EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
AND	
MS L. COTTERILL	**WM MORRISON SUPERMARKETS PLC**

WRITTEN REASONS

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham **ON:** 20 & 21 January 2021

EMPLOYMENT JUDGE Algazy QC

Representation

For the Claimant: In Person

For the Respondent: Mr S. Liberadzki - Counsel

WRITTEN R E A S O N S

1. INTRODUCTION

1.1. The Claimant was employed by the Respondent as a Customer assistant in the checkout department until her summary dismissal on 25 January 2019.

1.2. The Claimant maintains that the dismissal was unfair and she brings a claim for unfair dismissal. The Respondent denies that the dismissal was unfair and asserts that she was dismissed for gross misconduct following a fair and proper process.

1.3. The Claimant represented herself. The Respondent was represented by Mr S.Liberadzki - Counsel.

1.4. The Claimant gave evidence on her own behalf and called one other witness, Ms Sharon Goodson. The Respondent called one witness, Ben Aldridge, Market Street Duty Manager who was the dismissing officer.

1.5. The Tribunal was provided with a bundle of documents. Numbers in square brackets in these Reasons refer to the bundle.

1.6. The appeal courts in cases such as *Mensah v East Hertfordshire NHS Trust* 1988] IRLR 531 have laid down guidance as to the appropriateness of the tribunal stepping in to assist litigants in person with the tribunal process. The limits to such assistance are also identified. In this case the tribunal sought to provide such assistance on a regular basis to the claimant. Examples included the explanation of the purpose of cross examination and how to go about it.

2. **THE ISSUES**

The issues that the Tribunal had to determine had been discussed and set out in an agreed list of Issues [28 h and 28 i] :

Unfair Dismissal

1. Reason for dismissal

1.1 Did the Respondent genuinely believe that the Claimant had dispensed and consumed a drink of coffee from the café during her shift which she did not pay for (theft)?

1.2 Was this the reason for the Claimant's dismissal?

1.3 Was this a reason relating to the conduct of the Claimant or a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?

2. Reasonableness

2.1 In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case? This gives rise to the following sub-issues:

2.2 Did the Respondent carry out a reasonable investigation into the alleged misconduct?

2.3 Did the Respondent have reasonable grounds for believing the Claimant had committed the alleged misconduct?

2.4 Did the Respondent follow a fair procedure, taking into account the ACAS Code of Practice on Discipline and Grievances?

2.5 Was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted?

3. Remedy

3.1 If the Claimant's dismissal was unfair:

3.2 Would the Claimant have been fairly dismissed in any event had a different procedure been followed and, if so, should any compensatory award be reduced to reflect that fact; and/or did the Claimant contribute to the dismissal? Should the Tribunal reduce any compensatory or basic award under s123(6) ERA 1996 or 122(2) ERA 1996 respectively?

4. Wrongful Dismissal

4.1 Was the Claimant in fact more likely than not guilty of the conduct theRespondent alleges? If so, was this conduct of a sort allowing for the contract of employment to be terminated without notice? Or otherwise, is the Claimant contractually entitled to her notice pay?

3. **THE FACTS**

3.1. On the evidence presented to the Tribunal, I found the following facts and such additional facts as are contained in the conclusions section set out below.

3.2. The salient facts are relatively brief and revolve around an incident that took place on 20 January 2019.

3.3. The Claimant was employed by the respondent from 8 December 2011 as a customer assistant and worked on the tills in the respondent's supermarket at Anchor Road, Aldridge, West Midlands. She had worked for the respondent for some eight years at the time of her dismissal. She had a "clean" disciplinary record save for some non-material minor matters.

3.4. On Sunday, 20 January 2019 the claimant was working but feeling unwell. She had a sore throat, tight chest and a wheeze. The claimant suffers from asthma and uses a Ventolin inhaler. She had forgotten to take the inhaler with her that day and feared an asthma attack.

3.5. The claimant told the tribunal that she believes it to be well known that coffee opens up the airways and improves wheeziness. The staff canteen was closed on that Sunday. There is an unresolved but immaterial dispute about whether the vending machines usually available for staff to use were turned off that day as well. The claimant contends that they were out of use.

