



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Butt

**Respondent:** Tesco Stores Limited

**HELD AT:** Manchester (by CVP)

**ON:** 19 and 20 January  
2021

**BEFORE:** Employment Judge B Hodgson (sitting  
alone)

## REPRESENTATION

**Claimant:** Mr M Keenan, Solicitor

**Respondent:** Ms C Goodman, Counsel

**JUDGMENT** having been sent to the parties on 5 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Background and Preliminary Application

1. This is a claim of unfair dismissal which is denied
2. It had been listed for hearing on 19 November 2020 but postponed on the application of the claimant for reasons of ill-health. The respondent consented to that application
3. The matter was relisted for hearing on 19 – 20 January 2021, indicated to be by way of Cloud Video Platform ("CVP") remote hearing

4. By email dated 10 December 2020, the claimant's solicitor, Mr Keenan, wrote to the Tribunal applying for the hearing to be in person rather than by CVP, on the basis that his client "does not have a computer and also has a bad internet connection", to which the respondent did not object
5. For reasons which are not clear, the Tribunal confirmed by letter dated 5 January 2021 (in addition to dealing with certain interlocutory matters) that the hearing would be proceeding by CVP, but without reference to the claimant's application
6. Mr Keenan followed this up on the morning of 15 January to be advised that the hearing would proceed as a hybrid hearing, namely that he and his client would attend in person and the respondent's representative and witnesses would attend remotely
7. The following narrative of subsequent events is taken from the papers before the Tribunal and the submissions of Mr Keenan and was accepted, insofar as facts within her knowledge were concerned, by Counsel for the respondent, Ms Goodman
8. Having had confirmation of the position from the Tribunal, Mr Keenan telephoned his client on 15 January to advise of the arrangements for the hearing, to be informed by his client that he was in fact in Pakistan. Up to that point, Mr Keenan had been unaware of this fact
9. The claimant advised Mr Keenan that he had been due to fly back to the UK on 7 January but that his flight had been cancelled. Mr Keenan was not given at this point any indication of why the flight had been cancelled but asked the claimant to send him evidence of, and reasons for, the cancellation and details of his re-arranged return flight. Mr Keenan received from the claimant only the timings of his return flight, namely on 21 January
10. By email timed at 14.15 on 15 January, Mr Keenan made application to the Tribunal for the hearing to be postponed, "in the interests of justice", to which the respondent objected. The application was refused by the Regional Employment Judge on the basis that it did not comply with the relevant Presidential Guidance but that the application would be further considered at the outset of the hearing if the claimant could not attend
11. Mr Keenan again requested further details from his client and, by email sent on Sunday, 17 January, the claimant advised Mr Keenan that the reason his flight had been cancelled was his son's ill-health. Mr Keenan did not see this email until the following day, Monday 18 January
12. Mr Keenan replied at 14.45 on 18 January asking his client to provide full details to explain his non-attendance. The claimant replied by email at 21.31 that the reason for cancellation had been that his son had been admitted to hospital in Pakistan but no documentation was forwarded in support of this position

13. At the outset of the hearing, as he had been invited to do, Mr Keenan renewed his application for postponement and this was opposed by Ms Goodman on behalf of the respondent
14. The grounds upon which the application was made on behalf of the claimant were as follows:
  - 14.1. The claimant could not be in attendance in person. Nor could he be in attendance remotely because he "does not have the facilities". He would be prejudiced by the hearing proceeding in his absence
  - 14.2. The Tribunal will need to consider all of the evidence and not being able to consider the claimant's oral evidence in cross-examination would mean the Tribunal not having the full picture
  - 14.3. With reference to the overriding objective (Rule 2 of the Employment Tribunals Rules of Procedure), it would not be in the interests of justice to proceed on this basis and specifically the parties would not be on an equal footing
  - 14.4. Mr Keenan accepted that a postponement would give rise to delay and expense but submitted that such consequences could adequately be dealt with by way of a costs award
15. In response, Ms Goodman raised the following grounds of objection, supported by written submissions:
  - 15.1. The claimant knew by 7 January at the latest that he would not be returning on that date and yet had not notified his solicitor of that fact. It was only as a result of his solicitor contacting him on 15 January that the facts started to emerge
  - 15.2. The claimant had not initially given any reason for his flight being cancelled and it was only two days later that the reason for cancellation was given as his son's ill-health. He has been asked to provide details but none have been forthcoming
  - 15.3. The only, vague, reference to a reason for his inability to join the hearing remotely is that: "I do not have the facilities"
  - 15.4. The Tribunal is restricted in its discretion under the provisions of Rule 30A, the application having been made less than 7 days before the hearing date. The only possible ground that can be relied upon under this Rule is "exceptional circumstances". Even if the claimant is unable to attend in person, he has been able to send emails and there has been no proper explanation for his absence. He has not acted promptly, being aware of the position since, at the latest, 7 January

