



EMPLOYMENT TRIBUNALS

Claimant: Mr S Melville

Respondent: Wm Morrison Supermarkets plc

Heard: via Cloud Video Platform and in person

On: 21 October and 2 December 2020

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: in person

For the respondent: Mr Braier, Counsel

JUDGMENT

1. The claim for unfair dismissal fails and is dismissed.

REASONS

The Proceedings

1. By claim form presented on 4 May 2020 following a period of early conciliation from 7 March 2020 to 7 April 2020, the claimant brought a claim of unfair dismissal.
2. I heard evidence from the claimant and, for the respondent, from Sean Fellows, Regional Manager who took the decision to dismiss the claimant, and from Jonathan Potts, Regional Manager, who heard the claimant's appeal.
3. There was an agreed bundle of documents running to 603 pages which was referred to by both parties.
4. I was also provided by the respondent with a chronology and written submissions, for which I am grateful.

The issues

5. The issues that fell to be determined at the hearing were:-

- a. What was the reason for the claimant's dismissal? The respondent asserts that the claimant was dismissed for a reason relating to his conduct, namely that the claimant allowed perishable stock to be kept in the outside caged area of the Loughborough store, where it was accessible to pests and encouraged an infestation of rats, resulting in stock loss; or alternatively for some other substantial reason. The claimant alleges that the real reason for his dismissal was to save costs as part of a change in the respondent's management structure.
- b. Does the dismissal meet the tests set out in *British Home Stores v Burchell [1978] IRLR 379*, namely:-
 - i. Did the respondent genuinely believe that the claimant was guilty of misconduct?
 - ii. Did the respondent have reasonable grounds upon which to form that belief?
 - iii. Did the respondent carry out as much investigation as was reasonable in the circumstances?
- c. Did the respondent follow a fair procedure in dismissing the claimant, taking into account the ACAS Code of Practice on Discipline and Grievances?
- d. Was the decision to dismiss within the range of reasonable responses?
- e. If the claimant was unfairly dismissed, what basic and compensatory awards should the respondent be ordered to pay, taking into account the claimant's mitigation and any *Polkey* reduction?
- f. Should the Tribunal reduce any compensatory and / or basic award to reflect the fact that the claimant caused or contributed to the dismissal?
- g. Did the respondent unreasonably fail to act in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, should there be any increase in the basic and/or compensatory awards?

Findings of fact

6. The claimant was employed by the respondent from 31 July 2017 until the 18 December 2019 when he was dismissed with immediate effect. The claimant worked as a Store Manager based at the Loughborough store. The claimant was the most senior member of staff on site at the Loughborough store and was responsible for the performance of the store, and for health and safety, hygiene and food safety.

7. The respondent is a large national retailer, with a particular focus on food. Food safety is of key importance to the respondent and it has strict policies on food safety which the claimant was familiar with. The respondent is subject to unannounced visits and inspections from environmental health officers who have the power to order the respondent to close a store and to prosecute the respondent.
8. The respondent's Health and Safety handbook makes clear that health and safety is the responsibility of all staff and provides that *"In order to protect the health and safety of its staff and customers, the Company may take disciplinary action against any employee breaching health and safety policies and procedures. Such disciplinary action may lead, in certain cases, to dismissal."*
9. The respondent's Disciplinary Policy lists the following as examples of potential gross misconduct:-

"Serious disregard of Health and Safety precautions, rules, procedures or standards including...food safety...standards

Failure to disclose known information to Morrison's management relating to...health and safety or food safety..."
10. A 'Group Organisation of health and Safety' document issued on behalf of the respondent's Board and Executive Committee in 2027 states that:-

"Day-to-day responsibility for implementation of the Group policy for the health, safety and welfare of all staff employed at each site and the health and safety of all visitors, contractors, and other persons visiting each site is delegated to the site manager..."

It is also the responsibility of the site manager to ensure, through delegation, that all staff comply with their general duties under health and safety law...

Disciplinary action may be taken against any employee who fails to comply with a statutory or regulatory requirement including their general duties. Serious, wilful or reckless failure to comply or putting themselves or others at risk may be regarded as gross misconduct."
11. The Loughborough store has a small warehouse in which goods are stored before they are moved onto the shop floor, and a yard next to the store. At times there is not enough space in the warehouse to store all of the goods, and it is common practice for goods to be stored in racking in the yard outside the store. This is particularly the case at busy periods of the year, such as the run up to the Christmas period, where additional stock is delivered to the store.
12. The respondent engages Rentokil to carry out regular checks of its storage, including that in the yard.
13. In March 2019 Rentokil raised concerns with the respondent about food being stored outside the Loughborough store. An email was forwarded to the

claimant and others stating in clear terms that *“you need to ensure that anything stored outside is not food. If it is absolutely necessary to use this area, then only products such as bottle of pop should be stored. Precautions still need to be taken as rodents try and find shelter in such pallets and there is as risk of pulling through onto the shop floor.”* The claimant and others were told to remove food from the yard with immediate effect, and that it was not acceptable to store food in the yard.

