



EMPLOYMENT TRIBUNALS

Claimant: Mrs F Enigbokan

Respondent: Asda Stores Limited

Heard on: 7th, 8th, 9th, 10th and 11th June 2021

Before: Employment Judge Pritchard

Representation

Claimant: Mr C Ikoku, solicitor

Respondent: Ms T Hand, counsel

JUDGMENT

- 1 The Claimant's claim that she was unfairly dismissed is not well-founded and accordingly the claim is dismissed.
- 2 The Claimant's claim of victimisation under section 27 of the Equality Act 2010 is dismissed upon withdrawal.
- 3 The Claimant's claim for holiday pay is dismissed upon withdrawal.

REASONS

1. The Claimant claimed constructive unfair dismissal. The Respondent resisted the claim.
2. The Claimant had also claimed victimisation but the Claimant said it was not a claim made under the Equality Act 2010 and it was agreed that for clarity such a claim should be dismissed upon withdrawal.
3. The Claimant also made a claim for holiday pay. The Claimant withdrew her holiday pay claim shortly before the Tribunal heard evidence in the case.
4. The Tribunal heard evidence from the Claimant on her own behalf and from the Respondent's witnesses: Jon Arthur (Security and Admin Manager); Glen Corkery (Replen Manager at relevant times); Julie Wringe (Customer Trading Manager at relevant times); and James Willingham (General Store Manager at the Respondent's Strood store). The Tribunal was referred to a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral submissions, neither party referring the Tribunal

to legal authority.

5. Issues

6. The Tribunal was provided with an agreed list of issues. Only liability was considered at the hearing together with any evidence relating to contribution and Polkey; a further hearing would be held to consider remedy if the Claimant were to succeed. The issues falling for consideration can be stated as follows:

Unfair dismissal

- 6.1. Was the Claimant constructively dismissed by way of the Claimant's resignation on 20 June 2019? In particular:
- 6.1.1. did the Respondent breach an express or implied term of the Claimant's contract of employment?
 - 6.1.2. if so, did such a breach amount to a repudiatory breach of the contract entitling the Claimant to resign and claim constructive dismissal?
 - 6.1.3. did the following conduct amount to a breach of the implied term of trust and confidence between the Claimant and the Respondent?
- 6.2. The Claimant asserts that the following conduct amounted to breaches of the implied term of trust and confidence:
- 6.2.1. Falsely accusing the Claimant of stealing on 18 January 2019.
 - 6.2.2. Unlawfully detaining the Claimant for over 4 hours or more in the guise of conducting the spot check.
 - 6.2.3. Reporting the matter to the Police when no prima facie evidence was disclosed by the search conducted by the Respondent including the till and bin searches.
 - 6.2.4. Investigation was orchestrated against her on 6 April 2019 for alleged shortages on the till in spite of not having found anything on her after the strip search.
 - 6.2.5. The escalation of the matter to a disciplinary hearing without publishing or informing the Claimant in writing the result of the investigation.
 - 6.2.6. Failure properly to investigate her grievance dated 16 April 2019 and the wrong conclusion reached that there was no detention.
 - 6.2.7. Failure of the grievance appeal hearing to find that she was unlawfully detained by mere suspicion.
 - 6.2.8. Failure of the Respondent to implement the findings of the grievance appeal that were in favour of the Claimant.
 - 6.2.9. The failure to follow the ACAS code by prompt investigation,

confirmed at the grievance appeal hearing.

- 6.2.10. Fast tracking the investigation to disciplinary without communicating to the Claimant.
- 6.2.11. Failure to reach a conclusion on the false allegation of stealing.
- 6.3. If so, did the Claimant affirm the contract before resigning?
- 6.4. If not, did the Claimant resign in response to the Respondent's breach?
- 6.5. If the Claimant was constructively dismissed, was her dismissal for a potentially fair reason pursuant to section 98(2) of the Employment Rights Act 1996 (ERA), namely some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?
- 6.6. If so, did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant (taking into account the size and administrative resources of the Respondent's undertaking) and was the dismissal fair taking into account the equity and substantial merits of the case?
- 6.7. If the Claimant was constructively dismissed, was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the Respondent?
- 6.8. If so, did the Respondent follow a fair procedure when dismissing the Claimant?
- 6.9. Did the Respondent follow the ACAS Code when dismissing the Claimant?
- 6.10. If the Claimant's dismissal is found to be unfair, which is denied by the Respondent, did the Claimant's conduct cause or substantially contribute to her dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?
- 6.11. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?

