in what the respondent called its "Ambient" department.

10 On 16 May 2018, the claimant was (see page 120) required by the respondent to go and support colleagues at the Feltham Store checkouts, and he refused to do so on the basis that he had not received training to do so.

11 On 30 May 2018, the claimant was (see page 121) suspended for using threatening behaviour towards managers of the Feltham Store. That behaviour occurred after the claimant had on that day stated forcefully that he could not be required by the respondent under his contract of employment to work anywhere other than replenishing groceries. That in turn happened when a Section Manager, Ms Maia Tukhashvili, said that he should use a new system for processing waste. That new system involved the use of a piece of information technology called a TC70 which is in the shape of a gun. As described to me, it was a piece of equipment which is now commonly used in supermarkets of the sort which usually contains a bar code scanner. What happened on that day was recorded in the documents at pages 122-126, as I describe below. Pages 122-123 were written by Ms Sam Ahmed, the Feltham store's People Trading Manager, in typed form on 31 May 2018. Pages 124-126 were handwritten notes made by Ms Kylie McConn, during an interview of Ms Tukhashvili carried out by Ms McConn on the same day, 31 May 2018. It was not clear to me whether or not the claimant accepted that Ms Tukhashvili was his line manager, but ultimately that was not material, although as I record below, Ms Ahmed (who might be expected to know the true position) referred to Ms Tukhashvili as the claimant's "direct line or report".

12 At that time the Feltham store operated a system for filling shelves of the sort which the respondent had used since the claimant started working for the respondent. That was to have staff such as the claimant going to the stock room and bringing out a trolley-load of stock, putting out on the relevant shelf or shelves as much as would fit there, and then taking back to the stock room what was left. However, some of the respondent's other stores had started to use a new system, using the TC70 "gun", which would tell a member of staff in the claimant's position where to go in the stock room, what to collect there, and where to take it to on the shop floor, with no oversupply and therefore no need to return anything to the stock room.

13 On 30 May 2018, the claimant started work at 3pm in the store's warehouse and asked Ms Tukhashvili what he could do. As recorded by Ms McConn at page 124 (and this was not contradicted by the claimant), Ms Tukhashvili said to the claimant

that the respondent had a new system, and she was going to teach him how to use the TC70 gun to process waste. What that involved was not explained to me, but whatever it involved, the claimant refused to do it, saying that he was "not a Process colleague" and that it was Ms Tukhashvili's job to do it. He also said: "It's your job, you guys are the section leaders, you need to do it".

14 There was then apparently something of an argument between the claimant and Ms Tukhashvili. She was recorded at page 124 to have said to Ms McConn:

> "He started shouting he was very angry and walked away. Vernon (deputy) asked us to go upstairs because people where [sic] around us in the warehouse."

15 At page 125, Ms Tukhashvili was recorded to have said to Ms McConn (I have added some punctuation to the original text):

> "I was trying to tell him to calm down. He would not stop shouting. Levent (GSM) came into the room and asked what was going on and why was there shouting. We all went into the training room. Tabarak [i.e. the claimant] carried on raising his voice. He was explaining what he wanted and how long he had worked for the company. He refused to train to work in any other department. He wasn't even open to training on checkouts. I explained I would give him time to train on the departments. He refused. I noticed that he had started to record our conversation on his phone. Tabarak was not listening and was argumentative. Levent asked him to swipe out and go home as he was refusing to do any job tasks."

16 Ms Ahmed's description of what occurred was at page 122, where she said this (the original text had capital letters at the start of every line and was largely without punctuation; I have therefore tidied up the text a little, but without changing its meaning):

> 'I was in the training room with Levent Karadag (GSM) doing PFSCFS with Diana (SM) when Vernon (Deputy) called saying that Maia (Section Leader) [i.e. Ms Tukhashvili] asked Tabarak to learn how to complete the task of waste due to the fact that Ambient colleagues are to be trained on TC70's and he refused and that Tabarak and Maia are coming up to see me. I met with both of them in the People Office and I asked what the issue was. Maia started to tell me what had happened and Tabarak cut her off and started shouting and getting aggressive. I told him not to raise his voice and explain to me why he was refusing a reasonable request by his direct line of report. He continued to raise his voice and at the same time pointing and stating "He will do what he wants and he will not do anything other than his aisle." I tried to explain through his shouting that he is contracted to Ambient and that involves everything in that dept and hence why he is receiving training on TC70. He continue[d] to use threatening behaviour to convey his conversation then Levent he entered the room as he could hear him shouting in the other room. When Levent came