- 14.** Subsequently, however, food was stored in the yard outside the Loughborough store and there was an infestation of rats in the yard, which caused damage to some of the products being stored there.
- 15.** The claimant was on holiday from 14-21 November. Whilst he was away, on 15 November, Rentokil visited the Loughborough store to carry out a routine inspection. Rentokil found a high volume of high risk products (including chocolates, crisps and nuts) stored outside under a canopy and on racking. Brian Stevens, Trading Manager at the Loughborough store, told Rentokil that some of the products had been outside for weeks. Rentokil found rat droppings and evidence of rats having gnawed at the products, indicating that rats were present amongst the items.
- 16.** Following the inspection, Rentokil reported to the respondent’s Head of Food Safety a concern that high risk perishable items such as food were being stored in the yard outside the Loughborough store. Rentokil also reported that rats had been found in the racking and that there was evidence that rats had caused some damage to goods stored outside the store.
- 17.** As a result of the damage caused by the rats, products with a value of approximately £5,100 had to be discarded or ‘wasted’.
- 18.** Having received the report from Rentokil, the respondent appointed Gordon MacPherson, Regional Manager, to carry out an investigation. On 20 November Mr MaPherson interviewed Andy Foster, Market Street Manager, Trevor Ward, People Manager, Brian Stevens, Trading Manager, and Ash Barikh, Services Manager.
- 19.** Mr Foster, when shown the pictures taken by Rentokil, described the state of the yard as “shocking”. He told Mr MacPherson that the state of the yard had deteriorated over the past few weeks, that some weeks the yard was “good” but then things would get worse again, and they would end up “fixing” the yard once a month. Mr Foster also said that the claimant would have seen the state of the yard, as it had been like that whilst the claimant was in the business. When asked why the yard had been allowed to get into such a state, Mr Foster replied that it was accepted by the claimant and tolerated, rather than being challenged. Mr Foster was aware that the state of the yard had been raised previously by Lucy Denton, and told Mr MacPherson that the claimant did not like to challenge people.
- 20.** During his interview Mr Ward said that he thought there was no drive to keep the yard “right”, that there was time to fix it, but that it never stayed in shape. Mr Ward described complacency towards the state of the yard. He also

described the claimant as a “*nice guy, but too nice sometimes*” who wanted to be everybody’s friend.

21. Mr Stevens told Mr MacPherson that over the last 12 months the yard had been fixed every four weeks, and that they had known that there were rats for 6 or 7 months. Mr Stevens also said that three weeks’ previously they had been taking a Christmas tree out of the racking in the yard to put up in the store, and a rat had come out of the tree. He described all of the senior team as being aware of the existence of rats, including the claimant. When asked by Mr MacPherson ‘how did we get into this state?’ Mr Stevens replied “*It’s acceptance – acceptance and people have given up. No point challenging...It’s easier not to manage people – there is no follow up / support from Scott*”.
22. When asked by Mr MacPherson ‘how have we got here’, Mr Barikh replied “*lack of accountability and control. Completely out of control. We fix it and then go back to this standard.*” He also said that there were no consequences for the lack of control, and said that people got away with things. He described the yard as ‘really bad’ and ‘the worst it’s ever been’ when shown the pictures. He was asked if the yard had been in that state before the claimant went on holiday and said that it had been, and that the claimant would have seen it. Mr Barikh also said that he had never seen the claimant challenge another member of staff about anything, and that he would expect a store manager to challenge.
23. When the claimant returned from holiday on 21st Number he was interviewed by Mr MacPherson. During that interview the claimant acknowledged that the state of the yard was ‘poor’ and ‘disgusting’, and said that it had got out of hand and escalated. When asked what he thought would have happened if an Environmental Health Officer had visited, the claimant replied that they could have closed the store down and prosecuted the respondent.
24. The claimant told Mr MacPherson that he had known about the presence of rates for quite a while, and that Rentokil had been coming in regularly to the store. He said that he was not trying to excuse the state of the yard, and that it shouldn’t have happened. Like others, he also identified a lack of challenge within the store, although said that he did challenge others. The claimant denied that the yard had been in a very bad state when he had left work for his holiday.
25. Mr MacPherson asked the claimant about the Christmas tree incident, and the claimant said that he had been told that a rat had jumped out of it and that he assumed Rentokil had been informed but hadn’t checked. He acknowledged that with hindsight he should have escalated the situation to Mr MacPherson, and agreed that the situation was serious. The claimant also said that he recalled the issue of food being stored in the yard having been raised previously by Lucy Denton.
26. At the end of the meeting, after an adjournment, Mr MacPherson suspended the claimant on full pay. The reasons given for the suspension were:-

