



# EMPLOYMENT TRIBUNALS

**Claimant: Mr J Umudi**

**Respondent: Lidl Great Britain Ltd**

**Heard at: Newcastle (CVP)**

**On: 8 & 9 November 2021**

**Before: Employment Judge A.M.S Green**

## **Representation**

Claimant: In person

Respondent: Ms R Knight, Counsel

# REASONS

1. For ease of reference I refer to the claimant as Mr Umudi and the respondent as Lidl.
2. Mr Umudi has requested written reasons for a judgment that I gave on 9 November 2021.
3. Mr Umudi has claimed unfair dismissal and breach of contract (failure to pay his notice) which is otherwise known as wrongful dismissal. He was dismissed with immediate effect on 23 October 2020 on the grounds of gross misconduct. Lidl justified the dismissal because it believed that he was caught with frozen food in his backpack which he was trying to steal from his workplace whilst he was working his night shift. Mr Umudi says that he was not guilty of trying to steal. He believes that he was set up by colleagues and had CCTV footage been reviewed, this would have exonerated him.
4. Mr Umudi presented his claim form on 8 March 2021 after a period of early conciliation which started on 12 January 2021 and ended on 12 February 2021. The claims were presented in time.
5. I conducted a remote CVP hearing. Although Mr Umudi had been previously represented, he was now acting as a litigant in person. I

carefully explained the procedure to him to make sure that he understood it, including the need to ask questions and not simply make statements when cross examining witnesses and I gave him additional time to prepare his closing submissions. We worked from a digital bundle. The following people adopted their witness statements and gave oral evidence:

- a. Mr Umudi;
- b. Adam Lyczko;
- c. Lee Stevenson;
- d. Damian Lack.

The parties made closing submissions.

6. In reaching my decision, I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document in the bundle should not be taken to mean that I have not considered it. Mr Umudi must establish his claims on a balance of probabilities. In other words, was it more probable than not that he was unfairly dismissed and wrongfully dismissed?
7. The issues that I must determine are as follows. In relation to his claim for unfair dismissal, what was the reason or principal reason for dismissal? Lidl says the reason was conduct. The Tribunal will need to decide whether Lidl genuinely believed Mr Umudi had committed misconduct. If the reason was misconduct, did Lidl act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mr Umudi? The Tribunal will usually decide, in particular, whether:
  - a. there were reasonable grounds for that belief;
  - b. at the time the belief was formed Lidl had carried out a reasonable investigation;
  - c. Lidl otherwise acted in a procedurally fair manner;
  - d. dismissal was within the range of reasonable responses.
8. In relation to the claim for wrongful dismissal, the issue that I must determine is:
  - a. What was Mr Umudi's notice period?
  - b. Was Mr Umudi paid for that notice period?
  - c. If not, was Mr Umudi guilty of gross misconduct? / did he do something so serious that Lidl was entitled to dismiss without notice?
9. Having considered the evidence, I make the following findings of fact:
  - a. Lidl is a company that owns and operates supermarkets across the United Kingdom. It operates a Regional Distribution Centre ("RDC") in Newton Aycliffe in County Durham.