3.6. The claimant decided to obtain a cup of coffee from the customer café which is located downstairs at the respondent's premises. Customer assistants working on the till are not permitted to carry cash. The claimant dispensed a cup of coffee and told the person working in the

café, Sharon Goodson, that she would pay for the coffee later. Sharon Goodson gave evidence that the café was very busy that day.

3.7. The claimant gave evidence that she was expecting her son to deliver her inhaler after his football match that afternoon. That was after she had called her son to make that request. It is not entirely clear when the call was made. In her oral testimony to the tribunal, she referred to making a call to her son and another call to her mother (concerning her flat) during her break that morning. However, her witness statement suggests that she made the call after she had consumed the coffee.

3.8. Another matter which is not free from doubt on the evidence before the tribunal is when precisely the claimant took her morning break. What is clear is that it took place sometime after 11 o'clock and after the claimants request to defer that break to later in the day was refused. The instruction to take the break was communicated by another till operator, Michelle Ted. The decision to refuse the claimants request to delay the break was taken by Jordan Spooner, the claimant's supervisor. The claimant insisted that these breaks are strictly of a 15 minute duration. She rejected the proposition put to her in cross-examination that her break that day was in fact over 20 minutes.

3.9. The claimant completed her shift at 4 pm. She went upstairs to the staff cloakroom on the third floor to collect her belongings. She then proceeded to do some shopping which she told the tribunal was for her mother for whom she was a carer. The till receipt shows the shopping was paid for at 4:22 pm. The claimant's evidence before the tribunal was that she then went to the customer café in order to pay for the coffee.

3.10. It is not in dispute that there was an exchange between the claimant and Sharon Goodson at around this time. This was confirmed by Ms Goodson. Jordan Spooner, in the record of his telephone investigation on 25 January 2019, said **"she was by café talking to Sharon, she**

never mentioned it. If she had of I would have advised to pay for coffee but she didn't say".

3.11. It was the claimant's case in her evidence before the tribunal, supported by Sharon Goodson, that she offered to pay for the coffee but that the tills were closed and so payment could not be taken. It was Ms Goodson's evidence that the cashing up of the restaurant tills would take place between 4.15 and 4.30. She further gave evidence that the claimant told her that she would be on shift tomorrow and pay then.

3.12. According to the claimant, Jordan Spooner was urging the claimant to hurry up because he wanted to close the store. There is a substantial dispute about whether there was an exchange between the claimant and Mr Spooner and the contents of any such exchange. In cross examination, the claimant said that she had told Mr Spooner that she hadn't paid for a coffee yet and fully intended to pay for the coffee. Paragraph 1.8 of the claimant's witness statement she says **"while I was talking to SG I was asked to hurry up by JS because he was waiting to close the store. His interview notes confirm he saw me talking SG".** The claimant does not mention the above mentioned exchange with Mr Spooner there.

3.13. In her disciplinary hearing on 25 January 2019 [124], the claimant had said **" Jordan had door open at end of shift, I told him I was going to check in café if someone there as I still owed for the coffee but nobody there".** She later went on to say in answer to a question about the conversation with Jordan at the front, **"I shouted down but not sure if he heard me. I wish I'd have done more to make sure it was paid for" [127].** When asked about that comment in cross-examination, she said that she was making him aware that she still had to pay for the coffee and that she had said it and that she imagined he heard her.

3.14. The tribunal also notes that Ms Goodson in her interview as part of the investigation [114] did not mention the claimant coming to her at the end

of the shift. Further in the disciplinary Hearing [129], the following exchange appears:

> **BA: you thought about payment starting your shopping. Did you go to café?**
>
> **LC: I think I look but nobody there**
>
> **BA: they finish at five, did you go in?**
>
> **LC: I can't remember to be honest.**
>
> **LC: I remember I was getting shopping but I guess it was too late by then slipped my mind the next day.**
>
> **BA: anything to add**
>
> **LC. No**

When these inconsistencies were put to the claimant in cross-examination particularly the phrase **"I think I looked but nobody there"** the claimant replied**: "I can't give a reason for that answer'**

3.15. The claimant returned to work the following day, Monday 21st January 2019. Paragraph 1.10 of her witness statement states that she was later than normal getting to work because of family problems and therefore had insufficient time to get to the restaurant to pay for the coffee. She decided to settle the payment after her shift. That explanation regarding her being late that morning was not provided at the disciplinary hearing. In the exchange noted above in the previous paragraph, she had merely said that it slipped her mind.