- a. the claimant had agreed that the pictures of the yard were disgusting and unacceptable, that he had assumed other people had escalated the issue and had not personally been involved;
- b. the claimant had accepted that it was his decision making that had caused the situation, and that there was a lack of control and challenge;
- c. the claimant had recorded this as an issue in a log book for months with no sustained corrective action or consequence; and
- d. the claimant was aware of the potential impact on customers and business, and that £5,100 of stock had been wasted.

27. On 23rd November the respondent wrote to the claimant confirming his suspension and inviting him to attend a disciplinary hearing on 26 November. The letter stated that the allegations that would be considered at the disciplinary hearing were:-

“A serious breach of health and food safety standards in that...you allowed perishable stock to be kept in the outside caged area of the Loughborough store. This perishable stock was accessible and desirable to pests and encouraged an infestation of rats, which has resulted in £5,100 of stock loss/waste.”

28. The letter inviting him to the disciplinary hearing advised the claimant of his right to be represented at the disciplinary hearing, and warned him that one of the potential outcomes of the hearing was that he may be dismissed for gross misconduct. It also enclosed copies of the documents that were obtained as part of the investigation.

29. The claimant asked for the date of the disciplinary hearing to be rearranged, because the letter of 23 November had been delivered to his parents' home. The respondent agreed and it was rescheduled for 4th December 2019. Prior to the reconvened hearing additional documents were sent to the claimant, namely the Rentokil report of 15th November and the Loughborough store stock loss report dated 16th November.

30. The disciplinary hearing took place on 4th December and was chaired by Sean Fellows. The claimant was accompanied at the hearing by a colleague who was also a store manager.

31. During the disciplinary hearing the claimant acknowledged that, throughout the time he worked at Loughborough store, it was common practice to store products in the yard, and that Regional Managers were aware of this. He also said that it was common practice to store food outside the Loughborough store. He suggested that Regional Managers were aware of this, and that only one, Lucy Denton, had asked him to remove it. He did however accept that on one occasion when Mr MacPherson visited the store he had told the claimant that the yard was “*out of control*” and needed to be “*reset*”.

32. When asked whether Mr MacPherson was aware of any pest activity in the yard, the claimant replied “*this was not something we spoke about*” although he

said that they had discussed the pest reports. The claimant agreed that he was aware of what he described as *'light pest activity'*.

- 33.** Mr Fellows adjourned the meeting to carry out some additional investigation of his own, and to familiarise himself with the yard area at the Loughborough store.
- 34.** Mr Fellows interviewed Brian Stevens, Trading Manager, by telephone. The warehouse was one of his responsibilities and he oversaw stock wastage. Mr Stevens told Mr Fellows that he felt unsupported by the claimant and that, as a result, he spent evenings trying to fix the problems in the yard himself.
- 35.** The disciplinary hearing continued on 18th December and the claimant was again accompanied by a colleague. In advance of the reconvened hearing Mr Fellows sent the notes of his interview with Brian Stevens to the claimant. The claimant was asked whether there was anything else that he wanted to raise, and he said that:-
- a. he believed there was no evidence of stock being spoiled;
 - b. some of the stock didn't need to have been wasted;
 - c. he could have done things differently and notified Mr MacPherson of the issue with stock;
 - d. it was common practice for stock to be stored in this area; and
 - e. more senior members of staff had not been investigated as thoroughly.
- 36.** The claimant acknowledged during the disciplinary hearing that there had potentially been a breach of health and safety and of food safety rules, that he should not have let stock be left outside, and that he should have reported pest activity sooner.
- 37.** Mr Fellows then adjourned the hearing to consider the evidence and his decision. He concluded that health and safety and food safety within the store were the claimant's responsibility as store manager, and that the claimant had let things lapse to such an extent that stock had to be wasted and rats were on site. He also concluded that the claimant had not taken accountability for dealing with the issue of the yard, and that he had breached the respondent's Food Safety Policy. That policy states, amongst other things, that:-
- "There is a legal requirement to keep stores pest free....*
- Store management are responsible for reporting any evidence of pests...*
- Any suspected pest sighting or evidence must be reported and a call made immediately to the pest contractor..."*
- 38.** In Mr Fellows' view, the claimant had failed to store stock correctly, had seriously breached health and safety and food safety, and put the public, colleagues and reputation of the respondent at risk. Mr Fellows concluded that the claimant's conduct amounted to gross misconduct and he decided that he should be dismissed. He considered lesser sanctions, including a demotion,

but felt that these were not appropriate because of the seriousness of the behaviour and that the respondent had lost confidence in the claimant. Mr Fellows concluded that the explanations put forward by the claimant did not mitigate or excuse his behaviour and that the claimant had failed to face up to issues. He believed that the claimant's behaviour would not change if he were to be demoted.