- b. Mr Umudi was employed as a Warehouse Operative. He worked at the RDC. His employment began on 1 June 2017. He was issued with a contract of employment which he signed on 31 May 2017 [48]. Clause 11 of his contract deals with termination of employment. Clause 11.2 of his contract provides that where he has been employed for one year and above, he was entitled to one week's notice for each complete year of service up to a maximum of 12 weeks. Clause 11.3 of his contract says that he could be suspended with or without pay. It also provides that his employment could be terminated without notice in cases of gross misconduct. Clause 11.4 of his contract sets out a non-exhaustive list of examples of gross misconduct including gross negligence or misconduct in the performance of duties, fraud or theft, breach of confidence and interest . Clause 12 of his contract deals with discipline and grievance policies and procedures. It refers to the fact that there is a copy of Lidl's Disciplinary and Grievance procedure in the induction pack and that these do not form part of Mr Umudi's terms and conditions of employment. However, clause 12.2 provides that Mr Umudi was required to comply with Lidl's policies and procedures from time to time in force.
- c. Lidl's Disciplinary Policy [56] sets out the process to be followed when disciplinary action is taken against an employee. It has several stages including investigation, disciplinary hearing and appeal. It says that employees at any disciplinary or appeal meeting may be accompanied by a colleague or trade union representative. It is noteworthy that when he was cross examined on the policy, Mr Umudi accepted that attempted theft was a serious matter and would warrant summary dismissal.
- d. On 11 to 12 September 2020 Mr Lyczko, Lidl's Warehouse Operations Assistant Team manager, was allocated to manage the night shift from 8 PM on 11 September 2020 to 4:30 PM on 12 September 2020. Mr Umudi was working the night shift. At approximately 8 PM on 11 September 2020, Mr Lyczko noticed Mr Umudi drive past the selection office towards the temperature-controlled area of the RDC with a backpack.
- e. There is disputed evidence about what was in the backpack over the course of the night shift. Mr Lyczko says that he noticed that he had a backpack on which did not look like that it had anything in it. In his witness statement, he says that it looked flat on his back. He goes on to say that staff have lockers where they should keep their personal belongings in (for example, their bags and coats) so it struck him as a little odd for Mr Umudi to have his backpack on his back in the RDC main area. He should also have already been working in the chiller area, as his shift started at 8 PM. Mr Lyczko was speaking to a Warehouse Operative called Aleksandra Szkuta at the time who confirmed that it was indeed Mr Umudi who he had just seen.

- f. Mr Lyczko goes on to say that approximately six hours later, at around 2 AM on 12 September 2020, following a check of the outside of the RDC, he entered the RDC via the property door and noticed Mr Umudi, Philip Laidler, a Warehouse Operative (“Philip”), and John Handley, a Warehouse Operative (“John”), talking to one another outside the freezer area. He wanted to speak to them because they should not have been talking. Furthermore, Mr Umudi should have been in the chiller picking stock and the other two men were assigned to clean the freezer at that time.
- g. In his witness statement Mr Lyczko says that as he drove towards them, he could see that Mr Umudi had the backpack in one of his hands which looked heavy and full. He remembered that six hours previously it looked empty and flat. He goes on to say that when Mr Umudi saw him approaching, he walked towards a nearby picker-truck, which was close to the freezer area and dropped the backpack in front of it (so it was hidden from his sight). He then started to walk towards the welfare area of the RDC. This aroused Mr Lyczko’s suspicions because it appeared that Mr Umudi had tried to hide the backpack from his view and had also started to walk away when he had seen that he was approaching him. In his witness statement, Mr Lyczko asked Mr Umudi what was in his backpack, and he replied that it was his clothes. Mr Lyczko then goes on to say that he asked if he could open the backpack and Mr Umudi refused. This made him think that Mr Umudi and he asked John and Philip to come over towards them and he asked them if the backpack belonged to Mr Umudi but before they answered, Mr Umudi said the backpack was not his. This further aroused Mr Lyczko’s suspicions as Mr Umudi previously stated that the backpack belonged to him. Mr Lyczko then unzipped the backpack and saw that it was full of Lidl frozen food products. At that point, he says that he did not open the backpack fully and he accepted that Mr Umudi, John and Philip would not have fully seen the contents of the backpack.
- h. Mr Umudi’s version of events concerning the backpack is different. In his witness statement he says that on the day in question, he was carrying his backpack and went straight to one of the forklift trucks and went across to the chiller to start picking up stock. He goes on to say that he had his backpack with him and his jacket and took them off and hung them up on the truck. Shortly afterwards, the battery on the truck died and he went to get another truck. He says that he left his backpack and jacket on the first truck in the chiller charging area. He then went for a quick cigarette break, he came back and started picking with the second truck. He did not think about his backpack and jacket which he had left on the other truck. He went over to see Philip and John who were near the chiller area he says that they asked if the bag nearby was his and he said it was. He goes on to say that they were laughing when

they asked that question. He had not moved back to where it was, and he had no idea of how it got there. The last that he knew of it was when it was on the track with the dead battery together with his jacket. At that point, he states in his witness statement that he picked up the bag and Mr Lyczko came over to him and asked what was in it. He says that he dropped the bag and said that he didn't know and speculated that it might have been his jacket. He denies dropping the bag behind the truck to hide it. He says Mr Lyczko partially opened the bag and asked him to accompany him to the office. At that point he fully opened the bag, and he states "I was shocked to see that it contained freezer items. I told him that I didn't know how the items got into the bag." He denied putting the items into the bag. He suggests that he was set up by Philip and John.

