EMPLOYMENT TRIBUNALS

Claimant: **Mr M Shovon**

Respondent: **Sainsbury's Supermarkets Limited**

Heard at: **East London Hearing Centre**

On: **28, 29, 30 June 2022 and 1 July 2022**

Before: **Employment Judge Russell**
Members: **Mr P Quinn**
Mr M Wood

Representation

For the Claimant: **In person**
For the Respondent: **Mr H Zovidavi (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The sole reason for dismissal was "some other substantial reason". The claim of automatically unfair dismissal by reason of protected disclosure fails and is dismissed.**

2. **The claim of ordinary unfair dismissal succeeds. The Claimant would have been fairly dismissed within four months and compensation is capped accordingly.**

3. **The claim of detriment because of a protected disclosure fails and is dismissed.**

REASONS

1 By a claim form presented to the Employment Tribunal on 20 April 2020, the Claimant brought complaints against the Respondent, his former employer, of ordinary unfair dismissal and automatically unfair dismissal by reason of a protected disclosure. The

Respondent resisted all claims and asserted that the potentially fair reason for dismissal was conduct.

2 Following a case management hearing before Employment Judge Jones on 19 October 2020, the Claimant was ordered to provide further information of a potential protected disclosure detriment claim. It appears that no final list of issues was provided to the Employment Tribunal either then or following that hearing.

3 Following Employment Judge Jones preliminary hearing the Respondent applied for and was granted leave to amend its Response following receipt of the Claimant's further information. An application dated 5 October 2021 to amend to plead capability as the potentially fair reason for dismissal was granted.

4 At the outset of this hearing, the Tribunal clarified the issues to be decided.

4.1 Did the Claimant make a protected disclosure? The Claimant relies two disclosures: orally to a line manager (Baba) from around Christmas 2018 and orally to a line manager, Mr Thomas on 14 May 2019. The Claimant says that on each occasion he disclosed information tending to show that the health and safety of an individual was being endangered because the Respondent manager, Baba was not following procedure whereby chiller goods were only allowed on the shop floor for unloading for a maximum of 30 minutes.

4.2 What was the sole or principal reason for dismissal? The Claimant will say that it was his protected disclosures. The Respondent will say that it was capability, namely his absence record.

4.3 If for a potentially fair reason, was dismissal fair in all of the circumstances of the case, having regard to s.98(4) Employment Rights Act 1996?

4.4 If unfair, should there be any adjustment to reflect the possibility that he could have been fairly dismissed in any event and/or for contributory fault?

4.5 Was the Claimant subjected to a detriment because of a protected disclosure? The Claimant relied on three detriments although the last was his dismissal which is considered separately. The two remaining detriments are:

(a) A written warning imposed by Mr Awotar in June 2019;
(b) A final written imposed by Mr Awotar in September 2019.

5 The hearing proceeded on that basis with witnesses being called and cross-examined accordingly. It was only on the third day, after the parties had been given time to prepare their submissions, that the Respondent again changed the reason for dismissal. Submissions had been due to be exchanged and the hearing to start at 12noon, however, Mr Zovidavi was not ready and was given until 12:30pm. In the Respondent's submissions, received by the Tribunal at 12:28pm, the Respondent asserted for the first time that it relied on "some other substantial reason", namely the failure to comply with the requirements of the Respondent's attendance policy.

6 Although the Respondent is entitled to change its averred reason even at such a late stage, the Tribunal were concerned that it may unduly prejudice the Claimant who was a litigant in person with English not his first language. For that reason, we adjourned after hearing Mr Zovidavi's submissions until the following day to give the Claimant an opportunity to seek advice from the Citizens Advice Bureau and to gather his thoughts. Mr Zovidavi had provided the Claimant with a copy of **Wilson v Post Office** [2000] EWCA Civ 3036 and Employment Judge Russell later sent links to the Judgments in **Kelly v Royal Mail** [2019] UKEAT/0262/18 and **Ssekisonge v Barts Health NHS Trust** UKEAT/1033/16/LA as she considered that they may be relevant to the issue of reason for dismissal. In the event, the Claimant was unable to obtain legal advice but was content to proceed to make his submissions orally on morning of 1 July 2022 after the Employment Judge explained in detail and without jargon the specific issues which he needed to address.

7 The Tribunal heard evidence from the Claimant and from his former line manager, Mr Raphiqe Thomas. For the Respondent, the Tribunal heard evidence from Mr Beeraj Awotar, Mr Mir Waliullah and Mr S Cavallero. We were provided with an agreed electronic bundle, with the caveat that the Claimant said the final pages from 340 to 392 were unreliable as they were not signed by him. We read those pages to which we were taken during the course of the evidence.

