EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Charles Thomas	**v**	**CPM UK Ltd**

Heard at: Watford (by CVP) **On:** 15, 16 & 17 June 2022

Before: Employment Judge Alliott
Mrs G Bhatt
Mr D Wharton

Appearances:

For the Claimant: In person
For the Respondent: Mr Tufall Hussain, Litigation Consultant

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claims of race discrimination and for unauthorised deduction of wages are dismissed upon withdrawal.

2. The claimant's claims for unfair dismissal and age discrimination are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 20 August 2012 as a field sales retail development executive. He was summarily dismissed on 13 December 2019, the reason being given as gross misconduct. By a claim form presented on 16 March 2020, following a period of early conciliation from 4 February to 11 March 2020, he brings claims for unfair dismissal, direct race and/or age discrimination and a claim for unauthorised deduction of wages. During the course of these proceedings the claimant has withdrawn the claims of race discrimination and unauthorised deduction of wages and consequently the same are dismissed upon withdrawal.

The issues

2. The issues were set out by Employment Judge Hawksworth in a case summary following a preliminary hearing heard on 12 March 2021. They are as follows:

> "Unfair dismissal
>
> What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
>
> If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
>
> > There were reasonable grounds for that belief;
> >
> > At the time the belief was formed the respondent carried out a reasonable investigation;
> >
> > The respondent otherwise acted in a procedurally fair manner;
> >
> > Dismissal was within the range of reasonable responses.
>
> Direct age discrimination (Equality Act 2010 s.13)
>
> > The claimant is 65. His age group is 60 and over and he compares himself with people younger than 60.
> >
> > Was the claimant's dismissal less favourable treatment?
> >
> > The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimants.
> >
> > If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
> >
> > If the claimant is continuing with his complaints of direct race and/or age discrimination he will provide further information about his comparators.
> >
> > If so was it because of age?
> >
> > In respect of the complaints of age discrimination, was the treatment a proportionate means of achieving a legitimate aim.
> >
> > The Tribunal will decide in particular:
> >
> > Was the treatment an appropriate and reasonably necessary way to achieve those aims?
> >
> > Could something less discriminatory have been done instead?
> >
> > How should the needs of the claimant and the respondent be balanced?
>
> Remedy"

3. In his further and better particulars the claimant puts forward a comparator, Mr Adrian Clarke, another field sales representative in his forties who was disciplined in June 2019 for inaccurate recording of stock, was accused of misconduct rather than gross misconduct and who received a formal written warning and was deprived of his bonus for two cycles.

The law

4. Unfair dismissal

4.1 S.98 of the Employment Rights Act 1996 provides as follows:

> "1. In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

4.2 It is for the respondent therefore to show the reason or principal reason for the dismissal.

4.3 The respondent needs to demonstrate that the respondent genuinely believed in the reason and that that belief was based on reasonable grounds following a reasonable investigation.

4.4 Where the employer shows a potentially fair reason for dismissal then, by virtue of s.98(4):-

> "(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair having regard to the reasons 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."

4.5 In particular, was the decision to dismiss within the range of reasonable responses of a reasonable employer? It is well established that it is not for the Tribunal to substitute its views for the views of the employer unless the decision falls outside the range of reasonable responses.

5. Age discrimination

5.1 It is not in dispute that the claimant was subjected to the disciplinary process for gross misconduct and summarily dismissed.

5.2 Was that less favourable treatment?

5.3 Any comparator has to be in not materially different circumstances.

5.4 Is Adrian Clarke an appropriate comparator?

5.5 What would an appropriate hypothetical comparator be?

5.6 Has the claimant shown a prima facie case of less favourable treatment such that the respondent is required to provide an explanation?

The evidence

6. We had a 182 page bundle.

7. The claimant's statement annexed to his claim form and his further and better particulars were treated as his witness statements and were verified on oath.

8. We had witness statements from the following:

(i) Mr Rupert Maynard, regional field manager and the claimant's line manager;
(ii) Ms Rhea Ratcliffe, regional field manager, who heard the disciplinary hearing and decided to dismiss the claimant;
(iii) Mr Tim Smith, senior account manager, who heard the appeal.

