



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103645/2018**

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**Held in Glasgow on 25 & 26 July 2018**

**Employment Judge: Frances Eccles**

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**Mr D Burns**

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**Claimant  
Represented by:  
Mr M Briggs  
Solicitor**

**Plastic Mouldings Limited**

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**Respondent  
Represented by:  
Mr P Brown  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed by the respondent and that the respondent shall pay the claimant (i) a basic award of £3,022.90 (three thousand and twenty-two pounds and ninety pence) (ii) a compensatory award of £6,934.82 (six thousand nine hundred and thirty-four pounds and eighty-two pence). The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the award as follows; the prescribed period is 18 November 2017 to 10 September 2018. The total award is £9,957.72. The prescribed element is £6,664.82. The compensatory award exceeds the prescribed element by £3,292.90.

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## REASONS

### BACKGROUND

1. The claim was presented on 24 March 2018. The claimant complained of unfair dismissal. The claim was resisted. In their response, accepted on 24 April 2018, the respondent admitted dismissal but denied any unfairness. The reason given for dismissal was theft amounting to gross misconduct. The claim was listed for a Hearing.
2. The Tribunal heard evidence for the respondent from Mr Michael McQueen, Product Manager and Dismissing Officer and Mrs Paula Aitken, Sales Manager and Appeal Officer. The claimant gave evidence. The parties provided the Tribunal with a Joint Bundle of productions. The claimant was represented by Mr M Briggs, Solicitor. The respondent was represented by Mr P Brown, Solicitor.

### FINDINGS IN FACT

3. From the evidence before it, the Tribunal found the following material facts to be admitted or proved: the claimant was employed by the respondent as a Machine Setter & Operator from 17 March 2007 until 17 November 2017 when he was dismissed. The respondent manufactures plastic components. It has office and factory premises in Irvine where it employs around sixty people. At the date of his dismissal, the claimant was aged thirty-nine. His gross weekly wage was £302.29. His average weekly take home pay was £268.31 .
4. The claimant has a phobia of cotton wool. It makes him fearful and anxious. When the claimant's work colleagues became aware of his phobia they teased him by placing cotton wool balls in areas of the factory where they knew he would be working. Their behaviour made him very anxious. He did not report it to management out of embarrassment and a desire to get along with his work colleagues.

5. From around September 2017 the claimant began working with Marcus Wilson who was new to the respondent's employment. Marcus Wilson became aware of the claimant's fear of cotton wool. On or about 7 November 2017, he brought a bag of cotton wool balls in to work. He intended to use the cotton wool to tease the claimant. He threw cotton wool balls at the claimant, put cotton wool balls into his own mouth, tied cotton wool balls to machinery and put cotton wool balls down the back of the claimant's shirt. The claimant felt very anxious. He noticed a bag of cotton wool balls on the top of Marcus Wilson's bag. While Marcus Wilson was distracted, the claimant removed the bag of cotton wool balls from the top of Marcus Wilson's bag and placed it in his own locker. The claimant proceeded to tease Marcus Wilson about the disappearance of the cotton wool balls. The rest of the day was spent with the claimant and Marcus Wilson joking about where the claimant had hidden the bag of cotton wool balls and playing "hot or cold" as Marcus Wilson tried to find it.

6. The claimant refused to return the cotton wool balls to Marcus Wilson. On or around 9 November 2017 Marcus Wilson approached his line Manager, Mr Norrie McQueen to enquire about how he could report a theft. When questioned by Norrie McQueen, Marcus Wilson reluctantly confirmed that the claimant had taken an item from him which he described as a gift from his partner. Marcus Wilson confirmed it was not "a wind up" and that the claimant had no intention of returning the item. Norrie McQueen sent Marcus Wilson back to work. When questioned by Norrie McQueen, the claimant identified the item taken from Marcus Wilson as cotton wool. He described Marcus Wilson finding out about his fear of cotton wool and bringing some in to work with which to terrorise him. He described Marcus Wilson putting cotton wool down his shirt and his decision to hide the cotton wool to stop Marcus Wilson from teasing him.