Findings of Fact

8 The Respondent is a large supermarket chain with shops throughout the UK, including one at Beckton, East London. It employs, amongst other roles, people to replenish its shelves with stock on a night shift when the shop is closed to customers. The Claimant was employed by the Respondent as a general assistant at Beckton from 7 May 2009.

9 The Respondent operates an attendance policy which is amended periodically. The policies in force at the material times for this case, from April 2019 to March 2020, expressly state that they are non-contractual and may be updated or changed by the company at any time. One of the main aims of the policy is to support employees when unwell, aiding their return to work with any necessary adjustments (duties, hours, shifts), obtaining medical or Occupational Health guidance and advice, agreeing timescales and providing reviews. There is support for mental health, including an independent and confidential helpline number offering free support 24 hours a day to all members of staff. Another main aim of the policy is to manage absence levels and make sure that everyone is treated fairly and consistently.

10 The policy provides that a manager will carry out a return to work meeting with an employee returning to work after absence, where they will discuss the reason for absence and any adjustments which may be required by way of support, overall sickness absence levels over the preceding 12 months for that employee and whether or not an attendance trigger has been reached. The triggers are three absences in a rolling 12 month period or an absence rate of 3% of the total hours contracted to be worked in that period. If a trigger has been reached, the policy states that the manager will confirm the reasons for absence and then make a decision as to whether to taken no further action or to progress the matter to the next stage of the process for investigation or a disciplinary hearing. It states:

> "**the manager holding the meeting will speak to you about the absences you have had over the last 12 months and will want to understand if there are any factors contributing towards them either caused by work or an underlying medical condition. They will also**

> **want to understand what action you are taking to improve your attendance. After reviewing your absence record and the points you have discussed in the meeting they will make a decision as to whether any action is taken."**

11 The outcomes available are: no formal outcome, a written warning live for 12 months, a final written warning in the event of absence during the life of a written warning and dismissal on notice for further absence whilst a final written warning is still live.

12 The Respondent maintains an internal record of sickness absence for each employee, called an absence tracker. A copy of the absence tracker said to relate to the Claimant was included in the bundle of documents. This is one of those documents which the Claimant disputed on the basis firstly that it was not signed by him and secondly that it incorrectly recorded his name. The Tribunal finds it neither surprising nor material that it was not signed by the Claimant – it is an internal management document not provided to the employee and there is no reason why it would be signed. There is a separate page to record sickness absence in any given year. On the first few pages, the employee name is shown as "S Shavon" whereas the Claimant's surname is "Shovon". For the following reasons, the Tribunal is satisfied that this absence tracker does relate to the Claimant and is a reliable record of the Claimant's sickness absence throughout his employment.

- the start date of the employee is 7 May 2009, this is the Claimant's start date.
- The page for 2010/2011 also includes the name "Shakib". The Claimant's full name is Mohamed Shakib Zia Shovon.
- On the page for 2014/2015, "Shavon" is corrected to Shovon and the name appears as Shovon consistently thereafter.
- The same payroll number appears on the pages both for Shavon and Shovon.

13 The absence tracker shows that the Claimant had more than three absences in each of his years of employment. The Claimant was given verbal warnings for absence on 3 December 2014 and 4 May 2017. The Claimant was given a written warning by Mr Thomas on 23 November 2018 after a seven day sickness absence which meant that he had reached a trigger. The Claimant cannot recall receiving it and there are no disciplinary records or document signed by the Claimant. However, we find on balance that the written warning was given as it is consistent with the contemporaneous absence tracker, correspondence and Mr Thomas' evidence on oath at this hearing. Although the Respondent did not rely on this earlier written warning as part of the process which led ultimately to dismissal, the Tribunal consider it relevant when considering Mr Thomas' understanding as a manager that the attendance policy should not be applied in an "automatic" fashion, inexorably following each step to dismissal. Rather, at each stage the manager retained the discretion depending on the reasons for absence and the relevant circumstances to decide not to impose any further outcome, giving the example of an absence caused by bereavement. The Tribunal found Mr Thomas to be a credible and reliable witness whose evidence was consistent with the supportive aim of the attendance policy and its express recognition that the manager retained a discretion to decide that there should be "no further outcome". Nevertheless, Mr Thomas considered it appropriate to issue the written warning as the Claimant's absence level in the preceding year (and throughout his entire employment) was high.