9. We heard evidence from Ms Ratcliffe and Mr Smith. To the claimant's and our surprise Mr Maynard was not called to give evidence. We nevertheless admitted his evidence subject to such weight, if any, we decided to place upon it.

The facts

10. The claimant was employed on 20 August 2012 by the respondent as a field sales retail development executive.

11. The claimant was born on 10 April 1955 and so was 64 years old in November 2019.

12. One of the respondent's clients was Lucozade Ribena Suntory (LRS). We heard that the retainer contract was in the region of £6 million p.a., £2 million of which related to the convenience store sector. LRS is an important client to the respondent.

13. The claimant was employed as a field based retail development executive. His role entailed him making visits to his assigned convenience stores at regular intervals to record the availability of the clients' products and, if necessary, encourage or facilitate replenishment of missing or low stock

items. The claimant had approximately 440 stores to visit which he did at about 12 per day on an eight-week cycle. CPM representatives have to complete preset surveys on their i-pads recording individual availability of a set range of products on entry and exit of the store. On arrival at a store the claimant was expected to look at the shelf or chiller and record what was available on entry. If items were not available he was expected to encourage the shop owner to place items on the shelf or in the chiller from stock or, if no stock was available and the claimant had the stock in his car to sell to the shop, to supply the stock and get it on the shelf/in the chiller. Once stock had been placed on the shelf or chiller the claimant was to record it as available on exit. If the shop owner was encouraged to place an order for the missing stock, for example online via an approved system, the claimant could take a photograph of the order, upload it on to the preset form, and record the stock as available on exit. Otherwise, the claimant was to record the stock as unavailable on exit.

14. The entry, exit and system order data was entered in real time and the respondent's line manager could monitor where it was entered to within about 400 metres and had access to the data. Part of the line manager's role was to audit the members of his team. An audit consisted of visiting a store shortly after the rep had visited and checking the accuracy of his entry and exit data.

15. The respondent had general operating standards – convenience. This provides as follows:-

> "This document is designed to set minimum standards of operating procedures when conducting the different elements of your role. While no written policy can replace thoughtful behaviour, please read this document carefully as it is intended to help you focus on key topics. Deliberate failure to follow these general operating standards may lead to disciplinary action being taken against you up to and including summary dismissal."

And under "reporting"

> "
>
> - Deliberate falsification of results will be treated as gross misconduct and may result in non-payment of bonus and render you liable to summary dismissal.
>
> - For a product to be recorded on entry or exit, there must be physical product available for sale in-store, unless a system order has been placed using the correct procedure."

And under "eligibility"

> "
>
> - All payments of bonus or incentives are made at the account management team's direction, who reserve absolute discretion to amend or withdraw this provision with reasonable notice."

And under "reminder"

> "

- The company considers any deliberate falsification of company records/deliberate mis-recording as gross misconduct, which may result in your summary dismissal.

- Your line manager will conduct regular audits on your work and results reported."

16. The claimant has always accepted that he knew the correct procedure for recording products. The 'General operating standards-convenience' document was re-issued to him in July 2019 and he signed an acknowledgement that he had read and fully understood the guidelines on 11 July 2019. Even if he did not read that document from cover to cover, we find that he knew the correct procedure for recording product availability on exit. He was an experienced employee and the recorded data had a direct influence on how much bonus he would earn.

17. The reps were given targets each cycle for availability on exit for the relevant products. We have the targets for C3, May/June 2019. The targets were 90% and 95%. It is notable that the document recites:-

"Qualifiers

2. Accurate in call recordings and evidence of system ordering, as requested by your RFM, must be in place."

18. That, in our judgment, emphasises the importance of accurate record keeping.

19. If stock was recorded as available on exit and it was not actually available on exit or a system order had not been generated then the bonus would be wrongly earned.

20. In addition, we heard that, on occasions, if a rep's figures were consistently low, the rep could be put on a personal improvement plan.

21. In January 2019 Mr Rupert Maynard took over the claimant's team of about 10 reps who each had their own territory.

22. Prior to December 2019 the claimant had an unblemished record and had won a number of sales awards, for example a weekend in Edinburgh. He came across as a diligent and hardworking individual trying to do his best in what he described as a difficult and pressured working environment. Twelve shop visits a day left little spare time and he describes some targets as being unrealistic.