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7. Norrie McQueen was unimpressed by the conduct of both employees. He called them to a meeting in the hope that they could resolve the matter between themselves. Marcus Wilson insisted that the claimant had stolen

from him. He stated that the claimant had threatened to physically assault him. The claimant responded by describing his threat as '*only banter*'. The claimant apologised for taking the cotton wool. Marcus Wilson apologised for putting cotton wool down the claimant's shirt. Marcus Wilson explained that he did not like the '*carry on*' between them. The claimant was taken aback and asked Marcus Wilson why he had not said anything before. Norrie McQueen understood that the matter had been resolved between the claimant and Marcus Wilson. He sent them back to work. Norrie McQueen prepared a report of the incident (P8/50-51) which he passed to Mr Michael McQueen, Product Manager. Following their meeting with Norrie McQueen, the claimant returned the bag of cotton wool balls to Marcus Wilson.

8. Michael McQueen was concerned that the claimant had been accused of theft. He decided to investigate the matter. He spoke to Marcus Wilson on 9 November 2017. Marcus Wilson confirmed that from the start of his employment with the respondent there had been an element of banter, both physical and verbal, with the claimant. He confirmed that the banter reached a point where cotton wool was removed from his bag by the claimant. He confirmed that he did not see the claimant remove the cotton wool but that the claimant had made no secret of the fact. Marcus Wilson confirmed that his bag was open when the cotton wool was removed from it. He confirmed that he had been made aware of the claimant's dislike of cotton wool and had decided to bring some into work to tease him. He explained that he had also hoped that having cotton wool would end the physical nature of the banter between them.

9. Michael McQueen spoke to the claimant on 9 November 2017. He informed the claimant that there had been an extremely serious accusation of theft made against him by a fellow employee. He explained that the fellow employee had reported the claimant going into his bag and removing an item belonging to him. The claimant explained to Michael McQueen that he was terrified of cotton wool. He freely admitted that he had taken the cotton wool. He described taking the cotton wool as part of the banter between himself and

Marcus Wilson. He explained and that he did not understand why Marcus Wilson had reported the incident as he thought they had a good relationship. He described playing 'hot or cold' after hiding the cotton wool balls and that he understood Marcus Wilson had treated the incident as a joke. The claimant offered to apologise to Marcus Wilson as his behaviour had obviously upset him. He reiterated that it was "all done as a prank not as a theft". Later that day the claimant confirmed that he had apologised to Marcus Wilson for his actions. Michael McQueen prepared a statement from the claimant (P10/53) which they both signed on 14 November 2017.

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10. Marcus Wilson approached Michael McQueen with concerns about the possibility of the claimant being dismissed for taking his cotton wool. He explained that the claimant had been very apologetic about the incident and that having spoken with the claimant he now realised that his own actions were reckless and no different from those of the claimant. He explained that he should have been more upfront from the start to prevent "any of this hassle occurring". He explained that he would not want the claimant to lose his job as he had only been employed by the respondent for a matter of weeks while the claimant had been employed for ten years. Michael McQueen asked Marcus Wilson whether he wanted to withdraw his complaint. Marcus Wilson replied that he could not "change what he had said as it was the truth". Michael McQueen suggested that Marcus Wilson consider his own part in the incident. He suggested that bringing cotton wool in to work to tease someone who had an issue with it was "not the smartest thing to do". Michael McQueen informed Marcus Wilson that he should let the claimant worry about his own part in the proceedings and what "he thought about whilst entering someone else's belongings and taking something that did not belong to him". Michael McQueen prepared a statement from Marcus Wilson (P9/52) which they both signed on 14 November 2017.

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11. Michael McQueen decided that the claimant should be disciplined. He wrote to the claimant (P11/54) inviting him to a Disciplinary Hearing on 14 November 2017. He informed the claimant that a meeting had been arranged for him to

answer a complaint of theft from a fellow employee. In his letter (P11/54) he informed the claimant;

5 *"It is alleged that you did enter the employee's personal belongings and remove an item from therein. The consequences of which, if proven would ordinarily result in Summarily (sic) Dismissal. "*

The claimant was informed that he was entitled to be accompanied at the meeting by the Shop Steward or any other employee of his choice.