3.16. Towards the end of her shift on that Monday, the client was called to the manager's office where three managers were present. Barry Fuller, Gemma Drinkwater and Darren Simms. It was an investigation into the

obtaining of the coffee the previous day which had not been paid for. [109]. The claimant explained that she taken a coffee and forgotten to pay for it but said she would bring the money later. The claimant also alleged that others and taken drinks without paying but did not provide any further information.

3.17. The claimant was suspended and the suspension was confirmed by letter dated 22 January 2019. The same letter contained an invitation to a disciplinary hearing to be held on 25 January 2019 to answer a single allegation, namely:

"**On Sunday 20th January you dispensed and consumed a drink of coffee from the café during your shift which you did not pay for"**

The letter contained a warning that the allegation was serious, and a potential outcome could be dismissal for gross misconduct or a formal warning. Attached were notes from the investigation meeting. Sharon Goodson's interview notes were not however given to the claimant until the day of the disciplinary hearing. The claimant was informed that she could be accompanied at the disciplinary hearing.

3.18. The hearing took place on 25 January 2019 and the claimant had her trade union representative, Pete Farrant, with her. The hearing was conducted by Ben Aldridge, a senior manager, together with Ms Drinkwater. The minutes of the disciplinary hearing at pages [121–131] of the bundle. The hearing was interrupted so that Mr Spooner could be interviewed on the telephone. This was done in light of the suggestion put forward by the claimant that she had told him about the fact that she needed to pay for the coffee.

3.19. One feature of the claimant's evidence before the tribunal was that she insisted that she had not been given the notes of the interview with Mr Spooner to read at the disciplinary hearing. The claimant maintained that stance right up to closing submissions. However, the claimants signature

appears on the first page of those notes [118]. The claimant confirmed in cross-examination that the signature was indeed hers. The Claimant was unable to reconcile this with her recollection that she was not in fact given the notes. The minutes of the disciplinary hearing confirmed that there was an adjournment for the claimant and a representative to look at the notes of the telephone interview with Mr Spooner at 15.52 [128].

3.20. As noted, Mr Spooner flatly contradicted the claimants account of any discussion about having to pay for the coffee. In closing submissions, the claimant advanced the proposition that he may have been getting back at her for reporting him to management over his lack of action with regard to shoplifters in the store.

3.21. Mr Aldridge decided to summarily dismiss the claimant for gross misconduct with immediate effect. This was confirmed by letter of the same date which appears at pages [144 -145].

3.22. The claimant lodged an appeal by letter dated 3rd February 2019 [147-152]. The appeal was heard on 25th Fairbury 2019 chaired by Duncan Jones and the claimant was again represented by a union representative, Alexandra Fraser.

3.23. The appeal was not upheld and this was confirmed in a letter dated 2 March 2019. Four grounds of appeal were advanced and considered by Mr Jones. Part of ground three was partially upheld by Mr Jones regarding the investigation meeting not being held privately as a member of staff entered the room to use the filing cabinet during the investigation.

3.24. The Claimant issued proceedings on 19 April 2019.

4. **THE LAW**

UNFAIR DISMISSAL/CONDUCT

4.1. Section 98 (1) of the Employment Rights Act 1996 ("ERA") provides:

"98 General
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 –
the reason (or, if more than one, the principal reason) for the dismissal, and
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."

4.2. Section 98 (4) of the ERA provides, so far as material:

"(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the ……whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
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
shall be determined in accordance with equity and the substantial merits of the case.

4.3. The well-known case of **British Home Stores v. Burchell [1978] IRLR 379** applies to conduct cases. The three-fold test that must be successfully negotiated by the employer is that (i) at the time of dismissal

the employer believed the employee to be guilty of misconduct with the burden of showing that there is a potentially fair reason for dismissal lying on the employer; (ii) at the time of dismissal the employer had reasonable grounds for believing the employee was guilty of that misconduct; (iii) at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

4.4. As was held in **Burchell**:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in

***a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion*.**"

4.5. The Tribunal also had regard to **Burdett v Aviva Employment Services UKEAT/0439/13/JOJ**. Gross misconduct could be made out by deliberate/wilful wrong-doing or gross negligence. Dishonesty was not required. See §§29 and 66.