Findings of fact

7. The Claimant commenced employment with the Respondent on 9 August 2013 as a Grocery Assistant at the Respondent's Beckton store. For reasons which do not concern the Tribunal, the Claimant transferred to the Respondent's Charlton store in October 2017. At relevant times she worked three days each week: on Thursdays from 5.00 pm to midnight, Fridays from 5 pm to midnight, and Saturdays from 3.00 pm to 10.30 pm. The Claimant worked on the Respondent's checkouts which involved dealing with cash transactions. Accordingly, she was in a position of trust.

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8. The Charlton store was underperforming with regard to what the Respondent describes as “shorts”, namely, shortages of cash in the tills compared to the cash sales recorded. In January 2019, Mr Arthur noticed that there had been a pattern of shorts on Thursdays, Fridays and Saturdays. With regard to the pattern of shorts he identified on those days, Mr Arthur noted that the Claimant’s operator number was linked to every till which was short. He therefore observed recorded CCTV footage of the tills on those days. He saw the Claimant repeatedly put her head under the till after she had taken cash payments. On one occasion, Mr Arthur noted that the Claimant, with no customer being served at the time, had opened the till by scanning a 5 pence carrier bag as a purported cash sale, remove all the £20 notes from the till, shuffle them in her hand, look around, then go under the till.
9. Mr Arthur’s suspicions were aroused and he decided he should investigate further. On 18 January 2019, shortly after the Claimant commenced her shift, Mr Arthur commenced a CCTV “spot check” observation of the Claimant. At about 8 pm, Mr Arthur saw the Claimant take £50 in cash from a customer (2 x £20 notes and 1 x £10 note), then disappear under the till. It appeared to Mr Arthur that the Claimant placed only the £10 note in the till.
10. Mr Arthur decided he would confront the Claimant when she took her break. He arranged for Juliet Butterfield, Section Leader, to be present. At about 8.50 pm, after the Claimant left the till to take her break, Mr Arthur approached her. He explained that he was carrying out a spot check and asked her to accompany him and Ms Butterfield to the training room which afforded privacy. Raz Biblob, Bakery Manager, also attended for part of the time the Claimant was in the training room to ensure she was not unaccompanied.
11. Mr Arthur questioned the Claimant about her actions and suggested she must have money about her person. The Claimant denied any wrongdoing. She emptied her pockets which revealed no stolen money. Also, without being asked to do so, the Claimant removed her shoes and some of her clothing in an attempt to show that she was not hiding anything. Ms Butterfield checked the till the Claimant had been working on and reported that it was short of approximately £100 in cash. Mr Arthur checked the till area but found nothing except for a plastic bag that the Claimant had been using. Mr Arthur decided to call the police which he did at some time between 9 pm and 10 pm.
12. Two male police officers attended the store fairly promptly. Mr Arthur showed the CCTV footage to the officers who decided that the Claimant should be searched and they called for a female police officer to attend. Two female officers attended the store. One or both of the female officers also watched the CCTV footage and decided the Claimant should be searched. There was nowhere suitable or appropriate where a personal search could be undertaken at the store so, at about 11.30 pm to 11.45 pm, the officers took the Claimant to the police station for that purpose.
13. About one hour later, the police officers returned with the Claimant to the store and informed Ms Butterfield and Mr Arthur that the search of the Claimant had revealed nothing incriminating. The Claimant was permitted to leave and go home.
14. The following day, the Claimant’s line manager, Jackie Keep, informed Mr Arthur that she had received a text message from the Claimant in which she

said she would not be coming in to work and would be consulting her GP. The Claimant complained of the actions taken by Mr Arthur and accused him of being a racist. Given the accusation, Mr Arthur considered it inappropriate for him to continue with the investigation. He subsequently prepared a written account of what took place.