- 39.** Mr Fellows decided that the claimant should be dismissed without notice for gross misconduct. He concluded that the business had been put at significant risk, that the issue had been ongoing for some time that it had been raised with the claimant previously, and he had failed to take sufficient action. The respondent is primarily a food retailer and, as such, hygiene and food safety are of primary importance. The claimant had, in Mr Fellows' view, put customers and the business at risk.
- 40.** Mr Fellows informed the claimant of his decision at the end of the disciplinary hearing on 18 December. He subsequently wrote to the claimant to confirm his decision and the reasons for it, which included the following:-
- a.** Serious negligence in his role as store manager by failing to fulfil his role and responsibilities to create a safe and legal environment by allowing perishable stock to be kept in the caged area outside the store;
 - b.** Failing to demonstrate effective routines and failure to hold his team accountable to their roles and responsibilities leading to a serious breach of health and safety and food safety, resulting in £5,100 of lost stock; and
 - c.** Loss of trust and confidence in the claimant as store manager.
- 41.** The claimant appealed and his appeal was heard by Jonathan Potts, Regional Manager responsible for the Kent and Surrey regions. The claimant's grounds of appeal, in summary, were that:-
- a.** The investigation process was tainted and biased;
 - b.** The time taken to conduct the investigation and conclude the disciplinary process was unreasonable;
 - c.** There was no evidence of perishable goods being left in the yard;
 - d.** The outcome was too severe;
 - e.** Other managers had not been disciplined for similar issues;
 - f.** He had not received answers to some questions raised; and
 - g.** There had been a breach of GDPR when information had been sent to a family member.
- 42.** The claimant was invited to an appeal hearing which took place on 21 February 2020. The claimant was offered the right to be accompanied at the hearing but chose to attend alone and indicated that he was happy to proceed without representation. The claimant was invited to put forward his grounds of appeal and did so.
- 43.** Mr Potts concluded that the claimant was aware of the situation with rats in the yard, and was very accepting of it. He explained to the claimant that was his responsibility to report and raise awareness of such issues, and the claimant agreed, suggesting that what he had done was an error.

- 44.** There was a discussion about the definition of 'perishable' goods, with the claimant suggesting that perishable goods were things like fish and meat, which were not stored in the yard. Mr Potts' view was that there were goods in the yard that were perishable and at risk, and the claimant accepted during the appeal hearing that he understood that there was a risk of putting anything edible in the outside yard area.
- 45.** The claimant was asked to give specific examples of other instances where no action had been taken against the managers involved. He did not do so, but explained in general terms that he had spoken to other store managers who also had too much stock and stored stock on the floor. The claimant was also asked whether he would have behaved in the way that he did if it was his business, and he replied that he would not have, and that he could have done things better.
- 46.** The claimant suggested during the appeal hearing that Mr MacPherson and Mr Fellows should also be investigated. After the meeting Mr Potts interviewed both of them. He asked Mr MacPherson about his visits to the store and the extent of his knowledge about the problems in the yard. He concluded that Mr MacPherson had expressed concerns to the claimant about the state of the yard, but had only become aware of the pest issues after receiving pictures of the yard taken by Rentokil. Mr Potts spoke to Mr Fellows about the disciplinary process and how he had reached the decision to dismiss him.
- 47.** Mr Potts concluded that Mr Fellows had adopted a fair approach when taking the decision to dismiss the claimant, and that the decision should be upheld. In reaching his decision Mr Potts considered the respondent's disciplinary policy, the Rentokil report and the Health and Safety and Food Safety Standards. He formed the view that the claimant had breached his responsibilities as a store manager and failed to report pest activity.
- 48.** On 15 April 2020 Mr Potts wrote to the claimant to inform him of his decision on the appeal and the reasons for his decision. There was a delay in delivering the decision to the claimant due to a number of factors, including Mr Potts' wish to speak to Mr MacPherson and Mr Fellows, annual leave and the national lockdown which caused panic buying in supermarkets, and a particularly busy and pressured period for the respondent.
- 49.** In the appeal outcome letter Mr Potts explained to the claimant that he had interviewed Mr MacPherson, and what Mr MacPherson had told him. He concluded that the investigation had been conducted fairly and openly. Mr Potts also explained that the claimant's clean disciplinary record had been taken into account by Mr Fellows as part of the decision making process. He apologised for the mistake in sending the disciplinary invite to the claimant's next of kin rather than directly to the claimant.
- 50.** Mr Potts concluded that the decision to dismiss the claimant was a fair one, because:-
- a.** The claimant failed to implement the stock holding and Rentokil policies, processes and routines in his store;