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12. The claimant attended the Disciplinary Hearing. He was accompanied by another employee, Donna Ramsay. Michael McQueen conducted the Disciplinary Hearing. He was accompanied by Leonne Gemmell, Senior Manager. Michael McQueen informed the claimant that the Disciplinary
- 15 Hearing was for the theft of cotton wool from another employee's property. Michael McQueen read out the report from Norrie McQueen (P8/50-51). The claimant confirmed that he agreed with Norrie McQueen's report. He described his conduct as 'daft' and explained that the cotton wool was taken from the top of Marcus Wilson's bag. Michael McQueen read out the
- 20 statement from Marcus Wilson (P9/52). The claimant denied having threatened Marcus Wilson in the terms described in Norrie McQueen's report (P8/50-51 ). Michael McQueen asked the claimant what conclusion he should reach. He explained that Marcus Wilson did not report the physical banter but did report the theft. The claimant explained that he had not thought of his
- 25 actions as stealing. He described them as a joke and that he had lifted the plastic bag and hidden it as banter. He was unable to explain the difference between his own actions and those described by Michael McQueen of going in to a woman's bag left lying in the canteen. The claimant denied that he would ever steal. He was unable to explain why he had waited until the
- 30 incident was reported before returning the cotton wool. The claimant suggested that he might have to look at *"who and how I have a joke in here"*. Michael McQueen explained that he would not jump in and make a decision but needed to reiterate that *"this is serious"* and any decision he came to could

be appealed. The claimant had nothing to add other than “/ done it as a joke”. The respondent prepared a record of the Disciplinary Hearing (P12/55-56).

- 5 13. In February 2014, Michael McQueen had received a complaint from the owners of a vending machine situated in the respondent's premises. The complaint concerned tampering and theft. Michael McQueen had placed a Memo (P5/44) dated 5 February 2014 in the respondent's canteen informing employees as follows:

10 "Vending Machines

*It has been brought to the attention of the Company (by the Contractors' who own the Vending Machines) that one of the machines has been tampered with and the contents stolen.*

15 *The situation will not be tolerated. Vandalism of company property and theft are both punishable offences and result in instant dismissal.*

20 *Be warned - anyone caught vandalising property or stealing from within our premises will be instantly dismissed, the police will be informed and prosecution will result. “*

- 25 14. Later that year, Michael McQueen had received complaints from employees about the theft of food and drink on the respondent's premises. He had placed a Memo (P4/43) dated 2 April 2014 in the respondent's canteen informing employees as follows:

"Stealing

30 *It has been brought to our attention that food and milk, belonging to employees, is being stolen from the workplace. Food, Ryvita, Milk etc has been brought by individuals and left on the premises for future use, however on returning the following day, they find that their food has been stolen.*



*This situation will not be tolerated. Stealing of items (whether owned by the Company or any of its employees) which do not belong to you is not acceptable and is a punishable offence which could result in you losing your job.”*

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15. The respondent's Disciplinary Procedure (P4/36-39) includes examples of "offences which are normally regarded as gross misconduct". The examples include 'theft, fraud, deliberate falsification of records'. The Disciplinary Procedure (P4/36-39) provides:

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*“If you are accused of an act of gross misconduct, you may be suspended from work, with pay, normally for no more than five days, while the Company investigates the alleged offence. If, on completion of the investigation and the full disciplinary procedure, the Company is satisfied that gross misconduct has occurred, the result will normally be summary dismissal without notice or payment in lieu of notice. As an alternative to dismissal, the company may consider a period of suspension, without pay, and a final written warning. Suspension without pay will be for a maximum of one week. ”*

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- 20 16. Michael McQueen rejected the claimant's explanation that he had taken the cotton wool balls from Marcus Wilson's bag as a 'joke' or 'banter' between work colleagues. He concluded that the claimant was guilty of theft and should be dismissed. He did not consider any alternative sanction. He wrote to the claimant by letter (P13/57) on 17 November 2018 notifying him of his decision as follows;

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*7 refer to the disciplinary hearing that took place on Tuesday 14<sup>th</sup> November and confirm my decision to terminate your employment with immediate effect as a result of your gross misconduct.*

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*At the hearing, we discussed the allegations against you and you were given every opportunity to explain your conduct. I appreciate that you admitted the conduct and I listened to your explanation of the reasons for your conduct,*



however, I do not accept that this excuses your behaviour. As you are aware, theft is a serious matter. I note that you have suggested that this was part of so called "banter" between you and a fellow worker but your actions went beyond what is acceptable.

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I cannot accept your suggestion that this was just a prank. Theft on any scale or terms is unacceptable and entirely breaches the trust that we expect and must have in all employees. We have a zero tolerance approach to theft and you were aware of that. Whilst I have taken account of what you have said, it does not excuse your actions or behaviour and as such, I believe that you are guilty of gross misconduct and that dismissal is appropriate.