in he could see that Maia looked really scared as he [i.e. the claimant] was shouting at the top of his voice and still pointing. I felt threatened by his behaviour and was glad to see the GSM come in and intervene. Levent asked him to calm down and explain what was wrong but he told him he will do as he pleased and continued to show and point at Maia. Then security was called and [the claimant was] suspended and had to be escorted out of the building due to his aggressive and threatening behaviour towards Maia and myself.'

17 The claimant was then subjected to the respondent's disciplinary procedure and accused of gross misconduct. During that process, the claimant's suspension was ended and he was deployed to the respondent's Hayes store, where the new TC70 gun was in use, and (after receiving training on it) he used it there. He also said to Mr Kusi-Mensah in answer to the question "Have you worked on BWS [i.e. the respondent's beer, wine and spirits department]?": "I did yesterday."

18 After hearing from the claimant and considering the matter, Mr Kusi-Mensah gave the claimant only a first written warning. That was recorded in the undated letter at pages 220-221, received by the claimant on 26 September 2018, which had to be read with the note stating the outcome given orally at page 208. Mr Kusi-Mensah recorded this in the letter at page 220:

> "4. You said on the 30/05/18, your Section Leader asked to scan waste but you refuse as you do believe it wasn't part of your job.
> 5. You did say you have a contract that state that you don't work on frozen or BWS."

19 Mr Kusi-Mensah's findings were recorded by him in this way on the same page:

> "1. Colleague has worked on grocery Days since 2014
> 2. I believe in 2016 Process was changed where every colleague was performing the same functions and were briefed.
> 3. I do believe Tabarak had a briefing and if not was made aware through notices around the store.
> 4. The section leader request for Tabarak to do waste was a reasonable request as it fits into his job role and training was offered by his section leader on the day to help him complete the task.
> 5. I don't believe Tabarak has given a compelling enough reason to [i.e. for] not being able to carry out the task.
> 6. I believe it was in his best interest to listen to the section leader to take their help.
> 7. One of our beliefs and qualities is to respect the individual and be a team player. We do not give tasks that are specific where a certain colleague can scan waste.
> 8. The behaviour that Tabarak displayed in front of the GSM, PTM and Section Leader was emotional and ignorant on what his job role was and this made him behave in an irate and frustrating manner.
>
> ...

11. Therefore I do not agree you were threatening towards your Managers and section leaders but I do believe your behaviour could have been displayed in a better way without your gestures."

20 The claimant appealed against that decision, but the appeal was dismissed by Mr Sweetser. There was for present purposes only one relevant ground of appeal, which was summarised by Mr Sweetser in paragraph 6(f) of his witness statement in the following way:

> "Mr Karadag forced Mr Butt to work on Beer, Wine and Spirits (BWS), the Frozen Department and Checkouts repeatedly even though he was aware of Mr Butt being Muslim, and did not want to work on this department as this was not part of Mr Butt's contract of employment."

21 Mr Sweetser's witness statement restated the reasons given in the letter in which he stated to the claimant the reasons why he dismissed the claimant's appeal. That letter, dated 19 October 2018, at pages 268-271, was in my view the better (in fact I saw it as the best) evidence of the reasons for that dismissal. In the letter, in response to the ground summarised as stated in the preceding paragraph above, Mr Sweetser said this:

> "You stated that Levent forced you with a condition to work BWS, Frozen and Grocery. You did not work BWS in May or September. You did not work on checkouts before which is with the public, you feel nervous and you never sit a minute. A lot of people work one department on a single aisle; Levant is trying to get you out. You consider grocery to be edible, non-edible and health and beauty.
>
> Your Caliph and your leader encourage you not to work on BWS. It doesn't mean if a customer asks you to drop something you would not.
>
> With the frozen area you do not want to work in as it is scary; you go inside and it is dangerous for health, and if you are sick you do not get any sick pay. You feel pain in your shoulder.
>
> We had some discussion together about the requirements of a replenishment colleague and that I believe your role would reasonably be expected to cover BWS, Frozen, Grocery and Health and Beauty as a minimum.
>
> To ensure service to our customer any colleague would be expected to support the checkouts through busy periods where more tills are needed.
>
> I cannot find anything on file reporting an underlying health condition for your shoulder which would mean we need to consider our reasonable adjustment policy. Through this though I would add that adjustments can only be applied if the business is able to accommodate them.