23. Nevertheless, we got the clear impression from what the claimant told us that prior to 2019 there was a culture of corner cutting on occasions amongst the reps who mis-recorded availability on exit figures in order to hit targets and earn bonuses. In his disciplinary hearing the claimant himself referred to others doing it.

24. Whether or not management had historically condoned such practices or turned a blind eye to it, it is clear to us and we find that Mr Maynard had, in effect, a zero tolerance attitude towards inaccurate recordings. The claimant told us that when he spoke to Mr Maynard about his difficulties, Mr

Maynard responded simply: "Just record what you see".

25. Mr Maynard's evidence is that on taking over in January 2019 he began auditing his team members. Although this is untested hearsay, we accept this evidence as the claimant himself refers to seven members of his team leaving their employment, whether by dismissal or resignation, prior to November 2019. The claimant told us the seven left having been pulled up for the same thing, that is to say, for mis-recording stock availability. Mr Smith presented evidence to us that at least four individuals had left because of audit failure, ie mis-recording.

26. It is clear to us that prior to November 2019 the claimant was well aware of the members of his team leaving and, in our judgment, must have been aware that Mr Maynard was carrying out audits, discovering mis-recordings and disciplining those found out.

27. On 21 November Mr Maynard carried out a live audit on the claimant, in that he visited stores shortly after the claimant had been to them. Three stores were visited and seven products had been recorded by the claimant as available on exit when they were not.

28. On 25 November 2019 the claimant and Mr Maynard had a meeting. The claimant was shocked that two long serving reps had been dismissed (AP (not in the claimant's team) and NA (in the claimant's team)) and asked if he had anything to worry about and was management culling the elderly. We accept his evidence as Mr Maynard was not here to answer to this. The claimant says that Mr Maynard replied that he had no intention of getting rid of him as he needed his experience to help the new recruits. Given that Mr Maynard had caught the claimant out shortly before, that appears to us to be somewhat duplicitous. In addition, it might be thought that Mr Maynard could have told the claimant about his findings and instructed him to stop misrecording stock as available. Nevertheless, given the importance the respondent sets on accurate recording, we accept that it was reasonable for Mr Maynard to continue to audit the claimant in order to ascertain whether 21 November was a "one off".

29. On 28 November and 3 December 2019 Mr Maynard conducted two further live audits. On 28 November four stores were visited and 27 products had been recorded as available on exit when they were not. On 3 December one store was visited and 3 products had been recorded as available on exit when they were not. In total, over 3 days, eight stores had been visited and 37 products misrecorded. 29 of the products misrecorded generated a bonus for the claimant of £840.

30. On 3 December 2019 Mr Maynard held an investigation meeting with the claimant and gave him the details of the discrepancies found. We have the notes of that meeting. The following is recorded:

    30.1 Mr Maynard explained the purpose of the meeting which included:

    > "This investigation could result in a disciplinary meeting; the allegation potentially constitutes gross misconduct."

    And

"RM – Do you remember reading and signing the general operating standard a few months ago?

CT – Probably

RM – On that it says must be physically available for sale, do you remember reading that?

CT – Yes, understand it should be physically for sale, but other people record this way so that's why I record.

RM – Acknowledge not following guidelines and doing it because that is how you believe other people do it.

CT – Yes, but not doing it for any gain."

And later having discussed the individual stores:-

CT – So error maybe, wouldn't have been done for gain. It is a balance that have to strike up between figures that company want and what the DMs [decision makers] say. What I don't do is set out to make money on this.

RM – But understand recording lines that aren't there feeds into bonus.

CT – Yes but my motivation isn't for financial gain, I am taking their word and making the call to believe them, not able to call back on these outlets due to time.

RM – So understand it is contrary to how you should record.

CT – Yes made a judgment call

RM – Is anything else that you want me to take into consideration.

CT – Just that it is not for financial gain."

31. The position as advanced by the claimant in his claim form was that he was making judgment calls when stock was not physically present on exit and no system order had been generated. He says that longstanding relationships with store owners meant that when they assured him they would be going to the cash and carry to restock product, he accepted their word and recorded stock as available on exit. He suggested this helped the relationship between the respondent and LRS in that targets would be hit and the respondent would not run the risk of losing the very valuable LRS contract.