14 The Claimant was absent between April 2019 and June 2019 by reason of stress and anxiety which was caused in part by personal issues and in part by problems he had experienced with a new line manager, Baba. During this two-month period of absence, the

Claimant attended a number of attendance review meetings with different managers. The meeting on 14 May 2019 was conducted by Mr Thomas. Consistent with the contemporaneous notes, the Claimant stated that he was not able to agree to a rehabilitation plan, redeployment to another department or adjustments of reduced hours/days of work as he had to follow his doctor's advice. The Claimant agreed to be referred to Occupational Health. The Claimant told Mr Thomas about the difficulties he had experienced with Baba about matters such as holidays and unfair criticism of his performance. Mr Thomas' contemporaneous note of what the Claimant said also includes a complaint that Baba did not like him and had:

> **"tried to make changes unreasonable and against ways of safely working, follow process to work following 30 minutes rule where he brings everything to shop floor and puts pressure on to complete and when appropriately challenged says that I should not worry about the company."**

15 The "30 minute rule" is an internal requirement that where a roller (container) of chilled foods is brought from the stockroom chiller onto the shop floor, the items must be replenished in fridges or freezers on the shop floor or returned to the chiller within 30 minutes. The rule ensures that chilled food is kept at a safe temperature and is safe for sale to customers. The Tribunal accept as plausible and credible Mr Thomas's evidence that he understood that the Claimant was giving him information about a breach of food safety procedures in a shop floor practice which directly contravened the Respondent's policies and basic food hygiene which could harm consumers.

16 There was a follow-up absence review meeting on 21 May 2019 between the Claimant and Mr Thomas. It was agreed that Mr Pyas (a more senior manager) would discuss the work-related issues with Baba which were causing the Claimant stress and anxiety upon his return to work and that no Occupational Health referral would be made until after that meeting had taken place.

17 The Claimant returned to work on 10 June 2019 and attended a return to work meeting as envisaged by the attendance policy. The reasons for absence were discussed, namely stress and anxiety in part work-related and in part personal. The Claimant was told that his total sickness absence in the preceding 12 months was in excess of the 3% trigger and the notes attached an appendix setting out the absences from 4 November 2018. Question 5 on the pro forma about stress factors at work was not answered, nor was question 6 about possible referral to Occupational Health. Question 8 requires that if a trigger has been reached, the manager considers "**all relevant factors and decide if arranging a disciplinary meeting would be appropriate where an independent manager will consider potential appropriate formal action**". Following this meeting, by a letter in which he was advised of his right to be accompanied and given a copy of the notes, the Claimant was invited to attend a disciplinary meeting with Mr Awotar on 13 June 2019 to discuss his attendance.

18 The meeting with Mr Pyas to discuss the Claimant's concerns at work and problems with Baba did take place but, the Tribunal finds, was unsatisfactory. It lasted about 2 minutes and consisted of Mr Pyas telling the Claimant and Baba to shake hands and move forward. Mr Pyas did not engage with the Claimant's issues or address any underlying problem in the working relationship.

19 The disciplinary meeting took place on 13 June 2019 and the Claimant was issued with a written warning. Notes of the meeting, which lasted an hour and a quarter, are

included within the bundle. The Claimant confirmed the dual nature of the causes of his stress. Mr Awotar asked a number of questions about his personal stressors. The Claimant said that he had a problem with Baba and another employee, Billy, picking on him. Mr Awotar said that he had read the Claimant's statement as written down by Mr Thomas (the notes on 14 May 2019). Mr Awotar criticised the Claimant for not raising his concerns with a manager sooner and informed the Claimant that the business could not sustain his levels of absence. Mr Awotar asked about the mediation and whether everything was okay now; the Claimant said it was but also suggested that there had been a day when Baba had attacked him again. About halfway through the meeting, the notes record that the Claimant said:

> "**raised an issue – rollers on shop floor too long. He said it is our responsibility and everyone looked at me. When I was finishing doing sandwiches and cardboard. I left cardboard and done sandwiches.**"

20 After a short adjournment Mr Awotar informed the Claimant that he would receive a written warning; stating "**I am not having a go at you, I apply rules and make sure you are being supported, you need to meet guidelines**". The Tribunal find this comment material and significant. Mr Awotar was aware from the statement/notes taken by Mr Thomas and the Claimant's comment in this meeting that he had raised concerns about rollers being on the shop floor too long, Baba breaching safe ways of working and issues about the 30 minute rule. However, these arose in the context of the work-related stresses that the Claimant said had been a partial cause of his absence. Mr Awotar's criticism was not that the Claimant had raised the concerns but that he had not done so sooner. The Tribunal finds that Mr Awotar did not regard the Claimant as a whistleblower but rather as an employee whose attendance was unreliable. The Tribunal accepts as accurate Mr Thomas' evidence that Mr Awotar had previously referred to the Claimant as a waste of space and lazy. In summary, Mr Awotar imposed the warning entirely because of the Claimant's absence levels and attached little if any weight to his personal circumstances.

21 Mr Awotar referred twice to the Claimant's ability to appeal, a right which was also included in the letter subsequently confirming the warning. On balance, the Tribunal finds that the Claimant was advised of his right of appeal but did not exercise that right, most likely because Mr Awotar told him that it would not be worth it given his record of extensive absences.