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Your employment was terminated with immediate effect on Wednesday. You will be paid up to that date, including any accrued but unpaid holidays but, as you are guilty of gross misconduct, you will not be entitled to receive any notice pay.

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You have the right to appeal against this decision. Should you wish to do so, you must do so in writing within 5 days of this letter, stating your full reasons and address this to Terry Houston. Your appeal may be heard by Terry or by another manager appointed by him to conduct the appeal. "

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17. The claimant appealed against his dismissal. He wrote to Terry Houston by letter (P14/58) dated 20 November 2017 in the following terms:

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"I am writing to confirm my intention to appeal the decision to dismiss me from the business.

Having taken advice from my trade union I can advise that the reasons for my appeal will include the following: \_\_\_\_\_

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- ◆ The decision to dismiss was unfair based on all the available information regarding this incident.

- *Mr McQueen both decided to progress a matter that had already been resolved to disciplinary action, and then undertook the disciplinary hearing himself. In the absence of a fair reason for dismissal my representatives are concerned that the decision by Mr McQueen was driven by other considerations, in effect using the cotton wool incident as an excuse to remove me from the business.*

*My representatives and I look forward to the opportunity to put this appeal forward and ask that a suitable convenient time for all parties be arranged. ”*

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18. Mrs Paula Aitken, Sales Manager agreed to conduct the Appeal Hearing. The claimant was invited to an Appeal Hearing by letter dated 4 December 2017 (P15/59). In her letter to the claimant (P15/59), Paula Aitken requested that the claimant provide her with further details of what he meant by reference to "*the cotton wool incident*" being only an excuse to remove him from the business. The claimant did not provide Paula Aitken with any further information before the Appeal Hearing.

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19. The claimant attended an Appeal Hearing before Paula Aitken on 12 December 2017. The claimant was represented by Paul Nielson of Unite the Union at the Appeal Hearing. The claimant said his dismissal was unfair as the incident was "*jokingly banter*" between himself and Marcus Wilson who had brought the cotton wool in to work to taunt him. He explained to Paula Aitken that Marcus Wilson had put cotton wool down his back and tied it to machines. He explained that the cotton wool was on top of Marcus Wilson' bag and that he had hidden it. He described his actions as a game and that after hiding the cotton wool he and Marcus Wilson had played '*hot and cold*'.

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20. Paula Aitken referred to Marcus Wilson being given the opportunity to drop the matter and of not wanting to withdraw the allegation of the claimant "*going into his personal property*". Paula Aitken described "*going into someone's property*" as wrong. The claimant expressed regret at taking the cotton wool. He referred to "*having a laugh*" with Marcus Wilson. Paula Aitken explained

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that Michael McQueen had given Marcus Wilson an opportunity to withdraw the complaint which he had declined. The claimant explained that he did not go through Marcus Wilson's bag. He said he regretted taking it and described his actions as an *"ongoing joke"*. The claimant suggested that Paula Aitken speak to other employees who all knew it was a prank and found it a laugh. The claimant expressed disbelief at being called a thief. He agreed that *"in a way"* what he had done was *'stealing'*. Paula Aitken commented that the value of the item was irrelevant. The claimant reiterated that he regretted taking the cotton wool. He reiterated that he had not gone into Marcus Wilson's bag as the cotton wool was on top.

21. The claimant informed Paula Aitken that Michael McQueen did not like him. He referred to an occasion when he had experienced difficulty in obtaining permission to take time off work for personal reasons. He referred to another occasion when Michael McQueen had suggested he did not need to work overtime. He described Michael McQueen as *'on his case'*. Paul Nielson submitted on behalf of the claimant that the *"term stealing totally misses the whole context"* of what had taken place. He referred to there being a *"line between theft and a joke"*. He suggested that Norrie McQueen could have dealt with the incident as a prank and disciplined the claimant and Marcus Wilson accordingly. He disputed that the claimant's conduct was equivalent to going into a woman's bag. He reiterated that it had never been the claimant's intention to steal. He reiterated that the claimant had clearly admitted to taking the cotton wool balls and submitted that the claimant's actions did not amount to theft. There was mention of the claimant's length of service relative to that of Marcus Wilson. The claimant stated that he would avoid workplace banter in the event that he got his job back.