- 15.5. Under the provisions of Rule 47, the Tribunal needs to consider any available information about the reasons for absence
- 15.6. The claimant's non-attendance would not in fact cause him any material prejudice. There is no dispute between the parties on any issue of credibility, for example as to the accuracy of notes of meetings. The crucial issue before the Tribunal concerns the interpretation of the CCTV footage of the incident in question, and whether or not it was reasonable of the respondent to conclude that it showed the claimant had spat at and struck a customer. The claimant's non-attendance would not adversely impact on him on that central issue
- 15.7. It is not clear whether the costs thrown away by a postponement would be adequately covered by a costs award
- 15.8. A postponement, by reference solely to the parties being on an equal footing, would not meet the other factors for consideration set out in the overriding objective, with particular reference to avoiding delay and saving expense
16. Mr Keenan was given the opportunity to respond and confirmed that he was relying solely on "exceptional circumstances" under Rule 30A. He did not seek to demur from Ms Goodman's contention as to the central issue in the claim
17. Rule 2 states:
- The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable*
- (a) ensuring that the parties are on an equal footing*
  - (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues*
  - (c) avoiding unnecessary formality and seeking flexibility in the proceedings*
  - (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
  - (e) saving expense*
- A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal*

18. Rule 30A states

- (1) *An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known*
- (2) *Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where –*
  - ...(c) *there are exceptional circumstances*

19. Rule 47 states

*If a party fails to attend or be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for that party's absence*

20. Having considered the representations of the parties, the Tribunal refused the application and gave the following reasons orally for its decision
21. The matter needs to be seen in the overall context of its timing. The claimant was dismissed effective as at 16 October 2019 (the ET1 Claim Form subsequently being presented on 5 February 2020). The events in question therefore arose well over twelve months ago
22. Mr Keenan first learned of the cancellation of his client's flight of 7 January when he (Mr Keenan) telephoned him on 15 January. Mr Keenan was only told at that stage that the flight had been cancelled and rearranged for 21 January. Details only of the rescheduled flight were sent through to Mr Keenan with no explanation of the reason for the cancellation or details of when the rescheduled flight had been booked. It was understood by Mr Keenan at that stage that it was the fact of the flight being cancelled that had given rise to the difficulty in the claimant attending
23. Mr Keenan asked his client to provide full details for his non-attendance and the reply, on Sunday 17 January, was that his son had been admitted to hospital. No detail has been provided as to when the son was admitted or for how long and whether or not it is continuing
24. No reason has been put forward as to why the claimant cannot attend remotely beyond the general statement that he does not have "the facilities" although, evidently, he can communicate electronically with his solicitor
25. The essential issue between the parties, by agreement, is whether or not it was reasonable for the respondent to interpret the CCTV footage of the incident as showing that the claimant had spat at and struck a customer. On that basis,

particularly given the claimant is legally represented, it would appear that he would suffer no material prejudice by the claim proceeding in his absence