22 The Claimant contacted Mr Awotar on 21 June 2019 asking for Mr Pyas' number as he had some problems with Baba on the shift. Mr Awotar forwarded the message to Mr Pyas and informed the Claimant that he would be at work that day. There is no evidence that any further action was taken.

23 The Claimant's next period of sickness absent was for cold and flu from 8 September to 16 September 2019. The manager conducting the return to work meeting on 16 September 2019 decided to refer the Claimant to a further disciplinary hearing as he had reached the trigger of three sickness absences in a 12 month period. The notes suggest that the Claimant thought that things had settled down at work and were fine so far.

24 Mr Awotar held the disciplinary meeting on 19 September 2019. He referred to a trend of absence indicating that the Claimant would likely be absent again during the winter months. He said that the Claimant's level of his sickness absence was massive (potentially the largest he had seen) and that it was costing the business a lot of money. The Tribunal

finds that Mr Awotar was not suggesting that the Claimant's sickness was not genuine. Mr Awotar issued the Claimant with a final warning as he believed he was required to do by the attendance policy because there had been a further absence during the period of a live warning. The issue of the 30 minute rule or food safety was not discussed at all in the disciplinary hearing and played no part in Mr Awotar's decision.

25 The Claimant appealed against the final written warning issued on 19 September 2019 on the basis that it was unfair to count the first period of absence because it was caused by work-related stress and also that he had had no chance to appeal the written warning.

26 The appeal was heard by Ms Safa. The Tribunal consider it significant that there was no reference to the 30 minute rule or food safety during the appeal hearing. The Claimant accepted that he had made a mistake by not appealing the written warning but did not say that Mr Awotar had discouraged him. In her decision making summary, Ms Safa set out the reasons for rejecting the appeal. In contrast with Mr Awotar, she did not rely on the fact that the trigger had been reached but also considered the reasons for each absence, whether any of the absences were linked and whether any were avoidable. She decided that they were not and that the Claimant could have acted to prevent absence. Ms Safa rejected the appeal.

27 The Claimant was then absent due to sickness from 13 October 2019 until 10 December 2019. The reason for absence was stress and anxiety caused by the imposition of a final written warning. The return to work form records that the Claimant still had anxiety which may be an outstanding and outgoing fact which may result in future absences. By this date, the Claimant had contacted Validium (the external organisation providing support to employees of the Respondent) and was awaiting a response. As the Claimant had hit the triggers within the attendance policy, the manager decided that he would be invited to a disciplinary hearing to consider his high absence levels and further absence during the period of a final written warning. The Claimant asked for reduced hours for a few weeks until he fully recovered.

28 Ms Lasky conducted the disciplinary investigation on 19 December 2019. The notes do not refer to any discussion about issues with chilled foods or the 30 minute rule, there was no mention of the earlier information provided to Mr Thomas and there is no evidence to show that Ms Lasky was aware of the earlier complaint by the Claimant. Rather, the Claimant's case was again that his first period of absence should be discounted as it was work-related stress. Ms Lasky regarded the Claimant's absence levels as being very high. The Claimant said that he would be okay if there was no pressure and there was a detailed discussion about causes of stress, the likelihood of recurrence and the Claimant repeated his request for reduced hours. Ms Lasky was not satisfied and she recommended the matter go forward to a disciplinary hearing.

29 The disciplinary hearing took place on 13 January 2020 and was chaired by Mr Waliullah. The Claimant was advised in advance that the outcome of the hearing could be dismissal and that he could be accompanied. Notes of the disciplinary hearing are included in the bundle of documents. The meeting lasted approximately 23 minutes, 10 minutes of which was a break for Mr Waliullah to contact HR and make his decision. In other words, only 13 minutes was spent with the Claimant discussing his absence and the reasons for it. Mr Waliullah made clear that he did not disbelieve that the Claimant's sickness absences were genuine and as a result there was no need for him to provide medical or GP evidence.

The Claimant's position was that the first period of absence was work-related stress which had since been resolved, he had sought support from Validium and had been supported by his line managers but not sufficiently by Mr Pyas. There was no discussion about possible Occupational Health or medical input to address the Claimant's health, any work-related component and likely future attendance levels. There was no evidence of the effects of the Claimant's absences on his colleagues or the performance of the Beckton shop (for example increased financial cost of covering his missed shifts).

30 When the hearing reconvened after the 10 minute break, Mr Waliullah told the Claimant that he would be dismissed with four weeks' notice because of his absence levels. The dismissal and right of appeal was confirmed by letter dated 21 January 2020, with the effective date of termination given as 12 March 2020. The Tribunal find that Mr Waliullah genuinely believed the reason stated in the dismissal letter: the Claimant's attendance at work had failed to improve to the required standard within a reasonable timeframe and his unsatisfactory level of attendance could not be sustained by the business. The Claimant's complaints about Baba and breaches of the 30-minute rule played no part whatsoever in Mr Waliullah's decision to dismiss. The Tribunal finds that Mr Waliullah took into account the Claimant's attendance record over the entirety of his employment in reaching his conclusion that there would be future absences and did not properly take into account the fact that the Claimant's first period of absence was at least in part work-related and so was the most recent absence.