15. On 22 January 2019, the Claimant was signed off by her GP until 4 February 2019 as unfit for work because of stress at work. On 7 February 2019 the Claimant was further signed off as unfit for work until 22 February 2019 because of "headache, stressed".
16. On 20 February 2019, the Claimant attended a welfare visit with the Customer Trading Manager. The Claimant confirmed that if her blood pressure had reduced when she attended her GP's surgery the following day, she intended to return to work on 22 February 2019.
17. Upon the Claimant's return to work on 22 February 2019, she attended a return to work interview with Jackie Keep. Among other things, the Claimant informed Jackie Keep that she had difficulty standing because of a back problem. The Claimant was nevertheless assigned to duties on the self-scan tills which required her to stand for long periods.
18. In mid-March 2019, Glen Corkery was provided with the evidence gathered by Mr Arthur and instructed to carry out an investigation into the Claimant's behaviour on the tills which had been observed on the CCTV. A planned investigation meeting with the Claimant was delayed: firstly, when Chris Timms, People Trading Manager at the time who was to take notes, had to leave work because his mother was ill: secondly, when the Claimant was on holiday. Instead, an investigation meeting took place on the following Saturday, 6 April 2019, chaired by Glen Corkery with Chris Timms taking notes.
19. Mr Corkery explained to the Claimant that the investigation had shown thirteen incidents of till shortages totalling £1,371.61 where the Claimant was the common denominator. He showed the Claimant nine instances of her on CCTV working on the tills including that relating to 18 January 2019. The Claimant explained that she would have opened the till with a carrier bag to tidy up the bank notes so they all faced the same way. As for putting her head under the till, that she said she would be picking things up from the floor which had dropped. She made the point that she would not be the only person working on the till.
20. Mr Corkery considered all the evidence gathered in the course of his investigation, including the mitigating evidence of the inconclusive police search and the Claimant's explanations for her behaviour. He nevertheless concluded that her behaviour on the tills was called into question. After an adjournment, he informed the Claimant of his recommendation that the matter should proceed to be considered under the Respondent's disciplinary process.
21. At the conclusion of the meeting, the Claimant was asked to sign a copy of Mr Corkery's adjournment note to confirm that she agreed with what had been said. However, the Claimant refused to do so because, she believed, it would amount to a confession.
22. During the meeting, the Claimant had complained that her re-assigned duties

required her to stand for long hours and that it hurt her feet. After the meeting had finished, Mr Corkery suggested that the Claimant might benefit from wearing socks instead of having bare feet in her shoes and to put plasters on her sore feet.

23. The Claimant decided not to return to her duties that day and instead left work to go home.
24. The following day, the Respondent sent a letter to the Claimant inviting her to attend a disciplinary hearing on 11 April 2019. The allegation was clearly set out as follows:

At the hearing you will be asked to respond to the allegation that between 8/12/18 and 18/1/19 you were the common denominator for till shorts on 13 different occasions totalling £1,371.61. On 9 of these occasions where CCTV evidence was collected your actions are irregular and deemed suspicious.

Theft is deemed to be a gross misconduct offence and if proven may result in your summary dismissal.

Enclosed with the letter were the notes of the investigation meeting, the adjournment summary, a copy of the CCTV footage, and Mr Arthur's statement.

25. On 8 April 2019, the Claimant submitted a GP's certificate stating that she was unfit for work for one month suffering from stress at work. The Respondent made arrangements for the Claimant to attend occupational health but they were unable to contact her by telephone.
26. On 26 April 2019, the Claimant attended a welfare meeting. The Respondent had been unable to contact the Claimant during her absence and she promised to provide a telephone number where she could be contacted for the purposes of an occupational health referral.
27. On the same day, the Respondent received a written grievance from the Claimant dated 16 April 2019. The Respondent decided to suspend the proposed disciplinary proceedings pending the outcome of the Claimant's grievance.
28. The Claimant's grievance fell under three headings: False Allegation of Stealing; Unlawful Detention; and Victimisation.
- 28.1. Her complaints under the heading False Allegation of Stealing referred to having been "accosted" by Mr Arthur on 18 January 2019, summoned to the training room, asked by Mr Arthur what she had in her bra, and being required to strip before her managers. She described it as a dehumanising episode following which her managers called the police.
- 28.2. Her complaints under the heading Unlawful Detention referred to her being detained in the training room from 8.51 pm to 11.40 pm without food and with no opportunity to change her sanitary pads. She complained about having to accompany the police and the embarrassment it caused her.