- i. I prefer Mr Lyczko's version of events and believe that it is more probable than not that Mr Umudi had placed freezer goods from the freezer area into his backpack for the following reasons:
  - i. Mr Umudi gave an inconsistent account about the contents the backpack. Under cross-examination he denied that Mr Lyczko had opened the bag to show him the contents. This directly contradicts what he said in his witness statement at paragraph 7 where he quite clearly says that it contained freezer items and he was shocked by that fact. Furthermore, a photograph was taken of his backpack at the time and the contents [92]. When confronted with that photograph, Mr Umudi said that it was the first time that he had seen it despite the fact that it had been put to him during an investigatory interview as part of the subsequent disciplinary process. The photograph is referred to in Mr Lyczko's investigation report of 12 September 2020 [99].
  - ii. He contradicted himself about who owned the bag. In his statement prepared in respect of the subsequent disciplinary action [97] Mr Lyczko stated that Mr Umudi initially admitted that the bag belonged and subsequently denied it. However, in cross-examination, Mr Umudi then said that he had never denied the bag was his. I have no reason to doubt what Mr Lyczko said.
  - iii. He is not provided any credible evidence to support his alternative hypothesis that the bag was filled with the freezer items as part of Philip and John's plan to set him up.
  - iv. Mr Lyczko interviewed Philip and John on 12 September 2020 [90] and he took a statement from Michal Kur and Darren Williams and other anonymised Warehouse Operatives [93 and 95] who confirmed that Mr Umudi had the bag on his truck all night which contradicts Mr Umudi's claim that it had been moved for reasons unknown. Ms

Szkuta was also interviewed and confirmed that she had seen Mr Umudi drive past her and Mr Lyczko with his backpack. She also noted that later during his shift, he kept his backpack covered with his hi viz jacket on his back which was barely visible [98].

10. Mr Lyczko suspected that Mr Umudi was trying to steal the freezer goods and he suspended Mr Umudi on 12 September 2020. He concluded that that there should be a disciplinary hearing [99].
11. On 15 September 2020, Mr Stevenson made a CCTV request to Lidl's CCTV department to see if the CCTV from the evening 11 to 12 September 2020 could provide evidence as to how the freezer products had come to be inside the bag. A copy of the CCTV investigation has been produced [80 and 101]. The section headed "incident description" states:

*Colleague seen by ATM outside his usual area of work holding a bag. According to the ATM the colleague acted suspiciously with the bag. The colleague has changed his story and now denies the bag being his after initially saying it was. The bag contained amounts of Lidl ice cream products and four units of fish fingers. Camera request info attached on separate sheet.*

12. On 16 September 2020, Mr Stevenson, the Team Manager of Warehouse Operations at the RDC wrote to Mr Umudi to confirm his suspension in relation to the allegations of gross misconduct that were made against him and to allow the investigation to be conducted impartially and fairly. [102].
13. The accompanying plan of the layout of the CCTV cameras shows numerous locations as well as blind spots. There are areas where a person could walk without being filmed such as the pedestrian passage between the chiller and the freezer area. None of these cameras are covert.
14. On 23 September 2020, the CCTV department responded saying amongst other things:

*the crux of the investigation seems to be ownership of a bag which was found to be full of freezer stock. Ownership of the bag has been disputed. The footage itself shows nothing untoward, but the bag is seen upon a person matching the description given. Two screenshots have been provided. A photo of the bag itself can be found in the Request doc.*

15. On 2 October 2020 Mr Stevenson wrote to Mr Umudi to invite him to a disciplinary hearing on 6 October 2020 [104]. In his letter, he stated, amongst other things, that the following allegation (s) had been made against him:

*Breach of trust: namely, failing to disclose why you were in possession or in the vicinity of a bag containing Lidl Freezer products on 12 September 2020.*

The letter went on to say:

*This allegation is considered as potential gross misconduct*

- *Gross negligence in the performance of duties: Namely, carrying Lidl freezer stock in a backpack around the RDC outside of its chilled chain on 11<sup>th</sup> September-12 September 2020*

*This allegation is considered as potential gross misconduct*

- *Colluding in the theft of a bag of Lidl Freezer products on 12 September 2020*