22. Paula Aitken confirmed that she would consider the points raised during the Appeal Hearing. Paula Aitken was of the same view as that of Michael McQueen that the claimant was guilty of theft and should be dismissed. She rejected the claimant's explanation that the incident was a joke between work colleagues. Having spoken to Michael McQueen about the claimant's

comments she rejected any suggestion that he was looking for an excuse to dismiss the claimant.

23. Paula Aitken wrote to the claimant by letter dated 20 December 2017 (P17/65) confirming her decision to refuse his appeal in the following terms:

*"I refer to our meeting last week to hear your appeal against dismissal. As explained I needed to check a few things before determining the issue. I listened carefully to the points that you and your union representative made on your behalf.*

*My understanding of your grounds of appeal were essentially that you felt that the sanction of dismissal was unduly harsh in the circumstances and that you felt that this decision arose as a result of Mr M McQueen's personal feelings towards you.*

*I have considered all of this carefully but I cannot find anything to support your assertion about Michael or that this affected his judgment or decision.*

*Regarding the sanction, again having considered this carefully, I do not agree with your assertion. The fact is you admitted to going into another employee's belongings and removing property belonging to him. I note that you are suggesting that this was only a joke but clearly, Markus did not take it as such and felt the need to report this. You are fully aware of the Company's zero tolerance policy on theft and misappropriation of other people's belongings.*

*I have considered what you said about Markus' behaviour. I agree that his behaviour was also unacceptable but as you are aware, he no longer works for the Company. In this situation, both of your behaviour was wholly unacceptable but the fact remains that taking someone's property is unacceptable and does amount to gross misconduct.*

*In the circumstances I have decided to uphold the decision to dismiss you and your appeal is rejected. This concludes our process."*

24. The claimant has sought alternative employment since his dismissal. He has applied for a significant number of posts. He was unsuccessful in obtaining alternative employment before attending a training course, which lasted six weeks and for which he was not paid. The training was provided through the claimant's Jobcentre. Following the training course, the claimant was successful in obtaining employment on 29 May 2018 for which he is paid a comparable wage to that paid by the respondent. While unemployed the claimant was in receipt of Universal Credit for himself, his partner and child.

## SUBMISSIONS

### 10 RESPONDENT'S SUBMISSIONS

25. Mr Brown for the respondent submitted that the central issue before the Tribunal is whether the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissing him. He submitted that while cotton wool may seem trivial and the cotton wool in question may have been on the top of Marcus Wilson's bag, the fact remains that the claimant took another person's property. The claimant, submitted Mr Brown, knew that the respondent does not tolerate theft. The claimant had no intention of returning the cotton wool and in all the circumstances, submitted Mr Brown the dismissal was fair.

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26. Mr Brown submitted that the respondent was entitled to reject the claimant's suggestion that the incident had been a joke. The claimant, submitted Mr Brown, had taken the law into his own hands and breached company rules. Mr Brown questioned the strength of the claimant's phobia given his ability to remove cotton wool from Marcus Wilson's bag. He also questioned why the claimant had failed to raise the matter with the respondent. Mr Brown submitted that this was not a case of the claimant being automatically dismissed. The respondent, having investigated the alleged theft, was entitled

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30 submitted Mr Brown, the respondent was entitled to take into account that Marcus Wilson had not treated the incident as a joke and did not withdraw the complaint when given the opportunity to do so by Michael McQueen.

27. Mr Brown submitted that the respondent did not seek to show that the incident for which the claimant was dismissed met the legal definition of theft. There was no suggestion that the respondent's property had been stolen. It was enough, submitted Mr Brown, that property had been taken with no intention of returning it to its owner. Michael McQueen had been consistent in his response, submitted Mr Brown and it should have been clear to the claimant that his dismissal was inevitable given how seriously theft was taken by the respondent. Similarly, submitted Mr Brown, Paula Aitken was entitled to reject the explanation advanced by the claimant at his Appeal that his actions were a joke. A re-hearing at Appeal would have served no purpose, submitted Mr Brown. The claimant had admitted taking the cotton wool. There were no new circumstances that would change the respondent's decision.