- 28.3. Her complaints under the heading Victimisation alleged that: despite the search having disclosed no wrongdoing, her managers had continued to “make her life hell” by requiring her to work in a standing role despite her medical records showing, and her managers knowing, she could not stand for too long; the investigation had been orchestrated against her to cover up a false accusation; she had been required to sign a paper admitting her misconduct; and that the matter had been escalated under the disciplinary procedure.
29. On 1 May 2019, the occupational health advisor made telephone contact with the Claimant but was unable carry out a consultation because of background noise and difficulty understanding what the Claimant was saying. A further appointment was arranged to take place on 14 May 2019.
30. On 7 May 2019, the Claimant was signed off by her GP as unfit for work for one month because of “stress @ work since incident”.
31. Ms Wringe chaired a grievance hearing with the Claimant on 10 May 2019. At the outset, Ms Wringe categorised the Claimant’s grievance under four points of summary: treatment by and the behaviour of Jon Arthur; removal from tills pending investigation and medical condition; behaviour of Chris Timms and Glen Corkery during investigation; and victimisation leading to disciplinary. The Claimant agreed with the summary. The Claimant had full opportunity to explain her grievance to Ms Wringe at the grievance hearing.
32. Ms Wringe adjourned the grievance hearing then interviewed and took statements from Juliet Butterfield, Raz Biblob, Jackie Keep, Glen Corkey, Jon Arthur, and Chris Timms. She re-interviewed Jon Arthur and Chris Timms.
33. The Claimant attended an occupational health meeting on 14 May 2019. It was noted that the Claimant was anaemic had an appointment for a blood transfusion. It was thought that the Claimant’s mental health was likely to improve once she had attended meetings to resolve current work issues. Although not fit to attend work, the Respondent was advised that the Claimant was fit to attend scheduled meetings.
34. Ms Wringe reconvened the grievance hearing on 20 May 2019 when the statements gathered in the course of the grievance investigation were discussed with the Claimant.
35. After an adjournment, Ms Wringe informed the Claimant of her decision. Although Ms Wringe did not uphold the majority of the Claimant’s grievances, she felt that there had been insufficient communication with the Claimant and that there had been unnecessary delay between 22 February 2019 and 21 March 2019 when the investigation meeting could have been held. Ms Wringe confirmed her decision in writing by letter of the same date.
36. On 27 May 2019, the Claimant appealed against Ms Wringe’s decision. Her grounds of appeal were set out under the same four points of summary identified by Ms Wringe at the start of the grievance hearing with which the Claimant agreed, those points of summary also having been used by Mr Wringe as headings under which she set out her written outcome to the grievance.

37. On 6 June 2019, the Claimant sent a further medical certificate to the Respondent which stated that she was unfit for work for one month because of dizziness.
38. James Willingham chaired the appeal meeting on 7 June 2019. The Claimant confirmed to Mr Willingham that she was sufficiently fit to attend and able to participate. At the conclusion of the meeting, after the Claimant had explained the particulars of her appeal, Mr Willingham informed her of his decision to overturn parts of Ms Wringe's decision, the key aspects of which can be summarised as follows:
- 38.1. There was a misunderstanding as to whether the Claimant wanted to go to the toilet or to be searched. That Mr Arthur was aware that the Claimant had been at work from 5.00 pm and would not have had the opportunity to take a natural break or to eat or drink for over six hours.
 - 38.2. The Claimant had provided the store with a GP's certificate in January 2018 and raised concerns during her return to work interview and stress risk assessment on 22 February 2019. An adjustment could have been made that did not require the Claimant to stand for prolonged periods. There was no suspension risk assessment but the Claimant could have been suspended which would have removed the risk of her handling cash; or she could have been redeployed to a different department.
 - 38.3. The investigation took too long to initiate.
 - 38.4. It was unclear why Mr Arthur had waited for the Claimant to take her break rather than having immediately removed her from the till and commenced an investigation immediately.
 - 38.5. Glen Corkery and Chris Timms should have explained to the Claimant that asking her to sign the adjournment summary was to confirm that it was a true reflection of what had been said.
39. Mr Willingham confirmed his decision to the Claimant by letter dated 3 June 2019.
40. Insofar as relevant to this case, Mr Willingham made the following recommendations to the Charlton store manager:
- 40.1. The disciplinary should be heard as soon as possible.
 - 40.2. A health and wellbeing review should be completed with the Claimant on her next shift and, where applicable, reasonable adjustments should be made.
 - 40.3. Colleagues should be re-trained and re-briefed regarding Asda's beliefs and respect for the individual.
 - 40.4. Consideration should be given to relocating the Claimant to another store.
41. On 11 June 2019, the Respondent informed the Claimant that arrangements had been made for her to see the Occupational Health Advisor on 24 June

2019.