*This allegation is considered as potential gross misconduct*

*Intending to steal a bag of Lidl Freezer products on 12 September 2020*

He was warned that disciplinary action could be taken against him including his dismissal. He was notified of his right to be accompanied by a co-worker or trade union representative. He was told that he would be presented with the allegations that had been raised against him and he would have the opportunity to put forward his own evidence

16. The disciplinary hearing took place on 6 October 2020. Mr Stevenson chaired the hearing and Mr Brown took notes. Mr Umudi co-signed the minutes of the hearing and did not challenge their accuracy [106]. The hearing was adjourned whilst Mr Stevenson conducted further investigations into the allegations after Mr Umudi provided new information and he held meetings with Philip [117] and John [122], Mr Lyczko [120], Mr Beadle [130].
17. Mr Stevenson then wrote to Mr Umudi on 14 October 2020 to invite him to a reconvened disciplinary hearing and once again reminded him of his rights to be accompanied by a co-worker or trade union representative, that he would be presented with the allegations raised against him, that he would have an opportunity to answer the allegations and to put forward his own evidence. He was also informed of his right of appeal [131].
18. The adjourned disciplinary hearing took place on 16 October 2020. Mr Umudi was not accompanied. The notetaker was Ann-Marie Watson. Minutes were taken and were signed by Mr Umudi. Mr Umudi raised some more points which required Mr Stevenson to adjourn the meeting once again so that he could complete further investigations.

19. The reconvened disciplinary hearing took place on 23 October 2020 and was chaired by Mr Stevenson with Richard Hobson to take notes. Mr Umudi attended without a companion.
20. On 2 November 2020, Mr Stevenson wrote to Mr Umudi to confirm that the allegation of breach of trust namely, that he had failed to disclose why he was in possession or in the vicinity of a bag containing Lidl Freezer products on 12<sup>th</sup> September 2020, was upheld. This was based upon the fact that he had been at work on that day, and the bag was his. The CCTV department had reviewed the footage on the day in question. The letter goes on to say:

*I find that it was clear in the investigation minutes from 12. 09. 2020 that you initially denied the bag was yours. This was also confirmed by Mark Beadle-Minute taker and Adam Lyczko - Investigating officer in separate investigations 12. 10. 2020 (Enclosure 3) and 13. 10. 2020 Enclosure 4).*

*I find that no one involved in the investigations or any witnesses had any reason to lie about the events and that Adam Lyczko had no prejudice towards you. This was confirmed in statements from Liam Cargill – Senior Warehouse Operative (Enclosure 5), John Bowker -Senior Warehouse Operative (Enclosure 6) and in an investigation with Steven Simmons, the colleague you claim told you (Enclosure 7).*

*I find it reasonable to suggest that you would notice if someone removed a bag from your truck over the course of 6 hours. I therefore believe that you know how the bag became full of Lidl Frozen produce and that you failed to disclose this information as it would either incriminate another individual or yourself further.*

*I find that you have withheld information with regards to the intention to steal Lidl products from the freezer on 12. 09. 2020. Whether or not this information pertains to your actions or those of another is unclear*

...

*Intending to steal a bag of Lidl Freezer products on 12 September 2020*

...

*I find it reasonable to suggest that you would notice if someone removed a bag from your truck over the course of 6 hours. I therefore find it unlikely that your bag would be filled full of frozen produce without your knowledge or involvement.*

*It was confirmed an investigation meetings with Adam Lyczko on 12.10.2020 and John Handley 06. 10. 2020 (Enclosure 8) that you are carrying your bag as you approached John Handley and Philip*



*Laidler. It was also confirmed by both individuals that you attempted to hide the bag behind a truck as Adam Lyczko approached you.*

*I find that no one involved in the investigations or any witnesses had any reason to lie about the events. I find that Adam Lyczko had no prejudice towards you. This was confirmed in statements from Liam Cargill-Senior Warehouse Operative, John Bowker-Senior Warehouse Operative and in an investigation with Steven Symonds, the colleague you claim told you.*