31 When asked by the Tribunal about his understanding of how much discretion he had under the attendance policy when deciding whether to dismiss the Claimant, Mr Waliullah replied simply "**I looked at absences**". When asked if he could discount absences in any circumstances, he replied that he would only do so if it were serious and life-threatening, giving the example of cancer. The Tribunal finds that Mr Waliullah had a mechanistic understanding of the operation of the attendance policy and did not appreciate that the policy itself expressly required him to consider whether there were contributing factors caused by work or an underlying medical condition.

32 On balance, having regard to the brevity of the meeting and the limited scope of the discussion, the Tribunal find that Mr Waliullah adopted a very rigid approach that "policy is policy" – the Claimant had reached a trigger, got a written warning, was absent again, got a final written warning and was absent again meriting dismissal. He did not consider whether any of the absences were related and/or whether the circumstances of the absences warranted any lesser sanction and/or whether further information would assist in deciding likely future attendance reliability.

33 The Claimant appealed by letter dated 30 January 2020. The appeal hearing on 5 February 2020, chaired by Mr Cavallero, lasted for about an hour and a quarter. Notes of the appeal hearing are included in the bundle. The Tribunal finds that this was the first time during the disciplinary process that the Claimant clearly and expressly stated he had challenged Baba about breaches of the 30-minute rule for chilled items, that Baba did not like it and that this was the cause of the work-related stress part of his first period of absence. The Claimant however did not suggest that either Mr Awotar or Mr Waliullah were aware of any protected disclosure nor that their disciplinary decisions were linked to any such disclosure. Mr Cavallero made clear his approach when he said in the appeal hearing:

> "**managers have a job to do and as far as I can see they have followed the process. Absence is very clear – if it hits 3 percent then there was a potential written warning and then if**

> **there was no improvement can lead to final written warning but you were off sick again for two months in ten months you were off for a lot of months."**

34 In his summary recording his reasons for not upholding the appeal, Mr Cavallero found that the Claimant had exceeded both triggers (3% of attendance and three periods of absence in the rolling 12 month period), the Claimant understood the attendance policy, there were no procedural errors, no mitigating evidence, no improvement in attendance and the decision to dismiss fell within the policy guidelines. Although he also stated that the absences seemed unrelated, the Tribunal find that Mr Cavallero adopted a very rigid approach to applying the attendance policy and did not take into account the fact that the first period of sickness absence and the final period of sickness absence both were by reason of stress and anxiety and that work-related issues were part of the cause of each. There is no apparent consideration of whether a lesser sanction than dismissal would be appropriate or whether further information (such as Occupational Health advice) would enable a better prediction of future attendance.

Law

35 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996.

36 In **Williams v Michelle Brown AM** UKEAT/0044/19/OO, HHJ Auerbach set out a five stage approach: (1) there must be a disclosure of information; (2) the worker must believe that the disclosure is made in the public interest; (3) such a belief must be reasonably held; (4) the worker must believe that the disclosure tends to show one of the matters listed in s.43(B)(1) (a) to (f); and (5) such belief must be reasonably held.

37 The ordinary meaning of 'giving information' is conveying facts and not simply making allegations, **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT at paragraph 24. A disclosure can include a failure to act as well as a positive act, **Millbank Financial Services Ltd v Crawford** [2014] IRLR 18.

38 The obligation breached need not be in strict legal language and there is no need to specify the precise legal basis of the wrongdoing asserted, **Twist DX v Armes** UKEAT/0030/20/JOJ.

39 A worker has the right not to be subjected to detriment because of a protected disclosure, s.47B Employment Rights Act 1996. The protected disclosure need only be *a* material cause of the Respondent's conduct, it need not be the sole or principal reason, see **Fitzmaurice v Luton Irish Forum** EA-2020-000295-RN.

40 By contrast, for a dismissal to be unfair under s.101A of the Employment Rights Act 1996, the protected disclosure must be the sole or principal reason for dismissal.

41 Section 98 of the Employment Rights Act 1996 provides that:

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

> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

42 The Respondent bears the burden of establishing a potentially fair reason for dismissal. If it does so, the Tribunal must then consider whether dismissal was fair within s.98(4) – namely was it reasonable for the employer to treat it as a sufficient reason for dismissal. The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. The Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) which requires consideration of the equity and substantial merits of the case which indicates that Parliament did not intend the Tribunal's consideration to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

43 In a "some other substantial reason" case, the Tribunal must conduct two stages of analysis: firstly determining whether the reason was of a kind justifying dismissal of an employee holding the job in question, and then separately going on to consider reasonableness, **Ssekisonge v Barts Health NHS Trust** UKEAT/1033/16/LA.