4.6. The Tribunal reminded itself of **Iceland Frozen Foods Limited v. Jones [1983] ICR 17** and the "band of reasonable responses" test.

In applying this test, whether or not the tribunal would have dismissed the employee is not a relevant consideration. The tribunal must not substitute its view for that of the employer **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82**

4.7. I also reminded myself of the guidance in **London Ambulance Service NHS Trust v. Small [2009] IRLR 563** in respect of the dangers of Tribunals falling into the substitution mindset.

4.8. The reasonableness test equally applies both to the investigation which led to that decision **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.** The issue for the tribunal is not whether it would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. What the tribunal should look at and assess is the reasonableness of the employer's conduct, not the level of injustice to the employee - **Chubb and Fire Security Ltd v Harper** [1983] IRLR 311.

4.9. The tribunal drew the attention of the parties to the case of **Brito-Babapulle v Ealing Hospitals NHS Trust [2013] IRLR 854.** The relevant passages refer to the correct approach to be taken in considering the appropriate sanction in a case where gross misconduct is established. Dismissal is not always inevitable as there may be mitigating factors which render the sanction of dismissal not a reasonable response. Factors such as length of employment and an unblemished record are relevant considerations.

4.10. With regard to wrongful dismissal, the tribunal must of course be satisfied that the claimant had committed an act which amounted to a repudiatory breach of contract and which entitled the respondent to dismiss her summarily. The respondent referred me to 2 authorities after exchanges with the tribunal on what the correct approach should in the particular circumstances of this case. They were **W. Devis v Atkins [1977] AC 931** @936 and **Kearns v Glencore [2013] EWHC 3697** @ §30.

5. CONCLUSIONS

Unfair dismissal

5.1. I considered the issues above-identified at paragraph 2 and arrived at the conclusions below set out. I use the numbering in the agreed List of issues

5.2. **In respect of issues 1.1 to 1.3:**

I conclude that the respondent did genuinely believe the claimant had dispensed and consumed a drink of coffee from the café for which she did not pay. I further find that was the reason of the claimant's dismissal and was a reason relating the conduct of the claimant.

5.3. **In respect of issue 2.2:**

The investigation conducted by the respondent was a reasonable one in all the circumstances. In my judgement it certainly fell within the range of reason investigations of a reasonable employer. Though some criticism was levelled at the fact that the disciplinary officer, Mr Aldridge, had not viewed the CCTV footage, I accept his evidence that that would not have changed his conclusions and that in any event there was no audio track. Indeed, it is not clear whether there was CCTV at the precise location where the exchange between the claimant and Sharon Goodson actually took place. It does not appear to have been at the café itself as was suggested at one stage.

5.4. **In respect of Issue 2.3:**

The totality of the evidence before Mr Aldridge was such that he did have reasonable grounds for believing that the claimant had committed the alleged misconduct. Evidence that was put before the tribunal but not before Mr Aldridge could self-evidently not be taken into account by him.

5.5. **In respect of Issue 2.4:**

In respect of the fairness of the procedure, there was a considerable exchange between the respondent's counsel and the tribunal about the impact of the evidence of Mr Aldridge with regard to his approach to the appropriate penalty to be applied in the case of gross misconduct where that misconduct was theft. The Tribunal further observes that Mr Aldridge's mastery of the respondent's disciplinary procedure was considerably less than impressive.

5.6. On one reading of his oral testimony before the tribunal, it could be suggested that he did not properly apply the approach laid down in the disciplinary policy at pages 93 and 94 of the bundle. He had told the tribunal more than once that he had considered the claimant's clean record not to be "relevant" given the nature of the misconduct. However, I conclude that looking at his evidence in the round and including what

he set out his witness statement paragraphs 21 and 23, he did in fact conscientiously approach his decision-making in accordance with the respondent's policy and did take into account the claimants clean record and other aspects of mitigation advanced by the claimant.

5.7. The Tribunal is mindful of its task here as set out in §40 of **Brito-Babapulle**:

> "**It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate."**

5.8. The issue of the route to imposing the sanction of dismissal following the finding of theft was the only aspect of the respondent's handling of the procedure that caused the tribunal any concerns about the fairness of the disciplinary procedure adopted by the respondent. On the totality of the evidence before me, I conclude that the procedure fell within the range of reasonable procedures and did not fall foul of the ACAS code of practice on discipline and grievances.