28. In all the circumstances, it was fair and reasonable for the respondent to dismiss the claimant, submitted Mr Brown. It was not a case of the claimant being automatically dismissed. Michael McQueen had taken into account all the facts and circumstances including the serious nature of the claimant's conduct and the extent to which it undermines trust between employee and employer. The dismissal, submitted Mr Brown, was fair and reasonable. It was not the value of the item stolen but the act itself for which the claimant was dismissed. The claimant, submitted Mr Brown, was in any event the author of his own misfortune and any award of compensation should be reduced to reflect the extent to which the claimant contributed to his dismissal.

#### 25 **CLAIMANT'S SUBMISSION**

29. Mr Briggs for the claimant submitted that this was a genuine case of what he would describe as workplace hijinks. It is not seriously in dispute that the claimant has a phobia of cotton wool. The behaviour of the claimant's colleagues flowed from this, submitted Mr Briggs. It was not something that the claimant considered necessary to report to management, for the simple reason that it was banter. There was no reason, submitted Mr Briggs, for Marcus Wilson to bring cotton wool into the workplace other than to tease the



claimant. This situation is completely distinct, submitted Mr Briggs, from the acts of pilfering relied upon by the respondent. This was not a case of someone stealing. It was more a question of confiscation, submitted Mr Briggs. The claimant's motivation was to stop Marcus Wilson teasing him with cotton wool. There was no intention to deprive Marcus Wilson of anything of value or of personal gain on the part of the claimant. The incident only became an issue, submitted Mr Briggs, when Marcus Wilson reported the theft of a gift from his partner. At the point of first reporting the incident, there was no mention by Marcus Wilson to the so-called gift being cotton wool balls for teasing the claimant.

30. The Tribunal should be taken into account, submitted Mr Briggs, that the claimant made no attempt to deny his part in the incident. Norrie McQueen spoke to both parties and thought the matter had been resolved. Any reasonable employer, submitted Mr Briggs, would have left the matter there. They would have identified the situation as no more than a 'carry on'. Michael McQueen decided however that matters should be escalated to an investigation and Disciplinary Hearing. At no stage during the process, submitted Mr Briggs, did the claimant's position deviate from what he had told Norrie McQueen. His position was consistent throughout that the incident was part of workplace banter. The claimant's fate was sealed however, submitted Mr Briggs, once it had been decided by Michael McQueen that the claimant had removed property from Marcus Wilson's bag. From that point onwards, submitted Mr Briggs, any mitigation advanced by the claimant was of no interest to the respondent.

31. The respondent, submitted Mr Briggs, acted unreasonably by relying on a zero-tolerance policy, the existence of which was questionable, and refusing to consider any possible outcome other than dismissal. Mr Briggs submitted that the respondent failed to take into account that the claimant's conduct was in part a joke and attempt to prevent further teasing by Marcus Wilson. Similarly, the respondent did not attach any weight to the claimant's length of service and his expressions of regret for what had occurred. This was



unreasonable, submitted Mr Briggs. It was not in accordance with equity and resulted in an unfair dismissal.

32. The Tribunal should not place too much emphasis on Marcus Wilson's decision not to withdraw his complaint, submitted Mr Briggs. The Tribunal has not heard from Marcus Wilson. It is possible to interpret his statement (P52) as an inability to change the factual nature of what he had said as opposed to a reluctance to withdraw the complaint, submitted Mr Briggs.
- 10 33. Mr Briggs questioned whether the respondent has a zero-tolerance policy. The respondent's Disciplinary Procedure (P4), submitted Mr Briggs, leaves room for alternative outcomes and is not definitive in nature. The Memo in relation to the vending machine (P5) relates to vandalism as well as theft. It also refers to calling the Police which the respondent did not do. As regards the Appeal, submitted Mr Briggs, Paula Aitken failed to cure any earlier defects because she approached the process as a review as opposed to a re-hearing.
- 15 34. Mr Briggs questioned the credibility of Michael McQueen in relation to the claimant having threatened Marcus Wilson. He submitted that it was unclear when the issue had been brought up and whether any weight was attached to it. The claimant's account of the incident was very concise and consistent submitted Mr Briggs. It should be treated as part of normal shop floor banter. There is no mention of it in the invitation to the Disciplinary Hearing (P11) or the dismissal letter (P12). It played no part in the decision to dismiss the claimant, submitted Mr Briggs.
- 20 25 35. As regards compensation, Mr Briggs submitted that there should be no deduction for contributory fault. He did not accept there had been any blameworthy conduct on the part of the claimant. If a deduction is considered appropriate, submitted Mr Briggs, it should be minor and take account of the fact that it was cotton wool that was removed from Marcus Wilson's bag.
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**ISSUES**

36. The issues considered by the Tribunal were (i) the reason for the claimant's dismissal; (ii) if potentially fair, whether in all the circumstances of the case the respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the claimant & (iii) if the respondent acted unreasonably and the claimant was unfairly dismissed, what compensatory award is just and equitable in all the circumstances including consideration of the extent to which the claimant may have contributed to his dismissal.