44 The fairness of a dismissal arising from the application of an attendance policy was considered by the Court of Appeal in **Wilson v Post Office** [2000] EWCA Civ 3036. The Court of Appeal held that the Tribunal had erred in law by focusing on the Claimant's health and fitness for work when deciding fairness when the real reason for dismissal was unsatisfactory attendance and, therefore, should have been considered as "some other substantial reason". The Court of Appeal rejected the employer's submission that given the admitted failure to comply with the requirements of the attendance policy, the only possible outcome was a finding of a fair dismissal. Buxton LJ emphasised the importance of the fact finding role of the Employment Tribunal and held at paragraph 37 that:

> **"There are a number of considerations that are at least ones that should properly be considered by the tribunal which has the duty of considering fairness and unfairness, over and above the fact … that Mr. Wilson undoubtedly did not fulfil the requirements of the**

> **procedure and, so far as one can see, nobody has actually criticised the machinery or procedure by which the employer operated that procedure. I do not intend to say any more on that issue because in my view this matter should go back to the Employment Tribunal, and it would be inappropriate to appear to be giving them any guidance, save to say that they will no doubt have very clearly in mind the limits of their jurisdiction that Mr. Carr urged upon us**."

45 **Kelly v Royal Mail** [2019] UKEAT/0262/18 also considered the fairness of a dismissal for failure to meet the requirements of an attendance policy. Choudhury P held that whilst absence related dismissals can be for "capability" under section 98, if the issues is not about inability to do the job due to ill health but instead about unreliable or unsatisfactory attendance, it could equally fall within the residual category of some other substantial reason. The failure of the Respondent to plead that reason neither prevents it from relying on some other substantial reason at the hearing nor precludes the Tribunal from finding that it was the reason for dismissal.

46 When considering fairness, at paragraph 26 Choudhury P held that:

> **"It would be surprising if conduct, which is in line with policy, in particular one that has been expressly agreed with the relevant trade union was to be regarded as unfair. Of course, it is not impossible that conduct in line with a policy may be unfair. There may be situations where, notwithstanding that the conduct is in line with policy, the circumstances are such that fairness demands a different approach be taken."**

47 It is not sufficient for the Tribunal to focus only on the genuineness of the belief regarding loss of confidence in the ability to maintain satisfactory attendance. The Tribunal must also look at the full range of factors in deciding whether the respondent acted reasonably or unreasonably in dismissing the claimant, **Kelly** at paragraphs 45 to 47. Relevant factors may include the Respondent's service obligations to the public, the real need for reliable attendance by employees, the reason for the most recent absences, the length of service, disability-related absences, the treatment of different absences as separate rather than combined and the full history of the Claimant's attendance over recent years and the procedural fairness or the procedure followed. However, even though employees do not choose to get ill or to have accidents, an employer is entitled under the policy to look at an employee's overall pattern of attendance in order to consider whether there was a likelihood of satisfactory attendance in the future (paragraph 55). Whilst the decision to dismiss was acknowledged as harsh, the Tribunal was entitled to find it within the range of reasonable responses particularly as the Respondent was under a legal obligation to meet certain levels of service delivery and could lose its licence if those standards were not maintained and the Claimant worked in job which was difficult to replace.

48 Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

49 The correct approach to reductions was given in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is blameworthy. This does not depend upon the Respondent's view of the conduct, but that of the Tribunal. For section 123(6), the Tribunal must find that the

conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

50 Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andrews** [2007] ICR 825, EAT as follows:

- in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

- in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

- there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary, that employment might have terminated sooner, is so scant that it can effectively be ignored.

51 The appropriate order for deductions is as follows:-

(i) Calculate the total loss suffered;
(ii) Deduct amounts received in mitigation and payments made by the formal employer other than excess redundancy payments;
(iii) Make any **Polkey** deductions;
(iv) Make any adjustment for failure to follow statutory procedures;
(v) Make any deduction for contributory fault;
(vi) Apply the statutory maximum.

Conclusions

52 The Tribunal heard little if any evidence as to the precise information said to be disclosed by the Claimant to Baba orally about the 30-minute rule. It is not clear, for example, whether the Claimant merely complained about the amount of work required if all rollers are brought out together or if he gave information that food safety rules were being breached. In conclusion, the Claimant has not discharged the burden of showing that any oral complaints to Baba were such as to amount to protected disclosures.