> With the wage model the store has I do not believe it is feasible for them to be able to restrict your duties.
>
> I do not believe from the information available to me that Levent is discriminating against you but that he is asking from you what is reasonably expected of our ambient colleagues.
>
> *Therefore I do not find in favour of this point.*" (Italics in the original.)

22 Mr Sweetser's witness statement contained (in paragraph 38) the following further relevant factual allegation, i.e. which was not stated in the outcome letter at pages 268-271:

> "ASDA's role for Grocery Colleagues had changed back In 2016 where their roles were expanded to cover other duties such as working on the Frozen Department, BWS, Health & Beauty and Checkouts. All ASDA Grocery Colleagues are required to carry out other duties in different departments to help out other colleagues In the business due to busy periods."

23 However, no documents concerning that change were put before me. There was in paragraph 32 of Mr Sweetser's witness statement this further relevant passage:

> "Mr Butt's role would have been asked to cover BWS, Frozen, Grocery and Health and Beauty as an absolute minimum. All colleagues within a Grocery Colleague role would have been required to carry out alternative duties."

24 I accepted that evidence of what the respondent did in practice. In the following paragraph of Mr Sweetser's witness statement, there was this statement:

> "Mr Karadag had provided Mr Butt with a reasonable request to work on other departments as a requirement of the businesses' operational needs."

To an extent, that was an assertion rather than evidence, but I accepted that it showed that the respondent thought it had the contractual power to require the claimant to work in any shop floor replenishment team.

25 After the dismissal by Mr Sweetser of his appeal, the claimant refused to return to work. In fact, while the dismissal of the appeal was stated in the letter dated 19 October 2018 at pages 268-271 (i.e. that letter stated that dismissal for the first time, as it was not stated orally at the appeal hearing), the claimant was absent from work from 17 October 2018 onwards.

26 The claimant's dismissal for his unauthorised absence from work was then proposed. The claimant procured representation by solicitors at that time, and they sent an email to the respondent about the proposal to dismiss the claimant. That was dated 5 November 2018 and was at pages 279-280.

27 The email's first three substantive paragraphs were in these terms:

> "Background
>
> There are a number of matters relating to our client's employment which are the subject of dispute. We do not intend to rehearse all the issues at this juncture save to say that Mr Butt is not happy with the way the disciplinary and grievance processes have been handled by ASDA and he does not consider it reasonable that he should be required to work under Mr Levent and Ms Ahmed.
>
> Contract of Employment
>
> The fundamental problem underlying the events of the last few months is a disagreement over our client's contract of employment. A copy of this contract is attached. The contract states that Mr Butt is employed as a Grocery Colleague. For the best part of 15 years Mr Butt carried out the tasks required of a Grocery Colleague without demur. In May 2018 our client was suspended because he refused to work in the waste department. In the 15 years before May 2018 the tasks of a Grocery Colleague did not include working in the waste department and yet ASDA now seems to believe that our client can be required to take on a number of additional responsibilities which were never previously part of the role such as waste, BWS, Frozen, and working behind the till.
>
> Breach of Contract
>
> At no point has Mr Butt agreed to any changes to the terms of his contract of employment (whether verbally or in writing) and for this reason he has legitimately refused ASDA's attempts to impose these changes on him."

28 The email concluded:

> 'Religious Discrimination
>
> Whether or not Mr Butt chooses to resign he already has a claim for religious discrimination as a result of ASDA's attempts to force him to work in the BWS section, which is wholly incompatible with his beliefs as a practising, devout Muslim.
>
> Next Steps
>
> In light of the above it is now for ASDA to justify in writing how it is that our client can be expected to "resume your role in your normal place of work" (according to John McCarthy's email to him on 27 October 2018) if what is meant by that is that he should take up a completely new role whilst continuing

to work for managers who have tried, unlawfully, to impose changes in his terms of employment in breach of contract and contrary to his religion.'