26. The application is based upon "exceptional circumstances" under Rule 30A. The application has clearly not been made promptly – there has not been delay on the part of Mr Keenan but he was not apprised of the situation until the telephone call made by him on 15 January
27. The claimant had known certainly by no later than 7 January (the date he had not travelled back to the UK as intended) that he would not be able to be in attendance and yet had not contacted his solicitor to advise of that situation. It was only when Mr Keenan contacted the claimant on 15 January that the situation came to his attention
28. It is improbable that the claimant would not have mentioned his son's hospitalisation, if that were in fact the reason for the flight being cancelled, when first advising his solicitor of his non-attendance. No information, whether supported by documentation or otherwise, has been produced as to when the alternative flight was arranged
29. Having overall regard to the overriding objective, it is difficult to see on what basis it can be argued that the claimant is not on an equal footing. He has legal representation and the respondent's witnesses can be fully and properly cross-examined. It is agreed that the central issue is not one that depends on questions of credibility of evidence as between the parties
30. Considering the other factors set out in the overriding objective:
  - 30.1. Although any claim of unfair dismissal is important to a claimant, on the face of matters – and with agreement as to the central issue - this is not a case of undue complexity and there is no requirement for further instructions or preparation. Proportionality must be considered and indicates that the hearing should proceed
  - 30.2. There would undoubtedly be significant delay, in the current circumstances of Covid restrictions, were the matter to be postponed and have to be relisted
  - 30.3. A postponement would give rise to expense thrown away both on the part of the respondent and the Tribunal which has set aside two days hearing time for this matter. There is good reason, with valuable Tribunal hearing time potentially being wasted, why applications for postponement made so late require "exceptional circumstances" in order to be granted
31. The overriding objective requires that cases be dealt with fairly and justly and this applies to both parties

32. Taking full account of the above, the Tribunal was satisfied that there were no exceptional circumstances that had been made out to justify the application being granted
33. The decision of the Tribunal therefore is that the application is refused which decision, for ease of reference, is included within the Judgment
34. Mr Keenan confirmed that his instructions were that, in the event of the application being refused, he was to proceed with the claim on behalf of his client
35. This claim arising from an express dismissal, the Tribunal would be hearing the respondent's witness evidence first. The Tribunal indicated to Mr Keenan therefore that he had the opportunity to speak to his client, whose evidence would not be heard until the second day, to discuss still the possibility of his attending in some form to give his evidence
36. Upon the resumption of the hearing on the second day, Mr Keenan advised the Tribunal that he had endeavoured to speak to his client by telephone without success. They had however had an email exchange in which the claimant had indicated that he could not attend remotely due to "lack of facilities" and, although he could join by telephone, he was not prepared to do so as it would be "prohibitively expensive"

#### Issues

37. The issues as to liability raised for the Tribunal to determine had been drafted and agreed between the parties as follows:
  - 37.1. Did the respondent conduct a reasonable investigation?
  - 37.2. Did the respondent have reasonable grounds to believe that the claimant was guilty of the misconduct?
  - 37.3. Did the respondent believe that he was guilty?
  - 37.4. Was dismissal within the range of reasonable responses open to the respondent?
  - 37.5. Did the respondent and the claimant comply with the ACAS Code of Practice?
38. As will be seen later in this Judgment, these issues were refined at the point of submissions with concessions being made on behalf of the claimant by his representative

#### Facts

39. The parties had prepared an agreed bundle of documents and references in this Judgment to numbered pages are to pages as numbered in such bundle

40. The claimant's evidence was set out in a witness statement which was produced to the Tribunal. The respondent called to give evidence: Ms Nicolle Jones, Checkout Manager; Mr Ardul Khan, Lead Grocery Manager; and Ms Victoria Collins, Operations Maintenance Manager (North)
41. It was accepted by Mr Keenan that his client's evidence, comprising a written statement only, would be given very little weight. The content of the statement was not admitted on behalf of the respondent
42. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities, having considered all of the evidence before it both oral and documentary
43. The respondent is a well-known national grocery chain
44. The claimant was employed at the respondent's Cheetham Hill store as Customer Assistant - Checkouts from 2 September 2009 until his summary dismissal effective on 16 October 2019. His statement of Terms and Conditions of Employment is at pages 35 – 36
45. The respondent's Disciplinary Policy is at pages 37 – 46
46. An incident occurred at the Cheetham Hill store on the evening of 14 February 2019, involving the claimant and a customer, as a consequence of which the claimant was hospitalised with a serious head injury
47. This fact was notified to Ms Nicolle Jones, the Checkout Manager, when she next attended work the following day 15 February. She viewed the CCTV footage of the incident and determined that an investigation was needed as to the events in question
48. The claimant was at that time signed off work due to his ill-health and Ms Jones arranged "wellness meetings" with him during the months of March and April. He failed to attend on 30 March (see pages 51 and 53) but did attend on 11 April (see pages 54 – 61). The purpose of the meeting was to discuss the claimant's health. He did not attend a follow up meeting on 16 May (pages 68 – 74) nor did he attend two Occupational Health appointments that had been arranged (see page 80)
49. In a telephone discussion with Ms Jones, the claimant indicated that he wanted the investigative process to be taken forward on the basis that not starting the process was negatively affecting his mental health. The claimant was told that generally such a process would not be taken forward until his return to work but he confirmed he wanted it to be actioned
50. Accordingly, by letter dated 11 June (page 76), the claimant was invited to an investigation meeting on 15 June, rescheduled to 22 June (page 77). The letter stated that the purpose of the meeting was to discuss allegations of:



- Unacceptable customer service
  - Continued argument with a customer
  - Spitting at a customer
  - Physically attacking a customer
51. The claimant did not attend, sending a text explaining that this was for medical reasons (see pages 78 - 79). The meeting was rescheduled for 2 July but again the claimant did not attend and, as a result, the process was adjourned until further notice (see pages 84 – 85)
  52. The claimant returned to work on 15 July. A Return to Work meeting was held with him (see pages 87 – 90) and he was suspended pending further investigation (see pages 91 – 96). The suspension was confirmed by letter of the same day (page 97) and he was invited to an investigation meeting on 18 July
  53. In advance of the meeting, Ms Jones reviewed the CCTV footage and the claimant's employment history and completed an Investigation Checklist (pages 100 – 108)
  54. The meeting commenced on 18 July but the claimant had attended without representation. A Union representative was available but the claimant wished to have an alternative representative and the meeting was accordingly adjourned (see pages 98 – 99)
  55. A further meeting went ahead on 25 July with the claimant represented (see notes at pages 109 – 114). The relevant CCTV footage was shown to the claimant and he was told it appeared to show him spitting and striking the customer. This was denied by the claimant who claimed the customer had spat at him and he had raised his hand to stop the spit
  56. The claimant was asked if he could identify any individuals from whom witness evidence could be taken. The claimant advised that he had given Ms Jones' contact number to one of the witnesses present but she had had no contact from him. She asked the claimant to let her have the witness' contact details so she could make contact with him herself
  57. A witness statement was taken by Ms Jones from Mr Graham Scholes on 9 August (see pages 115 – 118) but he had not witnessed the incident itself
  58. The claimant provided a telephone number to Ms Jones for the witness referred to and she attempted to speak to the individual but without success. Upon reviewing the CCTV footage, Ms Jones noted that the individual in question had in fact approached the claimant after the incident and was not a witness to the actual confrontation

59. There was one potential witness who had physically placed herself between the claimant and the customer but she was not identified and there were therefore no means by which to contact her
60. Ms Jones again reviewed the evidence she had. She reviewed the CCTV footage which in her view showed the claimant first spitting at the customer and raising his hand to strike him. The footage did not, in Ms Jones' view, support the claimant's version of events that he did not spit and only put his hand up to stop the customer spitting at him. It appeared to Ms Jones that the claimant showed no willingness to accept any accountability for his actions and decided the matter should move to a disciplinary hearing
61. Ms Jones wrote to the claimant by letter dated 13 August (page 119) calling the claimant to a meeting on 15 August. The claimant did not attend citing his mother's ill-health as the reason. The meeting was rescheduled for 23 August (see page 121) and the claimant attended on that day (see notes at pages 122 – 125). Ms Jones advised him that she had taken the decision to send the matter to a disciplinary
62. The statement of Mr Scholes was read out to the claimant at the meeting and at his request a copy of this was sent out the next day to the claimant's solicitor who was also provided with a copy of the CCTV footage
63. By letter dated 23 August (page 126), the claimant was called to a disciplinary hearing on 29 August. The allegations were set out as before in the letter of 11 June
64. Ms Jones outlined her decision and reasoning in a meeting with Mr Ardul Khan, a Manager, who took the role of disciplinary officer. Mr Khan had been aware of the incident generally but had had no involvement in the internal process before this contact. Ms Jones forwarded to him the notes of the investigatory meetings. Mr Khan reviewed the respondent's Disciplinary Policy and the CCTV footage
65. The claimant did not attend the hearing on 29 August (notes at pages 129 – 130) which was rescheduled by letter dated 29 August (page 131) for 31 August
66. There was further contact with the claimant on 30 and 31 August regarding timing and representation (see pages 132 – 136) and, following discussion, it was agreed to reschedule the meeting for 4 September. This was confirmed by letter dated 1 September (page 137)
67. The claimant attended on 4 September (see notes at pages 138 – 141) but without a representative and it was agreed to further adjourn and reconvene on 9 September, confirmed by letter of 6 September (page 142)
68. The claimant telephoned in on 9 September to say that he could not attend due to a family bereavement. The meeting was again rescheduled, to 16 September (see letter at page 143). The claimant was advised that, following the earlier