42. By letter dated 16 June 2019, the Claimant was invited to attend a disciplinary hearing to take place on 21 June 2019. The letter was in similar form to that sent to the Claimant on 7 April 2019 with the same enclosures.
43. On 19 June 2019, the Claimant spoke to the Deputy Store Manager and said that she was too unwell (dizzy and tired) to attend either the disciplinary hearing or the occupational health appointment when she had a hospital appointment that day. The Deputy Store Manager agreed to re-arrange the disciplinary hearing for a further two weeks' time at the Claimant's request.
44. By letter dated 20 June 2019, the Claimant resigned with immediate effect. She alleged that she had been constructively dismissed and the thrust of her complaints concerned false accusation of theft, being taken away by the police, the fact that her complaints of unlawful detention and false allegation of theft had not been addressed in the grievance process, and that no adjustments had been made to accommodate her medical condition.

Applicable law

45. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly described as a constructive dismissal.
46. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:
 - 46.1. That there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach). The final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA. Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.
 - 46.2. That the breach caused the employee to resign – or the last in a series of events which was the last straw. An employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that he/she at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069; Wright v North Ayrshire Council EATS/0017/13/BI).
 - 46.3. That the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

47. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.
48. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.
49. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall 1979 ICR 731 EAT.
50. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact.
51. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
52. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Conclusion and further findings of fact

53. The Tribunal addresses below its conclusions in respect of each of the Claimant's allegations set out in agreed list of issues which, the Claimant alleges, gave rise to a fundamental breach of contract.

Falsely accusing the Claimant of stealing on the 18 January 2019

54. The Claimant submits, in terms, that Mr Arthur did not demonstrate a suspicion of the Claimant's guilt but a pre-conceived belief. The Tribunal accepts that Mr Arthur believed the Claimant had stolen the money. Indeed, Mr Arthur confirmed in evidence that he was astonished when he was told that the police had been unable to find evidence of stolen money when they had undertaken a personal search of the Claimant.

55. However, the question for the Tribunal is not whether Mr Arthur believed the Claimant was guilty, but whether that belief was reasonable.
56. The Claimant complains that Mr Arthur did not spot check other till operatives. When challenged in cross examination, Mr Arthur convincingly demonstrated how he had identified the trend of shorts and how the Claimant was the common denominator by reference to her operator number. Mr Arthur was not familiar with the Claimant before his interactions with her on 18 January 2019. The only credible evidence to show that the Claimant had been singled out for a spot check was because the data Mr Arthur had considered led him to identify a trend of till shortages on the days worked by the Claimant, with the Claimant's operator number the common denominator. Also, he had observed highly unusual behaviour: the Claimant disappearing beneath the till during cash transactions and opening the till by scanning a carrier bag. Then, on 18 January 2019, he saw CCTV footage of the Claimant taking £50 in cash from a customer before going beneath the till and, as it appeared to him, placing just £10 in the till.
57. The Tribunal is unable to conclude that Mr Arthur acted without reasonable and proper cause in carrying out a spot check of the Claimant and not carrying out spot check of other individuals working on the checkouts in respect of the shorts he had identified.
58. The parties did not place the CCTV footage in evidence. However, at least two police officers viewed the CCTV footage on 18 January 2019 and, having done so, proceeded with a personal search of the Claimant. The Tribunal finds it highly likely that what those police officers observed on the CCTV had satisfied them that there were reasonable grounds to undertake a personal search of the Claimant. This supports the Respondent's case that it too had a reasonable suspicion of the Claimant's misconduct based on what had been observed on the CCTV footage.
59. Taking the data and the trends extrapolated from it by Mr Arthur, the unusual behaviour demonstrated by the Claimant together with what Mr Arthur observed on the CCTV footage of 18 January 2019, the Tribunal concludes that his belief that the Claimant had concealed money on her person was reasonably held.
60. The Claimant sought to persuade the Tribunal that the Respondent's accusation of theft was in itself sufficient to breach the implied term of trust and confidence. In the Tribunal's view, it is irrelevant whether an employer "accuses" an employee of misconduct or describes suspected wrongdoing as an "allegation". The question is whether the employer had reasonable and proper cause to make the accusation or allegation. Given Mr Arthur's reasonably held belief, the Tribunal finds that the Mr Arthur had reasonable and proper cause to accuse the Claimant to the extent he did on the day in question.
61. The Claimant also sought to persuade the Tribunal that Mr Arthur's accusation was false. However, an accusation in itself is no more than that: an accusation. It is not determinative of guilt or innocence. In the employment context, and in this case, such a determination could only be made upon the conclusion of a fair disciplinary process.