*On 12. 09. 2020 there was a 30 minute window on our picking system (Enclosure 9) between 01:15 AM and 01:45 AM whereby you only completed 7 minutes of picking. You were also not clocked out for breaks during this time. This was the 30 minutes prior to you being found holding the bag full of frozen produce. Your explanation for this was that you took several unauthorised cigarette breaks that evening and also remembered at one point having to change your truck as it had run out of battery. There was no information uncovered or provided from you to suggest either way whether or not this took place. However, this time would have given you ample opportunity to fill the bag full of produce.*

*Due to data protection procedures and general evidence of petty theft around the RDC I do not believe our CCTV system would necessarily deter all theft. I therefore find that you were intending to steal the frozen products that were in your backpack that evening.*

The other allegations were not proven. As a result of these findings, Mr Stevenson decided to dismiss Mr Umudi with immediate effect and his last day at work with Lidl was 23 October 2020. He was notified of his right of appeal [156]. In reaching his decision Mr Stevenson had referred to the pick rate protocol record for Mr Umudi [83]. In his witness statement at paragraph 22 Mr Stevenson explains that this is a record showing how much time a staff member has spent picking products. The protocol shows the picking time in 15-minute intervals. By way of explanation, if a staff member is allocated to picking during their shift work, then he would have expected to see their pick rate record to show them picking for the full 15 minutes per each 15-minute interval (apart from when they would be taking their allocated work breaks). He goes on to say that he thought it would be useful to have this information for Mr Umudi during his shift on 11 to 12 September 2020 to try and obtain further information of what he was doing that evening. According to the record produced, the column headed "interval" shows the date and the relevant time set out in 15-minute intervals. The fourth column headed "time" shows how much time Mr Umudi spent picking during those intervals. Mr Stevenson noted that between 1:15 AM to 1:45 AM he had only been picking for a total of 8 minutes. As he was allocated to picking in the chiller during that shift, he would have expected that he would have been picking for the full 30 minutes and not just eight minutes. Mr Stevenson therefore thought that it was important that he investigate with Mr Umudi's times. He wanted to know what he had been doing during that time especially as Mr Lyczko had seen him with a full backpack at 2 AM.

21. Mr Umudi appealed the decision and was asked to provide his grounds of appeal which he did in a subsequent handwritten letter [162]. He denied stealing the frozen produce. He referred to cameras being everywhere in the warehouse which would prove his innocence. He said that he was not the person who put the produce into his bag, and he did not know what was inside the bag. He said that he had never taken anything. His two workmates knew the truth and they knew how the bag got to where it was.
22. In a letter dated 3 December 2020, Mr Lock, Regional Head of Logistics at Lidl invited Mr Umudi to an appeal hearing on 9 December 2020. He notified him of his right to be accompanied by a co-worker or trade union representative. He notified him that he would have the opportunity to state the reason for his appeal and to put forward any new evidence. Once all the evidence had been heard at the meeting it would be adjourned to enable a decision to be made regarding the original disciplinary action taken against him [163].
23. The appeal hearing took place on 9 December 2020. Mr Lock chaired the hearing and Gail Hobson took notes. Mr Umudi attended without a companion. Minutes were produced [166].
24. On 29 January 2021, Mr Lock wrote to Mr Umudi confirming that his appeal had been unsuccessful [167]. He stated, amongst other things:

*During the meeting we were able to discuss previous events and your reasons for appeal and in summary they are as follows:*

- *You stated that you felt CCTV had not been requested*
- *You stated you had not put the freezer items into your backpack*
- *You stated that you felt your ATM was trying to set you up.*

*I have considered all the evidence available to me and I find the following:*

- *CCTV had been requested as per Lidl CCTV request policy and failed to show anything conclusive towards the investigation and therefore would not be released.*
- *You failed to provide any plausible reason as to why the items were in your backpack.*
- *You could also give no reason to why you took your backpack into the warehouse confirming you have a locker that you use every other day you are in work.*
- *You also stated that you had been outside for a break in between the time you started work and the time in which your backpack was searched, giving no reason as to why you didn't return your backpack to your locker.*
- *It was explained that an ATM has the right to search if they have reasonable doubt. As you had your backpack*

*in the warehouse and firstly denied it was yours your ATM, then later stating it was in fact your backpack, this was enough grounds for your ATM to search your belongings.*

*Based on the above I find that the original decision to dismiss you was correct. This decision is upheld.*

25. I now turn to the applicable law. The circumstances under which an employee is dismissed are set out in Employment Rights Act 1996, section 95 ("ERA") are as follows:

*(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...., only if) –*

*(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*

...