- b. As a store manager the claimant was expected to proactively manage these important issues, to protect colleagues and customers; and
 - c. There had been a full investigation process and a reasonable time had been taken to consider a decision.
51. Mr Fellows acknowledged in his evidence during the Tribunal hearing that space in the Loughborough store was constrained, and that the size of the warehouse was too small for the size of the store and the amount of stock being delivered into it. There were however other stores with similar constraints which operated in a safe way, by storing low risk stock, such as household items, outside, and for a few hours at a time only. The replenishment process in other stores was, in Mr Fellows' opinion, more efficient, with stock being rotated more often.
52. The claimant suggested to Mr Fellows that he should have interviewed an additional three people. Mr Fellows concluded that the statements of the four people that had been interviewed as part of the investigation were clear and corroborated each other. He spoke personally to Brian Stevens, but did not consider it necessary to interview anyone else.
53. The claimant also suggested during the Tribunal hearing that the respondent should have reviewed the CCTV footage of the yard. Mr Fellows told the Tribunal that he did not think this was necessary because, in his view, the photographs and statements provided by Rentokil gave a clear description of the yard and stock. The suggestion that the respondent check the CCTV was only raised by the claimant on 21 February 2020.
54. In his evidence to the Tribunal the claimant accepted that he had been told by Mr Stevens, during a telephone call on a Sunday evening, that a rat had jumped out of a Christmas tree being stored in the yard. The claimant was not in store at the time and Mr Stevens was in charge. Mr Stevens rang the claimant to tell him about the incident. The following day when the claimant returned to the store Mr Stevens had left. The claimant assumed that Mr Stevens had reported the incident, and did not report it himself or check that Mr Stevens had done so.
55. The claimant suggested that Mr MacPherson was aware that there were rats in the yard. On balance I do not accept his evidence on that issue. At the disciplinary hearing the claimant said that Mr MacPherson had visited the store twice whilst the claimant was present, and that they had walked the yard on only one of those occasions. In his claim form the claimant said that Mr MacPherson had visited his store "*on many occasions and had witnesses stock retention on the yard every time*". In cross-examination the claimant said that he had walked the yard with Mr MacPherson on two occasions. The claimant's evidence on this issue is contradictory and has changed over time.
56. The claimant accepted in his evidence to the Tribunal that he had expressed gratitude to Mr Fellows for the thoroughness with which he had conducted the disciplinary process, and that Mr Fellows' decision was carefully considered. He took issue however with the length of time taken to deliver the outcome.
57. In his claim form the claimant suggested that the real reason for his dismissal was cost-cutting on the part of the respondent. The claimant told the Tribunal

that there had been a management restructure in January 2020 but that his level of management was not affected. He suggested however that his dismissal was part of a cost-cutting exercise because he was paid a 'hefty' salary. In cross examination he accepted that he had no evidence to support this assertion and that it was only his belief. I am satisfied, on the evidence before me, that cost-cutting did not form part of the decision to dismiss the claimant.

The Law

58. Section 98 of the Employment Rights Act 1996 ("**the ERA**") provides that :-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) The reason (or, if more than one, the principal reason) for the dismissal; and*
- (b) That it is either as 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 with the employee held...*

(2) A reason falls within this subsection if it -

(b) relates to the conduct of the employee

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

- (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
- (b) Shall be determined in accordance with equity and the substantial merits of the case."*

59. In a case in which the respondent relies on conduct as the potentially fair reason for dismissal, the Tribunal must consider the tests set out in the leading case of *British Home Stores v Burchell* [1978] IRLR 379, namely:-

- i. Did the respondent genuinely believe that the claimant was guilty of misconduct?
- ii. Did the respondent have reasonable grounds upon which to form that belief? and
- iii. Did the respondent carry out as much investigation as was reasonable in the circumstances?