Unlawfully detaining the Claimant for over 4 hours or more in the guise of conducting the spot check

62. It is not the function of this Tribunal to determine whether the Claimant was unlawfully detained in a legal sense. The question is whether or not the Respondent had reasonable and proper cause for its conduct.
63. The Tribunal notes that, even on the Claimant's case, she was not in the training room for over four hours and could not possibly have been "detained" by the Respondent for that period of time.
64. Nevertheless, the Claimant was in the Respondent's training room for about 2 hours 50 minutes. In submissions, Mr Ikoku made the valid point that the Claimant had been unable to take her usual one hour break at this time.
65. It is this aspect of the case which has caused the Tribunal the most concern. An employer must tread carefully in cases of suspected theft such as this. Detaining an employee for an unreasonable period of time, perhaps without access to the toilet or food, without reasonable and proper cause, might well amount to a breach the implied term of trust and confidence, and indeed, other legal liabilities.
66. The Tribunal is not persuaded that by asking the Claimant to attend the training room, to question her about what had been seen on CCTV, and requiring her remain there until the police arrived, was unreasonable. This is despite the fact that the Claimant would otherwise be taking a break. The circumstances were that the Respondent had a reasonable belief that the Claimant had stolen money for the reasons explained above. It was a serious matter.
67. Much of the argument before the Tribunal concerned whether or not the Claimant had asked Mr Arthur and Ms Butterfield if she could use the toilet and that they had refused.
68. It was part of the Claimant's grievance and appeal that she a request to use the toilet and that it had been denied. The Claimant refers the Tribunal to what she had to say in her text message to Julie Keep on 19 January 2019 as a contemporaneous account of happened in this regard, namely "I was never allowed to eat nor go to the toilet to ease myself".
69. In the statements gathered in the course of Ms Wringe's investigation Jon Arthur, Raz Biblob and Juliet Butterfield stated that the Claimant had not requested to use the toilet, although a request by her to be searched in the toilet by Juliet Butterfield had been made and denied (in evidence before the Tribunal, the Claimant denied that she had asked to be searched by Ms Buterfield).
70. Ms Wringe preferred what Jon Arthur, Raz Biblob and Juliet Butterfield had to say and concluded that the Claimant had not been denied use of the toilet. Mr Willingham concluded that there was a misunderstanding as to whether or not Claimant wanted to use the toilet.
71. As rightly submitted by Ms Hand, regardless of the Respondent's conclusions, the Tribunal must make its own determination as to whether or not the Claimant

asked to use the toilet and was refused.

72. The Tribunal has considered the credibility of the witnesses. Mr Arthur gave forthright and straightforward evidence. In contrast, the Claimant sought to evade straightforward questions put to her in cross examination. Her evidence was also inconsistent in parts. For example, she denied having seen the CCTV footage of 18 January 2019 when the meeting notes make clear that it was shown to her; she told the Tribunal that she did not know the time she was returned to the store by the Police because she didn't look at the time whereas her own case before the Tribunal is that she was returned at 00.42 hours. Further, she has tended to exaggerate her case, for example, by alleging that she was unlawfully detained for over four hours when, even on her own account, she was in the training room for less than three hours. Her reliability is also called into question in this way: in her grievance letter she complained that she had "been required to strip before managers" whereas no such requirement had been made of her.
73. Mr Ikoku submitted that the Claimant's managers had lied and, as managers, must have conspired. However, there was no evidence before the Tribunal to suggest that Mr Arthur, Mr Biblob and Ms Butterfield conspired to make false statements.
74. On the balance of probabilities, the Tribunal concludes that, save for asking Juliet Butterfield to carry out a personal search in the toilets, the Claimant did not ask to use the toilet and/or that the Respondent refused.
75. There was no evidence to suggest that the Claimant was held in the training room against her will.
76. The Tribunal concludes that the Respondent's requirement for the Claimant to be present in the training room was not, in the circumstances, of this case without reasonable and proper cause. She was not detained such that the Respondent breached the implied term of trust and confidence.