29 On 21 November 2018, the claimant followed up that email with one sent in his name, of which there was a copy at pages 284-285. It started in this way:

> "Further to the email sent to you from my solicitor on 5 November 2018 I repeat that I am not happy with the way the disciplinary and grievance processes have been handled by ASDA and I do not consider it reasonable that I should be required to work under Mr Levent and Ms Ahmed given that they have tried to impose changes to my contract of employment, which also amount to religious discrimination.
>
> Contract of Employment
> Under my contract of employment I am employed as a Grocery Colleague and this is the job I have done for almost 15 years.
> In May 2018 I was suspended for refusing to work in the waste department. In 15 years before May 2018 my work as a Grocery Colleague did not include working in the waste department. I do not understand why ASDA now seems to believe that I can be required to take on a number of additional responsibilities which were never previously part of my role such as waste, BWS, Frozen, and working behind the till.
>
> Breach of Contract
> At no point have I agreed to any changes to the terms of my contract of employment (whether verbally or in writing) and for this reason I am entitled to refuse to accent changes to my contract of employment which ASDA is trying to impose on me."

30 However, the claimant accepted that he did in fact from time to time "help out" (as he put it) in the respondent's beer, wine and spirits department of whatever store he was working at.

31 The claimant did not complain about the procedure followed by the respondent when it made (through Mr Cork) the decision to dismiss him for his continued unauthorised absence, and I myself could see nothing about which complaint could reasonably be made in that regard. Mr Cork decided that the claimant should be dismissed summarily for gross misconduct because of his continued unauthorised absence from work.

The relevant legal principles; a discussion

The law of unfair dismissal

32 Mr Heard's primary submission was that the claimant's continued refusal to attend work justified his dismissal on an objective basis, and that as a result the claimant's dismissal was both justified at common law, so that it was not wrongful,

and fair in the sense that it was within the range of reasonable responses of a reasonable employer.

33 As I said to Mr Heard during the hearing, I could not accept that the fairness of the claimant's dismissal had to be assessed in such a simple way. That was because the claimant's persistent unauthorised absence was the result of him having refused to return to work because he knew that if he did return to work then the respondent would instruct him to do things which he believed the respondent had no contractual power to require him to do. If support for the correctness of the proposition that I had to address the claimant's claim in that way was required, as I said to Mr Heard, it is to be found in the case law concerning the obligation of an employment tribunal to consider the circumstances in which a written warning on which a decision to dismiss was based in part, was given. I did not at the time of the hearing have that case law to hand. The best authority on that point that I was subsequently able to identify was the decision of the Court of Appeal in *Way v Spectrum Property Care Ltd* [2015] IRLR 657, where, as the headnote says, the court concluded this:

> "A warning given in bad faith is not, in circumstances such as in the present case, to be taken into account in deciding whether there is, or was, sufficient reason for dismissing an employee. An employer would not be acting reasonably in taking into account such a warning when deciding whether the employee's conduct was sufficient reason for dismissing him; and it would not be in accordance with equity or the substantial merits of the case to do so."

34 Therefore, I concluded that the question whether or not the claimant was dismissed fairly had to be considered against the background of what it was that the claimant could lawfully be required by the respondent to do in the course of his work. In that regard, I referred myself to paragraphs DI[1355]-[1356] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*") where there is the following statement of some of the factors which need to be taken in account when considering the fairness of the dismissal of an employee for refusing to comply with an instruction of the employer.

> "**[1355]**
> It is a general principle underlying the contract of employment that the employee must obey the lawful and reasonable orders of the employer. Usually the question of whether the order is lawful or not depends upon whether it is in accordance with the contract of employment. If it is, then the employee is generally committing an act of misconduct in refusing to comply with it; if it is not, then the employer is acting in breach of contract in seeking to compel the employee to do something which he is not lawfully entitled to require him to do.
>
> **[1356]**

Before looking at the operation of these principles, a number of qualifications need to be made:

– even if the employee is committing misconduct by refusing to obey the order, this act of misconduct is not necessarily sufficiently grave to justify the employer adopting dismissal as the sanction;

– exceptionally employees can refuse to obey lawful orders;

...