60. The Tribunal must also consider the procedure followed by the respondent, including whether it complies with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
61. Finally, the Tribunal should consider whether dismissal is within the range of reasonable responses, taking care not to substitute its view on the appropriateness of the disciplinary sanction applied for that of the employer. The range of reasonable responses test applies to the investigation process, to the employer's belief in the employees' guilt of misconduct, and to the appropriateness of dismissal as a sanction (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23).
62. Where issues of inconsistency of treatment arise, the Tribunal must consider whether the circumstances of the case or cases with which the claimant compares himself are truly parallel. If they are, and the employer applies different sanctions to truly parallel cases, dismissal is likely to be outwith the range of reasonable responses. See *Hadjianou v Coral Casinos Ltd* [1981] IRLR 352 and *Paul v East Surrey District Health Authority* [1995] IRLR 305.

Submissions

Respondent

63. Mr Braier submitted, on behalf of the respondent, that the reason for the dismissal was conduct or, in the alternative, some other substantial reason. The Tribunal should, he argues, discount the claimant's assertion that the restructure was the reason for dismissal, as the claimant had accepted in evidence that the restructure did not affect his role, and that he had no evidence to support his assertion that cost cutting was the reason for his dismissal. The issue had been dealt with as gross misconduct under the respondent's disciplinary procedure.
64. Mr Braier stated that the Tribunal should only consider what was before the respondent at the time of the disciplinary and appeal hearings, and should focus on what the claimant actually said to Mr Fellows, rather than what he wished he'd said. So, for example, the claimant's assertions that the state of the yard before he went on holiday was different to the state that Rentokil found can be ignored because they were not made at the time. The claimant had accepted the state of the yard at the time, and the risk that it posed.
65. The Burchell tests have, in Mr Braier's submissions, been satisfied. In relation to the two complaints raised by the claimant about the investigation – (1) the failure to interview others, and (2) not checking the CCTV footage, neither of these were necessary. It was not outwith the range of reasonable responses not to interview other managers and, at the time he made his decision, Mr Fellows had considerable and sufficient evidence before him. The issue of the CCTV was not raised until the appeal hearing and then in the context of the presence of meat and fish, which was never part of the respondent's case. The respondent had photos of the yard, so CCTV was not necessary. When the claimant raised the CCTV issue at the appeal hearing he knew it would no

longer be available, so no criticism can be made of the respondent for not checking it.

66. In Mr Braier's view, the focus should be on whether the dismissal of the claimant for gross misconduct was within the range of reasonable responses. The claimant was responsible for complying with a number of health and safety and food safety duties, and the policies made it clear that breach of one of them could amount to gross misconduct. The claimant had accepted that the 'buck stopped' with him, that the yard was in a bad state, that he knew about the rat jumping out of the Christmas tree a few days' earlier, that he had not reported that incident and that products desirable to rats were being stored in the yard.
67. The claimant had also accepted in evidence that an unannounced visit from Environmental Health could lead to the store being shut and a prosecution, with damage to the respondent's income and reputation. This was in addition to the further potential damage if products that were infected with rat urine or droppings were put into store and sold to customers.
68. Dismissal was, in Mr Braier's submission, within the range of reasonable responses, particularly given that the respondent is primarily a food retailer.
69. Mr Braier referred me to the case of *Adesokan v Sainsbury's Supermarkets Ltd* [2017] IRLR 346 as authority for the proposition that gross negligence can amount to gross misconduct where it has the effect of undermining trust and confidence in the employment relationship, and that there does not need to be any dishonesty or intention to poison the employment relationship for this to be so.
70. The procedure followed by the respondent was, Mr Braier submitted, a fair one, during which the claimant had thanked the disciplinary manager for the way in which he approached the task. Mr Fellows had kept his mind open to all options before deciding to dismiss. The claimant had every chance to defend himself against the allegations, and did so.
71. Mr Braier also submitted that the delay in delivering the appeal outcome was not unreasonable given the circumstances of the pandemic and the impact of panic buying on supermarkets, and that the claimant had suffered no prejudice as a result of the delay.
72. There was, in Mr Braier's submission, no differential treatment. There must be truly parallel circumstances for such an argument to succeed, and that was not the case here. The claimant had not given evidence of other managers who had stored perishable stock in the yard or experienced pest activity. The claimant was also in a different position to more junior colleagues because he accepted that the buck stopped with him.
73. In the alternative, Mr Braier submitted that if I were to find some procedural unfairness in the manner in which the respondent dealt with the disciplinary process, I should make a 100% reduction for Polkey (as the claimant would have been dismissed anyway had a different procedure been followed) and for contributory conduct.