Reporting the matter to the Police when no prima facie evidence was disclosed by the search conducted by the Respondent including the till and bin searches

77. The Tribunal heard conflicting evidence as to whether or not the Claimant asked for the Police to be called. The Respondent submitted that if the Tribunal finds that she did so then there can have been no breach of the implied term.
78. The Tribunal has no need to determine that question. Notwithstanding the till and bin searches, there was ample prima facie evidence before the Respondent: the trend identifying the Claimant by operator number; the recorded CCTV footage; the Claimant's unusual behaviour on the till; the CCTV footage of 18 January 2019 showing the Claimant's actions when accepting cash from a customer; and the approximate £100 till shortage identified by Ms Butterfield. Mr Arthur held a reasonable belief that the Claimant might have concealed stolen money on her person. It would have been highly inappropriate for any member of the Respondent's staff to carry out a personal search of the Claimant.
79. The Claimant sought to rely on the following extract from the Respondent's disciplinary policy:

No colleague would be dismissed for a first offence – except in cases of gross misconduct

80. This provision in the policy has no relevance as to whether or not the Respondent will call the police in a case of suspected theft.

81. Mr Arthur had reasonable and proper cause to call the Police.

Investigation was orchestrated against her on the 6th April 2019 for alleged shortages on the till in spite of not having found anything on her after the strip search

82. To the extent that the allegation of orchestration means that the Respondent had a hidden agenda to victimise the Claimant, there was no credible evidence to suggest it.

83. The Claimant submitted, in terms, that the investigation was instigated to cover up Mr Arthur's incorrect conclusion that the Claimant had stolen money. However, there was no credible evidence to suggest this was the case.

84. Notwithstanding the fact that no stolen monies were discovered when the Claimant was searched by the Police, in the Tribunal's view the Respondent had reasonable and proper cause to investigate her behaviour on the till which called for an explanation. Again, the Tribunal refers to the fact that, having observed the CCTV footage of 18 January 2019, the police officers considered that a personal search was justified and this supports the Respondent's evidence that the Claimant's behaviour was suspicious. Further, Ms Butterfield had discovered that the Claimant's till was approximately £100 short that day.

85. The Respondent had reasonable and proper cause to investigate the Claimant's behaviour on the till notwithstanding the negative police search.

The escalation of the matter to disciplinary hearing without publishing or informing the Claimant in writing the result of the investigation

86. Firstly, there is no requirement, as matter of law or as a matter of good industrial relations practice, for the outcome of an investigation to be published.

87. Secondly, at the conclusion of his investigation meeting, the Claimant was informed of Mr Corkery's recommendation that the matter should proceed to a disciplinary hearing. That recommendation was indeed put in writing: it was an enclosure with the letter inviting the Claimant to a disciplinary hearing.

Failure to investigate her grievance properly dated 16th April 2019 and the wrong conclusion reached that there was no detention

88. Mr Ikoku made much of this point, both during cross examination and during submissions.

89. In the course of the hearing, Mr Ikoku appeared to be referring to the fact that the Claimant's grievance included a complaint of unlawful detention which had not been expressly addressed by Ms Wringe. However, in submissions Mr Ikoku said that the allegation related to Ms Wringe's failure to address the

Claimant's complaint that she had been falsely accused.

90. As to the alleged unlawful detention, Ms Wringe considered this aspect of the Claimant's grievance when considering the treatment of the Claimant and the behaviour of Mr Arthur. The Claimant's specific complaint in this regard was that she had been denied a request to use the toilet. Mr Wringe clearly dealt with this in her grievance outcome letter.

91. As to the mention of false accusation in the Claimant's grievance letter, it appears under the heading of victimisation as follows:

Investigation was orchestrated against me to cover up the false accusation since nothing incriminating was found on me

92. The way this aspect of the grievance is phrased, the Claimant appears to have been complaining that after the police search had disclosed no incriminating evidence, it was improper and unfair for the Respondent to have investigated the matter any further.

93. In the grievance outcome letter, Ms Wringe dealt with this complaint in the following way:

Having taken into account the interviews with you, Jon Arthur, Glen Corkery, Juliet Butterfield, Jackie Keep and Chris Timms I believe that the incident on 18/01/2019 and the previous fact finding by Jon Arthur has led to the subsequent investigation completed by Glen Corkery on 06/04/2019, this would be in line with company policy.