meetings not being able to go ahead, if he did not attend this hearing the matter would be considered in his absence and a decision made. The letter was hand delivered

69. The claimant did attend on 16 September with his representative (see notes of meeting at pages 144 – 154)
70. The claimant gave his version of events. He had taken a t-shirt from the customer's basket to remove the tag which led to a confrontation. The customer had racially abused him and he had accordingly asked the customer to leave the store. The customer had then spat at him and he had put his hand up to stop the spitting. He had not spat at the customer. The customer had then hit the claimant on the head with the bottle he was holding
71. Mr Khan advised the claimant that, on his viewing, the CCTV footage contradicted that version as it showed the claimant firstly spitting at and hitting the customer. The claimant was asked if he could have done anything different and accepted that he could have tried to ignore the customer
72. Mr Khan reviewed the evidence. He noted that the Disciplinary Policy included "assault including harmful or offensive contact with another person or threatening to harm someone" as an example of gross misconduct (see page 43)
73. There was no sound on the CCTV footage but - accepting the claimant's assertion that he had been racially abused - for reasons of protecting personal safety, the instruction to and training of members of staff, including the claimant, is to remove oneself from such a situation. The footage showed, in Mr Khan's view, that the claimant did not do that
74. Mr Khan checked with the claimant that he had previously viewed the CCTV footage which he confirmed. He was offered the opportunity to view it again but declined
75. Mr Khan's conclusion was that the claimant's conduct amounted to gross misconduct. He confirmed that decision by letter dated 18 September (page 155)
76. The letter sets out the reasons for the decision to summarily dismiss the claimant for gross misconduct as follows:
  - You have provided unacceptable customer service by taking the item of clothing without notifying customer resulting in customer looking over his shoulder to look where you have gone
  - Further to claiming he has shouted racial/religious comments you have continued to argue with the customer and walk alongside the customer towards the exit of the self-service. Upon customer leaving you have carried on arguing resulting the customer returning to face you

- You have spat at the customer resulting in the customer spitting back at you
  - You have physically attacked the customer by striking the customer with your fist in a forward moving action
77. The letter advised the claimant of his right of appeal to Ms Victoria Collins, then Store Manager, which he exercised
78. The claimant's grounds of appeal were set out in an email dated 26 September (pages 156 – 157). This repeated essentially the claimant's version of events, as described to Mr Khan
79. In preparation, Ms Collins viewed the CCTV footage and the documents arising from the investigation and disciplinary process (as contained in an Appeal Folder – pages 159 – 168)
80. The claimant was invited to an appeal meeting on 2 October (page 158). He attended but without representation (see notes at pages 172 – 174) and the hearing was rescheduled to 7 October. This hearing again was adjourned due to lack of representation and further rescheduled to 22 October (notes at pages 176 – 177 and follow up letter at page 178)
81. The appeal hearing proceeded on 22 October (see notes at pages 182 – 191) and the claimant repeated his version of the events of the day in question. The CCTV footage was viewed with the claimant and his representative. The claimant produced images of his head injury
82. Ms Collins adjourned the appeal overnight to consider the outcome and the meeting reconvened the following day (see notes at pages 192 – 194). Ms Collins advised the claimant that her decision was to uphold the decision to dismiss
83. The claimant's representative had stated that the claimant had an unblemished disciplinary record. Ms Collins on checking the record found that this was not correct and advised the claimant's representative that the record showed three previous sanctions for the same issues but indicated that this was simply for clarity, given the representations made. The incident and the allegations arising were considered on their own individual merits
84. The outcome was confirmed by letter (undated – page 195). The reasons given for upholding the decision to dismiss were:
- 84.1. I believe that the Disciplinary Manager Ardul Khan had reasonable belief that your version of events did not correspond to that shown in the footage of the incident
- 84.2. I believe that Ardul Khan had reasonable belief that you were the aggravator in the situation that resulted in this incident