– even though the employer cannot at common law insist on the employee acting outside the terms of the contract – for this amounts to altering it unilaterally – it is not infrequently the case that the employee can be fairly dismissed if he refuses to accept this change in contract. In other words, the employer can effectively insist upon a variation of contract. This can arise where the interests of the business necessitate such a change. If the employee refuses to accept it then he can be dismissed under the heading of 'some other substantial reason' or misconduct. Dismissals under the former head arising from the employer's desire to reorganise the business are quite common (see para [1854] ff below). Note that if an employee agrees to work to new terms 'under protest' he will still be expected to comply with those new terms and a failure to do so may lead to a fair dismissal for misconduct (*Robinson v Tescom Corporation* [2008] IRLR 408);

...

– there could be an overlap with human rights law if the order conflicts with the employee's Convention rights, which can be taken into account. This is particularly likely in relation to the employee's religious or other beliefs. However, in this context a court or tribunal is likely to apply the same distinction as that established in religious discrimination law, namely that the individual has a right to hold a religious belief and up to a point to manifest it but must not engage in inappropriate proselytising at work, especially where others object. Thus, where a nurse had been ordered to stop doing so with patients but continued to do, so her dismissal was fair: *Kuteh v Dartford & Gravesend NHS Trust* [2019] EWCA Civ 818, [2019] IRLR 716 (applying the discrimination cases of *Chondol v Liverpool City Council* UKEAT/0298/08, [2009] Lexis Citation 583 and *Wasteney v East London NHS Foundation Trust* [2016] IRLR 388, EAT)."

35 The final part of that extract was consistent with something which I said during the hearing to Mr Heard, which was that the European Convention on Human Rights was relevant here in that I was bound by the Human Rights Act 1998 to take it into

account in deciding the fairness of the claimant's dismissal. That proposition was founded on the line of cases concerning the fairness of dismissals for conduct where the employer has obtained evidence of the employee's conduct via covert surveillance. A good example of that line of cases is the decision of the Employment Appeal Tribunal in *City and County of Swansea v Gayle* [2013] IRLR 768 where, in fact, the dismissal was held to have been fair despite the use of covert surveillance.

36 However, the claimant had not here relied on the European Convention, the relevant part of which is Article 9, concerning the right to freedom of thought, conscience and religion. In fact, the decision of the European Court of Human Rights in *Grimmark v Sweden* [2020] IRLR 554 suggests that such reliance would have been difficult here. In any event, it might have been said that the best way of relying on the claimant's relevant belief(s) in the circumstances was by claiming under section 19 of the Equality Act 2010 that there had been indirect discrimination because of religion or belief. That had not been done here, despite the claimant being legally represented. He told me that his solicitors had advised against making such a claim, but in any event he had not made such a claim and he had not put before me any (or at least any substantial) evidence to the effect that there was any interference with his religious beliefs through being required to assist in the sale of alcohol.

37 In addition, the situation which gave rise to the claimant's dismissal was, it appeared, caused by the claimant at first refusing to use the new TC70 gun, which had nothing to do with the sale of alcohol, even if (as it appeared from the documents before me was the case) the equipment was being used to "waste" alcoholic beverages.

38 Therefore, in my judgment the only potentially material factor which might undermine the fairness of the claimant's dismissal here was the possibility that his contract of employment did not permit the respondent to require him to work elsewhere than in the respondent's Grocery department. However, the powers of an employer under a contract of employment are not determinative of the fairness of a dismissal for conduct for refusing to comply with an instruction of the employer. That is clear from the passage from *Harvey* that I have set out in paragraph 34 above. It is even more clear from the discussion in paragraphs DI[1357]-[1376.01] of *Harvey*, the majority of the final part of which bears repeating:

> "**[1373]**
> The following two cases illustrate more fully the importance of analysing with care the contractual terms. Both are appellate decisions. The first was decided in favour of the employer, and the second in favour of the employee.
>
> ...

Redbridge London Borough Council v Fishman [1978] IRLR 69, [1978] ICR 569, EAT: F was engaged as the full time teacher in charge of the resources centre at a large comprehensive school. She was told she was to work almost full time at the centre and only to do sufficient classroom teaching to enable her to 'keep in touch with practical requirements'. Two years later a new head teacher was appointed and F was asked to teach, and taught, 12 English lessons a week in addition to her work at the resources centre. When she was subsequently informed that she was now to teach 18 English lessons a week she refused to do this, stating that it would interfere with her work at the centre. She was dismissed and successfully claimed compensation. The tribunal held that she had acted reasonably in refusing to teach the extra lessons – she was being required to do work which was different from that which she was employed to do. The EAT, in dismissing the employer's appeal, observed that F had been 'engaged in response to an advertisement, and to assurances which indicated quite plainly that she was not being recruited as a general teacher but as a teacher with special duties which would largely absolve her from general teaching duties'. The head's instruction was not reasonable in the circumstances and F had been unfairly dismissed.'