32. We find that the claimant knew what he was doing was not supposed to happen and was contrary to his instructions. We find that he did so in order to hit his targets. We find that he may have thought that in some way this helped the respondent by hitting targets. We find that he also did so as he thought others were doing it and he wanted to keep up with them in terms of performance. As he put it, "If you can't beat them join them". We find that the claimant would have been well aware that his bonus would rise due to his actions and in that sense he stood to gain financially. In addition, hitting targets would remove the chances of being put on a performance plan.

33. Mr Smith gave evidence that in actual fact mis-recording stock availability and hitting targets as a result would not help the respondent. In our

judgment hitting targets was likely to be in the interests of the respondent but we also accept that if LRS became aware that the data was mis-recorded that would adversely affect the relationship and potentially imperil the contract.

34. On 3 December 2019 the claimant was suspended and the follow up letter of 4 December 2019 informed him his conduct could be deemed gross misconduct for financial gain.

35. Mr Maynard carried out two further investigatory meetings by telephone with the claimant on 6 December 2019. In both of these Mr Maynard was requesting information about the other people who had mis-recorded stock and the claimant was reluctant to provide names. He reiterated that he had not acted for financial gain.

36. Following HR involvement Mr Smith directed that Ms Ria Ratcliffe conduct the disciplinary hearing.

37. On 6 December 2019 Ms Ratcliffe wrote an email and letter to the claimant requiring him to attend a disciplinary hearing initially set for 9 December 2019. The allegations were set out and he was provided with all relevant documents. The hearing was re-arranged for 11 December 2019 at the claimant's request.

38. The disciplinary hearing took place on 11 December 2019. Right at the outset the claimant said: "Simply guilty as charged". Each of the store visits was discussed with some explanations given, eg a tapping error but essentially the claimant was saying that he was relying on the stock being ordered in. The following exchanges took place:-

> "R – Taking on board how you feel about it have you been told to record like this before.
>
> C – Yes, by Richard Hall, a previous manager.
>
> R - How long ago?
>
> C - Three years back
>
> R - How about from any other managers?
>
> C - I thought it was expected. If I thought people were following me, I wouldn't have done it.
>
> R - At the July team meeting do you remember going over the operating standards?
>
> C - Yes
>
> R - Did you check them?
>
> C - Thought it was a complete roll on
>
> R - Did you query what you were signing?
>
> C - No at the meeting I was sick of driving 2.5 hours to meetings. It wasn't

covered what we were signing but was rushed through and then 2.5 hours driving back.

R - Was recording procedures gone through?

C - Guilty as charged

R - Why do it?

C - To help the client and the company and they will get in the figures.

R - Do you understand this undermines our data integrity with the client?

C - I don't feel it was mis-recording as I thought they would be putting it (the SKUs [stock-keeping units] back in as they have had them before. We were pressed to get 90% for Frusion."

And

"R - Over 8 stores on 3 separate days there were mis-recordings over 37 SKUs.

C - I felt pressured and didn't do it for financial gain and wouldn't even know where I was with bonus. I don't cherry pick calls I do them from top to bottom. I didn't get the Highland Spring award and I let it go so that proves it's not about financial reward."

39. Following the hearing Ms Ratcliffe decided to dismiss the claimant summarily for gross misconduct. It is unfortunate that the claimant heard from colleagues before being told officially on 13 December 2019.

40. Ms Ratcliffe told us that the claimant's admitted conduct constituted deliberate mis-recording with financial gain attached. Further that it was not one or two calls on one day but multiple stores over three days and was clearly happening on a regular basis. She said everyone knew audits happen. She told us that LRS trust the respondent and such conduct would undermine the respondent's integrity and put the respondent's business potentially at risk. We accept Ms Ratcliffe's reasoning. We find that the claimant's conduct was serious, deliberate, involved financial gain and put the respondent's integrity at risk. We find that Ms Ratcliffe's reason for dismissal was gross misconduct and that she genuinely believed that the claimant had committed gross misconduct. We find that Mr Maynard conducted a reasonable investigation and that Ms Ratcliffe had reasonable grounds for her belief.