94. It is clear to the Tribunal that Ms Wringe carefully considered each aspect of the Claimant's grievance as it was reasonably understood by her. She investigated each aspect. The Tribunal has little doubt that Ms Wringe took her responsibility seriously and applied herself conscientiously to the task of fairly and impartially considering the Claimant's grievance.

95. As to the suggestion that Ms Wringe reached the wrong conclusion that there was no detention, that was a conclusion to which Ms Wringe was entitled to come.

Failure of the grievance appeal hearing to find that she was unlawfully detained by mere suspicion

96. This did not appear as a specific point of appeal in the Claimant's letter of appeal. Nevertheless, Mr Willingham clearly did apply his mind to it and reached the following conclusion in his grievance appeal outcome letter:

I am satisfied that the correct process was followed in searching you and calling the police. You were detained lawfully as you were being paid and without force

97. Mr Willingham goes on to reach his conclusion as to the Claimant's alleged request to use the toilet.

98. Mr Willingham gave the benefit of the doubt to the Claimant and partly accepted her version of events. Indeed, the Claimant submitted that Mr Willingham

carried out a thorough appeal which showed his seniority. An example of a finding in the Claimant's favour is Mr Willingham's conclusion that the Respondent failed to have due regard to the Claimant's difficulty standing for long periods.

99. It appears that the Claimant wishes to complain about one conclusion reached by Mr Willingham with which she disagrees. The fact that the Claimant disagrees with the conclusion is nothing to the point. Mr Willingham's conclusion cannot be said to be unreasonable. The Tribunal is satisfied that Mr Willingham conducted out the grievance appeal fairly.

Failure of the Respondent to implement the findings of the grievance appeal that were in favour of the Claimant

100. Of the relevant recommendations made by Mr Willingham:

- 100.1. It is clear that the disciplinary was arranged to be heard as soon as possible in accordance with Mr Willingham's recommendation. The Claimant's submission that the Respondent's decision to proceed to a disciplinary hearing was the last straw event leading her to resign contradicts her argument that the Respondent failed to comply with Mr Willingham's recommendation.
- 100.2. It was not possible for the Respondent to carry out a health and wellbeing review upon the Claimant's return to work because the Claimant did not return to work. The Tribunal notes that in any event the Claimant was promptly referred to occupational health.
- 100.3. There was no evidence upon which the Tribunal could conclude that the Respondent failed to retrain and re-brief colleagues as Mr Willingham had recommended. In any event, since the Claimant had no idea whether or not this recommendation had been complied with, it cannot have been causative of her decision to resign.
- 100.4. There was no evidence to suggest that, had the Claimant returned to work, relocation to another store would not have been considered. Again, since the Claimant had no idea whether or not it would have been complied with, any such failure cannot have been causative of her decision to resign.

The failure to follow ACAS code by prompt investigation, confirmed at the grievance appeal hearing

101. There were genuine reasons why the investigation meeting did not take place until 6 April 2019 including the Claimant's sickness absence, Mr Timms leaving to care for his mother, the requirements of the Respondent's rota, and the Claimant's holiday. Mr Willingham stated in evidence that had he known the reasons for the delay, he would not have reached the same conclusion in the grievance appeal on this point.
102. The Tribunal finds that the Respondent had reasonable and proper cause for the delay in commencing the investigation which, in any event, was not overlong.

Fast tracking the investigation to disciplinary without communicating to the Claimant

103. The invitation to the disciplinary hearing followed hot on the heels of Mr Corkery's decision that the matter should proceed to a disciplinary hearing but there was nothing unreasonable about that. The Claimant had advance notice of the disciplinary hearing, she was informed in advance of the allegation being made against her and provided with all relevant evidence.

Failure to reach a conclusion on the false allegation of stealing

104. Determination as to whether the Claimant had committed misconduct in this way was to be determined at a disciplinary hearing. That did not take place because the Claimant resigned. To the extent that this allegation refers to that made in the Claimant's grievance, the Tribunal has addressed this point above.
105. In conclusion, the Claimant has failed to show that the Respondent committed a fundamental breach of contract or engaged in a course of conduct that cumulatively amounted to a fundamental breach entitling her to resign. The Claimant was not constructively dismissed. The remaining issues set out in the list of issues above do not fall for consideration.
106. The Tribunal wishes to emphasise that this conclusion does not mean that Tribunal has found blameworthiness or guilt on the Claimant's part; that was not an issue falling for the Tribunal's consideration in this case.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date 14 June 2021