26. The fairness of a dismissal is set out in section 98 of ERA as follows:

*(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 a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it –*

...

*(b) relates to the conduct of the employee,*

...

*(4) Where the employer has fulfilled the requirement 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,*

27. (b) shall be determined in accordance with equity and the substantial merits of the case.

28. Lidl must show that misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. Lidl must show that:

- a. it believed that Mr Umudi was guilty of misconduct;
- b. it had in mind reasonable grounds upon which to sustain that belief; and
- c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that Lidl need not have conclusive direct proof of Mr Umudi's misconduct; only a genuine and reasonable belief.

29. The Tribunal has to decide whether Lidl's decision to dismiss Mr Umudi fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**). For the purposes of that test, it is irrelevant whether or not the Tribunal would have dismissed Mr Umudi if it had been in Lidl's shoes. The Tribunal must not "substitute its view" for that of Lidl's.

30. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the route of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence.

31. Even where gross misconduct may justify summary dismissal, an employer suspecting an employee of such conduct should still follow a fair procedure including a full investigation of the facts. If an employer does establish a reasonable belief that the employee is guilty of misconduct in question, he must still hold a meeting and hear the employee's case, including any mitigating circumstances that might lead to a lesser sanction. Accordingly, even if the employee has committed an act of gross misconduct, the fairness or otherwise of any subsequent dismissal remains to be determined in accordance with the statutory test.

32. A conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. Without following these steps, it will not in general be possible for an employer to show that he acted reasonably in treating the conduct reason as a sufficient reason to dismiss. In **Polkey**, Lord Bridge set out these procedural steps as follows: a full investigation of the conduct and a fair hearing to hear what the employee wants to say in explanation or mitigation.
33. When assessing whether the employer adopted a reasonable procedure, the Tribunal should use the range of reasonable responses test that applies to substantive unfair dismissal claims. In **Sainsbury plc v Hitt 2003 ICR 111, CA** Lord Justice Mummery stated that:

*The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.*

34. The ACAS Code (the “Code”) sets out the basic requirements for fairness that will be applicable in most conduct cases. It is intended to provide a standard of reasonable behaviour in most instances.
35. An employer should normally carry out a full investigation before deciding whether dismissal is a reasonable response in the circumstances unless the employee has admitted guilt (see above). Applying the **Burchell** test, the employer should not act on the basis of mere suspicion. It must have a genuine belief that the employee is guilty, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The employer’s job is to gather all the available evidence. Once in full possession of the facts, the employer will be able to make a reasonable decision about what action to take. It is also important that the employer puts itself into a position of being able to make specific rather than general allegations against the employee. If an employer fails to establish all of the facts it risks a finding that a resulting dismissal was unfair both in respect of a failure to carry out a reasonable investigation and a failure to comply with the Code.
36. The Code states that “a fair disciplinary process should always be followed before dismissing for gross misconduct.” Unless the misconduct is so heinous as to require instant dismissal (e.g. where there is a danger to life or severe damage to the business) even serious conduct cases should be dealt with in the normal way.
37. There is no hard and fast rule as to the level of inquiry the employer should conduct into the employee’s suspected misconduct to satisfy the

**Burchell** test. It will depend on the circumstances, the nature and the gravity of the case, the state of the evidence and the potential consequences of an adverse finding on the employee. The Code emphasises that the more serious the allegation, the more thorough the investigation conducted by the employer ought to be. An investigation leading to a warning need not be as rigorous as one leading to dismissal (**A v B 2003 IRLR 2003 IRLR 405, EAT**). There should be careful and conscientious enquiry with the investigator putting as much focus on evidence that may point towards innocence as on those which points towards guilt. The Code stresses that employers should keep an open mind when carrying out an investigation. Their task is to look for evidence that weakens as well as supports the employer's case. If disciplinary action results in dismissal and there is an indication that the employer has pre-judged the outcome, that can be sufficient to make the dismissal unfair.

38. The purpose of the disciplinary hearing is twofold: it allows the employer to find out whether or not the misconduct has been committed and it allows the employee to explain the conduct or any mitigating circumstances. If the employer fails to ensure that the employee is given a fair chance to refute any allegations of misconduct against him or her, this may lead a Tribunal to conclude that the decision to dismiss was a foregone conclusion.
  