5.9. **In respect of Issue 2.5:**

The claimant considers that the punishment of dismissal for a first offence of this kind over a cup of coffee to be harsh and disproportionate. Mr Liberadzki for the respondent make the submission that a harsh sanction is not necessarily an unfair sanction under the legislation. He is correct in that submission. Different employers may come to different views about the appropriateness of a dismissal in circumstances of the claimant's consumption of a cup of coffee. Further the tribunal's own view about the severity of the outcome of the claimants disciplinary

hearing is also not relevant. Tribunals must be careful not to slip into the substitution mindset.

5.10. The question for me is whether it falls in the range of reasonable responses of a reasonable employer. In so doing I must consider the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case.

5.11. I was taken to various company documents which emphasised the respondent's very strict approach to theft. That is understandable given the nature of the respondent's business. Consumption of stock before payment is equally forbidden albeit that in this case Mr Aldridge was prepared to overlook that particular breach of company policy given the claimants straightened circumstances at the time she took the coffee.

5.12. The claimant also sought to pray in aid a disparity of treatment argument. I was not taken to the authorities on this topic such as the cases of **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352** and **Paul v East Surrey District Health Authority [1995] IRLR 305 (CA).** However, I considered them and determine that there was simply no credible evidence before the tribunal on which such an argument could be mounted. The highest it could be put was that Sharon Goodson gave some evidence about other members of staff saying that they had no cash and/or that they needed to get a cash point either in the staff canteen or the customer café. Further the respondent points out that in any event, claimant's situation can be distinguished because she had four opportunities to pay for the coffee which she did not take up.

5.13. In all those circumstances I am unable to say that dismissal, though it might be considered to be harsh in the circumstances, falls outside the band of reasonable responses.

5.14. **In respect of Issue 2.1:**
In light of my conclusions on issues 2.2 to 2.4, I conclude that the respondent acted reasonably in treating the claimants conduct as a sufficient reason for dismissing her.

5.15. Accordingly, I do not need to consider the issues concerning remedy fo unfair dismissal or ant Polkey reduction/contribution in paragraph 3 of the list of issues.

Wrongful dismissal

5.16. The only witness called for the respondent was Mr Aldridge the dismissing officer. There is a conflict between the claimants account of any exchange with Jordan Spooner at the end of the shift on 20 January 2019 and what Mr Spooner had told the disciplinary hearing in his telephone investigation on 25 January 2019.

5.17. The respondent submitted that even if the claimants version of events were to be preferred, her conduct still amounted to gross misconduct and amounted to a repudiatory breach of the employment contract entitling the employer to terminate the employment summarily. Alternatively, it was still open to the tribunal to reject the claimants evidence absent the respondent leading evidence from Mr Spooner directly.

5.18. Dealing with that last point first, The inconsistencies in the claimant's evidence before the Tribunal and what was said at the various stages of the disciplinary procedure tend to show that she is not a reliable historian. Some of the inconsistencies have been alluded to in the narrative section of these reasons. Specifically, with regard to the discussion that the claimant may or may not have had with Mr Spooner, those inconsistencies lead me to reject the claimant's version of events in the format that she settled on in her oral evidence before the tribunal.

On the balance of probabilities, I do not accept that she told Mr Spooner that she still needed to pay for the coffee at the end of the working day on 20 January 2019.

5.19. The clear evidence before the Tribunal is that the claimant passed up four opportunities for payment, having consumed a cup of coffee prior to payment which, although is itself a breach of company policy, was in circumstances of her feeling unwell and fearing an asthma attack.

5.20. Those four opportunities were:

(i) Immediately after she consumed the coffee
(ii) During her morning break
(iii) At the end of her shift on Sunday
(iv) Before her shift began on Monday

5.21. The claimant's explanations as to why she did not avail herself of these opportunities that were put before the tribunal were inconsistent, at times different to what she had told the respondent and lacked credibility. A further feature of the evidence was that Mr Aldridge formed the view, as expressed in paragraph 23 of his witness statement that the claimant, had not been honest throughout the process.

5.22. The totality of the conduct of the claimant established before the Tribunal as above set out was, in my judgement, conduct which amounted to a repudiatory breach of her employment contract and which entitled the respondent to terminate the contract summarily. Accordingly, the claim for wrongful dismissal also fails.

Employment Judge Algazy QC

2 February 2021