**DISCUSSION & DELIBERATIONS**

37. In terms of Section 94 of the Employment Rights Act 1996 ("ERA"), the claimant had the right not to be unfairly dismissed by the respondent. It was not in dispute that claimant had been dismissed by the respondent. He claimed that his dismissal was unfair. The respondent denied any unfairness.

38. In terms of Section 98(1) of ERA, it is for the respondent to show the reason (or, if more than one, the principal reason) for the claimant's dismissal. It was not in dispute that the claimant was dismissed for removing cotton wool from Marcus Wilson's bag which he, at least initially, refused to return. The respondent treated the incident as an act of theft. The claimant denied theft, describing the incident as a prank, but did not dispute that he had removed cotton wool from Marcus Wilson's bag. There was reference in evidence to the claimant having threatened Marcus Wilson with physical violence, something which the claimant denied. The respondent did not seek to show that this played any part in their decision to dismiss the claimant. The claimant questioned whether Michael McQueen may have been motivated to dismiss him out of personal animosity. This was not established and in any event the claimant did not dispute that the principal reason for his dismissal related to his conduct in removing cotton wool from Marcus Wilson's bag.

39. Conduct is a potentially fair reason for dismissal in terms of Section 98(2) (b) of ERA. The respondent having met the requirement to show that the claimant was dismissed for a potentially fair reason, the Tribunal went on to consider whether the dismissal was fair or unfair having regard to the claimant's conduct. In terms of Section 98(4)(a) of ERA, this depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking), the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him. This must be determined in accordance with equity and the substantial merits of the case in terms of Section 98(4) (b) of ERA.
40. When considering whether the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him, the Tribunal must have regard to whether the decision to dismiss fell within the "range of reasonable responses" of a reasonable employer. It is not for the Tribunal to consider how it would have responded to the claimant's conduct. It must consider whether a reasonable employer might reasonably have dismissed the claimant in response to his conduct.
41. Whether the respondent acted reasonably or unreasonably will depend on the circumstances of the case. The respondent sought to show that they had a "zero tolerance" policy towards theft which they were obliged to implement in response to the claimant's conduct. From the evidence before it the Tribunal was not persuaded that at the time of the claimant's dismissal the respondent had such a policy. The respondent's Disciplinary Policy (P4/36-39) did not provide for summary dismissal in response to all cases of theft. The Memo from February 2014 (P4/43) was concerned with a situation involving vandalism and theft. The subsequent Memo from April 2014 (P5/44) did not state that dismissal would be the inevitable outcome if an employee was found to have been stealing. The Tribunal did not accept in these circumstances that the claimant's dismissal was justified as being in accordance with a "zero tolerance" policy.

42. Had there been a "zero tolerance" policy in place at the time of the claimant's dismissal, it would still be necessary for the Tribunal to consider whether the respondent's application of the policy was reasonable. A reasonable employer will consider the relevant circumstances before deciding whether to dismiss an employee. In this case, the claimant had been employed by the respondent for over 10 years. There was no evidence of any previous disciplinary action against him. The claimant did not deny that he had taken the cotton wool from Marcus Wilson's bag. He explained that he had a phobia of cotton wool. He explained that he had hidden the cotton wool in his locker because Marcus Wilson was using it to tease him. While not acceptable to Michael McQueen as an excuse for the claimant's conduct, neither explanation was seriously disputed by the respondent. The claimant apologised for his behaviour and returned the cotton wool to Marcus Wilson. It was not in dispute that the only reason Marcus Wilson had brought the cotton wool in to work was to tease the claimant. There was no suggestion that the claimant had stolen anything belonging to the respondent. The cotton wool belonged to Marcus Wilson. While Marcus Wilson did not feel able to "*change what he had said*" about the claimant's conduct, he did not want the claimant to be dismissed and sought to persuade the respondent against taking such action.