39. Establishing that the reason for the dismissal relates to the employee's conduct under section 98 (2) (b) of ERA is the first stage in the process. While the **Burchell** test is relevant to establishing the employer's belief in the employee's guilt and, therefore, to establishing the reason the dismissal, it applies equally to the question of whether it was reasonable for the employer to treat that reason as a sufficient reason to dismiss in the circumstances under section 98 (4) of ERA (**Foley v Post Office 2000 ICR 1283, CA**). When assessing whether the **Burchell** test has been met the Tribunal must ask itself whether what occurred fell within a 'range of reasonable responses of a reasonable employer. In judging the reasonableness of an employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. The Court of Appeal has held that the 'range of reasonable responses' test applies in conduct case both to the decision to dismiss and the procedure by which the decision was reached. Furthermore, employers should ensure that any penalty imposed is commensurate to the misconduct committed by the employee.
  
40. The Code states that the opportunity to appeal against a disciplinary decision is essential to natural justice and that an appeal may be raised on any number of grounds such as new evidence, undue severity or inconsistency of penalty. The conduct of the appeal hearing is important. The principles of natural justice should be observed so far as possible. The person appearing hearing the appeal should be different to those who have handled the prior stages of the disciplinary process and ideally, they

should not have contact with each other. It is recognised that the person who investigated the offence might need to be present at the appeal hearing to give factual information. However that person ideally should not remain behind after the hearing to discuss matters of the ultimate decision maker. Such behaviour would smack of bias and may be sufficient to render a dismissal unfair.

41. I now turn to the wrongful dismissal claim. Any dismissal by the employer in breach of contract, whether constructive or express, will give rise to an action for wrongful dismissal at common law. There are several different examples of wrongful dismissal. In this case, the relevant type of wrongful dismissal is whether dismissal occurs with no notice or inadequate notice and summary dismissal is not justifiable. Underpinning this is repudiatory conduct by an employee justifying summary dismissal.
42. Cases concerning repudiatory breaches by employees typically concern dishonesty, disobedience, or negligence. However, the common theme underlying the concept of all repudiatory breaches is that the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract (**Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA**). The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate (i.e., summary dismissal). There is a link here between summary dismissal and wrongful dismissal as dismissal without notice is wrongful (i.e., is a breach by the employer) unless the employer can show that summary dismissal was justified because of the employee's breach of contract.
43. Lidl must be able to prove that there was a repudiatory breach of contract to justify summarily dismissing Mr Umudi without incurring liability for wrongful dismissal. It is not enough for Lidl to prove that it had a reasonable belief that Mr Umudi was guilty of gross misconduct. The Tribunal must be satisfied both that Mr Umudi committed the misconduct, and that it was sufficiently serious to amount to a repudiation (**Shaw v B and W Group Ltd Eat 0583/11**).
44. The degree of misconduct necessary for Mr Umudi's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. I remind myself that in **Briscoe v Lubrizol Ltd 2002 IRLR 607, CA** the Court of Appeal approved the test set out in **Neary and anor v Dean of Westminster 1999 IRLR 288, ECJ (Special Commissioner)**, where the Special Commissioner asserted that the conduct:
- must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment.*
45. There are no hard-and-fast rules. Many factors may be relevant: for example, the nature of the employment and the employee's past conduct. The issue of whether misconduct by the employee amounts to a

repudiation of the contract may also turn on the terms of an individual's contract where the employer has stated that certain acts are to be treated as warranting summary dismissal.