[1374]
See also *Simmonds v Dowty Seals Ltd* [1978] IRLR 211, EAT, where S, a permanent night worker, refused to work days and was held to have been unfairly dismissed.

[1375]
It is worth emphasising again that compliance with the contract does not itself determine the question of whether or not the dismissal is fair. This point was stressed by Phillips J in the *Redbridge Council* case when he said:

> ''In truth, we think that the [employment] tribunal perhaps paid too much attention to the contractual position. The jurisdiction based on [the ERA 1996 s 98(4)] has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrariwise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by [s 98(4)], they are not of the first importance'.'

[1376]
In *Farrant v Woodroffe School* [1998] IRLR 176, [1998] ICR 184, the EAT (Judge Peter Clark presiding) commented that it did not think it could improve on that analysis. Clearly, however, the contractual position may be relevant, although it will not be determinative of the issue. This fundamental point was reaffirmed subsequently by Judge Eady in the EAT in *Shevlin v Innotech Advisers Ltd* UKEAT/0278/14 (17 July 2015, unreported) where she cited *Farrant* and also the case law set out at DI [5] above, in the context of the

relationship between unfair dismissal under the statute and wrongful dismissal at common law.

[1376.01]
A dismissal is even more likely to be fair where the employer gives an order which in fact constitutes a breach of contract but when he genuinely believes, after taking advice, that it does not: *Farrant v Woodroffe School* [1998] IRLR 176, [1998] ICR 184, EAT. *Farrant* was followed in *Ford v Libra Fair Trades* UKEAT/0077/08, [2008] All ER (D) 106 (Oct), in which the EAT held that where an employee is dismissed for failing to perform duties under her contract, a tribunal does not need to decide whether the misconduct relied upon was or was not a breach of the contract of employment, as long as the employer held a genuine and reasonable (even if mistaken) belief that the misconduct alleged arose in relation to a task which the employee was contractually obliged to carry out. The employer's belief in the contractual position is relevant because the test is the reasonableness of the employer's reaction to the refusal by the employee. That belief must be genuine and based on reasonable grounds in accordance with *British Home Stores v Burchell* [1978] IRLR 379 (see para [1453.02] ff).'

39 I found the following summary in Westlaw of the effect of the decision of the Employment Appeal Tribunal in *Ford v Libra Fair Trades* a very helpful, succinct and accurate statement of the approach that I had to take here when considering the claim of unfair dismissal:

"Where an employer required an employee to carry out certain duties and the employee refused, or carried them out defectively, the contractual position was not determinative as to either the employer's reason for dismissal or the overall question of reasonableness, *Farrant v Woodroffe School* [1998] I.C.R. 184, [1997] 10 WLUK 155 applied. The fact that an employer was mistaken as to the true nature of an employee's contract of employment did not prevent a tribunal from concluding that the reason for dismissal related to the conduct of the employee. An employer could establish as his reason for dismissal something that he genuinely believed to have been a breach of contract, even if in fact it was not, *Trust Houses Forte Leisure v Aquilar* [1976] I.R.L.R. 251, [1976] 1 WLUK 674 and *Maintenance Co v Dormer* [1982] I.R.L.R. 491, [1982] 1 WLUK 252 applied and *Abernethy v Mott* [1974] I.C.R. 323, [1974] 2 WLUK 27 considered. The tribunal was not required to determine whether the duties were or were not part of the employment contract; it had to look at the reasonableness of the decision to dismiss and, in the context of a potentially mistaken belief as to whether the conduct complained of fell within the employee's contractual duties, at whether the mistaken belief was one which it was reasonable to hold. It also had to decide whether the dismissal was within the range of reasonable responses open to a reasonable employer.