Claimant

- 74.** The claimant, to his credit, accepted in submissions that standards had fallen in his store. He said that some of this was due to an increase workload and a lot of stock, and that he felt he had not been supported by the respondent. He had, in his view, no control over stock retention and decisions by the respondent to send additional stock to store.
- 75.** It is, the claimant submits, the investigating manager's responsibility to gather all relevant evidence and Mr MacPherson should, therefore, have checked the CCTV evidence in the yard. Mr MacPherson did not, in the claimant's view, carry out as much investigation as he should have done.
- 76.** The process followed by the respondent was, the claimant argues, a 'catalogue of errors' when the claimant's livelihood was at stake. Documents had been delivered to the wrong address, notes suggested the timing of meetings was overlapping, and the claimant had to chase for the dismissal and appeal outcomes.
- 77.** The claimant pointed out that he had been honest when questioned about what had happened in the yard, and that further breaches of policy had happened whilst he was not in the business, but had not been dealt with.
- 78.** It was, in the claimant's submissions, common practice to store goods in the yard, and a practice which had been witnessed by many regional managers including Mr Fellows. The claimant had not had the opportunity to check what products had been wasted as a result of the rat infestation, and the majority of the wasted stock was non-food products.
- 79.** The respondent had, the claimant argued, failed to support him or offer performance management. Further investigation should be carried out to prove that stock in the yard could have been retained, and that the yard was not in such a bad state before the claimant went on holiday.

Conclusions

Reason for dismissal

- 80.** I am satisfied, on the evidence before me, that the reason why the claimant was dismissed was his conduct. Specifically, serious negligence in his role as store manager by allowing perishable stock to be stored outside in the yard, resulting in a serious breach of health and safety and food safety and a rat infestation which was not reported, £5,100 worth of stock having to be wasted, and which put the respondent at risk of having to close the store and face a prosecution.
- 81.** Following the principles in *Adesokan v Sainsbury's Supermarkets Ltd* the claimant's gross negligence was capable of and, in my view, did in this case

amount to gross misconduct which caused the respondent to lose trust and confidence in the claimant.

- 82.** The respondent's policies make clear that failure to comply with health and safety or food safety requirements will be treated as a disciplinary matter, and that was indeed how the respondent treated the issue on this occasion.
- 83.** There is no evidence before me to support the claimant's assertion that the dismissal was part of a cost-cutting exercise. The claimant accepted in his evidence that his level of manager had not been affected by the management restructure that took place in January 2020, that he had no evidence to support his assertion, and that it was just that – a bare assertion.
- 84.** In these circumstances I find that the reason for dismissal was the claimant's conduct.

The Burchell test

- 85.** Having heard the evidence of Mr Fellows, the dismissing manager, and reviewed the relevant documents, I am satisfied that Mr Fellows genuinely believed that the claimant was guilty of gross misconduct. Mr Fellows presented as a credible witness, who took his duties as disciplinary manager seriously, and who was thanked by the claimant for the manner in which he performed his role. He took the time to visit the Loughborough store and to re-interview Brian Stevens to satisfy himself of Mr Stevens' evidence, before taking his decision.
- 86.** I am also satisfied that Mr Potts genuinely believed the claimant to be guilty of misconduct. There was no suggestion by the claimant that either Mr Fellows or Mr Potts did not genuinely believe that he was guilty of misconduct. I therefore find that the respondent did have a genuine belief in the claimant's guilt.
- 87.** Turning then to the second limb of the Burchell test – did the respondent have reasonable grounds upon which to find that the claimant was guilty of misconduct? I find that it did. There was clear evidence, in the form of the Rentokil report and photographs, of a rat infestation in the yard outside the Loughborough store, and of substantial damage to goods caused by the rats. There was also good evidence, both from the claimant and from the others interviewed as part of the investigation, that the claimant was aware of the state of the yard and of the rat infestation.
- 88.** The claimant himself described the state of the yard as 'poor' and 'disgusting' when interviewed by Mr MacPherson. He accepted that had an Environmental Health Officer, the store could have been closed down and the respondent prosecuted. He also admitted that he had known about the existence of rats in the yard for some time, but had not reported it. The claimant accepted that he was ultimately responsible for health and safety and food safety within the store, and that the 'buck stopped' with him. The claimant also acknowledged that he knew the respondent's policies on health and safety and food safety and that he had been previously told by Lucy Benson not to store food in the yard.