46. Applying the law to the facts, I conclude as follows.

47. Regarding Mr Umudi's claim for unfair dismissal:

- a. The reason for Mr Umudi's dismissal was conduct. Specifically, it was because he intended to steal frozen food from the RDC. When he was asked about the presence of the produce in his bag, he could provide no credible explanation. This conclusion is set out in the dismissal letter. I also note, that when he was cross examined Mr Umudi accepted that attempted theft was a serious matter and could warrant summary dismissal. This is in the context when he was asked about the disciplinary policy. Furthermore, Mr Umudi has never challenged there was a potentially fair reason in this case and that was the reason upon which Lidl relied .
- b. Lidl genuinely believed that Mr Umudi was guilty of gross misconduct for the following reasons:
  - i. Mr Umudi did not challenge Mr Stevenson's evidence set out in paragraph 75 in his witness statement onwards which explains the basis upon which he reached his decision. In summary, he thought that Mr Umudi was guilty of misconduct because he had been inconsistent about who owned the bag. He had claimed that Philip and John had lied but had not provided a credible explanation held that belief. He also claimed that Mr Lyczko had some sort of vendetta against him but there was no evidence to support that. Furthermore, he had behaved suspiciously when he had been challenged. He had a 30-minute window of opportunity given that his pick rate had gone down to 8 minutes out of 30 minutes. This was not challenged, and I accept that conclusion.
  - ii. I am also satisfied that a thorough and reasonable investigation into the allegations was carried out by Mr Lyczko. He took statements from Mr Umudi, John and Philip. He also took statements from other people who might be able to cast light on Mr Umudi's alternative explanation. It was a balanced investigation. Once the investigation was completed, Mr Stevenson took over and he almost immediately requested the CCTV footage to be reviewed which reported that a person matching Mr Umudi's description had been observed. There was nothing suspicious such as other people tampering with his bag. Mr Umudi accepted that he was aware of where the cameras



were. The fact that they were not covert meant that they would have some deterrent effect with employees and others who might be tempted to steal produce.

- iii. Mr Stevenson carried out a thorough disciplinary hearing which he adjourned twice to conduct further investigations after new matters had been brought to his attention by Mr Umudi. He reinterviewed John and Philip as well as Mr Lyczko. He interviewed Mr Bradley and Mr Symonds who might be able to support the alternative explanations put forward by Mr Umudi. He interviewed Mr Bowker and Mr Cargill and he checked the clock records and pick rates on the date of the alleged incident.
  - iv. Mr Umudi had four opportunities to provide a credible explanation in response to the allegations. He could have done this during the initial investigation, and the three disciplinary hearings. There was nothing to suggest that this was a process that had been rushed or was in any way cursory. The only additional thing that Mr Stevenson could have done would have been actually to have viewed the CCTV footage, but I agree with Ms Kight that it would have been unlikely that this would have changed anything. He had no reason not to accept the findings of the CCTV department report. It was their job to review the footage and to report their findings. Furthermore, by the time that the matter was formally adopted as a ground of appeal, the CCTV records would have been overwritten and there would be nothing for Mr Stevenson to see.
- c. Under all the circumstances, a thorough and fair investigation had been conducted.
- d. I also accept that the decision to dismiss was within the range of reasonable responses that a reasonable employer would have done in the circumstances. I note that Mr Umudi has argued that he should have been given the benefit of the doubt. However, given the quality of the evidence I do not see that there was any doubt in the conclusion. He had attempted to steal frozen produce from Lidl. Lidl had reasonable grounds to conclude that on a balance of probabilities. The evidence suggested that it was more probable than not that was what he intended to do. Theft and dishonesty are examples of gross misconduct set out in the disciplinary policy. An employer faced with such a situation could be reasonably expected to dismiss given that such action undermines trust and confidence in an employee particularly where products are concerned and where they have access to the same.

48. Turning to the question of wrongful dismissal, as per his contract of employment, Mr Umudi was entitled to 3 weeks' notice. He was not paid

his three weeks' notice. Lidl dismissed him without notice in circumstances where there had been an act of gross misconduct. For the reasons that I have already given, I believe that he was guilty of gross misconduct. He had attempted to steal frozen produce from his employer. He was found in possession of a bag full of frozen products. He had acted suspiciously when he had been observed and provided inconsistent explanations about such matters in what was in the bag and who had it. He did not provide any credible evidence to support his alternative explanation that somebody else must put the produce into his bag as part of a plan to set him up. I note that during the course of his evidence, when he was challenged on these points, he became agitated and sometimes shouted. On at least one occasion I had to ask Mr Umudi to calm down. His behaviour taken with evidence as a whole lead me to find him not to be a generally credible witness.

49. Mr Umudi was guilty of gross misconduct and Lidl was entitled to terminate his employment without notice. They were not in breach of contract in so doing.
50. For the reasons given above, I have no alternative but to dismiss the claims for unfair and wrongful dismissal.

Employment Judge Green

Date 29 November 2021