53 The written note taken by Mr Thomas and the oral evidence of both Mr Thomas and the Claimant sets out what information was given on 14 May 2019. The Claimant not only alleged that Baba made changes which were unreasonable and against safe working practice, he provided information in support. The relevant information was that Baba was not following the 30-minute rule and was bringing all stock onto the shop floor at the same time. The reference to the 30-minute rule was information which led Mr Thomas to understand that this was a breach of food safety procedures in a shop floor practice which directly contravened the Respondent's policies and basic food hygiene which could harm consumers. The Tribunal concludes that the Claimant reasonably believed the same when he disclosed the information to Mr Thomas. The possible effect upon customers, given the nature of the Respondent business, was clearly a matter in the public interest. The Claimant did make a protected disclosure on 14 May 2019.

54 The next issue is whether that protected disclosure played any material part in the decisions of Mr Awotar to issue the first written warning and the final written warning. The Tribunal has found as a fact that it did not. The Claimant referred to raising concerns about Baba, including the 30 minute rule, during the first disciplinary. Mr Awotar's reaction was to criticise him for not raising his concerns with a manager sooner. This is entirely inconsistent with the Claimant's case that Mr Awotar issued the warning because he had raised the concerns at all. We conclude that Mr Awotar was merely "applying the rules" (the attendance policy) as he said to the Claimant when he issued the written warning. Mr Awotar did not regard the Claimant as a whistle-blower but as an employee whose attendance and performance he regarded as unsatisfactory.

55 The same is true of the final written warning: Mr Awotar issued the Claimant with a final warning as he believed he was required to do by the attendance policy because there had been a further absence during the period of a live warning. The issue of the 30 minute rule or food safety was not discussed at all in the disciplinary hearing and played no part in Mr Awotar's decision. The same view was shared by Ms Safa who did not rely solely on the fact that a trigger had been reached but also took into account the relevant factors set out in the attendance policy in the exercise of her discretion to reject the Claimant's appeal.

56 The claims of detriment because of a protected disclosure fail and are dismissed.

57 Turning finally to the dismissal by Mr Waliullah, the Tribunal reminds itself that s.103A requires the protected disclosure to be the sole or principal reason for the dismissal (not just a material cause as for a detriment claim). The Tribunal has found as a fact that Mr Waliullah genuinely believed the reason given in the dismissal letter: the Claimant's attendance at work had failed to improve to the required standard within a reasonable timeframe and his unsatisfactory level of attendance could not be sustained by the business. The Claimant's complaints about Baba and breaches of the 30-minute rule played no part whatsoever in Mr Waliullah's decision to dismiss.

58 The reason for dismissal was unsatisfactory attendance in breach of the attendance policy. The claim of automatic unfair dismissal because of a protected disclosure fails and is dismissed.

59 Section 98(1)(b) requires the Tribunal to consider whether the reason (unsatisfactory attendance in breach of a policy) was of a kind such as to justify the dismissal of a general assistant rather than the Claimant individually. The Respondent has a customer-facing business and properly replenished shelves are important to the reputation of its brand and

the quality of the shopping experience for customers. The work was undertaken overnight when the shop was closed to customers and it was important to the Respondent that the required work be completed. As a result, regular attendance by its staff performing the duties of a night shelf-stacker is a reason such as to justify dismissal of such an employee with unreliable and unsatisfactory levels of attendance. The reason for dismissal was "some other substantial reason", a potentially fair reason.

60 The focus must then be on whether the dismissal of the Claimant was fair within s.98(4). This requires consideration of the particular circumstances of the Claimant and the Respondent's application of the policy to him as an individual. The Tribunal reminds itself that it is not asking whether it would have dismissed the Claimant but whether the decisions of Mr Waliullah and Mr Cavallero fell within the range of reasonable responses open to an employer.

61 The Tribunal concludes that the attendance management policy has the two principle aims of ensuring that all employees: (i) provide regular and reliable attendance; and (ii) are treated equally when they are not able to do so. The policy is intended to be supportive and not punitive. As made clear in the policy itself, the decision to take action at any stage was not intended to be automatic or mechanistic. The manager had a discretion to take no action at all if he or she considered that appropriate. Mr Thomas understood this discretion and gave bereavement as a sensible example of when it would be appropriate to take no action. Ms Safa also understood the discretion when she considered the appeal against the final written warning. Although she rejected the appeal, she was considering a period of absence caused by cold and flu which was clearly unrelated to the first period of absence which was due to stress and anxiety.