40 It was in the light of that case law that I applied the passage concerning the interpretation of a contract in *Investors Compensation Scheme LTD. v West*

Bromwich Building Society [1998] 1 W.L.R. 896 on which Mr Heard relied, which was at pages 912H-913D, and in particular these paragraphs:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> ...
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749."

41 Finally, I record here that the following passage in AII[157] of *Harvey* neatly encapsulates the effect of the decision of *Cresswell v Inland Revenue Board* [1984] ICR 808, to which I drew the parties' attention during the hearing:

> "In relation to job content an employee may be under an implied obligation to adapt to new methods and techniques, provided that these do not amount to a change in the job itself (possibly a difficult line to draw) and that the employer offers necessary re-training: *Cresswell v Inland Revenue Board* [1984] IRLR 190, [1984] ICR 808, Ch D (see para [41] above). The caveat that this term applies only to work methods was made express in *Smith v London Metropolitan University* [2011] IRLR 884, EAT where it was held that the employer could not use it to require a lecturer whose contract was to teach theatre studies to change to teaching mainstream literature because that would constitute a change in job *content*." (Original emphasis.)

The law of contract relevant to the claim of wrongful dismissal

42 The relevant principles in the law of contract might be thought to be simple: the claimant was required to attend work in order to do his job, and he refused to do so, thereby being in repudiation of an essential term of his contract of employment. If it was necessary to go further, then the implied term of mutual trust and confidence applied, which is the obligation imposed on both parties to a contract of employment not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence that exists or should exist between employer and employee as employer and

employee. A breach of that term is such as to entitle the innocent party to terminate the contract without notice. The latter proposition is most clearly stated in the judgment of Dyson LJ in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481.

My conclusions

The claim of wrongful dismissal

43 My first conclusion was that the claimant was irrefutably in repudiation of the first of the two terms of the contract to which I refer in the preceding paragraph above, and in breach of the second one. Thus, his dismissal without notice was justified at common law and his claim of wrongful dismissal had to be dismissed.

The claim of unfair dismissal

44 While, for the reasons stated most clearly in paragraph 39 above, the terms of the claimant's contract of employment were not determinative here, it was necessary for me to decide what the claimant had originally been employed to do, i.e. interpreting the words of the offer letter at pages 37-39 against the factual background which gave rise to them. Having considered that offer letter against the factual background which gave rise to it, I concluded that (1) the claimant was employed by the respondent to do the job of replenishing stock on the shop floor of whichever store at which he was working, and (2) there was no limit on the kind of stock which he could lawfully be required to replenish. In my judgment, it would be a nonsense to suggest that the claimant could contractually be required by the respondent only to replenish one kind of stock such as that which he regarded as "grocery" stock. In addition, and in any event, the claimant was first employed (see paragraph 6 above) as an "Asda - Assistant", which showed that he was not intended at the time of his appointment to replenish stock of any particular kind. He was later referred to as a "Grocery Colleague", but it would be odd if the later terminology could be regarded as having narrowed the scope of the duties that the respondent could, consistently with his contract of employment, have required him to do. In any event, I concluded that it had not done that.

45 In that circumstance, the claimant's dismissal was for unauthorised absence in the circumstance that his refusal to attend work was in no way justified by the law of contract. That dismissal was undoubtedly for the claimant's conduct. The conduct was clearly and admittedly committed. The procedure followed in deciding that the claimant should be dismissed was unimpeachable, and in any event in my judgment within the range of reasonable responses of a reasonable employer. Finally, I could see no alternative to the conclusion that the dismissal was in those circumstances well within the range of reasonable responses of a reasonable employer.

46 Even if the claimant's refusal to replenish stock in the frozen section or the BWS section had been capable of being regarded as justified in the law of contract and

he had been dismissed because of that refusal, in my judgment his dismissal would not in these circumstances have been unfair. That is because it was in my judgment in the circumstances, including in particular my factual findings stated in paragraphs 23 and 24 above, within the range of reasonable responses of a reasonable employer to conclude that the claimant's contract of employment required him to do the things that he was refusing to do.

47 For the reasons given in the two preceding paragraphs above, the claimant's claim of unfair dismissal failed and was dismissed.

48 In the circumstances, none of the claimant's claims succeeded.

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Employment Judge Hyams

Date: 20 March 2021

JUDGMENT SENT TO THE PARTIES ON

7 April 2021

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FOR THE TRIBUNAL OFFICE