- 84.3. You are a fully trained and experienced colleague and you give no tangible reason as to why you did not walk away at any point throughout the situation to remove yourself
85. It was confirmed to the claimant that there was no further right of appeal from this decision
86. In the course of the hearing, the Tribunal was given sight of the CCTV footage in question. The Tribunal's finding following that viewing was that, objectively, the footage clearly shows the claimant first spitting at the customer and then raising his hand to the customer's face in an aggressive rather than a defensive action

Law

87. Section 98(1) of the Employment Rights Act 1996 states:
- 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*
88. Relating to the "conduct of the employee" is one of the reasons set out in subsection (2)
89. Section 98(4) of the Employment Rights Act 1996 states:
- 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*
90. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof
91. There is well-established case law setting out the guiding principles for determining an unfair dismissal claim based upon a dismissal by reason of conduct, as alleged in this case

92. The case of ***British Home Stores Limited v Burchell (1980) ICR 303*** proposes a three-fold test. The Tribunal must decide whether:
  - 92.1. the employer had a genuine belief that the employee was guilty of the misconduct alleged;
  - 92.2. it had in mind reasonable grounds upon which to sustain that belief; and
  - 92.3. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances (which include the gravity of the charges and the potential impact upon the employee – ***A v B 2003 IRLR 405***)
93. The Tribunal must then consider whether the sanction of summary dismissal was reasonable in all the circumstances
94. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (***Iceland Frozen Foods v Jones 1983 ICR 17***). This applies to procedural as well as substantive matters (***Sainsburys v Hitt 2003 ICR 111***).

#### Submissions

95. The claimant's representative made oral submissions, summarised as follows:
  - 95.1. The principal issue is the reasonableness of the respondent's belief in misconduct and in particular that the claimant assaulted the customer. He was a night shift worker who had been subjected to a serious assault resulting in significant time off
  - 95.2. Although this was not intended to be a criticism of the respondent, there was a significant period of time before an investigation could proceed. Ms Jones had viewed the CCTV footage the day after the incident and there was then a delay before the claimant was interviewed
  - 95.3. Anything that may have been said by the claimant at the time of the incident should be ignored – he had been hit and was in shock
  - 95.4. Ms Jones had formed a belief of what had occurred from her viewing of the CCTV footage which was wrong because the footage was open to interpretation, as indicated by the claimant's representative, Clare Hansen, at the appeal stage
  - 95.5. It is accepted that Ms Jones was not a decision maker but she made her recommendations to Mr Khan which led to him being influenced by her view. This in turn led to any element of doubt or misinterpretation not being addressed and the initial conclusion as to what had occurred being accepted as fact throughout the process

- 95.6. Ms Collins simply reviewed Mr Khan's decision
- 95.7. It is accepted the respondent held a genuine belief but it was not a reasonable belief. Doubt should go to claimant bearing in mind he had been subjected to racial abuse, spat at and was the victim of a serious assault
- 95.8. There are four strands to the allegations of misconduct. Nobody is saying that the claimant was totally innocent. It is accepted he did not avoid confrontation (as referred to at paragraph 29 of Mr Khan's witness statement quoting the claimant as saying he "could have tried to ignore him"). However, the first two issues relating to customer service cannot amount to gross misconduct – it is the customer who was acting aggressively and the claimant's response is open to interpretation. The CCTV footage is not of good quality and there is no sound. It shows the claimant being attacked and defending himself rather than him throwing a punch. If confined to the first two issues, the claimant is only guilty of misconduct, not gross misconduct
- 95.9. His accepted conduct may therefore go to contributory fault but does not amount to gross misconduct. Therefore this must be an unfair dismissal
- 95.10. There is no allegation that the respondent was in breach of any provisions of the ACAS Code. The process followed was faultless and the claimant was given considerable leeway in terms of attendance
- 95.11. A conclusion as to what had occurred was reached at the very beginning of the investigative process which carried through the disciplinary process to the decision but there is no criticism of the reasonableness of the investigation or any suggestion that other witnesses could or should have been interviewed
- 95.12. It is conceded that, were it to be correct that the claimant had spat at the customer, it would be a struggle on behalf of the claimant to seek to persuade a Tribunal that dismissal was outside of the band of reasonable responses as such conduct would amount to a criminal assault
96. The respondent's submissions were set out in writing and are therefore on record
97. In summary, in regard to the relevant outstanding issue, the respondent's position was as follows:
- 97.1. The CCTV footage unmistakably shows the claimant engaged in prolonged argument with the customer; spitting at the customer, in response to which the customer spits back at him; and finally hitting the customer once with his right arm after which the customer repeatedly hits him on the head with a bottle