62 By contrast, when considering whether or not to dismiss the Claimant, Mr Waliullah was looking at a most recent absence which was caused by work-related stress and anxiety, namely the imposition of the final written warning in circumstances where the Claimant believed that the first period of stress-related absence should not be counted because it was caused in part by the unreasonable conduct of a manager towards him at work. The Claimant had raised his concerns about Baba and Mr Thomas' initial response was to decide that Occupational Health input was required. This only changed when it was decided that Mr Pyas would resolve the problem instead when the Claimant returned to work. Mr Pyas' attempt at resolution was perfunctory at best – he did not investigate whether the Claimant had good reason to feel stressed by Baba to the point where he had been unable to work. He merely required both men to shake hands and move on. Although the Claimant did say that things thereafter were "fine", he also referred to some ongoing problems in the hearing leading to the first written warning. The Claimant had also contacted Mr Awotar and Mr Pyas on 21 June 2019 due to ongoing problems with Baba but no further action was taken. This is all information which would have been readily available to Mr Waliullah if he had investigated the Claimant's case at disciplinary that the first period of absence was in part due to problems with Baba.

63 The Tribunal has found that when deciding to dismiss the Claimant, Mr Waliullah looked only at the level of absences which exceeded the triggers in the attendance policy. He did not reasonably consider whether there was an underlying cause, he did not reasonably consider whether the first and final absences were linked, he did not reasonably consider whether Occupational Health input may assist the Claimant to address his concerns and provide reliable service. In deciding that there would be future absences, Mr Waliullah looked only at the Claimant's history of attendance over his whole period of

employment. Nor was there any evidence before Mr Waliullah of actual adverse effects caused by the Claimant's absences, whether upon his colleagues or the performance of Beckton. The Claimant was a night-time shelf stacker, his work was not specialist and there was no evidence before Mr Waliullah that he had been difficult to replace, as was the case in **Kelly.**

64 For all of these reasons, the Tribunal concludes that Mr Waliullah did not properly exercise his discretion – he did not carry out a full and fair consideration of all of the circumstances of the case, balancing the needs of the Respondent and the effect upon the Claimant. This was a mechanistic application of the attendance policy: there had been a further absence during the period of a live final written warning and as a result the Claimant must be dismissed. In suggesting that only a serious, life-threatening cause for absence such as cancer would permit absence to be disregarded, Mr Waliullah unreasonably limited his own discretion and did not consider sanctions short of dismissal. In so limiting the consideration of his discretion in breach of the policy, and in failing to take into account relevant factors, the Tribunal concludes that the dismissal by Mr Waliullah was not within the range of reasonable responses open to an employer.

65 The Tribunal has found that Mr Cavallero adopted the same restrictive approach when he rejected the appeal. He did not take into account the fact that the first period of sickness absence and the final period of sickness absence both were by reason of stress and anxiety and that work-related issues were part of the cause of each. There is no apparent consideration of whether a lesser sanction than dismissal would be appropriate or whether further information (such as Occupational Health advice) would enable a better prediction of future attendance. The unfairness of the dismissal was not corrected by the appeal.

66 The claim of unfair dismissal succeeds.

67 Although dealing with liability only in this hearing, the Tribunal was asked to consider whether this was a case in which there was a chance that the Claimant's employment might have ended fairly in any event (**Polkey**) or there should be a reduction for contributory fault.

68 If Mr Waliullah and/or Mr Cavallero had properly exercised their discretion they would have had to consider whether the first period of absence should be discounted and/or the connection between the first and final periods of absence and the effect of the Claimant's underlying mental health condition. This would have required Occupational Health input. However, the Claimant's attendance record overall was very poor – he had exceeded the triggers in every single year of his employment and for varied reasons. Even with the Occupational Health input and even if not dismissed with effect from 12 March 2020, the Tribunal concludes that there would inevitably have been further absence and that the trend was unlikely to change in the long term. A further absence, even for cold or an upset stomach unrelated to mental health, would have again resulted in the Claimant being at risk of dismissal and, as with Ms Safa's decision on the appeal for flu absence earlier, would have permitted a reasonable employer fairly to dismiss even if others may think the decision harsh. Looked at overall, the Tribunal concludes that it is 100% likely that the Claimant would have been fairly dismissed for breach of the attendance policy within a further four month period.

69 This is a case in which it is accepted that each of the Claimant's absences were genuine and for medical reasons. He took appropriate steps to obtain management support

in his problems with Baba which were not adequately addressed. He took appropriate steps to obtain support from Validium in his final period of absence. In all of the circumstances, there is no foolish, blameworthy or otherwise culpable conduct such as to warrant a deduction for contributory fault either to the basic or compensatory award.

70 The Claimant is entitled to: (a) a basic award; (b) four months' salary less any sums earned in mitigation in new employment during the period 12 March 2020 to 12 July 2020 and (c) a payment to compensate him for loss of statutory rights. If the parties cannot agree these sums within 28 days of this Judgment being sent to them, they must notify the Tribunal in writing and a remedy hearing will be listed. Given the relatively modest nature of the sums likely to be awarded, it is hoped that such a hearing will not be necessary.

Employment Judge Russell
Dated: 24 October 2022