41. We have examined closely whether the decision to dismiss was within the range of reasonable responses of a reasonable employer. Whilst the decision to dismiss could be considered harsh given the personal circumstances and mitigation advanced by the claimant, we cannot conclude that summary dismissal was outside the range of reasonable responses of a reasonable employer. Mr Smith told us that the respondent has about 2,000 employees working autonomously in the field and that the respondent has to be able to rely on the integrity of their recordings and to tolerate mis-recordings would send out entirely the wrong message.

42. Mr Maynard had already audited seven other team members who had left because of the same conduct. There was no inconsistency in the way the

claimant was treated. Accordingly, we find that the dismissal was fair.

43. As regards the age discrimination claim, it is not in dispute that the claimant was subjected to the disciplinary process for gross misconduct and was dismissed.

44. The claimant has relied on Mr Adrian Clarke as a comparator. Mr Clarke was disciplined in June 2019 for mis-recording data. Mr Clarke was dealt with as a case of simple misconduct and not gross misconduct and given a warning and was held not eligible for two cycles of bonus payments.

45. We have considered whether Mr Clarke is an appropriate comparator and whether he was in not materially different circumstances.

46. Ms Ratcliffe and Mr Smith pointed to material differences in the alleged misconduct.

47. Mr Clarke had misrecorded 22 products in 12 stores which, in our judgment, is comparable to 37 products in eight stores as far as the claimant is concerned.

48. Mr Clarke's explanation was that it had occurred because he was rushed and concentrating on promoting the new products. Ms Ratcliffe and Mr Smith deem this as non-deliberate conduct.

49. Mr Clarke's mis-recording was both of products not there as available but also products <u>there</u> as <u>not</u> available. In only one instance did a record improve his bonus against 29 of the claimants. The false negatives would have adversely affected his bonus. In this respect we find that Adrian Clarke was in a materially different position to the claimant and was not an appropriate comparator.

50. We have gone on to consider a hypothetical comparator, namely a younger colleague who had committed the same misconduct as the claimant. The four colleagues from the claimant's team who had left employment due to audit failures were aged 27, 62, 44 and 43. We have concluded that such a hypothetical comparator would have been treated in exactly the same way. Consequently, we find that the claimant was not treated less favourably.

51. The claimant appealed on 20 December 2019. His grounds of appeal were as follows:-

- Proof of unfair/inconsistent treatment in relation to like-for-like case
- Evidence of manager failing to follow correct disciplinary process
- Evidence of manager, Rupert Maynard, incompetence of management
- Evidence of pre-determined decision being made before I was informed of the company's decision
- Harsh sanction considering no previous offences after seven years of service

- Evidential proof that some of the allegations of falsifying evidence are incorrect

- Lack of consideration for mental wellbeing (dismissal over the phone rather than in a face-to-face meeting)

- Evidence of racial prejudice undertones exhibited publicly by investigator & area manager.

52. The appeal was heard by Mr Smith on 23 January 2020. The claimant had an opportunity to advance all his mitigation which was, in essence, that the sanction was too harsh and that he had not been motivated by gain. Some of his other complaints, even if valid, were not relevant to the issue of his dismissal. For example, the allegations of learning of his dismissal over the phone and the comment made concerning Mr Maynard's allegedly racially prejudicial remark at a meeting sometime before.

53. Mr Smith considered the matters put to him and the appeal was rejected in a letter dated 31 January 2020. Dealing with the substance of the appeal, Mr Smith wrote:

> "Whilst we acknowledge your length of service and unblemished service record, the outcome of deliberately mis-recording products in-store will be financial gain. You referenced in both the disciplinary and appeal hearing that you were aware that your actions were in direct conflict with our guidelines and in spite of this you had still falsified recordings."

54. In our judgment, Mr Smith was entitled to come to that judgment and, as already indicated, we cannot find that the decision to dismiss was outside the range of reasonable responses of a reasonable employer.

55. Consequently, the claimant's claims are dismissed.

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Employment Judge Alliott

Date: 17 November 2022

Judgment sent to the parties on

18 November 2022

For the Tribunal office