- 97.2. Without seeking in any way to underplay the severe effects of the incident on the claimant, the subsequent events are not directly relevant to the question of whether or not the claimant is guilty of gross misconduct
- 97.3. The claimant has consistently refused to take responsibility for his own behaviour
- 97.4. The respondent's witnesses all gave credible evidence of what they had concluded, having given the claimant multiple opportunities to give his version of events. There has been no suggestion of any motive on their part to come to a foregone conclusion of his guilt
- 97.5. The Tribunal should look at the allegations in their entirety and note that assault and physical abuse of customers are given as examples of gross misconduct under the respondent's Disciplinary Policy
- 97.6. The Tribunal has the opportunity to form its own view as to what the CCTV footage shows occurred, having been given sight of it

### Conclusions

98. It is for the respondent to prove the reason for dismissal. The reason relied upon by the respondent is conduct. It is accepted on behalf of the claimant that conduct was the reason for dismissal
99. The Tribunal then needs to consider the fairness of the dismissal pursuant to the provisions of section 98(4), seen through the prism of the test set out in ***Burchell***
100. As indicated above when setting out the issues agreed at the outset of the hearing, a number of concessions were made in the submissions made on behalf of the claimant
101. It was conceded on behalf of the claimant that the respondent held a genuine belief and that there had been a reasonable and proper investigation. It was further effectively conceded that, were the respondent's belief to have been reasonably held, dismissal was within the band of reasonable responses. On the evidence and facts found, these were fair and proper concessions to make. It is perhaps noteworthy, reverting to the application to postpone, that, given these concessions, the only relevant content of the claimant's written statement on the outstanding issue discussed below – even if accepted at face value – is effectively a repeat of the version of events he gave during the internal process
102. The sole outstanding issue between the parties consequently was whether or not the respondent's belief in the claimant's guilt was reasonably held. The claimant's position in regard to this limb is, firstly, that the respondent's stated interpretation of what the CCTV footage showed was not reasonably held and,



secondly, that, having formed its view at the outset of the investigation, the respondent was not prepared properly to consider any alternative

103. It is accepted on behalf of the respondent that, although the allegations must all be considered in the overall context of the incident, the first two allegations would not, if standing alone, amount to acts of gross misconduct. The fairness of the decision to dismiss therefore must turn on the stated belief that the claimant was guilty of spitting at and striking the customer
104. The Tribunal's finding of fact as to the CCTV footage is set out above. It is not for the Tribunal to substitute its own view but, in light of its finding, the Tribunal accepts that the interpretation reached by the respondent was an interpretation it was reasonably entitled to reach. That interpretation was that, even accepting the claimant's evidence that he had been racially abused, he should not have continued the confrontation and spat at and struck the customer – such conduct concluded by the respondent as being shown by the CCTV footage
105. Further the Tribunal is satisfied on the evidence that such interpretation was separately and independently reached by both the dismissing officer and the appeal officer in coming to their conclusions. This was the position they maintained in cross-examination and they gave their evidence credibly and consistently. Such evidence was also consistent with the extent to which, in both the disciplinary and appeal processes, the claimant was given full opportunity to make his representations and these were tested by the officers against the evidence of the CCTV footage
106. In those circumstances, the Tribunal's conclusion is that the dismissal of the claimant was not unfair and the claim is accordingly dismissed

Employment Judge B Hodgson

Date 8 April 2021

REASONS SENT TO THE PARTIES ON

15 April 2021

FOR THE TRIBUNAL OFFICE

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