- 89.** The evidence of the claimant's colleagues who were interviewed during the investigation supported the conclusion that the state of the yard was unacceptable, had been for some time, and that the claimant had not taken sufficient steps to resolve the issue. There was, therefore, ample evidence before the respondent for it to reasonably conclude that the claimant was guilty of misconduct.
- 90.** In relation to the investigation, the claimant suggested that two further steps should have been taken: checking the CCTV evidence in the yard and interviewing other people. The CCTV issue was raised for the first time on 21 February during the appeal hearing, at which point the footage would no longer have been available. I fail to see what difference obtaining the CCTV footage would have made to the outcome of the disciplinary process. The respondent had photographs of the yard showing its state, in addition to witness evidence.
- 91.** The claimant has not identified which other witnesses should have been interviewed. He suggested to Mr Potts that disciplinary action should also be taken against Mr Fellows and Mr MacPherson, and Mr Potts spoke to both of them. Mr Fellows visited the yard and interviewed Brian Stevens before making his decision to dismiss. The claimant has not suggested how the outcome may have been any different had further witnesses been interviewed. In the circumstances it was not unreasonable for the respondent not to interview more witnesses.
- 92.** The investigation that was carried out was, in my view, within the range of reasonable responses. The respondent has therefore met the requirements of the Burchell tests.

Procedure

- 93.** The procedure followed by the respondent was, on balance, and when taken as a whole, a fair one. The investigation, disciplinary hearing and appeal were all conducted by different and independent managers. The claimant was told of the allegations he was facing and provided with all relevant evidence ahead of the disciplinary and appeal hearings. He had the right to be accompanied at the disciplinary and appeal hearings and exercised that right at the disciplinary hearings.
- 94.** He was warned in advance of the disciplinary hearing that dismissal was a potential outcome of the hearing. The hearing was adjourned to enable further investigation to be carried out. The claimant was given full reasons for his dismissal and offered the right of appeal.
- 95.** The claimant suggested that it took too long to conclude the disciplinary process. The length of time between the investigation meeting on 21 November and the claimant being informed of his dismissal on 18 December was less than one month. Given the severity of potential consequences of the decision for the claimant it was incumbent on the respondent to ensure that a thorough process was conducted and that careful consideration was given to the evidence and the points made by the claimant before a decision was taken.

- 96.** In the circumstances I do not believe that there was any inordinate, or even unreasonable delay in conducting the disciplinary process through to the dismissal.
- 97.** There was, however, delay in concluding the appeal process. The appeal hearing itself did not take place until 21 February, more than two months after the claimant's dismissal, and the decision was not delivered until 15 April, almost two months later. I accept that the delay in delivering the appeal outcome was caused at least in part by the pandemic and the impact of panic buying on the respondent.
- 98.** The appeal should have been concluded more quickly. On balance however, the delay in the appeal does not in my view render the dismissal unfair. There is no evidence to suggest that a shorter appeal would have resulted in a different outcome (and indeed the claimant is not suggesting as such) so, to the extent that there was a delay, I find that absent the delay the same decision would have been reached at appeal.

Was dismissal within the range of reasonable responses?

- 99.** The respondent is a food retailer for whom food safety and health and safety are of critical importance. Its policies make abundantly clear the importance that it places on food safety and health and safety and that the consequences of failing to comply with the employer's requirements may result in disciplinary action up to dismissal.
- 100.** The potential consequences to the respondent of the state of the yard behind the Loughborough store are significant. The store could have been closed down had Environmental Health visited, and the respondent could have been prosecuted. This could have caused a loss of income and damage to the respondent's reputation. In addition, had produce which had come into contact with rat urine or faeces been put onto the shop floor, it could potentially have been sold to customers.
- 101.** Although the claimant had a clean disciplinary record, which was taken into account by the respondent when reaching its decision, he had been told previously that food must not be stored in the yard, and knew that it should not have been there. He also accepted that he had known about the rat infestation for some time and had not reported it. Mr Stevens was sufficiently concerned about the rat appearing out of the Christmas tree that he called the claimant on a Sunday evening to tell him about it. Despite that, the claimant did nothing to address the problem and did not even report it, instead making a false assumption that Mr Stevens had reported it, but without checking that he had done so.
- 102.** The decision to dismiss was, in my view, a harsh one, and I have some sympathy for the claimant, who was willing to admit that he had made a mistake, at least at the early stages of the disciplinary process. I have reminded myself however that it is not for me to step into the shoes of the employer and to substitute my view as to the disciplinary sanction to impose. It would be an error of law for me to do so.

- 103.** It cannot, however, be said that the decision to dismiss fell outside the range of reasonable responses, particularly given the nature of the respondent's business.
- 104.** I therefore find that dismissal was within the range of reasonable responses.
- 105.** For the above reasons, the claim for unfair dismissal fails and is dismissed.

Employment Judge Ayre

21 May 2021

Sent to the parties on:

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For the Tribunal:

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