43. The Tribunal did not agree with the respondent that the value of the cotton wool was an irrelevant consideration. A reasonable employer would have taken the negligible value of the cotton wool into account when deciding whether the claimant's conduct was sufficient to justify dismissal. From first learning about the claimant removing cotton wool from Marcus Wilson's bag, it was Michael McQueen's position that the claimant was facing "*an extremely serious accusation of theft*". When the claimant did not deny the incident, his dismissal became inevitable. Michael McQueen proceeded on the basis that "*theft on any scale or terms is unacceptable*". This approach resulted in his failure to take account of all the circumstances of the case. This was unreasonable. Similarly, having rejected the claimant's concerns about Michael McQueen's motivation for dismissing him, Paula Aitken proceeded

on the basis that *"taking someone's property is unacceptable and does amount to gross misconduct"*. As a result, she also failed to take into account all the circumstances of the case when deciding whether the claimant's conduct had been a sufficient reason for dismissing him.

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44. Having regard to equity and the substantial merits of the case, the Tribunal concluded that the respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him. The Tribunal concluded that summary dismissal as a response to the claimant's conduct of removing  
10 cotton wool from Marcus Wilson's bag and refusing to return it was, in all the circumstances, outwith the band of reasonable responses of a reasonable employer. Dismissal was an unreasonable response. A reasonable employer acting reasonably would have taken into account all the circumstances of the case and would not, as in the case of the respondent, have dismissed the  
15 claimant. This was unreasonable and resulted in the claimant being unfairly dismissed.

## COMPENSATION

- 20 45. Having concluded that the claimant was unfairly dismissed, the Tribunal was satisfied that he is entitled to a basic award in terms of Section 119 of ERA. Based on his age (39), length of service (10 years) and weekly wage (£302.29) at the date of dismissal, the Tribunal calculates the claimant is entitled to a basic award of £3,022.90 (10 weeks x £302.29).

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46. The Tribunal was satisfied that a compensatory award of £7,405.36 is just and equitable in all the circumstances of the claimant's case. This is based  
30 on the claimant's loss of wages since dismissal (27.6 weeks x £268.31). The Tribunal was satisfied that the claimant sought to mitigate his loss since dismissal and that the above loss of wages was sustained by him in consequence of his dismissal and is attributable to action taken by the respondent in terms of Section 123 of ERA. The claimant is also entitled to

compensation for loss of statutory rights for which the Tribunal has awarded the claimant £300.

47. As regards contribution, the Tribunal was satisfied that the claimant was not  
5 entirely blameless. It was not in dispute that he had removed cotton wool  
from a bag belonging to another employee. The claimant accepted that  
Marcus Wilson was upset by his behaviour. In all the circumstances however,  
the Tribunal was not persuaded that it would be just and equitable to reduce  
the compensatory award by more than 10%. The claimant had apologised for  
10 his conduct. He had returned the cotton wool balls. He had explained why he  
removed the cotton wool balls from Marcus Wilson's bag. He wanted to stop  
Marcus Wilson from teasing him. Marcus Wilson did not want the claimant to  
be dismissed for his conduct. Having reduced the amount of the  
compensatory award by 10% the compensation awarded to the claimant is  
15 £6,934.82 (£7,705.36 - £770.54). The Tribunal was not persuaded that any  
similar reduction should be made to the basic award.

48. The claimant was in receipt of Universal Credit following his dismissal and  
accordingly the Employment Protection (Recoupment of Benefits)  
20 Regulations 1996 apply as follows; the prescribed period is 18 November  
2017 to 10 September 2018. The total award is £9,957.72. The prescribed  
element is £6,664.82. The compensatory award exceeds the prescribed  
lament by £3,292.90.

## CONCLUSION

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49. The Tribunal concluded that the claimant was unfairly dismissed by the  
respondent and that the claimant should be awarded (i) a basic award of  
£3,022.90 and (ii) a compensatory award of £6,934.82. The Employment  
Protection (Recoupment of Benefits) Regulations 1996 apply as follows; the  
30 prescribed period is 18 November 2017 to 10 September 2018. The total

award is £9,957.72. The prescribed element is £6,664.82. The compensatory award exceeds the prescribed element by £3,292.90.

**Employment Judge: F Eccles**  
**Date of Judgment: 10 September 2018**  
**Entered in register: 17 September 2018**  
**and copied to parties**